

9-1-2004

Ailor v. City of Maynardville, 368 F.3d 587 (6th Cir. 2004)

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completion of maintenance of transportation structures without first obtaining a permit. Precedent demonstrated the narrow construction of this exemption with the apparent purpose of allowing routine government maintenance of transportation, public water-supply, and similar facilities without the cost, use of time, and consequent danger to people and facilities that may occur if a permit was required. The court concluded the Town's actions fell within the maintenance exemption, construing an embankment that supported a road for transit by motor vehicles as a "transportation structure." The court further noted that "maintenance," under this exemption, did not include any modification that changed the character, scope, or size of the original fill design. However, the court did not rule on this issue since June did not raise it or discuss the federal regulation supporting it either in the district court or on appeal. The court, thus, affirmed the district court's grant of summary judgment on June's CWA claims because June only challenged whether the Town qualified for the maintenance exemption, and the court found that it did.

Finally, in regards to the RCRA claim that the Town engaged in the dumping of solid waste, the court also granted summary judgment in favor of the Town. The court relied on *S. Rd. Assocs. v. Chesapeake Bay Found., Inc.* to conclude the RCRA prohibited the act of introducing substances that caused "exceedances," but did not prohibit the actual pollution of the toxic substance in the environment. The court also determined a "historical act" did not support a claim under the RCRA. The court held June's allegations were "historical acts," as he failed to show the Town was continuing to introduce substances that made the exceedances worse at the time June filed his lawsuit.

Accordingly, the court affirmed the district court's grant of summary judgment for the Town on all issues.

Michael O'Loughlin

SIXTH CIRCUIT

Ailor v. City of Maynardville, 368 F.3d 587 (6th Cir. 2004) (holding that a citizen suit under the Resource Conservation and Recovery Act, and the Clean Water Act is moot if previous enforcement actions remedied the alleged injuries).

The City of Maynardville ("City") owned and operated a sewage treatment plant on Bull Run Creek in Tennessee. Betty Lynch ("Lynch") and Harry Ailor ("Ailor") both owned land along the creek downstream from the plant. Between January 1991 and December 1992, the plant repeatedly violated its National Pollution Discharge Elimination System ("NPDES") permit due to overflows and discharges of raw sewage and other pollutants into Bull Run Creek, inducing the Tennessee Department of Environment and Conservation ("TDEC") to issue an Order and Assessment in November 1993 against the City.

The Tennessee Water Quality Control Board entered an Agreed Order (“Order”) in July 1995 that included civil penalties and required the City to develop and implement a corrective action plan to bring the plant into compliance with its NPDES permit. The City met its requirements and opened the expanded and improved treatment plant in November 2000 with a final inspection in February 2001. Since the inspection, the plant had no major violations of its NPDES permit and only four minor violations.

Lynch and Ailor filed a citizen suit in state court in January 1998 and gave notice to the City of a pending suit in February 2001. They filed a citizen suit again in the United States District Court for the Eastern District of Tennessee in May 2001 under the Clean Water Act (“CWA”) and the Resource Conservation and Recovery Act (“RCRA”) alleging that the plant’s overflows and discharges caused serious bodily injury and loss of value to their property. Lynch and Ailor sought remedial relief, compensatory damages, punitive damages, and litigation costs. The district court granted summary judgment to the City, stating that although the TDEC enforcement action did not preclude the citizen suit under the CWA, the previous enforcement action already granted all forms of relief available to Lynch and Ailor under RCRA and the CWA. Lynch and Ailor filed a motion to alter or amend judgment based on the City’s admission that it violated its NPDES permit several times after November 2000. The district court summarily denied the motion for failure to show good cause. Lynch and Ailor filed this appeal in the United States Court of Appeals for the Sixth Circuit claiming that the City did not meet the burden required to establish mootness and that their RCRA claim was improperly dismissed.

The court reviewed the district court’s grant of summary judgment *de novo* to determine whether Lynch and Ailor had standing. The court stated that standing requires a plaintiff to demonstrate: 1) he or she suffered an “injury in fact” that is concrete, particularized, and actual or imminent; 2) the injury is fairly traceable to the defendant’s challenged action; and 3) the injury can be redressed by a favorable decision. The court determined that Ailor did not possess standing, since he no longer owned the property in question and, therefore, had no redressable injury in fact because the CWA does not allow citizen suits for past violations. However, the court found that Lynch possessed standing, because of classifying the four minor discharges by the City’s plant as continuing violations.

Lynch and Ailor then argued that the district court erred in granting the City’s motion for summary judgment on the grounds that their CWA claims were moot. A citizen suit, under the CWA, requires a showing of continuous violation with a reasonable likelihood that there will be more violations in the future. A citizen suit is also only proper when the federal, state, and local agencies failed to enforce the laws. Since the TDEC initiated enforcement proceedings and the City fixed

the plant according to the Order issued, the court found that there must be a good-faith allegation of continuous or intermittent violation for the suit to be proper. The burden is on the City to show that the alleged violations were not likely to recur. The court found that the City satisfied their burden, because the minor violations occurred before the replacement of the outdated plant.

Lynch and Ailor also argued that the district court erred in dismissing their RCRA claim. The court upheld the district court's ruling that the case was moot. The court reasoned that the City's actions after the filing of the lawsuit remedied the injuries alleged in the complaint with no showing of a reasonable likelihood of recurrence. Additionally, the court upheld the district court's dismissal of Lynch and Ailor's RCRA claim based on the fact that the relief available under RCRA is no different than the relief available under the CWA.

Conversely, the dissent argued the City did not satisfy its burden to show that alleged violations would not recur. Since the plant's last violation was only six months before the district court granted summary judgment, the dissent asserted that this was not enough time to show a reasonable likelihood that the discharges and overflows would not recur, especially with the possibility of higher flows in winter and spring. The dissent also stated the state's determination that the City substantially complied with its obligations should not shield the City from citizen suits seeking to enforce the CWA.

For the reasons above, the court affirmed the district court's holding that Lynch and Ailor's suit was moot and that relief is not available under RCRA or the CWA when the previous actions already remedied the alleged injuries.

Kathleen Booth

NINTH CIRCUIT

Save Our Sonoran v. Flowers, 381 F.3d 905 (9th Cir. 2004) (holding: (1) a district court's grant of a preliminary injunction suspending construction activities is reviewed only for an abuse of discretion where the reasons for granting the injunction are firmly based in the factual record of the case; and (2) that an organization challenging an action based on National Environmental Policy Act noncompliance has standing as long as the organization's injury in fact results from the alleged noncompliance).

56th & Lone Mountain, L.L.C. ("Lone Mountain") appealed to the Ninth Circuit Court of Appeals the decision of the United States District Court for the District of Arizona granting a preliminary injunction against any construction activity on a planned housing development located on 608 acres of undisturbed land in the Sonoran Desert. The district court granted the injunction pending the outcome of a suit brought by a nonprofit organization, Save Our Sonoran ("SOS"),