STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Application of
SUFFOLK COUNTY WATER AUTHORITY
for a permit pursuant to
Environmental Conservation Law ("ECL")
Article 15 and Part 601 of
Title 6 of the Official
Compilation of Codes, Rules
and Regulations of the
State of New York ("6 NYCRR")
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

DEC Project No. 1-4700-00010/00583

RULING ON ISSUES AND PARTY STATUS

BACKGROUND

Pursuant to Section 15-1528(4) of the New York State Environmental Conservation Law ("ECL"), the Suffolk County Water Authority ("SCWA" or "Applicant") applied for an exemption from the statutory moratorium on installing public water supply wells in the Lloyd Sands aquifer (the "Aquifer") on Long Island. The moratorium applies to areas that are not coastal communities, as defined by the statute. The statute provides further that the Commissioner of the New York State Department of Environmental Conservation (the "Department") "may grant exemptions to the moratorium upon a finding of just cause and extreme hardship," and mandates that an adjudicatory hearing[1] be held, and findings presented to the Commissioner, prior to granting an exemption. ECL Section 15-1528(4). The proposal is also subject to the provisions of ECL Article 15, Title 15 and Part 601 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the

[1] Pursuant to Section 621.1(a) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), an adjudicatory hearing "means a trial type proceeding which provides the opportunity for adjudication on the basis of evidence, including direct testimony and cross examination provided under article 3 of the State Administrative Procedure Act [SAPA], section 70-0109 of the Environmental Conservation Law (ECL), Section 621.6 of this Part and Part 624 of this Title." Section 624.2(a) of 6 NYCRR defines an adjudicatory hearing as "a hearing, held pursuant to ECL section 70-0119 or SAPA article 3, where parties may present evidence on issues of fact, and argument on issues of law and fact prior to the commissioner's rendering of a decision on the merits, but does not include legislative hearings."

State of New York ("6 NYCRR") that govern applications for water supply permits.

Section 15-1528(2) provides that:

> [a] moratorium shall be established on the granting of new permits to drill public water supply, private water supply or industrial wells into the Lloyd Sands or to permit new withdrawals of water from the Lloyd Sands. Such moratorium shall apply to all areas that are not coastal communities. The waters of the Lloyd Sands shall be reserved for the use of coastal communities during the moratorium, however, nothing herein shall affect the permits of wells presently screened in the Lloyd Sands and withdrawing water therefrom.

The Lloyd Sands are defined to mean "that geological strata generally known to be the deepest and oldest water-bearing layer of the Long Island aquifer system and shall not include bedrock." ECL Section 15-1502(2). As the court noted in Matter of Town of Hempstead v. Flacke, 82 A.D.2d 181, 184 (2nd Dept. 1981), "there are four major underground reservoirs, or aquifers, from which the residents of Long Island draw their fresh water. The uppermost aquifer is the glacial aquifer, followed in descending order by the Jameco aquifer, the Magothy aquifer, and the Lloyd aquifer, the deepest and purest of the four." Section 15-1502(1) of the ECL provides that "coastal communities" are "those areas on Long Island where the Magothy aquifer is either absent or contaminated with chlorides." Section 15-1528(1) directs the Department to identify the areas of Long Island within Kings, Queens, Nassau and Suffolk counties that are to be considered coastal communities for the purposes of the statute.

The SCWA proposes to install Middleville Road Well #3 (the "Well") in the Aquifer at a depth of 845 feet. The screen interval will be 801 to 841 feet. The Well will have a capacity of 300 gallons per minute ("gpm"), and would be located on the south side of Middleville Road, approximately 2,300 feet west of Old Bridge Road, Town of Huntington, Suffolk County, New York (SCTM #400-60-1-1.002). The proposal is subject to the provisions of ECL Section 15-1503, which sets forth the requirements for applications for water supply permits.

According to the SCWA, due to nitrate and perchlorate contamination of the upper glacial and Magothy aquifers in its Northport Intermediate Pressure Zone, the SCWA faces a

significant problem in supplying a sufficient quantity of potable water in that locality.[2] In its application, the SCWA stated that the proposal is intended to utilize a supply of water with a very low nitrate level to increase the available capacity at the Middleville Road wellfield, by blending water from the Well with existing Well No. 1, which has been out of service for a number of years due to nitrate levels in excess of drinking water standards.

Middleville Road Well #1 is screened in the Magothy Aquifer at a depth of 470-540 feet below grade, with a 1,400 gpm capacity. If an exemption were granted, operation of the Well would allow the SCWA to return Well No. 1 to 1,400 gpm capacity. The SCWA took the position that it has made a showing of "just cause and extreme hardship" and that the application therefore meets the requirements for an exemption from the moratorium.

The SCWA contended in the alternative that the proposed Well is located in a coastal community, as defined in ECL 15-1502(1), and therefore is not subject to the moratorium. Accordingly, the SCWA argued that there is no statutory requirement for a finding of just cause and extreme hardship, or for an adjudicatory hearing, prior to granting the requested permit on this basis. Issues Conference Exhibit (hereinafter "IC Exh.") 7, at 1.

The project is an unlisted action pursuant to the State Environmental Quality Review Act ("SEQRA"), ECL Article 8. The SCWA, as lead agency, issued a negative declaration on January 29, 2004, having determined that the project would not have a significant effect on the environment, and that a draft environmental impact statement would not be prepared. The SCWA coordinated its SEQRA review with the Department, the Suffolk County Department of Health Services, Bureau of Drinking Water, the New York State Environmental Facilities Corporation, and the New York State Department of Health, Bureau of Public Water Supply Protection.

Department Staff referred this application to the Office of Hearings and Mediation Services because the request for an exemption triggered the requirement pursuant to ECL 15-1528(4) that an adjudicatory hearing be held. Department Staff supports granting the permit pursuant to an exemption based upon a showing of "just cause and extreme hardship," as set forth in ECL 15-1528(4), but opposes granting the permit pursuant to ECL 15-

[2] The Northport Intermediate water supply system serves portions of the Hamlets of Middleville, Vernon Valley, Fort Salonga, and Northport, and the Village of Northport.

1528(2), which would be grounded in the SCWA's contention that the Well is located in a statutorily defined "coastal community."

PROCEEDINGS

The application was deemed complete on March 15, 2004, and a Notice of Complete Application and Public Hearing (the "Notice") was published in the March 23, 2005 edition of the Department's electronic *Environmental Notice Bulletin*. The Notice also appeared in the March 31, 2005 edition of *Newsday*. The matter was assigned to administrative law judge ("ALJ") Maria E. Villa.

Part 624 of 6 NYCRR governs participation in a Department permit hearing. The provisions of Part 624 are made applicable to this proceeding by operation of Section 621.7(h) and 621.2(b) of 6 NYCRR, as well as Section 621.4(b), which sets forth the requirements for water supply applications under Title 15 of ECL Article 15. In addition, the hearing procedures set forth in Part 624 apply by virtue of Section 624.1(a)(6). That subsection states that the those procedures are to be used in any circumstance comparable to hearings conducted under Part 621 or ECL article 70 that arise out of permits, licenses or other entitlements that are not specifically subject to those provisions.

The Notice set a deadline of April 29, 2005 for the receipt of any petitions for full party status or *amicus* status. No such petitions were received by that date. On May 4, 2005, counsel for Department Staff sent via telefacsimile to the ALJ and counsel for the SCWA a letter dated March 17, 2005 on "Water for Long Island" letterhead. The letter was addressed to the Department's Acting Commissioner, and was signed by a number of organizations, including the Nassau County League of Women Voters, Residents for a More Beautiful Port Washington, the Long Island Sierra Club, the North Shore Garden Club, the North Shore Land Alliance, the East Norwich Civic Association, and the Great Neck Breast Cancer Coalition, as well as four individuals: Laurie Farber, Rea Schnittman, Dorothy Cappadona, and Sarah Meyland. The signatories collectively opposed the SCWA project, which the letter stated was still in the planning stage, and requested that they be considered "parties in interest" if an application for the project were submitted. IC Exh. 12, at 2. The letter listed Ms. Meyland as the individual to be contacted "for purposes of a continued dialogue, or to respond to this letter." Id.

Counsel for Department Staff indicated that the letter had recently been received by Region 1 from the Department's Central Office. Counsel stated further that "[w]hile the letter reflects

a general concern for the protection of the Lloyd Aquifer, it does not appear to meet the requirements for a petition seeking party status as set forth at 6 NYCRR § 624.5." IC Exh. 12. Upon receipt of the letter, the ALJ contacted Ms. Meyland, advised her that the hearing would take place the following week, and by letter dated May 4, 2005, provided her with a copy of the Notice.

Pursuant to the Notice, the legislative public hearing was held on May 10, 2005 at the Department's Region 1 Office in Stony Brook, New York. The speakers at the legislative hearing included Liz Remsen, an Associate Director with the North Shore Land Alliance; Maureen Dolan, of the Citizens Campaign for the Environment; Laurie Farber, Conservation Chair for the Long Island chapter of the Sierra Club; Sarah Meyland, who also submitted a late-filed petition seeking party status, as more fully described below; Shirley Seigal, one of the directors of the Water Authority of Great Neck North; and Charles Theofan, the City Manager of the City of Long Beach. All of those who spoke at the hearing opposed the project, with the exception of Timothy Hopkins, Esq., counsel for the SCWA, who responded to comments made by several of the speakers.

Those speakers challenging the proposal urged that conservation measures should be implemented before any attempt is made to tap into the Aquifer, and contended that using water from that resource to blend with water that has high nitrate readings is an inappropriate response to what in fact does not amount to an emergency situation. According to the speakers, allowing drilling would set a dangerous precedent, particularly because the Aquifer has a small recharge zone, compared to the other, shallower Long Island aquifers, and should be tapped only in emergencies. A number of speakers maintained that the resource should be preserved for future generations.

Several speakers criticized Department Staff's acquiescence to the proposal, and asserted that the Department failed in its obligation to subject the application to close scrutiny. According to one speaker, there has been no effort on the part of the Department to fulfill the statutory mandate of ECL Section 15-1528(3), which would allow for the moratorium to be lifted, based upon a directive from the Commissioner after a finding that sufficient research has been conducted "to provide a sound working knowledge of the details, dynamics, water volume, and levels of safe withdrawal appropriate to maintain a safe quantity of Lloyd Sands water." Some of the speakers also stated that the public notice of the hearing was insufficient.

Mr. Hopkins, who spoke on behalf of the SCWA, maintained that Department Staff had undertaken a rigorous review of the application, and enumerated the studies of the Aquifer that have been done that, in the SCWA's view, establish that there would be little if any impact on the Aquifer if the Well were put into service. Mr. Hopkins also took issue with comments received from those communities or districts that had exempted themselves from the moratorium through legislation.

Written comments, all critical of the proposal, were also received during the comment period, including comments from Assemblyman Thomas P. DiNapoli, co-chair of the New York State Legislative Commission on Water Resource Needs of New York State and Long Island. The SCWA submitted responses to the comment letters received.

The issues conference began immediately following the legislative public hearing. The SCWA was represented by Timothy Hopkins, Esq., the SCWA's General Counsel. Craig Elgut, Esq., Acting Regional Attorney, appeared on behalf of Department Staff. Pursuant to Section 624.5(a) of 6 NYCRR, the SCWA and Department Staff are automatically full parties in this permit hearing.

A late-filed petition for party status dated May 10, 2005 was submitted at the issues conference by Sarah Meyland, on behalf of herself individually, as well as on behalf of Laurie Farber, the Conservation Chair of Sierra Club, Long Island Group; Shirley Siegal, of the League of Women Voters of Nassau County; Elizabeth C. Remsen of the North Shore Land Alliance, Inc.; and Matthew T. Meng, of the East Norwich Civic Association and the Long Island Drinking Water Coalition. The petitioners asserted as good cause for the late filing that they had not received adequate notice of the proceeding.

After hearing argument from the participants, the ALJ permitted these petitioners to supplement their petition for party status pursuant to Section 624.5(b)(5) of 6 NYCRR.[3] The supplemental submission was timely received on May 23, 2005, but, as more fully described below, the time to file petitions for party status was ultimately extended, and these petitioners and others filed another, timely petition during that period.

[3] Section 624.5(b)(5) provides that "[w]here the ALJ finds that a prospective party did not have adequate time to prepare its petition for party status, the ALJ shall provide an opportunity for supplementation of the petition."

By letter dated May 17, 2005, Nassau County, through its Chief Deputy County Attorney, Elizabeth Botwin, requested an extension of time to submit a petition for party status. Enclosed with that correspondence was a letter dated June 8, 2004 from Thomas Suozzi, Nassau County Executive. IC Exh. 14. The letter was addressed to then-Commissioner Erin M. Crotty, and indicated that Nassau County "would be fundamentally opposed to any actions that would alter the quality or quantity of the Lloyd Aquifer waters or endanger the drinking water supply of coastal communities such as the City of Long Beach and other coastal areas." Id. The letter referred to an application by the City of New York to withdraw water from the Aquifer, and asked the Department "to withhold the approval of any application to tap the Lloyd Aquifer, even temporarily, until this issue has been fully reviewed and considered by all interested parties, including specifically, Nassau County and the City of Long Beach." Id.

Upon receipt of this correspondence, the ALJ informed Ms. Botwin of a conference call that had already been scheduled for May 24, 2005 among the participants at the issues conference to discuss, among other things, the need for further notice of these proceedings. Thomas Maher, P.E., Nassau County's Director of Environmental Coordination, participated in that conference call.

Following discussion during the conference call, the ALJ determined that additional notice of the proceedings was needed, because adequate notice, within the meaning of 6 NYCRR Section 624.3(d), was not provided. The regulation requires that individual copies of the hearing notice must be sent to "such other persons as the department deems to have an interest in the application." Despite this requirement, copies of the Notice were not mailed to all those with an interest in this application. Specifically, prior to the Notice's preparation and publication, the Office of Hearings and Mediation Services was not provided with copies of the March 17, 2005 letter from Ms. Meyland (IC Exh. 12), the June 8, 2004 letter from Nassau County Executive Thomas Suozzi (IC Exh. 14), or a June 16, 2004 letter from May Newburger (IC Exh. 16). Consequently, notice was not mailed to these interested persons.

As a result, pursuant to a supplemental notice (the "Supplemental Notice") dated June 8, 2005, the ALJ extended the time to file petitions for full party or *amicus* status, and to submit written comments on the application. The Supplemental Notice was published in the *Environmental Notice Bulletin* on June 8, 2005, and in *Newsday* on June 13, 2005, and set July 1, 2005 as the deadline for receipt of any additional written comments, or

petitions for full party or *amicus* status. In addition to those who received a copy of the original Notice, a copy of the Supplemental Notice was mailed to Nassau County, the New York City Department of Environmental Protection, and a number of potentially affected water suppliers on Long Island. Further written comments in opposition to the proposal were received during the extended comment period, and the SCWA responded to those comments. The Suffolk County Department of Health submitted a letter in support of the application.

Following the publication of the Supplemental Notice, Sarah Meyland submitted a timely petition for party status, dated June 28, 2005. The petition was submitted by Ms. Meyland in her individual capacity and also on behalf of Rea Schnittman, the Nassau County League of Women Voters, the North Shore Land Alliance, the Sierra Club, the East Norwich Civic Association, the Long Island Drinking Water Coalition, the Huntington League of Women Voters, the Conservation Board of the Village of Lloyd Harbor, Friends of the Bay, Residents for a More Beautiful Port Washington, and the League of Women Voters of Suffolk County (hereinafter referred to as "Petitioners").[4]

As provided for in the Supplemental Notice, the issues conference continued on July 12, 2005. Thomas F. Maher, P.E., Nassau County's Director of Environmental Coordination, was present on behalf of Nassau County. The ALJ inquired of Mr. Maher regarding Nassau County's position on party status. Mr. Maher responded that while the County did not object to a grant of a "just cause and extreme hardship" exemption, the County expressed concern as to the precedent that might be set by any determination in this proceeding with respect to the Well's location in a "coastal community." July 12, 2005 Issues Conference Transcript (hereinafter "IC Tr.") at 15-16, 17.

Mr. Maher said that he met with the SCWA on June 22, 2005 to discuss the application, and that Nassau County did not agree with the SCWA's contention that the Well was located in a coastal

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[4] By letter dated June 6, 2005, Julian Kane requested party status and notification of the public hearing. By letter dated June 8, 2005, the ALJ provided Mr. Kane with a copy of the Supplemental Notice, as well as a copy of Section 624.5 ("Hearing Participation") of 6 NYCRR. The ALJ advised Mr. Kane that petitions for party status were to be submitted by July 1, 2005. No petition from Mr. Kane was received by that date. At the issues conference, Sarah Meyland said that she had spoken with Mr. Kane, who was experiencing health problems. Ms. Meyland stated that Mr. Kane had decided not to pursue a filing for party status, but would be willing to work with the Petitioners. July 12, 2005 Issues Conference Transcript, at 27.

community due to the presence of what he characterized as "low levels or trace amounts of chlorides." IC Tr. at 16. Mr. Maher took the position that the language of the statute is ambiguous as to what is meant by "just cause and extreme hardship," and that Nassau County did not feel that it was in a position to make a judgment as to whether the circumstances of this application met that standard. IC Tr. at 17.

Mr. Maher asked if Nassau County might defer its decision as to whether to seek party status. IC Tr. at 18. The ALJ responded that at this point any such request would constitute a late-filed petition, and would be required to comply with the provisions of Section 624.5(c) in order to be considered. The ALJ enumerated those requirements, and pointed out that the County had participated in a conference call before the Supplemental Notice was issued, and had provided comments in a letter dated June 29, 2005. IC Tr. at 18-20; IC Exh. 20. Mr. Maher then stated that "our intent was really to be able to comment. If we didn't file the requirements of seeking party status, you know, that's the way it is." IC Tr. at 20.

By letter dated August 2, 2005, Nassau County sought to file an untimely petition for party status. All parties were provided the opportunity to comment on the petition. The SCWA submitted a letter in opposition to Nassau County's petition. No other comments were received. The transcript of the issues conference was received on August 31, 2005, and the issues conference record closed on that date.

DISCUSSION AND RULING

Section 15-1528(4) requires that an adjudicatory hearing be held, and findings presented to the Commissioner, when an exemption is sought based upon a claim of "just cause and extreme hardship." Thus, adjudication must take place to determine whether the SCWA's application to draw water from the Aquifer should be approved and an exemption granted on this basis. Nevertheless, the statute and the regulations do not elaborate further as to the standards to be applied in making such a determination.

At the issues conference, in response to a question from the ALJ, counsel for Department Staff stated that because the statute and the regulations do not provide specific criteria, "we have to rely on the Commissioner to utilize what the Commissioner deems appropriate to determine just cause and extreme hardship." IC Tr. at 72; May 10, 2005 Issues Conference Transcript at 38-39. The SCWA noted that it had raised this question with Department

Staff, and that in response, Department Staff indicated that "there were no set criteria, and that we would have to rely upon the language of the statute itself." IC Tr. at 74.

The SCWA's Application: "Just Cause and Extreme Hardship"

The engineer's report prepared by SCWA that accompanied the application includes a section entitled "Exemption to prohibition on Lloyd Well based on Just Cause and Extreme Hardship." IC Exh. 4, at 19. In that section, the SCWA asserted that there would be no significant adverse impact if the Well were developed. Id. To support this conclusion, the SCWA referred to a report prepared for the SCWA in 2001 by Leggette Brashears & Graham, Inc. ("LBG") of a pumping test of the Veterans Administration Hospital Well Field in Northport, New York. IC Exh. 4, Appendix A. The test was conducted from January 9 to January 12, 2001. IC Exh. 4, at 11. The SCWA argued that the LBG report "is an example of the SCWA's sound working knowledge of the details and dynamics of the Lloyd Aquifer system," and went on to conclude that "a rate of withdrawal not to exceed 300 gpm would preserve a safe amount of water in the Lloyd Aquifer." IC Exh. 4, at 19.

The SCWA asserted further that because the SCWA operates several wells in the vicinity of the proposed Well, water quality trends are monitored by frequent testing at the SCWA's laboratory. According to the SCWA, this testing would enable the SCWA to respond to any changes in water quality that were attributable to operation of the Well. Id. The SCWA concluded that LBG's pump test indicated that there is "little danger" of salt water intrusion into the Aquifer, due to the distance to Long Island Sound and the steep hydraulic gradient. IC Exh. 4, at 20. The SCWA also maintained that the Aquifer's thick confining clay layer restricts movement of water from the Magothy Aquifer into the Lloyd Aquifer, and "in the unlikely event" that contaminated water were to move through the clay and against the potentiometric head, the leakage would be confined to the vicinity of the Well and would be captured through pumping. Id.

The SCWA pointed out that the Well would be operated in accordance with a Department-issued water supply permit, which would limit water withdrawals to a safe level. Id. The SCWA stated further that it is participating in the development of a "state of the art" model to monitor any impacts from the operation of the proposed Well. Id.

The engineer's report also contended that the proposal is a measured response to the existing water deficit in the Northport Intermediate Zone, without resorting to "costly or

environmentally damaging measures," and stated further that "[a] maximum of 400,000 gpd would be drawn from the Lloyd aquifer." Id. According to the SCWA, the proposal is also the least damaging alternative. The SCWA took the position that if it continues to import water from surrounding areas, deficits in those locations from which the water was drawn could develop, due to lack of recharge in those areas. Id. The SCWA asserted further that there are no other viable locations where a well could be developed, because no other parcels satisfy the SCWA's requirements for water quality, location, or size. Id. In addition, the SCWA stated that developing additional, shallower wells at the Middleville Road site is unworkable because the water obtained from such wells would contain high levels of nitrates. Id.

The SCWA argued that the proposal is an economically reasonable approach, and the most efficient solution to the nitrate levels in water in the Northport Intermediate Zone. IC Exh. 4, at 21. The engineer's report stated that "[c]osts associated with developing a complicated system of pressure reducing valves, booster pumps and infrastructure improvements or developing new wellfields, or treating nitrate rich water far exceed the cost of developing Well #3." Id. The SCWA went on to assert that development of the well would have far less environmental impact than any alternative. Id.

According to the SCWA, the prohibition on water withdrawal from the Aquifer works an "extreme hardship" on the SCWA, requiring it to "embark on expensive and risky machinations that may imperil the environment, that could jeopardize SCWA's ability to meet demand requirements and are far more expensive." Id. The SCWA concluded that the conditions existing in the Northport Intermediate Zone are those "for which the waters of the Lloyd Sands are reserved," and asserted that prohibiting the SCWA from withdrawing water in this instance is inconsistent with the legislative intent of ECL Section 15-1528. Id. In addition, the SCWA argued that its proposal does not violate the legislative policy reserving the waters within the Aquifer for coastal communities, pointing out that water from the Well will be used to supply such coastal communities along the north shore of Long Island, obviating the need for those communities to develop their own wells. Id.

Finally, the SCWA stated that the proposal was part of a "multi-faceted approach to resolving the nitrate contamination in Northport," pointing out other measures the SCWA has undertaken to address the situation. Id. These measures include drilling additional wells on SCWA property, using water from other

pressure zones, acquiring new well sites, and the future operation of a "state of the art" nitrate removal system. Id.

In an October 29, 2004 response to a second request for information by Department Staff (the "Response"), the SCWA maintained that a finding of "just cause and extreme hardship" sufficient to grant an exemption to the moratorium was merited because of the public health hazard posed by nitrate contamination in the area of the Well. IC Exh. 7. According to the SCWA, nitrate contamination is a significantly greater risk to public water supplies than chloride contamination. IC Exh. 7, at 5. The SCWA pointed out that while the United States Environmental Protection Agency ("EPA") has established a National Primary Drinking Water Standard for nitrates, no such standard has been established for chlorides. Id. Rather, EPA has established National Secondary Drinking Water Standards, or Secondary Maximum Contaminant Levels ("SMCLs"). Id. The SCWA asserted that these standards are "established only as guidelines to assist public water systems in managing their drinking water for *aesthetic* considerations, such as taste, color and odor." Id. (Emphasis in original). As a result, the SCWA argued that chlorides do not present a risk to human health at the SMCL and are considered to be nuisance chemicals. IC Exh. 7, at 5-6. In contrast, the SCWA maintained that nitrate contamination in public water supplies, particularly water consumed by infants, poses a serious health hazard, and that as a result, the situation warranted a finding of "just cause and extreme hardship," and a grant of an exemption, with respect to the SCWA's application.

The SCWA went on to point out that the majority of the water to be drawn from the Well would be used for domestic water supply purposes, and noted that the demand for water has been increasing in the area. IC Exh. 7, at 7-8. The Response addressed water conservation measures undertaken to meet this demand, and contended that the SCWA "cannot even meet existing peak demand without considering the flow needed to fight a fire." IC Exh. 7, at 9. The SCWA asserted that it already employs and promotes all of the Department's recommended water conservation measures. According to the SCWA, this supported its claim that a finding of just cause and extreme hardship was warranted, and that an exemption should be granted. Finally, the Response addressed the question of saltwater intrusion, concluding that there is "little or no chance" of such intrusion and no significant impact on the Aquifer to be anticipated if the application were approved, based upon groundwater modeling and surveys of other wells in the Northport-Huntington area. IC Exh. 7, at 10-12.

The Response also concluded that the proposal was the most cost-effective manner of addressing the contamination problem at the wellfield. IC Exh. 7, at 15. In its Response, the SCWA pointed out that importing water to the Northport Intermediate Pressure Zone could be done, but only at a cost of approximately $500,000 per mile of water main. Id. The Response indicated that approximately ten miles of such main would need to be installed, and additional wells would be needed to produce the water to be imported. Id. According to the SCWA, importing water from other zones would also necessitate the use of booster pumps, and/or pressure reducing valves which the SCWA contended increases power costs and reduces operating efficiency. Id.

In addition, the SCWA discussed the costs of treatment, arguing that contaminant removal systems for high nitrate water are extremely expensive, compared to blending with low nitrate water to meet drinking water standards. Id. To illustrate, the SCWA stated that it recently installed a nitrate removal system at its South Spur Drive wellfield, at a capital cost of approximately $1.8 million. Id. The Response indicated that the annual operating cost of the system is approximately $75,000 above the costs of a well without such a system. Id. According to the SCWA, a treatment system cannot be installed at the Middleville Road location in any event, because the site is too small to accommodate the equipment and buildings required. Id.

In its Response, the SCWA said that it had asked Department Staff to articulate the criteria that would be used to determine "just cause and extreme hardship," and that in response, Department Staff stated that because this is the first application for an exemption to the statutory moratorium,

> the Department does not have specific prior caselaw or hearing records to offer as guidance for establishing and determining "just cause and extreme hardship" as those terms are used in the moratorium statute other than the language of the statute itself.

IC Exh. 7Y. At the first issues conference session, the SCWA contended that both background chloride concentrations in the Magothy Aquifer and the safe yield for the Lloyd Aquifer in western Suffolk County and greater Long Island should be taken into consideration in evaluating the request for an exemption. May 10, 2005 Issues Conference Transcript, at 16-17. At the continuation of the issues conference, the SCWA argued that the language of the statute indicates legislative intent that where

the Magothy Aquifer is contaminated with chlorides such that expensive treatment is required, the water in the Lloyd Aquifer may be used. IC Tr. at 75-76. In light of this, the SCWA reasoned that "if we have a contamination in the Magothy Aquifer that is on the same order of magnitude for treatment costs, then we shouldn't have to treat either, and we respectfully submit that that is just cause and extreme hardship." IC Tr. at 76.

Department Staff pointed out that the Department has no policy or guidance interpreting the statutory language, and took the position that such interpretation is committed to the Commissioner's discretion. May 10, Issues Conference Transcript at 38-39, IC Tr. at 72. Department Staff stated that it believed the SCWA had demonstrated "just cause and extreme hardship," and that an exemption to the statutory moratorium should be granted.

According to Department Staff, were it not for the statutory moratorium, "this is an unremarkable permit." May 10, 2005 Issues Conference Transcript at 66. Department Staff explained that a draft permit had not been prepared, but noted that this could be done if necessary. Id. at 65. While there is therefore no dispute between the SCWA and Department Staff with respect to the granting of an exemption, as discussed in more detail below, the Petitioners have raised adjudicable issues as to whether the application satisfies the "just cause and extreme hardship" standard.

The SCWA's Application: "Coastal Community"

In the alternative, the SCWA asserted that the Well is located in a coastal community, and thus would not be subject to the statutory moratorium. This argument was raised in SCWA's October 29, 2004 Response to Department Staff's second request for information, and was not included in the original Notice.[5] After the ALJ determined that further notice of the proceedings would be necessary, the SCWA added this issue, and this addition is reflected in the Supplemental Notice.

The SCWA asserted that Middleville Road in the Town of Huntington is a "coastal community" as defined in ECL Section 15-1502(1) because the Magothy aquifer is contaminated with

[5] In its initial application, the SCWA took the position that there was no coastal community that would be impacted by the proposal, and stated that "[i]n effect, this well will be serving the community along the coast, although it is not a 'coastal community' for purposes of Article 15." IC Exh. 4, at 19. The SCWA argued that the community in question is not "coastal" because the Magothy aquifer is contaminated with nitrates, rather than chlorides. Id.

chlorides at that location. IC Exh. 7, at 2. To support this contention, the SCWA provided the results of analysis of samples taken at two wells (Middleville Road Well Nos. 1 and 2) screened in the Magothy aquifer. According to the SCWA, the sampling results for both of the wells "consistently show chloride contamination, making the area a coastal community." Id.

Department Staff disputed the SCWA's contention, arguing that the SCWA's interpretation of the definition of the term "coastal community" is not consistent "with either the letter or intent of the statutory moratorium." IC Exh. 8, at 1. Department Staff took the position that the engineering report that accompanied the original application correctly concluded that the Well is not located in a coastal community. Id.

Pursuant to Section 624.4(c)(1)(ii), an issue is adjudicable if it relates to a matter cited by Department Staff as a basis to deny the permit, and is contested by the applicant. A factual record will be developed with respect to this issue, and as discussed at the issues conference, the participants will have the opportunity to address this question in post-hearing briefs.

Petitions for Party Status

As noted earlier, the Petitioners submitted a timely request for party status. Section 624.5 of 6 NYCRR ("Hearing Participation") states that in order to be granted party status, a proposed intervenor must file an acceptable petition, which must fully identify: (1) the proposed party, together with the name of the persons acting as the party's representative; (2) the petitioner's environmental interest in the proceeding; (3) any interest relating to statutes administered by the Department relevant to the project; (4) whether the petition is for full party or *amicus* status; and (5) the precise grounds for opposition or support. 6 NYCRR Section 624.5(b)(1)(i)-(v). In addition, a petition for full party status must identify a substantive and significant issue for adjudication, and present an adequate offer of proof, to include the witnesses, the nature of the evidence to be presented, and the grounds upon which the assertion is made with respect to the issue. Section 624.5(b)(2).

An issue is substantive if there is sufficient doubt about the applicant's ability to meet statutory or regulatory criteria applicable to the project, such that a reasonable person would require further inquiry. In determining whether such a demonstration has been made, the ALJ must consider "the proposed issue in light of the application and related documents, the

draft permit, the content of any petitions filed for party status, the record of the issues conference and any subsequent written arguments authorized by the ALJ." Section 624.4(c)(2). An issue is significant "if it has the potential to result in the denial of a permit, a major modification to the proposed project or the imposition of significant permit conditions in addition to those proposed in the draft permit." Section 624.4(c)(3).

In this case, the "substantive and significant" standard is applicable to the issues Petitioners seek to adjudicate in connection with the well permit application and whether the SCWA has complied with the requirements for such a permit pursuant to ECL Section 15-1503(2). As noted previously, Department Staff has indicated that it would be prepared to issue a permit to the SCWA were it not for the statutory moratorium that requires that an adjudicatory hearing be held.

With respect to the showing necessary to exempt the SCWA from the moratorium, however, the SCWA must show "just cause and extreme hardship." In contesting the application, the Petitioners must raise substantive and significant issues in an effort to demonstrate that the SCWA is not entitled to the exemption.

At the July 12, 2005 session of the issues conference, both the Applicant and Department Staff indicated that they had no objection to participation by Ms. Meyland and her group of proposed intervenors. IC Tr. at 34-35. Moreover, there was no dispute among the participants that the issue for adjudication is whether the application satisfies the statutory requirement that "just cause and extreme hardship" be shown, such that an exemption to the moratorium may be granted. Nevertheless, the SCWA and Department Staff disputed some of the matters raised in the petition and raised objections to the Petitioners' characterization of the scope of the proposed issue, as more fully described below.

Department Staff objected to the petition presented at the May 10, 2005 issues conference session by Ms. Meyland and others, because that petition sought to introduce consideration of the requirements set forth in ECL Section 15-1528(3). May 10, 2005 Issues Conference Transcript at 31-32. That provision speaks to the efforts to be undertaken during the moratorium to study and characterize the Aquifer, and the conditions under which the moratorium would be lifted. According to Department Staff, any inquiry in this proceeding with respect to the requirements of that section would be misplaced, because the exemption is a separate issue, and theoretically, an application could have been

made shortly after the statute was enacted that would have required an evaluation of subdivision (4)'s "just cause and extreme hardship" language without the benefit of the information to be developed pursuant to subdivision (3). Id.

In their June 28, 2005 submission, Petitioners countered that the criteria set out in the statute for lifting the moratorium should not be relaxed when determining whether an exemption is warranted. IC Exh. 10A, at 2. Petitioners asserted that, to date, the Department has not demonstrated that it has the necessary information and expertise to make decisions with respect to safe withdrawal levels from the Aquifer, as well as the dynamics and water volume peculiar to the Aquifer, "tak[ing] into account both the localized and regional aspects and implications of Lloyd Sands water withdrawals, with special attention given to the prevention of water contamination and salt water intrusion." Id., citing ECL Section 15-1528(3).

With respect to the "coastal community" issue, Petitioners argued that, pursuant to ECL Section 15-1528(1), only the Department is authorized to determine what localities fall within that statutory definition, and noted that the Department has not identified the Middleville Road wellfield as a "coastal community." That provision directs the Department "to identify those areas of Long Island within the counties of Kings, Queens, Nassau and Suffolk which, for the purposes of this section, shall be considered coastal communities."

The Petitioners took the position that the hearing process improperly merged consideration of both the request for a statutory exemption, and the Applicant's alternative argument that the Well would supply water to a coastal community and thus would not be subject to the moratorium. At the issues conference, the SCWA responded that the request for a statutory exemption, as well its arguments with respect to the well's location in a coastal community, are appropriate for consideration in this proceeding. IC Tr. at 36-37. Department Staff concurred that both were viable alternatives for the Applicant to pursue. IC Tr. at 37. The Petitioners responded that while well permit applications are routinely considered by the Department, this is the first time that an application to develop a well in the area subject to the moratorium has been submitted. IC Tr. at 38-39. According to Petitioners, this circumstance broadens the type of issues to be addressed as well as the parties to be included. IC Tr. at 39-40. Department Staff countered that separate consideration of arguments applicable to both components of the SCWA's application would be an inefficient use of the process. IC Tr. at 44.

Petitioners' arguments that it is improper at this juncture to consider both "just cause and extreme hardship" and the "coastal community" issue are unpersuasive. At the hearing, a factual record will be developed with respect to the technical elements of the application. That record will inform the inquiry into the legal issues, including the question of the Well's location in a coastal community within the meaning of the statute. Post-hearing briefing will address the evidence offered and its applicability to the legal issues to be decided. Ample public notice has been provided, and there is no need, as Petitioners suggest, to undertake further efforts to include additional parties beyond those who have already indicated a desire to participate.

The petition proposed issues that related to two statutory sections. First, the petition referred to ECL Section 15-1503 which sets forth the standards for water supply permit applications. The petition also raised issues with respect to ECL 15-1528, in the context of the SCWA's argument that the moratorium is inapplicable because the Well is located in a coastal community, and the SCWA's contention that it satisfies the "just cause and extreme hardship" standard such that a permit for the Well should be granted.

In connection with their arguments concerning the SCWA's water supply permit application, the Petitioners referred to subsection (2) of ECL Section 15-1503 in particular. That subsection provides, in pertinent part, that

> [i]n making its decision to grant or deny a permit or to grant a permit with conditions, the department shall determine whether the proposed project is justified by the public necessity, whether it takes proper consideration of other sources of supply that are or may become available, whether all work connected with the project will be proper and construction safe, whether the supply will be adequate, whether there will be proper protection of the supply and watershed or whether there will be proper treatment of any additional supply, whether the project is just and equitable to all affected municipalities and their inhabitants and in particular with regard to their present and future needs for sources of water supply, whether there is provision of fair and equitable determinations of and payments of

any direct and indirect legal damages to persons or property that will result from the acquisition of any lands in connection with the proposed project, and whether the applicant has developed and implemented a water conservation program in accordance with local water resource needs and conditions.

1. "Other Sources of Supply"

According to the Petitioners, the SCWA's application failed to satisfy these standards in several respects. The Petitioners contended that the SCWA did not make any attempt to locate water from other formations, nor did the SCWA describe any efforts to obtain a suitable location or additional space for a nitrate treatment facility. The Petitioners argued that the SCWA did not explore the option of transporting water from adjacent portions of its treatment system to meet future demand in the Northport Intermediate Pressure Zone. Thus, Petitioners contended that the application failed to take proper consideration of other sources of supply that are or may become available, in derogation of the statutory permitting requirements. The SCWA responded that the application contains an extensive discussion of treatment. IC Tr. at 45.

Department Staff took the position that the issues proposed were part of the "just cause and extreme hardship" inquiry. The Petitioners responded that the questions raised were relevant to that inquiry, and should include also consideration of alternative sources of water. IC Tr. at 49.

Ruling: The Response to Department Staff's second request for information contains a discussion of alternatives, and refers to the costs of transporting water from other areas, which the SCWA estimated to require the installation of approximately ten miles of water mains at a cost of $500,000 per mile. The SCWA indicated further that because adjacent zones are operating at or near capacity, additional wells would be required to produce the water to be imported. The discussion in the application and the Response is cursory, however, and documentation of costs, the SCWA's efforts to locate other sources of supply, and the evaluation of the treatment alternative are lacking. Under the circumstances, this sub-issue should be considered at the hearing.

2. "Proper and Construction Safe"

The Petitioners went on to argue that the application does not mention any special precautions taken to ensure that the Well will not leak contamination into the Aquifer. According to the Petitioners, their hydrologic experts urged that given the depth and sensitivity of the Aquifer, special precautions should be taken prior to drilling. IC Exh. 31. The Petitioners contended that nothing in the record indicates that any special precautions were taken in installing the well. Id. Noting that a nearby well at the Northport VA Hospital has experienced leakage problems, the Petitioners argued that the application failed to satisfy that portion of the statute that requires that all work connected with the project be proper and construction safe, and maintained that the issue of precautionary measures taken in drilling the well is appropriate for adjudication.

The Petitioners inquired whether the proposed Well has already been installed, and counsel for the SCWA responded that he believed that it had been. IC Tr. at 50. This is confirmed by the record. Specifically, Attachment A to the March 28, 2003 Joint Application for Permit form states that "[i]n order to investigate the subsurface geology and hydrogeologic characteristics of the aquifer, an 844 foot deep 6" test well was constructed. This well was used to conduct an extensive aquifer test and to sample for water quality. Upon completion of the aquifer test, the Authority decided to develop the test well with the intent of using it as a production well." IC Exh. 31.

The SCWA pointed out that it has hundreds of wells, and has the capability to construct sound and viable well casings. IC Tr. at 45-46. The SCWA noted further that the VA Hospital wells were installed in the 1920s and 1930s, and went on to assert that there had been no offer of proof that the wells at the VA Hospital had introduced contamination into the Aquifer. IC Tr. at 48, 52.

The Petitioners contended that the proof is contained in documentation supplied by the SCWA. Id. The SCWA countered that the Petitioners had not specified the precautionary measures to be taken in installing the well. Id. The Petitioners responded that extra sealing with concrete and bentonite should be provided when a well is installed in the Aquifer. IC Tr. at 53. The SCWA pointed out that it had used concrete and bentonite in the installation, and the Petitioners replied that they had not seen that information. IC Tr. at 53-54. It appears from the engineer's report that accompanied the application that the test well was sealed with cement grout. IC Exh. 4, Appendix I,

Driller's Log, "Completion Report – Long Island Well," Well No. S-114648T, completed 1/11/00.

Department Staff took the position that a permit would ultimately be issued specifying the construction methods to be used. IC Tr. at 54-55. According to Department Staff's technical representative, the Well was constructed as a test well, and was approved by the Department on that basis as a result of a preliminary report. IC Tr. at 55. Department Staff stated that the test well had "supplied a significant amount of data that was utilized by the applicant and then by the Department to render decisions on the application." IC Tr. at 56. The SCWA added that the actual construction of the well falls within the jurisdiction of the New York State Department of Health, as administered locally by the Suffolk County Department of Health. Id.

The Petitioners characterized this procedure as "backwards," maintaining that the well was installed "under the guise of a test well, knowing full well that the Authority was then going to come in and basically request a re-categorization of the well from test well to production well." IC Tr. at 56-57. The Petitioners asserted that it was entirely appropriate to inquire into the construction of the well as part of the adjudicatory hearing. IC Tr. at 57.

Ruling: While the sub-issue of alternative sources of supply is appropriate for inquiry at the hearing, as well as consideration of the treatment alternative, the same cannot be said with respect to the construction of the well, based upon the offer of proof. In response to the Petitioner's assertions, the Applicant indicated that it used concrete and bentonite in constructing the well casing. The Petitioners' offer of proof relies upon their claim that leakage such as that experienced at the wells at the Northport VA Hospital can be expected to occur at the proposed Well. The VA Hospital wells are not analogous, inasmuch as those wells were installed seventy or eighty years ago. The Applicant also indicated that the VA Hospital wells are operated by the federal government, and are not under the SCWA's control, and pointed out that water from those wells has been safely used for decades to address nitrate contamination in the area. IC Tr. at 67-68. This question will not be advanced to adjudication.

3. "Protection of the Water Supply and Watershed"

The Petitioners argued further that the proposal would not properly protect the supply and the watershed, noting that the

main source of nitrate contamination in the wellfield area is sewage waste from residential development. According to the Petitioners, sewering is the only remedy that will address this problem, rather than the SCWA's campaign to reduce the use of lawn fertilizers. The Petitioners argued further that because the measures proposed by the SCWA are ineffectual, there is a strong likelihood that the Applicant will make further requests to tap into the Aquifer in the future to access water for blending to reduce nitrate contamination.

Both the Applicant and Department Staff took the position that the issue raised was irrelevant. The SCWA noted that it had no jurisdiction to require sewer installation, and asserted that any inquiry into the impact upon the watershed and water supply of the State in general was outside the scope of a well permit hearing. IC Tr. at 59-60. Department Staff echoed the SCWA's concerns, arguing that the inquiry would range beyond the ambit of this proceeding. IC Tr. at 60-61.

In response, the Petitioners argued that the SCWA had in fact raised this issue as part of its application. According to the Petitioners, the engineer's report identified the source of the nitrate problem in the Northport Intermediate Pressure Zone as unsewered residential housing, not lawn fertilization. IC Tr. at 61-62. The Petitioners maintained that if this question were not addressed, the stage would be set for further applications to drill into the Aquifer, while the underlying problem remained unsolved. IC Tr. at 62-63.

The SCWA reiterated that it did not have the ability to remedy the situation, and lacked jurisdiction to require that sewers be installed. IC Tr. at 63-64. The Petitioners expressed concern that if the problem were not addressed the SCWA would continue to assert just cause and extreme hardship as a basis for future applications. IC Tr. at 64-65. The Applicant responded that it could not create a sewer district, and noted that unless the Petitioners proposed to condemn hundreds of houses, the problem would continue. IC Tr. at 68-69.

Ruling: The issue proposed by Petitioners with respect to the source of high nitrate levels will not be adjudicated. There is no dispute that these levels are the result of residential development, and it is therefore unclear from the Petitioners' offer of proof what the question for adjudication would be.

The Petitioners also maintained that the SCWA's proposal would not protect the aquifer from nitrate seepage as a result of drawdown from the Magothy aquifer, due to the relative thinness

of the Raritan Clay at the Middleville wellfield. The Raritan Clay layer separates the two aquifers. In support of their arguments, the Petitioners referred to elevated nitrate levels detected at the VA Hospital well that draws water from the Aquifer. In addition, according to the Petitioners, the hydrologic cross-section submitted by the SCWA indicates that the Raritan Clay cap, which is normally approximately 100 feet thick, is "exceedingly thin" (fifty feet) at the location of the proposed Well. IC Tr. at 85, 87.

The Applicant reiterated that the nitrate levels at the VA Hospital wells were not elevated with respect to drinking water standards, and that this is strong evidence that extensive contamination of the Aquifer is not likely. IC Tr. at 70-71. Department Staff argued that this should not be an issue for the hearing, contending that the Petitioners were attempting to revisit the SEQRA negative declaration. IC Tr. at 72-73. The Petitioners responded that in order to provide a complete petition, they raised all issues that they believed were pertinent to the inquiry, particularly because of the lack of regulatory guidance, which the Petitioners contended should have been developed by the Department over the last twenty years. IC Tr. at 88. Department Staff objected at this point, arguing that the SCWA "has already gone through this part of the process and they should not be required to go through this process again because Ms. Meyland wants to insert herself into the process at this stage as opposed to during the application stage or during SEQRA or any other portion of the process." IC Tr. at 93.

Ruling: The characteristics of the Aquifer at the site of the proposed Well are appropriate for consideration at the hearing, and go to the question of the safe yield of the Well. The LBG report includes the geologic cross-section that depicts the Raritan Clay level at the Middleville wellfield. IC Exh. 4, Figure 4. The cross-section appears to indicate that the clay layer at this location is thinner than at other locations shown in the cross-section, such as the West Neck Road wellfield, the Mill Lane wellfield. Notwithstanding Department Staff's objection, to the extent a material omission exists in the application materials, that material omission is relevant to whether the Applicant has established just cause and extreme hardship.

4. <u>"Just and Equitable"</u>

The Petitioners went on to contend that the proposal is not "just and equitable to all affected municipalities and their inhabitants and in particular with regard to their present and

future needs for sources of water supply." ECL Section 15-1503(2). The Petitioners argued that this application "could open the door for similar efforts to tap the Lloyd by non-coastal communities" with similar justifications. IC Exh. 10A, at 5. The Petitioners asserted that easy access to the Aquifer for non-coastal communities will increase the probability that coastal communities will be deprived of the use of the resource. According to the Petitioners, the "just and equitable" language of Section 15-1503(2) applies to this proceeding, because the Department is considering both the grant of a waiver, and a permit to develop a well.

The Applicant pointed out that modeling had been done to study the effects of pumping, and that there had been no offer of proof that such pumping would have negative effects on neighboring communities. IC Tr. at 81-82. The Applicant also contested the Petitioners' contention that access to the Aquifer by non-coastal communities increases the probability that coastal communities would be deprived of water. The SCWA asserted that the rate of recharge of the Aquifer was eight billion gallons per day at the location in question, as estimated by the United States Geological Survey. IC Tr. at 93-94, IC Exh. 19B. According to the SCWA, even under the cumulative impact analysis performed by the Applicant, eighty-three percent of the recharge would not be utilized. IC Tr. at 94-95. The SCWA pointed out that in Nassau County, eighty-five percent of the recharge is being utilized by water suppliers, and went on to note that the proposal would use only eight percent of the recharge of the Aquifer in western Suffolk County. IC Tr. at 95.

The Applicant also referred to two wells at Caumsett State Park in Lloyd Neck that formerly withdrew water from the Aquifer. The system served by those wells has since been connected to the SCWA's distribution network. IC Tr. at 96. The SCWA pointed out that the two wells were withdrawing more water (200 gpm, respectively, for a total of 400 gpm) than would be removed by the proposed Well, which would withdraw 300 gpm. Id. The SCWA concluded that if the application were approved, the Applicant would still not be withdrawing as much water as was taken in the past. IC Tr. at 97.

The Applicant went on to address the Petitioners' argument that the Aquifer is a resource that should be preserved for future generations, noting that in western Suffolk County, the Aquifer has only eight million gallons per day of recharge. IC Tr. at 97. According to the Applicant, that is equivalent to approximately four of the SCWA's regular production wells, which number about 200 in the area. Id. The Applicant concluded that,

as a result, the Aquifer can only serve various limited purposes, not general production needs, and could never be used for that purpose because of its limited capacity. IC Tr. at 97-98. According to the Applicant, it is in the SCWA's best interest, as well as the interest of the general public, to preserve the resource. IC Tr. at 99. Finally, the Applicant stated that there had been no showing that there would be any effect on communities in Nassau County. IC Tr. at 100.

The Petitioners countered that not all water users in Western Suffolk County are SCWA customers, noting that there are a number of private wells. IC Tr. at 101. The Petitioners argued that the proposal must be shown to be just and equitable to these persons. Id. According to Petitioners, the effects of the proposed Well would be far-reaching, because of the drawdown effect and the fragility of the Aquifer. IC Tr. at 103.

Ruling: The requirement in Section 15-1503(2) that a proposed permit be "just and equitable" requires consideration of the water supply needs of neighboring municipalities, and goes to the safe yield of the Aquifer. The Applicant acknowledged that this question is pertinent to the "just cause and extreme hardship" inquiry. This requirement will be addressed at the hearing.

This inquiry also implicates the public necessity requirement in Section 15-1503(2). Matter of Saratoga County Water Authority, Commissioner's Decision, at 2, 1996 WL 172700, * 2 (Apr. 4, 1996), refers to an earlier ruling in that proceeding, where the Commissioner stated that the "public necessity" inquiry "is intended to take into account the proposed use of the water supply resource," and noted further that the term is "meant to afford some measure of the public's need for the particular water supply proposed." Matter of Saratoga County Water Authority, Ruling on Motion for Leave to Appeal, at 2, 1995 WL 1780810, * 2 (Sept. 11, 1995) (citing Ton-da-Lay, Ltd. v. Diamond, 44 A.D.2d 430 (3rd Dept. 1974)).

Moreover, in Matter of Town of Hempstead v. Flacke, 82 A.D.2d 183, 187 (2nd Dept. 1981), the court noted, on appeal, the deference due to the Commissioner's determination in the underlying administrative proceeding, which considered an application to deepen an existing well into the Lloyd Aquifer for a period of one year. The court cited the Commissioner's determination that an inquiry into the "public necessity" for the project "must entail consideration of (1) the nature of the present use (potable or non-potable) and (2) the importance of

the water supply source." Id. The hearing in this case will include testimony and evidence on this question.

5. "Water Conservation"

In their petition, the Petitioners cited to ECL Section 15-1527(4), which sets forth the requirements for certain well permits in Long Island counties. Section 15-1527(4)(g) requires that "if the well is to be used by a water purveyor, either public or private, or a water authority," the application must address "whether such purveyor or authority has an active and on-going water conservation program, leak detection program, and metering program." The Petitioners pointed out that the SCWA is seeking an exemption for "extreme hardship" based upon projected peak demand shortfalls in the future. According to the Petitioners, the SCWA has not shown that it has made any attempt to reduce water demand in the Northport Intermediate Pressure Zone through "an aggressive and targeted water conservation program." IC Exh. 10A, at 6. The Petitioners argued further that while the text of a water conservation policy adopted in 1989 accompanied the application, no timetable for active implementation was included. The Petitioners pointed to New York City's water conservation program as an effective response to increased demand.

At the issues conference, Department Staff again objected to this inquiry as beyond the scope of the proceedings. IC Tr. at 105. The Applicant noted that its application contained an extensive discussion of conservation measures, and that it had also provided further information in its response to the Department's second request for information. IC Tr. at 106. The Petitioners responded that they would use documentation provided by the Applicant to demonstrate that the SCWA failed to create a water conservation program that would effectively reduce the need for additional water in the Northport Intermediate Pressure Zone. IC Tr. at 106-07. According to Petitioners, this failure undercuts the SCWA's argument that it faces a hardship situation within the meaning of the statute.

Ruling: This sub-issue need not be adjudicated. The record contains information concerning the efforts undertaken by the SCWA to implement water conservation measures, and the Petitioners' offer of proof is insufficient to establish the need to inquire further. The inquiry required pursuant to Section 15-1527 is satisfied by the application materials.

Coastal Community

In further support of their request for party status, Petitioners argued that the area of the proposed Well is not a coastal community, and went on to assert that, contrary to the SCWA's position, the chloride levels at the Middleville Road wellfield do not amount to contamination within the meaning of ECL Section 15-1502(1). Referring to the statute's legislative history, the Petitioners contended that the contamination the statute was intended to address is that related to saltwater intrusion, and maintained that the chloride levels at the wellfield are some of the lowest in the SCWA's distribution system. According to the Petitioners, adopting the SCWA's logic would allow every water utility on Long Island to claim that it is located in a coastal community.

In connection with this issue, the Petitioners proposed to offer the testimony of May Newburger, a sponsor of the legislation in the Assembly, as well as that of Assemblyman Steven Englebright. According to the petition, Assemblyman Englebright is a geologist by training, and will use data from the SCWA's 2005 Annual Drinking Water Quality Report "to demonstrate the weakness of the SCWA argument regarding chlorides." IC Exh. 10A, at 6.

Ruling: The SCWA agreed that whether the well is located within a statutorily defined "coastal community" is an issue for adjudication, noting that the participants disagree as to what constitutes "contamination" within the meaning of the statute. IC Tr. at 108-109. Department Staff concurred. IC Tr. at 110. This issue will be adjudicated.

The Petitioners asserted further that the precedent-setting nature of this application could have a negative effect on coastal residents of Long Island. The Petitioners maintained that every coastal area of Long Island faces the potential for saltwater intrusion, and consequently may need to draw water from the Aquifer. In connection with this issue, the Petitioners proposed to address the potential environmental impacts of the proposal, including saltwater intrusion, reduction of groundwater discharge into coastal waters, alterations in diversity of habitat over time, drinking water impairment or loss of potable water supply, and degradation of the Lloyd Sands water if the aquifer is extensively pumped.

Several witnesses were listed in the petition who would discuss efforts by other water systems to address saltwater intrusion, as well as the risks posed by expanding access to the

aquifer. These witnesses included Robert Graziano, the Superintendent and Deputy Chairperson of the Water Authority of Great Neck North; Dennis Kelleher, P.E., of H2M Group, consultant to the several water districts, including the Village of Bayville Water District; and William Seevers, a hydrologist.

The Applicant took issue with the Petitioners' statements, asserting that the SCWA had appropriately proposed two grounds for its application under the statute. IC Tr. at 113-114. Department Staff argued that the legislation, as drafted, allows for the grant of an exemption. IC Tr. at 115. According to Department Staff, it is counterintuitive to assert that an application is precedent setting when it is specifically provided for by statute. IC Tr. at 115.

Ruling: The factual elements of this proposed sub-issue are essentially subsumed within the issue of the Aquifer's safe yield, and as such, will be adjudicated. The precedent setting nature of the application amounts to an argument by the Petitioners that the application should be subject to greater scrutiny, and is not an issue for adjudication. The statute itself acknowledges the special protections afforded to the Aquifer and implements procedural safeguards with respect to applications to withdraw water. There is therefore no need to supplement the record on this point.

The Petitioners also proposed to adjudicate issues related to the fragility of the Aquifer, including risks of contamination from leaking well casings, the introduction of contaminants from shallower formations, and a reduction in hydraulic head. The Petitioners argued that the Department had failed in its statutory duty pursuant to ECL Section 15-1528(2) and (3) to ensure that sufficient research has been conducted to provide a sound working knowledge of the Aquifer, including a knowledge of details, dynamics, water volume and level of safe withdrawal appropriate to maintain a safe quantity of water. The Petitioners went on to quote the statutory language requiring the Department to implement a workable program that would administer a well permitting process for the Aquifer, taking into account "both the localized and regional aspects and implications of Lloyd Sands water withdrawals, with special attention given to the prevention of water contamination and saltwater intrusion." ECL Section 15-1528(3).

Because such a program is not yet in place, the Petitioners maintained that the Department cannot rely upon an applicant's proposal to substitute for the statutory mandate. In support of their arguments on this issue, the Petitioners proposed to rely

upon documents submitted by the SCWA, as well as the testimony of Messrs. Kelleher, Seevers, and Engelbright, and that of Kyle Rabin, Executive Director of Friends of the Bay.

Ruling: Consideration of the Department's duty to implement regulatory guidance is not appropriate for adjudication in this proceeding. Rather, the statute articulates the considerations to be taken into account by the Department, and to the extent those considerations are relevant to the application at hand, they will be part of the evidence received at the adjudicatory hearing. These considerations include, but are not limited to, the risks of contamination from leakage or migration from other strata, as well as reduced hydraulic head, if the proposed Well is put into service.

The Petitioners went on to argue that allowing use of Lloyd Sands water for blending purposes is poor environmental and public health policy. According to the Petitioners, a need to blend high nitrate water does not amount to "just cause" sufficient to support an exemption, in light of the availability of other treatment technologies and the danger that the Aquifer itself will be contaminated by nitrates. The Petitioners offered the testimony of Robert Graziano, of the Water Authority of Great Neck North, and Dr. David Stern, a professor of environmental engineering, in support of this issue.

At the issues conference, the Applicant responded to this concern by noting that blending nitrates for drinking water purposes to meet the standard of ten parts per million "is a generally accepted method for treating drinking water," and observed that the 1998 Nassau County groundwater study made reference to this method. IC Tr. at 117-118; IC Exh. 18B. The SCWA went on to argue that "there is no health reason to treat water below, significantly below, the level of 10 parts per million," and asserted that for this reason, blending high nitrate water with clean water is allowed. IC Tr. at 118-119. The SCWA characterized the costs of treating high nitrate water as "extraordinarily expensive," and contended that such treatment costs 67 percent more than treating for chloride contamination. IC Tr. at 119. Finally, the Applicant argued that this issue is not appropriate for adjudication because treatment for drinking water supply purposes is within the jurisdiction of the State Department of Health. IC Tr. at 119. The SCWA took the position that the legislative intent of the moratorium was not to require costly treatment, but rather recognizes that treatment may not be appropriate in coastal communities. IC Tr. at 121-122.

Department Staff pointed out that the SCWA was not proposing to use the Well as a sole source, but instead planned to use only the water necessary to blend to reduce the nitrate levels in drinking water. IC Tr. at 123. According to Department Staff, this is a mitigating factor in its consideration of the application. IC Tr. at 124.

The Petitioners argued that the proposed sub-issue is at the heart of the matter, stating that they planned to provide testimony from other water suppliers to challenge the SCWA's assertion of extreme hardship. IC Tr. at 124-125. According to the Petitioners, the hearing should address the efforts undertaken by the Applicant to explore and evaluate other options beyond blending to address the nitrate problem. IC Tr. at 125. The Applicant reiterated that this is a question for the Department of Health.

Finally, with respect to the SCWA's assertion of "extreme hardship," the Petitioners stated that because no regulations have been developed to define the term, the Department cannot defer to the SCWA. The Petitioners argued that extreme hardship "is more than expediency . . . [and] more than financial demands and cost comparisons." IC Exh. 10A, at 9. The Petitioners maintained that the SCWA had not demonstrated that it had pursued other options or implemented aggressive water conservation measures in the area. The Petitioners offered a number of witnesses with respect to this issue, including several legislators, Mr. Kelleher, and two certified public accountants.

Ruling: These proposed sub-issues are essentially the same, in that they seek to define the parameters of "just cause and extreme hardship." The proposal before the Department is whether withdrawals from the Aquifer at this location to blend with high-nitrate water should be approved. The application itself raises the issue of alternatives to blending, and it is appropriate to take those alternatives into consideration, and develop the record accordingly.

Ruling on Petition for Party Status

On this record, the Petitioners have demonstrated an adequate environmental interest, and have filed an acceptable petition for party status. Moreover, the SCWA and Department Staff have not objected to the Petitioners' participation, except to the extent described above. Accordingly, the Petitioners are granted party status in this proceeding.

Nassau County

As discussed above, by letter dated August 2, 2005, after the second deadline for filing for party status, and after the second issues conference session had concluded, Nassau County submitted a petition for party status. IC Exh. 28. In addition, in a letter dated August 1, 2005, Thomas Maher withdrew his comment letter of June 29, 2005 (IC Exh. 20), and sought to clarify the County's position with respect to the SCWA's application. IC Exh. 27.

The August 1 letter indicated that the County opposed the SCWA's application because the County disagreed with the SCWA's assertion that the Well would supply water to a "coastal community." According to Mr. Maher, chlorides are ubiquitous in Long Island groundwater, even in areas with little or no development. IC Exh. 27, at 2. Mr. Maher stated further that background concentrations of chlorides range from less than 10 milligrams per liter ("mg/l") to as high as 40 mg/l. In light of this, the County expressed concern that indiscriminate drilling would occur if the Well were approved and deemed not to be subject to the moratorium because of background chloride concentrations of 10-20 mg/l in the overlying aquifer. According to Mr. Maher, the County took no position on whether the application was justified by extreme hardship, stating that the SCWA had presented information "which may be relevant to this claim, but the County is not in a position to determine whether it is complete or whether there is evidence to the contrary." Id.

Nassau County's late-filed petition must be evaluated pursuant to Section 624.5(c)(1), which provides that "[p]etitions filed after the date set in the notice of hearing will not be granted except under the limited circumstances outlined in paragraph (2) of this subdivision." Paragraph 2 states that, "in order to receive any consideration," late filed petitions must include, in addition to the required contents of a petition for party status, a demonstration of good cause for the delay, as well as a showing that the proposed petitioner's participation will not significantly delay the proceedings or unreasonably prejudice the other parties. Section 624.5(c)(1)(i) and (ii). Finally, a late-filed petition cannot be granted absent a demonstration that participation will materially assist in the determination of issues raised in the proceeding. Section 624.5(c)(1)(iii).

Nassau County argued that its earlier request for an extension of time, as well as the comments submitted by Mr. Maher

(IC Exh. 20) "sufficiently and timely set forth all elements of Nassau County's petition for party status." IC Exh. 28, at 2. With respect to environmental interest, the County indicated that the County and its residents "are affected by any new drilling in the Lloyd Sands aquifer." Id. The County expressed concerns as to the precedent that might be set by the SCWA's application, including the SCWA's argument that the area to be served by the proposed well is a "coastal community." The County also indicated that it wished to ensure that "new drilling be permitted only when it meets the statutory standards of 'just cause and extreme hardship.'" Id.

With respect to the interests related to statutes administered by the Department, the County stated that those interests centered around the Department's definition of "coastal community" and the Department's determination as to whether the SCWA satisfied the "just cause and extreme hardship" standard. The County opposed any approval of the SCWA's application based upon the Applicant's assertion that the proposed Well would serve a coastal community, and also opposed a grant of an exemption "unless SCWA has demonstrated just cause and extreme hardship." IC Exh. 28, at 3. These were also the issues the County proposed to adjudicate, indicating for its offer of proof that "Thomas Maher is prepared to present evidence concerning the definition of the term 'coastal community' and its application to the Middleville Well No. 3 site." Id.

The County went on to argue that its participation as a party would not delay the proceedings, nor would that participation expand the scope of the issues for adjudication, pointing out that it would address the same issues already under consideration. The County also claimed that its participation would not prejudice any other party, based upon the lack of objection by any other party at the issues conference. The County argued further that because the outcome of the adjudication would have a long-term impact on its residents, and because the issue is unique to Long Island, the County should be afforded the opportunity to be heard. According to the County, the delayed filing was simply the consequence of its impression that its previous correspondence adequately set forth the basis of its request for party status.

The SCWA opposed the County's participation, pointing out that the deadline for petitions for party status had already been extended, in part because of Nassau County's expressed interest in making such a filing. IC Exh. 29, at 1. The SCWA observed that Nassau County had in fact submitted four pages of comments by letter dated June 29, 2005, in advance of the July 1, 2005

deadline, but did not submit a timely petition for party status. The SCWA noted further that Thomas Maher, the County's Director of Environmental Coordination, was present at the issues conference on July 12, 2005, and indicated at that time that the County's intent was to comment on the application.

The SCWA asserted that it would be unreasonably prejudiced by the County's participation, pointing out that the County initially stated that it did not oppose the requested exemption based upon a showing of hardship, in contrast to the position in its late-filed petition. According to the SCWA, the County had not justified its late application for party status, nor had it provided any offer of proof, other than the evidence to be offered by Mr. Maher with respect to the definition of the term "coastal community." The SCWA pointed out that this is a legal issue, and argued that the County's participation would not materially assist in its determination.

Ruling: Under the circumstances, Nassau County's late-filed petition for party status must be rejected. The deadline to seek party status and to comment on the application was extended by approximately two additional months, in part because of the County's expressed interest in participating as a party at the hearing. The County was provided with ample notice of the proceedings, and is represented by counsel. The County's argument that it believed that its prior submissions were sufficient to support a petition for party status is not persuasive, particularly in light of the express statutory requirements in the Notice and Supplemental Notice, with which the County's attorneys are familiar.

Moreover, the County failed to make any offer of proof with respect to its claim that the application for an exemption should be denied based upon the SCWA's claim of just cause and extreme hardship. The County's submissions are inconsistent with respect to this point. Mr. Maher's August 1, 2005 correspondence states that the County takes no position on this issue, while the August 2, 2005 letter requesting party status indicates that the County opposes the exemption.

Nevertheless, because the County proposes to address the issue of the status of the wellfield in a "coastal community," it is appropriate to afford the County *amicus* status in this proceeding. In addition to the requirements for a petition for party status, a petition for *amicus* status must identify the nature of the substantive and significant legal or policy issue to be briefed, and provide a statement why the proposed party is

in a special position with respect to that issue. Section 624.5(b)(3)(i) and (ii).

In this case, there is no dispute that the issue of the applicability of the moratorium to the proposed Well is substantive and significant. The interpretation of the statute's definition of "coastal community" is a legal question, and the County is in a special position to offer assistance with respect to the interpretation of this unique local issue. Accordingly, the County is granted *amicus* status for the limited purpose of participating in the briefing of this issue, which will follow the adjudicatory hearing.

As required by the statute, and based upon this record, the issues for adjudication at the hearing are (1) whether the SCWA's application meets the standard set forth in ECL Section 15-1528(4) for a grant of an exemption from the moratorium, based upon just cause and extreme hardship; and (2) whether the Well is located in a "coastal community" within the meaning of ECL Section 15-1528(1) and thus is not subject to the moratorium. The inquiry will require consideration of the following sub-issues:

1. Whether the proposed pumping is within the safe yield of the Aquifer. The inquiry will include consideration of the characteristics of the Aquifer, as well as water supply needs.

2. Whether the proposal poses a risk of contamination of the Aquifer from saltwater intrusion or other constituents. This inquiry will include an examination existing, background chloride concentrations in the Magothy Aquifer.

3. Whether the SCWA took into account appropriate alternatives to the proposal, including alternatives to blending, and the costs associated with those alternatives.

After the adjudicatory hearing is concluded, post-hearing briefing will be scheduled. The schedule will allow for the submission of initial and reply briefs, including argument concerning the SCWA's assertion that the proposed Well is not subject to the moratorium because it is located in a statutorily defined "coastal community."

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 with the Commissioner in writing within five days of the disputed ruling (see 6 NYCRR 624.6(e)(1)).

Allowing extra time due to the length of these rulings, any appeals must be received by Deputy Commissioner Carl Johnson, to whom decision making authority in this matter has been delegated, before 4:00 p.m. on Wednesday, November 23, 2005. Replies to appeals are authorized, and must be received before 4:00 p.m. on Friday, December 16, 2005.

Send one copy of any appeal and reply to Deputy Commissioner Carl Johnson, c/o Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services, New York State Department of Environmental Conservation, 625 Broadway, 14th Floor, Albany, New York 12233-1010, and one copy of any appeal and reply to all others on the service list at the same time and in the same manner as transmittal is made to the Deputy Commissioner. The Deputy Commissioner will not accept submissions by electronic mail, or via telefacsimile. Send two copies of any appeal and reply to the ALJ, and one copy of any appeal and reply to James T. McClymonds, Chief Administrative Law Judge, Office of Hearings and Mediation Services, 625 Broadway, First Floor, Albany, New York 12233-1550.

Appeals should address the ALJ's rulings directly, rather than merely restate a party's contentions.

A revised Service List and an updated Exhibit List are attached. **Unless the ALJ's permission is obtained prior to service, all submissions are to be served on all parties and the ALJ by overnight mail.**

/s/
Maria E. Villa
Administrative Law Judge

November 9, 2005
Albany, New York

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