

**RECENT DEVELOPMENTS IN
ENVIRONMENTAL LAW**

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I. HAZARDOUS WASTE

Bartlett v. Browning-Ferris Indus.,
683 So. 2d 1319 (La. Ct. App. 1996)

Plaintiffs, individuals who reside in proximity to the defendants' activities, appealed the Fourteenth Judicial District Court's verdict denying injunctive relief and damages against the defendant companies, which were involved in the operation of the Willow Springs hazardous waste site. The trial court jury found that the defendants were not negligent in operating the waste site and that the operation of the site was a nuisance or an abuse of right, but that the plaintiffs suffered no damages.

The Willow Springs waste site was initially used as a field and industrial waste site in the 1950s. During the next thirty years the site's unlined ponds were used for the disposal and storage of hazardous waste. Near the end of the 1970s, a deep injection well was operated, as well as a landfill for solids and sludges. In 1979, Louisiana started to regulate the disposal and transportation of hazardous waste. Pursuant to Louisiana law, the defendants were granted interim status to continue to operate the facility while seeking the appropriate state permits, so long as the state was notified of the ongoing operation.

In May 1980, the EPA began implementing hazardous waste regulations which required operators like the defendants to notify EPA of their operations. After over a decade of the application process, a final permit was granted for the Willow Springs site. By 1988, all waste the operation received, including drilling fluid additives, was stored in a tank system, and by 1990 the Willow Springs facility began a phase-out at the site.

In affirming the trial court's decision, the Court of Appeal first addressed the plaintiff's allegations regarding ultrahazardous activity

using a three-prong test developed by the United States Court of Appeals for the Fifth Circuit and used in several Louisiana courts. For the first prong of the test to be satisfied, the “activity must not require substandard conduct to cause injury.” The court found specifically that drilling fluid additives were stored in storage drums and transported in trucks. Thus, the court considered the additives as movable and therefore not related to the land. Further, the court found that because the operation of the Willow Springs site could be done in a safe manner, by definition the activity could not be ultrahazardous, because if it were then no amount of due care would have reduced its harmful nature.

The court then addressed the negligence issue by first determining whether there were damages. Judge Doucet dismissed the plaintiffs’ contention of damages for the fear of cancer because they failed to carry the burden of proof for this contention. The court also found the claim for damages from devaluation of the plaintiffs’ homes to be inconclusive because of conflicting expert testimonies.

Finally, the court addressed the nuisance claim against the defendants. The court looked at the lower court’s jury interrogatory and found it to be semantically deficient because it asked two questions but allowed for only one answer. However, in looking at all of the circumstances, the court found it to be functionally clear that the jury found a nuisance without any damages sustained by the plaintiffs other than inconvenience.

In his dissent, Judge Amy argued that the plaintiffs suffered more than inconvenience and were prevented from the enjoyment of their properties. Thus, the dissent felt that the jury, in the court below, erred in failing to award monetary damages.

Andrew C. Lehman

II. CLEAN WATER ACT

United States v. Ahmad, 101 F.3d 386 (5th Cir. 1996)

Appellant Attique Ahmad appealed his conviction for criminal violations under the Clean Water Act arising from a discharge of gasoline into the sewers of Conroe, Texas in January 1994. The United States Court of Appeals for the Fifth Circuit found that the district court had erred in its instructions to the jury and reversed and remanded.

Ahmad was convicted in the United States District Court of the Southern District of Texas on two counts: knowingly discharging a

pollutant from a point source into a navigable water of the United States without a permit in violation of 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A), and knowingly operating a source in violation of a pretreatment standard in violation of 33 U.S.C. §§ 1317(d) and 1319(c)(2)(A). The jury deadlocked on the third count, which was knowingly placing another person in imminent danger of death or serious bodily injury by discharging a pollutant in violation of 33 U.S.C. § 1319(c)(3).

Ahmad owned a convenience store/gas station in Conroe, Texas. After discovering a leak in one of the station's underground gasoline tanks, he used a hand-held motorized pump to pump 5,220 gallons of fluid from the tank into the street. Approximately 4,690 gallons of the fluid was gasoline and it flowed into a neighboring creek as well as into the city's sewage system.

The jury instructions in the trial attached the requisite *mens rea*, knowledge, only to the first elements, discharge and operation, respectively, in counts one and two. On appeal, Ahmad argued that the jury instructions were improper because the jury should have been instructed that knowledge was required as to each element of the offense, not just the discharge and operation of the source.

In finding that the jury instructions were improper, the court first concluded that the *mens rea* requirement applies to each element of the offense, except the "purely jurisdictional elements." Furthermore, the court found that the jury had not received adequate instruction as to which elements the knowledge requirement applied. In fact, it found that the jury could infer that knowledge only applied to the actual discharge and operation of the source. The court concluded that there was "a reasonable likelihood" that the jury had applied the improper instructions, and that this constituted reversible error. The case was remanded back to the district court.

Elizabeth Mackenzie

III. RESOURCE CONSERVATION AND RECOVERY ACT

United States v. Gist, 101 F.3d 32 (5th Cir. 1996)

Defendant pleaded guilty in the United States District Court for the Northern District of Texas to counts one and five of a superseding indictment charging violations of the Resource Conservation and Recovery Act (RCRA). On appeal, the defendant argued that the two

counts should be placed in a “single group” within the meaning of United States Sentencing Guideline (USSG) § 3D1.2 for sentencing purposes.

Count one involved defendant’s electroplating business located in Balch Springs, Texas. Defendant’s zinc-cyanide electroplating business utilized several liquid solutions containing a number of toxic and corrosive hazardous substances. The solutions could be disposed of lawfully through the sewer system if properly treated. However, the evidence showed that the defendant inadequately pretreated or failed to pretreat the solutions that he dumped into the sewer. Instead of complying with a Dallas County Water Control and Improvement District order to submit future plans for disposal, the defendant abandoned the site, leaving behind highly acidic and toxic wastes. Count one charged the defendant with knowingly disposing of a hazardous substance at the Balch Springs site without a permit and leaving the hazardous substances at the abandoned facility in violation of 42 U.S.C. § 6928(d)(2)(A).

Count five involved activities at a facility leased by the defendant in Forney, Texas. Defendant disposed of hazardous wastes generated at the Forney site by transporting hazardous waste to property he owned in Lake Fork, Texas. At the Lake Fork site the wastes were burned, buried, and drained onto the ground. Count five charged defendant with knowingly transporting hazardous waste from Forney to Lake Fork, an unpermitted facility, in violation of 42 U.S.C. § 6928(d)(1).

Defendant’s pre-sentence report scored counts one and five under USSG § 2Q1.2. Using USSG § 3D1.4 the combined offense level for the two counts was 26. Defendant argued that the two counts should have been combined into a “single group” under USSG § 3D1.2, producing a lower offense level of 24.

Defendant first argued that under USSG § 3D1.2(b), the counts should have been grouped together because they involved the same victim. The Fifth Circuit, considering the uncontested facts, rejected the argument that there were no identifiable victims and that only societal interests were harmed. The court concluded that the district court had correctly found distinct, identifiable victims for each count and therefore USSG § 3D1.2(b) was inapplicable.

Defendant’s second argument involved USSG § 3D1.2(d), which provides for the grouping of an offense behavior if it is ongoing or continuous in nature. Both counts one and five were increased under USSG § 2Q1.2(b)(1)(A) because the discharge of toxic substances was ongoing, continuous, or repetitive. Defendant argued that this finding

should have triggered USSG § 3D1.2(d). The court made three observations in rejecting the defendant's argument: (1) the primary consideration militating against grouping is whether the offenses involve different victims; (2) USSG § 3D1.2 lists several guidelines which are explicitly to be grouped under subsection (d) and USSG § 2Q1.2 is not listed; and (3) the application note (number 6) contains an example of a defendant convicted of three counts of discharging toxic substances from a single facility. The note states that these counts are to be grouped together for sentencing purposes. The Fifth Circuit by implication thought that a defendant charged with discharging substances from different facilities at different times would not be able to have the counts grouped together.

In sum, the Fifth Circuit stated that the district court properly found that under USSG § 2Q1.2(b)(1)(A), defendant's conduct at both the Balch Springs and Forney site was "ongoing." Although it was labeled "ongoing," counts one and five involved different victims at separate locations on different dates and the district court had correctly decided not to group the counts under USSG § 3D1.2. The judgment of the district court was therefore affirmed.

Roy Spurbeck

IV. CLEAN AIR ACT

*Louisiana Environmental Action Network v.
Browner*, 87 F.3d 1379 (D.C. Cir. 1996)

Three groups of petitioners brought challenges to the 1990 Amendments to the Clean Air Act (CAA), which permit the Environmental Protection Agency (EPA) to delegate its authority and responsibility to implement various air pollution requirements to a state if that state's program to regulate air pollution receives EPA approval. The petitioners alleged that the rules were illegal for various reasons, including that the rules violated the CAA or constituted an improper delegation of federal power.

The court first briefly discussed the background of EPA's rulemaking authority under the Clean Air Act. Under the Act, the EPA is authorized and required to "promulgate regulations establishing emissions standards for a full range of major sources of hazardous air pollutants." After establishing these federal standards, EPA is authorized to enforce them through appropriate administrative, civil, or criminal

actions. Additionally, section 7412(1) of the Act declares that each state may develop and submit to the Administrator “a program for the implementation and enforcement . . . of emissions standards and other requirements for covered air pollutants.” In 1993, the EPA promulgated regulations to establish the standards the agency will use in determining whether to approve a state’s plan. These delegation rules, adopted pursuant to section 7412(1), make clear that federal authorities will enforce an approved state program in place of the otherwise applicable federal regulation.

After requiring additional briefs on the issue of standing from each of the petitioners, the court stated that as an Article III court it could not address the merits of any of the claims because none of the petitioners established the required constitutional predicates for judicial review. For a claimant to have judicial review, that party must demonstrate constitutional and prudential standing, and its claim must be constitutionally and prudentially ripe. The court then went on to evaluate standing and ripeness issues for each group of petitioners.

The first group of petitioners, “the environmental petitioners,” were Louisiana Environmental Action Network, Manasota-88, and the Natural Resources Defense Council (collectively “LEAN”). The environmental petitioners claimed that the delegation rules did not adequately comply with the CAA, and argued that the Act mandates that state standards cannot be less stringent than applicable federal standards, and that the delegation rules do not adequately assure compliance with this congressional mandate. LEAN asserted that EPA’s rules permit states to exempt sources of air pollution within their borders from the detailed requirements of the CAA.

The court first addressed the question of whether LEAN met the standing requirements. The court stated that anyone who would invoke the aid of courts in resolving a complaint must allege, at a minimum, an actual or imminent injury personal to the plaintiff that is fairly traceable to the defendant’s conduct and that is likely to be redressed by the requested relief. The court determined that LEAN had not demonstrated an imminent injury. LEAN argued that, because the delegation rules permit the EPA not to enforce federal air pollution standards in a particular state as soon as the EPA approves that state’s proposed program, the delegation rules permit a potentially harmful enforcement gap if a state seeks section 7412 approval prior to that state putting its program into effect.

The court went on to say that, even assuming LEAN's challenge was correct on the merits, the asserted harm was a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, and such harm alone does not normally warrant exercise of the court's jurisdiction. In an effort to particularize its injury, LEAN asserted that "members of petitioning groups . . . must breathe" and that this was a reason to address the delay in enforcing air pollution standards. The court responded that it would be difficult to find a more generalized grievance than one shared by all persons who breathe, and that this might have been a sole reason for declining jurisdiction over LEAN's claims.

The court went next to the standing requirement that the injury be "concrete or imminent," citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Under these requirements, the court determined that LEAN did not establish that an enforcement gap in the regulations would concretely and personally effect it or its members. If no state seeks delegation of EPA's authority under the challenged rules, then no enforcement gap can result. The court added that even if an enforcement gap may occur in one state, the assumption cannot be made that such a gap will effect areas actually frequented by LEAN's members. LEAN also did not prove that an enforcement gap would be imminent, as again, no such gap can occur unless some state seeks under the promulgated delegation rules to substitute its own program for the federal regulations. Even with the assumption that a state will seek such substitution, the asserted enforcement gap still cannot develop unless the regulations within that state's program will not be in effect at the time the EPA might approve the state's program. The court concluded that LEAN's asserted "enforcement gap" was not only too vague to establish a concrete injury, but that the possibility of such a gap was too remote to establish an imminent one.

The second group of petitioners, the "utilities petitioners," consisted of Alabama Power Company, the Edison Electric Institute, the National Rural Electric Cooperative Association, the American Public Power Association, and a number of individual electric utilities (collectively "Alabama Power"). The utilities petitioners contended that the EPA's rules are invalid because they allow the agency to exceed its powers under the CAA by making federally enforceable standards that are more stringent than the Act mandates. Alternatively, they contended that if EPA's rules correctly interpret section 7412(1), then that section is an unconstitutional delegation of power. The court found that like LEAN, Alabama Power did not state a genuine injury that could be constitutionally addressed by a federal court. Throughout its brief,

Alabama Power described the “dire consequences” that would befall it if a state were to adopt a requirement more stringent than the EPA itself could promulgate. However, Alabama Power identified no state, let alone a state in which one of the utilities operates, which had adopted a more stringent rule which was or was about to be federalized by the EPA. The court went on to hold that because of its speculative nature, Alabama Power’s claim could not be considered an actual or imminent injury, nor was the claim ripe for review even if such injury could be found.

The third petition was a joint petition by the Clean Air Implementation Project, the Chemical Manufacturers Association, and the American Automobile Manufacturers Association, Inc. (collectively “CAIP”). This petition echoed the claims of Alabama Power and added that the delegation rules arbitrarily permit state and federal authorities to compel compliance with newly approved, more stringent state regulations without adequate notice under federal law. The court stated that CAIP came closest to establishing justiciability for its claim, identifying a “galaxy of likely circumstances” in which its members could be trapped in the intolerable position of being unable to comply with new state standards. CAIP’s concern was that EPA might approve such state standards shortly before some compliance deadline, thus leaving insufficient time for CAIP’s members to respond accordingly. However, the court was easily able to dismiss CAIP’s claim on ripeness grounds, as the rule must actually be applied to see what its effect is before a justiciable claim may be brought. The court added that CAIP’s claim itself could not demand immediate relief because the primary injury alleged was not a present hardship resulting from the regulations themselves, but rather a future injury that may result from programs approved under the regulations. The court also noted that CAIP showed no inability to bring its claim at a later time.

The court concluded that none of the parties challenging the Clean Air Act regulations had established both standing and ripeness, and thus there had been no demonstration that the court could and should review the merits of each claim.

Roberta Stewart