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Alaska Eskimo Whaling Comm'n v. U.S. Env't Prot. Agency, 791 F.3d 1088 (9th Cir. 2015)

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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

the Beaufort Sea. The Permit mandated limitations and monitoring requirements, which barred discharge during the fall bowhead whale-hunting season. Despite these measures, the AEWEC claimed that the EPA failed to adequately consider how the authorized discharges would impose on subsistence communities' fall whale hunt. The AEWEC contended that the discharges would divert the whales further from their migratory routes, making the hunt less productive and more dangerous.

The United States Court of Appeals for the Ninth Circuit ("Court") had jurisdiction to review the Permit, in accordance with the National Pollutant Discharge Elimination System ("NPDES") provisions within the Clean Water Act ("CWA"). AEWEC petitioned the Court to remand the Permit to the EPA for further proceedings leading to additional restrictions. The Court reviewed the action under the arbitrary and capricious standard of the Administrative Procedure Act, which generally states that the EPA's action is presumed to be valid and must be affirmed if a "reasonable basis" exists for its decisions.

The EPA produced three documents to explain its decision: (i) the Response to Comments, which included all the comments the EPA received from the community when drafting the Permit; (ii) its Ocean Discharge Criteria Evaluation ("ODCE"); and (iii) its Environmental Justice Analysis. In the Response to Comments, the EPA wrote that non-contact cooling water would not cause an unreasonable degradation to the marine environment because its analysis indicated the discharge's temperature would dissipate within "100 meters of the discharge location." In the ODCE, the EPA stated that authorized discharges would dissipate and dilute to "approximately 600:1 at 100 meters from the discharge point." However, the day before oral argument, the EPA submitted a letter to the Court that acknowledged a mistake in the record, in which the model it cited in support of its statements did not include non-contact cooling water, but actually referred to drilling-related effluents.

Faced with this discovery, the Court remanded to the EPA to reconsider its determination that non-contact cooling water discharge would not cause "unreasonable degradation of the marine environment," and to submit specific evidence regarding the effects of that discharge on the bowhead whale migration.

The AEWEC next argued that the EPA failed to base its decision on two considerations listed in the CWA for determining degradation of marine waters. The Court determined that the CWA set forth considerations that the EPA must follow when "promulgating its own regulations, not the criteria that EPA must apply to each permitting decision it makes." The Court concluded that those criteria did not apply to this case.

The Court weighed whether the EPA's application of its regulatory criteria was arbitrary or capricious. To begin this inquiry, the Court examined 40 C.F.R. § 125.123 that provides criteria under which the EPA issues discharge permits. Paragraph (a) of the statute states that "[i]f the director on the basis of available information. . . determines prior to permit issuance that the discharge will not cause unreasonable degradation of the marine environment after application of any necessary conditions. . . he may issue an NPDES permit containing such conditions."

In support of its position, the AEWEC first contended that paragraph (c) of

the statute applied to this case. That paragraph stipulates that the EPA must determine there were no other reasonable alternatives other than on-site disposal of materials. However, the Court held that there was no evidence in the record, nor in the regulations, to support the claim that paragraph (c) applied to this proceeding.

Second, the AEWEC argued the evidence did not support a finding that discharges other than non-contact cooling water will not cause an “unreasonable degradation of the marine environment.” The AEWEC’s challenge of the EPA’s evidentiary analysis was based on two CWA criteria: (i) the potential impact the discharge will have on human health; and (ii) “[s]uch other factors relating to the effects of the discharge as may be appropriate.”

The Court disagreed with the AEWEC, holding that the record was “replete with evidence” that the EPA fully considered the AEWEC’s concerns and that it considered the CWA’s criteria in making its determination. Therefore, the Court held that the EPA was not arbitrary or capricious in issuing the Permit.

Third, the AEWEC argued that the EPA did not provide a rational explanation of how the EPA’s monitoring program would prevent conflict with subsistence use and that the EPA acted arbitrary and irrational in relying on such monitoring programs. Again, the Court disagreed with the AEWEC. It found that the detailed description of the monitoring program included requirements for monthly monitoring, post-drilling reports, and ongoing monitoring of marine mammal deflection during discharges. Based on these requirements, the Court held there was no basis for concluding that the EPA’s design and implementation of the monitoring program was arbitrary or capricious.

Finally, the AEWEC contended that the EPA should adopt the same mitigation measures that the National Marine Fisheries Services (“NMFS”) adopted. These are the same measures the AEWEC, Shell Gulf Oil of Mexico, and Shell Offshore, Inc. agreed to in a separate Conflict Avoidance Agreement. The Court held that the EPA was not required to adopt those terms because the AEWEC identified no legal authority requiring such measures. The Court found no measures that would mandate the EPA to incorporate the NMFS mitigation measure or the Conflict Avoidance Agreement into the Permit.

Accordingly, the Court remanded to the EPA for a determination of whether the discharge of non-contact cooling water would cause an “unreasonable degradation of the marine environment,” and denied the petition in all other respects.

Vann A. Ellerbruch

Alaska Wilderness League v. Jewell, 788 F.3d 1212 (9th Cir. 2015) (affirming the district court’s ruling that: (i) the Bureau of Safety and Environmental Enforcement’s approval of the challenged oil spill response plans was not arbitrary and capricious; (ii) the Endangered Species Act did not require the Bureau of Safety and Environmental Enforcement to consult with any environmental agencies before approving oil spill response plans; (iii) the Bureau of Safety and Environmental Enforcement was entitled to *Chevron* deference for its interpretation of the Oil Pollution Act; and (iv) the National Environmental Policy Act did not require the Bureau of Safety and Environmental Enforcement to do an