

State of New Hampshire
Supreme Court

2008 TERM

MAY SESSION

NO. _____

APPEAL OF SAVE OUR GROUNDWATER
(N.H. DEPARTMENT OF ENVIRONMENTAL SERVICES WATER COUNCIL)

APPEAL BY PETITION PURSUANT TO RSA 541 AND SUPREME COURT RULE 10

PETITION FOR APPEAL

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APPEAL BY PETITION FROM ORDERS OF THE
N.H. DEPARTMENT OF ENVIRONMENTAL SERVICES WATER COUNCIL

Save Our Groundwater hereby appeals to the New Hampshire Supreme Court from an order of the New Hampshire Department of Environmental Services (DES) Water Council which denied it standing in a proceeding regarding approval for bottling of groundwater.

a. PARTIES

Save Our Groundwater (SOG) is a non-profit public interest organization concerned with the quality and management of groundwater resources in New Hampshire. It maintains its headquarters at PO Box 182, Barrington, NH 03825. It is represented in this appeal by Joshua L. Gordon, Esq., 26 S.Main St., #175, Concord, NH 03301, (603)226-4225,www.AppealsLawyer.net. SOG was represented below by Robert A. Backus, Esq., 116 Lowell St, P.O. Box 516, Manchester, NH 03105 (603) 668-7272.

Garrison Place Real Estate Investment Trust (GP-REIT) owns the land in Barrington and Nottingham on which USA Springs, Inc. seeks to install its water extraction and bottling facilities. It is represented in this proceeding by Edward C. Mosca, Esq., Mosca Law Office, 27 Webster St., 2nd Floor, Manchester, NH 03104 (603) 628-3695.

USA Springs, Inc. is a privately-held business seeking to drill wells, mine water, and build a water bottling facility in Barrington and Nottingham. It is not clear from the record whether USA Springs, Inc. is a party to this proceeding; and if it is, by whom it is represented.

The New Hampshire Department of Environmental Services (DES) Water Council, pursuant to RSA 21-O:7, IV, denied standing to SOG in a proceeding involving approval for bottling groundwater. The Water Council is available through Thomas S. Burack, DES

Commissioner, 29 Hazen Dr. PO Box 95, Concord, NH 03302, (603) 271-4974.

The State of New Hampshire is also involved in this matter. It is represented by Richard Head, Assistant Attorney General, Attorney General, 33 Capitol St., Concord, N.H. 03301, (603) 271-3650.

b. DECISIONS AND ORDERS SUBJECT TO APPEAL

This case is captioned:

Appeal of Save Our Groundwater, In Re: 10/25/05 New Sources of Bottled Water Conditional Approval to USA Springs - Design Review #994058, State of New Hampshire Water Council, Docket No. 05-21 WC

- DECISION & ORDER ON NOTICE OF APPEAL (Aug. 22, 2007).
- DECISION & ORDER ON MOTION FOR REHEARING, (Apr. 16, 2008) (copy appended).

c. QUESTIONS PRESENTED FOR REVIEW

1. Did SOG have standing to participate in the procedure in which the DES will consider approving bottling of groundwater by USA Springs, Inc., when members of SOG are in proximity to the wells and the DES-defined zone of influence such that bottling groundwater will have an impact on their land?
2. Did the DES Water Council provide an insufficient explanation of its decision to deny SOG standing?
3. Did the DES deny SOG due process of law when it failed to apprise SOG, by its insufficient explanation, why it found standing lacking?
4. Did DES prejudice SOG and its members, and violate their statutory and constitutional rights to due process and prompt resolutions of disputes by delaying resolution of this matter for nearly two years?
5. Are standing rules liberalized in light of statutory language that encourages citizen participation?

d. CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS IN ISSUE

- N.H. ADMIN.RULES, ENV-Ws 389 (now codified as N.H. ADMIN.RULES, Env-Dw 303)
- N.H. CONST. pt. 1, arts. 14 & 15; U.S. CONST. amds. 5 & 14.
- RSA 485-C

e. OTHER DOCUMENTS

No other documents are necessary for the consideration of this notice of appeal.

f. STATEMENT OF THE CASE

1. Permit to Withdraw and Approval to Bottle Are Intertwined

For a facility desiring to bottle groundwater for sale, two separate items are intertwined:

1) the permit to withdraw groundwater, and 2) the approval to bottle it.

USA Springs, Inc. was granted the first item, a conditional Large Groundwater Withdrawal Permit. *See, In re Town of Nottingham*, 153 N.H. 539 (2006). This case concerns the second item, the permit to bottle the groundwater.

That the two are intertwined can be gleaned from several sources.

First, the rules governing permitting of large groundwater withdrawals repeatedly reference the water bottling rules. *See* N.H. ADMIN.RULES, Env-Ws 388.09(g); Env-Ws 388.10(b)(11); Env-Ws 388.17(e).¹ The rules under which any large groundwater withdrawal

¹The rules governing item one – the withdrawal – are N.H. ADMIN.RULES, Env-Ws 388, *Major Groundwater Withdrawal*. The rules governing item two – the bottling – are N.H. ADMIN.RULES, Part Env-Dw 303, *Groundwater Sources of Bottled Water*. These bottling regulations, however, were recodified during the pendency of this case before DES. At the outset they were designated N.H. ADMIN.RULES, Env-Ws 389, but now contained in N.H. ADMIN.RULES, Env-Dw 303. For the purposes of this pleading, the two designations can be used interchangeably.

permit is granted require compliance with the bottled water rules.²

Second, among the conditions contained in USA Springs, Inc.'s Large Groundwater Withdrawal Permit is:

The permittee shall obtain new source approval for Bottled Water from the Department in accordance with Env-Ws 389 prior to initiating withdrawals at the site for the purpose of bottling water.

LARGE GROUNDWATER WITHDRAWAL PERMIT, No. LGWP-2004-0003, ¶10 (July 1, 2004).

Third, in the *permit* proceeding, SOG raised issues concerning the *bottling* approval. DES at that time demurred ruling on the issue. DES first summarized in italics the issue SOG raised and DES's recommendations, and then presented its ruling:

The applicant has not used its data to refine the wellhead protection area and therefore has not complied with Env-WS 389.15. It is recommended that NH DES find that the applicant has failed to identify the zone of influence sufficiently to identify adverse impacts. Thus, the applicant has not complied with Env WS 389 and therefore this application should be denied.

Because at this time, USA Springs has not requested approval for a new bottled water source in accordance with Env-Ws 389, the Department makes no findings regarding Nottingham's recommendation pertaining to Env-Ws 389.

Large Groundwater Withdrawal Permit No. 2004-003 (July 1, 2004) at 25 (italics in original).

Essentially DES indicated that at the initial *withdrawal* permitting stage, it would not reach issues concerning the not-yet-ripe *bottling* approval.

Fourth, the withdrawal and the bottling are connected logically. Without an approval to bottle, a permit to withdraw would be useless. And without an a permit to withdraw, an approval to bottle would be equally useless.

²Although not relevant here, because bottling water for sale involves health issues in addition to environmental matters, enforcement of the bottled water rules is administratively shared by DES and the Department of Health and Human Services.

For at least these four reasons, the withdrawal permit and the bottling approval are intertwined.

2. Requirements for Approval to Bottle

To be approved for bottling groundwater, an applicant must comply with a list of requirements set forth in the bottling rules. N.H. ADMIN.RULES, Env-Dw 303.04. The rules create several zones to protect the quality of the water to be bottled, including a “wellhead protection area,” N.H. ADMIN.RULES, Env-Dw 303.04, and a zone of influence, the sizes of which are determined based on a hydrogeologic model of the site. N.H. ADMIN.RULES, Env-Dw 303.07 & .08.

3. Being Within the Zones

Being in the “wellhead protection area” involves periodic listing of potential sources of contamination, N.H. ADMIN.RULES, Env-Dw 303.16(a)(1), disclosure of otherwise private information, N.H. ADMIN.RULES, Env-Dw 303.16(a)(2)a, notification of prohibited activities, N.H. ADMIN.RULES, Env-Dw 303.16(a)(2)d, and other requirements. These may be burdensome, may cause stigma concerning one’s land, and may effect property values. There is no concomitant benefit to a landowner being in a zone intended to protect a neighbor’s income-producing pumping and bottling facility.

It is believed that the “wellhead protection area” in the case of USA Springs, Inc., has not yet been conclusively established. It is undisputed, however, that members of SOG are likely to be within it, and an affidavit was provided to DES attesting to members’ proximity.

Moreover, regardless of the protection zones, DES has acknowledged that the groundwater withdrawals will potentially harm the wells of SOG’s members by increasing

contamination, decreasing well water levels, and other short- and long-term effects. As noted, without the bottling approval, exercising the withdrawal permit is highly unlikely.

4. Standing to Participate in New Sources of Bottled Water Approval Process

For at least these reasons, SOG has cognizable interests in the process by which USA Springs, Inc. is seeking approval for bottling groundwater, and a right to provide its input on behalf of its members facing potential adverse impacts to their property.

Nonetheless, without regard to the intertwining of withdrawal and bottling, nor to the facts of SOG's proximity and thus its opportunity to suffer harm, DES found that SOG has no standing to participate in the proceeding. SOG appealed that decision to the Water Council, which affirmed two years later. SOG now appeals to this Court.

g. JURISDICTIONAL BASIS FOR APPEAL

- RSA 21-O:7, IV
- RSA 541:6
- Supreme Court Rule 10(1)(a) & (c)
- *Petition of Hoyt*, 143 N.H. 533 (1999)

h. REASONS WHY THIS APPEAL SHOULD BE ACCEPTED

This appeal should be accepted because SOG and its members have interests in this proceeding. If DES's ruling that SOG does not have standing is maintained, it will infringe landowners' rights to protect the integrity of their land.

i. PRESERVATION

Counsel for SOG hereby certifies that every issue specifically raised has been presented to the administrative agency and has been properly preserved for appellate review by a properly filed pleading.

For the reasons stated, SOG prays that this Court accept this appeal, issue an appropriate order of notice to the New Hampshire Department of Environment, and direct the submittal of briefs and the scheduling of oral argument in the ordinary course of Supreme Court business.

Respectfully submitted,
Save Our Groundwater,
By its Attorney,

Dated: May 16, 2008

Joshua L. Gordon, Esq.
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CERTIFICATION

I hereby certify that, in accordance with Supreme Court Rules 10(8) and 26(2), copies of this Appeal by Petition have been served on all parties noted in section a. of this Petition.

Dated: May 16, 2008

Joshua L. Gordon, Esq.

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