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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1439-15T4
A-1442-15T1
A-1917-15T1

CHEMISTRY COUNCIL OF
NEW JERSEY,

Appellant,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

SOLVAY SPECIALTY POLYMERS USA, LLC,

Appellant,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

ARKEMA INC.

Appellant,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Respondent.

Argued December 7, 2016 – Decided December 19, 2017

Before Judges Fuentes, Carroll and Gooden
Brown.

On appeal from New Jersey Department of
Environmental Protection.

Cristina Stummer argued the cause for
appellant Chemistry Council of New Jersey
(Saul Ewing LLP, attorneys; Steven J. Picco
and Christina Stummer, of counsel and on the
brief).

Christopher M. Roe argued the cause for
appellant Solvay Specialty Polymers USA, LLC
(Fox Rothschild LLP, attorneys; Christopher M.
Roe, Kenneth H. Mack and Jonathan D. Weiner,
of counsel and on the brief; Victoria W.
Hollinger, on the brief).

Glenn A. Harris argued the cause for appellant
Arkema Inc. (Ballard Spahr LLP, attorneys;
Glenn A. Harris, on the brief).

Timothy P. Malone, Deputy Attorney General,
argued the cause for respondent (Christopher
S. Porrino, Attorney General, attorney;
Melissa H. Raksa, Assistant Attorney General,
of counsel; Timothy P. Malone and John P.
Kuehne, Deputy Attorney General, on the
brief).

Martha N. Donovan argued the cause for amicus
curiae FluoroCouncil (Norris McLaughlin &
Marcus, PA, attorneys; Martha N. Donovan and

Jessica L. Palmer, of counsel and on the brief).

The opinion of the court was delivered by
FUENTES, P.J.A.D.

On the afternoon of November 25, 2015, the day before Thanksgiving, the New Jersey Department of Environmental Protection (DEP) posted on its website "Interim Specific Ground Water Quality Criteria" (ISGWQC) for a "toxic" substance named perfluorononanoic acid (PFNA). The DEP describes PFNA as "a perfluorinated compound (PFC) with harmful human health effects[.]" The DEP claims it took this action under the authority codified in N.J.A.C. 7:9C-1.7(c), in response to the discovery of PFNA in ground water.

In these three related appeals, which we now consolidate for the purpose of this opinion, plaintiffs Chemistry Council of New Jersey, Solvay Specialty Polymers USA, LLC, and Arkema Inc., challenge the DEP's authority to issue the interim criteria that support this action. Plaintiffs argue the DEP's reliance on N.J.A.C. 7:9C-1.7(c)(2) for authority to take this action constitutes an ultra vires "rule-making short-cut" in violation of the Administrative Procedure Act (APA), N.J.S.A. 52:14B-3, 4, 4.9 to -5, and the statutes governing this State agency. Even if we were to find N.J.A.C. 7:9C-1.7(c)(2) authorizes the DEP to take

these interim measures, plaintiffs argue the approach adopted by the DEP here did not follow the rule. Finally, plaintiffs argue the ISGWQC adopted by the DEP for PFNA was arbitrary, capricious, and unreasonable because it is not supported by credible scientific evidence.

Amicus Curie FluoroCouncil (Council) is a global organization administered by the American Chemistry Council. It claims to represent "the world's leading manufacturers of fluoropolymers, fluotelomers and other fluorinated surfactants and surface property modification agents (fluorotechnology)." The Council also argues that the remediation approach adopted by the DEP is not scientifically sound and thus legally unenforceable.

After carefully reviewing the record before us and considering the arguments presented by the parties, we are satisfied that the ISGWQC have acquired a permanency which is facially inconsistent with the "interim" authority conferred to the DEP under N.J.A.C. 7:9C-1.7(c)(2). As judges, we are not in position to determine the scientific validity of these measures. Our conclusion here is based on well-settled principles of statutory construction in the context of administrative law. We will thus limit our factual recitation to the following undisputed procedural events.

On January 17, 2014, the DEP alerted the Borough of Paulsboro that it had discovered concentrations of PFNA at a level of 150 parts per trillion in the Borough's supply of potable water. A Technical Support Document dated June 24, 2014, prepared by the DEP Office of Science and authored by Dr. Gloria B. Post, revealed the presence of PFNA in certain public drinking water sources five years earlier in 2009. The study found 0.96 ppb (parts per billion) of PFNA in a municipal well "at a public water supply well (Paulsboro Water Department)" located two miles from Solvay's plant in the Township of West Deptford, Gloucester County. The DEP did not notify the public or Solvay of this sampling study in 2009.

In a letter dated January 17, 2014, addressed to the Paulsboro Water Department and copied to the Borough's Mayor and another individual identified only as "Site Remediation Program," the DEP's Assistant Director of Water Supply Operations made the following statement:

As you are aware, sampling of Paulsboro Water Department's water system for perfluorinated compounds (PFC) has been conducted by the New Jersey Department of Environmental Protection (Department), Paulsboro Water Department (Paulsboro), and Solvay Specialty Polymers (Solvay). One of those compounds, perfluorononanoic acid (PFNA), has been detected at levels of up to 150 parts per

trillion in Well #7. While PFCs are considered to be emerging contaminants and there is currently no drinking water standard or guidance level for PFNA, the Department believes the concentrations found at Paulsboro's Well #7 warrant actions.

The Department understands that it is currently necessary for Paulsboro to operate Well #7 because Paulsboro's other primary well, Well #8, is offline while treatment for radium is upgraded, and that Well #8 is expected to be online in March 2014. We also recognize that PFCs have been detected in Well #8 but at significantly lower levels.

In order to address community concerns with reports of PFNA in the water supply, we have prepared the enclosed Fact Sheet to use for your communications with the public. While using Well #7, to ensure an abundance of caution, we recommend for the most sensitive population, infants and children up to age one, that bottled water or liquid prepared formula be used, including use of bottled water when preparing powdered or concentrate formula.

The Department would like to work closely together with Paulsboro and Solvay to facilitate a simple remedy to reduce concentrations of PFNA in their water system, assist in communications with the public, and determine the need for the provision of bottled water as appropriate. Toward that end, I will be contacting you shortly to further discuss these matters.

On March 14, 2014, the DEP posted on its website a draft ISGWQC for PFNA of 0.02 ppb, the equivalent of 20 parts per trillion. The DEP posted an updated Draft of Technical Support on April 17, 2014, which included six "focus questions" seeking

public input on the draft ISGWQC. Appellants claim that this Draft was not scientifically sound because the author had not submitted her methodology, data, and conclusion to peer review. Once again we emphasize that, as appellate judges, we are not competent to determine the scientific validity of the approach adopted by the DEP. However, from a legal perspective, we note that DEP did not publish a notice of proposed rulemaking or the text of the March 2014 TSD in the New Jersey Register.

Despite this omission, Solvay submitted comments and objections to the draft in a letter dated May 1, 2014, authored by its attorneys. Solvay's counsel argued that the proposed ISGWQC "would violate the New Jersey Administrative Procedures Act." Specifically, counsel made the following request:

If the Department feels that the setting of a ground water criterion for PFNA is essential, and the Department believes that the science exists upon which the Department can reliably set such a criterion, Solvay respectfully requests that the Department invoke a process that fully complies with the APA, the enabling environmental statutes, and its own rules. Doing so would allow the public and interested parties to meaningfully participate and add credibility to the outcome.

The DEP did not heed this request. The interim criteria posted on its website in March 2014 remained. On April 9, 2015, the DEP, acting in conjunction with the Drinking Water Quality Institute (DWQI) lowered the Target Human Serum Level established

in March 2014 from 17 ppb to 5.2 ppb. Once again this action was announced to the public and the affected parties via a draft ISGWQC for PFNA posted on the Department's website. This cut the original proposal from 0.02 ppb to 0.01 ppb. The Department relied on the same scientific study. The DEP limited the public's response to the April 9, 2015 interim criteria to four questions addressing whether the public possessed technical information relevant to "the choice of uncertainty factors" and to the "choice of Relative Source Contribution factor."

Appellants responded to the DEP's questions. Their responses challenged the scientific validity of the data and methodology used to reach the conclusions of the Department. In a document dated June 24, 2015, the DEP posted on its website a "Response Summary to the Requests for Public Input." This posting was done without any advance notice to the public and its legal consequences were immediately effective. Although the Department did not promulgate regulations to identify PFNA as a "hazardous substance," the PFNA ISGWQC is incorporated by reference as "minimum ground water remediation standards." This required the ground water to conform to a level of PFNA below 0.01 ppb.¹

¹ N.J.A.C. 7:26D-2.2(a)(1) sets the minimum remediation standards to which ground water shall be remediated pursuant to N.J.A.C. 7:9C-1.7(c) and (d).

The DEP did not publish these standards in the New Jersey Register. In addition to a posting on its website, on November 30, 2015, the DEP sent email notice to a select segment of the regulated community and licensed site remediation professionals. According to Solvay, no laboratory located in this State is certified to analyze water for PFNA to the level required by these interim criteria. In fact, Solvay claims that there are only four laboratories certified to do this type of work in the continent of North America. Since the issuance of the ISGWQC for PFNA, the Department has identified fifty wells that exceed the ISGWQC for PFNA. These wells are located over a three-county area, spanning forty-one miles.²

II

Appellants argue that the DEP adopted the ISGWQC for PFNA in violation of the rule-making procedures required under the APA and applicable statutes. They also challenge as arbitrary and capricious the calculations and scientific methodology adopted by the DEP to reach its conclusion. Appellants also argue that the interim criteria violate the Brownfield and Contaminated Site Remediation Act. Amicus Curiae, FluroCouncil, takes issue with the scientific methodology used by the DEP to establish the ISGWQC

² Pursuant to N.J.A.C. 7:26E-1.11, immediate remediation is required under the Site Remediation Standards.

for PFNA. It claims that the remediation standards established by the DEP are "nearly impossible" to uphold by the regulated community.

In response, the DEP argues that the use of interim specific criterion for PFNA is in accordance with the APA and applicable statutes. The DEP maintains that the equation and scientific methodology it used to establish PFNA interim criteria are reasonable, supported by substantial evidence in the record, and in accordance with N.J.A.C. 7:9C-1.7(c)(4). In support of this latter argument, the DEP emphasizes that this regulation enables the DEP to recognize and promptly respond to new constituents which pose a threat to public health. Thus, the use of the interim criteria at issue here "provides more certainty to the regulated community engaging in cleanup, prior to formal adoption of a specific criterion in the rule's appendix."

The DEP also argues it went beyond what is required under N.J.A.C. 7:9C-1.7(c)(4) when it provided "significant and repeated opportunity for public participation" by soliciting comments on its website and considering the responses "to certain questions from interested parties on multiple occasions." On September 2015, the DEP received a "Petition for Rulemaking." In response, it "noted its intent to initiate a stakeholder process in 2016 to determine whether Ground Water Quality Standards should be

updated." Finally, in the brief filed in this appeal, the DEP noted it "intends to move forward with this process and to formally adopt interim specific criteria, including PFNA, as specific criteria in the coming months."

An administrative agency's authority to act is subject to the due process requirements of the APA, which defines a "rule" as

[E]ach agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intra-agency and inter-agency statements; and (3) agency decisions and findings in contested cases.

[N.J.S.A. 52:14B-2.]

When issuing new rules and regulations, an administrative agency must "proceed in accordance with traditional rulemaking requirements for a rule proposal, including provision of notice and an opportunity to comment." I/M/O Provision of Basic Generation Serv., 205 N.J. 339, 349 (2011). The APA defines an "administrative rule" to include an "agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." N.J.S.A. 52:14B-2.

This appeal turns on whether the ISGWQC adopted by the DEP for PFNA falls under N.J.A.C. 7:9C-1.7(c)(2)(ii), which provides as follows:

(c) Ground water quality criteria for Class II-A areas are established as follows:

. . . .

2. The Department may establish an interim specific criterion, pursuant to (c)3 below, for a constituent not listed in Appendix Table 1.

. . . .

ii. Interim specific criteria shall be replaced with specific criteria as soon as reasonably possible by rule.

[Emphasis added.]

The ISGWQC for PFNA adopted by the DEP as an "interim criteria" was posted on the Department's website on March 14, 2014. As far as we know, these interim measures remain in effect more than three years after they were first posted on the website. Whether this approach constitutes a valid exercise of the authority provided in the regulation or constitutes an invalid agency action in violation of the requirements of the APA is a judicial determination.

In making this determination, we must apply the multi-factor analysis the Court established in Metromedia, Inc. v. Div. of Taxation, 97 N.J. 313 (1984):

[A]n agency determination must be considered an administrative rule . . . if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

[Id. at 331-32]

However, not all of these factors need to be present for an agency action to be considered to constitute an administrative rule. Id. at 332. The salient facts in the Court's decision in University Cottage Club of Princeton v. Dep't of Env'tl. Prot., 191 N.J. 38 (2007), provide a blueprint of how to determine whether an agency's action constitutes rule making under Metromedia. In University Cottage Club the Commissioner of the DEP based his decision to deny the plaintiff's certification as a tax-exempt historic site based "on an intention to promulgate more stringent

rules governing public access to such sites[.]" Id. at 41. Despite the absence of duly promulgated regulations, the Commissioner decided, in the interim, "to deny all applications that did not meet 'objectively reasonable standards of public accessibility.'" Ibid. This court affirmed the Commissioner's decision. Ibid. The Supreme Court reversed. Ibid.

Writing for the Court, Justice Long identified the particular defects of the Commissioner's decision under the Metromedia paradigm:

Here, the Commissioner's decision to reject what he had previously declared to be the applicable twelve-day public-access standard pending promulgation of his new and more stringent access requirement and to deny all pending applications that did not meet undisclosed "objectively reasonable standards" has all of the earmarks of rule-making. Plainly, the new scheme was intended to apply generally and uniformly to all similarly situated persons. Further, it was intended as a statement of an administrative position that had not been previously expressed, constituting a material change from a clear, past agency position on the subject. It was also intended to prescribe a standard, not clearly inferable from the enabling legislation, and was, in form and effect, a decision on administrative regulatory policy.

[Id. at 54-55 (emphasis added).]

The ISGWGC also has all the "earmarks of rule-making." It is a new standard for water quality, intended to apply universally, uniformly, and prospectively to the regulated community. The

record also supports the applicability of the fifth Metromedia factor. Although ISGWQC for PFNA has been potentially subject to the interim generic criterion of ppb as a synthetic organic chemical,³ this is the first time the DEP has singled out PFNA as a constituent of ground water requiring attention. Furthermore, the ISGWQC is, in form and effect, "a decision on administrative regulatory policy." University Cottage Club, 191 N.J. at 55.

N.J.A.C. 7:9C-1.7(c)(2)(ii) expressly limits the DEP's authority to establish "specific criteria" with the expectation that they "shall be replaced with specific criteria as soon as reasonably possible by rule." (Emphasis added). The record here shows that these interim criteria have become de facto a permanent regulatory scheme without the agency complying with the requirements of the APA. As such, these measures are declared invalid.

However, the public interest requires that we give the DEP a reasonable opportunity to either initiate the process of complying with the APA or seek Supreme Court review of our decision. We therefore stay the implementation of this decision for thirty days to permit the DEP to file a petition for certification to the Supreme Court or a formal notice to this court that it has decided

³ N.J.A.C. 7:9C-1.7(c)(6)

to start the process of compliance with the APA. In light of this decision, we decline to address the remaining arguments raised by appellants attacking the actions taken by the DEP.

Reversed and remanded.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION