App. No. ___

In the Supreme Court of the United States

StarLink Logistics, Inc.,
Petitioner,

v.

ACC, LLC; Tennessee Solid Waste Disposal Control Board,
Respondents.

PETITIONER'S APPLICATION TO EXTEND TIME TO FILE PETITION FOR A WRIT OF CERTIORARI FROM SEPTEMBER 5, 2018 TO NOVEMBER 2, 2018

To the Honorable Justice Kagan, as Circuit Justice for the United States Court of Appeals for the Sixth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, petitioner StarLink Logistics, Inc.[*] respectfully requests that the time to file a petition for a writ of certiorari in this case be extended for fifty-eight days to and including November 2, 2018. The Tennessee Court of Appeals issued its opinion on January 31, 2018. *See* App. A, *infra*. The Tennessee Supreme Court denied petitioner's request for permission to appeal on June 7, 2018. *See* App. B, *infra*. Absent an extension of time, the petition therefore would be due on September 5, 2018.

[*] StarLink Logistics Inc. is an indirectly wholly owned subsidiary of Sanofi. No publicly held corporation owns more than 10% of Sanofi stock.

Petitioner is filing this application at least ten days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review this case.

Background

This case involves a conflict between state and federal law governing point-source emissions of pollutants into the navigable waters of the United States. The state court below erroneously held that state law prevails in such a conflict.

1. The federal Clean Water Act (CWA or Act), 33 U.S.C. § 1251 *et seq.*, is intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 1311 of the CWA prohibits "the discharge of any pollutant"—defined as the addition of any pollutant to navigable waters by a point source—except "as in compliance with" specified provisions of the Act. 33 U.S.C. §§ 1311(a), 1362(12). The term "pollutant" is defined to include various types of waste (including chemical wastes, solid waste, and incinerator residue) "discharged into water," and the term "discharge of a pollutant" is defined to include "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §§ 1362(6), (12).

For most point-source discharges, regulated entities achieve compliance with the CWA by obeying the terms of a permit issued under the National Pollutant Discharge Elimination System (NPDES), pursuant to 33 U.S.C. § 1342. The CWA provides that the Administrator of the Environmental Protection Agency (EPA) "may, after opportunity for a public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding" the general prohibition on discharges in Section 1311(a), "upon condition that such discharge will meet" statutory criteria or criteria established by the Administrator. 33 U.S.C. § 1342(a)(1).

The CWA authorizes the EPA Administrator to delegate to a willing State the authority "to administer its own permit program for discharges into navigable waters within its jurisdiction." 33 U.S.C. § 1342(b). Any permit issued by a State under that delegated authority must "apply, and insure compliance with, any applicable requirements" of specified provisions of the CWA, including Section 1311. *Id.* § 1342(b)(1)(A).

2. Petitioner owns a nearly 1,500-acre parcel of real property in Maury County, Tennessee. App. A at 2. Petitioner's property includes Arrow Lake and parts of Sugar Creek. *Ibid.* Respondent ACC, LLC owns nearby property on which it operated a landfill for more than a decade, pursuant to a landfill permit issued by the Tennessee Department of Environment and Conservation (TDEC). *Ibid.* During the 13 years in which ACC operated the landfill, ACC disposed of waste from a nearby aluminum smelting plant—waste that included "salt cake slag" with high concentrations of sodium chloride and potassium chloride salts and other pollutants. *Ibid.* Within a few years of opening the landfill, ACC learned that it was leaching high levels of chloride and ammonia from the slag into the groundwater and surface water that drains into Sugar Creek and Arrow Lake (on petitioner's property). *Ibid.* As a result of that leachate, Sugar Creek and Arrow Lake became extremely polluted, *ibid.*, leading to destruction of surrounding trees and surface vegetation and polluting the water to such a degree that no aquatic life survives in the upper portion of the lake, *Starlink Logistics, Inc. v. ACC, LLC*, 2012 WL 2395199 (M.D. Tenn. June 25, 2012). Even after ACC closed the landfill, it has continued to pollute surrounding waters, including Arrow Lake and Sugar Creek. App. A at 2-3; *StarLink Logistics Inc. v. ACC, LCC*, 494 S.W.3d 659, 660-661 (Tenn. 2016). ACC has never applied for or obtained a NPDES permit for its leachate discharges to navigable waters.

As a result of the pollution from ACC's landfill, ACC was found to have violated the Tennessee Water Quality Control Act (WQCA), Tenn. Code Ann. §§ 69-3-108(a) and (b) (2012), 69-3-114(a) and (b) (2012) and the Tennessee Solid Waste Disposal Act (SWDA), Tenn. Code Ann. § 68-211-104(1), (3), and (4). App. A at 2 & n.1. Between 2003 and 2011, ACC and TDEC engaged in various efforts to mitigate the contamination, but the now-closed landfill has continued to contaminate the ground water, as well as surface water in Arrow Lake and Sugar Creek. *Id.* at 3-4.

3. In 2011, ACC and TDEC entered into an Initial Consent Order that they then filed in the Davidson County Chancery Court, seeking to make it a judicial order. App. A at 4. The Initial Consent Order acknowledged that ACC was in violation of the WQCA and the SWDA and set out certain requirements for ACC, in an attempt to address the ongoing pollution from its landfill. *Ibid.* Petitioner then intervened and objected to the Initial Consent Order. *Ibid.*

When the parties were unable to resolve their differences, the chancery court remanded the Initial Consent Order to the Tennessee Solid Waste Disposal Control Board (Board). App. A at 4. ACC and TDEC requested entry of an amended and restated consent order (Amended Order) that would require ACC to take certain actions to prevent unauthorized discharge of leachate contamination into water that flows from the landfill into Arrow Lake and Sugar Creek. *Id.* at 4-6. Petitioner objected on several grounds, including that the Amended Order expressly authorized ACC to continue discharging untreated leachate to navigable waters without requiring ACC to obtain and comply with a NPDES permit for those discharges under the WQCA and CWA. *Id.* at 6. The Board entered an order approving the Amended Order. *Ibid.*

Petitioner appealed the Board's decision to the chancery court, which affirmed the Board's decision approving the Amended Order. App. A at 6. Petitioner appealed that decision to the

Tennessee Court of Appeals, which reversed on the ground that the Board failed to consider another feasible and potentially economically viable plan. *Ibid.* The Tennessee Supreme Court reversed and remanded, holding that the court of appeals applied the wrong standard of review for judicial review of agency decisions. *Ibid.*

4. On remand, the court of appeals affirmed the chancery court's decision upholding the Board's approval of the Amended Order. App. A.

The court of appeals first rejected petitioner's argument that the Amended Order violates statutory provisions because it permits ACC to discharge pollutants into navigable waters from a point source without obtaining a NPDES permit. App. A at 8-11. The court acknowledged that, "[u]nder the CWA, those with allegations of pollution must either stop the actions that are causing the pollution or obtain a [NPDES] permit to limit and monitor the amount of pollutant released into the waterway in question." *Id.* at 8-9. But the court rejected petitioner's argument that, by approving a third option—*i.e.*, "permitting ACC to continue the harmful behavior of allowing the leachate to seep into Sugar Creek and Arrow Lake without the oversight of a NPDES permit"—the Amended Order violates the CWA and Tennessee's WQCA, which is supposed to implement the CWA. *Id.* at 9. The court reasoned that, although federal decisions interpreting the CWA to permit *only* cessation of pollution *or* acquisition of a NPDES permit that allows the discharges subject to terms and conditions "are persuasive authority for purposes of construing the Tennessee rule, they are non-binding even when the state and federal rules are identical." *Ibid.* (quoting *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 430 (Tenn. 2011)). The court concluded that petitioner's "reliance on the federal law and interpretations of the federal CWA in this case was misguided" because the text of the state statute was sufficiently clear. *Ibid.*

The court of appeals thus concluded that, because it was not required "to follow the federal law" and was required to give "deference" to "TDEC and the Board," the Board did not err in interpreting the text of Tennessee's WQCA to conflict with the federal CWA. App. A at 10.

The court of appeals went on to reject petitioner's argument that Tennessee's Hazardous Waste Management Act (HWMA) does not authorize either TDEC or the Board's Commissioner to continue discharging pollutants without a NPDES permit. App. A at 11-12. The court held that "the Board had the latitude to exempt ACC from the typical requirement of the NPDES permit," and again rejected petitioner's argument that the Board is obligated to comply with the requirements of the CWA. *Id.* at 11. The court explained that petitioner's "reliance on" "federal law" "is misguided" because "[n]either the Board nor [the court of appeals is] obligated to follow such precedent when the similar state law can be interpreted using plain language and legislative intent." *Id.* at 12.

5. On June 7, 2018, the Tennessee Supreme Court denied petitioner's application for permission to appeal. App. B.

Reasons For Granting An Extension Of Time

The time to file a petition for a writ of certiorari should be extended for fifty-eight days to and including November 2, 2018, for several reasons:

1. The forthcoming petition will present an important question of federal law that should be resolved by this Court. Because the Supremacy Clause of the U.S. Constitution, U.S. Const. art. VI, cl. 2, provides that federal law "shall be the supreme Law of the Land," any state law that conflicts with or frustrates the enforcement of a federal law is preempted. Preemption principles have particular valiance in the area of water pollution—because the federal CWA sets minimum standards for pollution and discharge controls that may then be implemented through approved

state statutes and programs. Although preemption principles mean that a State such as Tennessee that is charged with enforcing federal limits on discharge of pollutants into navigable waters may not establish limits that are more lenient that those in the CWA, the Tennessee Court of Appeals held the opposite. The court held that the state agency charged with enforcing limits on point-source discharges into navigable waters did not need "to follow the federal law." App. A at 10; *see id.* at 12. The court further held that it could interpret the state law that is designed to implement federal discharge limits according to the state law's "plain language and legislative intent," even when that interpretation conflicts with the federal law. *Id.* at 12; *see id.* at 9. Those holdings conflict with governing federal law and with the law of other States. *See City of Burbank v. State Water Res. Control Bd.*, 108 P.3d 862, 870 (Cal. 2005) ("To comport with the principles of federal supremacy, California law cannot authorize this state's regional boards to allow the discharge of pollutants into the navigable waters of the United States in concentrations that would exceed the mandates of federal law."); *see also*, *e.g.*, *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737, 744 (9th Cir. 2018) (holding that an entity that discharges pollutants from a point source must either obtain a NPDES permit or stop polluting); *Concerned Area Residents for the Env't v. Southview Farm*, 34 F.3d 114, 117 (2d Cir. 1994) (same).

2. Petitioner has only recently retained Sarah Harrington as Supreme Court counsel for the filing of a petition for a writ of certiorari. Ms. Harrington was not involved in any earlier stage of the case. Additional time is necessary and warranted for counsel, among other things, to review the record in the case, research case law in other circuits, and prepare a clear and concise petition for certiorari for the Court's review.

3. No prejudice would arise from the extension. Whether the extension is granted or not, the petition will be considered during this Term.

4. The press of other matters before this Court makes the submission of the petition difficult absent an extension. Petitioner's counsel is counsel or co-counsel in several other cases in which filings are due in this Court or in the courts of appeals in the next several months.

Conclusion

For the foregoing reasons, the time to file a petition for a writ of certiorari in this matter should be extended for fifty-eight days to and including November 2, 2018.

Respectfully submitted,

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