

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 07-P-1980

TOWN OF HAMILTON

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION & others.

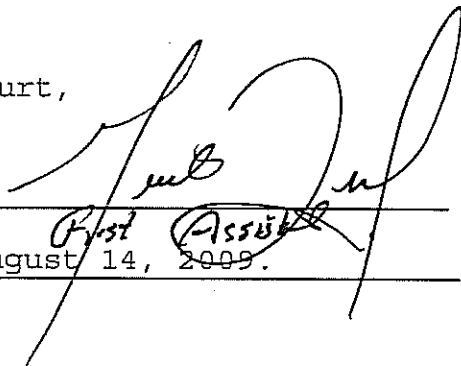
Pending in the Superior

Court for the County of Essex

Ordered, that the following entry be made in the docket:

Judgment affirmed.

By the Court,



, Clerk

Date August 14, 2009.

NOTE:

The original of the within rescript
will issue in due course, pursuant
to M.R.A.P. 23

APPEALS COURT

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT CLERK'S OFFICE
John Adams Courthouse
One Pemberton Square, Suite 1200
BOSTON, MASSACHUSETTS 02108-1705
(617) 725-8106

August 14, 2009

Margaret Van Deusen, Esquire
Charles River Watershed Assn.
190 Park Road
Weston, MA 02493

RE: No. 2007-P-1980
Lower Ct. No.: ESCV2006-00745 &

TOWN OF HAMILTON

vs.

MASS DEPT. OF ENVIRONMENTAL PROTECTION & others

NOTICE OF DOCKET ENTRY

Please take note that on August 14, 2009, the following entry was made on the docket of the above-referenced case:

Decision: Rule 1:28 (KF KZ T). Judgment affirmed. *Notice. (See image on file.)

Very truly yours,

The Clerk's Office

Dated: August 14, 2009

To: J. Raymond Miyares, Esquire
William L. Pardee, Esquire
Margaret Van Deusen, Esquire

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

07-P-1980

TOWN OF HAMILTON

vs.

DEPARTMENT OF ENVIRONMENTAL PROTECTION & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The town of Hamilton appeals from a judgment of the Superior Court upholding a modified permit to withdraw water from the Ipswich River issued by the Massachusetts Department of Environmental Protection (DEP) under G. L. c. 21G, § 7, and remanding the issue of the river's safe yield to the DEP for calculation. Hamilton raises the following arguments: (1) the DEP failed to determine the proper water source to be used in application review; (2) if such determination was made, it was arbitrary and capricious and not in accordance with applicable law; (3) the administrative magistrate, in reviewing the permit, gave improper deference to the DEP's decision; (4) the administrative magistrate did not make the required findings of fact necessary to permit judicial review of the permit decision; and (5) the administrative magistrate improperly relied on evidence outside the record prejudicing the town. Additionally,

¹ The Ipswich River Watershed Association, Inc.; the Essex County Greenbelt Association, Inc.; and twelve citizens, interveners.

the intervening parties argue that it was error for the Superior Court judge to fail to require an immediate water banking program in Hamilton while the DEP calculates the river's safe yield. We do not, however, address these arguments because we find the appeal to be premature as there has not yet been a final agency decision.

Background. In 2001, a commission of the DEP listed the Ipswich River as hydrologically stressed, meaning that it had low flows lower than other Massachusetts rivers. In December, 2002, the DEP issued Hamilton an order to complete a permit review indicating how it intended to keep residential per capita water use at or below sixty-five gallons per day and reduce seasonal water use by twenty percent from levels recorded in 1999. Then in May, 2003, the DEP modified Hamilton's water withdrawal permit for the river, allowing continued withdrawal of an annual average of .11 million gallons per day, in addition to .92 million gallons per day registered volume. The permit also contained the following special conditions: (1) imposition of seasonal water use restrictions based on streamflow; (2) limiting residential per capita water use to sixty-five gallons per day; (3) seasonal water use cap of .70 million gallons per day from May 1 through September 30; and (4) requiring the town to issue restrictions on water pumped from privately owned wells that would otherwise be exempt from DEP regulation. Hamilton requested an adjudicatory

regulations of the Water Management Act required that Hamilton's modified permit be conditioned so the river's safe yield was not exceeded, the remand requires the DEP to revisit the modified permit once the safe yield has been determined. The determination of the river's safe yield may alter the character of the dispute here. By way of example, Hamilton argues that the DEP could not properly determine the entire river basin to be its (Hamilton's) water source for purposes of application review without making a safe yield determination. Hamilton contends that, if the DEP's current safe yield number for the river (calculated in 1991) is incorrect, the modified permit, based on this information, cannot stand. This argument is potentially extinguished by the pending safe yield determination and, consequently, review of this issue is premature. See Wrentham v. Housing Appeals Comm., 69 Mass. App. Ct. 449, 455 (2007).

Additionally, the argument of the interveners, that an immediate water banking system is required while the DEP makes its safe yield determination, is premature. The interveners argue that the town's modified permit conditions will not bring water withdrawals within any safe yield zone for the river and the water banking is a necessary interim measure. This is a fact based question that will be directly affected by the DEP's forthcoming safe yield determination and is not ripe for review.

Lastly, we would note that 310 Code Mass. Regs.

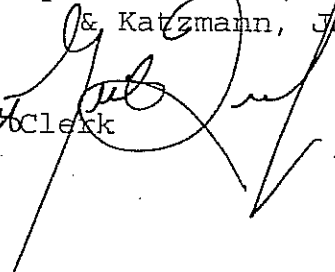
§ 36.28(1)(j) (1994) provides that "[a]ll permits shall be conditioned on at least the following: . . . that the withdrawal in combination with other registered and permitted withdrawals shall not exceed the safe yield of the water source." As the safe yield of the Ipswich River has not been determined since 1991 and must now be redetermined, the modified permit issued to Hamilton may be in violation of this regulation. Consequently, the DEP should make its safe yield determination in an expedited manner in order to avoid being in violation of its own regulations.

The judgment affirming the DEP commissioner's decision upholding the town's modified withdrawal permit, and remanding the issue of safe yield to the DEP for determination is affirmed.

So ordered.

By the Court (Kafker, Trainor
& Katzmann, JJ.),

First Assistant
Clerk



Entered: August 14, 2009.