NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

February 9, 2018

Ruling on the Scope of the Department's Jurisdiction to Review and Fix Excess 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].)

As discussed in a ruling dated April 26, 2017, I noted that the Water Board and Petitioners agreed that the Commissioner has the authority to adjudicate disputes about the rate for entitlement water pursuant to Administrative Code § 24-360(b).[1] Although the New York State Legislature had amended several sections of Environmental Conservation Law (ECL) article 15, title 15 (Water Supply) in 2011,[2] I noted further that this legislation did not amend either Administrative Code § 24-360(b), or Public Authorities Law (PAL) §§ 1045-j(9) and 1045-bb. As a result, I concluded 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]) was unchanged by the 2011 amendments. (*See* April 26, 2017 ruling at 9.)

Accordingly, Petitioners and the Water Board have exchanged discovery demands, and are in the process of preparing for a hearing to consider the entitlement water rates. The issues conference will be scheduled after the discovery process continues further. (*See* Memorandum dated May 18, 2017 at 1-2.)

In the April 26, 2017 ruling, I reserved on Petitioners' request to review rates for excess water. I noted that before the Commissioner could consider excess water and disputes about the associated rates, the excess water users must apply for a water supply permit pursuant to ECL 15-1501(1)(a), as directed by the Court in *Matter of Village of Scarsdale v Jorling*, 91 NY2d 507, 517 (1998). I noted further that several upstate communities had filed applications for water supply permits with the Department,[3] and concluded that Department staff's determination about these pending applications was a precondition to any consideration related to excess water rates. (*See* April 26, 2017 ruling at 15.)

I directed Department staff to complete the review of the pending permit applications filed by the upstate communities (*see* April 26, 2017 ruling at 17). Subsequently, I further directed staff to issue written determinations about the pending permit applications by July 7, 2017 (*see* Memorandum dated May 18, 2017 at 2).

Following the May 17, 2017 telephone conference call, Department staff filed correspondence dated June 16, 2017, July 5, 2017, and July 7, 2017. In each, staff moved to: (1)

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[1] By letter dated December 19, 2016 (at 1), Department staff took no position about whether the Commissioner has authority to review, and fix fair and reasonable rates for the entitlement water.

[2] *See* L 2011, ch 401, effective February 15, 2012.

[3] 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.)

dismiss Petitioners' request to adjudicate excess water rates, and (2) strike references made in the April 26, 2017 ruling (at 16-17) to the Croton reservoir system.

According to staff, the pending excess water permit applications filed by upstate communities are not ripe for review because the Water Board has not filed an application for either a new withdrawal or an increase in the existing, authorized withdrawal pursuant to ECL 15-1521. Under these circumstances, staff concluded that the Commissioner lacks jurisdiction to adjudicate excess water disputes. (*See* Staff's letter dated July 5, 2017 at 2.) In the July 7, 2017 letter, staff said there is no need to act on the pending permit applications.

In a memorandum dated July 19, 2017, I requested clarification and some additional factual information from Department staff to understand the bases for staff's position that the Department lacks jurisdiction to review and fix the rates that the Water Board charges upstate communities for excess water. In addition, I stated that the Water Board and Petitioners would have the opportunity to respond to staff's motions. By letter dated August 21, 2017, staff filed a timely response to my request for clarification (Staff's August 21, 2017 clarification).

Thereafter, Petitioners and the Water Board filed separate responses dated October 6, 2017. Replies were authorized. Petitioners filed a letter dated November 1, 2017. The replies from the Water Board and Department staff are dated November 3, 2017.

With the November 3, 2017 reply, Department staff attached Exhibits A through D. Exhibit A is a copy of Division of Water Technical and Operational Guidance Series (TOGS) 3.2.1 entitled, *Processing Water Withdrawal Permit Applications*, dated May 25, 2017. TOGS 3.2.1 includes various attachments.[4] Department staff provided Attachment A entitled, *New Permitting Procedures of Public Water Supply Systems*. Exhibit B is the Division of the Budget Bill Memorandum (Session Year 2011) for Assembly No. 5318-A,[5] dated August 25, 2011. Exhibit C is a copy of a Memorandum dated August 3, 2011 from Maureen A. Coleman, Esq., Legislative Counsel, to Mylan L. Denerstein, Esq., Counsel to the Governor, regarding A5318-A/S.3798. Exhibit D is New York State Assembly Memorandum in Support of Legislation submitted in accordance with Assembly Rule III, Sec. 1(f) concerning Assembly No. 5318-A. The Assembly Memorandum is dated June 17, 2011.

Finally, Petitioners filed a letter dated December 8, 2017 as a sur-reply. Department staff filed a letter dated December 12, 2017 as a sur-reply. In an email dated December 12, 2017 from Ms. Rubin, the Water Board confirmed that it would not be filing a sur-reply.

[4] TOGS 3.2.1 with Attachments A through F are available from the Department's website at http://www.dec.ny.gov/docs/water_pdf/togs321.pdf.

[5] Assembly Bill No. 5318-A became the 2011 amendments to ECL article 15, title 15 (*see* note 2, *supra*).

Staff's Clarification

With their letter dated February 15, 2017, Petitioners included Exhibit 2, which is a copy of the water withdrawal reporting forms prepared by the New York City Department of Environmental Protection (DEP) on March 29, 2013 and filed with the Department's Bureau of Water Resources Management. The reports provide data about the New York City water supply system in gallons per month for the 2012 calendar year for each reservoir system (*i.e.*, Catskill, Croton, and Delaware).

Staff confirmed that the data provided by DEP included the total amount of water withdrawn from the New York City water supply system by in-City as well as upstate users (*see* Staff's August 21, 2017 clarification at 1). Staff also confirmed that the permitted capacity for the water supply system is 1.8 billion gallons per day (*see* Staff's August 21, 2017 clarification at 2).

With an email from Mr. London dated February7, 2017, Department staff provided electronically scanned copies of the permits, issued by the Department's predecessor commissions, that authorized the construction and operation of the Delaware and Catskill reservoir systems. These are:

1. State Water Supply Commission (*see* Water Supply Application [WSA No. 1]);

2. State of New York, Conservation Commission (*see* WSA Nos. 166, and 214);

3. State of New York Department of Conservation, Water Power and Control Commission (*see* WSA Nos. 466, 1342, and modifications); and

4. State of New York Department of Conservation, Water Resources Commission (*see* WSA No. 2005 and modifications).[6]

According to staff, these permits set no limit on the amount of water that the City of New York may take from its water supply system. Staff concluded that the City is authorized to withdraw up to the full capacity of the system. With respect to the language in the permits that references the quantity of water that upstate communities may take, Department staff interprets this language to mean the amount of water authorized by Administrative Code § 24-360(e). (*See* Staff's August 21, 2017 clarification at 2.)

Moreover, staff believes that when the predecessor authorities issued these permits, they did not contemplate that upstate communities would need excess water. Therefore, staff concluded that the Water Board has the discretion to supply excess water to upstate communities. Staff noted further that the permits neither expressly prohibit the Water Board

[6] These permits remain in effect today pursuant to ECL 15-1501(2), as amended in 2011.

from providing excess water, nor do the permits expressly mandate that the Water Board provide excess water. Staff stated that the Water Board's discretion to provide excess water from the City's water supply system is reflected in the broad authority provided to the Department, pursuant to ECL 15-1503(4), to impose permit conditions as appropriate to manage the water resources of the State. (*See* Staff's August 21, 2017 clarification at 3-4.)

Positions of the Parties

A. Petitioners

Petitioners posit three bases that authorize the Commissioner to review and set the rates charged by the Water Board for excess water. First, consistent with the Court's holding in *Matter of Village of Scarsdale v Jorling* (91 NY2d at 517), Department staff has the pending permit applications filed by upstate communities.[7] Second, the terms and conditions of the permits issued by the Department's predecessor commissions for the development and operation of the City's water supply system provide broad authority for the Department to regulate and preserve the State's water resources. Third, Petitioners argued that the Department may require the Water Board to obtain a permit for the Croton reservoir system pursuant to ECL 15-1501, or 15-1503. (*See* Petitioners' October 6, 2017 response at 8, and November 1, 2017 reply at 1.)

Petitioners object to staff's failure to review and process the pending permit applications filed by upstate communities. They argued that, as a result, they have endured 12 years of exorbitant rates for excess water. They observed that Department staff's position with respect to the pending permit applications has been inconsistent. Petitioners noted that staff did not comply with the directive in the April 26, 2017 ruling to complete the review of the pending applications by July 7, 2017. Then, according to Petitioners, staff contended that the review of the applications was not ripe until after the Water Board applied for a permit either to withdraw a new volume of water or to increase the authorized withdrawal. Finally, staff moved, without explanation, to dismiss the joint petition, as it relates to excess water rates, without the need to act on the pending permit applications. (*See* Petitioners' October 6, 2017 response at 2-3.)

Based on their review of the permits issued by the Department's predecessor commissions for the development and operation of the City's water supply system, and staff's clarification, Petitioners noted that the City may withdraw up to the daily capacity of the water supply system to meet the needs of in-city users and upstate communities. With respect to upstate communities, Petitioners noted further that their needs may include water in excess of the entitlement amount authorized by Administrative Code § 24-360(e). Staff acknowledged in the August 21, 2017 clarification (*supra*) that the Water Board has the discretion to provide upstate communities with excess water, and that the Water Board has exercised this discretion. (*See* Petitioners' October 6, 2017 response at 3, and December 8, 2017 sur-reply at 2.) According to

[7] In their December 8, 2017 sur-reply (at 2-3), Petitioners stated that the upstate community applicants duly responded the staff's notices of incomplete application, and asserted that the respective applications are complete pursuant to the requirements outlined in 6 NYCRR part 621.

Petitioners, the terms and conditions of the permits make clear that the rights of the City are not superior to the water requirements of other municipalities (*see* Petitioners' October 6, 2017 response at 6, and December 8, 2017 sur-reply at 2).

Given these circumstances, Petitioners asserted that the Commissioner has broad authority to establish the rates for excess water as a condition of the permit review process. (*See* Petitioners' October 6, 2017 response at 3-4, 6.) In their reply, Petitioners argued that in the *Matter of Village of Scarsdale v Jorling* (91 NY2d 507), the Court did not condition the Department's authority to manage the State's water resources on whether the water supplied to upstate communities is mandatory or discretionary. Petitioners argued further that the Department must ensure that the price for the water supplied is fair. Petitioners concluded, therefore, that the Commissioner must resolve the disputes associated with excess water rates. (*See* Petitioners' November 1, 2017 reply at 1.)

Finally, had they been aware of the original permits, which authorized the City to withdraw up to the full capacity of the water supply system, Petitioners observed that the upstate communities would have had an administrative remedy to review excess water rates when disputes arose in the 1990s. Nevertheless, Petitioners maintained that the Court's determination in *Matter of Village of Scarsdale v Jorling* (91 NY2d at 517) remains unchanged. (*See* Petitioners' December 8, 2017 sur-reply at 2.)

B. Water Board

Referring to *Matter of Village of Scarsdale v Jorling* (91 NY2d at 517), the Water Board acknowledged that the Commissioner has authority to review and set the rates that it charges upstate communities for excess water. However, the question, according to the Water Board, is what effect do the 2011 amendments to ECL article 15, title 15 have on the requirement that upstate communities apply for permits from the Department to take excess water. (*See* Water Board's October 6, 2017 response at 1.)

The Water Board noted that according to staff, the Commissioner's authority to review excess water rates depended on the Water Board filing an application pursuant to ECL 15-1521. If staff's contention is correct, then the Water Board agreed that the Department does not have jurisdiction to consider excess water rates at this time because the Water Board has not filed an application pursuant to ECL 15-1521. The Water Board noted further that if the Department directed the Water Board to file an application pursuant to ECL 15-1521, the Department of Public Service could not consider any water rate disputes between the Water Board and upstate communities due to provisions outlined in PAL § 1045-j(9) and § 1045-bb which, notwithstanding any other law to the contrary, limits the review of water rates to the Department. (*See* Water Board's October 6, 2017 response at 2 including note 4.)

The Water Board agreed with Department staff concerning the amount of water that may be withdrawn from the City's water supply system. In addition, the Water Board agreed that it

has the discretion to provide excess water to upstate communities pursuant to the terms of the original approvals. (*See* Water Board's October 6, 2017 response at 3.)

C. Department Staff

In the reply, Department staff renewed its motion to dismiss Petitioners' request to adjudicate excess water rates. Staff explained that the City has existing permits that allow it to withdraw up to the full capacity of the water supply system. According to staff, the permits do not place any restrictions on the sale or transfer of water. Staff contended that the water sought by Petitioners is a portion of the total amount already authorized. Given these circumstances, staff contended that neither the water supplier (*i.e.*, the Water Board) nor the purchaser (*i.e.*, upstate communities) has requested either "a new or increased withdrawal of water for a public water supply system," pursuant to ECL 15-1521. Staff characterized the permit applications filed by upstate communities in 2004 as "submittals." Department staff explained further that the submittals cannot be considered applications because modification of the City's approved withdrawal, pursuant to ECL 15-1521, is a necessary precondition to upstate communities applying and obtaining permits for excess water withdrawals, pursuant to ECL 15-1501(a). In the absence of an application pursuant to ECL 15-1521, Department staff contended that Petitioners' request is not ripe, and concluded that the Commissioner lacks authority to adjudicate disputes about excess water rates. (*See* Staff's November 3, 2017 reply at 1-2, and December 12, 2017 sur-reply at 1.)

Staff explained further that the Water Board has discretion to transfer excess water to upstate communities, and has done so. In the absence of an application pursuant to ECL 15-1521, staff contended that if Petitioners are dissatisfied with the rates charged for excess water, Petitioners may seek judicial review of them. (*See* Staff's November 3, 2017 reply at 2; *see also* Water Board's November 3, 2017 reply at 1.)

Contrary to Petitioners' contentions, Department staff argued that the terms and conditions of the existing permits do not provide for the adjudication of excess water rates. According to staff, the conditions that authorized the Department's predecessor commissions to adjudicate fees relate only to the entitlement water as provided by Administrative Code § 24-360(e). When the original permits were issued, staff asserted that the commissions did not contemplate or anticipate a future demand for excess water by upstate communities. (*See* Staff's November 3, 2017 reply at 3.)

Staff argued that the Court's lack of a reference to ECL 15-1521 in *Matter of Village of Scarsdale v Jorling* (91 NY2d at 518) is not significant. According to staff, the legislative intent of the 2011 amendments was to switch the administrative review of water rates from the Department of Environmental Conservation to the Department of Public Service irrespective of the original legal authority. To support this argument, staff cited to the New York State Assembly Memorandum in support of legislation. (*See* Staff's November 3, 2017 reply at 3, and Exhibit D.)

Discussion and Rulings

For the reasons outlined below, I conclude that the Commissioner has the authority to review the rates charged by the Water Board to upstate customers for excess water. The Court in the *Matter of Village of Scarsdale v Jorling* (91 NY2d at 517-518) expressly considered the question, and affirmed the Appellate Division's declaration that the Department has the implied authority pursuant to ECL article 15, title 15 to set excess water rates (*see Matter of Village of Scarsdale v Jorling,* 91 NY2d at 518, *affg*, 229 AD2d 101, 112 [2d Dept 1997]). The Court noted, however, that the Department's oversight role with respect to excess water rates is not triggered until applications for excess water have been filed (*see Matter of Village of Scarsdale v Jorling*, 91 NY2d at 517).

Despite the permit applications filed by several upstate communities some 12 years ago,[8] Department staff, first, held the permit applications in abeyance, and then did not comply with my directive to complete the review of the pending applications. Subsequently, staff contended that the review of the pending permit applications would be premature until the Water Board filed a permit application pursuant to ECL 15-1521. Finally, staff argued, without explanation, that acting on the pending permit applications was simply not necessary.

Upon review of the permits issued to the City of New York by the Department's predecessor commissions that authorized the construction and operation of the Delaware and Catskill reservoir systems, and based on the information provided in staff's August 2017 clarification, I conclude that the pending permit applications filed by upstate communities are not necessary. Nevertheless, consistent with the Court's determination, I conclude further that the Department's oversight role with respect to excess water rates has been triggered for the following reasons.

As staff noted in the August 2017 clarification, the City is authorized to withdraw up to the full capacity of the system, and to distribute water to in-city users and upstate customers, alike. When the Department's predecessor commissions drafted these permits to develop the water supply system, they did so as the conservators of the State's water resources. Subsequently, with the creation of the Department of Environmental Conservation and the enactment of what is now codified as ECL article 15, title 15, Department staff assumed this role. If permit modifications were warranted to control, regulate and preserve the State's water resources, staff has the authority to act. However, staff has determined that maintaining the status quo with respect to the City's water supply system is consistent with the established public policy.

Moreover, in the August 2017 clarification, staff noted that the City's permits neither expressly prohibit the Water Board from providing excess water, nor expressly mandate that the Water Board provide excess water. Staff acknowledged that the Water Board has discretion to provide excess water from the City's water supply system, and said that this discretion is

[8] *See* note 3 *supra*.

reflected in the broad authority provided to the Department, pursuant to ECL 15-1503(4), to impose permit conditions to regulate and preserve the water resources of the State.

I agree with and accept Department staff's assertion that the pending permit applications filed by the upstate communities are not necessary. The Department's predecessor commissions and staff have already exercised their authority by: (1) permitting the Water Board to withdraw water up to the full capacity of the water supply system; (2) requiring the Water Board to provide entitlement water; and (3) granting the Water Board the discretion to provide excess water to the upstate communities.[9] Given this exercise of authority, the pending permit applications are, therefore, academic.

Based on staff's clarification, the Department's predecessor commissions have already issued permits that allow the Water Board, on an on-going basis, to provide excess water to upstate communities, up to the limit of the City's water supply system. As noted by the Court, the Commissioner's power to review the rates associated with excess water usage derives from the Department's authority as the conservator of the State's water resources to issue permits setting conditions for taking excess water. Therefore, the Department's oversight role to consider disputes associated with excess water rates has been triggered in the manner contemplated by the Court. (*See Matter of Village of Scarsdale v Jorling*, 91 NY2d at 517-518.) Accordingly, I conclude that the Commissioner has the authority to consider Petitioners' request to review the rates for excess water.[10]

Staff's contention that a permit application from the Water Board seeking to increase its water withdrawal, pursuant to ECL 15-1521, is a precondition to considering excess water rates is without merit. The basis for my conclusion is the Court's determination in the *Matter of Village of Scarsdale v Jorling* (91 NY2d at 517 ["authority over excess consumption rates is derived from the DEC's power to control, regulate and preserve the water resources of the entire State;" "it is within the DEC's power to review the rates fixed for excess water consumption by the Water Board to reflect the policy concerns of regulating and preserving the State's water resources"]). I conclude that the Court's determination is binding on the Department and serves as precedent in deciding this matter, contrary to staff's continued argument that the Court's determination is dicta.

My basis for this conclusion is that *Matter of Village of Scarsdale v Jorling* was a hybrid Civil Practice Law and Rules (CPLR) article 78 proceeding and declaratory judgment action (*see*

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[9] This conclusion is consistent with staff's argument that the 2011 amendments to ECL article 15, title 15 simplify the Department's permit program (*see* Staff's December 19, 2016 letter at 2; *see also* TOGS 3.2.1, Attachment A).

[10] The authorizations issued by the Department's predecessor commissions came to light as a result of the captioned petition. Consequently, when the courts were considering the Village of Scarsdale's January 20, 1994 CPLR article 78 petition and declaratory judgment action, the record before the courts may not have included the authorizations issued by the Department's predecessor commissions. As a result, the courts' determinations reflect the record presented at that time. Nevertheless, I conclude that the courts' declarations apply to any exercise of jurisdiction by the Department, including its predecessor commissions, and should not be limited only to new applications. (*See Matter of Village of Scarsdale v Jorling*, 91 NY2d at 517-518.)

229 AD2d at 104-105). The Village of Scarsdale and the other petitioners sought a declaration, among other relief, regarding the Department's authority to review the rates associated with excess water usage. In relevant part, the Appellate Division granted the request (*see Matter of Village of Scarsdale v Jorling*, 229 AD2d at 112-113), and the Court of Appeals affirmed (*see* 91 NY2d at 518-519). The declaration was necessarily dependent upon the courts' conclusion that the Department has the authority to review excess water rates pursuant to its permitting powers. Therefore, the Court's conclusion was not dicta.[11]

Moreover, I find that the Court's references to ECL 15-1501(1)(a), as well as ECL 15-1503(2) and 15-1503(4) rather than to ECL 15-1521 were deliberate rather than random as suggested by staff. In considering the issues, the Court identified specific provisions of ECL 15, title 15 and excluded the reference to ECL 15-1521 initially made by Supreme Court (*compare Matter of Village of Scarsdale v Jorling*, 229 AD2d at 112, *and* 91 NY2d at 517 *with* 168 Misc2d at 10).[12]

Finally, ECL 15-1521 is inapplicable in this matter for the following reasons. First, the Water Board has not filed a permit application with the Department for a new or increased withdrawal of water from a public water supply system, pursuant to ECL 15-1521. Second, Department staff has not directed the Water Board to file such a permit application, pursuant to this provision. Third, an ECL 15-1521 permit is not needed now. The water provided by the Water Board to the upstate communities in excess of the entitlement amount has already been authorized by the Department's predecessor commissions and, to date, the total amount of water withdrawn from the City's water supply system does not exceed the capacity of the system.

I acknowledge, as staff argued, that the legislative intent of the 2011 amendments was to switch the administrative forum to adjudicate water rates from the Department of Environmental Conservation to the Department of Public Service. However, the 2011 amendments to ECL 15-1521 did not expressly transfer the authority to adjudicate water rate disputes concerning existing water permits from the Department of Environmental Conservation to the Department of Public Service. In addition, the Legislature did not to amend the Public Authorities Law as part of the 2011 amendments to ECL article 15, title 15. By not transferring the jurisdiction to adjudicate water rate disputes under existing permits, and by not amending PAL § 1045-j(9) and § 1045-bb, I conclude that the Legislature intended to preserve the Department as the administrative forum in cases related to the New York City water supply system.

Based on the foregoing, I deny staff's motion to dismiss Petitioners' request to adjudicate excess water rates. In addition, I deny Petitioners' recommendation to hold a joint rate proceeding with the Department of Public Service (*see* Petitioners' sur-reply at 3), based on the controlling effect of PAL § 1045-j(9) and § 1045-bb.

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[11] I note further that the 2011 amendments to ECL article 15, title 15 have no bearing on the two issues considered by the Court in the *Matter of Village of Scarsdale v Jorling* (91 NY2d at 512).

[12] *See also Matter of Westchester County*, Commissioner's Interim Decision, dated November 22, 1993 (DEC Water Supply No. 8865) at 3.

Accordingly, an administrative hearing will be convened to consider Petitioners' request to review the rates for excess water as established by the Water Board and charged to upstate customers for FYs 2015-2017. After developing a complete record, the Commissioner will fix rates for the excess water.

Finally, I conclude that further consideration of issues related to the applicability of ECL 15-1501(9), and the Croton reservoir system is not necessary. The parties provided additional comments and arguments in their respective responses (*see* Petitioners' October 6, 2017 response at 6-8, and December 8, 2017 sur-reply at 3; Water Board's October 6, 2017 response at 3, and November 3, 2017 reply at 2-3; and Staff's November 3, 2017 reply at 3-5, and December 12, 2017 sur-reply at 1-2). After considering these comments and arguments, I refer the parties to my prior rulings outlined in my letter dated June 21, 2017 at 2-3. In addition, I note that staff did not provide any legal basis for the request. Therefore, the renewed requests to strike are denied.

Appeals

A ruling of the ALJ to include or exclude any issue for adjudication, a ruling on the merits of any legal issue made as part of an issues ruling, or a ruling affecting party status may be appealed to the Commissioner on an expedited basis (*see* 6 NYCRR 624.8[d][2]). Ordinarily, expedited appeals must be filed in writing within five days of the disputed ruling (*see* 6 NYCRR 624.6[e][1]). In this case, however, any appeals must be received before 3:30 P.M. on Friday, March 28, 2018. Replies are authorized, and must be received before 3:30 P.M. on Wednesday, April 25, 2018.

I hereby incorporate by reference the rulings dated April 26, 2017 and June 21, 2017. The parties may appeal from the rulings dated April 26, 2017, June 21, 2017, as well as those addressed above. Appeals should address the ALJ's rulings directly, rather than merely restate a party's contentions. New materials enclosed with any appeal or reply will not be considered, and will be returned.

Send the original hard copy of any appeal plus two copies (for a total of three paper copies) to Louis A. Alexander, Assistant Commissioner, Office of Hearings and Mediation Services, 625 Broadway, 14th Floor, Albany, New York, 12233-1010. In addition, send one hard copy of any appeal to the parties on the preliminary service list (revised December 15, 2017, *infra.*), excluding the ALJ, at the same time and in the same manner as transmittal is made to the Assistant Commissioner. Follow the same directions when filing replies.

In addition to the required number of hard copies of appeals and replies, each party shall file one electronic copy in portable document format (PDF) – optical character recognized (OCR) – via email to everyone on the service list, including the ALJ. The electronic copies are due by 3:30 P.M. on the dates specified above. The parties may call me at 518-402-9003 for instructions to convert documents to optimized PDFs.

Service List

With the November 3, 2017 reply, the Water Board requested the addition of Melanie C.T. Ash, Esq., Senior Counsel, to the service list. A revised preliminary service list dated December 15, 2017 is attached to this ruling. I consider the service list to be preliminary in nature because additional parties may be added subsequent to the issues conference.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: February 9, 2018
Albany, New York

To: Attached Preliminary Service List revised December 15, 2017