



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

BOB MARTIN
Commissioner

KIM GUADAGNO
Lt. Governor

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
WATER COMPLIANCE AND
ENFORCEMENT,

Petitioner,

v.

CHEYENNE CORPORATION AND
CAYUSE, LLC, T/A WILD WEST
CITY,

Respondents.

ADMINISTRATIVE ACTION
FINAL DECISION

OAL DKT NO. ECE 1167-14
AGENCY REF. NO. PEA 130001-1904320

CHEYENNE CORPORATION AND
CAYUSE, LLC, T/A WILD WEST
CITY,

Petitioners,

v.

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
WATER ALLOCATION,

Respondent.

OAL DKT NO.: ELU 3817-14
AGENCY DKT NO. Project ID No. 171221186

This Order addresses the consolidated appeal of two decisions of the Department of Environmental Protection (Department) regarding a public water system previously used by Cheyenne Corporation and Cayuse, LLC, t/a Wild West City (Respondents) to serve patrons of their seasonally operated western theme park in Byram Township, Sussex County. After water samples tested positive for total coliform and E. coli in 2010 and 2011, the Department ordered Respondents to take corrective action to protect the public health by either providing an alternate source of water or installing 4-log virus inactivation. Although Respondents eventually installed a new well, they appealed the Department's April 26, 2013 Administrative Order, which required them to re-designate for non-potable use or decommission the former well. Respondents separately appealed the Department's April 17, 2013, denial of their request for a waiver of the rule governing decommissioning wells (decommissioning rule) found at N.J.A.C. 7:9D-3.1, in the Department's rules entitled Well Construction and Maintenance; Sealing of Abandoned Wells, N.J.A.C. 7:9D.

Respondents filed hearing requests to challenge these decisions and the matters were transferred to the Office of Administrative Law (OAL) and assigned to Administrative Law Judge (ALJ) Tiffany M. Williams. The ALJ granted Respondents' unopposed motion to consolidate the matters. Respondents then filed a motion for summary decision, and the Department filed a cross-motion for summary decision. Respondents and the Department both submitted further replies disputing the other's arguments. On December 31, 2015, the ALJ issued her Initial Decision granting the Department's motion, affirming and ordering enforcement of the Administrative Order and affirming the Department's denial of Respondents' request for waiver from the decommissioning rule. Both parties filed exceptions, and the Department filed a reply to Respondents' exceptions. Respondents' exceptions asserted various factual and legal errors. The

Department took exception to certain factual findings, which did not impact any of the ALJ's legal conclusions.¹

The time for issuing the Final Decision was extended to May 16, 2016.

STATUTORY AND REGULATORY BACKGROUND

The Department regulates public water systems pursuant to its authority under the Safe Drinking Water Act (SDWA), N.J.S.A. 58:12A-1 et seq. The SDWA declares the State's "paramount policy ... to protect the purity of the water that we drink" and to maintain "high-quality potable water . . . in order to safeguard the health and welfare of the people of the State." N.J.S.A. 58:12A-2. The Act further provides that it is in the State's best interest for the State, through the Department, to assume primary enforcement responsibility under the federal Safe Drinking Water Act, 42 U.S.C. 300f et seq., which provided a comprehensive framework for establishing standards and regulating the monitoring of potable water. N.J.S.A. 58:12A-2.

Following its mandate under the SDWA, the Department adopted primary drinking water regulations, N.J.A.C. 7:10-5, that are no less stringent than the national regulations. N.J.S.A. 58:12A-4. Primary drinking water regulations apply to public water systems, identify contaminants which may adversely affect public health, specify a maximum contaminant level (MCL) for each contaminant, and set criteria and procedures to ensure that a drinking water supply complies with the MCL. N.J.S.A. 58:12A-3k; N.J.A.C. 7:10-1.3; 42 U.S.C. 300f(1). Among other things, the Department adopted and incorporated by reference the National Primary Drinking Water Regulations set forth in 40 C.F.R. 141, N.J.A.C. 7:10-5.1, for which the Department has primary

¹ This Final Decision does not address every exception made by the parties by paragraph reference; however, the arguments of the parties have been considered and corrections have been made in this Final Decision to minor factual errors in the Initial Decision.

enforcement responsibility, see 76 Fed. Reg. 2,374 (Jan. 13, 2011). The national regulations include the Total Coliform Rule, which sets public water system monitoring and analytical requirements for coliform, 40 C.F.R. 141.21 to 141.29, and the Ground Water Rule, which is intended to protect against microbial pathogens through fecal contamination in public water systems that use ground water sources, 40 C.F.R. 141.400 to 141.405. See 71 Fed. Reg. at 65,576.

Although fecal indicators typically are not harmful when ingested, their presence shows pathogenic viruses and bacteria have a pathway to enter ground water sources. 71 Fed. Reg. at 65,576. These pathogens can reach ground water via subsurface and near surface pathways, e.g., fecal contamination through subsurface pathways from improper storage or management of manure or failed septic systems, as well as fecal contamination from the surface along the casing or through cracks in the sanitary seal. 71 Fed. Reg. at 65,581. Most waterborne pathogens cause gastrointestinal illness with diarrhea, abdominal discomfort, nausea, vomiting and other symptoms. 71 Fed. Reg. at 65,580. Waterborne disease usually causes acute effects from a single exposure. Although most gastrointestinal illnesses generally are of short duration and result in mild illness, some can cause other serious disorders and also result in severe illness or death. Moreover, infected humans, even without clinical illness signs, may infect other people through secondary spread. Ibid. By requiring higher risk systems to monitor and take corrective action, when necessary, the public health is protected. 71 Fed. Reg. at 65,581.

The SDWA authorizes the Department to take enforcement action, including issuing orders as necessary to enforce the State's primary drinking water regulations. N.J.S.A. 58:12A-4c. If information is received that a contaminant that is present in or is likely to enter a water system may present an imminent and substantial endangerment to the health of persons, the Department may

take necessary actions, including issuing orders, to protect the health of those persons. N.J.A.C. 58:12A-6.

The Department also has authority to direct the sealing of any well which is not in use, is in a condition that endangers or threatens subsurface or percolating waters, or endangers life. N.J.S.A. 58:4A-4.2. Under the implementing regulations, the Department may order the decommissioning, i.e., the permanent closure or sealing, of any well which is abandoned, has been constructed in violation of N.J.S.A. 58:4A-4.1 et seq., has not been maintained in a sufficiently protective condition, has been replaced by another well, or is contaminated. N.J.A.C. 7:9D-1.5 and -3.1.

FACTS AND PROCEDURAL BACKGROUND

Respondents operate their seasonal western theme park known as Wild West City (WWC) from May through October. These matters concern a transient, public non-community water system (water system) that had served Wild West City before water quality sampling yielded positive E. coli results. According to the record, the water system served an average transient population of 400 persons per month, an average non-transient population of 50 persons per month, and fewer than 1,000 persons on any given day. NJDEP Exh. 17 (NJDEP, Bureau of Safe Drinking Water Implementation, Non-Community Water System Inspection Report, July 18, 2012); NJDEP Exh. 19 (NJDEP Bureau of Safe Drinking Water, Transient Non-community Water Systems Inspection Report, July 27, 2009). Cayuse operates and Cheyenne Corporation (Cheyenne) owns the water system. Michael Stabile is the managing member of Cayuse and the President and a shareholder of Cheyenne, which together are responsible for the water system. NJDEP Exh. 11 (Order on Consent Providing for Substitution of Respondent).

The well had been used since the 1950s. According to Respondents, the well is located in a well pit, 5 feet by 5 feet by 5 feet, in a building located on the highest point of the property. NJDEP Exh. 18 (March 7, 2011 from M. Stabile to K. Tedesco, NJDEP); NJDEP Exh. 20 (Answer to Interrogatory No. 58). The single-cased well is six inches in diameter, made of steel, and one inch above the cement floor. NJDEP Exh. 18 (March 7, 2011 from M. Stabile to K. Tedesco, NJDEP); NJDEP Exh. 20 (Answer to Interrogatories Nos. 44-46). The well head is capped and approximately 30 inches below grade. NJDEP Exh. 20 (Answer to Interrogatories Nos. 59-60). A septic tank was located approximately 200 feet from the well, a sewage distribution box approximately 125 feet from the well, and a disposal field approximately 200 feet from the well. NJDEP Exh. 20 (Answer to Interrogatories Nos. 68-70). Respondents were unable to provide other detailed information to the Department regarding the well's construction or structural integrity, e.g., the length of the casing, the length of the borehole below the bottom of the casing, whether the annular space is sealed with grout, and if sealed, the length of the seal and material used to seal the space between the well casing and the wall of the borehole. NJDEP Exh. 20 (Respondents' answers to interrogatories). Such details about the integrity and adequacy of the casing and grout seal are important as proper well construction and well design minimize the risk of contamination to the well and aquifer. Certification of Karen M. Fell (Aug. 28, 2015) (Fell Certif.) ¶¶ 16, 18-20.

The Total Coliform Rule requires periodic testing of the distribution system, i.e., all pipes and conveyances from a well, N.J.A.C. 7:10-1.3, for microbiological contaminants in public water systems. 40 C.F.R. 141.21. Respondents must conduct regular monitoring for total coliform in the distribution system, once each calendar quarter that the system provides water to the public. 40 C.F.R. 141.21(a)(3)(i). Under the Total Coliform Rule, if a routine or repeat sample tests positive

for total coliform, the system must also analyze the sample for the presence of E. coli. 40 C.F.R. 141.21(e). If E. coli is present, the Department must be notified. Ibid.

The October 21, 2010, routine sample collected from the distribution system tested positive for total coliform and E. coli. NJDEP Exh. 23 (Individual Total Coliform Results (Distribution System)). Respondents were therefore required to collect a set of repeat samples within 24 hours of being notified of the positive result. 40 C.F.R. 141.21(b)(1). The total coliform positive result along with the fact that the system did not provide permanent virus treatment also required Respondents to conduct "triggered source water monitoring" under the Ground Water Rule. 40 C.F.R. 141.402(a).

The next day, on October 22, 2010, Respondents collected the required samples, all of which tested positive for total coliform and E. coli. NJDEP Exh. 23 (Individual Total Coliform Results (Distribution System)).

Under the Total Coliform Rule, this collection and sampling process must be repeated until either total coliform is not detected or the MCL for total coliform is exceeded. Id. The MCL for total coliform is violated if any repeat sample is positive for E. coli or if a routine sample is positive for E. coli positive and a repeat sample is positive for total coliform. 40 C.F.R. 141.63(b). Respondents violated the MCL for total coliform in both ways.

Under the Ground Water Rule, if a triggered source water monitoring sample tests positive for E. coli, the State may require either the collection of five additional source water samples within 24 hours of notice of the total coliform positive sample, or corrective action. 40 C.F.R. 141.402(a)(3); 40 C.F.R. 141.403(a)(6). The Department did not require immediate corrective action, and the five repeat source water samples collected on October 23, 2010 were also positive

for total coliform and E. coli. NJDEP Exhs. 22 (March 17, 2011 Letter from NJDEP to M. Stabile) and 23 (Individual Groundwater Rule Total Coliform Results (Raw Water)).

Because the sample was fecal indicator-positive, Respondents were required to meet the treatment technique requirements of the Ground Water Rule, 40 C.F.R. 141.403. Unless the State directs the implementation of a specific corrective action, the water system must consult with the State regarding the appropriate corrective action within 30 days of receipt of notice from the State requiring same. Within 120 days of receiving the notice, the water system must complete the corrective action or be in compliance with a State-approved corrective action plan. 40 C.F.R. 141.403(a)(4) and (5). The Ground Water Rule specifies four corrective action alternatives: correct all significant deficiencies; provide an alternate source of water; eliminate the source of contamination; or provide treatment that reliably achieves at least 4-log treatment of viruses. 40 C.F.R. 141.403(a)(6). Accordingly, the Department served Respondents with a Notice of Non-compliance, which among other things, required Respondents to submit a report detailing proposed or completed corrective actions, within thirty days of receipt of the letter. NJDEP Exh. 24 (Notice of Non-Compliance dated October 27, 2010).

Respondents and the Department subsequently communicated numerous times. Respondents suggested various reasons and theories to explain why the water tested positive for total coliform and E. coli, as well as their attempts to locate and remediate the source of contamination. NJDEP Exh. 14 (Nov. 26, 2010 email from M. Stabile to K. Mulligan, NJDEP); NJDEP Exh. 18 (March 7, 2011 letter from M. Stabile to K. Tedesco, NJDEP).² Respondents proffered as potential sources of contamination that 1) an animal had burrowed into the well pit

² In their motion papers and exceptions, Respondents suggest that the Department had the burden to establish that the contamination did not emanate from the sources identified by them. In fact, under the Ground Water Rule, it was incumbent on Respondents to take the necessary corrective action, e.g., to eliminate the source of contamination and correct all significant deficiencies, which they failed to do.

area, causing dirt to get into the distribution manifold which had a leak; 2) that a highway widening project in Byram Township caused a lowering of the aquifer and also exposed the aquifer to surface water contamination; and 3) a sewer line break or sewer overflow caused sewage to contaminate the aquifer. NJDEP Exh. 14 (Nov. 26, 2010 email from M. Stabile to K. Mulligan, NJDEP); NJDEP Exh. 18 (March 7, 2011 letter from M. Stabile to K. Tedesco, NJDEP). To eliminate the potential contamination sources, Respondents proposed to re-test the water system at the end of March and to extend the well casing, repair the distribution manifold and sanitary seal, chlorinate and re-test the water system, and perform monthly tests for E. coli. NJDEP Exh. 18 (March 7, 2011 letter from M. Stabile to K. Tedesco, NJDEP). If test results were positive, Respondents stated they “would seek financing to dig a new well.” NJDEP Exh. 18 at 8 (March 7, 2011 letter from M. Stabile to K. Tedesco, NJDEP).

Another phone conversation ensued, which the Department memorialized in a March 17, 2011 letter to Respondents. In that letter, the Department approved the Respondents’ proposed corrective action plan and directed them to complete the following by April 30, 2011 before opening for the season: 1) submit to the Department a copy of the well permit to extend the casing and the corresponding well record, and 2) collect two rounds of five source water samples at least five days apart with no chlorine residual detected in the well. If any of the special samples were to test positive for E. coli, Respondents would be required to provide a new source of water or install 4-log virus inactivation. NJDEP Exh. 22 (March 17, 2011 letter from NJDEP to M. Stabile).

By letter dated April 1, 2011, Respondents advised the Department that water sampling in March 2011 tested negative for total coliform. Respondents also sought to amend their corrective action plan to include repair of the distribution system and replacement of the sanitary seal. NJDEP Exh. 27 (April 1, 2011 letter from M. Stabile to DEP). The Department approved the revised plan,

according to which Respondents were required to replace the sanitary seal and repair the distribution manifold. The Department still required Respondents to collect two rounds of five source water samples at least five days apart with no chlorine residual detected in the well. All samples had to be total coliform and E. coli negative. The Department reiterated that, if any sample were to test positive for E. coli, Respondents would have to provide a new water source or 4-log treatment of viruses using inactivation, 40 C.F.R. 141.403(a)(6)(ii) and (iv). NJDEP Exh. 28.

Respondents repaired the leak in the distribution manifold, replaced the sanitary well seal, and chlorinated the well. NJDEP Exhs. 30 and 32. Respondents advised the Department that they had eliminated the sources of contamination and addressed the significant deficiencies, in accordance with the Ground Water Rule. NJDEP Exh. 30 (May 2, 2011 letter from M. Stabile to DEP).

In response, the Department allowed Respondents to resume using the well, subject to a number of conditions. NJDEP Exh. 38 (May 5, 2011 letter from the Department to M. Stabile). Respondents were required to submit more detailed information regarding the chlorination procedure they completed and to conduct bi-weekly assessment monitoring of the raw water source for the operating season (May 1 through October 20, 2011) and submit the sampling results. The Department also advised Respondents that, in the event any future raw water sample were to test positive for E. coli, corrective action would have to be taken within 120 days by installing a new well or permanent treatment. Ibid.

On September 2, 2011, a source water sample collected pursuant to Respondents' assessment monitoring obligations tested positive for total coliform and E. coli. The positive result triggered the requirement to install a new well or permanently treat the existing well. On September 9, 2011, a distribution system sample tested positive for total coliform and E. coli. NJDEP Exh. 41.

On September 14, 2011, Respondents requested the Department consider the “September 10, 2011 E. coli positive test³ from their well as an “anomaly” and allow them to conduct weekly tests for the remainder of their operating season in lieu of taking corrective action. Respondents Exhs. L and M. By letter dated September 20, 2011, the Department denied the request, explaining that well construction details are unknown, E. coli was detected in the previous year (2010), and the well tested positive for E. coli even after Respondents completed repairs and chlorinated the well in an attempt to address the deficiencies and eliminate the source of contamination. The Department therefore directed Respondents to conduct corrective action within 120 days and to consult with the Bureau regarding their planned corrective action. The Department also advised that they could submit a written extension request. Respondents Exh. L.

On or about November 13, 2011, Respondents requested that the Bureau reconsider its position, on the basis of Respondents’ assertion that contaminated flood waters could have caused the well to test positive for E. coli. NJDEP Exh. 50. Respondents provided a summary of the sampling results from October 28, 2010 through October 26, 2011, in support of their request. By letter dated November 17, 2011, the Department denied the reconsideration request and required Respondents to submit a corrective action plan by November 8, 2011 and complete all corrective actions by January 18, 2012. NJDEP Exh. 49. When Respondents failed to comply with the deadline, resulting in a treatment technique violation, the Department issued a Notice of Non-Compliance on February 28, 2012. NJDEP Exh. 51.

In response, on April 10, 2012, Respondents requested invalidation of the September 2 and September 9, 2011 water samples pursuant to 40 C.F.R. 141.21(c)ii and iii, which allow the State to invalidate a total coliform-positive sample taken as part of a water system’s routine testing

³ It is assumed that Respondents meant to say September 9, 2011 as there was no sample identified for September 10, 2011.

throughout its distribution system, as required by 40 C.F.R. 141.21(a). On April 12, 2012, the Department denied the request, because the conditions for invalidation under 40 C.F.R. 141.21(c)(1)(iii) and 40 C.F.R. 141.402(d)(1)(ii) were not met. NJDEP Exh. 53 (April 12, 2012 letter from DEP to M. Stabile). To protect the public, the Department directed Respondents to disconnect the well from the distribution system, discontinue its use while corrective action was being taken, and provide an alternate water source. The Department also confirmed the parties' agreement made during an April 5, 2012 meeting, that Respondents would submit a corrective action plan by April 13, 2012. Ibid. Respondents took no further action with respect to their invalidation request.

On April 13, 2012, the Department wrote to Respondents, explaining again the public health risks caused by the presence of E. coli in drinking water and expressing grave concern that Respondents were continuing to provide water from the well to the public. NJDEP Exh. 54 (April 13, 2012 letter from the Department to M. Stabile). The Department later advised that Respondents could retain the well for non-potable use by taking certain steps outlined in its letter. NJDEP Exh. 59 (June 13, 2012 letter from DEP to M. Stabile).

On June 18, 2012, Respondents began construction of a new well, which was completed on June 22, 2012. NJDEP Exh. 21 (NJDEP, Bureau of Water Allocation and Well Permitting, Well Record, Well Permit No. E201206349). On July 23, 2012, the Department approved Respondents' request for a 30-day extension to have the well re-designated for non-potable use. NJDEP Exh. 61 (July 23, 2012 letter from DEP to M. Stabile). Respondents did not take the necessary steps for re-designation, but instead submitted a request to the Department on October 15, 2012 to waive strict compliance with the decommissioning rule. Although Respondents constructed a new well, they

wanted to resume use of the former well. The Department denied the waiver request on April 17, 2013 and, on April 26, 2013, issued an Administrative Order, both of which are on appeal now.

The ALJ's Initial Decision summarized the material undisputed facts and based on that review, the ALJ granted the Department's cross-motion for summary decision and denied Respondents' motion. The ALJ concluded that the Department properly denied Respondents' waiver request. She further found that the issues surrounding Respondents' request to invalidate the September 2 and 9, 2011 water samples and the Department's response were not before the OAL in this contested case because the denial was an independent issue never raised in the decisions before her and Respondents never appealed the denial, instead choosing to install a new well. The ALJ also found that the Department's Administrative Order directing Respondents to take corrective action was authorized based on the undisputed facts, including that Respondents never definitively identified the source of contamination, that the well tested positive for E. coli in 2010 and 2011, and that E. coli poses a significant risk of public harm when present in a public drinking source. The ALJ concluded, therefore, that the Administrative Order should be enforced. The Department and Respondents both filed exceptions, and the Department filed a reply to the Respondents' exceptions.⁴

LEGAL DISCUSSION

Under N.J.A.C. 1:1-12.5, a party is entitled to summary decision where the moving party shows that there is no genuine issue as to any material fact challenged and should prevail as a matter of law. Contini v. Bd. of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995). When a party

⁴ On May 6, 2016, Respondents submitted the results of well sampling conducted on April 12, 2016, requesting supplementation of the record. The sampling report was not before the Department or the OAL and cannot be considered part of the record for review in this contested case. Respondents' request to supplement the record must therefore be rejected.

moves for summary decision, the non-moving party must submit responding affidavit(s) setting forth specific facts to show that there is a genuine issue which can be determined only in an evidentiary hearing. N.J.A.C. 1:1-12.5(b); see Housel v. Theodoridis, 314 N.J. Super. 597, 604 (App. Div. 1998) (to defeat a summary judgment motion, the non-moving party cannot simply “sit on his or her hands,” but must present specific facts showing there is a genuine issue for trial). Like the standard for summary judgment under N.J. Court Rule 4:46-2, the standard on a motion for summary decision requires the court or agency to determine whether the evidence, when viewed in the light most favorable to the non-moving party, is “sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.” Contini, supra, 286 N.J. Super. at 122 (quoting Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995)).⁵ For the reasons below, I find that the Department’s motion was properly granted.

Denial of waiver request

The ALJ found that Respondents had no valid basis to request the waiver of the decommissioning rule and that they failed to satisfy the criteria in support of the waiver request, N.J.A.C. 7:1B-2.1(a). Initial Decision at 10. Respondents take exception to the ALJ’s conclusion. The record shows that Respondents did not meet the criteria set forth in the Waiver Rule, N.J.A.C. 7:1B. I therefore ADOPT the ALJ’s conclusion concerning this issue.

The Department’s Waiver Rule sets forth “the limited circumstances in which the Department may, in its discretion, waive the strict compliance with any of its rules in a manner consistent with” the Department’s core missions, including the protection of public health. N.J.A.C.

⁵ The court in Housel explained in a footnote that the governing standard on a summary judgment motion, set forth in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995), is very similar to the standard enunciated in Judson v. Peoples Bank and Trust Co., 17 N.J. 67 (1954), which applied in the years before Brill (not after, as the ALJ stated, Initial Decision at 8).

7:1B-1.1(a). The Waiver Rule is not intended “to allow for the routine circumvention of any Department rule.” N.J.A.C. 7:1B-1.1(b). In rejecting a challenge to the Waiver Rule, the Appellate Division explained that the rule “will be applied only in limited circumstances where an applicant establishes that it meets one of the four bases for consideration of a waiver request and demonstrates the compelling circumstances needed to satisfy the rule’s criteria.” In re N.J.A.C. 7:1B-1.1 et seq., 431 N.J. Super. 100, 129 (App. Div. 2013).

On October 15, 2012, Respondents submitted a request for waiver from the requirements of N.J.A.C. 7:9D-3, which govern the decommissioning of wells. NJDEP Exh. 1 (Waiver Request). The narrative description of their request reveals that rather than requesting a waiver of any particular rule, Respondents were attempting to challenge the Department’s denial of their request to continue testing the well. Despite the lack of clarity of the request, the Department reviewed it and concluded that a waiver could not be granted. The Department’s decision, affirmed by the ALJ, was proper.

Respondents argued that grounds for a waiver existed based on conflicting rules, undue burden, and public emergency. First, Respondents identified 40 C.F.R. 141.402(a)(2), Ground water source microbial monitoring and analytical methods, as the conflicting federal rule. Id. However, in their hearing request, Respondents asserted that they “never stated” there was a conflict between these two rules, but that this was “NJDEP’s interpretation.” NJDEP Exh. 3. Rather, Respondents explained a conflict existed because the federal Ground Water Rule allows, as a corrective action alternative, elimination of the contamination source, but this alternative was “never offered” to them. Id. This argument must be rejected.

The Waiver Rule defines “conflicting rules” as “a situation in which ... a Department rule and the rule of ... a Federal agency[] conflict so as to make compliance with both rules impossible

or impracticable.” N.J.A.C. 7:1B-1.2. Respondents’ assertion – even if true, which it is not – does not fall within the scope of this provision. Instead, Respondents disagree with the Department’s application of the Ground Water Rule following indications of E. coli contamination in the public water source. Moreover, contrary to Respondents’ assertion, the Department gave them the opportunity to eliminate the contamination source and correct the significant deficiencies. Respondents, however, failed to do so.

In any event, there is no conflict between the Department’s decommissioning rule and the Ground Water Rule. The Ground Water Rule requirements are National Primary Drinking Water Regulations, which, among other things, set forth monitoring and corrective action requirements. 40 C.F.R. 141.400 to 141.405. The decommissioning rule sets forth requirements for removing from service wells which are abandoned, violate well construction requirements, have been replaced by another well, are contaminated, or have not been maintained in a way to ensure protection from contamination for the State’s subsurface and percolating waters. N.J.A.C. 7:9D-3.1(a). Compliance with both is possible and practicable.

Respondents next claimed that compliance with the decommissioning rule would be unduly burdensome. In their exceptions, Respondents argued that the cost to decommission a well is a significant burden to its business. However, the standard is not whether compliance imposes a significant burden. To be unduly burdensome, the requester must show that the situation is such that strict compliance would cause “[a]ctual, exceptional hardship for a particular project or activity, or property,” or that cost of compliance would be “excessive” compared to an alternative compliance measure which achieves comparable or greater public health, safety or environmental benefits. N.J.A.C. 7:1B-1.2.

Respondents' motion papers presented no evidence to support their claim that compliance would be unduly burdensome. Respondents had already installed a new well, thus undermining their exceptional hardship argument.⁶ Moreover, they retain the option of re-designating the existing well for non-potable use, which requires the submission of an application for a different type of permit. Respondents have not shown that compliance would result in excessive costs compared to an alternative compliance measure with comparable or greater health, safety or environmental benefits, both in terms of cost and comparable benefits, as the well they wish to use is susceptible to fecal contamination and thus does not provide benefits comparable to a clean water source.

The Respondents further claimed that a waiver was warranted because of a public emergency, arguing that the positive total coliform and E. coli sampling results were due to storms during which a state of emergency was declared. This argument is without merit. The Waiver Rule defines "public emergency" as a situation in which a duly authorized federal or state official declares a public emergency. N.J.A.C. 7:1B-1.2. Even if there was a state of emergency around the time of the sampling, Respondents' request for a waiver did not show how a waiver of the decommissioning rule would effectuate a response to the public emergency.

In reviewing the request, the Department considered the waiver evaluation criteria in N.J.A.C. 7:1B-2.2(a) and concluded that Respondents had not met their burden of providing sufficient information and data to support the need for a waiver. Specifically, the Department found that public notice was provided, N.J.A.C. 7:1B-2.2(a)1; there was insufficient evidence to determine whether Respondents directly caused or contributed to the circumstances that resulted in the rule

⁶ Respondents argued that they had no choice but to drill a new well. Exceptions at 11; Rb at 10. This is incorrect. Respondents were initially allowed to implement measures to eliminate the source of contamination and address deficiencies, but failed to do so.

being unduly burdensome, N.J.A.C. 7:1B-2.2(a)4, and that Respondents failed to meet all other criteria, i.e., N.J.A.C. 7:1B-2.2(a)2, (a)3, (a)5, (a)6 and (a)7.

Respondents had the burden to establish that a waiver was warranted and they failed to do so in their April 2012 request. Respondents' arguments made in the OAL again failed to establish that the waiver criteria were met, or to present evidence showing there is a disputed material fact. Although Respondents did not assert a net environmental benefit as a basis for a waiver, N.J.A.C. 7:1B-2.1(a)3, in their waiver request or in their hearing request of the Department's denial, Respondents argued in their motion for summary decision in the OAL that a waiver would result in a net environmental benefit, and also raised this issue generally in their exceptions to the ALJ's finding that the evidence does not support a finding of waiver under N.J.A.C. 7:1B-2.1(a)1 through (a)4. Initial Decision at 10. Even if Respondents had properly asserted net environmental benefit as a basis for their waiver request, they failed to show that "the qualitative or quantitative benefit to the environment substantially outweighs any environmental detriment due to the waiver. N.J.A.C. 7:1B-1.2 and -2.1. Respondents simply argued that the well is a safe drinking water source, despite the positive total coliform and E. coli results. Respondents' argument must be rejected. Clearly, there is no net environmental benefit to using a water source for visiting patrons, including sensitive subpopulations such as children and the elderly, which has tested positive for fecal contamination, compared with a clean water source.

For these reasons, the ALJ's initial decision concluding that the Department properly denied the waiver request is ADOPTED.

Administrative Order

Following its decision on the waiver request, the Department issued an Administrative Order which outlined the compliance and enforcement history pertaining to the well and directed the re-

designation or decommissioning of the existing well by May 15, 2013. NJDEP Exh. 6. Respondents appealed, making the same arguments in their hearing request that they did in their challenge to the Department's waiver request denial. The ALJ affirmed the Administrative Order and the Respondents took exception, arguing that summary decision should not have been granted to the Department because the source of contamination of the well was not definitively found. Respondents also argued that the record does not support a finding that the well threatened public health and that the Department should have allowed Respondents to continue to monitor the well. Based on the undisputed material facts in the record, I find that the Department properly exercised its authority in directing Respondents to either decommission or re-designate the former well.

As explained above, Respondents' ground water supplied public water system violated the MCL for total coliform when the October 21, 2010, routine sample they conducted of the well's distribution system tested positive for total coliform and E. coli and the repeat samples collected pursuant to 40 C.F.R. 141.21(b)(1) also tested positive for total coliform and E. coli. 40 C.F.R. 141.63(b). For public notification purposes, this violation is one that may pose an acute risk to health. Id. Thus, the MCL violation established that the water system could threaten public health.

Because a routine monitoring sample collected under 40 C.F.R. 141.21(a) was positive for total coliform and the water system did not provide at least 4-log treatment of viruses, the triggered source water monitoring requirements of the Ground Water Rule applied. The source water sample and the repeat source water samples all tested positive for E. coli. NJDEP Exhs. 22 (March 17, 2011 Letter from NJDEP to M. Stabile) and 23 (Individual Groundwater Rule Total Coliform Results (Raw Water)). As a result, the treatment technique requirements of the Ground Water Rule, 40 C.F.R. 141.403, applied.

As Respondents noted, the corrective action alternatives required by the Ground Water Rule include correction of all significant deficiencies; an alternate water source; elimination of the source of contamination; or 4-log treatment of viruses. 40 C.F.R. 141.403(a)(6). The Department gave Respondents the opportunity to address the significant deficiencies and eliminate the source(s) of contamination when the Department approved the initial and modified corrective action plans. 40 C.F.R. 141.403(a)(5)(ii). However, if these actions failed to achieve their purpose, as was reflected by a subsequent E. coli-positive raw water sample, then the Department was required to direct Respondents to implement one of the two remaining corrective action alternatives under the Ground Water Rule: provide another water source, or implement 4-log virus treatment. 40 C.F.R. 141.403(a)(6)(i) to (iv).

Under the Ground Water Rule, if a ground water source sample collected under 40 C.F.R. 141.402(b) – which pertains to assessment source water sampling – is E. coli-positive and the State so directs, 40 C.F.R. 141.403(1)(2), a system must implement one or more of the corrective action alternatives set forth in 40 C.F.R. 141.403(a)(6). While the Department agreed that Respondents could resume using the well, based on the initial corrective actions taken and the additional coliform sampling results, the Department required Respondents to conduct bi-weekly assessment raw water source monitoring pursuant to 40 C.F.R. 141.402(b). The Department informed Respondents that if any raw water sample were positive for E. coli, they would have to either provide an alternate water source or install permanent disinfection. NJDEP Exh. 38 (May 5, 2011 Letter from NJDEP to M. Stabile). The September 2, 2011 raw water sample collected as part of Respondents' assessment raw water source monitoring obligations was E. coli positive. Therefore, Respondents were required to implement one of the two remaining corrective action alternatives.

The foregoing facts are undisputed. As shown in the subsequent E. coli-positive raw water sample, it is further undisputed that Respondents failed to eliminate the source of contamination and to correct all significant deficiencies. Respondents provided an alternate water source, first a water tanker, then, a new well. However, Respondents do not dispute that they failed to decommission the old well, or to submit an application to use the well as a non-potable water source. Instead, they argue they should be allowed to continue to use their well because the well is safe.

Respondents' argument must be rejected. As explained above, the Ground Water Rule seeks to minimize the risk to public health caused by viral and bacterial pathogens in public water systems using ground water sources. It is undisputed that Respondents failed to eliminate the source of contamination. The Department explained why proper well construction and design is important to minimize the risk of contamination to a well, why the lack of details about Respondents' well are cause for concern, why fluctuating water quality indicates there is a pathway for contamination, and why wells must be decommissioned if they are no longer used or improperly constructed. See Fell Certification. Respondents did not offer any specific facts showing these facts are in dispute.

Pursuant to N.J.A.C. 7:9D-3.1, the Department may order the sealing of any well which is abandoned, has been replaced by another well, is contaminated, or has not been maintained in a condition that ensures protection from contamination for subsurface and percolating waters of the State. An abandoned well is one that is not in use, is not properly maintained, endangers life, or endangers or threatens the subsurface and percolating waters from any cause. The positive total coliform and E. coli results showed that the well is not properly maintained and is not in use, because of its threat to public health.

Here, the Department allowed Respondents to re-designate the well for non-potable use as an alternative to decommissioning. Re-designation is a separate permitting process that requires the submission of a different permit application. Respondents still have this option.⁷

Denial of request to invalidate samples

The ALJ rejected Respondents' claim that the Department improperly denied their request to invalidate the September 2 and 9, 2011 sampling results as outside the scope of this contested case. Respondents took exception to this finding, arguing that the Department had an obligation to advise them of their right to contest the denial and that the denial is relevant to their waiver request. The Department replied that the ALJ's finding was correct, that the Department's decision was a final agency action which Respondents should have, but did not, appeal to the Appellate Division, and in any event, the record supported the Department's denial.

On the existing record, I find that it is not necessary to determine whether the Department's letter denying Respondents' request to invalidate certain samples was an appealable final agency action. What is absolutely clear is that Respondents waited for more than six months to make that request, then continued to challenge the Department's instructions to them concerning the well in all respects. However, they failed to take any formal steps to challenge the Department's decision denying the invalidation request and only challenged the Department's denial of their waiver request and the subsequent Administrative Order. The request for invalidation, further, is not a sub-issue of their challenge to the Department's waiver request denial.

Respondents argued for the first time in their motion for summary decision that the water samples taken in September 2011 should have been invalidated. The Department responded both as

⁷ The Department previously gave Respondents the corrective action alternatives of installing a new well or installing permanent treatment to the old well. Respondents chose the former. If Respondents wish to resume use of the old well, Respondents may still apply to the Department to install permanent treatment.

to Respondents' faulty procedure and the substance of the claim. Therefore, the issue has been fully briefed. While I concur with the ALJ that the invalidation request was not properly before the OAL, I find that as a matter of law and based on the undisputed facts, the Department properly denied Respondents' requests to invalidate the samples.

Respondents requested invalidation of the water samples pursuant to 40 C.F.R. 141.21(c)ii and iii. These provisions allow the State to invalidate a total coliform-positive sample taken as part of a water system's routine testing throughout its distribution system, as required by 40 C.F.R. 141.21(a). The invalidation criteria are specific and limited, and do not apply here.

Respondents claimed that hurricanes and extensive flooding caused the positive results. NJDEP Exh. 52. Thus, they argued that the invalidation criteria were satisfied, because the positive samples resulted from a domestic or other non-distribution system plumbing problem and the State had substantial grounds to believe that the positive result was due to a circumstance or condition which did not reflect water quality in the distribution system. Respondents also argued in their exceptions that the Department did not definitively rule out that the positive E. coli results were due to extreme weather events, and therefore, summary decision should have been denied.

Their argument fails for several reasons. First, the samples were not subject to invalidation under 40 C.F.R. 141.21(c). The Total Coliform Rule allows a State to invalidate a total coliform-positive sample collected from the distribution system as part of the water systems' minimum monitoring obligations. 40 C.F.R. 141.21(c) ("A total coliform-positive sample invalidated under this paragraph (c) does not count towards meeting the minimum monitoring requirements of this section.") As the Department found, the September 9, 2011 positive total coliform sample was not taken as part of Respondents' minimum monitoring requirements under the Total Coliform Rule. Second, even assuming that this rule is applicable, Respondents did not take the repeat samples

required to meet the criteria in 40 C.F.R. 141.21(c)(ii) or (iii). Third, Respondents did not present evidence sufficient to meet the “substantial grounds” criteria of the rule, i.e., to allow the Department to conclude the sampling result was due to a circumstance or condition which did not reflect water quality in the distribution system.⁸

The Ground Water Rule similarly allows a State to invalidate a positive sample under very limited circumstances, see 40 C.F.R. 141.402(d), which are not present here. Although not explained by Respondents, I address this issue briefly for the sake of completeness. As a threshold matter, the invalidation criteria set forth in 40 C.F.R. 141.402(d) could not have been applied to the positive total coliform and E. coli source water samples taken on September 2 and 9, 2011. The Ground Water Rule allows a State the discretion to invalidate a fecal indicator positive ground water source sample collected under paragraph (a), if specified conditions are met. 40 C.F.R. 141.402(d). Paragraph (a) of 40 C.F.R. 141.402(d) sets forth the requirements for triggered source water monitoring. As the Department explained, the samples at issue were collected under paragraph (b), as part of Respondents’ assessment source water monitoring. Therefore, the Department properly denied Respondents’ request.

CONCLUSION

For the reasons set forth therein and above, I ADOPT the Initial Decision granting the Department’s cross-motion for summary decision and upholding and directing Respondents to comply with the Administrative Order, which directed Respondents to either re-designate the well

⁸ For the Department to determine substantial grounds, 40 C.F.R. 141.21(c)(iii) requires the Department to document its decision to invalidate under this paragraph and the decision must be approved and signed by the supervisor of the recommending Department official. The document, which must state the specific cause of the total coliform-positive sample and the corrective action taken, must be made available to the public and to EPA. “The state may not invalidate a total coliform-positive sample solely on the grounds that all repeat samples are total coliform-negative.” 40 C.F.R. 141.21(c)(iii).

for non-potable use or decommission the well. Respondents must advise the Department of their election within fifteen (15) days of this Final Decision, and complete such action within sixty (60) days of this Final Decision. I also ADOPT the Initial Decision granting the Department's cross-motion for summary decision and upholding the denial of Respondents' waiver request. Finally, I ADOPT as MODIFIED the Initial Decision's conclusion that the invalidation issue was not properly before the OAL, finding also that, as a matter of law, the Department properly denied Respondents' request to invalidate the positive E. coli samples collected on September 2 and 9, 2011. Respondents' motion for summary decision is accordingly denied in all respects.

IT IS SO ORDERED.

DATE: May 12, 2016



Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

DEPARTMENT OF ENVIRONMENTAL PROTECTION, WATER COMPLIANCE
AND ENFORCEMENT v.
CHEYENNE CORPORATION AND CAYUSE, LLC, t/a WILD WEST CITY
OAL DKT NO. ECE 1167-14
AGENCY REF. NO. PEA 130001-1904320

CHEYENNE CORPORATION AND CAYUSE, LLC, t/a
WILD WEST CITY v.
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
WATER ALLOCATION

OAL DKT. NO. ELU 3817-14
AGENCY DKT. NO. Project ID No. 171221186

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