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City of Waco v. Tex. Natural Res. Conservation Comm'n, 83 S.W.3d 169 (Tex. App. 2002)

## TEXAS

**City of Waco v. Tex. Natural Res. Conservation Comm'n, 83 S.W.3d 169 (Tex. App. 2002)** (holding that a case is ripe when a controversy exists over the effect of a state statute prohibiting the issuance of permits to dischargers that cause or contribute to the violation of water quality standards and there is actual hardship occasioned by a denial of judicial review).

The City of Waco ("Waco") filed a complaint against the Texas Natural Resource Conservation Commission ("TNRCC") in the District Court of Travis County. Waco asserted that the TNRCC worsened the impairment of the North Bosque River by granting new applications for additional discharges of waste into the already polluted river without developing the Total Maximum Daily Load ("TMDL") plan. Waco argued that the TNRCC's discretionary "interim policy" of granting permits was at odds with state law requiring that a sufficient allocation be available for the water to receive the additional loading and still meet state water quality standards. Before Waco filed a complaint, the TNRCC submitted the TMDL plan based on outdated and flawed information.

Waco wanted a declaration that the TNRCC would not issue any more permits for new confined animal feeding operation permits ("CAFO") until the it promulgated legally binding regulations to implement TMDLs. The TNRCC argued that Waco's suit was not ripe.

The district court agreed with the TNRCC in determining the case was not ripe and dismissed the suit. Waco appealed to the Court of Appeals of Texas. The court of appeals held that the Uniform Declaratory Judgment Act ("UDJA") provided that Waco's claim was fit for judicial review. In addition, Waco would suffer hardship if judicial review was not granted. The court concluded the case was ripe and remanded to the trial court.

During the 1980s, the dairy industry greatly expanded in the North Bosque River watershed in Waco, Texas. As a result of this growth, the waste produced by the dairy operations greatly impaired the water quality of the river. The primary source of the pollution was phosphorous, a nutrient in animal waste.

The Clean Water Act required TNRCC to identify which of the state's navigable waters were impaired by pollutants, and to develop a TMDL plan for assimilation of pollutants present in the water. More than three years after the TNRCC identified the North Bosque as impaired, it still had not developed the TMDL plan. TNRCC required new dairy operations to obtain CAFOs.

In its analysis, the court of appeals stated one must look at whether the facts demonstrate the presence of "ripening seeds of a controversy." Here, Waco contended that section 122.4(i) of the Code

of Federal Regulations, which is incorporated into state law, prohibits the TNRCC from issuing new CAFO permits until it develops compliance schedules and pollutant load allocations. The statute states that no permit may be issued to a new source or a new discharger if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.

On the other hand, the TNRCC argued that the statute merely limits ability to issue permits that would violate water standards, and this depends on the permit. Thus, the claim was not ripe until the TNRCC actually approved a permit.

The court reasoned that the controversy as to whether the statute operated to prohibit TNRCC from approving new discharge permits until it adopted pollution reduction measures presented a legal inquiry.

The court concluded that there were two requirements in order to determine if a case is ripe. First, the issues must be fit for judicial review. Second, there must be hardship occasioned to the party by the court's denial of judicial review.

The court found that Waco met the fitness requirement. Waco filed under the UDJA, which stated that parties are not confined to review of agency rules, but a claimant can obtain a declaration of its rights under a statute. Under the UDJA, Waco had to demonstrate that a justiciable controversy existed and the controversy would be resolved by declaration. In this situation, there was a controversy between Waco and the TNRCC regarding the effect of section 122.4(i) of the statute, and a declaration by the court would resolve this controversy.

The court further concluded that Waco fulfilled the hardship requirement, the second prong of the ripeness standard. Waco met the hardship standard because the waters would become much more polluted if Waco was forced to wait until TNRCC granted another permit in order to challenge it.

The court reversed the dismissal and remanded the case for a determination on the issues.

*Natalie Lucas*