

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

PETER THORSON, MANAGED
INVESTMENTS INCORPORATED,
CONSTRUCTION MANAGEMENT,
INC. and GERKE EXCAVATING, INC.,

Defendants.

ORDER

03-C-074-C

In an opinion and order dated April 6, 2004, I granted plaintiff's motion for summary judgment in part. Plaintiff was not granted summary judgment on its claim under 33 U.S.C. § 1319(b) and (d) of the Clean Water Act against defendant Construction Management, Inc. because there was no evidence of this defendant's involvement with the relevant pollutant discharge. In addition, plaintiff was denied summary judgment on defendants' counterclaim insofar as defendants were seeking a declaration that the unfilled portions of their construction site exceeds the scope of the Act's jurisdiction.

Plaintiff now seeks reconsideration of the portion of the order denying its motion for

summary judgment on defendants' counterclaim. Plaintiff had argued that it was entitled to protection under the doctrine of sovereign immunity. In rejecting this argument, I noted that "[a]lthough defendants did not address this issue in their response brief, § 702 of the Administrative Procedure Act waives sovereign immunity for a suit seeking relief other than monetary for 'a person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of the relevant statute.'" In addition, I cited to the United State Supreme Court's ruling in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC), 531 U.S. 159, 165 (2001), in which the Court entertained the plaintiff's challenge to the Corps' jurisdiction under the Clean Water Act under the § 702 of the Administrative Procedure Act after the Corps had denied the plaintiff a permit.

Plaintiff challenges that conclusion, arguing among other things that the holding in SWANCC is distinguishable because the permit denial in that case was on the merits whereas the permit denial in this case was without prejudice and that there is no administrative record for review because defendants did not plead their claim under the Administrative Procedure Act.

An action brought under 5 U.S.C. § 702 must be a challenge to some agency action. Sciolino v. Marine Midland Bank-Western, 463 F. Supp. 128, 130 (D.C.N.Y. 1979) (§ 702 "applies only to a governmental agency's action and the jurisdiction of district courts to

review such action.”). Therefore, in order for defendants to pursue their claim challenging the Corps’ jurisdiction over the unfilled portion of the site under the Administrative Procedure Act, defendants must be able to identify some action in which the Corps exercised its jurisdiction over that portion of the lot.

I will stay trial with respect to the portion of defendants’ counterclaim that was not dismissed in the order of April 6 order in order to allow the parties time to brief the issue whether either the Corps’ permit denial or the letter it sent to the site’s previous owner on February 10, 1999 advising him that part of the site could not be manipulated without first obtaining a permit qualifies as an “agency action” on which defendants may base a claim. The court’s standard 21/10 day briefing schedule will apply and begin to run from the date of this order. The injunctive relief and penalty phase of this proceeding will proceed to trial on May 3, 2004 as scheduled, as will any proceedings regarding the liability of defendant Construction Management, Inc. In addition, the parties may have until April 26, 2004, to file the documents required by the amended preliminary pretrial conference order.

Entered this 22nd day of April, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge