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Legal Envtl. Assistance Found., Inc. v. Dep't of Envtl. Mgmt., No. 1000563, 2002 Ala. LEXIS 76 (Ala. March 1, 2002)

Rachel M. Sobrero

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STATE COURTS

ALABAMA

Legal Envtl. Assistance Found., Inc. v. Dep't of Envtl. Mgmt., No. 1000563, 2002 Ala. LEXIS 76 (Ala. March 1, 2002) (holding that the Alabama Department of Environmental Management's procedures implemented in response to mandates of the Federal Antidegradation Policy were within the definition of a rule under the Alabama Administrative Procedures Act and the Alabama Environmental Management Act).

The Alabama Department of Environmental Management ("ADEM"), attempting to comply with Federal Antidegradation Policy ("FAP") requirements, revised its statewide antidegradation policy but failed to include methods or procedures for implementing the policy. As a result, the Legal Environmental Assistance Foundation ("LEAF") sued ADEM in Montgomery Circuit Court alleging that ADEM, in its revision, adopted rules that failed to comply with the requirements as defined by the Alabama Administrative Procedures Act ("AAPA") and the Alabama Environmental Management Act ("AEMA") for promulgating new rules. ADEM, relying on *Alabama Department of Transportation v. Blue Ridge Sand & Gravel, Inc.*, which held standard specifications adopted by the Alabama Department of Transportation were not rules, moved for summary judgment and prevailed. LEAF appealed, and the Court of Civil Appeals affirmed without opinion. The Alabama Supreme Court granted certiorari.

The FAP requires states to develop and adopt a statewide antidegradation policy, and to identify methods for implementing the policy. Minimum requirements mandated by FAP include consistency with the following: (1) protecting existing uses of instream water and protecting the level of water quality necessary to protect existing uses; (2) maintaining and protecting the quality of waters exceeding levels necessary to support propagation of fish, shellfish and wildlife, but if a lower level is found necessary by a state, the state must assure water quality adequate to fully protect existing uses; (3) assuring water quality and uses are not lowered below existing statutory and regulatory requirements; and (4) maintaining and protecting high quality waters where those waters constitute an outstanding national resource.

The Alabama Supreme Court distinguished this case from *Blue Ridge Sand & Gravel, Inc.* on two grounds. First, the implementation procedures promulgated by the ADEM constituted a regulation or statement of general applicability that implemented or prescribed law or policy, or that described the procedure or practice of an agency,

bringing the regulations within the definition of a rule. ADEM's procedures constituted a rule because they implemented the state's antidegradation policy, proscribed Alabama's pollution policy, and described the application procedure and requirements for discharge permits. Second, ADEM's procedures did not fit within an exception to the definition of a rule because they were not specifically required by statute, by existing rule, or by federal policy.

While the FAP imposes minimum requirements, or maximum pollution levels, it does not specifically mandate what pollution levels Alabama allows. It merely states that if Alabama allows pollution, the allowable levels must not exceed those stated in the federal requirements; Alabama must decide and promulgate allowable levels and must establish criteria for discharge permits.

The Environmental Protection Agency ("EPA") likewise did not require Alabama adopt specific procedures, forms, or economic analyses. The EPA only required ADEM to adopt implementation procedures within federal parameters.

Since the court found ADEM's procedures to be rules within the meaning of the AAPA and the AEMA, ADEM violated the rulemaking provisions of the AAPA and the AEMA. Thus, the court reversed summary judgment in favor of ADEM and remanded for further proceedings.

Rachel M. Sobrero

CALIFORNIA

Arreola v. County of Monterey, 122 Cal. Rptr. 2d 38 (Cal. Ct. App. 2002) (allowing recovery when flood control project failed due to counties' deliberate act of non-maintenance and state's deliberate obstruction of floodplain).

James Arreola and approximately 300 property owners (Arreola") sued in inverse condemnation and tort when the Pajaro River broke through its levee during a storm, causing massive property damage. Arreola brought his claim against the County of Santa Cruz, Santa Cruz County Flood Control and Water Conservation District, the County of Monterey, the Monterey County Water Resources Agency ("counties") and the State of California.

Both the counties and the state appealed from a trial court ruling in favor of Arreola. The counties appealed on whether: (1) the trial court properly analyzed the reasonableness of the counties' actions; (2) inadequate maintenance of a public project can support an inverse condemnation claim; (3) the trial court erred in defining "design capacity" of a flood control project; (4) there was sufficient evidence to support the findings of liability; and (5) the trial court erred in relying