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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1461-21

EMPOWERNJ, BLUEWAVENJ, CLEAN WATER ACTIONNJ, DELAWARE RIVERKEEPER NETWORK, DON'T GAS THE MEADOWLANDS COALITION, and FOOD & WATER WATCH,

Plaintiffs-Appellants,

v.

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Defendant-Respondent.

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Argued March 1, 2023 – Decided August 7, 2023

Before Judges Mayer, Enright and Bishop-Thompson.

On appeal from the New Jersey Department of Environmental Protection.

John H. Reichman argued the cause for appellants (John Reichman Law LLC, attorneys; John H. Reichman, on the briefs).

Nicolas G. Seminoff, Deputy Attorney General, argued the cause for respondent (Matthew J. Platkin, Attorney General, attorney; Sookie Bae-Park, Assistant Attorney General, of counsel and on the brief; Nicolas G. Seminoff, on the brief).

PER CURIAM

Petitioners, representing a coalition of environmental and community organizations in New Jersey, appeal from the December 14, 2021 final agency decision of the Commissioner of the Department of Environmental Protection (DEP) denying their petition for rulemaking under N.J.S.A. 52:14B-4(f) and N.J.A.C. 7:1D-1.1. They argue the Global Warming Response Act (GWRA), N.J.S.A. 26:2C-37 to -68, requires the DEP to adopt rules and regulations establishing interim benchmarks approaching the GWRA's limit on greenhouse gas (GHG) emissions and setting certain restrictions on fossil fuel infrastructure projects. We disagree, and for the reasons that follow, we affirm the decision of the DEP.

I.

Our analysis of this appeal first requires a preliminary discussion of the GWRA and the State's overall regulatory scheme to address and reduce emissions.

A. Statutory and Regulatory Background

The GWRA was first enacted in 2007 and established two GHG emission goals. The first GWRA goal was to reduce GHG emissions to 1990 levels by 2020, referred to as the "20x20 goal." The second GWRA was to reduce Statewide GHG emissions to eighty percent below 2006 levels by 2050, referred to as the "80x50 goal," also known as the "2050 limit." N.J.S.A. 26:2C-38 to -39.

In 2019, the Legislature amended the GWRA. The Legislature's updated findings and declarations included a requirement that the State develop a "comprehensive strategy to reduce" emissions known as short-lived climate pollutants, such as black carbon and methane. L. 2019, c. 197, § 1 (codified as amended at N.J.S.A. 26:2C-38). The amendments also required DEP to "prepare a report recommending the measures necessary to reduce [GHG] emissions, including short-lived climate pollutants, to achieve the 2050 limit" (Report) within twelve months of the effective date of the amendments. L. 2019, c. 197, § 4 (codified as amended at N.J.S.A. 26:2C-42(c)). Relevantly, within eighteen months of issuing the Report, the amendments stated DEP "shall adopt . . . rules and regulations establishing interim benchmarks necessary to achieve the 2050 limit, and measures necessary to achieve the 2050 limit and the established

interim benchmarks." L. 2019, c. 197, § 3 (codified as amended at N.J.S.A. 26:2C-41(d)).

On October 15, 2021, DEP published the Report which conveyed the limitations of existing State legislation, policies, and programs in reaching the 2050 limit and provided detailed recommendations spanning eight distinct emissions sectors for policymakers to consider in formulating legislation, rules, policies, and programs to ensure that New Jersey achieves the 2050 limit. In the Report, the DEP recommended various measures to meet the 2050 limit, including interim goals for 2030 and 2035, consistent with the 2019 Energy Master Plan (2019 EMP) as required by N.J.S.A. 26:2C-42(c). The Report identified three emissions reduction pathways with established timelines and targets towards achieving the State's goals. The Report also noted those measures required action by other State agencies.

B. Rulemaking Petition

On July 21, 2021, petitioners sought rulemaking by the DEP under N.J.S.A. 52:14B-4(f) and N.J.A.C. 7:1D-1.1. Specifically, they requested DEP "adopt rules that set a [fifty percent] collective GHG reduction target by 2030 from 2005 levels and implement how that reduction is to be achieved" (Benchmarks Rulemaking). They also requested rules "restricting the issuance

of operating permits for new fossil fuel infrastructure projects, and stopping public forest logging programs" (Projects Rulemaking). The Projects Rulemaking would require any parties pursuing fossil fuel projects to certify:

> i) the 2030 GHG reduction target, interim benchmarks and the 2050 clean energy standards can be met if the facility is constructed and operates; ii) there are no renewable energy alternatives to provide the energy the project would produce; and iii) New Jersey's energy requirements cannot be met by any other means, including through energy efficiency measures.

On September 7, 2021, DEP published notice of receipt of the petition. 53 N.J.R. 1529(b).

C. Executive Order No. 274

On November 10, 2021, Governor Philip D. Murphy signed Executive Order No. 274 (EO274). EO274 established the policy goal "to reduce [GHG] emissions to [fifty] percent below 2006 levels by the year 2030" and tasked the Office of Climate Action and the Green Economy with coordinating the implementation of the "objectives and strategies" in the Report. EO274 also provided:

> Nothing in this Order shall be construed to confer any legal rights upon entities whose activities are regulated by State entities, nothing shall be construed to create a private right of action on behalf of any such regulated entities, and nothing shall be used as a basis for legal challenges to rules, approvals, permits, licenses, or

> other action or inaction by a State entity. Nothing in this Order shall be construed to supersede any federal, State, or local law.

D. Commissioner's Decision

On December 14, 2021, the DEP issued a written denial of the petition (Denial). In denying their request to codify interim benchmarks as a department rule, DEP determined the agency "fulfilled the Legislature's direction in the 2007 GWRA, N.J.S.A. 26:2C-42, to prepare a report recommending measures necessary to achieve the [2050 limit]." The DEP explained that in October 2020, DEP delivered the Report "to the Legislature, identif[ied] the limitations of existing legislation, policies, and programs in achieving the [2050 limit] and provid[ed] detailed recommendations for bridging the resulting emissions reductions gap." The DEP further explained "the 2019 GWRA amendments effectively directed the [DEP] to prepare the [Report] recommending policy actions while simultaneously adopting rules to facilitate their implementation. According to the DEP, the agency complied with the statutory directive and "worked on parallel tracks to advance the long-term directional policy planning (in the form of the [Report]) and commence[d] the first phase of the [Climate Pollutant Reduction] rule."

Additionally, the DEP interpreted N.J.S.A. 26:2C-41(d) as giving the agency discretion to first determine whether interim benchmarks "as a matter of regulation [was] a prerequisite to achieving the [2050 limit]." The DEP stated the Legislature used the phrase "any established interim benchmarks" in N.J.S.A. 26:2C-42(c) and "any interim limits" in N.J.S.A. 26:2C-41(b)(3), which gave DEP the discretion to promulgate interim benchmarks by rule. Finding the State had achieved its interim goals identified in the 2050 limit based on the DEP's and other State agencies' rulemaking and reporting requirements, the DEP deemed petitioners' proposed regulations unnecessary, and rejected their argument for Benchmarks Rulemaking. The DEP concluded that "the [Report], 2019 EMP, and any updates thereto, . . . represent[ed] appropriate and effective vehicles for establishing any interim benchmarks, as these directional policy supports '[were] designed to be living documents to be continually reassessed, remodeled, and reprioritized as early objectives are achieved and newly emerging pathways mature.'"

The DEP similarly rejected petitioners' argument for the Projects Rulemaking after concluding it would be "impractical" for the DEP to undertake the requested "broad" rulemaking to "categorically limit fossil fuel project development in the State." The decision stated the DEP would "continue and

accelerate its efforts to establish regulations, policies, and programs intended to reduce the emissions of climate pollutants consistent with Executive Orders, and in further coordination with the Governor's Office of Climate Action and the Green Economy, as well as other State, local and non-government actors." The DEP cited to the proposed Advanced Clean Trucks and Fleet Reporting Rule (ACT Rules), 53 N.J.R. 588(a), published in October 2020 that required manufacturers of vehicles over 8,500 pounds gross vehicle weight rating to participate in a credit/deficit program intended to increase the percentage of zero-emission vehicles sold in New Jersey. ACT Rules also included a one-time reporting requirement which allowed the DEP to obtain information that would inform future decisions concerning further emission reductions from the transportation industry.

Similarly, in June 2021, the DEP published proposed GHG Monitoring and Reporting rules, 53 N.J.R. 1063(a), to add a reporting threshold for methane that also required natural gas public utilities to report information about their distribution pipelines in the State. The DEP stated the methane reporting in addition to the agency's emissions inventory which had been published since 2008, would assist the State's efforts to mitigate climate change.

Lastly, in December 2021, the DEP published proposed rules on the Control and Prohibition of Carbon Dioxide emissions, to reduce carbon dioxide emissions from: (1) fossil fuel-fired electric generating units through the application of emission limits; (2) certain commercial and industrial fossil fuel-fired boilers based upon additional permit requirements; and (3) No. 4 and No. 6 fuel oil by banning its sale and use. Citing to the Report, the DEP stated those proposed rules for adoption were intended to "implement[] measures necessary to achieve the 2050 limit." 53 N.J.R. 1945(a).

In its decision, the DEP stated an intention to propose additional rulemakings in 2022 and going forward in the agency's "continuing work to reduce emissions of climate pollutants and thereby limit the risk of worsening climate impacts upon the State, its communities, residents, and businesses." The DEP also expressed it would issue a broader plan that would "set the course for further policy and program change—including actions [that] may not require rulemaking—for the express purposes of implementing the strategies of the [Report] and 2019 EMP."

II.

On appeal, petitioners argue the DEP was required to adopt rules setting interim benchmarks and implementing measures, and the failure to do so was unreasonable. We find petitioners' contentions unavailing.

A. Scope of Review

Our review of an agency's denial of a rulemaking petition is generally limited to determining whether the agency's inaction is "arbitrary, capricious, unreasonable, or beyond the agencies delegated powers." In re State Bd. of Educ.'s Denial of Petition to Adopt Reguls. Implementing N.J. High Sch. Voter Registration Law, 422 N.J. Super. 521, 531-32 (App. Div. 2011) (citing In re Amendment of N.J.A.C. 8:31B-3.31 and N.J.A.C. 8:31B-3.51, 119 N.J. 531, 544 (1990)). "Administrative agency actions are presumed to be valid if they are within the statutory authority delegated to the agency, and the burden is on the party challenging the agency action to overcome this presumption." Coal. for Quality Health Care v. N.J. Dep't of Banking & Ins., 348 N.J. Super. 272, 301 (App. Div. 2002) (citing Hills Dev. Co. v. Bernards Twp. in Somerset Cnty., 103 N.J. 1, 45 (1986)).

"[W]e must give great deference to an agency's interpretation and implementation of its rules enforcing the statutes for which it is responsible."

In re Freshwater Wetlands Prot. Act Rules, 180 N.J. 478, 488-89 (2004) (citing In re Distrib. of Liquid Assets, 168 N.J. 1, 10-11 (2001)). "Such deference is appropriate because . . . 'agencies have the specialized expertise necessary to enact regulations dealing with technical matters and are particularly well equipped to read . . . and to evaluate the factual and technical issues that . . . rulemaking would invite.'" Id. at 489 (second internal quotation marks omitted) (quoting N.J. State League of Muns. v. Dep't of Cmty. Affs., 158 N.J. 211, 222 (1999)); see also Equitable Life Mortg. & Realty Invs. v. N.J. Div. of Tax'n, 151 N.J. Super. 232, 238 (App. Div. 1977) ("Agency rule-making is not a ministerial function but rather a highly discretionary undertaking."). "Courts can intervene only in those rare circumstances in which it is clear that the agency action is inconsistent with its mandate." In re Petitions for Rulemaking, N.J.A.C. 10:82-1.2 & 10:85-4.1, 117 N.J. 311, 325 (1989).

The primary goal of a court reviewing the interpretation of a statute is to effect the Legislature's intent. DiProspero v. Penn, 183 N.J. 477, 492-93 (2005) (citing Frugis v. Bracigliano, 177 N.J. 250, 280 (2003)). "[G]enerally, the best indicator of that intent is the statutory language." Ibid. Accordingly, the analysis "begins with the plain language of the statute." Ibid. (citing Miah v. Ahmed, 179 N.J. 511, 520 (2004)). We read a statute in light of its text's

"ordinary meaning and significance" and "in context with related provisions so as to give sense to the legislation as a whole." Ibid. (citing Lane v. Holderman, 23 N.J. 304, 313 (1957), and Chasin v. Montclair State Univ., 159 N.J. 418, 426-27 (1999)). We utilize extrinsic evidence "if a plain reading of the statute leads to an absurd result or if the overall statutory scheme is at odds with the plain language." Ibid. (citing Hubbard ex rel. Hubbard v. Reed, 168 N.J. 387, 392-93 (2001)). Extrinsic evidence includes "legislative history, committee reports, and contemporaneous construction." Ibid. (citing Cherry Hill Manor Assocs. v. Faugno, 182 N.J. 64, 75 (2004) (internal quotation marks omitted)).

B. Interim Benchmarks and Proposed Rulemaking

At the heart of petitioners' contention is whether the Legislature itself found interim benchmarks necessary, or whether it intended to commit such a finding to DEP's discretion. Petitioners contend DEP reads the statute to mean "if necessary" or "as necessary." On the other hand, DEP argues N.J.S.A. 26:2C-42(c) refers to "any" interim benchmarks, which DEP suggests conditions its rulemaking on DEP's discretionary determination of necessity.

We reject petitioner contention that DEP reads the statute to mean "if necessary" or "as necessary," and find it contrary to the plain text. We conclude, because N.J.S.A. 26:2C-42(c) refers to "any" interim benchmarks, the

Legislature granted DEP the discretion to condition its rulemaking on a determination of necessity. In reviewing the legislative findings, we conclude a gap in the statutory scheme of GWRA was reasonably filled by the DEP.

Our Supreme Court finds it "fundamental that a section of a statute should not be read in isolation from the context of the whole act . . . ." Waterfront Comm'n of N.Y. Harbor v. Mercedes-Benz of N.A., Inc., 99 N.J. 402, 414 (quoting Richards v. United States, 369 U.S. 1, 11 (1962)); accord Dugan v. Camden Cnty. Clerk's Office, 376 N.J. Super. 271, 277 (App. Div. 2005). Additionally, N.J.S.A. 26:2C-41(d) states the DEP "shall adopt . . . rules and regulations establishing interim benchmarks necessary to achieve the 2050 limit and measures necessary to achieve the 2050 limit and the established interim benchmarks."

We interpret "interim benchmarks" with reference to the 2050 limit. It is a maxim of statutory construction that "'a word is known from its associates.'" Sealed Air Corp. v. Royal Indem. Co., 404 N.J. Super. 363, 380 (App. Div. 2008) (quoting Bertrand v. Jones, 58 N.J. Super. 273, 283 (App. Div. 1959)). N.J.S.A. 26:2C-41(d) and -42(c) expressly pair the 2050 limit with "interim benchmarks." Further, N.J.S.A. 26:2C-38 includes the Legislature's affirmative findings that "steps," "specific actions," and thus, "measures" are necessary and

must be taken, and later requires the codification of these measures into rules and regulations by DEP. On the other hand, where the legislative findings specify the 2050 limit, they do not specify any interim benchmarks. Cf. N.J.S.A. 26:2C-38. We interpret these "steps" and "specific actions" to relate to the "measures" referenced in the 2007 version of the GWRA, L. 2007, c. 112, § 6, and again in the 2019 amendments, L. 2019, c. 197, § 3. Thus, "steps" and "specific actions" refer to the "measures necessary to achieve the 2050 limit," while "interim benchmarks" are similar in kind to the 2050 limit specified by the Legislature.

Consequently, we must examine whether the Legislature intended to commit a finding of necessity to the discretion of DEP. See In re State Bd. of Educ.'s Denial, 422 N.J. Super. at 533 ("Our analysis therefore hinges, to some degree, upon identifying who makes (or has made) the determination of "necessity" for regulations under the [relevant statute]: the Legislature or the agency.). Reading N.J.S.A. 26:2C-41(d) in the context of the whole GWRA, we are satisfied DEP reasonably interpreted the statute to find it had discretion to make a finding of necessity with respect to establishing interim benchmarks.

Critically, we center our discussion on N.J.S.A. 26:2C-38, and find a gap in the legislative findings where the Legislature declined to specify any interim

benchmarks. The Legislature found "if steps are not taken to reverse" global warming trends, the results would be "catastrophic" and "as a State, there are specific actions that can be taken to attack the problem of global warming." N.J.S.A. 26:2C-38. Accordingly, the GWRA neatly pairs its findings that "steps" are required to reverse global warming, "solutions exist" to do so, and "specific actions . . . can be taken" to combat global warming, with a clear requirement that DEP adopt rules and regulations "implementing measures necessary to achieve the 2050 limit." N.J.S.A. 26:2C-41(d). Therefore, we discern no gap in those parts of the statute. Further, we note while the Legislature specified the 2050 limit, it did not specify any interim benchmarks, which resulted in a gap.

We also reject petitioners' contention that this reading of the statute would rewrite it to mean the DEP shall adopt rules "if necessary" or "as necessary." In fact, petitioners refer to several statutes where the Legislature uses these phrases. See, e.g., N.J.S.A. 13:1E-99.28b; N.J.S.A. 40:55D-66:16; N.J.S.A. 58:10A-37.17(b); and N.J.S.A. 4:1C-32.5(b). Petitioners also question the meaning of "shall" in the statute. However, we determine the meanings of the terms "necessary" and "shall" are not dispositive. As we have noted, "shall" generally conveys a mandatory meaning. In re State Bd. of Educ.'s Denial, 422

N.J. Super. at 532. But where "shall" merely "relates to the form and manner in which the law is to be carried out," it "conveys only a suggestion that something be done," called a "directory" meaning. Ibid. (citing N.J. Educ. Ass'n v. State, 412 N.J. Super. 192, 213 (App. Div. 2010)). We have previously noted "the use of the term 'shall' is arguably tempered by an ensuing phrase in the same sentence of the provision[] [stating the regulations are] 'necessary to implement the provisions of this act.'" Id. at 533.

Here, the GWRA contains very similar language, noting DEP "shall adopt . . . interim benchmarks necessary to achieve the 2050 limit." N.J.S.A. 26:2C-38 (emphasis added). As we have stated, however, the gap the DEP filled in the statutory scheme related to the legislative findings which did not specify any interim benchmarks or any determination that such benchmarks were necessary. Thus, the meanings of "shall" and "necessary" do not alter our conclusion. We also discern no ambiguity in N.J.S.A. 26:2C-41(d) and -42(c), so we need not determine whether "shall" is directory or mandatory in section -41(d). Accordingly, we conclude petitioners have not met their burden to show DEP acted arbitrarily, capriciously, or unreasonably.

Further, the statutes relied upon by petitioners in of their argument are not before us, and therefore, we take no position on how to interpret those statutes.

Our role is not to rewrite a challenged statute or to "'presume that the legislature intended something other than that expressed by way of the plain language.'" See DiProspero, 183 N.J. at 492 (quoting O'Connell v. State, 171 N.J. 484, 488 (2002)). We ordinarily decline to supply a statutory provision omitted in one section of a statute but included in another. T.H. v. Div. of Developmental Disabilities, 189 N.J. 478, 492 (2007) (citing Higgins v. Pascack, 158 N.J. 404, 419 (1999)). We cannot therefore say that the Legislature intended to include that interim benchmarks were necessary in its legislative findings.

Finally, we disagree with petitioners' contention that a reading of N.J.S.A. 26:2C-41(d) as we have would render the text superfluous. An agency may "fill in gaps" in a statute. See A.Z. ex rel. B.Z. v. Higher Educ. Student Assistance Auth., 427 N.J. Super. 389, 401 (App. Div. 2012) (citing T.H., 189 N.J. at 490-92) ("[A]n agency may not adopt regulations that, rather than fill in gaps in the statute, alter the terms of a legislative enactment or frustrate the policy embodied in the statute."). The DEP's Denial did not frustrate the purposes of N.J.S.A. 26:2C-41(d). Instead, it merely filled a gap in N.J.S.A. 26:2C-38 by finding petitioners' application to adopt rules setting interim benchmarks was not necessary to effectuate the 2050 limit. Given the absence of an explicit Legislative finding that interim benchmarks were necessary, we decline to

supply them by second-guessing the agency's expert judgment. See In re Stream Encroachment Permit, 402 N.J. Super. 587, 597 (App. Div. 2008).

C. Review of Petition Denial

Petitioners next argue the DEP's Denial was arbitrary, capricious, or unreasonable. Petitioners have the burden of showing that an agency action was arbitrary, capricious, or unreasonable. In re Reallocation of Probation Officer, 441 N.J. Super. 434, 443 (App. Div. 2015) (citing Barone v. Dep't of Hum. Servs., 210 N.J. Super. 276, 285 (App. Div. 1986)). We disagree. We are satisfied the DEP reasonably interpreted the statute in finding it had discretion to make a finding of necessity before establishing any benchmarks. The record shows the DEP viewed the Report, 2019 EMP, and any updates to the Report and plan as "appropriate and effective vehicles for establishing any interim benchmarks," because those "directional policy supports 'were designed to be living documents to be continually reassessed, remodeled, and reprioritized as early objectives [were] achieved and newly emerging pathways mature[d]." Thus, the DEP determined the "State's use of such living, directional guideposts [in the 2050 limit] [was] appropriate." Considering our deferential standard of review, we find no reason to disturb the DEP's determination that a rule setting interim benchmarks was not necessary.

Similarly, we are not convinced by petitioners' arguments that the DEP arbitrarily and capriciously denied the Projects Rulemaking provision of the petition. Petitioners have not demonstrated how the proposed rulemaking implementing measures were "necessary to achieve the 2050 limit." The record, however, supports the DEP's claims that it was in the process of implementing several measures to achieve the 2050 limit through regulations, policies, and programs. Additional rulemakings were to be proposed as part of the agency's "continuing work to reduce emissions of climate pollutants" as well as the issuance of a "broader plan" to implement the strategies of the Report and the 2019 EMP. Thus, we are satisfied DEP's action to deny the Projects Rulemaking provision of the petition was reasonable based on the record.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION