



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

(CONSOLIDATED)

INITIAL DECISION

SUMMARY DECISION

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

Petitioner,

v.

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

Respondent.

OAL DKT NO. ECE 1167-14

AGENCY DKT NO.

PEA 130001-1904320

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

Petitioner,

v.

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
WATER ALLOCATION,**

Respondent.

OAL DKT NO. ELU 3817-14

AGENCY DKT NO.

Project ID # 171221186

Mary Benson, Esq.,¹ for Cheyenne Corporation and Cayuse, LLC, t/a Wild West City (Law Office of Mary Benson, attorney)

Melissa P. Abatemarco, and **Susan Savoca**, Deputy Attorneys General, for New Jersey Department of Environmental Protection (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: October 5, 2015

Decided: December 31, 2015

BEFORE **TIFFANY M. WILLIAMS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Cheyenne Corporation and Cayuse, LLC, t/a Wild West City (WWC)² appeals the decision of the Department of Environmental Protection (DEP) to: 1) deny its request for waiver of a Notice of Non-Compliance issued February 28, 2012; and 2) issue an Administrative Order dated April 26, 2013, requiring WWC to re-designate or decommission an existing well. The matters were transmitted to the Office of Administrative Law (OAL) where they were filed as contested cases on March 31, 2014, and January 29, 2014, respectively. The matters were consolidated by order dated June 30, 2014 (R-10), and the parties mutually requested to dispose of both matters by summary decision, without conducting a hearing. By mutual assent of the parties, WWC filed its brief on July 30, 2015, and a reply on September 10, 2015. DEP filed its papers on August 28, 2015, and a reply on September 18, 2015. The record closed on October 5, 2015.

Summary decision is appropriate where the “competent evidential materials presented, when viewed in a light most favorable to the non-moving party, are sufficient

¹ Although Michael Stabile initially entered an appearance as the president of Cheyenne Corporation (R-12), Mary Benson, Esq. entered her appearance as counsel of record on the briefs dated July 30, 2015, and September 10, 2015.

² This matter was initially transmitted under the name Wild West City; however, by order dated July 24, 2014, the parties consented to substitute the correct legal entity, Cheyenne Corporation and Cayuse LLC, t/a Wild West City. (R-11.)

to permit a rational fact finder to resolve the alleged dispute in favor of the non-moving party.” Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). Although the matters were consolidated, the DEP bears the burden of proof in the enforcement action at Docket No. ECE 01167-2014, while WWC bears the burden of proof in the denial of the waiver action at Docket No. ELU 03817-2014. Having reviewed the parties’ briefs, responses, and supplemental briefs, I **CONCLUDE** that the matter is ripe for summary decision in favor of DEP in both the enforcement action and in the denial of the waiver action.

FINDINGS OF FACT

Based on review of the undisputed facts submitted by the parties in their brief appendices, I **FIND** the following as **FACT**:

1. Cayuse, LLC owns and operates a seasonal western theme park known as Wild West City (WWC), located on Lackawanna Drive in Stanhope Borough, Sussex County. The theme park is operated on property owned by Cheyenne Corporation. Michael Stabile is the managing member of Cayuse, LLC and is the president and a shareholder of Cheyenne Corporation.
2. WWC has operated and maintained a transient non-community water system on this site since 1957. WWC serves less than 1,000 persons. The Stabile family has owned and operated the business since 1963.
3. Prior to June 2012, a public transient non-community water system comprised of a single Category 1 well, supplied potable water to WWC.
4. The well is located in a shed located on the highest point of the property. Within the building, the well is located in a well pit that is 5’x5’x5’ deep. The well casing extends one to three inches above the cement floor and the wellhead is capped thirty to thirty-six inches below grade. The well is single-cased and is composed of steel. (R-20.)
5. A sewage disposal box is located approximately 120 feet from the well. The septic tank and sewage/septic disposal are located approximately 200 feet from the well wall. (R-20.)

6. The water system does not provide any treatment of the raw water, other than a point-of-entry system installed in 2005 to treat volatile organic contamination of the well that originated at a dump in Byram Township. (R-20.)
7. On October 21, 2010, after the park closed at the end of the season, WWC conducted a routine quarterly sampling and the distribution system tested positive for both total coliform and E. coli.
8. The next day, on October 22, 2010, WWC collected three repeat samples and confirmed the same positive results for total coliform and E. coli. (P-1.)
9. On October 23, 2010, WWC collected five “triggered source water monitoring” samples from the well, which all tested positive for total coliform and E. coli. WWC notified DEP of the results telephonically on the same day, and provided public notice.
10. On October 27, 2010, DEP issued a Notice of Non-Compliance, requiring WWC to implement remedial measures to eliminate the microbiological contamination from the system; submit a remediation report; and to collect five additional samples during the next month that the park was to be used by the public for drinking water. (P-2; R-24.)
11. On November 26, 2010, WWC sent a communication to DEP concluding that an animal had burrowed into the well pit causing the well seal to be covered with several inches of dirt. WWC also conveyed that a neighboring road project, which had resulted in sewer line breaks, may have contributed to the findings of coliform and E. coli. WWC had also discovered a leak in the distribution manifold. (P-3; R-14, R-26.)
12. By May 2011, DEP and WWC had agreed upon a corrective action plan. DEP advised that any further positive results during the remediation period would result in WWC installing a new well or a well treatment and required bi-weekly testing. (P-5, P-6, P-7, P-8; R-18, R-27, R-28, R-29, R-30, R-31, R-34, R-37, R-50.)
13. WWC repaired the leak in the distribution manifold on April 12, 2011. On April 25, 2011, the well seal was replaced, and the well was chlorinated.
14. After several negative test results, DEP advised WWC that well use could resume effective May 5, 2011, but that bi-weekly monitoring samples would be

- taken from May 1, 2011, through October 10, 2011. DEP advised that any further positive results during that period would result in WWC installing a new well within 120 days. (R-38.)
15. Between May 2011 and August 2011, the well tested negative for any presence of total coliform and E. coli. (R-35, R-36.)
 16. On September 2, 2011, a raw-water assessment sampled revealed a positive test for total coliform and E. coli. (P-10.) Another raw-water test was conducted a week later, outside of the bi-weekly schedule, which revealed a negative sample. (P-11.) However, a test the same day of a sample from the distribution system tested (P-11) positive for coliform and E. coli. (R-41.) WWC provided a public notice the same day. (R-42.)
 17. On September 11, 2011, WWC provided an alternative water source and subsequently requested the DEP invalidate the September 9, 2011, result because of severe flooding from Hurricane Irene and Tropical Storm Lee, which had accrued in August-September 2011. (R-43, R-44.) Several other water systems within Byram Township also tested positive around the same time for total coliform, and E. coli. (P-9; R-39, R-40.)
 18. WWC requested a variance from the corrective action and sought continued biweekly testing due to its theory that the recent positive result had been an anomaly caused by recent weather conditions. (P-13; R-43.)
 19. On February 28, 2012, DEP issued a Notice of Non-Compliance to WWC for failure to timely complete corrective action by not decommissioning and replacing the well. (P-16; R-51.)
 20. On April 10, 2012, WWC requested that DEP invalidate the September 2 and 9 test results due to the impact of Hurricane Irene and Tropical Storm Lee. (R-52.) On April 12, 2012, DEP denied the request and requested that WWC decommission the well, provide an alternative source and develop a corrective action plan. (R-53; P-14.) WWC wrote back to DEP indicating it did not plan to disconnect or discontinue use of the existing well until the matter was resolved. (R-45.) DEP responded to WWC's letter on April 13, 2012, requesting that WWC cease use of the existing well due to repeated E.coli occurrences. (R-54.)

21. On June 22, 2012, WWC constructed a new well. In or around July 2012, the new well was put into service. (R-21, R-56.)
22. On June 4, 2012, rather than decommissioning the original well, WWC reiterated that it did not want to abandon the original well and wanted to use the well for agricultural necessities. (R-58.) On June 13, 2012, DEP advised WWC to submit a request for pre-approval of a re-designation of the original well for non-potable use. DEP also advised that if pre-approved, WWC had to submit a well permit application for re-designation, within thirty days or else the well would have to be decommissioned. (R-59.)
23. On February 21, 2013, the DEP reminded WWC of its obligation to either re-designate or decommission the well. (P-18.) On April 24, 2012, the County refused to issue a Certificate of Compliance for the new well until WWC complied with the 2012 permit condition requiring WWC to decommission the original well. (R-63.) DEP granted WWC an extension of the thirty-day requirement. (R-61.)
24. WWC neither decommissioned the well nor requested re-designation of the well. On February 21, 2013, DEP advised WWC that it had to either re-designate or decommission the original well. (R-62.) In October 2012, WWC requested to waive DEP's requirement that it decommission the original well. (R-64.)
25. On April 26, 2013, DEP issued an Administrative Order requiring WWC to either re-designate or decommission the unpermitted noncompliant well. (R-6.) WWC appealed the Administrative Order on June 3, 2013. (R-7.)
26. DEP denied the request on April 17, 2013, and WWC appealed the denial on May 13, 2013. (P-19; R-2, R-3.)

LEGAL ANALYSIS AND CONCLUSIONS

In the first instance, WWC sought a waiver from DEP's requirement that it either obtain approval to have the original well designated as non-potable or decommission the well. WWC's basis for waiver was that the positive samples taken in September 2011 should have been invalidated due to unexpected intervention of severe weather. Additionally, WWC challenges the propriety of DEP's enforcement action seeking to

have the well-decommissioned one redesignated. In passing the Safe Drinking Water Act (SDWA), the New Jersey Legislature declared a “paramount policy of the State to protect the purity of the water that we drink . . . [and] that the maintenance of high-quality potable water is essential in order to safeguard the health and welfare of the people of the State.” N.J.S.A. 58:12A-2. The Act empowered DEP “to promulgate and enforce regulations to purify drinking water.” Ibid. The Act further defines a public water system as a system that provides water to the public “for human consumption through pipes or other constructed conveyances . . . if such system regularly serves an average of at least 25 individuals daily at least 60 days out of the year.” N.J.S.A. 58:12A-31; N.J.A.C. 7:10-1.3. Additionally, governing regulations for drinking water exist under the federal and state parallel versions of the SDWA. See N.J.A.C. 7:10-5, 40 C.F.R. § 141.

Where DEP becomes aware that a contaminant has invaded a water system, which may present imminent or substantial endangerment of harm, DEP is empowered to take actions necessary to protect the health of users of the system, including the issuance of enforcement orders. N.J.S.A. 58:12A-6. Under New Jersey regulations governing the existence of microbiological contamination in the distribution system of public water systems, public non-community water systems serving less than 1,000 persons must conduct routine monitoring for total coliform quarterly during the calendar period that the system provides water to the public. 40 C.F.R. § 141.21(a)(3)(i). In the event that a routine sample tests positive, repeat samples must be collected within twenty-four hours of the original positive result. 40 C.F.R. § 141.21(b)(1). A positive sample must further be evaluated for the presence of *E. coli* and if detected, the owner of the system must notify DEP by the end of the next business day, unless it is an acute sample, which must be reported to DEP via telephone as soon as detected. 40 C.F.R. § 141.21(e); N.J.A.C. 7:10-5.4(c).

Under the Ground Water Rule (GWR), ground water samples, or raw water samples from a well, must also be collected where there has been a positive test sample for total coliform. 71 F.R. 65592 (November 8, 2006). The GWR also proscribes treatment techniques for *E. coli* contaminated systems, including providing

an alternative water source, correcting any deficiencies and identifying the source that led to the contamination. 40 C.F.R. § 141.403(a)(6); 71 F.R. 65577 (November 8, 2006). A ground water system is deemed in violation of these requirements if corrective action is not completed within 120 days. 40 C.F.R. § 141.404(b), (d).

Unless DEP determines that immediate corrective action is taken, a public water system with E. coli present in a raw water sample is required to collect five additional source water samples within 24 hours of being notified of the E. coli sample. 40 C.F.R. § 141.402(a)(3); 71 F.R. 65594 (November 8, 2006). As an alternative, the State could also opt to require assessment source water monitoring, which may include more frequent monitoring. 40 C.F.R. § 141.402(b).

Here, the initial E. coli sample on October 21, 2010, followed by three positive repeat samples on October 22, 2010, and additional positive raw samples on October 23, 2010, triggered corrective action by DEP against WWC. In complying with the corrective action requirements of bi-weekly assessment source water monitoring, testing on September 2, 2011, revealed that WWC's sample of the well tested positive for total coliform and E. coli.

Accordingly, I **CONCLUDE** that the DEP properly required that WWC take corrective action. The undisputed facts detail a series of events, which culminated in two instances of positive test samples for E.coli. DEP properly intervened under its regulatory authority. The preponderance of the credible evidence established no basis for concluding that DEP deviated from requiring the necessary corrective action consistent with its legal obligation.

I further **CONCLUDE** that the sample invalidation issue raised by WWC is not properly before the OAL as it is an independent issue to those raised in the orders that are being appealed. It is undisputed that WWC did not seek an administrative appeal after receiving DEP's denial of its request to invalidate the samples on April 12, 2012. Instead, WWC actually began to comply with the corrective action by installing a new well, which it completed in June 2012. No administrative appeal was filed related to

that issue. Additionally, the record lacks credible evidence to support an inference that the sample invalidation was a sub-issue of WWC's appeal of DEP's failure to waive the corrective action requirements. WWC raised this argument directly with DEP—who rejected it. WWC did not appeal but instead took steps to build a new well, which it put into operation a few months later. In the interim, WWC never filed an administrative appeal contesting DEP's failure to invalidate the samples. It was not until WWC raised the issue of retaining the original well for livestock irrigation, that an appeal followed. However, the appeal sought to challenge DEP's requirement that it seek a permit to the use of the well for this livestock. This issue is wholly independent from DEP's failure to invalidate samples when WWC previously sought to retain use of the well for public drinking water. WWC has put forth no credible argument or evidence as to why they could not have filed an appeal of DEP's denial of their request to invalidate the sample in connection with their corrective action plan.

New Jersey regulations render authority to the DEP to order the decommissioning of wells where they have been abandoned (i.e. improperly maintained or endanger life) or have not been maintained in a condition that ensures protection from contamination or have been replaced by another well. N.J.A.C. 7:9D-3.1(a); N.J.A.C. 7:9D-1.5. Decommissioning means “the permanent closure or sealing of any well” N.J.A.C. 7:9D-3. It is undisputed that WWC never definitively identified the source of the well's contamination on either occasion that it tested positive for E coli. While WWC enjoyed many years of providing safe drinking water for the public, it cannot be ignored that the well tested positive for E. coli twice within a six-month period. Neither can it be ignored that E. coli poses a significant risk of harm to the public when it invades a public drinking source. The record supports the fact that WWC at all times acted in a responsible and proactive manner in dealing with the threat of E. coli. With a long history of maintaining and operating its theme park primarily incident-free, WWC had developed the public's trust, which would have been compromised by retaining use of the original well as source of public drinking water.

Accordingly, in order to maintain the public trust and to comply with the highest standards of statutory and regulatory authority, I **CONCLUDE** that WWC should

decommission or re-designate the original well in compliance with DEP's requirements in the Administrative Order dated April 26, 2014. In light of the fact that WWC has built a new well for potable water, justice would require that the public be spared a risk of another E. coli scare by resuming use of the original well. Taking such a risk seems to have no economic or public policy benefit. DEP has consistently indicated that WWC could apply for pre-approval to re-designate the well for livestock irrigation, in the event that WWC finds some appropriate non-potable use for the existing well. The undisputed record indicates that WWC aborted that process in filing this appeal, but without adequate justification to suggest that the Administrative Order should be reversed.

Moreover, the record does not support a conclusion that DEP's denial of WWC's request for a waiver was improper. In fact, the preponderance of the evidence provides a plethora of evidence to support denial of the waiver. First, as aforementioned, WWC simply had no valid basis to request a waiver. There is no downside to seeking pre-approval to either decommission or re-designate its well. To the contrary, there is a substantial risk of harm to the public if DEP were to forego the process, in light of the prior E. coli findings. Moreover, DEP offered a path to restoration for the original well by requiring installation of a treatment. The record does not offer credible evidence to justify WWC's disregard of this option. Additionally, the preponderance of the evidence does not support a finding that either of the criteria for waiver exists. The evidence does not support a finding of conflicting rules, an undue burden for compliance, a net environmental benefit nor a public emergency. See N.J.A.C. 7:1B-2.1(a).

ORDER

Accordingly, it is **ORDERED** that the Administrative Order dated April 13, 2013, shall be enforced and the DEP's cross-motion for summary decision upholding the Administrative Order shall be **GRANTED**. It is further **ORDERED** that WWC's motion for summary decision based on the DEP's denial of its request for a waiver is hereby **DENIED**.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, P.O. Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 31, 2015

DATE

TIFFANY M. WILLIAMS, ALJ

Date Received at Agency:

Date Mailed to Parties:

APPENDIX

LIST OF EXHIBITS

For Petitioner:

- P-1 Analytical Results dated October 28, 2010
- P-2 Notice of Non-Compliance dated October 27, 2010
- P-3 Email from Mary Benson to Kathleen Mulligan and Scott Somers dated November 26, 2010
- P-4 Email from Mary Benson to Kristin Tedesco, Kathleen Mulligan, and Marsha Chirico dated November 26, 2010
- P-5 Letter to Stabile from Div. of Water Supply dated March 17, 2011
- P-6 Email from Kristin Tedesco to WWC and Kathleen Mulligan dated April 7, 2011
- P-7 Email from Kristin Tedesco to Mary Benson and Linda Ofori dated April 29, 2011
- P-8 Letter to Mike Stabile from DEP dated May 5, 2011
- P-9 Drinking water test results from DEP
- P-10 Analytical results dated September 6, 2011
- P-11 Analytical results dated September 13, 2011
- P-12 Letter to Mike Stabile from DEP dated September 20, 2011
- P-13 Letter to DEP from Mike Stabile dated September 14, 2011
- P-14 Letter to Mike Stabile from DEP dated April 12, 2012
- P-15 Letter to DEP from Mike Stabile dated January 10, 2012
- P-16 Letter to Mike Stabile from DEP dated February 28, 2012
- P-17 Analytical results dated March 18, 2011
- P-18 Letter to Mike Stabile from DEP dated February 21, 2013
- P-19 Letter to Mike Stabile from DEP dated April 17, 2012
- P-20 Copy from Wikipedia "New York City Water Supply System"

For Respondent:

- R-1 Waiver request dated October 15, 2012
- R-2 Letter to Mike Stabile from DEP dated April 17, 2013

- R-3 Letter to DEP from Mike Stabile dated May 13, 2013
- R-4 Omitted³
- R-5 Omitted
- R-6 Letter to Mike Stabile from DEP dated April 26, 2013
- R-7 Letter to DEP from Mike Stabile dated June 3, 2013
- R-8 Omitted
- R-9 Omitted
- R-10 Order of Consolidation of ECE 1167-14 and ELU 3817-14
- R-11 Order on Consent Providing for Substitution of Respondent
- R-12 Notice of Appearance dated August 14, 2014
- R-13 Omitted
- R-14 Email from Mary Benson to Kathleen Mulligan dated November 26, 2010
- R-15 Copy of WWC website
- R-16 Copy of WWC website
- R-17 NJDEP Water System Inspection Report dated July 18, 2012
- R-18 Letter to DEP from Mike Stabile dated March 7, 2011
- R-19 NJDEP Water System Inspection Report dated July 27, 2009
- R-20 Answer to Supplemental Interrogatories dated March 14, 2015
- R-21 Well Record dated June 22, 2012
- R-22 Letter from DEP to Mike Stabile dated March 17, 2011
- R-23 DEP Drinking Water Results
- R-24 Notice of Non-Compliance dated October 27, 2010
- R-25 Notice of Violation dated January 26, 2011
- R-26 Email from Mary Benson to Kathleen Mulligan dated November 26, 2010
- R-27 Letter to DEP from Mike Stabile dated April 1, 2011
- R-28 Email from Kristin Tedesco to Mary Benson dated April 7, 2011
- R-29 Email from Kristin Tedesco to Mary Benson dated April 25, 25, 2011
- R-30 Fax from WWC to Kristin Tedesco dated May 2, 2011
- R-31 Email from Mary Benson to Kristin Tedesco dated April 21, 2011
- R-32 Letter from WWC to DEP dated May 18, 2011
- R-33 EPA Ground Water Rule Corrective Actions Guidance Manual

³ Certain exhibits were omitted because they constituted administrative notices from the Office of Administrative Law and are not in evidence.

- R-34 Email from M. Chirico to J. Breiten and K. Tedesco dated September 12, 2011
- R-35 Fax to Kristen Tedesco from Cassandra Malone dated April 29, 2011
- R-36 Fax to Kristen Tedesco from Terry Poyer dated May 4, 2011
- R-37 Email from Kristen Tedesco to Mary Benson dated April 29, 2011
- R-38 Letter to Mike Stabile from DEP dated May 5, 2011
- R-39 Fax to Karen M. Fell from Mike Stabile dated September 14, 2011
- R-40 Letter to Mike Stabile from DEP dated September 20, 2011
- R-41 Analytical Results dated September 8, 2011
- R-42 Email from Scott Somers to K. Tedesco, and K. Mulligan dated Sept. 9, 2011
- R-43 Letter to DEP from Mike Stabile dated September 14, 2011
- R-44 Website copy of Tropical Storm Lee (2001)
- R-45 Letter to DEP from Mike Stabile dated April 13, 2012
- R-46 Letter to DEP from Mike Stabile dated January 10, 2012
- R-47 Fax to Karen Fell from Mike Stabile dated October 19, 2011
- R-48 Copy of Email to WWC from Kathleen Burkhard dated October 26, 2011
- R-49 Letter to Mike Stabile from DEP dated November 17, 2011
- R-50 Fax from Mike Stabile to Karen Fell dated November 13, 2011
- R-51 Letter to Mike Stabile from DEP dated February 28, 2012
- R-52 Letter to DEP from Mike Stabile dated April 10, 2012
- R-53 Letter to Mike Stabile from DEP dated April 12, 2012
- R-54 Letter to Mike Stabile from DEP dated April 13, 2012
- R-55 Well Permit dated May 8, 2012
- R-56 DEP Permit #14899 dated May 14, 2013
- R-57 Ground Water Rule Implementation Guidance
- R-58 Letter to DEP from Mike Stabile dated June 4, 2012
- R-59 Letter to Mike Stabile from DEP dated June 13, 2012
- R-60 Fax to K. Burkhard from Mike Stabile dated July 18, 2012
- R-61 Letter to Mike Stabile from DEP dated July 23, 2012
- R-62 Letter to Mike Stabile from DEP dated February 21, 2013
- R-63 Letter to Mike Stabile from DEP dated April 24, 2013
- R-64 Waiver Request dated September 25, 2012
- R-65 Letter to Mike Stabile from DEP dated September 25, 2011

R-66 Letter to Mike Stabile from DEP dated October 23, 2012

R-67 Occurrence and Monitoring Document for the Final Ground Water Rule

R-68 DEP Primacy Revision Application for December 2009