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Askins v. Ohio Dep't of Agric., 809 F.3d 868 (6th Cir. 2016)

COURT REPORTS

FEDERAL COURTS

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Askins v. Ohio Dep't of Agric., 809 F.3d 868 (6th Cir. 2016) (holding that (i) the Clean Water Act's citizen suit provision does not apply to notification requirements; (ii) the Clean Water Act's notification requirement is not a condition of a National Pollutant Discharge Elimination System permit; (iii) the Clean Water Act does not permit a cause of action against non-polluting regulators for violations of procedural regulations; and iv) the U.S. Environmental Protection Agency's decision not to hold a hearing was not a failure to perform a non-discretionary duty, and as such was not actionable under the Clean Water Act).

This was an appeal from The United States District Court for the Northern District of Ohio, which dismissed all of appellants', Larry and Vickie Askins ("Askinses"), claims. The Ohio Environmental Protection Agency ("Ohio EPA") administers the National Pollutant Discharge Elimination System ("NPDES") under the U.S. Environmental Protection Agency's ("U.S. EPA") approval. In 2001, the Ohio legislature authorized the Ohio Department of Agriculture ("ODA") to apply to the U.S. EPA to transfer authority from Ohio EPA to ODA, so that ODA could administer part of the state-NPDES program. The Clean Water Act ("CWA") permits such a transfer, but requires the U.S. EPA's permission prior to transfer. The Askinses alleged that the transfer took place in 2001, while the Ohio EPA didn't seek permission until some five years later. As such, the Askinses sued under the CWA's citizen suit provision, alleging various violations of the CWA.

The lower court held that the Askinses failed to state a claim under the CWA, the U.S. EPA did not fail to perform a non-discretionary duty under the CWA, and the U.S. EPA, the Ohio EPA, and the ODA did not violate the CWA. The Askinses appealed to the Sixth Circuit Court of Appeals ("Court"), arguing that the CWA's citizen suit provision permitted their cause of action.

First, the Court considered whether the Askinses could maintain a citizen suit action for a violation of the CWA's notice requirement under Section 1314. The Court reasoned that the notice requirement at issue is not an enumerated provision requiring compliance, and as such, the citizen suit provision does not encompass alleged violations of the requirement.

Next, the Court considered whether the notification requirement was a "condition." The Court concluded that the notification requirement serves as a timing mechanism, which triggers a state's ability to apply to administer the

NPDES program, as opposed to a substantive requirement. Further, the notification requirement referred to EPA approval of a state's permit program, not a state's approval of individual permits. Finally, the Court concluded that the Askinses' reading of the notification requirement as a condition was contradictory to NPDES requirements, specifically that state and federal permit conditions be the same. As such, the Court held that the CWA's notification requirement is not a permit "condition."

Third, the Court determined whether there existed a private cause of action against regulators for violations of procedural regulations. The Court concluded that if Congress intended the citizen suit provision to permit the Askinses' claim, it would have included language in the explicitly enumerated circumstances permitting suit. Further, if the citizen suit provision were so expansive as to permit this claim, the provision's remedies would give it more teeth than the U.S. EPA itself has, by way of the provision's shorter notice period and availability of civil penalties and costs. This is not the case because Congress intended the citizen suit provision to supplement the regulators' authority. Additionally, cases that considered other, identical citizen suit provisions reached the same conclusion as this Court. Therefore, the Court held, the CWA citizen suit provision did not permit a private right of action against a non-polluting regulator for procedural violations.

Finally, the Court considered whether the U.S. EPA failed to perform a non-discretionary duty. The Court held that the CWA does not require the U.S. EPA to hold a hearing. Should the U.S. EPA choose to hold a hearing, the CWA requires it to withdraw approval of a state-NPDES program after hearing, proper notice, and time to address the issue. That is to say, the CWA does not require a hearing in the first place; therefore it is not a non-discretionary duty. The U.S. EPA did not hold a hearing in the present case, so no non-discretionary duties arose. Thus, the CWA did not permit the Askinses' citizen suit.

Accordingly, the Court affirmed the lower court's dismissal for lack of subject-matter jurisdiction.

Tim Berrier

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Alaska Eskimo Whaling Comm'n v. U.S. Env't Prot. Agency, 791 F.3d 1088 (9th Cir. 2015) (holding the Clean Water Act neither requires the EPA to satisfy each of the criteria in the statute when issuing an oil exploration waste discharge permit, nor determine reasonable alternatives to on-site disposal of wastes, and that the Clean Water Act does not require the EPA to incorporate the Alaska Eskimo Whaling Commission and oil companies' agreed migrating measures into discharge permits).

The Alaska Eskimo Whaling Commission ("AEWC") represents several native Alaskan villages engaged in subsistence hunting of bowhead whales in the Beaufort Sea. The AEWC challenged a wastewater discharge permit ("Permit") that the Environmental Protection Agency ("EPA") issued to oil exploration companies. The Permit authorized discharge of thirteen waste streams into