United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-5073 **September Term, 2004**

FILED ON: JUNE 3, 2005 [897844]

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION, ET AL.,
APPELLANTS

v.

STEPHEN L. JOHNSON, ADMINISTRATOR, EPA, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 02cv01361)

Before: RANDOLPH, GARLAND, and ROBERTS, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia, and was briefed and argued by counsel. The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. Cir. Rule 36(b). For the reasons set forth in the memorandum accompanying this judgment, it is

ORDERED and **ADJUDGED** that the judgment of the District Court be affirmed.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41(a)(1).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

No. 04-5073 -- *Pennsylvania Municipal Authorities Ass'n v. Johnson*

MEMORANDUM

Appellants Pennsylvania Municipal Authorities Association, Tennessee Municipal League, and The City of Little Rock Sanitary Sewer Committee appeal from a judgment of the district court dismissing their claims for lack of subject matter jurisdiction. *See Pennsylvania Muni. Auths. Ass'n v. Horinko*, 292 F. Supp. 2d 95 (D.D.C. 2003).

First, appellants argue that the district court erred in holding that it lacked jurisdiction to consider the plaintiffs' challenge to the policies of three EPA regions because those policies, expressed mostly in the form of emails and internal memoranda, were not "final agency action." *See* 5 U.S.C. § 704. For an agency action to be considered final, it "must mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000) (internal quotation marks omitted). Here, appellants state that they are not challenging any specific permit objections or denials. But the regional policies that they do challenge are simply steps toward the regions' ultimate decisions concerning whether to object to and/or deny particular permits. We therefore agree with the district court that, "until something more happens to them (e.g., permit denials or a national EPA guidance document . . .), these municipalities can not claim final agency action by the EPA." 292 F. Supp. 2d at 105; *see AT&T Co. v. EEOC*, 270 F.3d 973, 976 (D.C. Cir. 2001) (holding that a policy was not reviewable because it was unclear whether the agency "had decided to take the final step of bringing suit against AT&T").

Second, appellants argue that the district court erred in denying their claim of jurisdiction under *Leedom v. Kyne*, 358 U.S. 184 (1958), because the regional policies are assertedly *ultra vires*. "The invocation of *Leedom* jurisdiction, we have emphasized, is extraordinary; to justify such jurisdiction, there must be a specific provision of the [statute] which, although it is clear and mandatory, was nevertheless violated by the [agency]." *Association of Civilian Technicians, Inc. v. FLRA*, 283 F.3d 339, 344 (D.C. Cir. 2002) (second alteration in original) (internal quotation marks omitted). Here, however, the appellants argue only that the EPA regions are acting in excess of authority delegated to them by the EPA Administrator. Because they do not identify any statutory provision that the agency violated, they cannot overcome the "nearly insurmountable limitations on *Kyne* jurisdiction." *United States Dep't of Justice v. FLRA*, 981 F.2d 1339, 1343 (D.C. Cir. 1993).

Finally, appellants contend that the EPA Administrator's failure to act to prevent the regions from implementing the disputed policies constitutes "agency action unlawfully withheld or unreasonably delayed" under 5 U.S.C. § 706(1). It is plain, however, that appellants have not satisfied the requirements for invocation of § 706(1). *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984).