

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ADAM B. KRAFCZEK, SR., ESQUIRE and :
NANCY SAYLOR GREGORY, :
CO-EXECUTORS OF THE ESTATE OF :
JOSEPHINE A. SAYLOR, DECEASED :

v. :

CIVIL ACTION
NO. 00-CV-1965

EXIDE CORPORATION, GENERAL :
BATTERY CORPORATION, and :
THE HONORABLE CAROL M. BROWNER :

O'Neill, J.

August , 2000

MEMORANDUM

Plaintiffs Adam B. Krafczek, Sr. and Nancy Saylor Gregory, co-executors of the estate of Josephine A. Saylor, brought this action on behalf of the decedent against defendants Exide Corporation (“Exide”), General Battery Corporation (“GBC”), and the Honorable Carol M. Browner, Administrator (“Administrator”) of the United States Environmental Protection Agency (“EPA”). Counts I and II are claims against defendants Exide and GMC, while Count III is a claim against the Administrator of the EPA. Presently before me is the Administrator’s motion to dismiss Count III for lack of subject matter jurisdiction under the citizen suit provision of the Resource Conservation and Recovery Act of 1976 (“RCRA”), which provides that “any person may commence a civil action on his own behalf . . . against the Administrator [of the EPA] where there is alleged a failure of the Administrator to perform any act or duty under [RCRA] which is not discretionary with the Administrator.” 42 U.S.C. § 6972(a)(2); see Fed. R. Civ. Proc. 12(b)(1). For the following reasons I will grant the motion and enter judgment for the Administrator.

RCRA governs the management of solid waste, which includes hazardous waste, a subset of solid waste. See 42 U.S.C. § 6901 et seq. Subtitle C of RCRA regulates the management of hazardous wastes at transporter, storage, and disposal facilities (“TSDs”) from cradle to grave. Congress amended RCRA on November 8, 1984 by adding the Hazardous and Solid Waste Amendments of 1984 (“HSW Amendments”), Pub. L. No. 980-616, 98 Stat. 3221 (1984), which expand EPA’s authority to require TSDs to undertake “corrective action” for the release, on-site and off-site, of any hazardous wastes. See 40 U.S.C. §§ 6924(u) and 6924(v). Plaintiff asserts EPA has failed to perform non-discretionary acts and/or duties under §§ 6924(u) and 6924(v) of the HSW Amendments.¹

In pertinent part, § 6924(u) provides:

Standards promulgated under this section shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a [TSD] facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such units . . .

42 U.S.C. § 6924(u).

Section 6924(v) provides:

As promptly as practicable after November 8, 1984, the Administrator shall amend the standards under this section regarding corrective action required at facilities for the treatment, storage, or disposal, of hazardous waste listed or identified under section 6921 of this title to require that corrective action be taken beyond the facility boundary where necessary to protect human health and the environment unless the

¹ RCRA permits EPA to authorize states to administer and enforce their own hazardous waste programs within the state. 42 U.S.C. § 6926(b). In 1986, EPA granted final authorization to the Commonwealth of Pennsylvania to operate its hazardous waste program, including the issuing of permits, in lieu of the federal program. 51 Fed. Reg. 1791 (January 15, 1986). Pennsylvania Department of Environmental Protection (“PaDEP”) manages the Commonwealth’s program. 35 P.S. § 6018.101, et seq. However, under 42 U.S.C. § 6926(g) EPA retains its authority to administer the HSWA requirements.

owner or operator of the facility concerned demonstrates to the satisfaction of the Administrator that, despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action . . .

42 U.S.C. § 6924(v).

Plaintiffs own real property, including the land itself, all structures and vegetation thereon, and any surface or groundwater flowing on or under, adjacent to the premises of Exide and GBC and within 2,500 feet of the perimeter of the area from which Exide and GBC have released hazardous wastes and substances. PaDEP issued a RCRA operating permit to GBC in 1988. Subsequently, EPA issued a corrective action permit, which requires GBC to initiate corrective measures. See Ex. A, III, C (1-5). Plaintiffs allege that the property has been and continues to be contaminated by Exide and GBC, that the contamination has been documented since at least the early to mid-1980's, and that the Administrator, notwithstanding EPA's alleged knowledge of the contamination, has failed and continues to fail to perform her nondiscretionary duty to remediate plaintiffs' property.

I.

Under Federal Rule of Civil Procedure 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. Because federal courts are courts of limited jurisdiction, every case begins with the presumption that the court lacks jurisdiction to hear it. See Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). On a Rule 12(b)(1) motion, the party asserting jurisdiction has the burden of demonstrating that subject matter jurisdiction exists. See Thomson v. Gaskill, 315 U.S. 442, 446 (1942). Therefore, plaintiffs have the burden of proving jurisdiction over Count III of their complaint is proper under RCRA's citizen suit provision which provides that "any person may commence a civil action on his own behalf . . . against the Administrator where there is alleged

a failure of the Administrator to perform any act or duty under [RCRA] which is not discretionary with the Administrator.” 42 U.S.C. § 6972(a)(2).

Plaintiffs argue that subject matter jurisdiction is proper because the Administrator has failed to perform non-discretionary acts and/or duties under § 6924(u) and § 6924(v). Defendant maintains that under the citizen suit provision this Court does not have jurisdiction over Count III because that claim is a collateral attack on the 1988 RCRA permit. I find that plaintiffs do not seek review of or challenge the 1988 RCRA permit. Nonetheless, jurisdiction is not proper because plaintiffs seek the enforcement of the Administrator’s performance of discretionary acts and/or duties under RCRA. See 42 U.S.C. § 6972(a)(2).

I agree with plaintiffs that the Administrator has a nondiscretionary duty under §§ 6924(u) and 6924(v) of the HSW Amendments. However, plaintiffs incorrectly state what that nondiscretionary duty is. Sections 6924(u) and 6924(v) merely require the Administrator to promulgate standards pertaining to corrective action. Section 6924(u) mandates EPA to promulgate standards requiring and to require in permits issued under RCRA after November 8, 1984 that “corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a [TSD] facility . . .” 42 U.S.C. § 6924(u). In July 1985 EPA promulgated the requisite standards. See 40 C.F.R. §§ 264.90(a)(2); 264.101; 270.60(b); 270.60(c).

Similarly, § 6924(v) requires the Administrator to amend, “[a]s promptly as practicable after November 8, 1984,” the standards under § 6924(u) “regarding corrective action required at facilities for the treatment, storage, or disposal, of hazardous waste listed or identified under § 6921 of [RCRA] to require that corrective action be taken beyond the facility boundary where necessary to protect human health and the environment . . .” 42 U.S.C. § 6924(v). In December 1987, EPA

promulgated, and subsequently amended, regulations regarding corrective action pursuant to § 6924(v). See 40 C.F.R. § 264.101.² Therefore, EPA has fulfilled its nondiscretionary duties under §§ 6924(u) and 6924(v) because it has promulgated the requisite standards.

Plaintiff contends that §§ 6924(u) and 6924(v) mandate EPA to require TSDs to undertake corrective action. However, those sections only require EPA to promulgate standards. 42 U.S.C. §§ 6924(u) and 6924(v). While the standards require a TSD to undertake corrective action, see 40 C.F.R. § 264.101, neither the regulations nor RCRA mandate EPA to actually enforce those standards. Section 6928 of RCRA sets forth the relevant federal enforcement provisions pertaining to facilities that transport, store, or dispose of hazardous waste. See 42 U.S.C. § 6928(a)-(h). Under the relevant enforcement provision, § 6928(a)(1), the “Administrator may issue” a compliance order or “may commence a civil action...” 42 U.S.C. § 6928(a)(1) (emphasis added). Consequently, whether EPA enforces the requirement of corrective action set forth in its co-defendants’ permit is purely discretionary.

In general, an agency has absolute discretion in deciding “not to prosecute or enforce, whether through civil or criminal process.” Heckler v. Chaney, 470 U.S. 821, 831 (1985). In Chaney the Supreme Court noted that :

This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed,

² EPA approved the same requirements under Pennsylvania’s program. See 25 PA. Code § 264(a).

whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.

Id. at 831-832 (citations omitted).

Therefore, under Chaney my analysis begins with the presumption that EPA's decision is unreviewable. Id. at 832. This presumption, however, may be rebutted if Congress has provided EPA in RCRA with guidelines pertaining to its exercise of its enforcement powers. Id. at 833. RCRA does not mandate EPA's exercise of enforcement powers under § 6928(a)(1) or provide guidelines to EPA restricting its enforcement powers under that subsection. Consequently, I find that the Administrator did not have a duty to enforce compliance with the corrective action provision of the permit and that any such enforcement is purely discretionary. Cf. Harmon Cove Condominium Ass'n v. Marsh, 815 F.2d 949, 952 (3d Cir. 1987) (holding that the decision of the Secretary of the Army whether to enforce a permit was purely discretionary and that judicial review of the agency's decision not to enforce the terms of the permit was improper).

An appropriate Order follows.

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ORDER

AND NOW this day of August, 2000, upon consideration of the defendant's motion to dismiss Count III for lack of subject matter jurisdiction, and plaintiff's response thereto, it is hereby ORDERED that the motion is GRANTED and the complaint is dismissed as to defendant Carol M. Browner.

THOMAS N. O'NEILL, JR. J.