

NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of a Joint Petition to Fix the Water Rates Charged to Upstate Communities for the Fiscal Years 2015, 2016, and 2017 by the New York City Water Board, pursuant to Section 24-360 of the Administrative Code of the City of New York, Article 15 of the Environmental Conservation Law of the State of New York, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York Part 603, by

Village of Scarsdale, Suez Water Westchester, Inc., Westchester Joint Water Works, City of White Plains, City of Yonkers, and Town of Greenburgh,

**Petitioners.**

(Village of Scarsdale 2016 Petition)

OHMS Case No.: 201671203

April 26, 2017

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**Ruling on the Scope of the Department's Jurisdiction  
to Review and Fix Water Rates**

**Proceedings**

With a cover letter dated August 18, 2016 from Joel R. Dichter, Esq. (Dichter Law, LLC, New York), the Village of Scarsdale, Suez Water Westchester, Inc., Westchester Joint Water Works, the City of White Plains, the City of Yonkers, and the Town of Greenburgh (Petitioners) filed a joint petition dated August 18, 2016 (Joint Petition) requesting a review of the rates charged by the New York City Water Board (the Water Board) to upstate customers for entitlement water and excess water for Fiscal Years (FYs) 2015, 2016, and 2017.

Petitioners seek administrative review of the following water rates:

1. Effective July 1, 2014 (FY 2015), the Water Board set the upstate rate for entitlement water at \$1,573.61 per million gallons (per MG), and the upstate rate for excess water at \$4,946.52 per MG. (*See* Joint Petition at ¶ 4, Exhibits 1 and 2 [Minutes from June 13, 2014].)
2. Effective July 1, 2015 (FY 2016), the Water Board set the upstate rate for entitlement water at \$1,728.99 per MG, and the upstate rate for excess water at \$5,093.58 per MG. (*See* Joint Petition at ¶ 4, Exhibits 1 and 2 [Minutes from June 12, 2015].)

3. Effective July 1, 2016 (FY 2017), the Water Board set the upstate rate for entitlement water at \$1,750.52 per MG, and the upstate rate for excess water at \$5,200.53 per MG. (See Joint Petition at ¶ 5, Exhibits 1 and 2 [Public Notice].)

First, petitioners seek a review of the wholesale rates established by the Water Board for entitlement water for FYs 2015-2017. According to Petitioners, these water rates are unjust and unreasonable. Petitioners ask the Commissioner of Environmental Conservation (the Commissioner) to fix fair and reasonable rates. Petitioners identified Administrative Code of the City of New York (Administrative Code) § 24-360 and Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (6 NYCRR) part 603 as the authority for this review by the Commissioner. (See Joint Petition at ¶ 6.)

Second, Petitioners seek a review of the rates charged by the Water Board for excess water consumed by the upstate communities. As authority for this review, Petitioners referenced Environmental Conservation Law of the State of New York (ECL) § 15-1521 (as amended by L 2011, ch 401, § 6), and contended that the New York State Public Service Commission (PSC) has jurisdiction to set the excess water rate pursuant to the terms and conditions of a permit issued by staff from the Department of Environmental Conservation (Department staff) to the City of New York pursuant to ECL 15-1501(9). (See Joint Petition at ¶¶ 7-9.) In the alternative, Petitioners asserted that Department staff may declare that the City of New York shall supply the excess water to the upstate communities and, after doing so, the Commissioner may then set the rate pursuant to ECL 15-1503 (see Joint Petition at ¶ 33).

With a letter from Chief Administrative Law Judge James T. McClymonds dated September 1, 2016, the captioned matter was assigned to me.

By letter dated September 16, 2016, Anthony London, Esq., filed a notice of appearance on behalf of Department staff.

In a letter dated October 11, 2016, Gail Rubin, Esq., Chief, identified herself with Doris F. Bernhardt, Esq., and Krista Friedrich, Esq., from the Affirmative Litigation Division of the New York City Law Department, as counsel for the Water Board.

In a letter dated October 21, 2016, I asked Department staff and the Water Board to respond to Petitioners' legal theories concerning the scope of the Department's jurisdiction in this matter. I inquired whether the Water Board and Department staff agreed with Petitioners' theory concerning the review of the rates for entitlement water as provided by Administrative Code § 24-360(e). I also inquired whether the Water Board and Department staff agreed with Petitioners' theory concerning the review of the rates associated with excess water. Finally, I requested that Petitioners provide me with a copy of the petition they filed with the PSC in October 2013 (see Joint Petition at ¶ 8).

As directed, Petitioners, with a cover letter from Mr. Dichter dated October 24, 2016, provided a copy of their petition, filed October 30, 2013, and the supplemental petition submitted to the PSC (Case No. 13-W-02274). Citing ECL 15-1521, Petitioners asked the PSC to review

the rates set by the Water Board for excess water with respect to FYs 2015 and 2016, and to fix fair and reasonable rates. With respect to the status of the October 2013 PSC petition, Petitioners advised that the Water Board moved to dismiss the PSC petition for lack of jurisdiction. Petitioners filed an opposition to the Water Board's motion to dismiss. Subsequently, the PSC granted an extension of time for the Water Board to file a supplement to its motion to dismiss. As of the date of Mr. Dichter's October 24, 2016 cover letter, the motion to dismiss the October 2013 PSC petition is pending.

In a letter dated November 7, 2016 from Ms. Rubin, the Water Board responded to Petitioners' legal theories concerning the scope of the Department's jurisdiction in this matter. The Water Board explained further that it filed a motion dated January 16, 2014 with the PSC to dismiss Petitioners' October 2013 petition and supplemental petition concerning rates for excess water. With the November 7, 2016 correspondence, the Water Board included a copy of its January 16, 2014 motion to dismiss.

With a letter dated December 19, 2016 from Mr. London, Department staff responded to Petitioners' legal theories concerning the scope of the Department's jurisdiction in this matter.

By letter dated January 4, 2017, I authorized Petitioners and the Water Board to comment about Department staff's December 19, 2016 response. In addition, I asked Department staff to provide me with copies of the water supply permits, issued pursuant to ECL article 15 and currently in effect, that the Department (or its predecessors) issued to the City of New York.

With an email dated February 7, 2017 from Mr. London, Department staff provided electronic copies of the permits that authorized the construction and use of the Delaware and Catskill reservoir systems. According to Department staff, the Croton reservoir system was constructed and commenced operations before the creation of the Department and its predecessor Commissions. Staff advised further that the Department has issued a water supply permit for a well field located in Jamaica (Queens County). Because this well field and any associated permit are not relevant to this proceeding, staff appropriately excluded it.

Petitioners and the Water Board timely filed their respective responses dated February 15, 2017. Subsequently, without leave, the Water Board filed a letter dated March 16, 2017 to reply to Petitioners' February 15, 2017. By email dated March 16, 2017 from Mr. Dichter, Petitioners objected because the Water Board's March 16, 2017 reply was not authorized. Petitioners requested that I strike the Water Board's March 16, 2017 reply. In an email dated March 24, 2017 from Ms. Friedrich, the Water Board argued that it did not have the opportunity to reply to arguments stated for the first time in Petitioners' February 15, 2017 response. The Water Board requested a consideration of its March 16, 2017 reply. Subsequently, with an email dated April 3, 2017 from Mr. Dichter, Petitioners asked me to consider a response to the Water Board's March 24, 2017 correspondence. Petitioners attached their response to the April 3, 2017 email. Because I did not authorize any additional filings after February 15, 2017, the Water Board's March 16, 2017 reply and Petitioner's April 3, 2017 response are not considered here.

As discussed further below, Petitioners and the Water Board agree that the Commissioner has authority to review the rates established by the Water Board for entitlement water and, if appropriate, to fix fair and reasonable rates. Department staff took no position.

However, a threshold legal question exists about whether an administrative remedy exists to review the rates charged by the Water Board to upstate communities for excess water. If an administrative remedy exists, the issue becomes which agency has authority to review the rates associated with excess water.

## I. Applicable Authorities

The following is a brief summary of the applicable statutes and case law. The parties' arguments are discussed further below in Sections II (Entitlement Water Rates) and III (Excess Water Rates).

### A. Water Supply Act

Section 24-360 of the Administrative Code codifies the Water Supply Act of 1905.<sup>1</sup> Pursuant to § 24-360(a), the Administrative Code authorizes municipalities and water supply districts located in several counties situated north of the City of New York to withdraw water from the City's water supply system.

In exchange for the water, the upstate communities must pay fair and reasonable rates. If either the upstate communities or the City<sup>2</sup> do not agree upon the water rate, either party may petition the New York State Department of Environmental Conservation to fix the rates after a hearing. (*See* Administrative Code § 24-360[b]). Administrative Code § 24-360(c) outlines the costs that may be included in the rate determination.

Administrative Code § 24-360(e) provides a formula for determining the amount of water that upstate communities are entitled to take from the City's water supply system (entitlement water):

[t]he daily quantity of water which may be taken and received by any municipal corporation or water district under the provisions of this section shall not exceed the quantity calculated by multiplying the number of its inhabitants as shown by

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<sup>1</sup> In 1935, the Water Supply Act of 1905 (L 1905, ch 724) was amended to authorize the State Water Power and Control Commission to resolve rate disputes between the City and upstate communities (*see* L 1935, ch 443, § 40). Then in 1963, the Act was amended to authorize the State Water Resources Commission to resolve disputes (*see* L 1963, ch 100, § 1389). Finally, in 1970, the powers of the State Water Resources Commission were transferred to the Department of Environmental Conservation (*see* L 1970, ch 140, §75; *see also* L 1985, ch 907, § 1 [recodifying Administrative Code § 24-360]).

<sup>2</sup> Administrative Code § 24-360(b) identifies the New York City "commissioner of environmental protection."

the last preceding census of the United States or the last state or official municipal census by the daily per capita consumption in the city of New York.

Because Administrative Code § 24-360(e) does not specifically authorize upstate communities to take more water than what is prescribed by the formula (*see Matter of Village of Scarsdale v Jorling*, 91 NY2d 507, 517 [1998]), taking excess water is not expressly authorized by Administrative Code § 24-360 (*see Matter of Village of Scarsdale v Jorling*, 229 AD2d 101, 112 [2d Dept 1997], *affd* 91 NY2d 507 [1998]).

B. ECL Article 15, Title 15 (Water Supply)

ECL article 15 is the State's Water Resources Law. Title 15 concerns water supply. In 2011, the New York State Legislature amended several sections of this title, among them ECL 15-1501, 15-1503, and 15-1521.<sup>3</sup> Some of the 2011 amendments to ECL article 15, title 15, are outlined below.

As amended, ECL 15-1501(1)(a) requires a permit or permit modification from the Department in order to operate a water withdrawal system with a capacity to withdraw a volume of 100,000 gallons or more per day from either an existing or new source, or to increase the withdrawal from an existing permitted source. Furthermore, ECL 15-1501(2), as amended, provides that all valid water supply permits and approvals previously issued by the Department or its predecessors remain in full force and effect for purposes of complying with the permit requirement at ECL 15-1501(1)(a) for existing water withdrawals and in an amount authorized by the permit or approval.

The 2011 amendments also added an additional permitting requirement outlined at ECL 15-1501(9). ECL 15-1501(9) states, in full, that:

[t]he department shall issue an initial permit, subject to appropriate terms and conditions as required under this article, to any person not exempt from the permitting requirements of this section, for the maximum water withdrawal capacity reported to the department pursuant to the requirements of title sixteen or title thirty-three of this article<sup>4</sup> on or before February fifteenth, two thousand twelve.

ECL 15-1503 outlines the information that must be included with an application for a permit, a renewal, or a modification to a water supply permit. Various subsections of ECL 15-1503 were amended in 2011. For example, ECL 15-1503(2) outlines the circumstances that the Department must consider in making a decision to deny or grant a permit, or to grant a permit

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<sup>3</sup> See L 2011, ch 401, effective February 15, 2012.

<sup>4</sup> Effective December 31, 2013, ECL article 15, title 33 (Water Withdrawal Reporting), which was added by L 2009, ch 59, Part CCC, § 1, was repealed by L 2011, ch 401, § 9.

with conditions. Among others, the Department must consider: (1) whether other available sources exist for the intended purpose; (2) whether the quantity of supply will be adequate; (3) whether the need for all or part of the proposed withdrawal cannot be reasonably avoided through conservation measures; (4) whether the withdrawal would result in any adverse environmental impacts; (5) whether the proposed withdrawal incorporates environmentally sound and economically feasible water conservation measures; and (6) whether the proposed withdrawal is consistent with other applicable laws.

The amended version of ECL 15-1503(4) is substantially the same as the original. The original language of ECL 15-1503(4) stated, in full, that:

[t]he department may grant or deny a permit or grant a permit with such conditions as may be necessary to provide satisfactory compliance by the applicant with the matters subject to department determination pursuant to subdivision 2 of this section, or to bring into cooperation all persons [or public corporations]<sup>5</sup> that may be affected by the project, but it shall make a reasonable effort to meet the needs of the applicant, with due regard to the actual or prospective needs, interests and rights of others that may be affected by the project.

The 2011 law also amended ECL 15-1521 entitled, *Supply of water to other public supply systems*. ECL 15-1521 has two components. First, upon consideration of an application for a new withdrawal or increased water withdrawal, the Department may require the operator of one water supply system to provide water to another water supply system. With respect to this component, the 2011 amendments clarify that any new water withdrawal or increase in the withdrawal must take place between public water supply systems. If the Department issues a permit that directs the transfer of supply from one system to another, the applicant is thereafter obliged to provide the water, consistent with the permit conditions.

The second component of ECL 15-1521 is to provide an administrative remedy with respect to rate disputes that may result from a new withdrawal or increased water withdrawal where the Department has required an applicant to provide water to another public water supply system. Prior to the 2011 amendments, ECL 15-1521 authorized the Department to fix fair and reasonable rates when disputes arose unless the Public Service Commission had such jurisdiction. However, with the 2011 amendments, when disputes arise about the price to be paid:

fair and reasonable amounts and rates shall be, after due hearings thereon, fixed by the *public service commission*. Any such agreement or determination of the *public service commission* may from time to time be modified by further agreement between the parties affected thereby or by the further order of the *commission* (emphasis added).

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<sup>5</sup> This bracketed text was deleted by the 2011 amendments to ECL 15-1503(4).

C. Public Authorities Law (PAL)

In 1984, the New York City Municipal Water Finance Authority Act, which is presently codified at §§ 1045-a to 1046 in the Public Authorities Law, created the Water Board and the New York City Municipal Water Finance Authority (the Authority). The Public Authorities Law (PAL) authorizes the Water Board to set rates for water usage to insure “sufficient funds – through fixing and collecting water and sewer charges and other revenues – for the City to operate and maintain the Water System and for the Authority to service water and sewer debt” (*Matter of Village of Scarsdale v Jorling*, 91 NY2d at 514 [quoting *Giuliani v Hevesi*, 90 NY2d 27, 34 (1997)]).

Pursuant to PAL § 1045-j(9):

[n]either the public service commission, nor any city or state agency, shall have any jurisdiction over the water board or authority or any power over the regulation of the fees, rates, rents or other charges established, fixed or revised by the water board except with respect to the supply of water or sewerage services to users outside the city as provided in article one of title K of chapter fifty-one of the administrative code of the city of New York.<sup>6</sup>

Nevertheless, PAL § 1045-bb states, in full, that:

[i]nsofar as the provisions of this title are inconsistent with the provisions of any other law, general, special or local or of the city charter or any local law, ordinance or resolution of the city, *the provisions of this title shall be controlling*, provided that nothing contained in this section shall be held to supplement or otherwise expand the powers or duties of the authority otherwise set forth in this title. *Nothing contained in this title shall be held to alter or abridge the powers and duties of the state department of environmental conservation or the state department of health* (emphasis added).

D. Matter of Village of Scarsdale v Jorling

The *Matter of Village of Scarsdale v Jorling* involved a challenge to an Interim Decision dated November 22, 1993, issued by then DEC Commissioner Jorling concerning a water rate petition initially filed with the Department by Westchester County and other upstate communities including the Village of Scarsdale.<sup>7</sup> The issues considered by the Court of Appeals were: (1) who has authority to fix the rate to be paid for water used by upstate communities, and (2) who has authority to determine the method for calculating the amount of water that may be

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<sup>6</sup> This reference to the Administrative Code includes § 24-360.

<sup>7</sup> See *Matter of Westchester County*, Commissioner’s Interim Decision, dated November 22, 1993 (DEC Water Supply No. 8865).

taken (*see Matter of Village of Scarsdale v Jorling*, 91 NY2d at 512). With respect to the first issue, the Court held that the authorizations outlined in Administrative Code § 24-360 and PAL § 1045(j) should be harmonized. Therefore, in the first instance, the Water Board initially sets the rates for entitlement water that upstate communities use subject, upon request, to review by the Department. The Court concluded that the effect of the two statutes is to give both the Water Board and the Department a role in setting rates for upstate communities who take entitlement water from the City's water supply system. (*See Matter of Village of Scarsdale v Jorling*, 91 NY2d at 516.)

The Court held further that the scope of the Administrative Code is limited to the upstate communities' use of entitlement water. Before taking excess water, the Court determined that those upstate communities must obtain a permit from the Department pursuant to ECL article 15. During the permit review process, the Court noted that the Department, as the conservator of the State's resources, would have authority to set conditions to take excess water, and to review the associated rates set by the Water Board. The Court expressly held that the Department's authority over excess water derives from the permit review process, and that the Department's oversight role is not triggered until a permit application has been filed. In the decision, the Court referenced ECL 15-1501(1)(a), as well as ECL 15-1503(2) and (4), respectively, as the bases for the Department's review of excess water and the associated rates. (*See Matter of Village of Scarsdale v Jorling*, 91 NY2d at 517.)

With respect to the second issue, determining who has the authority to calculate water usage is significant for two reasons. First, the upstate rate for entitlement water cannot exceed the rate charged to in-City users, according to Administrative Code § 24-360(c). Second, the Administrative Code sets no limit on the rate charged for excess water. The Court held that the Department has no authority to calculate water usage. Rather, the Court determined that the method is expressly outlined in Administrative Code § 24-360(e), and is within the exclusive purview of the Water Board, as the system operator. The Water Board maintains the equipment and the records to determine per capital usage. Because the Department has the authority to impose conditions on taking excess water, the Court reiterated that the Department can fulfill its role of regulating and conserving the State's water supply resources. (*See Matter of Village of Scarsdale v Jorling*, 91 NY2d at 517-518.)

## II. Entitlement Water Rates

Petitioners seek a review of the rates established by the Water Board applicable to upstate customers for entitlement water for FYs 2015-2017, and to fix fair and reasonable rates (*see* Joint Petition at ¶¶ 4-6). In support of the request, Petitioners reference Administrative Code § 24-360 (*see* Joint Petition at ¶¶ 10-15).

Petitioners object to the water rates charged for entitlement water for FYs 2015-2017, and asserted that these rates are unjustified. The joint petition identifies the percentage increase from year to year beginning with FY 2012. For example, from FY 2012 to FY 2013, the rate

increased by 12.34% (*see* Joint Petition at ¶¶ 18-19). Subsequent rate increases ranged from 5.13% to 9.87% (*see* Joint Petition at ¶¶ 20-21). According to the joint petition (at ¶ 22), upstate communities obtained an injunction from Supreme Court, New York County, to block implementation of the FY 2017 water rate.

Prior to implementing any rate change, the Water Board conducts public hearings, and provides a comment period about the proposed rate. Representatives from the upstate communities have filed comments about each proposed rate change during the various public comment periods, and have objected to each proposed rate change. Petitioners stated that the Water Board and the upstate communities cannot agree upon the rates, and contended that the Water Board would not participate in any negotiations with respect to the proposed rate changes. (*See* Joint Petition at ¶¶ 23-24).

The bases for Petitioners' objection to the proposed rate changes are outlined in the joint petition at ¶ 25. Petitioners alleged that the proposed rates for entitlement water included costs not authorized by Administrative Code § 24-360(c), such as costs associated with debt service, as well as personnel and other than personnel costs. According to Petitioners, the manner in which the Water Board has accounted for cash used for construction or defeasance of debt is also a major issue. Petitioners objected to including cash in the rate that the Water Board used for defeasance and construction in conjunction with the "true-up" calculation.

In a letter dated November 7, 2016, the Water Board agreed with Petitioners that the Commissioner has authority to review and fix the rates for entitlement water. In a letter dated December 19, 2016, Department staff, however, took no position with respect to whether the Commissioner has authority to adjudicate disputes between the Water Board and upstate communities about the entitlement water rates.

**Discussion and Ruling:** The consensus between the Water Board and Petitioners that the Commissioner has the authority to adjudicate disputes about the rate for entitlement water is based on Administrative Code § 24-360(b). Nothing in the 2011 law, amended either Administrative Code § 24-360(b), or PAL §§ 1045-j(9) and 1045-bb. Therefore, pursuant to Administrative Code § 24-360(b), PAL §§ 1045-j(9) and 1045-bb, as well as the Court's determination in *Matter of Village of Scarsdale v Jorling* (*see* 91 NY2d at 516), I conclude that the Commissioner's authority to review and fix the rates that the Water Board may charge upstate communities for entitlement water (*see* Administrative Code §24-360[e]) remains unchanged by the 2011 amendments. Accordingly, a hearing will be convened to consider Petitioners' request to review the rates for entitlement water as established by the Water Board and charged to upstate customers for FYs 2015-2017 and, after developing a complete record, the Commissioner will fix fair and reasonable rates for the entitlement water.

### III. Excess Water Rates

Petitioners also seek a review of the rates charged by the Water Board for excess water. The rate for excess water is equal to the rate charged to in-City users, which is almost 300% more than the rate for entitlement water, according to Petitioners. As noted above, Petitioners filed their October 2013 petition and supplemental petition with the PSC concerning the rates associated with excess water. In the joint petition pending here, Petitioners request a determination that the Department either has issued, or will issue, a water supply permit to the City pursuant to ECL 15-1501(9) that would authorize the City to supply excess water to upstate communities. Subsequently, the PSC could review and fix the rates associated with excess water usage, as provided for by the 2011 amendments to ECL 15-1521. (*See* Joint Petition at ¶¶ 7-9).

To support the second component of their request, Petitioners referred to *Matter of Village of Scarsdale v Jorling* (*see* 91 NY2d at 517). Petitioners noted that in 2004, several upstate communities filed applications with the Department for water supply permits consistent with the Court's determination in order to trigger the Department's oversight of excess water and the associated rate.<sup>8</sup> According to the joint petition, the Department has held the permit applications in abeyance. With the 2011 amendments to ECL article 15, title 15, Petitioners contended that the Department retains permitting authority with respect to excess water. However, pursuant to ECL 15-1501(9) and 15-1521, the Department must now issue a permit to the Water Board, rather than to individual upstate communities, with conditions that would limit the maximum water withdrawal capacity. The permit issued to the Water Board would authorize it to supply the entitlement water as well as excess water to upstate communities. With respect to the rates for excess water, the administrative review of those rates would take place before the PSC. (*See* Joint Petition at ¶¶ 27-30, 32.)

With respect to excess water and the associated rate, Petitioners offered the following alternative legal theory. Petitioners argued that the Department has authority, pursuant to ECL 15-1503, to issue a permit with conditions that establish the terms for the supply of water, as well as the rates. (*See* Joint Petition at ¶ 33.)

Contrary to Petitioners, the Water Board contended that the Commissioner continues to have sole jurisdiction to review and fix rates for excess water, and that the PCS has no authority to consider such water rates. To support this contention, the Water Board referred to its papers filed with the PSC,<sup>9</sup> and cites to several authorities. (*See* November 7, 2016 letter at 1-2.)

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<sup>8</sup> As stated in the joint petition (*see* note 2 at 10), United Water New Rochelle (DEC Application No. 3-5599-00059/00001), the Village of Scarsdale (DEC Application No. 3-5550-00074/00001), Mt. Vernon Water System (DEC Application No. 3-5508-00320/00001), and Westchester Joint Water Works (DEC Application No. 3-5599-00053/00001) filed applications with the Department. (*See also* Petitioners' February 15, 2017 letter at 4.)

<sup>9</sup> Water Board's January 16, 2014 motion to dismiss (PSC Case No. 13-W-02274) (Board's 2014 Motion).

First, the Water Board noted that in *Matter of Village of Scarsdale v Jorling* (see 91 NY2d at 517), the Court held that the Department has authority to review the rates for excess water in connection with an application by upstate communities for a permit to take excess water from the City's water supply system, pursuant to ECL 15-1501 and 15-1503. The Water Board noted further that the Appellate Division and the Court of Appeals based their respective determinations on ECL 15-1501 and ECL 15-1503, rather than on ECL 15-1521, as Supreme Court initially had done (compare *Matter of Village of Scarsdale v Jorling*, 229 AD2d at 112, and 91 NY2d at 517, with 168 Misc2d at 10). Upon review, both the Appellate Division and the Court of Appeals identified ECL 15-1501(1)(a) as the authority for the Department to issue permits to the upstate communities who take excess water (see *Matter of Village of Scarsdale v Jorling*, 229 AD2d at 112, *aff'd* 91 NY2d at 517.) (See Board's 2014 Motion at 9-10.)

In addition, the Water Board argued that the PSC cannot exercise any authority over the rates set by the Water Board. To support this argument, the Water Board referenced PAL §§ 1045-j(9) and 1045-bb. The Water Board noted that PAL § 1045-j(9) expressly states that the PSC has no jurisdiction over the Water Board or the Authority with respect to rates, and other functions. The Water Board noted further that PAL § 1045-bb states that title 2-a of the Public Authorities Law does not "alter or abridge" the powers and duties of the Department concerning the control, regulation, and preservation of the State's water resources. (See Board's November 7, 2016 letter at 2.)

Finally, the Water Board argued that Petitioners' reliance on the 2011 amendments to ECL 15-1521 as authority for the PSC to review water rates is misplaced. The Water Board said that it has not applied to the Department for a permit to provide a new withdrawal of water, or to increase the withdrawal of water. Because the Water Board has not filed the prerequisite application with the Department, the Water Board concluded that ECL 15-1521 does not apply here. The Water Board observed that the 2011 amendments to ECL 15-1521 do not mention the City, the Water Board, or water rates. In addition, the Water Board observed further that the 2011 amendments did not amend any provisions of either the Water Supply Act, as codified in Administrative Code § 24-360, or PAL §§ 1045-j(9) and 1045-bb. (See Board's 2014 Motion at 11-13.)

According to Department staff, the Commissioner does not have authority to adjudicate disputes about rates associated with excess water taken from the City's water supply system. Staff noted that Administrative Code § 24-360 addresses only entitlement water and, therefore, does not apply to excess water. In addition, Department staff argued that the 2011 amendments to ECL 15-1521 authorize only the PSC to review and fix water rates. The 2011 amendments expressly removed the Department's jurisdiction that had been previously authorized by ECL 15-1521. (See Staff's December 19, 2016 letter at 1-2.)

With reference to *Matter of Village of Scarsdale v Jorling* (see 91 NY2d at 517), Department staff contended that the Court's reliance on ECL 15-1501 and ECL 15-1503 as authority for the Department to adjudicate excess rates is misplaced. According to staff, the language of ECL 15-1501 and ECL 15-1503 does not provide for the adjudication of rates associated with excess water. Staff argued that if the Legislature had intended to provide the

Department with the authority to adjudicate excess water rates, the Legislature would have provided such language in these two provisions of ECL article 15, title 15, and it did not. In contrast, Department staff observed that prior to the 2011 amendments, ECL 15-1521 authorized the Department to review and fix water rates, provided that the PSC did not have jurisdiction. With the amendments, staff maintained that the Legislature withdrew the Department's authority to review and fix water rates, and vested that authority exclusively with the PSC. (*See Staff's December 19, 2016 letter at 2.*)

Staff said that the Department has not directed the Water Board to provide the upstate communities with excess water, and has not issued any permits to the Water Board that would require the Water Board to provide excess water. Staff noted that the current permits neither require nor prohibit the Water Board from selling excess water to any of the upstate communities. Staff noted further that the Department has not issued any permits to the upstate communities to take excess water from the City's water supply system. According to Department staff, the 2011 amendments to ECL article 15, title 15 are intended to simplify the Department's permit program. Pursuant to ECL 15-1501(5) and ECL 15-1521 and other provisions of title 15, staff contended that the Department now has discretion to issue a permit to the entity who withdraws water directly from a particular water source without the need to issue additional permits to those entities who also take water from the currently approved sources provided the total amount of water withdrawn by all users does not exceed the quantity approved in the initial permit. (*See Staff's December 19, 2016 letter at 2.*)

Finally, Department staff contended that the Water Board's reliance on PAL § 1045-j(9) as providing the Department with the authority to review and fix rates for excess water is misplaced. Staff acknowledged that PAL §1045-j(9) references the Water Supply Act. Staff argued, however, that because the Water Supply Act addresses only entitlement water, the scope of PAL § 1045-j(9) is likewise limited. Consequently, staff concluded that PAL § 1045-j(9) pertains only to the entitlement water rate. With respect to PAL § 1045-bb, staff conceded that the Department's powers and duties are neither altered nor abridged. Staff observed, however, that no law authorizes the Department to consider issues related to excess water. Staff concluded that the Department cannot exercise any authority with respect to a particular power or duty when that power or duty was never duly conferred upon the Department. (*See Staff's December 19, 2016 letter at 2-3.*)

Contrary to the contentions of the Water Board and Department staff, Petitioners argued that PAL § 1045-j(9), by its own terms, does not apply "with respect to the supply of water or sewerage services to users outside the city." Therefore, the Water Board cannot rely on PAL § 1045-j(9) as a basis for its contention that the PSC has no authority to review and fix water rates, according to Petitioners. In addition, Petitioners argued further that Department staff cannot rely on PAL § 1045-j(9) as a basis for its contention that the Department has no authority to review and fix rates related to excess water. (*See Petitioners' February 15, 2017 letter at 1-2.*)

According to Petitioners, the Department previously relied upon ECL 15-1521 as authority to review and fix water rates. To support this contention, Petitioners referenced

administrative decisions dating from the mid-1990s that resolved water rate disputes throughout the State. (See Petitioners' February 15, 2017 letter at 2.)

Petitioners noted that one of the issues explicitly considered in *Matter of Village of Scarsdale v Jorling* (see 91 NY2d at 515) was whether the Department has any control over the rates for excess water. Petitioners noted further that the Court determined that the Department's authority over excess water rates derives from its power to control, regulate, and preserve the State's water resources. The Court determined further that the Department's authority is not curtailed by PAL § 1045-bb. (See *Matter of Village of Scarsdale v Jorling*, 91 NY2d at 517). Petitioners concluded that the Court's determination in *Matter of Village of Scarsdale v Jorling* is at the center of this case. (See Petitioners' February 15, 2017 letter at 2-3.)

With reference to ECL 15-1521, Petitioners contended that *Matter of Village of Scarsdale v Jorling* (see 91 NY2d at 518) demonstrates that the Department has authority to set rates for entitlement and excess water pursuant to the Administrative Code and the ECL. Petitioners stated that the 2011 amendments to ECL 15-1521 transferred rate making authority from the Department to the PSC. As a result, one effect of the 2011 amendments to ECL 15-1521 was to modify the Court's 1998 determination in *Matter of Village of Scarsdale v Jorling* with respect to who can review and fix excess water rates. (See Petitioners' February 15, 2017 letter at 3-4.)

Petitioners stated that they obtained copies of the permits issued by the Water Supply Commission, a predecessor to the Department, which authorized the City to develop the Catskill and Delaware reservoir systems. As a condition of these permits, Petitioners observed that the Commission reserved the right to resolve rate disputes between the City and upstate users. For example, in a decision of the Water Power and Control Commission on Water Supply Application No. 466, dated May 25, 1929, Condition No. 6 states, in full, that:

[t]he Commission reserves the right to authorize the taking of water from any such water shed for the supply of a publicly or privately owned public water supply system not situated on such water shed. In such case the compensation, if any to be made by the taker of the water to the city may be agreed upon between the parties, or, if they cannot agree, shall be fixed by this Commission.

The Commission had previously conditioned approvals in a similar manner.<sup>10</sup> (See Petitioners' February 15, 2017 letter at 4, and Exhibit 1.)

With the 2011 amendments, Petitioners noted further that ECL 15-1501(9) directs the Department to issue a permit for the maximum water withdrawal capacity reported to the Department pursuant to ECL 15-3301 (Water Withdrawal Reporting), prior to February 2012.<sup>11</sup>

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<sup>10</sup> See also State of New York Conservation Commission, Water Supply Application No. 166, Decision dated October 21, 1914, Condition No. 5; and State of New York Conservation Commission, Water Supply Application No. 214, Decision dated June 6, 1916, Condition No. 5.

<sup>11</sup> As previously noted (*supra.* at note 4), ECL 15-3301 was repealed by L 2011, ch 401, § 9, effective December 31, 2013.

Upon review of the water withdrawal reports dated March 2013 for the Croton, Catskill and Delaware reservoirs, Petitioners stated that the reported volumes include the total amount of water taken from the City's water supply system. Petitioners concluded that the permit required pursuant to ECL 15-1501(9) would, therefore, include entitlement water as well as excess water provided to upstate users. These circumstances fulfill the first component of ECL 15-1521 as noted above, according to Petitioners. Given the dispute about excess water rates, Petitioners argued that the PSC would have the authority to consider those disputes and fix the rates for excess water consistent with the second component of ECL 15-1521, as amended. Nevertheless, in the interest of administrative economy, Petitioners argued that the best course of action would be for the Department and the PSC to jointly review and fix just and reasonable rates for both entitlement water and excess water. (*See* Petitioners' February 15, 2017 letter at 4-5, and Exhibit 2.)

The Water Board reiterated its position that the Department has jurisdiction to review and fix the rates associated with excess water noting the Court expressly considered "whether the DEC has any oversight powers over excess water consumption rates" (*Matter of Village of Scarsdale v Jorling*, 90 NY2d at 515). According to the Water Board, staff's characterization that the Court's determinations are dicta and, therefore, not binding is incorrect. Rather, the Water Board maintained that the Court's determinations squarely address the scope and nature of the Department's jurisdiction in this matter. (*See* Board's February 15, 2017 letter at 1-2.)

Because some Petitioners have filed permit applications with the Department, the Water Board asserted that the Department's jurisdiction has been triggered, consistent with the Court's determination (*see Matter of Village of Scarsdale v Jorling*, 91 NY2d at 518). The Water Board argued that Department staff should review these applications and determine whether to issue permits and, if so, under what conditions. (*See* Board's February 15, 2017 letter at 2.)

The Water Board interpreted staff's position that the 2011 amendments to ECL article 15, title 15, are intended to simplify and streamline the permit review process by providing the Department with the discretion to issue a permit only to the entity who initially withdraws the water, rather than to other users who may purchase water, to mean that the Department need not complete its review of the pending permit applications. If staff's position is accepted, then the Water Board argued, in the alternative, that the Water Board has the discretion to provide excess water, and that no administrative review of the associated rates would be available. Rather, the Water Board contended that upstate communities could seek judicial review of the rates for excess water in a manner similar to the remedy available to City inhabitants (*see Matter of Village of Scarsdale v Jorling*, 91 NY2d at 516). The Water Board noted further that its alternative position would be consistent with staff's interpretation of PAL § 1045-j(9) which, according to staff, applies only to entitlement water because Administrative Code § 24-360 is also so limited. (*See* Board's February 15, 2017 letter at 2.)

Finally, the Water Board supports staff's positions that the Department has not issued, and does not intend to issue, any permit that would require the City to supply excess water to Petitioners. Also, the Water Board supports staff's position that the permits previously issued to the City neither require nor prohibit the City from providing excess water to upstate

communities. The Water Board maintained that it does not consider itself to be an applicant for a permit pursuant to the first component of ECL 15-1521. Consequently, the Water Board concluded that the Department does not have jurisdiction pursuant to ECL 15-1521 to issue a permit that would require the Water Board to provide upstate communities with excess water. (See Board's February 15, 2017 letter at 2-3.)

**Discussion and ruling:** In *Matter of Village of Scarsdale v Jorling* (see 91 NY2d at 515), the Court considered whether the Department has any regulatory authority to set rates for excess water. In affirming the Department's authority, the Court determined that the source of the authority is derived from the Department's permitting authority under ECL 15-1501(1)(a) and ECL 15-1503(2) and (4). The Court determined further that the Department's authority is not abridged by PAL § 1045-bb. (See *Matter of Village of Scarsdale v Jorling*, 91 NY2d at 517.)

Conspicuous from the Court's analysis is the absence of any reference to ECL 15-1521. As the Water Board noted above, both the Appellate Division and the Court of Appeals based their respective determinations on specific references to ECL 15-1501(1)(a) and ECL 15-1503(2) and (4), rather than on ECL 15-1521, as Supreme Court initially had done (*compare Matter of Village of Scarsdale v Jorling*, 229 AD2d at 112, and 91 NY2d at 517, with 168 Misc2d at 10). In so doing, the Court confirmed DEC Commissioner Jorling's determination that the Department's authority over rate disputes was limited to situations where water withdrawals are authorized by either statute (entitlement water) or permit (excess water), and that ECL 15-1521 does not apply to issues related to excess water taken from the City's water supply system (see *Matter of Westchester County*, Commissioner's Interim Decision, dated November 22, 1993, at 3).<sup>12</sup>

Because the Department's authority to review excess water rates is not triggered until a permit application for excess water is filed, I conclude that Petitioners' challenges to the rates for excess water as set by the Water Board for FYs 2015, 2016, and 2017 are not ripe for review at this stage of the proceeding. In order for the Department to consider excess water and disputes about the associated rates, the excess water users must, per the Court's direction, apply for a water supply permit pursuant to ECL 15-1501(1)(a) (see *Matter of Village of Scarsdale v Jorling*, 91 NY2d at 517). As Petitioners noted above, several upstate communities have filed applications for water supply permits with the Department. To date, staff has not explained, within the context of this matter, why the pending permit applications have been held in abeyance. Initially, Department staff must determine how to process the permit applications filed in 2004.<sup>13</sup> Department staff's determination about these pending applications are a precondition to any consideration about excess water rates.

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<sup>12</sup> In the *Westchester County* proceeding, Commissioner Jorling noted that ECL 15-1521 only applied in circumstances when, as part of a permit for a new or additional water supply or source of water supply, the permittee is required by the Department to supply water to another public water supply system (see Interim Decision at 3). Commissioner Jorling concluded that ECL 15-1521 did not address the "'excess' water question" (*id.*).

<sup>13</sup> These permit applications were filed prior to the February 15, 2012 effective date of the 2011 amendments to ECL article 15, title 15. Consequently, Department staff will make an initial determination concerning which version of ECL article 15, title 15, applies to the review of these applications.

Prior to the 2011 amendments, ECL 15-1501(1)(a) required a permit or permit modification from the Department to withdraw water from either an existing or new source, or to increase the withdrawal from an existing source. Subsequent to the 2011 amendments, the obligation to obtain a permit remains. However, based on the 2011 amendments, a permit is only required when the water withdrawal system has a capacity that is equal to or greater than the *threshold volume* (see ECL 15-1501[1]). The *threshold volume* is defined in the 2011 amendments at ECL 15-1502(14) and, in part, means:

the withdrawal of water of a volume of one hundred thousand gallons or more per day, determined by the limiting maximum capacity of the water withdrawal, treatment, or conveyance system.

The remainder of the statutory definition concerns the threshold volume of water withdrawn for agricultural purposes. (See also 6 NYCRR 601.4[p].) Whether upstate communities have systems capable of taking excess water equal to or greater than the threshold volume identified at ECL 15-1501(1), as recently amended, is unknown. Staff, therefore, will determine the scope of the Department's jurisdiction with respect to this recent amendment to ECL 15-1501(1).

Rather than considering individual permit applications from various upstate communities, Department staff advised that ECL 15-1501(5) provides the Department with the discretion to issue a permit to the City as the entity who withdraws water directly from approved water sources without the need to issue additional permits to the upstate communities (see also 6 NYCRR 601.8). In order to exercise the discretion provided by ECL 15-1501(5), Department staff stated that the total amount of water withdrawn by all users cannot exceed the quantity approved in the initial permits. (See Staff's December 19, 2016 letter at 2.) However, staff does not intend to exercise this discretion (see Staff's December 19, 2016 letter at 3), and the Water Board supports that position (see Board's February 15, 2017 letter at 2). Whether staff ultimately chooses to exercise this discretion would be determined as part of the permit review process.

Petitioners' argument that ECL 15-1501(9) requires the Department to issue a water supply permit to the City, which could require the City to provide upstate communities with excess water, is incomplete. I note that the subdivision of ECL 15-1501 applicable to the City's current approvals, with respect to the Delaware and Catskill reservoir systems, is found at ECL 15-1501(2) rather than at ECL 15-1501(9). As amended by the 2011 law, ECL 15-1501(2) states that all valid water supply permits and approvals from the Department or its predecessors, such as the State Water Supply Commission and the State of New York Conservation Commission, remain in full force and effect for the purposes of satisfying the permitting requirements at 15-1501(1). Therefore, the determinations and decisions provided with Mr. London's February 7, 2017 email with respect to the Delaware and Catskill reservoir systems are prior approvals that remain valid pursuant to ECL 15-1501(2).

However, staff stated in the February 7, 2017 email that the Croton reservoir system was constructed and commenced operations before the creation of the Department and its predecessor

Commissions. Based on this statement, it is not clear whether a prior approval exists for the Croton reservoir system. If a prior approval does not exist, then the requirement at ECL 15-1501(9) may require the Department to issue a permit for the Croton reservoir system as contended by petitioners. The answer to this question again lies with Department staff who, in the first instance, will comply the applicable statutory and regulatory requirements.

By its express terms, ECL 15-1521 would apply only after the Department issues a permit requiring the operator of one public water supply system to provide water to another publicly owned supply system. However, such a permit issued pursuant to ECL 15-1521 was not under consideration in *Matter of Village of Scarsdale v Jorling* (91 NY2d at 507). Therefore, the applicability of ECL 15-1521 to the pending applications depends upon how Department staff chooses to implement the permit program established by the 2011 amendments to ECL article 15, title 15.

Well established procedures exist for the review of any application for a water supply permit (*see e.g.* ECL article 8 [SEQRA], ECL article 15, title 15 [Water Supply] and ECL article 70 [UPA], and implementing regulations<sup>14</sup>). The procedures require Department staff to undertake the review, consistent with the applicable statutes and regulations. Therefore, Department staff must address all issues associated with the application review process in the first instance before the Office of Hearings and Mediation Services convenes any necessary public hearings. Based on the foregoing circumstances, a consideration of excess water rates cannot commence until Department staff has completed the review of the pending applications, received any additional applications and reviewed them, decided the scope of its permitting jurisdiction with respect to the 2011 amendments to ECL article 15, title 15, and determined whether to grant or deny permits, or to grant permits with conditions.

Therefore, I hereby direct Department staff to complete the review of the pending applications for water supply permits filed by United Water New Rochelle (DEC Application No. 3-5599-00059/00001), the Village of Scarsdale (DEC Application No. 3-5550-00074/00001), the Mt. Vernon Water System (DEC Application No. 3-5508-00320/00001), and Westchester Joint Water Works (DEC Application No. 3-5599-00053/00001). A consideration of excess water and the associated rates will be held in abeyance pending Department staff's determinations about these permit applications.

### **Scheduling**

I would like to schedule a telephone conference call with representatives from the Water Board, Petitioners, and Department staff to discuss the topics listed below. Except for May 11, 2017, I am available during the remainder of the week of May 8, 2017 from 9:30 a.m. to 4:30

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<sup>14</sup> The applicable regulations include 6 NYCRR part 601 (Water Withdrawal Permitting, Reporting and Registration), part 617 (SEQR), part 621 (Uniform Procedures) and, if a public hearing should become necessary, part 624 (Permit Hearing Procedures).

p.m. Except for May 16, 2017, I am available during the remainder of the week of May 15, 2017 from 9:30 a.m. to 4:30 p.m. If you need additional dates, please advise.

I request that the parties' representatives advise me about their availability by Tuesday, **May 2, 2017**. Please advise by email, and copy the other representatives. I will provide the call-in information under separate cover.

I. Permit Review

As discussed above, I am directing Department staff to complete the review of any pending applications for permits to take excess water before convening a hearing to consider any disputes related to the rates charged for excess water. During the telephone conference call I will ask Department staff to provide an update with respect to the review of the pending applications for water supply permits. Of particular concern is whether staff has made any completeness determinations, as required by 6 NYCRR 621.6(c) (*see* definition at 6 NYCRR 621.2[f]). Also, I request that Department staff be prepared at the conference call to elaborate upon the statements outlined in the December 19, 2016 correspondence (at 2) concerning the streamlining of the Department's program with respect to the review of water supply permits and the nature of the Department's discretion.

II. Discovery

In an email from Mr. Dichter dated February 21, 2017, Petitioners requested permission to commence discovery pursuant to 6 NYCRR 624.7. Petitioners' request was limited to the entitlement water and the associated rates. Neither the Water Board nor Department staff objected. By email dated March 2, 2017, I authorized the parties to go forward with discovery.

Subsequently, Petitioners' counsel served discovery demands upon counsel for the Water Board with emails dated March 7, 2017 and March 15, 2017 from Mr. Dichter. In addition, Petitioners provided Department staff with copies of the demands sent to the Water Board's counsel with Mr. Dichter's March 7 and 15, 2017 emails. Department staff shall advise the Water Board by May 2, 2017 whether staff wants copies of the Water Board's responses to Petitioners' discovery demands.

To date, I have not received copies of any discovery demands served by the Water Board or Department staff.

I appreciate receiving copies of any discovery demands. However, please do not provide me with copies of any responses unless there are disputes about what has been requested or what should be produced.

During the telephone conference call, I would like to develop a tentative schedule concerning any other discovery demands. I recognize, however, that finalizing the discovery schedule may have to take place after the issues conference has convened.

III. Issues Conference

The applicable hearing regulations are outlined at 6 NYCRR parts 603 and 624 (*see* 6 NYCRR 624.1[a][6]). Section 603.7 provides for a notice of hearing (*see also* 6 NYCRR 624.3). Based on past experiences, I recognize that participation has been limited to communities from Westchester County. Nevertheless, because any determination made by the Commissioner will apply to all upstate communities, I will prepare a notice of hearing, which will include the opportunity for any other upstate community who takes water from the City's water supply system to file a petition, or to join the current petition filed by the Village of Scarsdale and the other communities from Westchester County (*see* 6 NYCRR 603.3 and 603.4; *see also* 6 NYCRR 624.5[b]).

In the past, the Water Board has provided my office with a list of the upstate water users and their addresses. I would appreciate the Water Board providing this information again. My office will mail copies of the hearing notice to all upstate communities who take water from the City's water supply system.

I have found the issues conference procedures outlined at 6 NYCRR 624.4(b) to be an efficient way to identify specific factual disputes that require adjudication. I propose, therefore, to schedule an issues conference with the forthcoming notice of hearing. I am available to convene the issues conference in July 2017. Based on past experiences, I anticipate that the issues conference will take one day. The location for the issues conference should be in an upstate community. I request that Mr. Dichter research potential locations for the issues conference in July 2017. If dates in August 2017 are needed for the issues conference, please advise.

\_\_\_\_\_/s/\_\_\_\_\_  
Daniel P. O'Connell  
Administrative Law Judge  
Email: [daniel.oconnell@dec.ny.us](mailto:daniel.oconnell@dec.ny.us)

Dated: Albany, New York  
April 26, 2017

To: Attached Preliminary Service List dated October 21, 2016