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Fed. Pac. Elec. Co. v. N.J. Dep't of Env'tl. Prot., 759 A.2d 851 (N.J. Super. Ct. App. Div. 2000)

Jon Hyman

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the reservation land subject to previously adjudicated water rights constituted an express waiver of sovereign immunity. In addition, the supreme court concluded both the Tribe's benefits from and compliance with the Humboldt Decree for more than five decades ratified this waiver. Further, the district court had authority to hold in contempt anyone who interfered with or frustrated the ability of the State Engineer or water commissioners to administer the Decree. Tribe immunity to jurisdiction frustrated the district court's authority over administration of the Decree.

The supreme court rejected the Tribe's argument regarding failure to join an indispensable party. The Tribe caused the events leading up to the contempt complaint rather than the United States. Therefore, the supreme court denied the writ of prohibition.

Holly Kirsner

NEW JERSEY

Fed. Pac. Elec. Co. v. N.J. Dep't of Env'tl. Prot., 759 A.2d 851 (N.J. Super. Ct. App. Div. 2000) (holding the New Jersey Department of Environmental Protection's failure to provide an electric company with notice of applicable groundwater remediation standards violated the Administrative Procedure Act).

The Federal Pacific Electric Company ("FPE") brought this action after the New Jersey Department of Environmental Protection ("Department") disapproved the groundwater component of its remedial action workplan. FPE submitted a remedial action workplan after it discovered trichloroethene ("TCE") groundwater contamination at its former manufacturing facility. The Department rejected FPE's remedial goal of 50 milligrams of TCE per liter, choosing instead, the Department's more demanding Groundwater Quality Standards ("GWQS"). FPE requested dispute resolution and argued GWQS were incompatible with the governing statute's standards. The Department's Bureau of Environmental Evaluation ("Bureau") disagreed. The Department maintained the GWQS established the appropriate criteria to attain discharge standards applicable to groundwater remediation. The Assistant Director of the Industrial Site Evaluation Element, the Director of the Division of Responsible Party Site Remediation, and the Assistant Commissioner of the Site Remediation Program agreed with the Bureau's initial response. After the various determinations, the Department's Commissioner declined FPE's dispute resolution request.

On appeal, FPE claimed the Department failed to adopt standards acceptable under the Administrative Procedure Act ("APA"). Additionally, FPE asserted the adopted standards violated existing

enabling acts. Furthermore, FPE argued the Department should have addressed FPE's workplan on a case by case analysis. Lastly, amici Petroleum Council and 2B Environmental, Incorporated ("2B Environmental"), argued the Department failed to comply with an APA requirement that an administrative agency, when readopting a rule, state that the rule's standards exceed the standards imposed by federal law. 2B Environmental also claimed the Department failed to reclassify the groundwater in accordance with the applicable statute, resulting in the invalidation of current standards. The court reversed the Department's determination and remanded the case. The court required the Department decide whether to repromulgate its regulations or treat FPE's remedial workplan on a case by case analysis.

In reaching its reversal decision, the court examined whether the Department failed to adopt minimum remediation standards in accordance with the APA. Before reaching this determination, the court analyzed the history of GWQS as applied to groundwater and TCE. In 1977, the Department adopted GWQS under authority of the Water Quality Planning Act. At that time, no established numeric standards for TCE existed. In 1983, New Jersey passed the Environmental Cleanup Responsibility Act ("ECRA"). ECRA mandated the Department adopt minimum standards for groundwater quality. In 1992, the Department proposed technical rules ("Rules") to make GWQS applicable to ECRA. However, the Department delayed the adoption of the Rules and chose to apply remediation standards on a case by case basis. In 1993, the Department readopted GWQS encompassing amendments making it applicable to ECRA, and included criteria standards for TCE remediation. In 1993, New Jersey amended ECRA and renamed the statute as the Industrial Site Recovery Act ("ISRA"). ISRA again directed the Department to establish criteria and minimum standards necessary for remedial action workplans. In 1995, the Department readopted GWQS without mentioning ISRA as the applicable statute for groundwater remediation standards. In 1996, the Department adopted the Rules citing ISRA as the applicable authority. FPE did not comment on the adoption of the Rules. In 1999, the Department, again citing ISRA as the applicable authority, amended the Rules to include groundwater within the definition of environmentally sensitive areas. In addition to the historical analysis, the court reviewed numerous comments made during the rule-promulgation period.

As a result of its complex history, FPE argued the Department failed to comply with the APA's notice requirement when it explained that GWQS and the Rules constituted the minimum remediation standards under ISRA. The court ruled the APA provided that before adoption of a rule, the Department is required to provide notice of the terms or substance of its intended action. The court noted the extensive comments the Department received regarding the Rules resulting from the Department's inability to clearly and concisely explain the purpose and effect of the Rules. The court found no

evidence in the legislative history that proved GWQS were the intended minimum remediation standards in all circumstances. The court determined the enabling statute for the GWQS was the Water Pollution Control Act. This act allowed the Department to consider different remediation standards when the potential future uses of surface and groundwater varied. The court held the Department failed to comply with the APA's notice provision because the Department: (1) did not explain the applicable minimum remediation standards clearly and concisely; and (2) did not explain whether these standards applied to ISRA. The court reversed the Department's decision that GWQS were the appropriate criteria for the attainment of discharge standards applicable to groundwater remediation. The court then remanded the case to the agency to determine whether the Department should re-promulgate the Rules or, related to the second issue, choose to deal with FPE's workplan on a case by case basis.

FPE argued the Department should have addressed the workplan using a case by case analysis because the Department had not adopted appropriate standards. The court noted that when the Department delayed the adoption of the Rules in 1992, it applied remediation standards on a case by case basis. Furthermore, the Brownfield Act, adopted along with ISRA, required site contamination analysis on a case by case basis if no minimum remediation standards existed. The court determined the minimum remediation standards had not been adopted and FPE's remedial workplan met the Brownfield Act criteria. The court remanded the case back to the Department to decide whether to re-promulgate its regulations or deal with FPE's remedial workplan on a case by case basis.

The court also considered amici Petroleum Council and 2B Environmental's arguments. 2B Environmental first argued the Department was responsible for reclassifying the geographic area that contained the groundwater in order to establish remedial requirements. The court ruled 2B Environmental could not raise the issue since neither FPE nor the Department raised the issue on appeal.

The second amici argument was that GQWS and the Rules were more stringent than the United States Environmental Protection Agency's drinking water contamination standards for TCE. The amici argued the APA required the Department to publish a statement that its rules were more stringent than federal law. The court gave two reasons to support the Department's compliance with the APA requirement. First, in re-adopting GWQS, the Rules, and the state drinking water regulations, the Department issued a statement and explanation of its stricter standards. Second, the court reasoned no federal groundwater standards existed for the Department to exceed.

In conclusion, the court reversed the Department's dismissal of the groundwater component of FPE's remedial workplan and denied the amici claims. The court noted that if the Department wanted GWQS to apply, the agency must republish the standards in conformance with

the APA in order to allow an informed comment and modification period. If the Department chose not to republish, then the Department would be required to deal with FPE's workplan on a case by case basis. The court both reversed the Department's disapproval of FPE's groundwater component in its remedial workplan and remanded the case back to the agency. The court instructed the agency to determine whether it should re-promulgate the groundwater standards or treat the FPE's workplan on a case by case basis.

Jon Hyman

NEW YORK

***In re New Rochelle, Inc. v. New York*, 712 N.Y.S.2d 637 (N.Y. App. Div. 2000)** (holding a stipulation agreement between New York City and United Water New Rochelle ("UWNR") to provide water during a supply system shutdown nullified: (1) UNWR's claim to review the shutdown determination; and (2) New York City's counterclaims both for a declaration of authority to shutdown and for the costs of providing water during the stipulation agreement period).

New York City ("City") owned and operated an aqueduct as part of a water supply system in the State of New York. United Water New Rochelle, Inc. ("UWNR") and the Village of Briarcliff Manor ("Village") acquired water from this aqueduct under City issued permits. On July 1, 1998, based on a determination by the New York Department of Environmental Protection ("DEP"), the City decided the aqueduct and nearby water chlorination facility needed to be shut down for repairs until mid-September and informed UWNR and the Village of the shut down.

UWNR filed a petition in the New York Supreme Court to review DEP's determination and to enjoin the shut down. The Village intervened. The three parties entered into a stipulation agreement in July 1998, whereby the City agreed to provide chlorinated water to both UWNR and the Village during the duration of the proposed shutdown. Pursuant to the stipulation agreement, the City provided UWNR and the Village with water through September 7, 1998. In its petition answer, the City counterclaimed for a declaration that it had the right both to shut down the aqueduct whenever DEP deemed it necessary and to recover the costs of providing water during the stipulation agreement period.

On March 10, 1999, the Supreme Court of Westchester County reviewed the UNWR and the Village petition and determined their permits were unenforceable because of the City's ability to discontinue the delivery of water. Additionally, the court declared the City did not possess a right to shut down the aqueduct whenever DEP deemed it