Water Law Review

Volume 3 | Issue 2 Article 18

1-1-2000

Kelly v. United States Envtl. Protection Agency, No. 99-2496, 2000 U.S. App. LEXIS 1786 (7th Cir. Feb. 10, 2000)

Adam B. Kehrli

magnitude of the task of issuing permits suggested that Congress intended to allow subordinate Corps officials to issue permits and specify permit conditions. The court noted that the Corps processed approximately 11,000 permits per year, a task too daunting for one person. Finally, the court stated that "when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."

Finally, the court addressed whether the conditions imposed on the permit were related to the discharge. The court noted that the CWA itself did not specify how closely the conditions must relate to the discharge. They held that permit conditions were valid if reasonably related to the discharge, whether directly or indirectly. From the record, the court could not determine with certainty whether the conditions adopted from the EIS are reasonably related to the discharge.

The court held that the Secretary could subdelegate authority to issue permits to agency officials. Thus, the court reversed and remanded the case to determine whether the conditions of the permit were reasonably related to the discharge.

Kimberley Crawford

SEVENTH CIRCUIT

Kelly v. United States Envtl. Protection Agency, No. 99-2496, 2000 U.S. App. LEXIS 1786 (7th Cir. Feb. 10, 2000) (holding that negligence or knowledge was not required for civil or administrative penalties for violations of the Clean Water Act).

Thomas Kelly bought property adjacent to Lake Koshkonong in Jefferson County, Wisconsin with the intention of turning it into a subdivision. A 3.5-acre swale, or low-lying marsh, existed on this property. As part of the development, Kelly began filling in the swale. In August 1990, with thirty percent of the swale filled, the Army Corps of Engineers ("Corps") informed Kelly that he needed a federal permit to discharge fill material into the swale, and later the Corps mailed him an application for a permit. Kelly continued to fill the swale because an attorney advised him that he did not need a permit.

When the Corps returned in September 1990, almost ninety percent of the swale contained fill material. The United States Environmental Protection Agency ("EPA") found that Kelly violated the Clean Water Act ("CWA") by filling a wetland without a permit, and ordered him to remove the fill and restore the swale to its prior condition. Kelly hired a friend, Jonathan Prisk, to do some of the work. In January 1994, Kelly again hired Prisk to dig pits in the swale, bury debris left by the previous summer's flooding, and level the ground. Prisk inquired about the

necessity of a permit and suggested doing the work upland away from the swale, to which Kelly replied, in effect, "Don't worry, be happy." The Corps again visited the property and observed the work Prisk was doing. After an administrative hearing, the EPA assessed administrative penalties against Prisk and Kelly in the amount of $3,000 and $4,000, respectively. The district court upheld the penalties. Both men appealed to this court, which affirmed the district court's decision.

Kelly and Prisk argued on appeal that they did not violate the CWA because they did not do so knowingly. The court disagreed for three reasons. First, their brief never developed this argument, thus the court deemed it waived. Second, the court held civil liability under the CWA, unlike criminal liability under the CWA, was strict. Last, even if the statute required knowledge, the incident in 1990 put Kelly and Prisk on notice that filling a wetland violated the CWA.

Kelly and Prisk also suggested that their actions caused no environmental harm, even though there was some contradictory evidence. The court stated that the CWA did not forbid the filling of wetlands, rather, it forbade the filling of wetlands without a permit. The court found that had Kelly applied for a permit, he might have received one (less than one percent of such applications were denied in 1994). Nevertheless, Kelly did not do so.

Contrary to their arguments, the court found that Kelly and Prisk's fines were not too high or retaliatory in proportion to the amount of damage caused. The intent of civil penalties under the CWA were to punish and deter. While the EPA could have sought civil penalties up to $25,000 per day, it chose instead to assess administrative penalties with a maximum of $10,000 each. In response to Kelly and Prisk's final argument that the $7,000 in total fines violated the "excessive fines" clause of the Eighth Amendment, the court said that when Congress had determined the appropriate punishment, a fine well within the statutory limits could not be grossly disproportionate to the gravity of the offense.

While Kelly and Prisk could have made other, more persuasive arguments, the court said, theirs was essentially nothing more than a diatribe against federal power under the CWA.

Adam B. Kehrli

Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs, 191 F.3d 845 (7th Cir. 1999), *petition for cert. filed*, Jan. 14, 2000 (holding that because certain intrastate waters provided habitat to migratory birds, and the potential aggregate result of the destruction of this habitat and subsequent decrease in population of migratory birds substantially affected interstate commerce, the United States Army Corps of Engineers justifiably exercised jurisdiction over the waters at issue based on the migratory bird rule).

The Solid Waste Agency of Northern Cook County ("SWANCC"), a