

SUPREME COURT OF KENTUCKY

Louisville Gas & Electric Co. v. Kentucky Waterways Alliance

517 S.W.3d 479 (Ky. 2017) · Decided April 27, 2017

SUMMARY

The Kentucky Supreme Court reviewed a challenge to an NPDES permit issued to Louisville Gas and Electric Company for discharges from its Trimble County coal-fired generating facility. The court held that the EPA's 1982 effluent limitations guideline addressed the relevant toxic pollutants, even though it imposed no technology-based limits for them, and therefore the state permit writer was not required to establish additional limits through best professional judgment. The court also rejected dismissal on jurisdictional grounds and reinstated the permit.

CASE DETAILS

COURT	Supreme Court of Kentucky
WRITING FOR THE COURT	Justice Hughes
JURISDICTION	Kentucky
DECIDED	April 27, 2017
DISPOSITION	reversed
PROCEDURAL POSTURE	The Kentucky Supreme Court granted and consolidated discretionary-review motions by LG&E and the Cabinet after the Franklin Circuit Court vacated LG&E's KPDES permit and the Court of Appeals affirmed. The Supreme Court reviewed both the circuit court's jurisdiction to hear the administrative appeal and the validity of the permit's technology-based effluent limitations.
STANDARD OF REVIEW	The court gave substantial deference to the Cabinet's reasonable construction of the applicable federal regulation. It reviewed the permit-related legal issues de novo and considered whether the permit writer abused her discretion in deferring a case-by-case best-professional-judgment analysis.
PRECEDENTIAL VALUE	Published Kentucky Supreme Court opinion; precedential
PARTIES	Louisville Gas & Electric Company, Commonwealth of Kentucky, Energy and Environment Cabinet v. Kentucky Waterways Alliance, Sierra Club, Valley Watch, Save the Valley

TOPICS

clean water act

environmental law

administrative law

statutory interpretation

appellate jurisdiction

PRACTICE AREAS

environmental law

administrative law

appellate procedure

QUESTIONS PRESENTED

1. Whether the Franklin Circuit Court's jurisdiction was adequately invoked when the administrative appeal was initially filed in Trimble Circuit Court and transferred to Franklin Circuit Court.
2. Whether the EPA's 1982 effluent-limitations guideline applied to LG&E's wastewater discharge even though it did not establish numeric limits for mercury, arsenic, and selenium.
3. Whether 40 C.F.R. § 125.3(c)(3) required the permit writer to establish case-specific technology-based effluent limits using best professional judgment for pollutants not assigned numeric limits by the 1982 guideline.
4. Whether the permit writer abused her discretion by deferring a best-professional-judgment analysis while EPA was expected to issue a revised national guideline.

HOLDINGS

1. The Franklin Circuit Court's assertion of jurisdiction and refusal to dismiss the timely administrative appeal did not constitute an abuse of the judicial function or a failure to comply strictly with legislative requirements. The court did not need to decide whether KRS 224.10-470 is jurisdictional or venue-based.
2. The 1982 guideline applied to LG&E's category of discharge even though it did not establish numeric technology-based effluent limits for mercury, arsenic, and selenium. The guideline expressly addressed those pollutants by determining that meaningful reduction was not then possible with available technology.
3. The permit was properly governed by 40 C.F.R. § 125.3(c)(1), which requires application of the applicable EPA-promulgated guideline, rather than § 125.3(c)(3), which addresses discharges only partly covered by an applicable guideline.
4. The permit writer did not abuse her discretion by deferring a case-specific best-professional-judgment assessment while EPA was apparently poised to issue a revised national guideline.

KEY QUOTATIONS

“If the Administrator finds, as he did in the 1982 Guideline, that no meaningful reduction of a given pollutant is possible with current technology, then the lack of a TBEL for that pollutant does not mean that the unregulated pollutant was unaddressed by or outside the scope of the Guideline.” (489)

“In sum, while the Franklin Circuit Court correctly determined that its jurisdiction to review the Alliance’s challenge to LG&E’s renewed Trimble County KPDES permit had been adequately invoked, both it and the Court of Appeals erred in concluding that the permit was invalid.” (492)

FACTUAL BACKGROUND

LG&E operated a coal-fired electric generating facility in Trimble County, Kentucky, using flue-gas desulfurization that produced wastewater containing pollutants. In 2007, LG&E sought a revised permit for an additional generating unit, proposing to continue using a gypsum settling basin before discharging treated wastewater into the Ohio River. Environmental groups objected that the permit lacked technology-based limits for dissolved mercury, arsenic, and selenium, while EPA was studying and preparing to revise the applicable 1982 effluent-limitations guideline.

PROCEDURAL HISTORY

The Cabinet's Division of Water issued LG&E a renewed permit for discharges from its expanded coal-fired generating facility. The Kentucky Waterways Alliance sought administrative review, and the appeal was transferred from Trimble Circuit Court to Franklin Circuit Court, which concluded that the permit violated the Clean Water Act because it lacked technology-based limits for mercury, arsenic, and selenium. The Court of Appeals affirmed in a divided decision. The Kentucky Supreme Court reversed and reinstated the permit.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The Court of Appeals' decision was reversed and LG&E's permit was reinstated. No further remand instructions were issued.

CASES CITED

- Dollar Gen. Stores, Ltd. v. Smith, 237 S.W.3d 162, 166 (Ky. 2007)
- Nat. Res. Def. Council v. U.S. Env'tl. Prot. Agency, 808 F.3d 556, 563-64 (2d Cir. 2015)
- PUD No. 1 of Jefferson Cty. v. Wash. Dep't of Ecology, 511 U.S. 700, 704 (1994)
- NRDC v. EPA, 822 F.2d 104, 124 (D.C. Cir. 1987)
- Texas Oil and Gas Ass'n v. EPA, 161 F.3d 923, 927-29 (5th Cir. 1998)
- Natural Resources Defense Council v. Pollution Control Bd., 394 Ill. Dec. 928, 37 N.E.3d 407 (Ill. App. Ct. 2015)
- Morgan v. Nat'l Res. & Environ. Prot. Cabinet, 6 S.W.3d 833, 842 (Ky. Ct. App. 1999)
- Hagan v. Farris, 807 S.W.2d 488, 490 (Ky. 1991)
- Pub. Serv. Comm'n of Ky. v. Commonwealth, 320 S.W.3d 660, 668 (Ky. 2010)
- Defenders of Wildlife v. Jackson, 284 F.R.D. 1, 3 (D.D.C. 2012)
- Nat. Res. Def. Council, Inc. v. EPA, 859 F.2d 156, 183 (D.C. Cir. 1988)
- Nat. Res. Def. Council v. EPA, 863 F.2d 1420, 1424-25, 1428 (9th Cir. 1988)

