The Supreme Court Takes Two Clean Water Act Cases

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October 2012
Introduction

- Intro to Supreme Court CWA decisions
- The other case
  - *Los Angeles County Flood Control District v. NRDC*
    - WESTCAS amicus brief
- Consequences
Part 1

Background
How Cases Get To Supreme Ct

- Certiorari
  - Parties petition for cert
- Supreme Court chooses its cases (grants cert)
  - Chooses very few
- Not many CWA cases
Some Clean Water Act Cases

- 404 cases (primarily)
  - *Sackett* (2012)
  - *Coeur Alaska* (2009)

- 402 cases
  - New cases
Sackett

2/3 acre residential lot
- EPA issues enforcement order
- Penalties: $75,000/day

Sacketts file suit
- EPA: no “pre-enforcement review”

Supreme Court 9-0
- Sacketts can sue EPA
Coeur Alaska

- Corps issues permit to discharge mining slurry into lake
  - Would kill all the lake’s fish
  - EPA says 404 permit OK

- Issue: NPDES permit required?

- Supreme Court 6-3
  - Defers to EPA memo
**Rapanos (and Carabell)**

- Wetlands adjacent to roadside ditches
  - Act applies to wetlands adjacent to navigable waters
  - Issue: what’s a navigable water?

- Supreme Court splits 4-1-4
  - 5 justices: Corps regs go too far
  - Plurality: dictionary definition of water
  - Kennedy: significant nexus
Flood Control District pumps water over levee from canal to lake

- Issue: point source?

Supreme Court 9-0

- Point source includes sources that do not generate pollutants
- No addition if same water body (8-1)
The New Cases

- Parties petition for cert
- Supreme Court asks Solicitor General to comment
  - Solicitor General says don’t take them
- Supreme Court takes them anyway
Part 2

Decker v. Northwest Environmental Defense Center
Decker (and Georgia-Pacific)

- Stormwater from logging roads
  - Channeled through ditches, pipes
- EPA silvicultural rule: not a point source
- Ninth Circuit: yes it is
  - NPS channeled = PS
Supreme Court Will . . . ?

- Probably reverse
- Could hold that Ninth Circuit should have deferred to EPA regulation
- Could say that the distinction between PS and NPS isn’t just channelization
Part 3

*Los Angeles County Flood Control District v. NRDC*
LA River Near 4th St Bridge
LA River Near 6th St Bridge
The Permit

- **Stormwater permit issued to**
  - 84 cities
  - Los Angeles County
  - Los Angeles County Flood Control District

- **Permit:** don’t cause WQS violations
  - Monitoring stations for compliance
  - (Issue: where are monitoring stations?)
Basic Layout?

Los Angeles River

Cities

County

Industries

STPs?

Flood Control District Pipes
In The Trial Court

- NRDC sues FCD and county
  - Monitoring stations show exceedances
  - Those are permit violations
  - Defendants are liable
- Trial court (CD Cal)
  - NRDC loses
  - No showing that what is coming out of pipes exceeds WQS
In The Ninth Circuit

- NRDC wins
- Evidence shows permit violations
- But . . .
Decision Is Unclear

- Ninth Circuit implies that monitoring stations are in pipe
  - Fairly represent discharges from pipe to river
- But monitoring stations are actually in river
Monitoring Stations?

Los Angeles River

IN RIVER?

IN PIPE?

Cities

County

Industries

FCD Pipes

STPs?
District Argues . . .

- That the Ninth Circuit held that . . .
  - Water flowing from a natural river channel
  - Through an artificial channelized stretch
  - And then back into a natural channel
  - Is a point-source discharge regulated by the Clean Water Act

- District: That’s wrong
Is This A Discharge?

- Natural River
- Artificial Channel
- (Same) Natural River
Analysis

- CWA regulates discharges of pollutants
  - Requires an “addition” of a pollutant
  - From the outside world
- Stream passing through channel (or pipe) doesn’t add anything
Case law: flow through dam not regulated discharge

*Miccosukee*: no addition if same body of water

EPA water-transfer rule: no addition for water transfers

- 11th Circuit defers
Counterargument?

- NRDC brief due 29 October
  - Ninth Circuit got law right?
- Oral argument 4 December
WESTCAS Amicus Brief

The problem

- NRDC is going after municipalities
- Stormwater permits typically prohibit causing or contributing to WQS violations
- WQS apply “at end of pipe”
- Are we sitting ducks?
Two Arguments

- A municipality isn’t responsible for other people’s discharges
- Municipalities should not be required to attain impossible goals
Who Is Discharging?

Los Angeles River

Cities

County

Industries

STPs?

Flood Control District Pipes
Ninth Circuit: The District

- District owned and operated MS4
- District “controlled the polluted stormwater”
- “the Act is indifferent to the originator of water pollution”
But EPA regulations . . .

- Specify that Clean Water Act regulates discharges *through* storm sewers
- Specify that when several municipalities are “co-permittees”
  - Each is responsible only for its own discharge
If Ninth Circuit Is Right

- Industries don’t need NPDES permits
  - For discharges into storm sewers
  - EPA cannot regulate if no discharge of a pollutant
- Cities are responsible for everything coming out of their pipes
EPA Position?

- Discharge takes place at outfall
  - Not when industry puts water in sewer
- But who is discharging through that outfall?
  - Only municipality?
  - Also permitted industries?
Analysis

- Regs are entitled to deference
  - Entities can discharge *through* storm sewer
  - Each discharger responsible for its own discharge

- Storm sewers are not like sanitary sewers
Sanitary v. Storm Sewers

Sanitary sewers
- Pretreating industries DO NOT need NPDES permits
- Sewage-treatment plant is discharger

Storm sewers
- Industries DO need NPDES permit
- Municipality is NOT (only) discharger
Doesn’t Make Sense

- To hold municipalities liable for discharges through storm sewers
- Consider dry-weather discharges
  - From industries
  - From sewage-treatment plants
- But: “pre-treatment” program
Who Is Discharging?

Los Angeles River

Flood Control District Pipes

Cities

County

Industries

STPs?
So . . .

Many discharges through one outfall
- Cannot characterize any discharge from outfall sample alone

But check monitoring reports
Second Argument

- CWA requires municipalities to implement controls to reduce discharge of pollutants to “maximum extent practicable”
- Attainment of all WQS not practicable
  - Or possible
- Municipalities should not be held liable
Why Impossible?

- Bacteria, mud
- Bacteria from:
  - Birds, deer raccoons, rodents
  - Ruminants, humans
  - Birds, dogs
  - Wildlife, livestock
  - Geese, sheep
  - Sheep, horses
Mud

- Natural background levels
  - Big Muddy
  - Mississippi Delta
- Naturally beneficial levels
  - *Herminghaus*
  - Less mud because of dams
- Flow, not mud, the issue
Defenders of Wildlife

Ninth Cir, 1999

Congress did not intend municipal stormwater to comply with WQS

But EPA can impose this requirement because CWA allows for “such other provisions” as EPA “determines appropriate”
Response to *Defenders*

- Not “appropriate” to impose impossible requirements
- Ninth Circuit did not consider appropriateness
Part 4

Consequences
Supreme Court Decision

- Early 2013
- Not likely to decide our issues
  - But may say something
What To Do?

- Watch your DMRs
- Negotiate reasonable permits
  - If WQS can’t be attained in wet weather . . .
  - Exception for impracticability or inappropriateness
- If you get sued . . .