

CLIENT ALERT

CITIZEN SUIT WATCH: Sixth Circuit Holds That Citizen Plaintiffs Cannot Sue State Officials For Failing To Enforce Federal Clean Air Act Regulations

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In *Sierra Club v. Korleski*, No. 10-3269 (6th Cir. May 25, 2012), the U.S. Court of Appeals for the Sixth Circuit ruled, in a 2-1 decision, that the Clean Air Act's citizen suit provision (42 U.S.C. § 7604(a)(1)) does not provide for suits against State officials based on an alleged failure to enforce federal air quality regulations. In so holding, the court reversed a lower court's injunction ordering the State of Ohio to administer the particular federal regulation at issue. As explained below, the Sixth Circuit finds no room for citizen enforcement litigants in the Clean Air Act's cooperative federalism scheme.

Case Background

The Clean Air Act¹ requires the U.S. Environmental Protection Agency ("US EPA") to set National Ambient Air Quality Standards ("NAAQS") for certain pollutants. Under the Act's "cooperative federalism" structure, the States have the "primary responsibility for assuring" compliance with those standards. The Act directs each State to submit a State Implementation Plan ("SIP") to the US EPA. A SIP describes how the State will comply with the federal air quality standards through, among other things, its permitting program. The US EPA may either approve or reject the SIP. If it approves the SIP, the SIP becomes federal law. The State may later modify the SIP, but only with the US EPA's approval.

The US EPA approved Ohio's SIP in 1972. That SIP requires regulated entities to obtain permits from the Ohio EPA before installing or modifying air emissions sources. Before the Ohio EPA may issue permits, the SIP requires it to determine that new or modified sources use the "best available technology" ("BAT") to limit emissions. In 2006, Ohio passed a law allowing the Ohio EPA to issue permits to small emitters without determining whether those sources will use BAT, thus effectively amending its SIP. In 2008, Ohio sought approval from the US EPA for the change – as required by the Clean Air Act – but the US EPA rejected Ohio's proposal on procedural grounds. Thus, the BAT requirement is still part of Ohio's SIP.

While the Clean Air Act allows the US EPA to enforce the BAT requirement itself, it did not do so in this case. Faced with federal inaction, Plaintiffs Sierra Club and several Ohio residents filed a citizen suit in the U.S. District Court for the Southern District of Ohio against the Director of the Ohio EPA. They claimed that the Director's failure to make BAT determinations before issuing permits to small emitters was a "violation of [] an emission standard or limitation" under the Act's citizen suit provision.² The relevant portion of the citizen suit provision provides for civil actions by "any person" and "(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency . . .) who is alleged to have *violated* . . . (A) an emission standard or limitation . . ."³

The district court ultimately agreed with the plaintiffs that, based on past Sixth Circuit precedent,⁴ Ohio's failure to implement its SIP constituted a "violation" of the Act enforceable by a citizen suit. The district court thus ordered the Ohio EPA to enforce the BAT requirement against all emission sources.

Sixth Circuit Decision

On appeal, the Sixth Circuit reversed, agreeing with Ohio that the Clean Air Act's citizen provision is not so broad as to allow private actors to hold State officials accountable for not performing their regulatory duties under the Act. In short, the Sixth Circuit's decision came down to two factors: (1) the meaning of the term "violation" in the Act's citizen suit provision; and (2) consistency with the Act's sanctions scheme.

As to the first factor, the plaintiffs argued that Ohio's failure to administer the BAT requirement was a "violation of . . . an emissions standard or limitation," within the meaning of the citizen suit provision. According to the plaintiffs, if Ohio must comply with the SIP, and the SIP requires BAT, then Ohio's failure to require BAT is a violation of the standard set by the SIP. The State of Ohio countered that "violation" is a term of art that applies only to regulated entities and not to "actions or omissions of a regulator *qua* regulator." The Sixth Circuit agreed with Ohio, citing *Bennett v. Spear*⁵ – a 1997 U.S. Supreme Court case – in support. *Bennett* involved a similarly worded citizen suit provision in the Endangered Species Act. In that case, the Supreme Court held that the Endangered Species Act's language does not allow for a citizen suit against a federal agency for the failure to perform a duty. The statute's "reference to any 'violation' of the [Endangered Species Act] cannot be interpreted to include the Secretary's maladministration of the [Act]."⁶

The Sixth Circuit largely adopted the Supreme Court's reasoning in *Bennett*. First, it found that "violation" is used elsewhere in the Clean Air Act in ways that are unlikely to apply to State officials. For example, other sections of the Clean Air Act authorize the US EPA to impose sanctions on any person who has *violated* a SIP, including substantial monetary fines and even imprisonment. The Sixth Circuit found that Congress is unlikely to have afforded the US EPA "'discretion' to impose ruinous fines upon her counterpart in Ohio." It found it equally implausible that a private citizen could subject the Director of the Ohio EPA to five years' imprisonment for failing to administer the SIP.⁷ In the Sixth Circuit's view, if "violation" cannot be read to apply to state officials like the Director of the Ohio EPA in other provisions of the Clean Air Act, then it cannot be read that way under the citizen suit provision.

Second, the Sixth Circuit emphasized that a particular section of the Clean Air Act other than the citizen suit provision – 42 U.S.C. § 7509 – deals with State "failures" to administer SIPs. The court opined that malfeasance by the Ohio EPA's Director in this case was better described as a "failure" under section 7509 than as a "violation" under the citizen suit provision. Unlike the citizen suit provision, section 7509 allows only the US EPA to bring enforcement actions. Noting the different language and enforcement opportunities in each section, the court determined that Congress deliberately carved out State noncompliance from the citizen suit provision's ambit.

Third, the court noted that the Clean Air Act gives a noncompliant State eighteen months to cure its failure to implement a SIP requirement before the US EPA may impose sanctions to try to induce, but not compel, the State to implement the requirement at issue. Allowing a private party to sue a State *immediately* would, however, "abrogate" that grace period. In addition, while the US EPA can sanction a State merely to *induce* compliance, the citizen suit provision provides for injunctive relief. Thus, the plaintiffs could effectively *compel* Ohio to comply with its SIP under their interpretation of the citizen suit provision. The court found this would be contrary to the Clean Air Act's sanctions scheme. "[T]he immediate, compulsory relief that the plaintiffs sought and obtained in this case makes nonsense of the more deliberate and cooperative regime set forth in [another part of the Act]."⁸

Finally, the court discussed one of its prior holdings in which it found that the citizen suit provision's use of the word "violation" includes a State's "failures" to comply with the Act. Over the dissent's objection, the majority found that because its prior case law⁹ considered a different provision of the Act, "[t]hat specific holding is technically not binding on us here."¹⁰ The majority went on to opine that, in any event, the Supreme Court's more recent holding in *Bennett* compelled a contrary result.

Implications

The *Sierra Club v. Korleski* ruling limits citizen plaintiffs' ability to compel a State to enforce the Clean Air Act's requirements in the Sixth Circuit. Notably, the Second, Third, and Ninth Circuits have, in the past, allowed for such suits to go forward although none of those decisions addressed the precise arguments raised in this appeal.¹¹ With this decision, the Sixth Circuit has strengthened State immunity from private attacks on administrative and legislative decisions that a citizen plaintiff believes to be contrary to State obligations under the Clean Air Act.

While the federal government may still use its enforcement discretion to induce state compliance or otherwise sanction a State, it did not do so here. The US EPA's support of the *plaintiffs* in this action as *amicus* further suggests that its failure to take action against Ohio was not a tacit approval of Ohio's SIP modification. Nonetheless, this decision appears to protect States, at least in the Sixth Circuit, from citizen suit litigation and liability when they have conflicts with US EPA in their administration of the Clean Air Act and choose to hold fast to their position in the face of US EPA opposition. In short, the Sixth Circuit finds little role for citizen enforcement litigants in the Act's cooperative federalism scheme.

¹ See, e.g., 42 U.S.C. §§ 7401 *et seq.*

² 42 U.S.C. § 7604(a)(1) (emphasis added).

³ *Id.* (emphasis added).

⁴ *United States v. Ohio Dep't of Highway Safety*, 635 F.2d 1195 (6th Cir. 1980).

⁵ 520 U.S. 154 (1997).

⁶ *Id.* at 174.

⁷ *Korleski*, Slip Op. at 12.

⁸ *Id.* at 13.

⁹ *U.S. v. Ohio Dep't of Highway Safety*, 635 F.2d 1195 (6th Cir. 1980).

¹⁰ *Korleski*, Slip Op. at 15.

¹¹ *Coal. Against Columbus Ctr. v. City of New York*, 967 F.2d 764, 773 (2d Cir. 1992) (["I]t is important that . . . the implementation of [a SIP] . . . be enforceable by a citizen suit."); *Am. Lung Ass'n of N.J. v. Kean*, 871 F.2d 319, 322

(3d Cir. 1989) ("We conclude . . . that the . . . Clean Air Act" allows for a "citizens' suit against the state in its regulatory capacity."); *McCarthy v. Thomas*, 27 F.3d 1363 (9th Cir. 1994) (not discussing the citizen suit jurisdictional issue).

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