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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4878-11T4

IN RE REGIONAL GREENHOUSE GAS
INITIATIVE (RGGI).

Argued January 8, 2014 – Decided March 25, 2014

Before Judges Waugh, Nugent, and Accurso.

On appeal from the New Jersey Department of
Environmental Protection.

Susan J. Kraham (Environmental Law Clinic,
Inc.) argued the cause for appellant
Environment New Jersey and Natural Resources
Defense Council (Ms. Kraham and Edward L. Lloyd
(Environmental Law Clinic, Inc.), attorneys;
Ms. Kraham and Mr. Lloyd, on the briefs).

Matthew T. Kelly, Deputy Attorney General,
argued the cause for respondent New Jersey
Department of Environmental Protection (John
J. Hoffman, Acting Attorney General, attorney;
Melissa H. Raksa, Assistant Attorney General,
of counsel; Mr. Kelly and Jung W. Kim,
Deputy Attorney General, on the brief).

James H. Laskey argued the cause for
intervenor-respondent Independent Energy
Producers of New Jersey (Norris McLaughlin &
Marcus, P.A., attorneys; Mr. Laskey, on the
brief).

PER CURIAM

In this appeal, appellants Environment New Jersey and
Natural Resources Defense Council (Council) challenge the action
of respondent New Jersey Department of Environmental Protection

(Department) with respect to regulations it adopted to implement the State's CO2 Budget Trading Program (Trading Program), N.J.A.C. 7:27C-1.1 to -10.11. In the challenged action, the Department posted a notice on its website to the effect that, because New Jersey had withdrawn from participation in the Regional Greenhouse Gas Initiative (RGGI)¹ as of January 1, 2012, the Department would no longer implement the Trading Program regulations for the regulatory period beginning on that date.

While acknowledging that the Trading Program regulations were adopted to facilitate New Jersey's participation in RGGI, Environment New Jersey and the Council argue that they can be implemented independently of RGGI and, consequently, cannot be abrogated except through the formal rulemaking procedures established by the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15. The Department takes the position that, because implementation of the Trading Program regulations depends on New Jersey's membership in RGGI, they became prospectively inoperative on the effective date of New Jersey's withdrawal from RGGI and do not need to be repealed. Nevertheless, the Department agrees that repeal of the

¹ The other member states are Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New York, Rhode Island, Maryland, and Vermont

regulations can only be accomplished through the APA rulemaking procedures. See In re Certain Amendments to the Adopted & Approved Solid Waste Mgmt. Plan of Hudson Cnty. Solid Waste Mgmt. Dist., 133 N.J. 206, 219 (1993); Metromedia, Inc. v. Dir., Div. of Taxation, 97 N.J. 313, 330 (1984).

Because we have determined that the Trading Program regulations were intended to implement RGGI, but were sufficiently broadly worded to allow for implementation of a program independent of RGGI, we remand to the Department with instructions to initiate the APA process to repeal or amend the regulations within sixty days from the date of this opinion.

I.

We discern the following facts and procedural history from the record on appeal.

In November 2005, the Department reclassified carbon dioxide as an air contaminant to bring New Jersey's definition of significant greenhouse gases into line with that of the Intergovernmental Panel on Climate Change and in anticipation of the State's participation in the development of a regional carbon dioxide cap-and-trade program through RGGI. 36 N.J.R. 4607(a) (Oct. 18, 2004); 37 N.J.R. 4415(a) (Nov. 21, 2005). In December, New Jersey's then-governor signed a memorandum of understanding (MOU) with the governors of the six other RGGI

states acknowledging the "growing scientific consensus" that climate change is occurring and that it poses "serious potential risks to human health" as well as severe weather, ecosystem, and sea level impacts. The MOU committed New Jersey and other signatory states to take legislative action to implement a regional carbon dioxide trading program to stabilize carbon dioxide emissions within the region.

The MOU provided for each participating state to create a regulatory program to cap carbon pollution from power plants and outlined provisions concerning the structure of compliance periods, offsets, allocations, and credits to be included in each state's regulations. The MOU called for the creation of a regional organization to assist and coordinate the independent actions of each state. The regional organization would offer technical assistance, but would have "no regulatory or enforcement authority with respect to the Program." All "such authority [was] reserved to each Signatory State for implementation of its rule." That organization, known as RGGI, Inc., was created in July 2007.

The Global Warming Response Act (Response Act), N.J.S.A. 26:2C-37 to -44, was enacted in July 2007. The Legislature made the following findings:

The Legislature finds and declares that internationally the issue of global warming

has caused alarm, awareness, and action concerning climate changes occurring around the globe attributed to the high level of certain gases called "greenhouse gases" gases that increase temperatures in the atmosphere and the risk of catastrophic changes to the Earth's ecosystems and environment; that, while this global warming may be a theory to some, the effects of increasing levels of greenhouse gases in the atmosphere are accepted by many respected scientists and members of the international community as seriously detrimental to the ecosystems and environment of the world; that, ultimately, if steps are not taken to reverse these trends, the effects on human, animal and plant life on Earth may be catastrophic; that solutions exist to halt the increasing of greenhouse gases in the atmosphere and reduce these emissions; that, as a global issue, each country and region within a country must do its part to reduce these greenhouse gases that threaten the globe; and that, as a State, there are specific actions that can be taken to attack the problem of global warming, through reductions of greenhouse gas emissions in the State and participation in regional and interstate initiatives to reduce these emissions regionally, nationally, and internationally.

The Legislature therefore finds and declares that it is in the public interest to establish a greenhouse gas emissions reduction program to limit the level of Statewide greenhouse gas emissions, and greenhouse gas emissions from electricity generated outside the State but consumed in the State, to the 1990 level or below, of those emissions by the year 2020, and to reduce those emissions to 80% below the 2006 level by the year 2050.

[N.J.S.A. 26:2C-38.]

The Response Act required reductions in the level of greenhouse gas emissions to or below specified levels by 2020 and 2050, respectively. N.J.S.A. 26:2C-39 to -40. It also required the Department to monitor and report on emissions levels and to create an Energy Master Plan. N.J.S.A. 26:2C-41 to -43.

In December 2007, the Global Warming Solutions Fund Act (Solutions Act), N.J.S.A. 26:2C-45 to -57, was enacted. The Legislature made the following findings with respect to that legislation:

The Legislature finds and declares that New Jersey should implement cost-effective measures to reduce emissions of greenhouse gases, and that emissions trading and the auction of allowances can be an effective mechanism to accomplish that objective.

The Legislature further finds and declares that entering into agreements or arrangements with appropriate representatives of other states may further the purposes of P.L.2007, c.340 (C.26:2C-45 et al.) and the "Global Warming Response Act," P.L.2007, c.112 (C.26:2C-37 et al.).

The Legislature further finds and declares that any carbon dioxide emissions allowance trading program established in the State to reduce emissions of greenhouse gases should provide both incentives to reduce emissions at their sources and funding or other consumer benefit incentives to reduce the demand for energy, which in turn would reduce the generation and emission of greenhouse gases.

The Legislature further finds and declares that funding consumer benefit

purposes will result in reduced costs to New Jersey consumers, decreased energy use, decreased greenhouse gas emissions, and substantial and tangible benefits to the energy-using business sector.

The Legislature further finds and declares that efforts to reduce greenhouse gas emissions in New Jersey must include complementary programs to reduce greenhouse gas emissions from electricity generated outside of the State but consumed in New Jersey, and that one measure that may be most effective in doing so is the adoption of a greenhouse gas emissions portfolio standard as authorized pursuant to the "Global Warming Response Act," P.L.2007, c.112 (C.26:2C-37 et al.) and section 38 of P.L.1999, c.23 (C.48:3-87).

The Legislature further finds and declares that energy efficiency and conservation measures and increased use of renewable energy resources must be essential elements of the State's energy future and that greater reliance on energy efficiency, conservation, and renewable energy resources will provide significant benefits to the citizens of this State.

The Legislature further finds and declares that public utility involvement and competition in the renewable energy, conservation and energy efficiency industries are essential to maximize efficiencies and the use of renewable energy and that the provisions of P.L.2007, c.340 (C.26:2C-45 et al.) should be implemented to further competition.

The Legislature further finds and declares that any emissions allowance trading program established in the State to reduce emissions of greenhouse gases should transition to any federal program enacted by the federal government that is comparable to

the emissions allowance trading program established in New Jersey.

The Legislature therefore determines that it is in the public interest to establish a program that authorizes the State to dedicate to consumer benefit purposes up to 100 percent of the revenues derived from the auction or other sale of allowances pursuant to an emissions allowance trading program and to authorize the Commissioner of Environmental Protection and the President of the Board of Public Utilities to further the purposes of P.L.2007, c.340 (C.26:2C-45 et al.) and the "Global Warming Response Act," P.L.2007, c.112 (C.26:2C-37 et al.), by participating with other states in the formation and activity of a separate legal entity established for the purpose of furthering the Regional Greenhouse Gas Initiative.

[N.J.S.A. 26:2C-45.]

The Solutions Act required the Department to "take any measures necessary to sell, exchange, retire, assign, allocate, or auction any or all allowances that are created by, budgeted to, or otherwise obtained by the State in furtherance of any greenhouse gas emissions allowance trading program implemented to reduce or prevent emissions of greenhouse gases." N.J.S.A. 26:26-47(a)(1). It allows the Department to "exercise [its] authority in cooperation and coordination with other states or countries that are participating in regional, national or international carbon dioxide emissions trading programs with the same or similar purpose." Ibid. The Solutions Act established

requirements to be followed by the Department if it chooses an auction as the means of allocating carbon dioxide emission allowances.² See N.J.S.A. 26:2C-47(b). It also created a Global Warming Solutions Fund under the administration of the State Treasurer for purposes of receiving money raised by allowance auctions. N.J.S.A. 26:2C-50.

On July 7, 2008, the Department proposed regulations to establish the Trading Program. 40 N.J.R. 3792(a) (July 7, 2008). The regulations, contained primarily in N.J.A.C. 7:27C-1.1 to -10.11, were adopted four months later. 40 N.J.R. 6541(b) (Nov. 17, 2008). In adopting the regulations, the Department noted that they "establish the New Jersey component of a regional CO[2] Budget Trading Program" and that they were based on model rules developed by RGGI in accordance with the MOU. Ibid. The stated purpose of the regulations is to "establish[] the New Jersey component of the CO[2] Budget Trading Program, which is designed to stabilize and then reduce anthropogenic emissions of CO[2], a greenhouse gas, from CO[2] budget sources in an economically efficient manner." N.J.A.C. 7:27C-1.1. The regulations contain detailed provisions for establishing an in-state cap on carbon dioxide emissions,

² The Act defines "allowance" as a "limited authorization, as defined by the department, to emit up to one ton of carbon dioxide or its equivalent." N.J.S.A. 26:2C-46.

creating carbon dioxide allowances equal to the cap, allocating those allowances to a consumer benefit account, and distributing those allowances from the account to electric generations through either auctions or fixed price sales at least once a year. N.J.A.C. 7:27C-1.1 to 5.5. The regulations also require the submission of reports and certifications of compliance for each three-year control period of the Trading Program's operation. N.J.A.C. 7:27C-1.4(o).

In November 2008, the Department contracted with RGGI, Inc., for the provision of "program implementation and program development services." New Jersey complied with its obligations under the MOU and implemented the Trading Program regulations as a member of RGGI during the first three-year control period, which was scheduled to end December 31, 2011.

In May 2011, however, Governor Christie announced his intention to end New Jersey's participation in RGGI. Consequently, on May 31, the Department gave RGGI, Inc., notice that "New Jersey will withdraw its participation in [RGGI] effective December 31, 2011."³ On November 29, the Department sent RGGI the required thirty-days written notice officially informing the other signatory states' governors of New Jersey's

³ The Legislature passed a concurrent resolution expressing its opposition to the proposed withdrawal from RGGI. S. Con. Res. 164, 214th Leg., Reg. Sess. (2011).

intent to withdraw as of January 1, 2012.

The Department posted an announcement on its website that, as of January 1, 2012, New Jersey power plants previously subject to the Trading Program would no longer be obligated to comply with the program requirements, except for the purposes of completing their obligations for the first control period, which had just ended. As a result of the State's withdrawal from RGGI, the Department stopped making emissions allowances available for purchase and also stopped providing for the award of emissions offset allowances to qualifying projects. This appeal followed.

II.

Environment New Jersey and the Council do not challenge the legality of New Jersey's withdrawal from RGGI. Instead, they argue that the Department engaged in improper rulemaking by posting the withdrawal notice on its website rather than repealing the Trading Program regulations through the procedures established by the APA. The Department, while agreeing that following the requirements of the APA is the only way to repeal or amend the regulations, argues that the regulations do not need to be repealed because their only purpose was to implement New Jersey's participation in RGGI. In essence, the Department's argument is that the Trading Program regulations

are defunct in light of New Jersey's withdrawal from RGGI.

Although the Trading Program regulations are worded more broadly, there can be little doubt from the legislative history outlined above that they were intended to enable New Jersey's participation in RGGI, rather than to establish a stand-alone carbon dioxide cap-and-trade program in New Jersey. In adopting the regulations, the Department characterized them as "establish[ing] the New Jersey component of a regional CO[2] Budget Trading Program." 40 N.J.R. 6541(b) (Nov. 17, 2008) (emphasis added). That language is echoed in the stated purpose of the regulations, which is to "establish[] the New Jersey component of the CO[2] Budget Trading Program." N.J.A.C. 7:27C-1.1 (emphasis added).

Nevertheless, the Trading Program regulations are worded quite broadly and can be read to require action by the Department absent participation in a regional greenhouse program. For that reason, we conclude that, in addition to the Department posting information on its website apprising the regulated community of the ramifications of the State's withdrawal from RGGI, the Department should have taken action to repeal the regulations or amend them to clarify that they do not

create a stand-alone trading program.⁴ Indeed, had the Department done so when the issue was first raised by Environment New Jersey and the Council, this appeal would have been unnecessary.

Consequently, we remand and direct the Department to take the necessary action under the APA to (1) repeal the Trading Program regulations or (2) amend them to provide that they are applicable only when New Jersey is a participant in a regional or other established greenhouse gas program.⁵ The Department shall begin the APA process, in accordance with N.J.S.A. 52:14B-4, within sixty days of the date of this opinion. Pending the Department's timely compliance with the requirements of this opinion, enforcement of the Trading Program regulations is stayed.⁶

⁴ Intervenor Independent Energy Producers of New Jersey requested we stay enforcement of the Trading Program regulations to allow the Department time to repeal or amend them.

⁵ We cannot determine from the record before us whether the Trading Program regulations are still required to regulate ongoing activity related to New Jersey's participation in RGGI during the first control period. If they are, the Department can take that into account in determining whether to repeal or amend the regulations.

⁶ If the Department fails to act in a timely manner, Environment New Jersey and the Council may seek additional relief by motion.

Remanded to the Department for action consistent with this
opinion.

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



CLERK OF THE APPELLATE DIVISION