SCHEDULED FOR ORAL ARGUMENT 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' REPLY BRIEF

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I. THE DEFENDANTS HAVE A NONDISCRETIONARY DUTY TO LIST AMMONIA AND HYDROGEN SULFIDE AS REGULATED POLLUTANTS AND TO LIST AFOs AS STATIONARY SOURCES UNDER THE CLEAN AIR ACT.

ARGUMENT

A. Plaintiffs Have a Valid Claim for Unreasonable Delay.

The crux of EPA's argument, as it was in the district court, is that the endangerment finding in Sections 108 and 111 of the Clean Air Act, 42 U.S.C. §§ 7408 and 7411, is discretionary and precludes Plaintiff's citizens suit claim. But the cases cited by EPA do not support its argument.

In Envt'l. Def. Fund v. Thomas, 870 F.2d 892 (2d Cir. 1989)[EDF], even when unreasonable delay cases were reserved for the court of appeals, the Second Circuit held that EPA had a non-discretionary duty to make a formal decision to revise the NAAQS for sulfur dioxide, and that the agency could not simply decide to make no decision to revise or not to revise the standards. EPA is essentially making the same argument in this case, that it has the discretion to never list ammonia and hydrogen sulfide as criteria pollutants and AFOs as stationary sources.

It is significant that the language of 42 U.S.C. § 7409 that was at issue in EDF was that EPA "shall" at five-year intervals "promulgate such new standards as may be

appropriate. . . .” Compare that to the facts of this case. The five-year interval is analogous to the “from time to time” requirement in §§ 7408 and 7411. See, Am. Lung Ass’n. v. Reilly, 962 F.2d 258 (2d Cir. 1992). Likewise, the phrase “as may be appropriate” implies no less discretion than “in his judgment” in §§ 7408 and 7411. In fact, the EDF court said so. EDF, 870 F.2d at 898. The EDF court held that the plaintiffs in that case alleged non-discretionary action and properly filed a citizen suit pursuant to § 7604.

In NRDC v. Thomas, 885 F.2d 1067 (2d Cir. 1989), the court of appeals said it had no jurisdiction because NRDC stated that it was alleging failure to perform a mandatory duty, not unreasonable delay. This was before the amendment to the citizen suit statute to allow claims for unreasonable delay. Furthermore, the facts of that case were that there was a record in which EPA expressed reasons why it had not or could not at that time list the pollutants at issue. In this case, there is no such record. That is why a motion to dismiss is inappropriate at this stage of the litigation.

NRDC v. Train, 510 F.2d 692 (2d Cir. 1976) [Train I], was a case brought pursuant to the citizen suit statute of the Clean Water Act, not under the Clean Air Act. So Train

I has absolutely no relevance to the facts and issues in this case. The citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365, does not allow claims for unreasonable delay.

In NRDC v. Train, 545 F.2d 320 (2d Cir. 1976)[Train II], as explained in the Plaintiffs' opening brief, the court made it clear that if the structure of the statute creates a mandatory duty, conditional language in the statute cannot be used by the EPA to defeat that mandatory duty. In Train II, unlike in this case, EPA had made an endangerment finding, but that does not diminish the basic lesson from Train II that the court must look at the legislative intent by examining the statute as a whole.

Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987), was an unreasonable delay case, but the issue was whether the district court or the court of appeals had jurisdiction. Since this case was prior to the 1990 amendment allowing citizen suits for unreasonable delay, the court held that the action was properly brought in the court of appeals. The Thomas court did discuss whether a deadline based on an inference could be drawn from the overall statutory framework, but that discussion was in the context of the pre-1990 statute. The court said:

> Although a date-certain deadline therefore may or may not be nondiscretionary, it is highly improbable that a deadline will ever be nondiscretionary, i.e. clear-cut, if it exists only be reason of an inference drawn from the overall statutory framework.

Id. at 791. But remember that the Thomas court was deciding the case in the context of the pre-1990 statute when the only nondiscretionary duty encompassed by the citizen suit statute was for violation of a clear-cut mandate. Now that the citizen suit statute includes claims for unreasonable delay, the above statement from the Thomas court is irrelevant. The concept of a deadline, as considered in the statement above, does not apply to an unreasonable delay case. In other words, if there is a clear-cut deadline, failure to meet that deadline obviously is a violation of a non-discretionary duty. If there is no deadline, it is an unreasonable delay case which, after 1990, is now within the ambit of § 7604 and provides the Plaintiffs a remedy under that statute.

The Thomas court then attempted to distinguish NRDC v. Train, supra, [Train I], but as already noted, Train I was a case brought pursuant to the citizen suit provision of the Clean Water Act and has no relevance to the issues in this case, especially after the 1990 amendment to § 7604. The Thomas court did, however, acknowledge that even under the pre-1990 statute, there could be cases where a

mandatory duty of timeliness could be inferred from the intent of the statute creating the duty.

Even though not actually relevant to this case, the analysis of the Thomas court supports the Plaintiffs in this case. The Thomas court recognized that applying statutory construction to a statute creating a duty can create a nondiscretionary duty. That is exactly what the Plaintiffs are saying in this case.

Before proceeding to the next case relied upon by EPA, it must be noted that the foregoing discussion of Sierra Club v. Thomas explains exactly why the court in Friends of the Earth v. EPA, 934 F.Supp.2d 40 (D.D.C. 2013), was incorrect in relying so heavily on the Thomas decision and why reliance on Thomas by EPA and the district court in this case was misplaced.

Finally, WildEarth Guardians v. EPA, 751 F.3d 649 (D.C. Cir. 2014), was a case challenging a denial of a petition for rulemaking, not a citizen suit for unreasonable delay. In Guardians there was a record made showing the basis for EPA's decision denying the rulemaking petition. That was clearly a significant factor in the court's decision. In that case, EPA had made a final decision in denying the petition for rulemaking, so the issue before the court was not unreasonable delay. The

issue was whether EPA had a reasonable explanation for its decision.

In its brief in this case EPA cites dicta from Guardians to the effect that the terms "from time to time" and "in his judgment" imply that EPA has reasonable discretion in determining when to add new pollutants or new sources. EPA's reliance is misplaced. The court's statement was dicta in a case where the question of mandatory versus discretionary action was not considered. On the other hand, courts where the nondiscretionary nature of those terms was directly confronted have held that both of those terms provide a basis for finding a mandatory duty. See, Am. Lung Ass'n. v. Reilly, 962 F.2d 258 (2d Cir. 1992); Center for Biological Diversity v. EPA, 794 F.Supp.2d 151 (D.D.C. 2011); Friends of the Earth v. EPA, 934 F.Supp.2d 40 (D.D.C. 2013).

So, with EPA's misplaced reliance on its cited authorities, the Plaintiffs' argument still stands. Sections 108 and 111 of the Clean Air Act, 42 U.S.C. §§ 7408 and 7411, clearly manifest the Congressional intent that EPA "shall" list criteria pollutants and stationary sources of pollution "from time to time." EPA's position in this case that it never has to list pollutants or sources

if it chooses not to would defeat the clear intent of the statutes.

B. A Motion to Dismiss Is Inappropriate At This Stage of the Case.

EPA claims in its brief that the most relief the Plaintiffs can receive is an order from the district court that EPA initiate a rulemaking proceeding regarding the listing of ammonia, hydrogen sulfide and AFOs, but that the court cannot require the listing of those pollutants and sources. Plaintiffs contend that the evidence is so clear that those pollutants and sources be listed that EPA has a nondiscretionary duty to list them.

But even if the ultimate relief would be that EPA initiate a rulemaking without requiring the actual listing, that does not support a motion to dismiss. A motion to dismiss is appropriate only if the Plaintiffs can prove no set of facts to entitle them to any relief. Rochon v. Gonzales, 438 F.3d 1211 (D.C.Cir. 2006). So even if a district court would not grant all the relief requested by the Plaintiffs, but granted some relief, the Plaintiffs' claims should not be dismissed.

C. Plaintiffs Are Not Required to File a Petition for Rulemaking.

EPA contends, as did the district court, that Plaintiffs have another remedy, a petition for rulemaking.

But this remedy is illusory. If the Plaintiffs initiated a petition for rulemaking they would be in the same predicament as the plaintiffs in WildEarth Guardians v. EPA, 751 F.3d 649 (D.C. Cir. 2014).

The Guardians court noted the "extremely limited" and "highly deferential" standard of review in considering rulemaking petitions. Id. at 651. Likewise, review of unreasonable delay cases grants agencies considerable deference and broad discretion. Cutler v. Hayes, 818 F.2d 879 (D.C. Cir. 1987). Forcing a court to apply such deference to agency action in this case would run counter to the mandatory intent of Sections 108 and 111.

Furthermore, when Congress passed the 1990 amendment to § 7604, allowing unreasonable delay cases under the Clean Air Act to be initiated pursuant to the citizen suit provision, it demonstrated its intent that plaintiffs not be restricted to filing petitions for rulemaking and being subject to the deferential standard of review that would entail. The amendment was a response to the decision of the First Circuit in Maine v. Thomas, 874 F.2d 883 (1st Cir. 1989). See, Robert J. Martineau, The Clean Air Handbook (2nd Ed.) 2004, n. 42-46.

In Maine the EPA adopted preliminary regulations in 1980 to address the problem of regional haze, promising to

adopt final regulations at a later unspecified date. But the agency took no further action. The plaintiffs in that case brought a citizen suit in district court. The appellate court said that a suit for unreasonable delay could only be brought in the court of appeals and not by a citizen suit. The facts in Maine present a situation similar to that facing the Plaintiffs in this case. It is clear, therefore, that when Congress amended the citizen suit statute in response to the Maine decision, it was intended that a case like the case before this Court could be brought as a citizen suit for unreasonable delay. If Congress had intended that plaintiffs be restricted to a petition for rulemaking, the citizens suit statute would not have been amended to allow for unreasonable delay cases.

CONCLUSION

It is clear that EPA is attempting to send the Plaintiffs, and this Court, on a wild goose chase. EPA contends that it has no mandatory duty to list pollutants and sources of air pollution if it does not want to. So, according to EPA, Plaintiffs have no remedy under § 7604. EPA claims instead that Plaintiffs can file a petition for rulemaking, even though petitions for rulemaking have been filed by other entities with no response from EPA. And even

though the agency's response, or lack thereof, to a petition for rulemaking is given such deference and discretion that Plaintiffs would have no practical remedy.

The purpose of the Clean Air Act is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). It is EPA's duty to fulfill this purpose. If EPA simply refuses to regulate air pollution from AFO's in spite of all the evidence, it is failing to carry out its duty.

At present, the protection of the public from air pollution from AFOs is woefully inadequate. A recent study from Johns Hopkins University documents what the study describes as "substantial gaps" in the regulatory framework to protect public health. Jillian P. Fry, et al., Investigating the Role of State Permitting and Agricultural Agencies in Addressing Public Health Concerns Related to Industrial Food Animal Production, 2014, available at http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0089870. The study cites the 2,400% increase in the size of hog operations from 1987 to 2007, the 613% increase in the size of dairy operations and a 127% increase in chicken operations during that same period.

The study then refers to a wide range of research documenting the adverse health impacts of AFOs. But the study concludes, "Despite health risks posed by these operations, regulation of IFAP [industrial food animal production] is limited . . . ." One state regulator reported to the study's investigators, "There are no state/federal regulations over air emissions." The study therefore concludes that one of the barriers identified that prevent adequate regulation of AFOs is "narrow or inadequate regulations." The study further concludes:

> Given the near absence of explicit public health protections in current IFAP regulations, and the findings about responses from government agencies when issues are brought to their attention, there is a clear need for a more comprehensive public health response to IFAP. . . . The public health implications of IFAP are increasingly clear, and regulations should ensure proper monitoring, oversight, and response by government agencies to protect public health.

The Johns Hopkins study demonstrates dramatically why EPA must take the action requested by the Plaintiffs for the protection of public health and why EPA's inaction cannot be justified.

Based on the foregoing, the judgment of the district court should be reversed and remanded.

/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, 8 copies of this Appellant's Reply Brief, to the Clerk of Court, 333 Constitution Ave NW, Room 5205, Washington, D. C., 20001-2866, on the 9th day of February, 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 9th day of February, 2015.

/s/ *Wallace L. Taylor*

WALLACE L. TAYLOR

CERTIFICATE OF COMPLIANCE

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

/s/ *Wallace L. Taylor*

WALLACE L. TAYLOR