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Environmental Law

2006 Cases Test Bounds of Agency Authority

Rulings often turned on the amount of discretion courts allowed public agencies

By Dennis J. Krumholz

New Jersey state and federal courts decided several important environmental cases during the past year, many addressing topical political and legal issues. Rulings often turned on the amount of discretion that courts will allow public agencies to exercise, especially in the face of unclear legislative authority. The majority of cases confirm that agencies retain a relatively free hand in crafting environmental policies, often at the expense of third parties. In a few instances, however, the courts did overrule the exercise of discretion they thought exceeded that which is authorized by legislation.

This article discusses those cases that addressed agency discretion, the dominant theme in environmental decisions this year. Of course, opinions were rendered in insurance, contract and regulatory disputes as well, but most turned on the particular facts of the case and none broke new legal ground. Practitioners also should consider the Third Circuit decision in *E.I. duPont de Nemours and Co. v. United States*, 460 F.3d 515 (3d Cir. 2006), which held that responsible parties may not seek contribution under Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).

New Jersey state and federal courts more often than not this year deferred to the exercise of authority by governmental agencies. The courts tended to permit the agencies to exercise deference and to limit the rights of third and even second parties to challenge agency decision-making. A typical example of deference to an environmental agency was the decision in *In re Stormwater Management Rules*, 384 N.J. Super. 451 (App. Div. 2006), which, in the absence of express statutory authority, upheld stormwater regulations imposing a 300-foot buffer around Category I waters, some of the most protected in the state. Appellant argued that this regulation was beyond the scope of NJDEP's statutorily delegated authority and was unreasonable. The court rejected the challenge, relying on the general power to regulate storm water granted to NJDEP in the Stormwater Management Act, N.J.S.A. 40:55D-93 et seq., even though buffers of a particular size were not expressly provided for in the statutory language. As a result, the 300-foot buffers around Category I waters remain in effect.

The Supreme Court of New Jersey similarly deferred to agency rulemaking in *In re Adoption of N.J.A.C. 7:26E-1.13*, 186 N.J. 81 (2006). There, appellants argued that NJDEP violated the Brownfields Act, N.J.S.A. 58:10B-1 et seq., because it applied pre-existing groundwater standards for potable water to remediation of industrial sites instead of promulgating new, less stringent, site specific standards. Remarkably, the Supreme Court granted certification but then affirmed without opinion the Appellate Division's decision, which had acknowledged the merits of both parties' arguments but nonetheless deferred to the authority and expertise of NJDEP because it was unable to better evaluate the parties' competing claims. Accordingly, groundwater remediation standards remain extremely stringent despite the legislative mandate to provide greater flexibility.

Indeed, the courts this year issued a number of opinions in which challenges to agency decisions were summarily dismissed after the courts concluded that the exercise of regulatory power was within the agencies' expertise. See *New Jersey Animal Rights Alliance v.*

Krumholz is chair of the environmental practice group at Riker Danzig Scherer Hyland & Perretti of Morristown. *He gratefully acknowledges the assistance of Jay P. Eversman, an associate in the group, in preparing the article. The firm represented Federal Pacific Electric Company in* In re Adoption of N.J.A.C. 7:26E-1.13, *discussed in the article.*

NJDEP, Docket No. A-1463-05T3 (App. Div. Dec. 2, 2005), in which the court held that the 2005 Comprehensive Black Bear Management Policy that included a black bear hunt was within the legislative grant of authority and the agency's discretion; *New Jersey Department of Environmental Protection v. Circle Carting, Inc.*, A-3907-03T1 (App. Div. Dec. 20, 2005), certif. denied 186 N.J. 364 (2006), where the court concluded that sufficient evidence was presented at a hearing to support the agency's decision to revoke appellant's A-901 solid waste license, registration as a solid waste transporter and certificate of public convenience and necessity, among other penalties; *Maier v. NJDEP*, Docket No. A-6574-03T3 (App. Div. Feb. 24, 2005) certif. denied 185 N.J. 36 (2005), where a prior administrative determination that had determined that sighting of an endangered wood turtle on appellant's land that was made after an Office of Administrative Law proceeding before an administrative law judge was held to have a preclusive effective effect during adjudication of Superior Court case bought by appellant; *Dziobek v. NJDEP*, Docket No. A-1107-04T2 (App. Div. Oct. 17, 2005), which upheld the agency determination to deny a wetlands permit on the basis of the agency determination that the wetlands were not isolated; and *Hudson Cty. Improvement Authority v. Miele Sanitation Co.*, Docket No. A-2753-02Ts (App. Div. Nov. 28, 2005), certif. denied 186 N.J. 364 (2006), where the court held that the Authority could force defendant to comply with its solid waste management plan.

Not only did courts often adjudge environmental regulations to be properly within an agency's authority, but the judiciary also continued to limit the rights of potential parties even to challenge agency action. In *I/M/O Freshwater Wetlands Statewide General Permits*, 185 N.J. 452 (2006), the Supreme Court upheld NJDEP's restriction on challenging an administrative permitting process. There, property owners and a community organization objected to a permit to fill wetlands issued to a neighboring property and sought an adjudicatory hearing under the Administrative Procedure Act before the Office of Administrative Law. The Supreme Court upheld the permitting process and denied the hearing on the basis that the neighbors' claims of increased flooding did not give rise to a property interest under the New Jersey or United States Constitution.

In its companion case, *In re NJPDES Permit No. NJ0025241*, 185 N.J. 474 (2006), the Court likewise limited the ability of third parties to challenge agency permit issuance. There, another community group sought "party" status under the Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and an administrative hearing to challenge renewal of a NJPDES permit. The Supreme Court upheld the denial of the organization's requests on the basis that it did not raise its objections during the applicable public comment period and failed to present a significant issue of law or fact likely to affect the public determination.

Limits to third-party agency challenges also arose in contractual settings. In *Town of Kearny v. N.J. Rail Carriers, LLC*, Docket No. A-1304-04T5 (App. Div. Sept. 28, 2005), a settlement agreement between NJDEP and New Jersey Rail Carriers, LLC (NJRC) recognized NJRC's rail carrier designation and NJRC's agreement to comply with all agency regulations relevant to an intermodal container facility. The Surface Transportation Board accepted the settlement agreement and recognized NJRC as a bona fide rail carrier. Kearny then brought an action asserting that NJRC was operating a solid waste facility, as opposed to being a bona fide rail carrier. The court concluded that the settlement agreement did not give Kearny third-party beneficiary rights to sue under the agreement.

Other cases turning aside third-party claims were *Hartz Mt. Industries, Inc. v. Polo*, 2005 WL 2807355 (D.N.J. Oct. 26, 2005), and *Borough of Carlstadt v. U.S. Army Corps of Engineers*, 2006 WL 305314 (D.N.J. Feb. 8, 2006), where the court dismissed for lack of standing two challenges by third parties to Army Corps permits issued for the controversial Xanadu project, and *In re Settlement of Borough of Tinton Falls v. Department of Environmental Protection*, Docket No. A-2080-04T2 (App. Div. June 19, 2006), where the court rejected a challenge by an environmental organization to a settlement between the Borough of Tinton Falls and NJDEP concerning a freshwater wetlands application.

Finally, one trial court deferred to an admittedly incomplete legislative scheme. *OFP, L.L.C. v. State of N.J.*, Docket No. MRS-L-000160-05 (Law Div. Morris Cty. Nov. 15, 2005). This case involved a challenge to the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq., alleging the act's application resulted in taking of property without just compensation and that its retroactive application violated due process and equal protection guarantees. The court concluded that the challenger had not exhausted its administrative remedies because NJDEP had not reached a final decision on whether plaintiff could develop its property, even though the procedures to pursue administrative remedies had not been promulgated. The court determined that before it could bring its challenge, the challenger must await both promulgation of the regulations governing administrative remedies and a final decision under them.

In sum, the judiciary deferred this year to agency practice in many areas of environmental regulation, even where the enabling statute is unclear or silent in defining proper regulatory bounds. Courts viewed third-party challengers skeptically as well, frequently denying them the ability to challenge agency decisions.

Nevertheless, the courts were willing in several important cases to limit the power of environmental regulators. Most notable in this respect was *United States v. Rapanos*, 126 S. Ct. 2208 (2006), where the United States Supreme Court considered the controversial broad federal jurisdiction over wetlands that are not

located adjacent to, but have some "hydrological connection" with, navigable waters. The court split evenly on the issue, with four justices joining a plurality opinion written by Justice Antonin Scalia, four justices joining a dissent written by Justice John Paul Stevens, and Justice Anthony Kennedy writing alone in a concurrence.

The Stevens dissent would have deferred to the Army Corps of Engineers' existing practice to assert jurisdiction over all wetlands having any "hydrologic connection," no matter how remote, to a navigable water body. In contrast, the Scalia plurality opinion found that federal control over wetlands was limited to those wetlands with a "continuous surface connection" to fixed and relatively permanent bodies of waters such as oceans, lakes and continuously moving streams.

The Kennedy concurrence, however, established a "significant nexus" test for federal jurisdiction over wetlands adjacent to nonnavigable water bodies. Kennedy's opinion rejected the dissent's acquiescence in the Army Corps' jurisdiction over any water with a hydrologic connection, but established a more fact-specific standard broader than the plurality in accepting wetlands for federal control. Instead of focusing on proximity to navigable waters or requiring a specific type of connection between the wetland and navigable waters at issue, e.g., a surficial connection or a hydrological connection, the "significant nexus" test analyzes physical, chemical and biological effects on navigable waters by filling-in of wetlands.

The EPA and the Army Corps of Engineers are currently developing a guidance document that is expected to address and implement the *Rapanos* decision. It is uncertain, though, to what extent the "significant nexus" test will serve as the basis for the document, and to what extent jurisdictional determinations made by the Corps will be affected. In the absence of specific criteria defining how a "significant nexus" should be determined, the Army Corps of Engineers may be left guessing whether it can regulate wetlands located near but not adjacent to nonnavigable waters.

New Jersey courts also struck down several agency actions on the basis that they were taken without statutory approval. Most noteworthy is *New Jersey Department of Environmental Protection v. Exxon Mobil Corporation*, Docket No. UNN-L-3026-04 (Law Div. Union Cty. May 26, 2006), where the Superior Court limited the authority of agencies to craft remedies for environmental harm. ExxonMobil, the successor-in-interest to the owner of the Bayway Refinery, argued that the Spill Act does not authorize the agency to impose strict liability for loss of use of natural resources. Although the court agreed that ExxonMobil can be held strictly liable for natural resource damages, it held that NJDEP could not impose liability for loss of use of these resources. Because "loss of use" has been the method used by the agency to seek damages, this ruling, if upheld on appeal, would severely undercut the Department's ability to recover NRD.

Another controversial United States Supreme Court decision from last year — *Kelo v. City of New London*, 125 S.Ct. 2655 (2005) — was central to the analysis in *LBK Assocs., L.L.C. v. Borough of Lodi*, Docket No. 44-3-1792 (Law Div. Bergen Cty. Oct. 6, 2005). The Law Division found that Lodi had unreasonably declared that a trailer park was in need of redevelopment because the borough's decision was not supported by substantial evidence but merely "vague criticism of the conditions at the complex [based] upon superficial observations."

Other cases overturning agency action were *State of New Jersey Department of Environmental Protection v. Kafil*, Docket No. C-175-01 (Super. Ct. Mercer Cty. Mar. 1, 2005), motion for reconsid. denied Docket No. MER-175-01 (May 3, 2006), which granted a motion to dismiss NJDEP's request that defendants remediate contaminated properties, though they had not personally contaminated the property; *I/M/O Island Bay, LLC*, Docket No. A-3163-05T3 (App. Div. June 21, 2006), where the court found impermissible NJDEP's withdrawal of Coastal Area Facilities Review Act approval that permitted a connection to existing sewer lines, on the grounds that it had occurred approximately two years following the previous approval; *B&J Realty, L.L.C. v. New Jersey Department of Environmental Protection*, 381 N.J. Super. 52 (App. Div. 2005), where NJDEP's assertion of CAFRA jurisdiction over appellant's property was found to be arbitrary, capricious and unreasonable because it relied on a previously issued CAFRA permit for another property, which had been amended to specifically exclude the property at issue; and *Robert T. Winzinger, Inc. v. The Pinelands Commission*, Docket No. A-6032-04T5 (App. Div. June 5, 2006), where the Pinelands Commission was found to have impermissibly denied a mining permit on the basis that the operation in the Pinelands Preservation Area had been abandoned and was a nonconforming use, because the decision was based on "zoning" concepts that were not found in regulations governing the Commission.

Finally, in *I/M/O Vending Components, Inc.*, Docket No. A-6646-03T2 (App. Div. May 9, 2006), the Appellate Division remanded a case to the Office of Administrative Law to assess whether the agency's authority exceeded its proper scope. In 2004, NJDEP rescinded a negative declaration that had been approved in 1985 pursuant to ECRA, the forerunner of ISRA, and that the agency once before had refused to rescind in 1996. NJDEP recently rescinded the negative declaration on the basis that the original submission did not disclose the full magnitude of contamination at the property, and appellants argued that the agency lacked authority to do so. The court remanded the matter to the Office of Administrative Law for a hearing into whether circumstances had changed since 1996.

New Jersey state and federal case law in 2006 reflects the tension between allowing agencies to exercise a free hand in crafting and enforcing environmental regulations and viewing this authority skeptically. The courts this year generally respected the discretion of regulating agencies and tended to uphold agency actions when challenged. Occasionally, however, courts struck down agency action where it clearly contradicted statutory authority. "Proceed at risk" might be an apt characterization of how practitioners ought to view challenging agency actions. ■