Court of Civil Appeals of Alabama.

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT and Alabama Environmental Management Commission v. LEGAL ENVIRONMENTAL ASSISTANCE FOUNDATION, INC.

2030878 and 2040311.

Decided: August 12, 2005

(Excerpt)

Case found at http://caselaw.findlaw.com/al-court-of-civil-appeals/1332808.html

In Count IV of its complaint, LEAF assailed subsection (9)(a)(1) of Rule 335-6-10-.12, under which those who wish to initiate a new or an expanded discharge into "Tier 2" water must supply ADEM with certain documentation, prepared by a registered engineer, pertaining to "discharge alternatives." That subsection, as well as an allied "Alternatives Analysis" form, states that "[a]lternatives with total annualized project costs that are less than 110% of the total annualized project costs for the Tier 2 discharge proposal are considered viable alternatives." According to LEAF (and the trial court's judgment), the so-called "110 percent rule" is arbitrary and violative of Section 6 of the Alabama Constitution of 1901. LEAF cites Friday v. Ethanol Corp., 539 So.2d 208 (Ala.1989), for the proposition that the due-process guaranty of that section is violated when a regulation "imposes restrictions that are unnecessary and unreasonable upon the pursuit of useful activities in that they do not bear some substantial relation to the public health, safety, or morals, or to the general welfare, the public convenience, or the general prosperity." 539 So.2d at 216. We will assume, without deciding, that the adoption of the so-called "110 percent rule" amounts to a "restriction" upon the freedom of the members of LEAF to participate in recreation upon all of Alabama's waterways. It remains to be considered, however, whether the "110 percent rule" is unconstitutional based upon the absence of some relationship to public health, welfare, or prosperity.

In Alabama Power Co. v. Citizens of Alabama, 740 So.2d 371 (Ala.1999), the Supreme Court cautioned the judiciary against "reevaluat[ing] the broad policy considerations inherent in crafting economic policy," and simultaneously reiterated that economic regulations should not be declared invalid "[i]f there is 'any state of facts either known or which could reasonably be assumed,' that would establish a rational relationship between the economic regulation and a legitimate state interest." 740 So.2d at 381. In enacting the AEMA, the Legislature charged ADEM with the responsibility not only of "administering environmental legislation," but also of "promot[ing] economy and efficiency in the operation and management of environmental programs," of "timely resol[ving] permitting actions," and of "insur[ing] that government is responsive to the needs of the people and sufficiently flexible to meet changing conditions." Ala.Code 1975, § 22-22A-2(1). Moreover, ADEM, acting through the Commission, is delegated the power to "develop environmental policy for the state." Ala.Code 1975, § 22-22A-5(3). In carrying out those duties, ADEM must have the discretion to decide whether, at some level, the "needs of the people" of Alabama will be better served by placing upper limits upon the costs of permit applicants' industrial plants and equipment than by requiring massive and inefficient expenditures from those applicants in order to achieve marginal improvements in water quality. While the authority to make such choices might well have been retained by the Legislature had that body elected to do so, ADEM and the Commission, as the Legislature's delegates, succeed to that body's plenary power to manage the delicate balance between the economy and the environment of Alabama.

In this case, ADEM proposed, and the Commission adopted, a rule in substantial conformity to guidelines suggested by EPA's regional administrator. The record reflects that that official sent a letter to ADEM's general counsel in 1997 in which he urged revision of state environmental regulations so as to require consideration of alternative treatment methods. The enclosures with that letter included an "Antidegradation Manual" issued by one of EPA's regional water-management divisions in which the following "rule of thumb" is set forth: "nondegrading or less-degrading pollution control alternatives with costs that are less than 110% of the costs of the pollution control measures associated with the proposed activity shall be considered reasonable." EPA's regional administrator went so far as to warn that "[i]f the State cannot or will not make such revisions, I am prepared to recommend an EPA promulgation of federal standards." Had that official done so, the expressed policy of the Legislature that the state "retain . the control over its air, land and water resources" (Ala.Code 1975, § 22-22A-2(2)) would necessarily have been thwarted.

The "110 percent rule," like the remainder of Rule 335-6-10-.12, was presented to the EPA before its promulgation as a rule and was approved by that agency as being "consistent with the requirements of the Clean Water Act and the applicable provisions of 40 C.F.R. § 131.12(a)." As adopted, the "110 percent rule," like many regulations and parts of regulations, reflects a compromise between environmental and broader economic concerns, a compromise that the judiciary should be loath to disturb. Although the trial court summarily rejected the rationality of the "110 percent rule," we easily perceive that Rule 335-6-10-.12(9) and its associated forms are rationally related to the goals of preventing federal preemption of state control of water resources and of establishing definite limits with respect to environmental cost burdens upon permit applicants, burdens that may chill industrial development and harm the public in the name of increased water quality. The trial court thus erred in invalidating the "110 percent rule" on due-process grounds.