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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-4723-05T2

SUSSEX COUNTY MUNICIPAL UTILITIES  
AUTHORITY,

Appellant,

v.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL  
PROTECTION,

Respondent.

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Argued June 5, 2007 - Decided June 27, 2007

Before Judges Skillman, Lisa and Holston,  
Jr.

On appeal from a Final Decision of the New  
Jersey Department of Environmental  
Protection, 0053350.

Anthony J. Zarillo, Jr. argued the cause for  
appellant (Courter, Kobert & Cohen,  
attorneys; Mr. Zarillo and John C. Hall of  
the D.C. bar admitted pro hac vice, of  
counsel; Mr. Zarillo and Charles A. Castle,  
on the brief).

Jane F. Engel, Deputy Attorney General,  
argued the cause for respondent (Stuart  
Rabner, Attorney General, attorney; Patrick  
DeAlmeida, Assistant Attorney General, of  
counsel; Ms. Engel, on the brief).

PER CURIAM

The Sussex County Municipal Utilities Authority (SCMUA) appeals from the denial by the New Jersey Department of Environmental Protection (DEP) of its application for a modification of its New Jersey Pollutant Discharge Elimination System (NJPDDES) permit with respect to the concentration of phosphorus allowed (phosphorus effluent limitations) in SCMUA's permitted discharges into the Wallkill River. SCMUA also appeals from the DEP's denial of its request for a stay of its phosphorus effluent limitations.

The DEP based its denials upon SCMUA's failure to support its application with a phosphorus evaluation study conducted pursuant to an approved work plan, as required by the DEP's Technical Manual for Phosphorus Evaluations for NJPDDES Discharge to Surface Water Permits (Manual). SCMUA submitted a phosphorus evaluation study in support of its application, but the DEP refused to consider it because it was not conducted in accordance with a work plan pre-approved by the DEP.

SCMUA's principal argument is that the DEP's application of the Manual constitutes illegal rule-making and was not a proper basis for the DEP to refuse to consider its study. SCMUA further argues that the statute authorizing DEP technical manuals does not apply to adoption of narrative criteria implementation procedures and instream numeric water quality

requirements, such as those included in the Manual. SCMUA also argues that, because the Manual was adopted after issuance to it of the permit sought to be modified, the Manual was inapplicable to its permit modification application, that its study substantially complied with the Manual requirements, and that the DEP's refusal to consider its study and the denial of its application was arbitrary and capricious, as was the denial by the DEP of its stay request.

We conclude that the DEP acted within the scope of its authority in requiring SCMUA to obtain pre-approval of its work plan by which its phosphorus evaluation study would be conducted. This conclusion makes it unnecessary to address in detail SCMUA's remaining arguments. We find no impropriety in the DEP's denial of SCMUA's stay request. Accordingly, we affirm.

I

SCMUA, classified as a major discharger by the DEP, operates a wastewater treatment facility in Hardyston Township, Sussex County. It is allowed to discharge between 2.5 and 3.0 million gallons per day (MGD) of disinfected domestic wastewater into the Wallkill River. The affected portion of the Wallkill is classified as a Freshwater 2, Non-Trout river, pursuant to N.J.A.C. 7:9B-1.15(g).

The DEP issued a draft surface water permit to SCMUA on April 17, 2003. With respect to phosphorus, a nutrient which, in excess, stimulates algae growth, the draft permit provided that "based on a reasonable potential analysis" of the effluent limitations of phosphorus, "cause exists to exceed the instream water quality criteria of 0.1 mg/L [milligram/liter]." For a period of fifty-nine months, the permit would allow SCMUA an interim monthly average phosphorus effluent limitation of 1.0 mg/L per 2.5 MGD discharge, and upon expiration of the fifty-nine month period, final monthly average phosphorus effluent limitations of .22 mg/L per 2.5 MGD discharge and .2 mg/L per 3.0 MGD discharge, respectively. The final permit was issued on June 18, 2003, effective August 1, 2003, with an expiration date of July 31, 2008.

In that final permit, the DEP responded to written comments submitted by SCMUA Administrator John Hatzelis and by SCMUA Chief Engineer Thomas Varro. SCMUA complained about the "new more restrictive total phosphorous effluent limitations":<sup>1</sup>

These new limitations, however, are not based upon any change in underlying law or water quality study. DEP, without undertaking applicable rulemaking pertaining

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<sup>1</sup> According to SCMUA, an adjudicatory hearing is pending before the OAL with respect to permit conditions, "including whether the phosphorus effluent limitation should have been imposed at all."

to the imposition of total phosphorous requirements ignores its own guidance, water quality management plans and TMDL listing decisions, as well as its historical interpretation of applicable law and, instead, proposed to impose these more stringent limitations upon SCMUA.

The DEP replied in part:

In this case, cause to exceed the 0.2 mg/l limit exists. The Department has provided 59 months for the permittee to come into compliance with the new phosphorus limitation. During this time, the permittee may conduct studies to determine if phosphorus is the limiting nutrient and to show that the discharge does not affect the designated uses of the river (see N.J.A.C. 7:9B-1.14(c)5).

. . . .

Therefore, no change has been made to the Final Permit.

In response to SCMUA's comment that "DEP Water Quality Determinations Indicate Phosphorus Is Not a Problem and Therefore No Criteria Exceedance Has Occurred," the DEP stated:

If the permittee has a study of the Wallkill River which proves that Phosphorus is not a limiting nutrient and Phosphorus is discharged at levels which results in no use impairment to the waterbody and if that document addresses all of the requirements of the Department's guidance document for phosphorus evaluation, the recognized study can then be submitted to this Bureau for review by the appropriate staff. The Department will review the work plan and final report to determine if the study was conducted according to Department protocol. If the workplan and subsequent study are

acceptable to the Department, the permit will be modified accordingly. As per the permit, the permittee has a 59 month interim compliance period for Phosphorus. The workplan and final study report are to be submitted during the interim compliance period such that the Department can review the submissions and modify the phosphorus limit (if appropriate) before the 0.2 mg/L limitation becomes effective.

Allowed phosphorus concentrations reflected in the draft permit remained the same in the final permit.

In March 2003 the DEP issued the Manual. Contained in the Foreword is the following:

This guidance manual is for use by NJPDES Discharge to Surface Water (DSW) Permittees, consultants and other interested parties who may be conducting a limiting nutrient analysis and a "render unsuitable for uses" analysis for total phosphorus, when offered these options as part of a compliance schedule contained in a Final NJPDES DSW Permit. . . .

. . . .

This guidance manual is intended to address only the optional phosphorus evaluations that are specified in applicable NJPDES permits.

Under the heading "Purpose of this document," the following appears:

This manual provides the Department's technical guidance for conducting certain evaluations concerning total phosphorus (TP). These analyses are in accordance with the allowable demonstrations provided for in the Surface Water Quality Standards (SQWS)

at N.J.A.C. 7:9(B)-1.14(c) to demonstrate whether or not TP is the limiting nutrient and whether or not TP otherwise renders the waters unsuitable for the designated uses. The results of such demonstrations shall be submitted to the Department for a final determination of the applicability of the TP stream criteria and a Water Quality Based Effluent Limitation (WQBEL) in accordance with the compliance schedule provided in a final NJPDES discharge permit. This document also describes the thresholds the Department will use for making the limiting nutrient and "render unsuitable" determinations, based on the data submitted by the permittees.

The Manual informs permittees that "if they elect to do so, [they] might need to conduct several types of assessments to provide information to the [DEP]" and that "[t]he first task in a phosphorus evaluation demonstration is to determine the spatial extent of the monitoring and assessment required."

A permittee is specifically informed that:

A Quality Assurance/Work Plan, descriptive of the proposed monitoring program, must be submitted to the Department and be approved prior to commencement of any monitoring. [Emphasis in original.] Only monitoring conducted in accordance with an approved workplan will be considered. [Emphasis added.] In addition, the submitted workplan must address all areas of analysis, as identified herein. For submission of completed workplans, or guidance in designing a detailed workplan, please contact the Department's Division of Water Quality, Bureaus [sic] of Point Source Permitting.

After the permittee has obtained the Department's written concurrence with their proposed workplan, sampling and assessment may commence. Completed studies, analysis and all associated data should be submitted to the NJDEP, Division of Water Quality, Bureaus [sic] of Point Source Permitting. The Department will review the submittal and make a determination. . . .

On June 8, 2005, SCMUA submitted copies of its June 6, 2005 "Quality Assurance Sampling Plan for a Phosphorus Evaluation Study on the Wallkill River" to the DEP for a determination as to whether the "final monthly average total phosphorous permit limit of 0.2 mg/l" applies to the segment of the Wallkill River to which SCMUA's Pollution Control Facility discharges. The plan, drafted by TRC Omni Environmental Corporation (Omni), set forth proposed sampling locations, sampling protocols, monitoring parameters and a sampling schedule.

Omni began conducting the study without DEP approval of its work plan. In a December 19, 2005 letter to SCMUA's Varro, Omni's Senior Project Manager, Thomas Amidon, recounted that SCMUA had verbally authorized it to begin sampling, which Omni did from June 24 through June 28, 2005. The letter further noted that DEP representatives John Kashner and Thomas Belton first met with Amidon and SCMUA's John Nugent for a field visit on July 1, 2005. In advance of formal DEP comments, Kashner offered Amidon his oral, unofficial "draft" review, including:

2) "Extend scope of study and add one more downstream station" . . . .

3) Mr. Kashner wanted to know whether June sampling would occur next year [2006] since it was already July 1. [When Amidon told Kashner and Belton that SCMUA] had already performed the June sampling, . . . they expressed skepticism that the June sampling would be approved because it was performed prior to having an approved Sampling Plan.

4) "The diurnal DO [dissolved oxygen] protocol requires that turbidity be monitored". . . .

5) "DO measurement by optical methods is unacceptable". . . .

6) "Permission to sample beyond the end of September is by request". . . .

The letter further stated:

TRC Omni has performed many Phosphorus Evaluation Studies with Sampling Plans that were approved by NJDEP. This Sampling Plan was not substantively different than any other of the Sampling Plans we have utilized for Phosphorus Evaluations. Based on the initial feedback we received during the site visit, we were expecting to receive a handful of relatively minor comments from NJDEP and revise the Sampling Plan accordingly. However, we did not receive any comments from NJDEP on the Sampling Plan. Mr. Kashner specifically stated that his review comments were only draft comments, and that he had yet to receive comments from Mr. Ferko in the Office of Quality Assurance. I certainly was not going to revise a Sampling Plan based on draft review comments from one NJDEP staff, particularly when I was told additional comments from other staff were forthcoming.

The main issue that emerged from the site visit was anticipated, namely that NJDEP was going to require a third downstream sampling location. We revised our sampling map accordingly, and performed the sampling in accordance with NJDEP protocols. The data collected during this study is very high quality data, as described in the Sampling Plan and Final Report. The analytical methods used are identical to those approved by NJDEP in similar stream studies. Laboratory results indicate all relevant QA/QC protocols were followed. We have no reason to believe that the data are anything other than reliable and representative, accurately reflecting instream conditions.

Nearly three weeks before Amidon's letter to Varro, Deputy Attorney General Jane F. Engel, in a December 1, 2005 letter to counsel for SCMUA, wrote that Omni's June 6, 2005 work plan had been rejected by Kashner and Belton on July 1, 2005, that they requested changes to the plan and that SCMUA did not submit an amended plan. Engel added that

[i]t therefore appears as if SCMUA proceeded with the stream study without an approved work plan, and did not give the Department the opportunity to observe SCMUA's field work, or data collection methods. The Department will not make water quality decisions and/or permit limitation changes based on information collected without an approved work plan.

SCMUA must submit the revised work plan to the Department, and once it has been approved, collect the data as required therein. After the approved sampling and analysis has been completed, the Department and SCMUA can then hold additional

discussions regarding whether any, or all, of the data collected without an approved work plan can be used to augment the data collected under an approved work plan.

Nevertheless, relying upon a March 10, 2006 Omni study, SCMUA, in a March 16, 2006 letter to the DEP, requested a modification of its permit "pertaining to phosphorus effluent limitations." The letter stated:

Enclosed is the SCMUA study conducted by Omni Environmental Corporation documenting the fact that SCMUA['s] discharge of phosphorus is not causing any type of use impairment (i.e., no "phosphorus-related problems exist"). This study, "Sussex County Municipal Utility Authority Wallkill River Phosphorus Evaluation Study," dated March 10, 2006, generally follows the Department's "Technical Manual for Phosphorus Evaluations."

Claiming that "[t]he latest information confirms that . . . impairment [to the Wallkill River] does not exist" and that "there is no environmental need to incur . . . substantial expenditure that would otherwise be required to achieve the stringent limits," SCMUA also asked the DEP for "a stay of the 0.2 mg/l total phosphorus limit."

In its March 10, 2006 study, Omni concluded:

Based on the data collected and the analysis discussed in this report, there is no evidence that phosphorus discharges from Upper Wallkill WPCF [SCMUA's facility] are rendering the Wallkill River below . . . [the facility] unsuitable for its designated

uses. On the contrary, existing levels of productivity in the stream are well below NJDEP threshold levels for algae, and dissolved oxygen under critical conditions is well above the criterion for nontrout waters, namely 4.0 mg/l minimum. Furthermore, diurnal fluctuations of DO and pH under critical conditions indicate that designated uses are fully attained.

. . . .

Given the data analysis, the instream phosphorus criterion does not apply to this segment of the Wallkill River. Consequently, the Department should not impose total phosphorus limits more stringent than the monthly effluent limit of 1.0 mg/l contained in the currently effective NJPDES permit for Upper Wallkill WPCF.

In an April 5, 2006, letter to SCMUA's Hatzelis, Howard B. Tompkins, Chief of the DEP's Bureau of Point Source Permitting, wrote that the DEP denied SCMUA's requests for modification and for a stay:

The [March 10, 2006] Phosphorus Study SCMUA now seeks to rely upon was not conducted in accordance with a Department approved work plan. SCMUA submitted a Phosphorus Study work plan for Department review and approval on June 6, 2005. However, after the Department reviewed it and requested changes to it, SCMUA did not re-submit a revised work plan that addressed the Department's concerns. Instead, SCMUA proceeded with work and did not give the Department an opportunity to observe SCMUA's field work or data collection methods.

In SCMUA's March 16, 2006 request, SCMUA states that the Phosphorus Study

"generally follows the Department's "Technical Manual for Phosphorus Evaluations" (p.2). The Technical Manual for Phosphorus Evaluations, however, emphasizes that: "A Quality Assurance/Work Plan, descriptive of the proposed monitoring program must be submitted to the Department and be approved prior to commencement of any monitoring. Only monitoring conducted in accordance with an approved work plan will be considered. See, Technical Manual for Phosphorus Evaluations for NJPDES Discharge to Surface Water Permits, March 2003, p.6. (Emphasis in original.)

To support a modification of the phosphorus effluent limitations, SCMUA must collect data pursuant to an approved work plan. Because the Department is not able to ensure that the data SCMUA previously collected without an approved work plan is of sufficient quality for its intended use, the Department hereby denies SCMUA's request for a modification of its phosphorus effluent limitations pursuant to N.J.A.C. 7:14A-16.3(c)1ii. In a future request, SCMUA may augment data collected under an approved work plan with the data SCMUA previously collected as part of the Phosphorus Study dated March 10, 2006. If SCMUA intends to do additional data collection with an approved work plan, that work plan needs to be submitted to the Department on or before May 15, 2006 if the data is to be collected during the 2006 summer season.

SCMUA's March 16, 2006 request for a stay of its phosphorus effluent limitations is also based on data that was collected by SCMUA without an approved work plan. As indicated in the discussion above, the data SCMUA submitted in support of this request is deficient. Therefore, SCMUA's request for a stay of its phosphorus effluent limitations is also hereby denied.

## II

SCMUA first argues that the DEP's application of the Manual in this case constitutes illegal rule-making in violation of the Supreme Court's decision in Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313 (1984). Our evaluation of this argument requires consideration of the applicability of pertinent statutes and regulations.

The Water Pollution Control Act (WPCA), N.J.S.A. 58:10A-1 to -20, was enacted in 1977. As explained by the Supreme Court in Public Service Electric and Gas Co. v. New Jersey Department of Environmental Protection, 101 N.J. 95, 98-100 (1985) (footnote omitted):

The Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), 33 U.S.C.A. §§ 1251 to 1376 (1978), established a comprehensive new program to clean up the nation's waters. Key to the act is the National Pollutant Discharge Elimination System (NPDES), which makes it illegal for anyone to discharge pollution into the nation's waters without a permit. 33 U.S.C.A. §§ 1311, 1342. In the interests of federalism, Congress provided that the NPDES program could be administered by states through a system of program delegation under which a state may issue NPDES permits for discharges into navigable waters within its jurisdiction, "but only upon EPA approval of the State's proposal to administer its own program." EPA v. State Water Resources Control Bd., 426 U.S. 200, 208, 96 S. Ct. 2022, 2026, 48 L. Ed. 2d 578, 585 (1976).

The laudable goal of the Clean Water Act was to rid the nation's waters of pollution by 1985. 33 U.S.C.A. § 1251(a)(1), (2).

New Jersey's Water Pollution Control Act acknowledged this delegation. L. 1977, c. 74, § 2 (codified at N.J.S.A. 58:10A-1 to -20). Recognizing that pollution of our water continually endangers the health of our citizens, the Legislature noted

It is in the interest of the people of this State to minimize direct regulation by the Federal Government of wastewater dischargers by enacting legislation which will continue and extend the powers and responsibilities of the Department of Environmental Protection for administering the State's water pollution control program, so that the State may be enabled to implement the permit system required by the Federal Act.

A permit program, established by N.J.S.A. 58:10A-6, which prohibits the discharge of pollutants into the State's waters without a permit, provides in relevant part:

a. It shall be unlawful for any person to discharge any pollutant, except as provided pursuant to subsections d. and p. of this section, or when the discharge conforms with a valid New Jersey Pollutant Discharge Elimination System permit that has been issued by the commissioner pursuant to P.L.1977, c.74 (C.58:10A-1 et seq.) or a valid National Pollutant Discharge Elimination System permit issued by the administrator pursuant to the Federal Act, as the case may be.

b. It shall be unlawful for any person to build, install, modify or operate any facility for the collection, treatment or discharge of any pollutant, except after approval by the department pursuant to regulations adopted by the commissioner.

c. The commissioner is hereby authorized to grant, deny, modify, suspend, revoke, and reissue NJPDES permits in accordance with P.L.1977, c.74, and with regulations to be adopted by him. The commissioner may reissue, with or without modifications, an NPDES permit duly issued by the federal government as the NJPDES permit required by P.L.1977, c.74.

. . . .

f. A permit issued by the department . . . pursuant to P.L. 1977, c. 74 shall require the permittee:

. . . .

(5) To install, use and maintain such monitoring equipment and methods, to sample in accordance with such methods, to maintain and retain such records of information from monitoring activities, and to submit to the commissioner, or to the delegated local agency, reports of monitoring results for surface waters, as may be stipulated in the permit, or required by the commissioner or delegated local agency pursuant to paragraph (9) of this subsection, or as the commissioner or the delegated local agency may prescribe for ground water.

Applicable definitions are contained in N.J.S.A. 58:10A-3

including:

e. "Discharge" means an intentional or unintentional action or omission resulting in the releasing, spilling, leaking,

pumping, pouring, emitting, emptying, or dumping of a pollutant into the waters of the State, . . . . "Discharge" includes the release of any pollutant into a municipal treatment works;

f. "Effluent limitation" means any restriction on quantities, quality, rates and concentration of chemical, physical, thermal, biological, and other constituents of pollutants established by permit, or imposed as an interim enforcement limit pursuant to an administrative order, including an administrative consent order;

. . . .

n. "Pollutant" means any dredged spoil, solid waste, incinerator residue, sewage, garbage, refuse, oil, grease, sewage sludge, munitions, chemical wastes, biological materials, radioactive substance, thermal waste, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal or agricultural waste or other residue discharged into the waters of the State. "Pollutant" includes both hazardous and nonhazardous pollutants[.]

The Commissioner is empowered by N.J.S.A. 58:10A-4

(emphasis added)

to prepare, adopt, amend, repeal and enforce, pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), reasonable codes, rules and regulations to prevent, control or abate water pollution and to carry out the intent of this act, either throughout the State or in certain areas of the State affected by a particular water pollution problem. Such codes, rules and regulations may include, but shall not be limited to, provisions concerning:

. . . .

b. The prior submission and approval of plans and specifications for the construction or modification of any treatment work or part thereof;

c. The classification of the surface and ground waters of the State and the determination of water quality standards for each such classification;

d. The limitation of effluents, including toxic effluents as indicated herein[.]

"Permit" is defined by N.J.S.A. 13:1D-101 to include any permit issued by the DEP "establishing the regulatory and management requirements for an ongoing regulated activity as authorized by federal law or the following [listed] State enactments," including the WPCA. Pursuant to N.J.S.A. 13:1D-105, the DEP is required to "establish classes or categories . . . for all permits, as defined pursuant to section 1 of P.L. 1991, c. 421 (C. 13:1D-101), issued by the department, authorizing an applicant to engage in a regulated activity."

Pursuant to N.J.S.A. 13:1D-110, the DEP is to review permit applications within thirty days of receipt, evaluating whether the supporting documentation was complete for the purposes of DEP's technical review.

Pursuant to N.J.S.A. 13:1D-111 (emphasis added), the DEP is required to

develop a technical manual for each class or category of permit, as established pursuant to section 1 of P.L.1991, c.423 (C.13:1D-105), issued by the department. Each manual shall define the procedural and substantive requirements for the completion of an application for a class or category of permit and the review thereof, and shall clarify departmental policies and interpretations of any laws, rules, and regulations relating to the filing and review of the application. Each technical manual shall also:

a. Provide a detailed summary and explanation of any policy considerations not otherwise identified by law, rule, or regulation that are used in the department's review and consideration of the permit application;

b. Detail and clarify the department's interpretation of any standards or other requirements that do not have a fixed meaning or are not defined by law, rule, or regulation, including, but not limited to, identification or stipulation of state-of-the-art control technologies and best management practices; and

c. Include any other general information about department policies that would facilitate the preparation by an applicant, and the review by the department, of an application.

d. Adoption of a technical manual, or of revisions thereto, shall not be subject to the notice and publication requirements of the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).

N.J.S.A. 13:1D-112 deals with the effect of a technical manual upon a filed application:

a. Policies and interpretations contained in a technical manual developed pursuant to section 1 of this act and in force on the date that an application for a permit subject to that technical manual has been filed, shall be binding upon both the department and a permit applicant, except as otherwise required under federal or State law, or rule or regulation promulgated thereunder, or an order of the court; however, if an application is determined to be incomplete, the date of filing shall be the date that the information required for a completed application is filed with the department. Any revision made to a technical manual shall have no effect upon a permit application that was submitted to the department prior to adoption of the revision.

Nothing in this section shall be construed to:

(1) exempt an applicant from complying with all applicable federal and State laws, or rules or regulations adopted thereunder, including compliance with the requirements of a permit issued by the department; or

(2) compromise or limit any enforcement action available to the department pursuant to law.

b. The department shall periodically, but not more frequently than every six months, except as otherwise required by federal or State law, or rules or regulations adopted thereunder, update and revise a technical manual.

Chapter 14A of Title 7 of the New Jersey Administrative Code, entitled "Pollutant Discharge Elimination System" contains regulations authorized by various enactments including "N.J.S.A.

13:1D-1 et seq." and "N.J.S.A. 58:10A-1 et seq." N.J.A.C. 7:14A-4.3 sets forth detailed information requirements to be supplied to the DEP by NJPDES permit applicants. N.J.A.C. 7:14A-4.4 enumerates additional application requirements for discharges to surface water.

Subchapter 6 of Chapter 14A contains conditions applicable to all NJPDES permits, including monitoring. N.J.A.C. 7:14A-6.5(b)4 requires all permittees to "[m]onitor in accordance with the edition of the Department's 'Field Sampling Procedures Manual' applicable at the time of sampling or an alternate method approved by the Department."

N.J.A.C. 7:14A-15.3(d) provides that "[a] prospective applicant may . . . obtain a technical manual prepared by the Department in accordance with N.J.S.A. 13:1D-111 for a specified class or category of permit." N.J.A.C. 7:14A-15.3(e) tracks the language of N.J.S.A. 13:1D-112 with respect to the effect of a technical manual upon an administratively complete application.

N.J.A.C. 7:14-16.3 contains, among other things, procedures for the modification of existing permits. The Department shall request additional information that is necessary to process the request, including: "For a permit modification, the submission of an updated permit application to support the request for

modification in accordance with N.J.A.C. 7:14A-4.2." N.J.A.C.  
7:14-16.3(b)5i(emphasis added).

Chapter 9 of Title 7 of the Administrative Code, entitled "Surface Water Quality Standards" contains regulations authorized by "N.J.S.A. 13:1D-1 et seq." and "N.J.S.A. 58:10A-1 et seq."

N.J.A.C. 7:9B-1.5(g) sets forth policies regarding "nutrients," including phosphorus (N.J.A.C. 7:9B-1.4), with respect to surface water standards:

(g) Nutrient policies are as follows:

1. These policies apply to all FW [fresh water] waters of the State.

2. Except as due to natural conditions, nutrients shall not be allowed in concentrations that cause objectionable algal densities, nuisance aquatic vegetation, abnormal diurnal fluctuations in dissolved oxygen or pH, changes to the composition of aquatic ecosystems, or otherwise render the waters unsuitable for the designated uses.

3. The Department may establish watershed or site-specific water quality criteria for nutrients in lakes, ponds reservoirs or streams, in addition to or in place of the criteria in N.J.A.C. 7:9B-1.14, when necessary to protect existing or designated uses. Such criteria shall become part of these Water Quality Standards.

N.J.A.C. 7:9B-1.14(c)5ii establishes surface water criteria with respect to phosphorus in streams: "[except] . . . where

watershed or site specific criteria are developed pursuant to N.J.A.C. 7:9B-1.5(g)3 phosphorus as total P shall not exceed 0.1 in any stream, unless it can be demonstrated that total P is not a limiting nutrient and will not otherwise render the waters unsuitable for the designated uses."

The standard of judicial review of agency decisions is limited. As noted in Public Service, supra, 101 N.J. at 103:

In light of the executive function of administrative agencies, the judicial capacity to review administrative actions is limited. Gloucester County Welfare Bd. v. New Jersey Civil Serv. Comm'n, 93 N.J. 384, 390 (1983). Though sometimes subsumed in the search for arbitrary or unreasonable agency action, the judicial role is restricted to three inquiries: (1) whether the agency action violates the enabling act's express or implied legislative policies; (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors. Campbell v. Department of Civil Serv., 39 N.J. 556, 562 (1963); see also Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980) (court will reverse decision of administrative agency only if it is arbitrary, capricious, or unreasonable or if it is not supported by substantial credible evidence in the record as a whole).

Recognizing that "[t]he Legislature has entrusted to the DEP the enforcement of a complex system of water pollution

control," we noted in SJC Builders, LLC. v. New Jersey Department of Environmental Protection, 378 N.J. Super. 50, 54 (App. Div. 2005), that an appellate court "will ordinarily defer to an agency's construction of its enabling statute and its regulations, particularly where the Legislature has relied on the agency's expertise in enforcing a complex regulatory scheme."

SCMUA claims that the principles enunciated in Metromedia required that the promulgation of the Manual be accomplished by formal rule-making. It argues that the Manual "is not [a] mere 'guidance' document, but a set of hard rules with which the NJDEP requires strict compliance," and that "[a]ny deviation from the Phosphorus Evaluation Manual's requirements yields heavy-handed Draconian results as evidenced here by the NJDEP's refusal to even review the Omni Report." We find these arguments unpersuasive.

In our view, the Manual's requirement for submission to the DEP for pre-approval of work plans for phosphorus studies need not be embodied in a formal rule, because this is nothing more than a logical extension of the DEP's existing authority contained in statutory enactments and regulations. Thus, even without the Manual, the DEP could reasonably require pre-approval of a work plan. And, with respect to the DEP's

establishment of testing criteria in the Manual, the Legislature specifically exempted the promulgation of technical manuals from the formal administrative rule-making process. N.J.S.A. 13:1D-111(d). Obviously, the Legislature recognized that flexibility is required in technical areas, in that the "manual shall also . . . [d]etail and clarify the department's interpretation of any standards or other requirements that do not have a fixed meaning or are not defined by law, rule, or regulation, including, but not limited to, identification or stipulation of state-of-the-art control technologies and best management practices[.]" N.J.S.A. 13:1D-111b.

Additionally, N.J.S.A. 52:14B-2(e) defines "administrative rule" or "rule" as follows:

(e) "Administrative rule" or "rule," when not otherwise modified, means each agency statement of general applicability and continuing effect that implements or interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but does not include: (1) statements concerning the internal management or discipline of any agency; (2) intraagency and interagency statements; and (3) agency decisions and findings in contested cases.

The Supreme Court in Metromedia, supra, considered whether the Director of the Division of Taxation's first use of a calculation known as an "audience share," which was "designed to

measure receipts attributable to New Jersey by relating the taxpayer's revenues to its listening and viewing audiences in the state," constituted administrative rule-making requiring compliance with the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -15, concerning "the adoption of agency rules." 97 N.J. at 319-20. In holding that the Director was required to abide by the APA's rule-making requirements, the Court stated:

[A]n agency determination must be considered an administrative rule when all or most of the relevant features of administrative rules are present and preponderate in favor of the rule-making process. Such a conclusion would be warranted if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy. These relevant factors can, either singly or in combination, determine in a given case whether the essential agency

action must be rendered through rule-making or adjudication.

[Id. at 331-32 (emphasis added).]

In SJC Builders, supra, the appellant contended that the DEP's "'working definition' of the term 'property' [was] an unauthorized expansion of the definition found in the NJPDES regulations, and that the agency [could not] use the definition without amending its regulations." 378 N.J. Super. at 56. We concluded "that the DEP's working definition [was] a reasonable construction of its existing regulations and [did] not implicate Metromedia principles." Ibid. We reach the same conclusion here.

The Legislature did not intend technical manuals to supplant statutes or regulations. As noted in the Sponsor's Statement introducing the bill that was eventually enacted as N.J.S.A. 13:1D-111,

[t]hese manuals would assist permit applicants by defining the procedural and substantive requirements pertaining to permit applications, serving as a guide for the completion of permit applications by permit applicants and the review thereof by personnel of the department, and clarifying departmental policies and interpretations of any laws, rules and regulations affecting the type of permit that is the subject of the technical manual.

[Sponsor's Statement to Assembly Bill No. 4517 (June 6, 1991).]

We emphasize what we stated earlier in this opinion. The dispositive issue before us is whether the DEP acted within the scope of its authority, and not arbitrarily and capriciously, in refusing to consider SCMUA's Omni study. The basis for the DEP's denial of SCMUA's application for modification of its permit and its stay request was that SCMUA failed to seek DEP's pre-approval of a phosphorus monitoring work plan, as a result of which the DEP could not reasonably rely upon SCMUA's unilaterally commissioned and conducted Omni study. SCMUA and Omni were clearly on notice of the pre-approval requirement. They knew that without a pre-approved work plan the DEP would not conduct the monitoring necessary to assure itself that the study was conducted and the data obtained in accordance with all applicable requirements.

While the pre-approval requirement is clearly spelled out in the Manual, the necessity of DEP involvement in monitoring and pre-approval is a common theme running through DEP statutes and regulations. See N.J.S.A. 58:10A-4b, granting the DEP Commissioner authority to enact regulations requiring "[t]he prior submission and approval of plans and specifications for the construction or modification of any treatment work or part thereof[.]" N.J.A.C. 7:14A-2.12(b) (emphasis added) provides:

[a]mbient studies consist of water quality and/or biological studies and shall be used

to supplement the Department's ongoing sampling programs. . . . Where the data do not exist and/or are incomplete, the Department may require the permittee or the applicant to undertake any and all studies that it determines necessary to determine permit limits and conditions. Such studies may include but are not limited to dilution analysis/mixing zone studies (including stream design flows), dissolved oxygen studies, effluent characterizations, studies to demonstrate compliance with the ocean discharge criteria, antidegradation analysis, in-stream water quality studies to develop water quality based effluent limitations, and biological, nutrient, and toxics impact analysis, along with related quality assurance/quality control project plan requirements in accordance with 40 C.F.R. 30.503.

N.J.A.C. 7:14A-6.5(a)2 provides that the DEP "shall determine the appropriate [monitoring] procedure and require that procedure in the NJPDES permit," and N.J.A.C. 7:14A-6.5(b)2 requires permittees to "[p]roperly monitor the discharge in accordance with the monitoring type, interval and frequency as specified in the permit."

Moreover, the DEP, by statute and by regulation, is empowered to require a permit applicant or permittee to submit information to it. See, e.g., N.J.S.A. 58:10A-9[a] ("Applications for permits shall . . . contain such information as . . . [the commissioner] may require."); N.J.A.C. 7:14A-4.3 (Application information requirements); N.J.A.C. 7:14A-4.4 (Additional application requirements for discharges to surface

water); N.J.A.C. 7:14A-6.8 (Reporting monitoring results); N.J.A.C. 7:14A-16.3(b)5 (Required provision of an updated permit application in connection with a request for modification).

We are satisfied that the DEP was authorized to require pre-approval of the work plan and that it reasonably refused to consider the Omni study because of the lack of pre-approval. We note that in its April 5, 2006 denial of SCMUA's application, the DEP allowed that in a future request for approval "SCMUA may augment data collected under an approved work plan with the data SCMUA previously collected as part of the Phosphorus Study dated March 10, 2006." The DEP further cautioned SCMUA that if it "intends to do additional data collection with an approved work plan, that work plan needs to be submitted to the Department on or before May 15, 2006 if the data is to be collected during the 2006 summer season." Rather than avail itself of that opportunity, SCMUA chose to file this appeal. We find nothing arbitrary or capricious in the DEP's action.

### III

SCMUA's arguments pertaining to the substantive provisions of the Manual, the alleged non-applicability of the Manual to its application based on the date of the Manual's adoption, and its assertion of substantial compliance require little discussion.

SCMUA contends that pursuant to N.J.S.A. 13:1D-111, technical manuals do not apply to adoption of narrative criteria implementation procedures and instream numeric water quality requirements. The DEP denied SCMUA's application because it was not supported by a phosphorus study conducted in accordance with a pre-approved work plan. Thus, the narrow issue before us is whether the DEP's pre-approval requirement was properly imposed. We have concluded it was. Substantive issues dealing with phosphorus effluent limitations are not before us.<sup>2</sup>

Likewise, we decline to address SCMUA's substantial compliance argument. The Legislature has granted the DEP permitting authority and authority to enact implementing regulations and to issue technical manuals. Needless to say, the regulations and procedures contained in the manuals are often complex and involve scientific and highly technical concepts.

The June 2005 work plan submitted by SCMUA did not meet with DEP approval. Preliminary or draft comments were ignored. Presumably SCMUA did not ask for final comments or for clarification. Instead, it commenced testing on its own

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<sup>2</sup> In its brief, the DEP comments that "to the extent that SCMUA challenges the substantive requirements of the Technical Manual, SCMUA will have the opportunity to challenge it in OAL after it has complied with the procedural requirements."

initiative and without DEP approval. In connection with its March 2006 application for modification, SCMUA submitted a study based upon unapproved methodology.

In effect, the DEP determined that SCMUA's failure to get work plan approval and SCMUA's subsequent submission of that "unauthorized" study did not substantially comply with its necessarily stringent requirements. We will not substitute our judgment for that of the DEP in this situation. In view of the highly technical subject matter involved, a court is not well equipped to determine if the study substantially complied with the Manual.

With respect to the substantive issues, we reiterate that they are not before us. In any event, we are in no position to determine if, as SCMUA claims, "[the] conclusions of the Omni Report provide adequate cause for the modification of the phosphorus limit of 0.2 mg/L within . . . SCMUA's NJPDES Permit under the applicable standards established by NJDEP rules and regulations." We will not attempt to undertake such a complex technical analysis, which is rightly left, subject to judicial review, to the agency possessing the required expertise.

SCMUA's permit was issued on June 18, 2003. The Manual was issued in March 2003. SCMUA's application for modification of its permit was filed on March 16, 2006. Pursuant to N.J.S.A.

13:1D-112a, policies and interpretations contained in a technical manual as of the date of a permit application are binding on the DEP and the applicant, but "[a]ny revision made to a technical manual shall have no effect upon a permit application that was submitted to the department prior to adoption of the revision." Relying on this provision, SCMUA reasons that because the Manual was adopted long after its application in 2002, resulting in issuance of its permit in 2003, the Manual does not apply. We disagree.

Initially, we repeat once more that the only issue before us pertains to the lack of work plan pre-approval, and, as we have stated, that requirement could have been imposed without the Manual. Further, when application for a permit modification is made, N.J.A.C. 7:14A-16.3(b)5i requires a permittee seeking such modification to submit "an updated permit application to support the request for modification in accordance with N.J.A.C. 7:14A-4.2." For all practical purposes, an application for a permit modification is an application for a permit. Because SCMUA applied for a permit modification in March 2006, it is bound by the March 2003 Manual.

IV

Finally, we address SCMUA's appeal of the DEP's denial of a stay. With respect to stays, N.J.A.C. 7:14A-17.6 provides in part:

(a) The Department's grant of a request for an adjudicatory hearing shall not automatically stay any contested permit condition(s). A permittee shall submit a written request to the Department, by certified mail, or by other means which provides verification of the date of delivery to the Department seeking a stay of any of the following:

1. Any permit condition where the permittee has requested an adjudicatory hearing, in accordance with N.J.A.C. 7:14A-17.2(a), to contest the specific permit condition;

2. Any permit condition where the permittee has requested a major modification or revocation and reissuance, in accordance with N.J.A.C. 7:14A-16.4, to alter the specific permit condition[.]

. . . .

(e) . . . .

2. For a stay of permit conditions pursuant to (a)2 above, where the permittee has requested a major modification or a revocation and reissuance of the existing permit to alter a specific permit condition, the Department shall grant a stay, without the need to request an adjudicatory hearing, if it makes a preliminary determination that a major modification or revocation and reissuance of the existing permit is appropriate but the Department cannot process the modification or revocation and reissuance request in a timely manner[.]

As noted in In re Order of the Commissioner of Insurance Deferring Certain Claim Payments by the New Jersey Automobile Full Insurance Underwriting Ass'n, 256 N.J. Super. 553, 560 (App. Div. 1992), the standards for granting a stay were set forth in Crowe v. De Gioia, 90 N.J. 126 (1982). A stay or a preliminary injunction should not be granted: 1) "except when necessary to prevent irreparable harm," 2) "when the legal right underlying plaintiff's claim is unsettled," and 3) "where all material facts are controverted." Crowe, supra, 90 N.J. at 132-34. "The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief." Id. at 134.

Although SCMUA requested a major modification of its permit, the DEP made no determination, preliminary or otherwise, that a modification is appropriate for the simple reason that SCMUA refused to get work plan approval. The DEP was therefore correct in not granting a stay under N.J.A.C. 7:14A-17.6(e)2.<sup>3</sup>

Applying the Crowe criteria, the DEP also did not abuse its discretion in denying SCMUA's stay application. SCMUA is not irreparably harmed because the new phosphorus effluent limit does not take effect until July 1, 2008. SCMUA was given fifty-

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<sup>3</sup> The DEP notes that "SCMUA may be eligible for a stay based on its pending adjudicatory hearing pursuant to N.J.A.C. 7:14A-17.6(a)1." This, however, is not before us.

nine months to avail itself of the optional procedure of conducting a phosphorus study to support a permit modification application. Any loss of time because it refused to get work plan approval has been a product of SCMUA's own actions. The merits of SCMUA's entitlement to a modification is unknown until proper testing is done.

Affirmed.

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

  
CLERK OF THE APPELLATE DIVISION