

EXHIBIT 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

CITY OF EARLINGTON, KENTUCKY

PLAINTIFF

v.

CIVIL ACTION NO. 86-0203-O(CS)

CITY OF MADISONVILLE, et al

DEFENDANTS

MEMORANDUM OPINION

This matter is before the court on the motion of defendant, William K. Reilly, Administrator of the United States Environmental Protection Agency ("EPA Administrator"), to dismiss Counts II and III of the Restated Petition for Declaration of Rights and Injunctive Relief.

BACKGROUND

This action arises from a dispute over a user charge system developed pursuant to the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1251 *et seq.*, and its accompanying regulations.

In the mid-1970s, defendant, City of Madisonville ("Madisonville"), filed a request with the EPA for a federal grant to construct a sewage treatment facility for the treatment of regional wastewater. The federal grant funds are provided by the EPA pursuant to Title II of the FWPCA, which allows the EPA to award federal funds for certain construction costs of publicly-owned wastewater treatment facilities and to assist municipalities to treat wastes in compliance with the FWPCA.

The City Council of plaintiff, City of Earlington ("Earlington"), adopted resolutions which allowed Madisonville to negotiate as lead applicant on behalf of Earlington for a joint facilities planning grant. The grant's purpose was to expand and upgrade Madisonville's Regional Wastewater Treatment Plant to treat Earlington's wastewater. The EPA subsequently

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awarded Madisonville a grant for design and construction of the expansion. Earlington then entered into an agreement with Madisonville for treatment of its wastewater at the expanded Madisonville facility. This agreement provided that the method of calculating Earlington's sewer usage bills would be actual metering of the wastewater produced.

As a condition of receiving the federal grant, Madisonville agreed to comply with the FWPCA and accompanying regulations which require legislative enactment of a user charge system. The statutes and regulations require that (1) the user charge be based upon either actual or estimated use of services by the plant's customers and (2) the costs of operation and maintenance for flow not directly attributable to users as wastewater be distributed among all the plant's customers. Madisonville enacted a sewer use ordinance which provides that sewer charges would be based on the estimated amount of wastewater produced by a user and includes in treatment costs a precalculated amount for operation and maintenance for non-wastewater.

Earlington originally filed this suit against Madisonville only and subsequently amended to add the EPA Administrator as a defendant. In Count I, Earlington alleges that Madisonville is overcharging it for waste treatment services under the terms of their contract. In Count II, Earlington alleges that the EPA Administrator has failed to perform a non-discretionary duty to require Madisonville to comply with certain statutory and regulatory user charge provisions of the FWPCA, 33 U.S.C. § 1284(b)(1)(A), and regulations enacted pursuant thereto, 40 C.F.R. §§ 35.927-4, 35.929, and 35.935-16, and the terms of the agreement between Madisonville and the EPA. In Count III, Earlington alleges that if the court does not have subject matter jurisdiction over the claims against the EPA Administrator under the FWPCA, it alternatively has subject matter jurisdiction under 28 U.S.C. § 1331 and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.* In addition, Earlington's statement of jurisdiction in its Restated Petition alleges that subject matter jurisdiction exists under 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202.

The EPA Administrator has filed the presently pending motion to dismiss seeking to dismiss Counts II and III, the two counts containing allegations against the EPA Administrator, contending that the court lacks subject matter jurisdiction and that Earlington has failed to state a claim against the EPA Administrator. For the reasons explained below, we will grant the EPA Administrator's motion to dismiss for lack of subject matter jurisdiction.

I. FEDERAL WATER POLLUTION CONTROL ACT

The EPA Administrator first contends that the court does not have subject matter jurisdiction under the FWPCA.

The FWPCA contains an elaborate and comprehensive scheme for enforcement. *Middlesex Co. Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 13, 101 S. Ct. 2615, 2623, 69 L. Ed. 2d 435 (1981). As part of that scheme, the FWPCA provides for suits against the EPA Administrator by government officials and private citizens. The citizen suit provision provides, in relevant part, that:

. . . any citizen may commence a civil action on his own behalf —

* * * * *

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, . . . to order the Administrator to perform such act or duty, . . . , and to apply any appropriate civil penalties under section 1319(d) of this title.

33 U.S.C. § 1365(a). According to this statute, the district court has jurisdiction over citizen suits against the EPA Administrator for enforcement of the FWPCA *only if* the claim involves the EPA Administrator's mandatory, rather than discretionary, duties and acts. *Allegheny Co. Sanitary Authority v. EPA*, 732 F.2d 1167, 1175 (3d Cir. 1984).

Earlington claims that the EPA administrator has failed to require Madisonville to

comply with statutory and regulatory provisions concerning user charge systems. The statutory basis for Earlington's claim is 33 U.S.C. § 1284(b)(1)(A), a section of the FWPCA.

That statutory section provides, in relevant part, that:

. . . the Administrator shall not approve any grant for treatment works . . . , unless he shall first have determined that the applicant (A) has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction, as determined by the Administrator, will pay its proportionate share . . . of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant

33 U.S.C. § 1284(b)(1)(A).

The regulations issued to implement § 1284(b)(1)(A) require that a grant applicant have a plan for developing a proportionate user charge system and must agree to maintain that system.¹ Title 40, Code of Federal Regulations, Section 35.903(h) provides, in pertinent part, that "[t]he Regional Administrator may not award grant assistance unless . . . he has made the determinations required by § 35.925 *et seq.*" which include determinations concerning user charge systems. Title 40, Code of Federal Regulations, Section 35.925-11 (1977) provides, in pertinent part, that:

. . . for a project involving a Step 2 or Step 3, an approvable plan and schedule of implementation have been developed for a system of user charges to assure that each recipient of waste treatment services within the applicant's service area will pay its proportionate share of the costs of the operation and maintenance . . . of all waste treatment service provided by the applicant and the applicant must agree that such system(s) will be maintained. . . .

After the applicant has developed a user charge system, that system must be approved in accordance with criteria set forth in the EPA's regulations. Title 40, Code of Federal Regulations, Section 35.935-13(a) provides, in pertinent part, that "[t]he grantee must obtain the approval of the Regional Administrator of . . . the system of user charges."

¹ The regulations governing this dispute are the 1977 version of the regulations found at 40 C.F.R. Part 35. *Bennett v. New Jersey*, 470 U.S. 632, 638 (1985).

Title 40, Code of Federal Regulations, Section 35.935-13(b)(1) provides, in pertinent part, that:

[t]he Regional Administrator may approve a user charge system in accordance with the following criteria:

(1) the user charge system must result in the distribution of the cost of operation and maintenance of treatment works within the grantee's service area to each user (or user class) in proportion to such user's contribution to the total wastewater loading of the treatment works. Factors such as strength, volume, and delivery flow rate characteristics shall be considered and included as the basis for the user's contribution to ensure a proportional distribution of operation and maintenance costs to each user (or user class).

The regulations also provide for EPA enforcement of the requirements set forth therein.

Title 40, Code of Federal Regulations, Section 35.965 provides that:

[n]oncompliance with the provisions of this subpart shall be cause for any one or more of the following sanctions, as determined by the Regional Administrator:

- (a) The grant may be terminated or annulled . . . ;
- (b) Project costs directly related to the noncompliance may be disallowed;
- (c) Payment otherwise due to the grantee of up to ten percent (10%) may be withheld . . . ;
- (d) Project work may be suspended . . . ;
- (e) A noncomplying grantee may be found nonresponsible or ineligible for future federal assistance or a noncomplying contractor may be found nonresponsible or ineligible for approval for future contract award under EPA grants;
- (f) An injunction may be entered or other equitable relief afforded by a court of appropriate jurisdiction;
- (g) Such other administrative or judicial action may be instituted as may be legally available and appropriate.

Our review of these statutory and regulatory provisions leads us to two separate conclusions. *First*, before approving a Title II grant, the EPA Administrator must determine that the grant applicant has adopted a "proportionate share" user charge system. Although the obligation to make this determination is mandatory, the actual determination necessarily involves the

exercise of discretion in making a determination in an area which the EPA Administrator has particular expertise. Thus, this initial pre-grant determination appears to involve a hybrid duty with both mandatory and discretionary elements. The hybrid nature of this duty could be problematic for the purpose of determining jurisdiction under the FWPCA citizen-suit provision. We need not address this issue, however, because Earlington does not challenge the approval of the grant to Madisonville, but challenges only the enforcement of Madisonville's compliance with the condition of the grant. Earlington obviously has no interest in disturbing the federal grant for which it was a joint applicant and under which it benefits.

Second, after approving a grant application, the EPA Administrator clearly has enforcement authority and prosecutorial discretion to determine whether grantees are in compliance, and if not, what sanctions are appropriate. The duty to enforce user charge system requirements is a discretionary duty. "Nothing in section 1284(b)(1)(A) suggests that Congress intended that it be enforced by anyone but the Administrator of the EPA, indeed it reads simply as a prohibition to the Administrator." *City of Detroit v. State of Michigan*, 538 F. Supp. 1169, 1171 (E.D. Mich. 1982). *See also State Water Control Board v. Train*, 559 F.2d 921, 927 (4th Cir. 1977). As discussed above, Earlington challenges only the EPA Administrator's alleged failure to enforce user charge system requirements.

Because Earlington's claim against the EPA Administrator concerns a failure to perform a discretionary duty, we conclude that we do not have subject matter jurisdiction under the FWPCA.

II. ADMINISTRATIVE PROCEDURE ACT

The EPA Administrator next contends that this court does not have subject matter jurisdiction under the APA. Earlington has alleged that if subject matter jurisdiction does not exist under the FWPCA because its claims involve a discretionary duty, such jurisdiction does exist under the APA to review the EPA Administrator's acts for an abuse of discretion.

The APA provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. . . ." 5 U.S.C. § 704. The APA also provides that "the reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. § 706(2)(A).

It is well established that the APA does not "afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Califano v. Sanders*, 430 U.S. 99, 107, 97 S. Ct. 980, 985, 51 L. Ed. 2d 192 (1977). *See also Federal Nat'l Mortgage Ass'n v. LeCrone*, 868 F.2d 190, 193 (6th Cir. 1989). Thus, before we can review the EPA Administrator's actions for an abuse of discretion under the APA, we must determine that we have subject matter jurisdiction under some other federal statute. Where the statute under which the agency is given responsibility does not expressly or implicitly preclude review, district courts have jurisdiction under 28 U.S.C. § 1331 to review agency action if a federal question exists. *See* 5 U.S.C. § 702.

Relying upon *Middlesex County Sewerage Authority, supra*, the EPA Administrator contends that there is no independent basis for subject matter jurisdiction outside the citizen suit provision of the FWPCA. In *Middlesex*, the National Sea Clammers Association ("Sea Clammers"), an organization whose members harvested fish and shellfish off the New York and New Jersey coasts, sued various state entities and officials and the federal government alleging that sewage and other waste was being dumped directly into the ocean from maritime vessels and the resulting pollution was damaging the fishing, clamming, and lobster industries. *Id.* at 5, 101 S. Ct. at 2618-19. Sea Clammers had asserted claims under the FWPCA and, on

review, the Supreme Court had to determine, *inter alia*, whether the FWPCA implied a private right of action independent of its citizen suit provisions.² *Id.* at 5, 101 S. Ct. at 2619.

The Supreme Court has held that no private right of action can be implied under the FWPCA and that enforcement of the Act must be limited to the express remedies of the Act.

In view of the elaborate enforcement provisions [in the FWPCA] it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under . . . [the FWPCA]. . . . In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.

Id. at 14-15, 101 S. Ct. at 2623. See also *City of Detroit*, 538 F. Supp. at 1170. The Court acknowledged that the citizen suit provision included a savings clause which provides that:

[n]othing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation to seek any other relief (including relief against the Administrator or a state agency).

33 U.S.C. § 1365(e). The Court concluded that this savings clause was "ambiguous concerning the intent of Congress to 'preserve' remedies under the [Act] itself" and that "it is doubtful that the phrase 'any statute' includes the very statute in which this statement was contained." *Id.* at 15-16, 101 S. Ct. at 2624. Thus, the Court did not interpret the savings clause as "saving" additional remedies predicated upon the FWPCA, but as saving remedies available under other statutes or common law.

As discussed earlier, we do not have subject matter jurisdiction under the citizen suit provision of the FWPCA because Earlington's claim alleges violation of a discretionary duty. Furthermore, under *Middlesex*, we cannot imply any private right of action under the FWPCA for the alleged violation of the EPA Administrator's discretionary duty. Although the FWPCA does not expressly preclude review under the APA, we believe that, as interpreted by

² Unlike this case, *Middlesex* did not involve claims based on a discretionary duty of the EPA Administrator. See *Clamorous* sought to assert an implied right of action outside the citizen suit provision because they were precluded from utilizing the citizen-suit provision due to their failure to satisfy the provision's notice requirements. *Id.* at 6, 101 S. Ct. at 2619.

the Supreme Court in *Middlesex*, the FWPCA implicitly precludes review under the APA of the EPA Administrator's discretionary duties and acts.

Here, the only possible source for federal question jurisdiction against the EPA Administrator would be the FWPCA. Because we do not have jurisdiction under that act, there is no federal question upon which to base subject matter jurisdiction for Earlington's claims under the APA.

Similarly, we do not have subject matter jurisdiction under the Declaratory Judgment Act. Like the APA, the Declaratory Judgment Act does not provide any independent basis for subject matter jurisdiction. *See, e.g., State Farm Fire & Casualty Co. v. Hiermer*, 720 F. Supp. 1310, 1312 (S.D. Ohio 1988). For the same reasons we do not have subject matter jurisdiction under the APA, we do not have such jurisdiction under the Declaratory Judgment Act.

Finally, we do not have subject matter jurisdiction under 42 U.S.C. § 1983. In *Middlesex*, 453 U.S. at 21, 101 S. Ct. at 2627, the Supreme Court concluded that the existence of the express remedies in the FWPCA indicated that Congress intended to not only foreclose implied private actions, but to also supplant remedies otherwise available under § 1983.

An order in keeping with the memorandum opinion will be entered this date.

This 5th day of April, 1993.


CHARLES R. SIMPSON III
UNITED STATES DISTRICT JUDGE

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cc: Counsel of Record



