

Section 404 Clean Water Act/Citizen Suit Action: United States District Court Judge Price Marshall (E.D. Arkansas) Addresses Motion to Dismiss



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United States District Court Judge Price Marshall of the Eastern District of Arkansas (Jonesboro Division) considered in an April 11th Order a Motion to Dismiss a Section 404 Clean Water Act citizen suit action. See case No. 3:17-cv-272-DPM.

The Order addresses the allegation that Lawrence County (“County”) violated an after-the-fact Section 404 Clean Water Act permit issued by the United States Army Corps of Engineers (“Corps”).

The April 11th Order notes that Cleo Watkins (collectively “Watkins”) and other Plaintiff farmers in Craighead County, Arkansas, sued Lawrence County and others over a bridge that is stated to have been built in the early 2000’s.

Watkins alleged that Lawrence County improperly built the bridge and improperly maintained it, which violated an after-the-fact Section 404 Clean Water Act permit issued by the Corps. As a result, Watkins alleged that the bridge had become a *de facto* dam causing frequent and increasingly severe flooding over their property. The counts pleaded by the Watkins Plaintiffs included: Clean Water Act, public nuisance, declaratory judgment, inverse condemnation under federal and state law, and violations of 42 U.S.C. § 1983.

The Lawrence County Motion to Dismiss included the argument that a Section 404 Clean Water Act citizen suit action was not appropriate in this instance.

Judge Marshall’s April 11th Order concludes that the Clean Water Act does not authorize the Section 404 Clean Water Act citizen suit in such circumstances. The basis of Judge Marshall’s conclusion is that Section 404 citizen suits are limited to those involving an “effluent standard or limitation”, noting:

... These permits are issued by the EPA under § 1342(a), or by states under § 1342(b) and § 1311(a). The Court of Appeals’ recent opinion in *City of Kennett v. EPA*, No. 17-1713 (8th Cir. 9 April 2018), addressed a challenge to one of these effluent permits. Watkins’s case, though, concerns a § 404 “dredge or fill” permit issued by the Corps under § 1344. His claims aren’t about effluent; they’re about bridge maintenance and silt accumulation.

The Judge concludes that § 1365 does not apply to Section 404 permits. His conclusion is based upon:

- § 1365(f) defines “effluent standard” on its own (Referencing the fact that words matter)

- Congress differentiated between pollution issues (§ 1342) and navigation issues (§ 1344) when it enacted the Clean Water Act
- Even under Watkins’s combined reading of 33 U.S.C. § 1365(a), § 1365(f)(1), § 1311(a), and § 1344(a), there is probably still an effluent requirement.

Judge Marshall concludes that there is no controlling precedent from the 8th Circuit Court of Appeals. He further states:

Limiting citizen suits to effluent makes sense. The limitation allows citizens to pursue redress for health issues while reserving other issues – like infrastructure, navigation, and dredging – to the Corps. This arrangement follows the traditional framework for navigable waters, with marginal alterations that enable private vindication of public health. Here, there’s no effluent or effluent standard in play. Lawrence County’s § 404 permit isn’t challenged. And the County’s alleged violations of that permit aren’t covered by § 1365.

Judge Marshall dismisses the Section 404 Clean Water Act citizen suit with prejudice.

[A copy of the Order can be downloaded here.](#)