

COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS

March 4, 2008

In the Matter of

SALEM AND BEVERLY WATER SUPPLY
BOARD

DEP Docket No. 97-062
DEP File No. 9P-3-17-258.01
Salem and Beverly

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DEP Docket No. 91-052
DEP File No. 9P-3-17-258.01
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RECOMMENDED FINAL DECISION

WATER WITHDRAWAL - appeals from water withdrawal permit and permit modification. Appeals dismissed as moot due to pending appeal of more recent permit modification. All issues that the permit holder raised or could have raised in the earlier appeals may be raised in the remaining appeal.

John E. Darling, Esq. (Serafini, Serafini and Darling), Salem, for applicant/petitioner Salem and Beverly Water Supply Board.

John Pike, Esq. (Conservation Law Foundation), Boston, for Intervenor Ipswich River Watershed Association.

Deirdre C. Desmond, Esq., Boston, for the Department of Environmental Protection.

JAMES P. ROONEY, Administrative Magistrate

The Salem and Beverly Water Supply Board has appealed a water withdrawal permit issued to it by the Department of Environmental Protection and two subsequent modifications of

that permit. In this opinion, I dismiss as moot the appeal of the permit and the appeal of the first modification of the permit.

Background

The Salem and Beverly Water Supply Board supplies water to the cities of Salem and Beverly. Under the Water Management Act, M.G.L. c. 21G, and the regulatory scheme implementing it, 310 CMR 36.00, the Board “registered” with DEP a report of the volume of water it withdrew from the Ipswich River before the Water Management Act was implemented. See M.G.L. c. 21G, §5. The Board stores this daily volume of 10.17 million gallons in a lake and a series of reservoirs for later use by its customers. In 1991, the Board also obtained a permit from DEP to withdraw an additional 1.14 million gallons per day from the Ipswich River. The Board appealed some of the conditions DEP imposed in the permit. While this appeal was pending, DEP modified the original permit in 1997. The Board appealed the modified permit as well. The Ipswich River Watershed Association intervened in that appeal.

In December 1999, the parties reported to me that DEP intended to issue a further modification of the permit based on studies being performed in the Ipswich River basin by the U. S. Geological Survey. They asked that the appeals be stayed until 21 days following the Board’s receipt of the next permit modification, which was scheduled to be issued in August 1999. The parties also agreed to the issuance by DEP of an Interim Modified Permit, which “shall be effective until modified again.” I subsequently granted a stay of the two pending appeals and continued the stay until DEP issued a further permit modification.

In April 2003, DEP issued the anticipated permit modification adding numerous new conditions in the process. The Board appealed that modification objecting to some of the new

conditions. The Ipswich River Watershed Association and others intervened in the appeal.

I raised with the parties the status of the earlier appeals. The Board urged me to continue the stay, rather than dismiss the earlier appeals, because it was concerned that DEP might claim that arguments the Board might wish to make in connection with the 2003 permit had been waived by the Board's failure to raise them in one of the earlier appeals. With the agreement of the other parties, I continued the stay of the pre-2003 appeals.

The 2003 appeal is stayed as well. The parties report that, following further work by USGS, DEP is preparing a further revision of the modified permit. I have continued the stay of the 2003 appeal to await this revision.

In an effort to streamline the hearing of the 2003 appeal, if and when it should be tried, on November 6, 2007, I issued an order directing the parties to show cause why the appeals of the 1991 and 1997 water withdrawal permits should not be dismissed with an express condition that no arguments that were made or could have been made in the earlier appeals will be deemed to have been waived.

The Board objected arguing that dismissing the earlier appeals would unravel the Board's agreement with DEP to allow water withdrawals under the terms of the Interim Modified Permit. The Board proposed consolidating the three appeals instead.

DEP and the Ipswich River Watershed Association take the position that the two earlier appeals should be dismissed as moot.¹ As for the Interim Modified Permit, DEP and the Watershed Association acknowledge that this is the only water withdrawal permit under which

¹ The parties described their response to my order to show cause and request for additional relief as a "Joint Motion to Show Cause." This is a misnomer.

the Board operates, but urge that it be vacated because of an alleged violation of a permit condition that was the subject of a Notice of Noncompliance DEP sent the Board on April 7, 2004. In that Notice, DEP asserted that the Cities of Salem and Beverly failed to install water savings devices in its municipal buildings, as the Interim Modified Permit required. DEP and the Watershed Association contend that the Board would not be harmed if the Interim Modified Permit were to be vacated because the Board could still withdraw water under its registration and in 2006 its water withdrawals did not exceed its registered volume.

The Board replied that it had promptly responded to the Notice of Noncompliance. In its response to the notice, the Board emphasized that it does not control the actions of the two cities, but nonetheless submitted a copy of a May 28, 2004 letter from Board Superintendent Thomas Knowlton to DEP in which he stated that the cities were voluntarily cooperating; they had either installed water savings devices or had concrete plans to do so. He included a list of the water savings devices Salem intended to install by the end of that year. The Board also submitted to me copies of letters from Salem and Beverly officials at the end of 2004 and the beginning of 2005 stating that the water savings devices that they planned to install in 2004 had, in fact, been installed. The Board objected to DEP's claim that it could continue to supply its customers based solely on the water it is allowed to withdraw under its registration. It stated that 2006 was a year with high rainfall and low water withdrawal, but that in 2007, it withdrew more water than it is allowed under its registration, as has been the case in 12 of the 18 years it has been withdrawing water under the Water Management Act.

DEP and the Ipswich River Watershed Association responded that the Interim Modified Permit had been entered into while the parties were awaiting USGS studies of the Ipswich River

and the next permit modification by DEP. Now that DEP has issued that permit modification, “[t]he Department and Intervenor no longer agree to the continued effectiveness of the Interim Modified Permit.” They suggest that, if the Board finds it needs to withdraw more water than it is allowed under its registration, it should negotiate an administrative consent order with DEP.

Discussion

The sole issue I asked the parties to address was the fate of the 1991 and 1997 appeals now that the Board has appealed DEP’s 2003 water withdrawal permit modification. Although a further permit modification is slated to occur, should the Board’s appeal proceed to a hearing, the issues will all concern in what form the latest permit modification should issue. There is no scenario in which either the 1991 permit, the 1997 permit modification, or any version of them would end up being the final permit. This makes the two earlier appeals appear moot.

The only bearing those earlier permits or the appeals of those permits could have on the appeal of the 2003 permit modification is in the scope of the issues. The parties have proceeded on the theory that the only matters appealable when a water withdrawal permit is modified are the aspects of the permit that have been modified. Thus, if DEP had imposed a condition when it first issued the permit, and that condition was not appealed when the permit was issued, the permit holder could not appeal this condition when DEP modified the permit unless the condition had been changed in some manner. That could matter here if the Board sought to appeal a condition included in the 2003 permit modification that was simply carried over from either the 1991 permit or the 1997 permit modification.

No party has suggested that any of the issues raised by the Board in the 2003 appeal are anything but challenges to the conditions DEP added in the 2003 permit modification. Thus, the

impact of the 1991 and 1997 appeals on the latest appeal is more theoretical than real.

Nonetheless, the possibility remains that when DEP redrafts the permit modification in light of the most recent USGS studies, the Board may conclude that the revision puts at issue a permit condition that dates back to either the 1991 permit or the 1997 modification.

All the parties agree that, because the Board appealed the 1991 permit and the 1997 modification, it should be allowed in the appeal of the 2003 modification to raise any issues it may have about the 2003 modification, whether such issues relate strictly to the 2003 modifications or to aspects of the permit that predate that modification. Two ways to implement this understanding have been suggested: consolidate all three appeals or allow the Board to raise any relevant issue it wants in the 2003 appeal, while dismissing the two earlier appeals.

Consolidation would be a sensible approach if at the conclusion of the latest appeal a decision would be rendered on each permit or modification that is the subject of the three appeals. But in the end, only one permit will issue, and that permit will be some form of the 2003 modification. As no decision on the 1991 permit or the 1997 permit modification is likely to be issued other than a decision that those earlier permits have been mooted by the 2003 modification, consolidation is unnecessary.

Only one plausible remedy remains: to dismiss the 1991 and 1997 appeals on the condition that the Board be allowed to raise any issues in the 2003 appeal that it could have raised in the earlier appeals. This will allow the latest permit modification to proceed to a conclusion without prejudicing any rights the Board may have to contest material issues pertaining to earlier versions of the permit. The parties drafted language that covers this scenario when they moved to stay the 1997 appeal. I adopt that language, with slight modifications,

noting that the parties' draft allows the Ipswich Watershed Association, which intervened in the 1997 appeal, to raise any issues in the 2003 appeal that it raised in 1997.

The Board raises the specter that dismissing the earlier appeals would effectively terminate the Interim Modified Permit. That is a potentially significant factor here because, since the Board appealed the permit and the two subsequent modifications, the Interim Modified Permit is the only water withdrawal permit in effect. Were its operation to be terminated, the Board contends it would be left without a water withdrawal permit that it needs in most years to supply sufficient water volume to its customers.

I am not convinced that dismissing the two earlier appeals will leave the Board bereft of a water withdrawal permit. To the contrary, the parties' March 19, 2004 Joint Status Report stated that "the December 18, 1998 Interim Modified Permit shall remain in effect during the pendency of appeal proceedings regarding the Modified Permit issued to Petitioner on May 19, 2003." Thus, counsel for all parties agreed that the Interim Permit, which was initially to be effective from 1998 until DEP issued a further permit modification, would remain in effect during the pendency of the appeal of the 2003 permit modification as well. The appeal of the 2003 permit has yet to be resolved, and hence the Interim Modified Permit remains in effect. As the dismissal of the earlier appeals will have no apparent effect on the Interim Modified Permit, there is no reason to withhold dismissal of those appeals.

That is as far as I will go in considering the Interim Modified Permit. Although DEP and the Ipswich River Watershed Association have asked that I vacate it, I lack the jurisdiction to do so. While the 1991, 1997, and 2003 versions of the water withdrawal permit are before me because each was appealed, the Interim Modified Permit was not appealed and therefore is not

before me. If DEP concludes that the Board failed to come into compliance with the Interim Modified Permit after the 2004 issuance of the Notice of Noncompliance or it concludes that the Interim Modified Permit should be vacated for some other reason, notwithstanding its 2004 agreement that the Interim Modified Permit should remain in effect during the pendency of the latest appeal, then DEP may take whatever action it deems appropriate under its statutory and regulatory authority over water withdrawal permits. It is not for me to decide the fate of the Interim Modified Permit.

Holding

The appeals by the Salem and Beverly Water Supply Board of the 1991 water withdrawal permit issued to it by DEP and the 1997 modification of that permit are dismissed as moot in light of DEP's further permit modification in 2003.

In order to preserve the Board's right to raise issues in its 2003 appeal concerning permit conditions carried over from the earlier permits, the dismissal is conditioned as follows. In its still pending appeal of the 2003 permit modification, the Board may raise any issue it raised or could have raised in its appeal of the February 1991 Water Withdrawal Permit (Docket No. 91-052) and in its appeal of DEP's modification of that permit in 1997 (Docket No. 97-062). Because the Ipswich River Watershed Association intervened in the 1997 appeal and also is an intervenor in the 2003 appeal, it may also raise in the 2003 appeal any issue it raised or could have raised in the 1997 appeal.

Notice

This decision is a recommended final decision of the Administrative Magistrate. It has been transmitted to the DEP Commissioner for her final decision in this matter. The decision is

therefore not a final decision subject to reconsideration, and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's final decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Commissioner, no party may file a motion to renew or reargue this recommended final decision or any portion of it, and no party shall communicate with the Commissioner's office regarding the decision unless the Commissioner, in her sole discretion, directs otherwise.

James P. Rooney
Administrative Magistrate