RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. CLEAN AIR ACT

United States v. EME Homer City Generation, L.P., 727 F.3d 274 (3d Cir. 2013)

The United States Court of Appeals for the Third Circuit affirmed the district court's ruling that dismissed claims brought by the Environmental Protection Agency (EPA) against former and current owners of a coal-fired power plant, and held that (1) failure to comply with prevention of significant deterioration (PSD) requirements is a one-time violation, (2) the Clean Air Act (CAA) does not authorize injunctions against former owners and operators for wholly past PSD violations, and (3) the CAA divested the district court of jurisdiction over Title V operating-permit claims. United States v. EME Homer City Generation, L.P., 727 F.3d 274, 284, 291, 300 (3d Cir. 2013).

A. Legal Background

In 1970, Congress turned a federal research program on air pollution into the CAA. *Id.* at 278. The 1970 version of the CAA authorized the EPA to set National Ambient Air Quality Standards (NAAQS), which are the national maximum permissible levels of common air pollutants. The EPA then identifies "nonattainment areas" in every state where a regulated pollutant level exceeds the NAAQS. If a state chooses to assume responsibility for how to meet the NAAQS, it does so by establishing a State Implementation Plan (SIP). *Id.* at 278-79.

Because the 1970 CAA only prevented existing pollution sources from exceeding the NAAQS, the CAA was amended in 1977 to review the effects of new pollution sources (from new construction or from facility modifications) on air quality before they are constructed. *Id.* at 279. This program is known as New Source Review (NSR) and is divided into two permit programs, one for "nonattainment areas" and one for "attainment areas." For attainment areas, the PSD program makes sure that any new emissions will not significantly degrade existing air quality. The PSD program, which is the focal point of this case, "requires operators of pollution sources in attainment areas to obtain a permit from the state or the EPA before" new construction or facility modifications take place. As part of the permitting process, the "best available control technology" (BACT) must be determined to control every regulated pollutant at the facility. *Id.* at 279-80. Congress mandated states to carry out the PSD program in their SIPs. *Id.* at 280.

Congress passed its third and newest major amendment in 1990 by enacting Title V, which made it easier for citizens, regulators, owners, and operators of pollution sources to know which CAA requirements applied to a certain pollution source. Title V accomplished this by requiring facilities that are major sources of air pollution to "consolidate into a single document (the operating permit) all of the clean air requirements applicable to a particular source of air pollution." *Id.* at 280 (quoting Sierra Club v. Johnson, 541 F.3d 1257, 1260 (11th Cir. 2008) (internal quotation marks omitted)). Similar to the PSD program, the Title V operating permit is a required part of SIPs. *Id.* at 280-81.

B. Factual and Procedural Background

The Homer City Generating Station (Plant), a coal-burning power plant, was built in the 1960s in Indiana County, Pennsylvania. *Id.* at 278. Congress had grandfathered plants built prior to the CAA, such as "the Plant, out of the PSD requirements 'until those sources [we]re modified in a way that increases pollution.'" *Id.* at 281 (quoting *Sierra Club*, 541 F.3d at 1261). From 1991 to 1996, modifications were allegedly made to the Plant's "boilers that increased net emissions of sulfur dioxide and particulate matter." These changes were allegedly "major modifications" that required a PSD permit and the use of BACT. However, because the former owners of the Plant believed the changes were "routine maintenance," which are exempted from the PSD program and BACT-based emissions controls, they did not obtain preconstruction permits. The former owners "applied for an operating permit as required by Title V," in 1995, but because they did not apply for a PSD premodification

permit with BACT limits, the Title V permit did not include any PSD or BACT-based requirements. It was not until 2004 that the Plant's Title V permit, which did not contain any PSD or BACT requirements, was finally approved. *Id.* at 282. However, by then, the former owners of the Plant had already sold the Plant to its current owners.

By 2004, the Plant had become a serious emitter of air pollution, and in 2008, the EPA notified the current and former owners of their alleged violations before suing them. The EPA then sued the former owners for (1) modifying the Plant without a PSD permit and without applying BACT requirements and (2) submitting an incomplete Title V operating-permit application. The EPA sued the current owners for (1) operating the Plant without BACT controls installed and without a valid PSD permit and (2) having a facially valid but incomplete Title V operating permit. "The EPA sought injunctive relief against the [f]ormer and [c]urrent [o]wners as well as civil penalties" from the current owners in the amount of $37,500 per day for the previous five years of operation. *Id.* at 282, 284.

The former and current owners moved to dismiss the complaint for failure to state a claim, and the district court granted the motion. *Id.* at 283. With regard to the current owners, the district court held that the PSD program only applies to construction and modification, not to *ongoing* conditions of operation. Because the PSD permit does not apply to an ongoing condition of operation, the current owners were not liable for violating Title V, and Title V does not permit a collateral attack on a facially valid permit. With respect to the former owners, the district court held that because they no longer owned the Plant, they posed no future risk of violating the PSD program. The court also held that the former owners could not have violated Title V because the former owners never owned or operated the Plant after the Title V permit was issued.

C. The Court's Decision

1. PSD Claims Against Current Owners and Operators

On appeal, the Third Circuit affirmed the district court's ruling in its entirety. Agreeing with other courts of appeals, the court found that the PSD program does not prohibit operating a facility without BACT or a PSD permit. *Id.* at 284. Based on a plain reading of the CAA, the court found that while the statute prohibits *constructing* a facility without obtaining a PSD permit or applying BACT limits, it does not prohibit *operating* a facility without a PSD permit or BACT limits. Therefore, agreeing with the district court, the Third Circuit found that failure to

comply with the PSD program and BACT limits for emissions is a one-time violation that occurs at the time of construction or modification and not during operation of the facility. In the court's words, "[J]ust because the PSD program requires a source to obtain a permit that sets some operating conditions does not mean that the PSD program requires a source without a permit to comply with operating conditions." *Id.* at 286. The Third Circuit clearly deferred to Congress's decision not to impose PSD requirements as operational conditions and suggested that if this was an oversight, then it is in Congress's power—not the court's—to amend the statute. *Id.* at 289-90.

Looking to policy concerns, the EPA argued that only allowing a one-time violation at the construction or modification stage would result in a very ineffective incentive for facilities to comply with the PSD program. *Id.* at 288. However, the court noted that if an owner modifies a facility in violation of the PSD program, civil penalties do not have to be limited to a one-day penalty (with a maximum amount of $37,500); instead, civil penalties may accrue *each* day the owner modifies or constructs the facility (with a maximum amount of $37,500 per day). Additionally, the Third Circuit found that the EPA has several other means to deter potential violators such as criminal penalties or injunctive remedies. *Id.* at 288-89. Moreover, if the EPA finds that a state is underenforcing the CAA or its own SIP, the EPA can order the state to bring the SIP into compliance and can also directly revise the SIP. *Id.* at 289. Finally, to guarantee that major modifications do not go unobserved as in the present case, the Third Circuit stated that the EPA could use its statutory power to require any source owner or operator to submit advance reporting of some or all proposed changes to facilities.

The EPA also argued that Pennsylvania's SIP is an independent source of PSD requirements and mandates a facility to obtain a PSD permit as an operating condition. *Id.* at 290. However, aligning itself with the United States Courts of Appeals for the Eighth and Eleventh Circuits, the Third Circuit found that the SIP mirrored the language of the CAA with respect to PSD programs, and therefore did not convert the PSD requirements into operating conditions.

2. PSD Claims Against Former Owners and Operators

Looking at the PSD claims against former owners of the Plant, the court held that the text of the CAA does not allow for an injunction against former owners and operators for "wholly past PSD violation[s], even if that violation causes ongoing harm." *Id.* at 291. The CAA "authorizes the EPA to bring a civil enforcement action when any person

has violated a permit or SIP," has violated the PSD program, or has "attempt[ed] to construct or modify a major stationary source" out of compliance with the NSR program. *Id.* at 291-92 (citing 42 U.S.C. § 7413(a)(5), (b)(1)-(3) (2006)). District courts only have authority "'to restrain such violation, to require compliance, to assess such civil penalty, to collect [certain] fees owed the United States' and 'to award any other appropriate relief.'" *Id.* at 292 (alterations in original) (quoting 42 U.S.C. § 7413(b) (2006)).

The EPA argued for injunctive relief against former owners and operators. However, the court found that aside from civil penalties, all other remedies, including injunctions, are forward-looking and cannot be issued for completed violations. *Id.* at 293, 295. The court did analyze whether the district court's authority to "award any other appropriate relief" could be interpreted as giving district courts broad authority to provide injunctive relief against former owners and operators. *Id.* at 292. However, applying the canon of *ejusdem generis*—where a general term ("appropriate relief") follows an enumeration of specific terms ("restrain such violation" and "require compliance"), then the general term is not to be interpreted in its widest scope, but is rather limited to covering subjects similar to the class of those specifically mentioned—the Third Circuit found that "appropriate relief" must be limited to covering *ongoing* (not past) violations, which is consistent with the "specific forward-looking injunctive remedies that precede it." *Id.* at 292-93.

The EPA then argued that the district court should either enjoin the current owners to cooperate with the former owners to install BACT, or order the former owners to pay the current owners for the cost of BACT and command the current owners to install it. *Id.* at 295. However, the Third Circuit found that because the current owners could not be held liable for violating PSD or BACT requirements, the district court had no authority to enjoin them in any way. The EPA argued in the alternative that the former owners should have been required to purchase and retire emissions credits to offset pollution, but the Third Circuit found that this would have been an "end-run around the five-year statute of limitations" on any civil penalties. *Id.* at 295-96.

3. Title V Claims Against Current Owners and Former Owners

Instead of dismissing the Title V claims on the merits as the district court did, the Third Circuit dismissed the claims because it found the district court lacked jurisdiction to hear the claims. *Id.* at 296. Agreeing with the United States Courts of Appeals for the Seventh, Eighth, and Ninth Circuits, the Third Circuit held that Title V directs challenges to

applications and permits into an administrative review process that is only reviewable by the courts of appeals and not by the district courts. *Id.* at 296-97. However, the Third Circuit did state that if the EPA found the permit not to be in compliance under the CAA, then under Title V, the EPA would have been required to object *during* the permitting process; thus the Third Circuit could have reviewed the permit. *Id.* at 297. While the CAA allows objections during the permitting process, the court found that under the statute it is not a violation to operate in compliance with "a facially valid but inadequate Title V permit." *Id.* at 298. Additionally, the Third Circuit asserted that even if certain permit deficiencies go unnoticed for a period of time, as in the case at hand, then the appropriate way to manage them would be for the EPA or the states to reopen the permit to include any "applicable requirement" that may have been omitted during the permitting process. *Id.* at 300 (citing 40 C.F.R. § 70.7(f) (2012)).

D. Analysis

The ruling in this case is a loss for the EPA and environmentalists because it effectively permits owners and operators of facilities that have allegedly violated PSD program requirements to circumvent lawsuits that would compel them to install pollution controlling mechanisms. Such a ruling means that under certain circumstances, violations under the CAA may occur, but there will not be a remedy for the violation, even when the effects of the violations are presently felt and ongoing. However, the Third Circuit's decision does draw attention to a few major points that plant owners will want to be mindful of in the future. As the court suggested, the EPA may contemplate employing an advance reporting requirement for planned modifications to determine if they trigger PSD requirements, even if the owners or operators of the facility believe the changes constitute "routine maintenance." Implementing such a requirement would allow the EPA to monitor and identify major modifications that may be needed to comply with the PSD program. Additionally, the court noted that civil penalties for PSD violations do not have to be limited to a one-day fine with a maximum sum of $37,500. Instead, civil penalties may accrue *each* day the facility is modified or constructed in a way that violates the PSD program.

Sona Mohnot

II. CLEAN WATER ACT

Gulf Restoration Network v. Jackson,
No. 12-667, 2013 WL 5328547 (E.D. La. Sept. 20, 2013)

A. Introduction

In *Gulf Restoration Network v. Jackson*, the United States District Court for the Eastern District of Louisiana decided whether the Environmental Protection Agency (EPA) must make a necessity determination in response to the plaintiffs' rulemaking petition asking for federal standards to control nitrogen and phosphorus water pollution under the Clean Water Act (CWA). No. 12-667, 2013 WL 5328547 (E.D. La. Sept. 20, 2013). The EPA had denied the plaintiffs' petition, asserting that federal rulemaking authority would not be the most effective or practical means of addressing the pollution. *Id.* at *2. In the complaint, the plaintiffs argued that the EPA's denial was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, violating the Administrative Procedure Act (APA). *Id.* at *3. Relying on *Massachusetts v. EPA*, the court held that the EPA must conduct a necessity determination in response to plaintiffs' rulemaking petition. *Id.* at *7.

B. Background

The CWA aims to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2006). To meet this goal, the CWA generally makes it illegal for any person to discharge any pollutant into navigable waters. *Id.* § 1311(a). However, obtaining a National Pollutant Discharge Elimination System (NPDES) permit allows a permittee to discharge regulated quantities of "any pollutant, or combination of pollutants." *Id.* § 1342(a)(1). These permits only cover discharges from *point sources*, defined as "any discernible, confined and discrete conveyance," leaving *nonpoint sources*—including polluted rain and snow runoff—unregulated under this subchapter. *Id.* § 1362(14); *see Polluted Runoff: Nonpoint Source Pollution*, EPA, http://water.epa.gov/polwaste/nps/index.cfm (last updated Sept. 9, 2013) (describing nonpoint sources). For the first twenty years of the CWA, the EPA's focus on regulating pollution from point sources helped recover some badly polluted waters, but overall, water quality across the country decreased. Oliver A. Houck, *The Clean Water Act Returns (Again): Part I, TMDLS and the Chesapeake Bay*, 41 Envtl. L. Rep. (Envtl. Law Inst.) 10,208, 10,209 (2011).

Water quality standards and Total Maximum Daily Loads (TMDLs) established authority to clean up impaired water bodies polluted by nonpoint sources. "Under section 303(d) of the [CWA], states, territories, and authorized tribes are required to develop lists of impaired waters. These are waters that are too polluted or otherwise degraded to meet the water quality standards set by states, territories, or authorized tribes." *Impaired Waters and Total Maximum Daily Loads*, EPA, http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/index.cfm (last updated Sept. 11, 2013). A TMDL is a calculation of the highest amount of a pollutant a water body can take and still meet water quality standards.

Currently, there are no numeric water quality standards or TMDLs for phosphorus and nitrogen in the Mississippi River Basin. *Gulf Restoration Network*, 2013 WL 5328547, at *1. The lack of regulation for phosphorus and nitrogen (often referred to as nutrient pollution) is identified by the EPA as "one of America's most serious water pollution issues." *Nutrient Pollution*, EPA, http://www2.epa.gov/sites/production/files/2013-08/infographic-nutrient-pollution-explained.png (last visited Oct. 13, 2013). Controlling nutrient pollution from fossil fuels, agriculture, urban sources, and industry will help "protect people's health, support the economy, and keep America's waters safe for swimming and fishing." All states are impacted by nutrient pollution but the Mississippi River Basin is "inundated with excess levels" of nutrient pollution, leading to a hypoxic or dead zone in the Gulf of Mexico. *Gulf Restoration Network*, 2013 WL 5328547, at *1.

On July 30, 2008, the plaintiffs petitioned the EPA to establish numeric nutrient criteria for water quality standards and TMDLs, specifically identifying the Mississippi River Basin and the northern Gulf of Mexico as needing such regulation. Amended Complaint for Declaratory and Injunctive Relief at 2, *Gulf Restoration Network*, 2013 WL 5328547 (No. 12-677). Regulation of nutrient pollution is needed to protect water quality and designated uses in the Gulf because the Gulf's dead zone is negatively impacting water quality, ecology and species diversity, and the Gulf's $2.8 billion commercial and recreational fishing industry. *Id.* at 12. In the petition, the plaintiffs noted that although the CWA "assigns responsibility for such pollution control to the states in the first instance, . . . most states to date have done little or nothing to meaningfully control" nutrient pollution and have little "political will to protect downstream waters." *Gulf Restoration Network*, 2013 WL 5328547, at *1. In light of inaction by the states, the petition requested for the EPA to "use its rulemaking powers to promulgate federal standards to control nitrogen and phosphorus pollution."

Almost three years later, on July 29, 2011, the EPA responded to the plaintiffs' petition. *Id.* at *2. The EPA agreed with the plaintiffs on the significance and seriousness of the water quality problems caused by nutrient pollution, but denied the petition on the grounds that "federal rulemaking authority would [not] be the most effective or practical means of addressing the nitrogen/phosphorus problem at [the] time." The EPA thought that the best way to address the pollution would be to "build on its earlier efforts and to continue to work cooperatively with states and tribes." The EPA explained that establishing federal numeric nutrient criteria and the regulatory oversight over the criteria once established would be "highly resource and time intensive." "EPA clarified that it was not concluding that [numeric nutrient criteria] were not necessary . . . but rather that EPA would exercise its discretion to continue in its partnership efforts with the states, not foreclosing its ability to resort to federal standards at some future time . . . ." *Id.* at *3.

The plaintiffs' complaint alleged the EPA's denial violated the APA for two reasons: (1) the basis for the EPA's denial was "not supported by reasons that conform to the relevant statutory factors in [section] 303(c)(4)(B) of the CWA," and (2) the EPA's denial conflicted with "the undisputed evidence that [numeric nitrogen and phosphorus limits] are 'necessary' to meet the requirements of the CWA." *Id.*; 33 U.S.C. § 1313(c)(4)(B) ("The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved . . . (B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter."). The plaintiffs sought for the court to declare the EPA's denial was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under the APA. *Gulf Restoration Network*, 2013 WL 5328547, at *3.

In response, the EPA filed a motion to dismiss the plaintiffs' complaint for lack of subject matter jurisdiction, observing the APA exempts discretionary agency action from judicial review. Specifically, the EPA argued that because section 303(c)(4)(B) of the CWA is written so broadly, it is meant to be "committed to agency discretion by law thereby rendering the denial of EPA's rulemaking petition unreviewable by a federal court."

In opposition to the EPA's motion to dismiss, the plaintiffs asserted that if the EPA's position was adopted it would enact a "sweeping exemption from judicial oversight by suggesting that the agency be given complete freedom from accountability for refusing to exercise its authority under [section] 303(c)(4)(B) of the CWA." The plaintiffs

highlighted that the "challenge presented by their complaint [was] EPA's refusal to make [a] 'necessity' determination" as required by section 303(c)(4)(B) of the CWA. To support their interpretation, the plaintiffs argued that under *Massachusetts v. EPA*, the agency had "no discretion to refuse to make a necessity determination."

C. The Court's Reasoning

The court found the EPA's arguments in the motion to dismiss to be unpersuasive. *Id.* at *4. The court noted that the plaintiffs were not asking the court to take up the necessity determination, review a necessity determination, or order the EPA to promulgate federal nutrient criteria. Rather, the plaintiffs were challenging the agency's "refusal to make either an affirmative or negative necessity determination in response" to the petition and the "EPA's reliance on non-statutory factors in declining to make that determination." The court agreed with the plaintiffs that their challenges were not matters of agency discretion and denied the EPA's motion to dismiss.

The court turned to the parties' cross motions for summary judgment and found the plaintiffs' challenge similar to the challenge in *Massachusetts v. EPA*. In *Massachusetts v. EPA*, the EPA had denied a rulemaking petition for the agency to regulate greenhouse gas emission from motor vehicles under the Clean Air Act (CAA). *Id.* at *5. The EPA's denial was based on the mistaken belief that they lacked authority to regulate such emissions and even if they did have the authority, it would be unwise to regulate these emissions at that time. The United States Supreme Court found that the EPA's reasoning for the denial "rested on reasoning divorced from" the language of the CAA. "The Court recognized that EPA's authority to regulate under the statute was conditioned on the formation of a 'judgment,' but the judgment made must relate to the constraints imposed by the statutory text itself." The statute serves to define limits within which the agency is to exercise their discretion. The Court in *Massachusetts v. EPA* ruled that since the EPA had not offered any reasoned explanation for its denial to regulate greenhouses gases, their actions were arbitrary, capricious, or otherwise not in accordance with law.

In the case at hand, the court found that possibly the most influential aspect of *Massachusetts v. EPA* was the Supreme Court's "implicit conclusion that EPA lacks the discretion to simply decline to make the threshold determination in response to a rulemaking petition even where the statutory text does not explicitly require it to do so." *Id.* at *6.

Therefore, it was contrary to law for the EPA to decline to make a necessity determination in response to plaintiffs' petition.

The plaintiffs additionally argued that the necessity determination must be based on "scientific data related to water quality." *Id.* at *5. In dicta, the court noted that the decision in *Massachusetts v. EPA* does not lead to the interpretation that "every discretionary EPA determination that serves as a restraint . . . to federal action must be based on scientific data." *Id.* at *6. Further, the court stated that *Massachusetts v. EPA* "does not stand for the proposition that EPA is precluded from relying on factors not expressly mentioned in the authorizing statute." Rather, the directive from *Massachusetts v. EPA* is that the agency cannot disregard a specific statutory instruction that "expressly curtails the exercise of its discretion when it denies a request for rulemaking."

The court did not find any statutory provision in the CWA that limited the EPA's decision only to scientific data and did not grant the plaintiffs' motion for summary judgment on the grounds that "a necessity determination under [section] 303 (c)(4)(B) is limited solely to scientific data." *Id.* at *7. Although the EPA's determination does not need to be limited to scientific data, the language of the CWA provides that before the EPA can impose federal regulations it must first show that the states have "demonstrate[d] that they either cannot or will not comply" with the CWA. *Id.* at *7; 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . . .").

In conclusion, the plaintiffs' reasoning persuaded the court that *Massachusetts v. EPA* requires the EPA to make a necessity determination in response to the plaintiffs' petition for rulemaking. The court remanded the "matter to EPA for further action consistent with the requirements of *Massachusetts v. EPA*." *Id.* at *7-8.

D. Analysis

The court's ruling may provide an important step towards addressing unregulated nutrient pollution across the country and specifically in the Mississippi River Basin. By refusing to grant the EPA deference in their denial of the plaintiffs' petition, the court foreclosed the EPA's current "hands-off approach" to dealing with nutrient pollution. *See id.* at *1. Although the court noted that the EPA's determination does not need to be based solely on scientific data, the court required the EPA to respond reasonably to the petition to determine whether numeric nutrient criteria are required. While the court did not explicitly state any factors the EPA must address in their forthcoming response, the court did

comment that an evaluation of the states' approach to nutrient pollution is one specific statutory hurdle the EPA must address before imposing federal numeric nutrient criteria. *See id.* at *7. Considering the prevalent, interstate nature of nutrient pollution (the Mississippi River Basin spans thirty-one states) and the current lack of meaningful state controls (states have identified roughly 15,000 water bodies with nutrient related problems), the EPA's necessity determination may force the agency to create numeric nutrient criteria and finally address what the agency has called the "most serious water pollution issue today." *Nutrient Pollution*, *supra*.

Allison Parks

III. INTERSTATE WATER COMPACTS

Tarrant Regional Water District v. Herrmann, 133 S. Ct. 2120 (2013)

The Red River Compact (Compact) allocates water rights in the Red River (River) to states within the Red River Basin. Tarrant Reg'l Water Dist. v. Herrmann, 133 S. Ct. 2120, 2125 (2013). Parties to the Compact include Oklahoma, Texas, Arkansas, and Louisiana. Prior to the finalization of the Compact in 1978, and congressional approval in 1980, the Red River was a repeated source of disputes between Oklahoma and Texas. Absent an interstate water compact, the allocation of water is "subject to equitable apportionment by the courts," and this typically entails years of legal battles between parties. *Id.* (citing Arizona v. California, 460 U.S. 605, 609 (1983)). To avoid lengthy and expensive court battles over the allocation of a river, states form interstate water compacts similar to the one at issue in this case. *See id.* States' authority to form an interstate water agreement stems from the United States Constitution's Compact Clause, and the agreement constitutes binding law when ratified by Congress. Brief of the States of Colorado et al. as Amici Curiae in Support of Respondents at 4-5, *Tarrant*, 133 S. Ct. 2120 (No. 11-889) (citing U.S. CONST. art. 1, § 10, cl. 3; Texas v. New Mexico, 462 U.S. 554, 564 (1983); Louisiana v. Texas, 176 U.S. 1, 22 (1900)). Such agreements are of particular importance to states in arid and semi-arid regions of the United States and help to clarify the water supply available for allocation within each state. *Id.* at 5. Compacts also free each state to form intrastate water apportionment regulations, similar to the Oklahoma statutes at issue in this case, without having to negotiate with each state in the compact. *Id.* at 6.

A. Factual and Procedural Background

In 2007, the petitioner, Tarrant Regional Water District (Tarrant), sought a permit from the Oklahoma Water Resources Board (OWRB) to withdraw 310,000 acre feet of water annually from a tributary of the Red River. *Tarrant*, 133 S. Ct. at 2128. When applying for a permit with OWRB, Tarrant also filed suit in the United States District Court for the Western District of Oklahoma to enjoin the enforcement of Oklahoma water statutes that prevented Tarrant from obtaining a water permit. *Id.* at 2129. Tarrant is a Texas state agency serving north-central Texas and provides water in the Dallas-Fort Worth metro area, primarily to the cities of Fort Worth, Arlington, and Mansfield. *Id.* at 2128. From 2000 to 2010, the Dallas-Fort Worth area experienced a jump in population from 5.1 million to 6.4 million. Prior to seeking a permit with OWRB, Tarrant attempted to purchase water directly from Oklahoma and tried to negotiate water purchases from the Choctaw and Chickasaw Nations. Both efforts were unsuccessful.

The stated purpose of the Compact is to provide an equitable apportionment of water from the River and its tributaries that run from the New Mexico and Texas border to Louisiana. *Id.* at 2126. Under the Compact, the River is divided into five subdivisions called "Reaches," and each Reach is further divided into "subbasins." Of primary importance in this case are the water rights in Oklahoma's subbasin 5 in Reach II, that encompasses the River from the Denison Dam to the Arkansas-Louisiana state line. In its permit application, Tarrant proposed to divert the Kiamichi River at a point within subbasin 5 of Reach II before it discharges into the Red River. *Id.* at 2128. Section 5.05(b)(1) of the Compact stipulates that during normal flow each state shall have "equal rights to the use of runoff originating in subbasin 5" provided that the flow at the Arkansas-Louisiana state line is 3000 cubic feet per second (CFS) or more, and a state is not entitled to more than 25% of the excess water. *Id.* at 2127 (quoting Red River Compact, Pub. L. No. 96-564, § 5.05, 94 Stat. 3305, 3311 (1980) (internal quotation marks omitted)). Should the River's flow at the Arkansas-Louisiana state line diminish, upstream states may keep water stored but must also ensure Louisiana receives a sufficient amount of water. The Compact does include an accounting provision to ensure apportionments are honored, but given the procedure's administrative costs, an accounting is not "routine," and the states have yet to utilize this portion of the Compact.

The Oklahoma water statutes challenged by Tarrant impose a heavy burden on those seeking to allocate water outside of Oklahoma. *Id.* at

2128. When an applicant proposes to divert water out of Oklahoma, the OWRB must consider whether the water "could feasibly be transported to alleviate water shortages in . . . Oklahoma." *Id.* at 2128 (quoting OKLA. STAT. tit. 82, § 105.12(A)(5) (West 2013) (internal quotation marks omitted)). The water statutes also require that a permit to remove water from the state must not "[i]mpair the ability of the State of Oklahoma to meet its obligations under any interstate stream compact." *Id.* (quoting OKLA. STAT. tit. 82, § 105.12A(B)(1) (internal quotation marks omitted)). Other provisions create a specific review process for out-of-state water users, require legislative approval of such permits, and ask that "[w]ater use within Oklahoma . . . be developed to the maximum extent feasible for the benefit of Oklahoma so that out-of-state downstream users will not acquire vested rights therein to the detriment of the citizens of this state." *Id.* at 2128-29 (citing OKLA. STAT. tit. 82, §§ 105.12(F), 105.12A(D), and 1086.1(A)(3)). In an advisory opinion referenced by the Court, the Oklahoma Attorney General emphasized that it was improper for out-of-state users to seek a permit from OWRB because the state found no reason to provide water to an out-of-state user without compensation. *Id.* at 2129. In filing suit, Tarrant claimed that the water statutes, and the Oklahoma Attorney General's opinion, were preempted by federal law and discriminated against interstate commerce in violation of the dormant Commerce Clause. The district court granted summary judgment for the OWRB on both claims, the United States Court of Appeals for the Tenth Circuit affirmed, and the United States Supreme Court granted Tarrant's writ of certiorari.

B. The Court's Decision

The Court, in a unanimous opinion authored by Justice Sotomayor, affirmed the holdings of the district court and the Tenth Circuit. *Id.* at 2124, 2137. The Court sided with OWRB on both issues and held that the Compact, which does not create cross-border rights, did not preempt the Oklahoma water statutes, and the Oklahoma statutes did not violate the Commerce Clause. *Id.* at 2137.

Tarrant's first claim focused on section 5.05(b)(1) of the Compact and a provision granting "equal rights to the use of runoff originating in subbasin 5 . . . provided no state is entitled to more than 25 percent of the water in excess of 3,000 [CFS]." *Id.* at 2129 (quoting Red River Compact § 5.05 (internal quotation marks omitted)). Here, Tarrant claimed that the "equal rights" language coupled with a statutory silence regarding state lines grants all signatories the ability to cross state lines and obtain a share of water in excess of 3000 CFS. OWRB disputed

Tarrant's reading, arguing that the language only grants a right to excess water within each state's borders, and any grant to cross state lines must be explicit in the Compact. *Id.* at 2130.

The Court noted that precedent set in *Texas v. New Mexico* required the Court to examine the Compact as a contract. *Id.* (citing Texas v. New Mexico, 482 U.S. 124, 128 (1987)). In examining a contract, the Court noted that express terms provide the best guide for the parties' intent. The Court acknowledged Tarrant's argument that other Compact sections do explicitly reference state boundaries; however, the Court noted that other sections of the Compact strongly counter Tarrant's interpretation. *Id.* at 2131. The clearest example being section 6.01(b), which states that Texas shall have 60% of the runoff in subbasin 1 of Reach III and Arkansas is entitled to 40% of the runoff in this subbasin. The section contains no reference to state lines, but the Court believed that the reasonable assumption was that Arkansas must wait for its 40% stake to flow through Texas before being claimed. The Court noted that if Tarrant's view on statutory silence were applied to this section it would mean that Arkansas could cross into Texas to obtain its 40% share without waiting for the water to flow into Arkansas. The Court believed such an outcome was counterintuitive and ran against the Compact's purpose of balancing the interests of all signatories. *Id.* at 2131-32.

Provided with the ambiguity arising from the varying interpretations of cross-border rights, the Court turned to the interpretive tools outlined in an earlier opinion, *Oklahoma v. New Mexico*. *Id.* at 2132 (citing Oklahoma v. New Mexico, 501 U.S. 221 (1991)). Three points convinced the Court that the Compact did not create cross-border rights. These were "the . . . principle that States do not easily cede their sovereign powers," the fact that similar compacts grant cross-border rights only in explicit terms, and the course of dealing between the compact signatories. The Court emphasized that it is rare for a state to give up its sovereign authority over navigable waters within its borders, and any ceding of such a right is typically clear and explicit in a compact. *Id.* at 2133. In explaining this point, the Court looked to other compacts granting cross-border rights and found that the language stipulating such rights was clear and unambiguous, contrary to the statutory silence in section 5.05(b)(1). *Id.* at 2133-34. The Court then examined the course of dealing between the parties and found that since the Compact's approval by Congress in 1980, no other signatory state sought a cross-border diversion similar to that currently sought by Tarrant. *Id.* at 2135. Particularly damaging to Tarrant were earlier attempts to purchase water from Oklahoma from 2000 until 2002, prior conduct that the Court

believed countered Tarrant's current claims that it was entitled to uncompensated access to water in Oklahoma under the Compact's terms.

Tarrant's second claim relied on an assertion that that the Oklahoma statutes discriminated against interstate commerce and violated the dormant Commerce Clause by barring the distribution of unallocated water out of the state. *Id.* at 2136-37. The Court undercut Tarrant's constitutional argument by pointing out that the Compact does not leave any water unallocated. *Id.* at 2137. The Court relied on the interpretive comment to article V in the Compact. The comment provides that when the River's flow is above 3000 CFS, all signatory states may use any amount of water that can be put to beneficial use, conditioned by the requirement that if states have competing uses and the excess of 3000 CFS cannot satisfy all competing uses, the signatory states must honor the others' right to 25% of the excess flow. Put simply, any excess water in a subbasin is not unallocated but is rather allocated to the state where the subbasin is located unless another Compact state requests an allocation and asks the other state to stop using more than their fair share. Thus, the Oklahoma water statutes could not discriminate against other states because unallocated water does not exist under the Compact.

C. Analysis

The Court rejected an interpretation by Tarrant that could have dealt a blow to a state's traditional authority over the allocation of water within its borders and allowed other states to side-step the terms of interstate water compacts. While the Court did not extensively address the merits of Tarrant's dormant Commerce Clause argument, instead focusing on Tarrant's mistaken belief that unallocated water existed under the Compact, the Court's rejection of Tarrant's dormant Commerce Clause argument avoided precedent that could have undermined a state's ability to promulgate and enforce intrastate water apportionment regulations. In closely following precedent regarding interstate compacts, the Court preserved the states' traditional authority over water allocation within their borders and maintained the strength and integrity of interstate water agreements.

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