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459 Mass. 319 / 457 Mass. 489 / 78 Mass. App. Ct. 775

Citation: 455 Mass. 740 (2010)
 Parties: WATER DEPARTMENT OF FAIRHAVEN VS. DEPARTMENT OF ENVIRONMENTAL PROTECTION (and thirteen companion cases[1])
 County: Middlesex
 Hearing Date: November 3, 2009
 Decision Date: January 14, 2010
 Judges: MARSHALL, C.J., IRELAND, SPINA, CORDY, BOTSFORD, & GANTS, JJ.

Water. Department of Environmental Protection. Municipal Corporations, Water commissioners, Water supply. Administrative Law, Adjudicatory proceeding, Agency's authority. Statute, Construction.

Discussion of the principles of statutory construction. [744-745]

Discussion of the background and framework of the Massachusetts

Water Management Act, G. L. c. 21G, which has as its purpose the planning, establishment, and management of programs to assess the uses of water in the Commonwealth and to plan for future water needs. [745-749]

In a civil action, a Superior Court judge properly entered in favor of the plaintiff cities and towns a judgment declaring that the defendant Department of Environmental Protection (department) had exceeded its authority under the Massachusetts Water Management Act, G. L. c. 21G (Act), in imposing water conservation measures as conditions on the plaintiffs' renewal of their registration statements regarding their withdrawal of water, where the department did not first issue regulations requiring registrants to satisfy such conservation measures [749]; likewise, the judge properly entered a judgment declaring that the department exceeded its authority under the Act by notifying the plaintiffs of their right to request an adjudicatory hearing without first having acted by regulation to create such an administrative remedy for registrants [750-751].

CIVIL ACTIONS commenced in the Superior Court Department on January 25, January 28, January 30, January 31, February 1, and February 4, 2008, respectively.

After transfer and consolidation, the cases were heard by Patrick F. Brady, J., on motions for summary judgment.

The Supreme Judicial Court granted an application for direct appellate review.

[1] The cities of Brockton and Lynn and the towns of Duxbury, Hamilton, Harwich, Manchester-by-the-Sea, Mashpee, Mattapoissett, Medfield, Millis, North Reading, Sandwich, and Wellesley (or their water districts, departments, or commissions) all commenced actions against the Department of Environmental Protection (department).

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William C. Henchy for Water District of Sandwich & others.

Gregg J. Corbo (Jeffrey T Blake with him) for city of Brockton & others.

Thomas P. Crotty for Water Department of Fairhaven & another, was present but did not argue.

of five years, withdrawals from the water source have been interrupted due to contamination of the water source, the periods of such interruptions shall be excluded pro rata from the computation of existing withdrawal."

General Laws c. 21G, s. 5, provides:

"The department shall, by regulation, establish a procedure for recognizing, as an existing withdrawal, a volume of water in excess of the average volume of water withdrawn from a particular water source during the period from [January 1, 1981,] to [January 1, 1986,] if such volume of water is within the normal variation of withdrawals made by the registrant; provided that the department shall not use such procedures to recognize, as existing withdrawals, such volumes of water which together exceed the safe yield of the water source from which the withdrawals are being made."

[4] The only exception to this guarantee is that, if "a state of water emergency" is declared under G. L. c. 21G, s. 15, the department may issue an order directing a registrant "to reduce, by a specified volume, the withdrawal or use of any water; or to cease the withdrawal or use of any water." G. L. c. 21G, s. 17 (3).

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31, 2017, each registrant's water consumption is to be limited to sixty-five residential gallons per capita per day, and unaccounted-for water loss is to be no more than ten per cent of the total usage. If the registrant fails to demonstrate adequate progress toward meeting these performance standards, "the [r]egistrant shall develop and implement an annual compliance plan" designed to meet them. The conditions also mandate adherence to the department's seasonal demand management plan by May 1, 2009, which restricts outdoor water use from May through September when the drought level is above normal. The department reserves the right to commence enforcement measures against the registrant if it does not make "demonstrable progress towards meeting these performance standards, or if it has not developed and implemented an annual compliance plan that is reasonably designed" to meet them.[5] In imposing these new conservation requirements as conditions for registration renewal, the department is seeking to restrict the manner in which water is used, but it does not seek to decrease the registrants' total water usage below the existing withdrawals to which they are entitled.

In announcing the new conditions, the department informed registrants of their opportunity to request an administrative hearing if they were aggrieved by any part of the registration renewal process. The plaintiffs challenged in the Superior Court the department's authority under the Act to impose these conditions on registration renewals and to create an adjudicatory process to resolve grievances regarding these conditions. The cases were consolidated and heard on cross motions for summary judgment. The Superior Court judge awarded declaratory relief to the plaintiffs under G. L. c. 231A, concluding that the department had exceeded its authority both in imposing the conditions and in creating the adjudicatory process. Furthermore, the judge concluded that, because the administrative remedy was not statutorily authorized, the plaintiffs could not be required to exhaust their administrative remedies before filing suit. The department appealed, and we granted its application for direct appellate review.

[5] The conditions also prohibited registrants from charging for water services on a descending unit rate basis, that is, charging lower unit prices to a user as its water use increases during the billing period. However, the plaintiffs, all of which are cities and towns, were already prohibited by statute from billing on a descending unit rate basis. G. L.

inevitable," the 1978 Water Supply Policy Statement expressed dismay over the lack of a comprehensive approach to water conservation in the Commonwealth, as well as "the lack of public awareness of the limitations of the water supply and the compromises necessary to assure a continued supply." Id. at 4. The study recommended the implementation of a centralized Statewide water conservation program. Id. at 22.

In 1977, the Legislature established a Special Legislative Commission on Water Supply (special commission), see Res. 1977, c. 13, that contracted with an independent law firm with expertise in environmental law "to research existing Massachusetts and federal groundwater law to identify gaps which needed to be filled in the Commonwealth, to look at laws of other states, and to make recommendations concerning legislation which would provide a suitable water resources management framework for Massachusetts with regard to identification of water use, protection of existing users, allocation of water among competing demands, and the integration of ground and surface water as a single hydrologic system." 1983 Senate Doc. No. 1826. The

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resulting report found the existing legal framework to be inadequate to promote water conservation in the Commonwealth. See id. (reprinting M.S. Baram & J.R. Miyares, *Groundwater: Legal and Institutional Analysis* [1982]). To rectify the inadequacy, it proposed legislative adoption of the Act, which the Legislature in 1985 enacted essentially as proposed. Compare id. with St. 1985, c. 592, s. 1.

2. The framework of the Act. Section 3 of G. L. c. 21G sets forth the Act's statement of purpose. It requires the department and the water resources commission (commission) of the Executive Office of Environmental Affairs to cooperate "in the planning, establishment and management of programs to assess the uses of water in the commonwealth and to plan for future water needs." Id. The commission is to "adopt principles, policies and guidelines necessary for the effective planning and management of water use and conservation in the commonwealth and for the administration of this chapter as necessary and proper to ensure an adequate volume and quality of water for all citizens of the commonwealth, both present and future." Id. "Such principles, policies and guidelines shall be designed to protect the natural environment of the water in the commonwealth; to assure comprehensive and systematic planning and management of water withdrawals and use in the commonwealth, recognizing that water is both finite and renewable; and to allow continued and sustain-able economic growth throughout the commonwealth and increase the social and economic well being and safety of the commonwealth's citizens and of its work force." Id.

Section 3 also grants authority to the department, after consulting with the water resources management advisory committee^[8] and obtaining the approval of the commission, to "adopt such regulations as it deems necessary to carry out the purposes of [the Act], establishing a mechanism for managing ground and surface water in the commonwealth as a single hydrological system and ensuring, where necessary, a balance among competing water withdrawals and uses." Id. In short, water manage-

[8] The Massachusetts Water Management Act (Act), G. L. c. 21G, establishes a water resources management advisory committee, appointed by the Governor and representing the various interest groups and industries, including at least one environmental organization. G. L. c. 21G, s. 3.

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ment, including water conservation, is an important purpose of the Act, and the department, with the advice of the water resources management advisory committee and the approval of the commission, has broad authority to issue regulations to

withdrawal and to consider alternatives to lessen that impact. G. L. c. 21G, s. 8. The department, in its sound discretion, "may issue permits for any new withdrawal of water if it determines that the withdrawal will conform to the regulatory standards established," but it must deny a permit if the proposed withdrawal would exceed the water source's safe yield. G. L. c. 21G, s. 11. In granting a permit, the department may attach any conditions it deems necessary to further the Act's purposes or to assure compliance with its regulations. *Id.* The department must make writ-ten findings of fact in support of its decision, and must state with specificity its reasons for issuing or denying a permit, or for imposing conditions on the permit. *Id.* Any person aggrieved by the denial of a permit or by the conditions imposed on its issuance is entitled to an adjudicatory hearing before the department in accordance with G. L. c. 30A. G. L. c. 21G, s. 12.

Therefore, under the Act, the department has broad authority under s. 3 to issue regulations to carry out the Act's purpose of water management, including water conservation, provided it does not infringe the registrants' entitlement to existing withdrawals. Pragmatically this means that the department, by regulation, may impose conservation measures on all water users,

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including registrants, but those conservation measures may not deny registrants their entitlement to existing withdrawals (for instance, by limiting a registrant's water use to less than the existing withdrawal).

3. The department's "registration conditions." The conservation measures imposed on the plaintiff registrants as "registration conditions" might have been lawful if they had been imposed by regulation on all registrants under G. L. c. 21G, s. 3, but they were not. As discussed, G. L. c. 21G, s. 3, gives substantial authority to the department to carry out the purposes of the Act, but only through the adoption of regulations. The department notes, correctly, that under the Act it may impose conditions on any permit without regulation, but it fails to recognize that the Act does not grant the department the same authority with respect to the filing of registration statements and renewals. Compare G. L. c. 21G, s. 11, with G. L. c. 21G, s. 5. Here, the department did not issue regulations requiring registrants to satisfy these conservation measures. Instead, they were listed as new conditions on the plaintiffs' registration renewals. The failure to issue regulations authorizing these conditions renders their inclusion in registration renewal statements unlawful.

The department, by regulation, has imposed "registration conditions" on registrants, but each of these conditions requires the accurate metering, monitoring, and recording of the withdrawal of water, and is designed to ensure that a registrant does not abuse its registration by withdrawing more water than its existing withdrawal.[9],[10] None of the "registration conditions" presently imposed by regulation requires conservation measures. 310 Code Mass. Regs. s. 36.08(3) (2005). If the department wishes to re-quire registrants to take specified conservation measures, it must do so by regulation.

[9] Title 310 Code Mass. Regs. s. 36.08(3) (2005) imposes on registrants the following conditions: "(a) The installation of flow meters; (b) The accurate recording and record keeping of all future withdrawal information; (c) Estimated registration statements must be verified within five years; (d) The submittal to the [d]epartment of additional historical water use data Such information shall be used to calculate a verified existing withdrawal value from cur-rent withdrawal information."

[10] We need not decide here whether a registrant's failure to comply with these conditions may allow the department to refuse to accept a registration renewal.

was not authorized by regulation. Having not acted by regulation as required by the Act, the department's creation of an administrative remedy for registrants cannot survive the plaintiffs' challenge.

5. Conclusion. We affirm the Superior Court's order granting declaratory relief to the plaintiffs under G. L. c. 231A.

So ordered.

under G. L. c. 21G, s. 14, or reject a registration renewal because of the registrant's purported failure accurately to meter, monitor, or record water use in accordance with existing regulations, 310 Code Mass. Regs. s. 36.08(3), it would further the purposes of the Act to provide an administrative hearing to the aggrieved registrant. Similarly, if the department were to issue regulations requiring registrants to comply with the same conservation measures at issue here, it would further the purposes of the Act to provide an agency adjudicatory process to resolve a registrant's claim that the conditions were so severe that they effectively denied the registrant its entitlement to existing withdrawals.

End Of Decision