ORAL ARGUMENT WAS HELD ON APRIL 2, 2015

In the United States Court of Appeals
For the District of Columbia Circuit

NO: 14-5187

SAMUEL ZOOK, MICHELLE McCLAIN-KRUSE,
BIRGITTA MEADE, and ANNETTE LAITINEN,

Plaintiffs-Appellants,

vs.

GINA McCARTHY and the UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
HONORABLE RICHARD J. LEON, JUDGE

APPELLANTS' PETITION FOR REHEARING BY THE PANEL

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Authorities upon which we chiefly rely are marked with asterisks.

ARGUMENT

I. THE REQUIREMENT FOR AN ENDANGERMENT FINDING IN §§ 108 AND 111 OF THE CLEAN AIR ACT DOES NOT PRECLUDE A CLAIM FOR UNREASONABLE DELAY OF A NONDISCRETIONIARY DUTY.

This case was an appeal from the district court's granting EPA's motion to dismiss. Plaintiffs brought this action pursuant to the citizen suit statute of the Clean Air Act, 42 U.S.C. § 7604. That statute authorizes a court to require EPA to carry out a nondiscretionary act that is unreasonably delayed. The basis of EPA's motion was that Plaintiffs' citizen suit did not challenge a nondiscretionary act because the listing of pollutants and stationary source first requires an endangerment finding that is to be made in the EPA Administrator's judgment. EPA contended in this case that the endangerment finding is discretionary, so a citizen suit is not available to the Plaintiffs.

Sections 108 and 111 of the Clean Air Act, 42 U.S.C. §§ 7408 and 7411, clearly say that EPA "shall from time to time" list air pollutants and stationary sources of air pollution to be regulated. So the clear intent of the statutes is a mandatory duty.

The Judgment of the panel in this case relied on the belief that the requirement for an endangerment finding in §§ 108 and 111, in the Administrator's judgment was discretionary and precludes Plaintiffs' action under 42

U.S.C. § 7604. Plaintiffs respectfully believe that the panel overlooked the holdings in Center for Biological Diversity v. EPA, 794 F.Supp.2d 151 (D.D.C. 2011) and Friends of the Earth v. EPA, 934 F.Supp.2d 40 (D.D.C. 2013), that the phrase "in [her] judgment" does not allow the EPA to determine when or if to make an endangerment finding.

The court in Center for Biological Diversity, in holding that the endangerment finding did not preclude a citizen suit, stated:

> Congress' use of the word "shall" throughout [the statute] suggests that it intended to mandate a certain outcome – the regulation of [air pollution]. . . . That purpose would be defeated by allowing EPA to avoid triggering its obligation to regulate in the first place. Indeed, EPA offers no explanation why Congress might have mandated the second step [listing pollutants and sources] in a two-step regulatory process while leaving the first step [the endangerment finding] to the discretion of the agency; after all, if step one is discretionary, the "shall" that appears to require step two becomes largely nugatory.

794 F.Supp.2d at 160.

In a footnote, the court further explained:

> The Court does not suggest that Congress could never have a reason to create a regulatory structure in which a discretionary first step triggers a mandatory second step; but where, as here, the first step is a factual determination that does not turn on policy questions . . . – the Court sees no basis to infer that Congress intended to allow EPA to avoid the effect of mandatory statutory language merely by declining to make that determination in the first place.

Id., n. 4.

In other words, because the endangerment finding is part of the mandatory nature and intent of §§ 108 and 111 and is a factual determination, not a policy determination, EPA does not have discretion as to when or if, or never, to make the determination. The Plaintiffs respectfully believe the panel misapprehended the distinction between a factual judgment and a policy judgment.

The court in Friends of the Earth also rejected EPA's argument that the endangerment finding was a discretionary act that precluded a citizen suit. The court said:

> While the use of "in his judgment" reveals that Congress sought to assign the agency the responsibility to judge or determine which pollutants belong to the category the agency is required to regulate, it does not signal that Congress necessarily gave the agency complete discretion over whether and when to make that determination. The provision states that the Administrator shall issue standards applicable to the emission of "any air pollutant . . . which in his judgment causes . . . ." The decision committed to agency expertise is the substance of the determination — whether an air pollutant meets the criteria — and the word "judgment" appears to be simply a synonym for decision or determination. Thus, the sentence has the same meaning as if it said "which he finds" or "which he determines." So, the text of the statute alone does not clearly indicate that making the determination is only a discretionary duty.

934 F.Supp.2d. at 49.

Therefore, at the very least, EPA is required to make an endangerment finding "from time to time", even if the details of that finding are within the judgment of the agency.

Although the Plaintiffs believe that the facts of this case require EPA to list ammonia and hydrogen sulfide as pollutants and animal feeding operations as stationary sources, the agency must at least undertake the endangerment finding. As Plaintiffs explained in their Reply Brief, a motion to dismiss can be granted only if Plaintiffs are not entitled to any relief. Rochon v. Gonzales, 438 F.3d 1211 (D.C. Cir. 2006).

The district court could, in response to the Plaintiffs' claims, just require that EPA make an endangerment finding without requiring the actual listing. So even if the district court would not grant all the relief requested by the Plaintiffs, but granted some relief, the Plaintiffs' claims should not be dismissed. Plaintiffs respectfully suggest that the panel overlooked this distinction.

The panel cited WildEarth Guardians v. EPA, 751 F.3d 649, 655 (D.C. Cir. 2014), for the proposition that scientific evidence alone cannot give rise to a mandatory duty to regulate. Plaintiffs respectfully believe that the panel's reliance on WildEarth Guardians was misplaced. That case was a challenge under the Administrative Procedure Act to EPA's decision denying a petition for rulemaking. EPA denied the petition, based not on the merits of the petition or the scientific evidence, but on the agency's assertion that it was forced to prioritize its limited resources.

Furthermore, if the panel was suggesting that a court can never review or question an agency's determination of scientific evidence, Plaintiffs respectfully assert that that contention is incorrect. The Administrative Procedure Act authorizes courts to review agency action based on scientific and other evidence. See, Brower v. Evans, 257 F.3d 1058 (9th Cir. 2001); United States v. Akzo Coatings of America, Inc., 949 F.2d 1409 (6th Cir. 1991)("There is no inconsistency between the deferential standard of review and the requirement that the reviewing court involve itself in even the most complex evidentiary matters.").

In addition, as discussed above, the district court would not have to address the scientific evidence if the court granted relief in the form of an order just requiring EPA to undertake the rulemaking, without requiring a specific result.

Based on the foregoing, the Plaintiffs respectfully assert that the panel misapprehended and overlooked the points set out above.

II. SINCE ORAL ARGUMENT IN THIS CASE, EPA HAS ASSERTED IN A SIMILAR CASE THAT THE CITIZEN SUIT STATUTE IS THE APPROPRIATE VEHICLE FOR ASSERTING UNREASONABLE DELAY CLAIMS UNDER THE CLEAN AIR ACT.

It is clear that throughout the briefing and argument of this case EPA has taken the position that the citizen suit

statute under the Clean Air Act, 42 U.S.C. § 7604, is not available to the Plaintiffs in this case, because the endangerment clause makes EPA's duty under the Act discretionary. The inference was that the only remedy available to the Plaintiffs was an action for unreasonable delay pursuant to the Administrative Procedure Act. The Plaintiffs interpret the panel's judgment as adopting the EPA's argument.

However, four days after oral argument in this case, EPA filed a motion to dismiss in two cases pending in the United States District Court for the District of Columbia, Environmental Integrity Project, et al. v. EPA, No. 1:15-cv-00139 (EIP), and Humane Society of the United States, et al., v. EPA, 1:15-cv-00141 (HSUS). Those cases involve claims for unreasonable delay under the Administrative Procedure Act regarding a petition asking EPA to list ammonia as a regulated pollutant under § 108 the Clean Air Act (EIP) and animal feeding operations as a stationary source under § 111 of the Act (HSUS). These claims seek essentially the same relief as the Plaintiffs' claims in this case.

EPA's motions to dismiss in EIP and HSUS assert that the Administrative Procedure Act is not available to the Plaintiffs in those cases because the Plaintiffs have another available remedy, a citizen suit pursuant to 42 U.S.C. § 7604.

In its motions EPA explained that Congress, in the 1990 amendments to the Clean Air Act, clarified that claims of unreasonable delay of agency action should be brought in the district court pursuant to § 7604. EPA's explanation is consistent with the Plaintiffs' explanation in their Reply Brief previously filed in this case that the 1990 amendment to § 7604 was a response to the decision of the First Circuit in Maine v. Thomas, 874 F.2d 883 (1st Cir. 1989).

So EPA in the EIP and HSUS cases makes the same argument and takes the same position that the Plaintiffs have taken in this case. Obviously, the panel did not have the benefit of EPA's argument in the EIP and HSUS cases. Given the EPA's position now, Plaintiffs respectfully request that the panel reconsider its decision.

In a subsequent pleading in support of its motion to dismiss in EIP and HSUS and in an attempt to explain away its position in this case, EPA argued that the citizen suit statute is only available if a petition for rulemaking has been filed. But that argument flies in the face of the position EPA took in Center for Biological Diversity, supra, and Friends of the Earth, supra. In both of those cases the plaintiffs had filed a petition for rulemaking, but EPA took the position that a citizen suit was not available. Furthermore, there is absolutely nothing in § 7604 that

requires a petition for rulemaking as a predicate to a citizen suit. So EPA's attempt to avoid the clear implication of its argument that a citizen suit is the appropriate remedy fails.

EPA should be bound by its most recent position on the availability of a citizen suit to challenge unreasonable delay in making an endangerment finding and listing of pollutants and sources under the Clean Air Act. Because the panel was not aware of EPA's changed position when the judgment in this case was issued, the panel did not have the opportunity to consider this case in light of that changed position. The panel should therefore grant a rehearing to consider this case in light of EPA's most current position on the issues.

CONCLUSION

Plaintiffs respectfully believe that the panel misapprehended or overlooked the nature and implications of the mandatory structure of §§ 108 and 111 of the Clean Air Act, and the nondiscretionary nature of the endangerment clause in those statutes. In addition, EPA has now changed its position on the availability of the citizen suit statute in this case. The panel did not have an opportunity to consider this changed position when it issued the judgment in this case.

Based on the foregoing, Plaintiffs respectfully request that the panel grant a rehearing in this case.

/s/ *Wallace L. Taylor*

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CERTIFICATE OF SERVICE

I Wallace L. Taylor, attorney for the Appellant, certify that I mailed, by United States Mail with first class postage affixed, 5 copies of this Appellants' Petition for Rehearing, to the Clerk of Court, 333 Constitution Ave NW, Room 5205, Washington, D. C., 20001-2866, on the 4 day of June, 2015.

The undersigned certifies that a copy of the foregoing was served electronically on the counsel of record who are registered with the Court's ECF system on the 4 day of June, 2015.

/s/ *Wallace L. Taylor*

WALLACE L. TAYLOR

CERTIFICATE OF COMPLIANCE

I, Wallace L. Taylor, attorney for the Appellant, certify that this Appellants' Petition for Rehearing complies with the page limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

/s/ *Wallace L. Taylor*

WALLACE L. TAYLOR