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United States Court of Appeals
Tenth Circuit

April 23, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CONCERNED CITIZENS FOR NUCLEAR SAFETY, INC.,

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; UNITED STATES DEPARTMENT OF ENERGY; TRIAD NATIONAL SECURITY, LLC,

Respondents.

No. 18-9542
(EPA No. 17-05)

ORDER DISMISSING FOR LACK OF JURISDICTION[*]

Before **MATHESON**, **MURPHY**, and **EID**, Circuit Judges.

In 2016, Concerned Citizens for Nuclear Safety, Inc. ("Concerned Citizens") filed a petition with the Environmental Protection Agency ("EPA") to terminate an effluent discharge permit held by the Radioactive Liquid Waste Treatment Facility at Los Alamos National Laboratory (the "Lab"). Concerned Citizens asserted that the Lab had experienced a "change in condition" such that the permit was no longer lawful. The EPA twice denied Concerned Citizens' request. Concerned Citizens

[*] This order is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

appealed to the Environmental Appeals Board ("EAB") but was unsuccessful there as well. Concerned Citizens then filed this appeal, asking us to reverse the EAB. On appeal, the EPA has challenged Concerned Citizens' standing to bring this lawsuit. We agree with the EPA that Concerned Citizens lacks standing and dismiss the appeal.[1]

I.

In 2016, when Concerned Citizens filed its petition with the EPA, the Lab held a National Pollutant Discharge Elimination System ("NPDES") permit to discharge treated radioactive effluent from Outfall 051.[2] *In Re Los Alamos National Security, LLC and The U.S. Department of Energy*, 2018 WL 3629715, at *1 (EAB 2018). This NPDES permit exempted the Lab from regulation under both the Resource Conservation and Recovery Act ("RCRA") and the New Mexico Hazardous Waste Act ("HWA").[3]

[1] In addition to standing, mootness appears to be another jurisdictional barrier to Concerned Citizens' appeal. Concerned Citizens challenges NPDES Permit No. NM0028355 as to Outfall 051, but that permit expired on September 30, 2019. A.R. at 53. Because a federal court may "choose among threshold grounds for denying audience to a case on the merits," we dismiss this appeal for lack of standing. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999).

[2] The Lab is currently owned by the Department of Energy and operated by Triad National Security, LLC ("Triad"). Triad assumed management responsibility on November 1, 2018. When this appeal was initially filed, the Lab was operated by Los Alamos National Security, LLC.

[3] The RCRA grants the EPA with authority to regulate the generation, management, and disposal of various hazardous and non-hazardous waste. *See* 42 U.S.C. § 6901 et seq. The HWA is New Mexico's state program for enforcing the RCRA.

The EPA issued the challenged NPDES permit in 2014 pursuant to the Lab's 2012 request to renew its 2007 NPDES permit. *Id.* at *3. Prior to November 2010, the Lab regularly discharged effluent from Outfall 051. *Id.* But since November 2010, the Lab has not discharged effluent from that outfall.[4] *Id.* The Lab now uses a mechanical evaporator to dispose of effluent. *Id.* The Lab has also constructed solar evaporation tanks that it anticipates will eventually assist in treating effluent. *Id.*

The Lab disclosed the "no discharge" nature of Outfall 051 in its 2012 permit renewal application. *See id.* at *3–4. The application stated that the facility "ha[d] not discharged to Outfall 051 since November 2010." *Id.* at *3 (quotations omitted) (alteration in original). Despite the "no discharge" nature of the outfall, the Lab requested to renew the permit "so that the [the Lab] can maintain the capability to discharge *should* the Mechanical evaporator and/or Zero Liquid Discharge tanks become unavailable due to maintenance, malfunction, and/or . . . an increase in treatment capacity." *Id.* at *3 (quotations omitted). In other words, Outfall 051 was the Lab's contingency plan. *See id.*

[4] In the EPA's 28(j) notice of additional developments, it informed the court that, in June 2019, the Lab began discharging wastewater through Outfall 051 because its solar evaporators were unavailable. We may not consider this information in our standing analysis because "[s]tanding is determined as of the time the action is brought." *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005). Additionally, Concerned Citizens urges us not to consider this information because it is new evidence that is "not properly part of the record on appeal." *See* Pet. 28(j) Letter (quoting *Utah v. United States DOI*, 535 F.3d 1184, 1195 n.7 (10th Cir. 2008)).

In June 2013, EPA Region 6 issued "a public notice of the draft permit seeking public comment." *Id.* at *4. The fact sheet accompanying the notice stated, "[t]he effluent is evaporated through a mechanical evaporator and has no[t] discharge[d] since November 2010. [The Lab] includes the outfall in the application *in case* the evaporator becomes unavailable due to maintenance, malfunction, and/or capacity shortage." *Id.* (quotations omitted).

No commenter objected to "the . . . continued authorization of discharges through Outfall 051 during the comment period." *Id.* On August 12, 2014, Region 6 issued its decision approving the renewed permit. *Id.* at *5. Concerned Citizens did not file a petition for review objecting to the "inclusion of Outfall 051 in the 2014 Permit." *Id.*

In June 2016, Concerned Citizens filed a request with the EPA Region 6 Judicial Officer to terminate the Lab's discharge permit for Outfall 051. *Id.* at *6. Concerned Citizens believed that the permit was unlawful because the Lab had experienced a "change in condition." *Id.* (quoting 40 C.F.R. § 122.64(a)). According to Concerned Citizens, the change in condition was the presence of the mechanical evaporators, which allowed the Lab to avoid discharging effluent from Outfall 051. *See id.* The Judicial Officer denied Concerned Citizens' request but noted "that Concerned Citizens could proceed with the matter before the Regional Administrator." *Id.* at *7. Concerned Citizens did so but was unsuccessful. A.R. at 178–80. Concerned Citizens then appealed to the EAB but lost there as well. *In Re Los Alamos*, 2018 WL 3629715, at *7. The EAB held that for a change in condition

to qualify as grounds for terminating a permit, the change must have occurred after the permit had been issued. *Id.* at *8–11. After losing before the EAB, Concerned Citizens filed this appeal.

II.

To establish standing under Article III, a party must show three things: (1) injury in fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). An injury in fact, is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). "Environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity." *Benham v. Ozark Materials River Rock, LLC*, 885 F.3d 1267, 1273 (10th Cir. 2018) (brackets and quotations omitted). Causation exists where the alleged injury is "fairly . . . trace[able] to the challenged action of the defendant." *Lujan*, 504 U.S. at 560 (alterations in original). And the redressability requirement is met where it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (quotations omitted). When the injury alleged is a procedural violation, "the requirements for Article III standing are somewhat relaxed, or at least conceptually expanded." *WildEarth Guardians v. EPA*, 759 F.3d 1196, 1205 (10th Cir. 2014).

An organization has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it

seeks to protect are germane to the organization's purpose; and (c) [the lawsuit does not require] the participation of individual members." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

III.

The EPA contends that Concerned Citizens has failed to satisfy any of the three requirements for standing. We conclude that Concerned Citizens has failed to establish causation and redressability. Consequently, we need not decide whether Concerned Citizens has satisfied the injury-in-fact requirement. *See Lujan*, 504 U.S. at 560 (indicating all three are necessary to establish standing). We do, however, describe the injury alleged by Concerned Citizens because doing so is necessary to our discussion of causation and redressability.

The injury alleged by Concerned Citizens was its members' diminished use and enjoyment of the Rio Grande River. To prove this injury, Concerned Citizens submitted declarations from two of its members. The first is from Gilbert Sanchez, a member of Concerned Citizens whose home is "only a few yards from the shore of the Rio Grande." G. Sanchez Decl. at 1. Sanchez "operate[s] a farm and ranch, where sheep, cattle, and other animals and poultry have been raised for generations." *Id.* He declared that "[s]ince it has become public knowledge that [the Lab] . . . has released hazardous chemicals to the Rio Grande and to the ground water flowing towards the Rio Grande, [his] appreciation for the river and its shores, and [his] use of that land and water have sharply declined." *Id.* at 2–3. He also stated that

"[r]iverside property such as [his] . . . is now considered undesirable on account of its proximity to the Rio Grande." *Id.* at 3.

The second declaration is from Joni Arends. *See* J. Arends Decl. at 1. Arends is a New Mexico attorney and the executive director of Concerned Citizens. *See id.* She declared that she previously used the river recreationally and professionally (she went on research-sampling trips on behalf of Concerned Citizens). *See id.* at 2–4. But she has not done so since September 2007 because she is "concerned about the contamination" from the Lab. *See id.*

To establish causation, Concerned Citizens must show that its members' diminished use and enjoyment of the Rio Grande River is fairly traceable to the Lab's NPDES permit to discharge from Outfall 051. According to Concerned Citizens, the permit exempts the Lab from compliance with the RCRA and the HWA, and these permit-based exemptions enable the Lab to discharge waste into the Rio Grande River. *See* Reply Br. at 1–9. As a result, Concerned Citizens argues that its members' diminished use and enjoyment is fairly traceable to the Lab's NPDES permit. We disagree.

Concerned Citizens has not offered a single example of a Lab activity that has contributed to increased contamination of the Rio Grande River and would be prohibited under the RCRA or the HWA. In their declarations, Arends and Sanchez opine that contamination levels would improve if the Lab was regulated under the RCRA and the HWA. They also state that they would feel better about using the river if they knew the Lab was regulated by the RCRA and the HWA. *See, e.g.*, J.

Arends Decl. at 4. ("I am confident that it would be much wiser and safer to require the [Lab] . . . to be regulated by a HWA permit."). But Arends and Sanchez offer no examples of Lab activities contributing to contamination that would be prohibited under either the RCRA or the HWA. *See id.* at 1–5; G. Sanchez Decl. at 1–5. Arends and Sanchez's speculative statements that it would be "wiser and safer" to regulate the Lab under the RCRA and the HWA are insufficient to make the alleged contamination of the Rio Grande River fairly traceable to the NPDES permit.

Redressability fails for similar reasons. To satisfy this requirement, the petitioner must show that favorable court action would likely redress the injury. *Lujan*, 504 U.S. at 560. Here, Concerned Citizens claims that the redressability requirement is met because the court may hold the Lab's NPDES permit invalid, which would require the Lab to comply with the RCRA and the HWA. However, Concerned Citizens presents no evidence that any Lab activity would be prohibited under either the RCRA or the HWA. Accordingly, Concerned Citizens has failed to show that it is "likely, as opposed to merely speculative," that its members' diminished use and enjoyment of the Rio Grande River would "be redressed by a favorable decision." *See id.*

Concerned Citizens contends that it should be held to lower standing requirements because its alleged injury was the violation of a procedural right. We disagree. As mentioned above, we apply "somewhat relaxed, or at least conceptually expanded" standing requirements, *WildEarth Guardians*, 759 F.3d at 1205, when the petitioner challenges a procedural right that has been afforded to "protect [the

petitioner's] concrete interests," *Lujan*, 504 U.S. at 572 n.7. Here, however, the injury alleged by Concerned Citizens is not a violation of a procedural right.

An injury in fact can be classified as a procedural violation where "the injury results not from the agency's decision, but from the agency's uninformed decisionmaking." *WildEarth Guardians*, 759 F.3d at 1205. For example, in *WildEarth Guardians*, the plaintiff's injury was classified as "one of process, not result" where the EPA failed to consult with the Fish and Wildlife Service before promulgating its final Federal Implementation Plan. *Id.* The injury was procedural because the violation did not directly harm the plaintiff. Instead, the violation impaired the agency's decision-making process in a manner that could have harmed the plaintiff's concrete interests. *Id.*; *see also Lujan*, 504 U.S. at 573 n.7 (classifying an injury as procedural in a hypothetical scenario where the agency issued a license without first "prepar[ing] an environmental impact statement, even though [the petitioner could not] establish with any certainty that the statement [would] cause the license to be withheld or altered . . .").

Unlike the procedural injuries described in *WildEarth* and *Lujan*, the injury alleged by Concerned Citizens resulted from the EPA's decision, not from deficiencies in the EPA's decision-making process. Concerned Citizens alleges that its members' diminished use and enjoyment of the Rio Grande River resulted from the EPA's issuance of an NPDES permit to the Lab. According to Concerned Citizens, the issuance of this permit has allowed the Lab to contaminate the Rio Grande by exempting the Lab from regulation under the RCRA and the HWA. Thus,

Concerned Citizens' injury flows directly from the EPA's decision to issue the NPDES permit; it does not result from any failure by the EPA to follow the proper decision-making procedure in issuing this permit. Because Concerned Citizens does not allege a procedural injury, it is not subject to relaxed standing requirements.

IV.

Concerned Citizens has failed to show that it has Article III standing. We therefore DISMISS the appeal.

Entered for the Court

Allison H. Eid
Circuit Judge