

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Application for a Permit Pursuant to
Environmental Conservation Law Article 15 and
Part 601 of Title 6 of the Official
Compilation of Codes, Rules and Regulations
of the State of New York To Install a Public
Water Supply Well (Middleville Road No. 3) on
the South Side of Middleville Road, Town of
Huntington, Suffolk County, New York,

- by -

SUFFOLK COUNTY WATER AUTHORITY,

Applicant.

DEC Project No. 1-4700-00010/00583

INTERIM DECISION OF THE DEPUTY COMMISSIONER

January 19, 2006

INTERIM DECISION OF THE DEPUTY COMMISSIONER¹

Pursuant to section 15-1528(4) of the New York State Environmental Conservation Law ("ECL"), the Suffolk County Water Authority ("applicant" or "SCWA") has applied to the New York State Department of Environmental Conservation (the "Department") for an exemption from the statutory moratorium on drilling public water supply wells in the Lloyd Sands (the "Aquifer") on Long Island. The matter was referred to the Office of Hearings and Mediation Services, and on November 9, 2005, Administrative Law Judge ("ALJ") Maria E. Villa issued her Ruling on Issues and Party Status ("November Ruling"). In that ruling, the ALJ, among other things, denied the petition of the County of Nassau (the "County") for full party status, while granting the County amicus status for the limited purpose of participating in post-adjudicatory hearing briefing.

The County has appealed from the November Ruling and seeks to be granted full party status in the adjudicatory hearing. Based on my review of the record in this matter, I affirm the ALJ's November Ruling and reject the County's request

¹ By memorandum dated March 1, 2005, then Acting Commissioner Denise M. Sheehan delegated decision making authority in this proceeding to Deputy Commissioner Carl Johnson. This memorandum was forwarded to the then identified participants in this proceeding by letter dated March 2, 2005.

for full party status.

BACKGROUND

The ALJ identified two issues in this proceeding: (1) whether SCWA's application to drill Middleville Road Well No. 3 ("proposed well") in the Aquifer meets the standard set forth in ECL 15-1528(4) for a grant of an exemption from the moratorium, based upon "just cause and extreme hardship;" and (2) whether SCWA's proposed well is located within a "coastal community" within the meaning of ECL 15-1528(1) and, therefore, not subject to the moratorium.

Two petitions for party status were filed, one jointly by various local individuals and organizations (denoted as "Petitioners" in the November Ruling) and one by the County. The County's petition dated August 2, 2005 was filed after the deadline established for such petitions. The ALJ determined that the petition failed to meet the requirements established by section 624.5(c) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR") for a late-filed petition (see November Ruling, at 31-33) and, therefore, rejected it. Nevertheless, the ALJ ruled that the County should be granted amicus status for the limited purpose of briefing whether the proposed well is located in a statutorily

defined "coastal community." The briefing on the interpretation of the statutory definition of "coastal community" is to follow the completion of the adjudicatory hearing (id. at 33-34).

The County filed an appeal dated November 22, 2005 ("County Appeal") in which it argued that its petition for party status was timely filed, but that, even if the petition were late, the petition met the requirements for a late-filed petition pursuant to 6 NYCRR 624.5(c) and, accordingly, the County should be granted full party status.² The County also challenged the ALJ's determination that the County failed to make any offer of proof with respect to its claim that SCWA's application "should be denied based upon the SCWA's claim of just cause and extreme hardship" (County Appeal, at 1-2). By letter dated December 15, 2005, Sarah Meyland, on behalf of Petitioners, supported the County's appeal.

In a reply brief dated December 14, 2005 ("Applicant

² Attached to the County Appeal are a letter dated August 2, 2005 from Rachel S. Paster, Deputy County Attorney, of the Office of the County Attorney to ALJ Villa (Exhibit A) addressing the County's request for full party status; a letter dated August 1, 2005 from Thomas F. Maher of the Office of the County Executive to ALJ Villa (Exhibit B) to clarify the County's position on SCWA's application; and a letter dated August 26, 2005 from Timothy J. Hopkins, General Counsel of SCWA, to ALJ Villa (Exhibit C) objecting to the County's petition for party status.

Reply Brief"),³ applicant opposed the County's appeal. Applicant argued that the County did not demonstrate good cause for its failure to timely submit a petition for party status, that applicant would be unreasonably prejudiced by the County's participation, and that the County has failed to show how its participation will materially assist the determination of the issue whether the application meets the standard for an exemption from the moratorium. Accordingly, applicant requests that the ALJ's November Ruling be affirmed.

DISCUSSION

The Department's regulations governing permit hearing procedures (6 NYCRR part 624) establish the requirements for hearing participation (see 6 NYCRR 624.5). The regulations provide that an applicant and assigned Department staff are automatically full parties to a proceeding (6 NYCRR 624.5[a]). Any other person desiring party status must file a petition that meets the requirements established at 6 NYCRR 624.5(b) by the date established in the notice of hearing. The Department's

³ Attached to the Applicant Reply Brief are five exhibits including various correspondence from the County to ALJ Villa (Exhibits A, B and D), a portion of the issues conference transcript from July 12, 2005 in which ALJ Villa questions a representative of the County whether the County objects to applicant's proceeding with the application on the basis of "just cause and extreme hardship" (Exhibit C), and a May 26, 2005 memorandum from Timothy J. Hopkins, General Counsel for applicant, to the service list for this proceeding (Exhibit E).

requirements with respect to the filing of petitions for party status are not insignificant formalities but are important to ensure an efficient, structured and fair hearing process.

The original hearing notice for this proceeding established a deadline of April 29, 2005 for the receipt of any petitions for party status. As the ALJ indicates in the November Ruling, the date for filing petitions for party status was subsequently extended until July 1, 2005 based, in part, on a request for an extension by the County (November Ruling, at 7). Although the County failed to file a petition for party status by either of those two dates, it subsequently filed a petition by letter dated August 2, 2005 (see Issues Conference ["IC"] Exhibit 28; see also Exhibit A to the County Appeal).

The record demonstrates that the County failed to timely submit a petition for party status, notwithstanding the filing deadline extension which the County had requested (see November Ruling, at 7-9 [noting that, in addition to the publication of the notice of the filing deadline extension, a copy of the notice was mailed to the County]; Applicant Reply Brief, at 1-2 [chronologically reviewing the County's failure to file a petition during the time period established by public notice]). The notices establishing the April 29, 2005 and July

1, 2005 submission dates recited the required contents for a petition for party status (see IC Exhibits 1 & 1A). Furthermore, based on my review of the County's comments and submissions on SCWA's application that were sent to the ALJ prior to the County's August 2, 2005 filing, I concur with the ALJ's conclusion that those were insufficient to constitute a petition for party status (see also IC Transcript, at 19-20).

Pursuant to the Department's regulations, petitions for party status filed after the date set in a notice of hearing must satisfy the requirements for late-filed petitions in order to be granted (see 6 NYCRR 624.5[c]). In addition to the required contents of a petition for party status at 6 NYCRR 624.5(b), the regulations provide that a petition filed late must include:

- "(i) a demonstration that there is good cause for the late filing;
- "(ii) a demonstration that participation by the petitioner will not significantly delay the proceeding or unreasonably prejudice the other parties; and
- "(iii) a demonstration that participation will materially assist in the determination of issues raised in the proceeding" (6 NYCRR 624.5[c][2][i-iii][emphasis added]).

As provided by this regulatory language, each of the three requirements must be satisfied before a late-filed petition will be granted.

I concur with the ALJ's determination that the petition

that the County filed on August 2, 2005 failed to meet the requirements for a late-filed petition. The record of this proceeding, including but not limited to the arguments presented by the County on its appeal, is bereft of any demonstration of good cause for the untimely filing, and, accordingly, the County has failed to satisfy 6 NYCRR 624.5(c)(2)(i). That failure alone justifies denying the County's request for full party status (cf. Matter of Saratoga County Landfill, Ruling of the ALJ on Party Status and Issues, August 1, 1995, at 56 [demonstration of good cause for late filings necessary for such filings to be excused]).

Moreover, with respect to the issue whether SCWA's application meets the ECL 15-1528(4) standard for an exemption based upon "just cause and extreme hardship," the County has failed to demonstrate that its participation would materially assist in the determination of the issue. The County's August 2, 2005 petition under the heading "Offer of Proof" states only that a County representative "is prepared to present evidence concerning the definition of the term 'coastal community' and its application to [the proposed well]" (see Exhibit A to the County Appeal, at 3). On its face, the County's petition does not make an offer of proof sufficient to challenge SCWA's claim of "just cause and extreme hardship" and, therefore, has not satisfied the

requirement in 6 NYCRR 624.5(c)(2)(iii) with respect to that issue.

Accordingly, I hereby affirm the ALJ's determination to deny the County full party status in this proceeding.

For the New York State Department of
Environmental Conservation

By: _____/s/_____
Carl Johnson, Deputy Commissioner

Albany, New York
January 19, 2006