

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of a Request for a Declaratory  
Ruling by

JONATHAN LOVETT

DECLARATORY  
RULING  
70-01

Under Section 204 of the State Administrative  
Procedure Act  
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Jonathan Lovett sent a petition to Robert F. Flacke, Commissioner, Department of Environmental Conservation, dated May 19, 1981, and received May 26, 1981, requesting a declaratory ruling pursuant to 6 NYCRR 619 as to the legality under ECL §70-0115 of the modification of a water supply permit to Heritage Hills Water Works Corporation which otherwise would have expired. This modification was granted ex parte by Stuart Dean, Chief Permit Administrator for the DEC in December of 1980 pursuant to 6 NYCRR 621.10.

The basic issue in the petition is whether a material change in the environmental conditions of the aquifer for which the permit was granted in Westchester County occurred, or may have occurred, in 1980. If there had been such a change, Mr. Dean should not have granted the modification. Mr. Lovett asserts that there was a drought in southeastern New York State in 1980, and that it constituted a material change in the environment as that term is used in 6 NYCRR §621.10(a) (1) (iii):

(1) The department shall notify the applicant by mail of its decision on a request for modification...on or before 15 calendar days after its receipt of such request, provided that

(iii) there has not been a material change in environmental conditions or relevant technology since the issuance of the

existing permit.

I find that there was adequate consideration of the impact of drought in the Department's hearing on this permit. The drought of the 1960's, which was more severe than the current drought, was used for analysis and comparison. Therefore, although there was and is a drought in southeastern New York State, it does not rise to the level of a material change in the environment.

In granting the permit which Mr. Dean extended, the Department was persuaded by the testimony of a highly qualified expert, Russell C. Slayback, a consulting hydrogeologist and groundwater geologist and Vice President of the firm of Leggette Brashears and Graham, Inc., the firm retained by Heritage Hills for a hydrogeologic evaluation of the site.

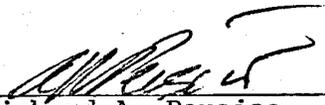
With his testimony before it, the Department clearly considered drought conditions in granting the permit. Slayback computed 450,000 gallons per day as the yield of the aquifer. This allows for six months without any recharge (the summer dry season) (1979 Hearing Transcript 492, 437). Actually, the Croton River watershed will probably supply some recharge, although he did not include this in his computations (tr. 430). Slayback believes that his figure of 450,000 gallons is conservative (tr. 430) and that the aquifer could probably yield more than the estimated 450,000 gallons without damaging any neighboring properties. This is due to the presence of groundwater discharge, but Slayback testified that this must be documented with monitoring proof before he can make a definite statement (tr. 534) as to the quantity of groundwater discharge. He maintained that the 450,000 gallon per

day figure is the one with which he is most "comfortable" since it has built in drought protection. He definitely can't see the figure going much lower (tr. 1207).

In the case of a one year drought, Slayback believes that the aquifer has sufficient storage (tr. 1245). Since a drought affects groundwater less than surface water, groundwater is a more dependable source in the case of a drought (tr. 582). Should a drought like that of the 60's occur, water restriction might be necessary (tr. 1248), but in no way would it affect any one of the adjacent properties (tr. 903-904). He assumed, while computing his data, that following the 180 day period without recharge there would be a 180 day period in which recharge would occur (tr. 492). Nevertheless he stands by his 450,000 gallon figure even in the case of a drought such as the 1963-65 drought (tr. 693).

In addition to the consideration of drought, I find that there has in fact been no material change in the aquifer at issue. Three water level measurements were performed on four observation wells in the Phase II of the Heritage Hills site. The first measurement was made on October 2, 1974, the second on October 10, 1978, and the third on February 10, 1981. Despite the fact that the first and second measurements were conducted before the 1980 drought, there were no substantial differences in the water levels of the four wells at the time of the third measurement. The attached graph of observation Well 1, which follows the same pattern as the other three wells, illustrates that despite the time span involved, the water level in the well follows the expected annual

cycle. The absence of a drastic change in the pattern substantiates the fact that the drought had little effect on the water level. Due to the fact that the water depth measurements varied so slightly over the 6 1/2 year period, I conclude that the recent shortage of precipitation did not amount to a material change in the environment because it did not substantially affect the aquifer's water level. Since there is and has been no evidence of any significant drop in groundwater levels within the watershed in which the aquifer is located, there was and still is no cause to treat the Heritage Hills Water Works Corporation request to modify as a new application, or hold public hearings on it, pursuant to section 621.10.

  
Richard A. Persico  
General Counsel/Deputy Commissioner

DATED: Albany, New York  
August 4, 1981

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