

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 08-0174

TOWN OF WELLESLEY DEPARTMENT OF PUBLIC WORKS

vs.MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION
(and thirteen companion cases¹)MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTIONS
FOR SUMMARY JUDGMENT

Plaintiffs, fourteen cities and towns, challenge Department of Environmental Protection ("DEP") conditions on their water withdrawal registration renewals. The towns argue that the DEP does not have authority to issue the conditions. The DEP responds that it does have such authority and also contends that the towns lack standing to bring this suit, because they have not exhausted all administrative remedies provided by the regulations. For the following reasons, this court concludes that the towns are correct and that they are entitled to a declaratory judgment in their favor. Counts for G. L. c. 30A review and for certiorari do not lie and should be dismissed.

¹ Mashpee Water District vs. DEP, Barnstable Superior Court, Civil No. 08-0082; Sandwich Water District vs. DEP, Barnstable Superior Court, Civil No. 08-0081; Fairhaven vs. DEP, Bristol Superior Court, Civil No. 08-0166; Hamilton vs. DEP, Essex Superior Court, Civil No. 08-0191; Lynn Water and Sewer Commission vs. DEP, Essex Superior Court, Civil No. 08-0208; Manchester-by-the-Sea vs. DEP, Essex Superior Court, Civil No. 08-0214; North Reading vs. DEP, Middlesex Superior Court, Civil No. 08-0491; Medfield vs. DEP, Norfolk Superior Court, Civil No. 08-0198; Millis vs. DEP, Norfolk Superior Court, Civil No. 08-0205; Brockton vs. DEP, Plymouth Superior Court, Civil No. 08-0163; Duxbury vs. DEP, Plymouth Superior Court, Civil No. 08-0138; Mattapoisett vs. DEP, Plymouth Superior Court, Civil No. 08-0139

BACKGROUND

I. Statutory and Regulatory Framework

The Massachusetts Water Management Act ("WMA"), G. L. c. 21G, establishes a framework for water planning, management, and conservation. It authorizes the DEP and Water Resources Commission² ("WRC") to adopt regulations necessary to carry out the WMA's purposes.³ In so doing, the WMA creates a system to monitor water withdrawals, defined as the removal or taking of water from a water source. G. L. c. 21G, § 2. The statute delineates two types of withdrawals. An existing withdrawal is the average volume of water withdrawn from a particular water source during the five-year period prior to January 1986. A new withdrawal is any withdrawal that is not an existing withdrawal.

To continue an existing withdrawal in excess of the 100,000 gallon per day threshold volume,⁴ § 5 requires a town⁵ to file a registration statement on or before January 1, 1988.

G. L. c. 21G, § 5; 310 Code Mass. Regs. 36.05. DEP regulations control the proper registration procedure and content.⁶ Existing withdrawals may be renewed according to applicable

² Generally, the Water Resources Commission ("WRC") is responsible for developing, coordinating and overseeing the Commonwealth's water policy and planning activities. See G. L. c. 21A, § 8B; G. L. c. 21G, § 3. The commission is established within the Executive Office of Environmental Affairs.

³ Section 3 provides that WRC policies and regulations "shall be designed to protect the natural environment of the water . . .; to assure comprehensive and systematic planning and management of water withdrawals . . ., recognizing that water is both finite and renewable; and to allow continued and sustainable economic growth . . . [for] the social and economic well being and safety of the commonwealth's citizens and of its work force."

⁴ The DEP may raise or lower the threshold volume by regulation, if necessary.

⁵ The statute applies to any "person" as defined in G. L. c. 21G, § 2. In this case, the only persons are towns.

⁶ Section 6 requires, at a minimum, that a registration include "(1) The use for which the water is being withdrawn; (2) An identification of the water source from which the withdrawal is being made, in sufficient detail to describe the water source adequately; (3) The location of the withdrawal; (4) The existing withdrawal . . . (5) Conservation measures instituted, or to be instituted, by the registrant; and (6) The point or points at which the water is to be discharged

regulations. To this end, § 5 provides:

Upon the expiration of any initial or renewal registration statement under this section, the registrant shall be entitled, upon the filing of a renewal registration statement, to continue existing withdrawals specified in the registration statement for a period of ten years.

The regulations also allow the DEP to request information prior to the filing of a registration statement. According to 310 Code Mass. Regs. 36.08(4),

[t]he registrant shall furnish to the Department within a reasonable time . . . any information which the Department may request to determine whether cause exists for imposing conditions upon or not accepting a registration statement.

This regulation has no parallel or similar provision in the statute.

Rather than registrations, the DEP issues permits for new withdrawals. G. L. c. 21G, § 7; 310 Code Mass. Regs. 36.17(1). A town cannot make a new withdrawal more than the threshold volume without a permit, issued according to DEP regulations. The statute provides ten factors, which, at a minimum, must be considered by the DEP when deciding whether to issue a permit. These include, for example, the impact of the proposed withdrawal on other water sources and the anticipated times of year when withdrawals will be made. Much like registrations, the WMA also lists the specific contents required in a permit application. G. L. c. 21G, § 8. A completed application contains all the information required by the statute and regulations.

The MWA explicitly provides that a permit may be conditioned on certain requirements. According to § 11, the DEP “may attach to any permit whatever conditions it deems necessary to further the purposes of this chapter or to assure compliance with its regulations.” A town may request an adjudicatory hearing before the DEP to review an adverse permit decision. The DEP’s final decision may be appealed to the superior court pursuant to G. L. c. 30A. G. L. c. 21G, § 12;

after use.” Regulation 310 Code Mass. Regs. 36.06 requires similar information to be included.

310 Code Mass. Regs. 36.40.

II. The Facts

The Town of Wellesley⁷ (“Wellesley”) filed a registration statement, pursuant to G. L. c. 21G, § 5, in December 1987, which the DEP acknowledged in September 1988. Wellesley filed a renewal in July 1997, and the DEP renewed the registration until December 2007 on the same terms as the original statement.

Wellesley filed another renewal in December 2007, but this time the DEP conditioned the renewal on compliance with new restrictions taken from a WMA policy adopted by the DEP in April 2004 and supplemented in January 2006. The policy mandated three substantive limitations on water usage: (1) a per capita, per day⁸ residential water use cap of sixty-five gallons for high and medium stress basins and eighty gallons per capita, per day for low stress and unassessed basins; (2) a limit on unaccounted for water of no more than ten per cent for high and medium stress basins and no more than fifteen per cent for low stress and unassessed basins; and (3) a limit on summer water withdrawals.⁹ The third limitation included a requirement that the towns develop a “Seasonal Demand Management Plan.”

⁷ The facts recounted here are specific to Wellesley, but its arguments and underlying factual scenario are applicable to the other plaintiffs. Specific dates and withdrawal amounts vary among the towns; however, those differences would not impact the towns’ case or the outcome of this decision.

⁸ The DEP defines “residential gallons per capita day” as the number of gallons of water used, on average, each day by a resident for purposes such as washing clothes, flushing toilets, showering and lawn watering. It is computed by dividing the total metered residential use by the number of residents served by that system. See “Performance Standards for Public Water Supplies” at the DEP website, www.mass.gov/dep/water/resources/rgpcd06.htm.

⁹ The 2004 Water Management Act Policy is #BRP/DWM/DW/P04-1 (Exhibit A to Wellesley’s Statement of Undisputed Facts). The policy is supplemented by #BRP/DWM/DW/G05-01 (Exhibit B). Both are also available at the DEP website.

While challenging the DEP's authority to condition the renewal, Wellesley, to preserve its appellate rights, filed a timely Notice of Claim of Adjudicatory Proceeding. Plaintiff's Statement of Facts at Exhibit C. On April 14, 2008, the DEP Commissioner issued a "Commissioner's Directive," effectively delaying the administrative appeal. The directive noted that the DEP was in the process of completing guidelines for registration renewals and ordered that all adjudicatory proceedings be stayed for 150 days, directed that after the 150 days, the presiding hearing officer must recommend whether to transfer the appeal to the Division of Administrative Law Appeals, and reserved the right to approve final decisions of the DEP.

Wellesley filed this action along with thirteen other cities and towns. For purposes of summary judgment, this court (Brady, J.) consolidated the cases.

III. Procedural Issues

The plaintiffs seek relief on three theories: (1) judicial review of an administrative decision under G. L. c. 30A; (2) an action in the nature of certiorari under G. L. c. 249, § 4; and (3) a declaratory judgment under G. L. c. 231A.

A. Chapter 30A Review

General Laws c. 30A, § 14 provides an aggrieved party judicial review of a "final decision of any agency in an adjudicatory proceeding." If the decision is not made in an adjudicatory setting, a court will lack jurisdiction to review the decision pursuant to c. 30A, § 14.

Warren v. Hazardous Waste Facility Site Safety Council, 392 Mass. 107, 117 (1984). As defined in G. L. c. 30A, § 1(1), an adjudicatory proceeding is "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing."

The decision to impose the new conditions was not made in an adjudicatory proceeding, as defined by c. 30A. The conditions are adapted from the 2004 Water Management Act policy. That policy was not subject to a hearing or an assertion by the towns of their legal rights. Further, the conditions do not decide any rights “of specifically named persons.” They apply to all persons wishing to renew a withdrawal. For these reasons, c. 30A, § 14 does not give this court jurisdiction to review the DEP’s action.¹⁰

B. Action in the Nature of Certiorari

Certiorari review is limited to the correction of substantial errors of law apparent on the record created before a judicial or quasi-judicial tribunal, St. Botolph Citizens Comm., Inc. v. Boston Redev. Auth., 429 Mass. 1, 7 (1999). To obtain certiorari review, a party must show (1) a judicial or quasi-judicial proceeding; (2) a lack of all other reasonably adequate remedies; and (3) a substantial injury or injustice arising from the proceeding under review.” Warren, 392 Mass. at 117. A hearing not preceded by “specific charges” and not “followed by the adoption of formal findings of fact” is more likely to be regulatory in nature. Id. Review is generally not available for discretionary administrative actions. Sch. Comm. of Harfield v. Bd. of Educ., 372 Mass. 513, 517 (1977).

The DEP did not adopt the relevant policy in the wake of any specific charges brought against the towns. The department had no opportunity to take testimony from witnesses. There

¹⁰ The Town of Hamilton seeks review under G. L. c. 30A, § 7, which provides, “[u]nless an exclusive mode of review is provided by law, judicial review of any regulation . . . may be had through an action for declaratory relief in the manner and to the extent provided under chapter two hundred and thirty-one A.” Section 7, unlike § 14, does not require an adjudicatory hearing. Westfield Housing Corp. v. Commissioner of Ins., 352 Mass. 374, 381 (1967) (“[T]he purpose of § 7 is to negate an inference, which might otherwise be drawn from § 14, that *only* a ‘final decision of any agency in an adjudicatory proceeding’ may be judicially reviewed.”) The question, however, of whether Hamilton is entitled to relief under § 7 does not impact the outcome of this decision. Granting relief simply shifts the issue to whether Hamilton should be given relief under c. 231A. The court addresses that issue directly in the claim for declaratory

was no hearing, at which persons could be cross-examined. The DEP did not make any official findings of fact. Although the DEP did not have the discretion to reject a registration statement, the DEP did not issue the conditions in the context of a judicial or quasi-judicial proceeding. Consequently, certiorari review is unavailable.

C. Declaratory Relief

To obtain declaratory relief in a case involving administrative action, "a plaintiff must show that (1) there is an actual controversy; (2) he has standing; (3) necessary parties have been joined; and (4) available administrative remedies have been exhausted." Villages Dev. Co. v. Secretary of the Executive Office of Env'tl. Affairs, 410 Mass. 100, 106 (1991). A request for a declaratory judgment does not suspend the requirement that a plaintiff exhaust administrative remedies before seeking judicial relief. See Wrentham v. Hous. Appeals Comm., 69 Mass. App. Ct. 449, 456-457 (2007).

Here, the first and third requirements are satisfied. There is an actual controversy over the registration renewals. Without them, the towns will be unable to continue withdrawing water. The cases have been consolidated, and the necessary parties are named in the suit.

"A party has standing when it can allege an injury within the area of concern of the statute or regulatory scheme under which the injurious action has occurred." Massachusetts Ass'n of Indep. Ins. Agents & Brokers, Inc. v. Commissioner of Ins., 373 Mass. 290, 293 (1977). While c. 231A does not independently provide a statutory basis for standing, see Pratt v. Boston, 396 Mass. 37, 42-43 (1985), a party does have standing where its alleged injury "come[s] within the 'zone of interests' arguably protected by [the statute]." Penal Insts. Comm'r for Suffolk County v. Commissioner of Corr., 382 Mass. 527, 532 (1981). After considering the language of the

relief itself.

MWA, the Legislature's intent in enacting the MWA, the structure of the DEP, the effects on the parties if standing is recognized, and the availability of other remedies to the plaintiffs, this court concludes that the towns have standing to seek declaratory relief. Cf. Enos v. Secretary of Env'tl. Affairs, 432 Mass. 132, 135-143 (2000) (no standing to obtain declaratory relief).

"[E]xhaustion cannot be required where no administrative remedy exists." O'Neill v. City Manager of Cambridge, 428 Mass. 257, 260 (1998). The MWA provides no mechanism to review a registration renewal decision, nor does it authorize the DEP to create one. The appeal procedure outlined in G. L. c. 21G, § 12 and 310 Code Mass. Regs. 36.40 applies only to permit applications and additions to existing withdrawals.¹¹ The DEP's reliance on Wilczewski v. Commissioner of the Dep't of Env'tl. Quality Eng'g, 404 Mass. 787 (1989) is misplaced. The court in Wilczewski affirmed the dismissal of an action for failure to exhaust the statutory remedy. Id. at 792-793. The court reviewed in detail "the administrative scheme available to the plaintiffs" and ultimately concluded that the lawsuit was "premature." Id. at 791-793. Unlike the statute in Wilczewski, the WMA does not provide a procedure for reviewing a registration renewal decision. Without an administrative remedy to exhaust, the towns are properly in superior court.

IV. Analysis of the WMA

Critical to the issues of this case is a careful examination of WMA provisions. The statute's meaning is a question of law for the court and is interpreted "according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of

¹¹ Regulation 310 Code Mass. Regs. 36.40 provides, "(1) [a]ny person who is aggrieved by a decision of the Department with respect to any permit application, or an addition to an existing withdrawal may request an adjudicatory hearing before the Department, under the provisions of M. G. L. c. 30A. . . . (5) [and a]ny person aggrieved by a final decision of the Commissioner may seek judicial review of that decision in Superior Court, in accordance with M. G. L. c. 30A."

the language.” Boston Police Patrolmen’s Ass’n, Inc. v. Boston, 435 Mass. 718, 719-720 (2002) (quotations omitted). The court “will not add words to a specific statute that the Legislature did not put there, either by inadvertent omission or by design. Moreover, where the Legislature has employed specific language in one portion of a statute, but not in another, the language will not be implied where it is absent.” Simmons v. Clerk-Magistrate of the Boston Div. of the Hous. Ct. Dep’t, 448 Mass. 57, 64-65 (2006) (citations omitted).

With this in mind, it is apparent that the Legislature chose to treat existing withdrawals differently from new withdrawals.

The registration procedure outlined in § 5 is distinct from the permit procedure outlined in § 7. Neither § 5 nor § 6 allows the DEP to impose conditions on the acceptance of a registration statement. In fact, the terms of the statute do not even call for the department to “accept” a registration. The statute does not require any affirmative action by the DEP or WRC. Rather, it provides that upon filing a renewal statement, “the registrant shall be entitled . . . to continue existing withdrawals . . .” (emphasis added). The statute does not mandate any action, acceptance, or approval. The DEP has no discretion to deny a complete, properly filed renewal application. See Hashimi v. Kalil, 388 Mass. 607, 609 (1983) (shall signals mandatory or imperative obligation); Johnson v. District Att’y for the N. Dist., 342 Mass. 212, 215 (1961) (shall is inconsistent with the idea of discretion).

The DEP’s own guidelines and the statutory history of the WMA suggest that the existing withdrawals were to be “grandfathered” into the WMA scheme. The DEP objects to the term “grandfathered,” but it is used by the DEP itself to explain the purposes of the statute.¹² The

¹² A grandfather provision “creates an exemption from [a] law’s effect for something that existed before the law’s effective date; specif., a statutory or regulatory clause that exempts a class of persons or transactions because of circumstances existing before the new rule or regulation takes

DEP's predecessor, the Department of Environmental Quality Engineering (DEQE), used the word in its "Guidelines for the Registration of Water Withdrawals Under the Water Management Act." See Philip Guerin Affidavit, Ex. B, "Water Management Act, Registration Guidelines, July 1987." Most importantly, the guidelines provide on page 2:

Why should I register: Registration of your "existing withdrawal" (5-year average) serves to document water use and grandfather the rights to this amount of water to the registrant.

The DEQE's own documents show that registered withdrawals and their renewals would not be subject to a rigorous review process, such as the one for permits.¹³ In addition, the guidelines' language suggests the registration process is not a mechanism of enforcement but rather documentation.

Further, § 11 refers only to the issuance of a permit, not the registration of a withdrawal. It provides a non-exclusive list of possible permit conditions. The permit application must be submitted with the required information from § 8 and § 9, and their related regulations, and then the DEP "may issue permits for any new withdrawal . . ." In other words, the DEP uses its discretion when issuing permits, although it cannot deny the permit without justification or reason. See G. L. c. 21G, § 11 ("The department shall make written findings of fact in support of its decision and shall state with specificity the reasons for issuance or denial of the permit . . ."). Issuance of a permit is not mandatory.

effect." Black's Law Dictionary 718 (8th ed. 2004), quoted in *Rourke v. Rothman*, 64 Mass. App. Ct. 599, 599 n.2 (2005), rev'd on other grounds, 448 Mass. 190, 198 (2007).

¹³ The legislative history also supports the towns' position. "The Act's requirement of water withdrawal permits for subsequent new users above the threshold amount would not apply to existing withdrawals of water at the time of its effective date." Report of the Special Commission Established to Make an Investigation and Study Relative to Determining the Adequacy of the Water Supply of the Commonwealth, 1983 Senate Doc. No. 1826, at 7.

V. The Towns' Remaining Arguments

A. Registration Statements Are Not Subject to DEP Conditions

No WMA section explicitly allows conditions on registrations. The statute mandates that upon filing a registration, the registrant shall be entitled to continue the water withdrawal. This is in contrast to § 11, which allows the DEP to “attach to any permit whatever conditions it deems necessary.” A permit requires an application, notice to affected parties, and issuance by the DEP. A registration requires none of these. Additionally, the legislative history and early DEQE documents suggest that the registrations would be “grandfathered” into the WMA scheme and ensuing regulations. Permits were not treated similarly. Finally, the WMA creates a process in § 12 to appeal permit decisions. A similar provision for registrations is absent.

The WMA treats registrations and permits differently. It does not authorize, by its terms or other regulations, the DEP to subject a registration renewal to conditions.

B. DEP Did Not Impose Conditions by Regulation

Even if the DEP could promulgate new conditions on registration renewals, they have done so improperly in this case. The conditions required in the registration renewals are taken from the 2004 Water Management Act Policy and its 2006 supplement. The towns correctly point out that the conditions in the policy are not listed in 310 Code Mass. Regs. 36.08, the regulation listing registration conditions. The statute, however, repeatedly mandates that the DEP act through regulations.

Without a relevant regulation to rely on, the DEP argues that § 6 of the WMA allows it to impose the new conditions. That section lists six items that must be included, at a minimum, in a registration statement. It requires that the statement identify the withdrawal and describe its use and location. No provision authorizes the DEP to set the conditions at issue here.

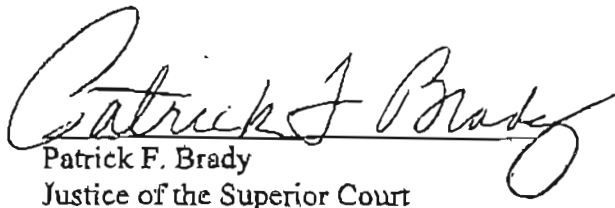
ORDER

The plaintiffs' motions for summary judgment on counts for judicial review under G. L. c. 30A and for certiorari are DENIED. Judgment should enter dismissing these counts.

The plaintiffs' motions for summary judgment on counts for declaratory relief under G. L. c. 231A are ALLOWED.

A declaratory judgment shall enter declaring that the Water Management Act does not authorize the Department of Environmental Protection to condition a withdrawal registration renewal; and that the plaintiffs may file their registration renewals, without condition, with the Department of Environmental Protection.

The parties shall submit a proposed form of judgment to the court no later than December 23, 2008.


Patrick F. Brady
Justice of the Superior Court

DATE: December 10, 2008