IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

LARRY ASKINS, et al.,

Plaintiff,

-vs-

OHIO DEPARTMENT OF AGRICULTURE, et al.,

Defendant.

Case No. 3:14 cv 1699

MEMORANDUM OPINION

KATZ, J.

Plaintiffs Larry and Vickie Askins filed a complaint against the United States Environmental Protection Agency, the Ohio Department of Agriculture, and the Ohio Environmental Protection Agency pursuant to the Clean Water Act, 33 U.S.C. §§ 1365(a)(1) and (a)(2). (Doc. No. 1). Plaintiffs subsequently amended their complaint. (Doc. No. 14). Plaintiffs previously moved for a preliminary injunction (Doc. No. 2), which the Court denied. (Doc. No. 20).

The United States EPA, the Ohio Department of Agriculture, and the Ohio EPA have moved to dismiss Plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). (Doc. Nos. 15, 17). Plaintiffs have filed a response (Doc. No. 21), and the agencies have filed replies. (Doc. Nos. 25, 26).

Plaintiffs assert that the Ohio Department of Agriculture is improperly issuing national pollutant discharge elimination system permits for concentrated animal feeding operations without authorization by United States EPA, through an approved memorandum of agreement, pursuant to 40 C.F.R. § 123.24. (Doc. No. 14, p. 7). Plaintiffs state that the agencies are in violation of 40 C.F.R. § 123.62(c) because the Ohio EPA has transferred part of its authority to administer these

permits to the Ohio Department of Agriculture without permission from the United States EPA. (Doc. No. 21, p. 5). Specifically, the Plaintiffs state that the Ohio EPA has delegated a portion of its authority to the Department of Agriculture by allowing that department to issue a manure management plan as a condition for obtaining the national permit. In addition, the Ohio EPA is alleged to be improperly allowing the Department of Agriculture to "determine, collect and analyze" data which is necessary to obtain the national permit. (Doc. No. 21, p. 11).

## I. Facts

In 1972, Congress established the Clean Water Act in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this objective, the statute prohibits the discharge of any pollutant or combination of pollutants to navigable waters unless the discharge is authorized by a permit issued under the national pollutant discharge elimination system program. 33 U.S.C. §§ 1311(a), 1342(a). A part of the regulatory focus of this program is to control wastewater discharges from manufacturing and industrial facilities, and sewage treatment plants.

The United States EPA has the authority to administer the discharge elimination program. 33 U.S.C. § 1342(a). However, the statute does allow states to submit a permit program to regulate discharges subject to approval by the EPA. 33 U.S.C. § 1342(b). The EPA must approve a state's discharge program unless the Administrator of the EPA determines that adequate authority does not exist to implement the program in compliance with the Clean Water Act. *Id.* If a state demonstrates that adequate authority exists and the EPA grants approval, then the authorized state agency will issue the discharge permits while the EPA retains statutory oversight of the state's administration of that program. 40 C.F.R. § 123.24.

In 1973, Ohio's EPA sent a request to the United States EPA to administer a state discharge permit program. On March 11, 1974, the two agencies entered into a Memorandum of Agreement to delegate the discharge permit program to Ohio's EPA. Since this time, Ohio's EPA has issued discharge permits for concentrated animal feeding operations.

In 1974 and 1976, the EPA issued its first regulations for concentrated animal feeding operations. *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 494 (2d Cir. 2005). The regulations defined the types of livestock operations that qualified as concentrated animal feeding operations, and established discharge permit requirements and guidelines for such operations. *Id.* The regulations remained applicable until the 2003 Concentrated Animal Feeding Operations Rule was adopted. *National Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738, 743 (5th Cir. 2011). In 2005, the Second Circuit vacated portions of the 2003 Rule that required all concentrated animal feeding operations to apply for discharge permits whether or not the operations had discharges. *Id.* at 744–45. In response to that decision, the EPA issued the 2008 Concentrated Animal Feeding Operations Rule which required such operations to apply for a discharge permit if the operations discharged or proposed to discharge pollutants. *Id.* at 746. The Fifth Circuit subsequently vacated portions of the 2008 Rule. *Id.* at 749, 756. On July 30, 2012, the EPA removed the proposed discharge requirement. 40 C.F.R. § 122.23(d) (2014).

Prior to 2002, Ohio's EPA issued permits to install, along with livestock waste management plans, and to regulate the design, construction, and operation of feeding operations with 1000 or more animal units. The install permits and the waste management plans were issued to regulate wastewater treatment systems, along with the application of manure and agricultural wastes on land. These programs were state-created and were issued and enforced only by Ohio's

EPA under Ohio Rev. Code Chapter 6111. These programs were not administered under the Clean Water Act, and were not a part of the national pollutant discharge elimination program regulated by Ohio's EPA.

Ohio's EPA in 2002 issued its first discharge permit to regulate production area and land application discharges from concentrated animal feeding operations. Unlike the state's programs, the national pollutant discharge elimination system permits were administered under the Clean Water Act and were subject to federal oversight. The evidence shows that since 2002, Ohio's EPA has issued approximately fifty-two national pollutant discharge elimination system permits to concentrated animal feeding operations. There are thirty-seven concentrated animal feeding operations facilities in Ohio with active national pollutant discharge elimination system permits enforced by Ohio's EPA.

Prior to 2002, Ohio's Department of Agriculture had no role in regulating environmental related issues associated with large animal feeding operations. In 2000, Ohio enacted a new law, codified in Ohio Rev. Code Chapter 903. The statute created the Ohio Department of Agriculture's permit to install program, along with the program for concentrated animal feeding operations. The law authorized the adoption of administrative rules and the creation of the Division of Livestock Environmental Permitting within the Ohio Department of Agriculture to administer the state program. Since 2002, the Ohio Department of Agriculture has implemented and enforced the state permits pursuant to state law. *See* Ohio Rev. Code Chapter 903.

The law transferred authority from Ohio's EPA to Ohio's Department of Agriculture to administer only the state permit to install program and required the Director of Ohio's Department of Agriculture to create a state permit to operate program. Ohio law prohibits the construction and

modification of new or existing large animal feeding facilities without a permit to install issued by the Ohio Department of Agriculture. *See* Ohio Rev. Code § 903.02. The permit to install regulates the design, construction, and modification of manure storage or treatment facilities at concentrated feeding facilities to ensure manure and agricultural wastes are properly collected and stored to prevent discharges. Ohio Rev. Code § 903.03 prohibits the ownership or operation of a concentrated feeding facility without obtaining a permit to operate. A permit to operate consists of a manure management plan, an insect and rodent control plan, a mortality management plan, an emergency response plan, and an operating record. The permit to operate includes best management practices for the proper management of storage facilities and the land application of manure to prevent or minimize water pollution.

The permits to install and to operate were created under Ohio law, and are issued to concentrated feeding facilities that are designed to collect, store, and apply manure and agricultural wastes for crop production, rather than discharge manure and agricultural wastes into the waters of the state. Furthermore, these permits are not components of Ohio's EPA's national pollutant discharge elimination system permit program or subject to the requirements of the Clean Water Act. There is no federal equivalent of these state permits in the Clean Water Act. *See* 33 U.S.C. § 1342. Further, the Ohio Department of Agriculture has independent jurisdiction to administer the state permit program for concentrated feeding facilities.

Finally, Ohio Rev. Code § 903.08 authorizes the Director of the Ohio Department of Agriculture to seek delegation to participate in the national pollutant discharge elimination system program in accordance with the Clean Water Act. The Director must submit a national pollutant discharge elimination system permit program to the EPA for approval. Ohio Rev. Code § 903.08.

Once the EPA approves the program, the authority to issue and enforce the national pollutant discharge elimination system permits to concentrated animal feeding operations for the discharge of pollutants will transfer from Ohio's EPA to the Ohio Department of Agriculture.

The requirements which states must meet to obtain approval from the EPA to administer and implement a national pollutant discharge elimination system program are contained in 40 C.F.R. Part 123. The various requirements to obtain approval are set forth in 40 C.F.R. §§ 123.21–.24.

The Ohio Department of Agriculture has obtained statutory and regulatory revisions for the proposed transfer of the national pollutant discharge elimination system permit program. In 2006, Ohio submitted its state program to the EPA for approval. The EPA reviewed the request and raised concerns regarding the proposed transfer of the program from the Ohio EPA to the Ohio Department of Agriculture. In response, Ohio's EPA and the Ohio Department of Agriculture proposed additional statutory and regulatory changes. In 2008, the EPA issued a proposed approval of Ohio's transfer request contingent upon the adoption of certain changes in Ohio law.

From 2008 to 2013, the Ohio Department of Agriculture proposed more revisions to various Ohio laws to address the EPA's concerns and to ensure compliance with the federal discharge regulations for concentrated animal feeding operations. However, the Ohio Department of Agriculture has not yet submitted an updated program to the EPA for review and approval. Therefore, Ohio's EPA continues to issue the national pollutant discharge elimination system permits to concentrated animal feeding operations as no transfer of that authority to the Ohio Department of Agriculture has been approved by the EPA.

## II. Standards of Review

Rule 12(b)(1) provides for the dismissal of an action for lack of subject matter jurisdiction. *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014). A Rule 12(b)(1) motion can challenge the sufficiency of the pleading itself (facial attack), or the factual existence of subject matter jurisdiction (factual attack). *Id*. A facial attack goes to the question of whether a plaintiff has alleged a basis for subject matter jurisdiction, while the court takes the allegations of the complaint as true for purposes of the Rule 12(b)(1) analysis. *Id*.

A factual attack challenges the factual existence of subject matter jurisdiction. *Id*. In the case of a factual attack, a district court has broad discretion regarding what evidence to consider in deciding whether it has subject matter jurisdiction, including evidence outside of the pleadings. *Id*. A court has the power to weigh the evidence and determine the effect of that evidence on its authority to hear the case. *Id*. at 759–60. The plaintiff bears the burden of establishing that subject matter jurisdiction exists. *Id*. at 760; *DLX, Inc. v. Commonwealth of Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004).

Regarding the request to dismiss under Rule 12(b)(6), a court's consideration of a motion to dismiss under this rule is limited to the pleadings, and reference outside the pleadings may convert the motion into one for summary judgment. *Jones v. City of Cincinnati*, 521 F.3d 555, 562 (6th Cir. 2008). However, "when a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment." *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335–36 (6th Cir. 2007). Such documents include public records that are not attached to the pleadings. *Barany–Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008); *see also Goryoka v. Quicken Loan,*

*Inc.*, 519 F. App'x 926, 927 (6th Cir. 2013) ("Matters of public record may be considered on a motion to dismiss.").

Because documents, other than public records, have been filed by both parties, and those documents have been reviewed and considered by the Court, the motion to dismiss pursuant to Rule 12(b)(6) will be construed as a motion for summary judgment. *Jones*, 521 F.3d at 562.

Summary judgment is proper where "there is no genuine dispute as to any material fact" and the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party asserting a genuine issue of material fact must support the argument either by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). A court views the facts in the record and reasonable inferences which can be drawn from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A court does not weigh the evidence or determine the truth of any matter in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The party requesting summary judgment bears an initial burden of demonstrating that no genuine issue of material fact exists, which the party must discharge by producing evidence to demonstrate the absence of a genuine issue of material fact or "by showing . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986) (internal quotation marks omitted). If the moving party satisfies this burden, the nonmoving party "may not rest upon its . . . pleadings, but rather must set forth specific facts showing that there is a genuine issue for trial." *Moldowan v. City of Warren*, 578 F.3d 351, 374

(6th Cir. 2009) (citing Rule 56 and *Matsushita*, 475 U.S. at 586). The party opposing the summary judgment motion must present sufficient probative evidence supporting its claim that disputes over material facts remain; evidence which is "merely colorable" or "not significantly probative" is insufficient. *Anderson*, 477 U.S. at 248–52.

III. Discussion

The first issue which must be addressed is whether the Plaintiffs have alleged a cause of action under the Clean Water Act. Under 33 U.S.C. § 1365(a):

> Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf–
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> **(1)** against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
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> **(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.
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> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

The Sixth Circuit has explained that multiple parties are responsible for the enforcement of the Clean Water Act, including the states, the federal government, and private citizens. *Sierra Club v. Hamilton County Bd. of County Comm'rs*, 504 F.3d 634, 637 (6th Cir. 2007). "Although the primary responsibility for enforcement rests with the state and federal governments, private citizens provide a second level of enforcement and can serve as a check to ensure the state and federal governments are diligent in prosecuting Clean Water Act violations." *Id.* (citing 33 U.S.C.

§ 1365(a)). Because citizen suits are "meant to supplement rather than to supplant governmental action," *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987), "citizen suits must fulfill several procedural prerequisites." *Sierra Club*, 504 F.3d at 637.

The statute provides that a citizen may not commence an action under § 1365 "prior to sixty days after the plaintiff has given notice of the alleged violation." 33 U.S.C. § 1365(b)(1)(A). The notice must:

> include sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.

40 C.F.R. § 135.3(a); *see also Sierra Club*, 504 F.3d at 637. This sixty-day notice provides federal and state governments with time to initiate their own enforcement actions. *Sierra Club*, 504 F.3d at 637. If either the state or federal government is diligently prosecuting a Clean Water Act violation, a citizen suit for that same violation may not proceed. *Id*. A citizen may still play a role in a governmental enforcement action under § 1365(b)(1)(B), which provides that "in any such action in a court of the United States any citizen may intervene as a matter of right." *Id*.

Plaintiffs have failed to satisfy the requirements of § 1365(a)(1). Under the statute, the Plaintiffs must allege either a violation of an effluent standard or limitation, or a violation of an order issued by the EPA Administrator or a state with respect to such a standard or limitation. Plaintiffs have not alleged facts that the agencies violated an effluent standard or limitation under the Clean Water Act. Thus, Plaintiffs have failed to state a cause of action under § 1365(a)(1).

Plaintiffs have also failed to establish a cause of action under § 1365(a)(2). This provision provides a limited waiver of sovereign immunity for claims "where there is alleged a failure of the

[EPA] Administrator to perform any act or duty under the this chapter which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2); *see also Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1128 (D.C. Cir. 1997). Thus, the Court only has jurisdiction if the EPA has an unfulfilled, non-discretionary duty under the Clean Water Act.

The evidence before the Court establishes that the Ohio Department of Agriculture does not issue the national pollutant discharge elimination system permits to concentrated animal feeding operations. That responsibility still lies with Ohio's EPA. Further, the transfer of this responsibility from Ohio's EPA to Ohio's Department of Agriculture has not been approved by the United States EPA. Therefore, the Ohio Department of Agriculture does not currently issue the national pollutant discharge elimination system permits.

Regarding their suit against the United States EPA, Plaintiffs must show that Congress has expressly and unambiguously waived the sovereign immunity of the United States. *Department of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999); *United States v. Mottaz*, 476 U.S. 834, 841 (1986). Such waivers may only be made by Congress and must be narrowly construed. *Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Williams*, 514 U.S. 527, 531 (1995).

As previously noted, the Clean Water Act allows private actions to be filed against the EPA Administrator. 33 U.S.C. §§ 1365(a)(1), (a)(2). Plaintiffs have failed to allege specific facts to show that the EPA has engaged in such conduct so that Plaintiffs may avail themselves under either provisions of this statute. Plaintiffs have the burden of demonstrating that this Court has jurisdiction over the subject matter of this case. *See RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134 (6th Cir. 1996). Plaintiffs have not met this burden. They have not established how this Court has jurisdiction over this case under the Clean Water Act.

Further, Plaintiffs do not address the issue of sovereign immunity or provide any argument discussing this Court's subject matter jurisdiction over the claims asserted against the EPA. Therefore, Plaintiffs have not met their burden of establishing that this Court has subject matter jurisdiction over the asserted claims in light of the EPA's sovereign immunity, the limited waiver of that immunity under § 136(a), and their failure to satisfy the statutory requirements of § 136(a).

Plaintiffs state that Ohio's EPA is requiring an applicant to obtain a manure management plan as a prerequisite in obtaining a pollutant discharge elimination system permit. They state that by allowing the Ohio Department of Agriculture to establish "the parameters, collect the data, set up the regulations and analyze the data to determine" if a manure management plan exists, Ohio's EPA has transferred part of its authority regarding the discharge elimination permits to the Department of Agriculture in violation of § 123.62(c). (Doc. No. 21, p. 4). Plaintiffs cite to no evidence or authority to support this assertion. (Doc. No. 21, p. 4)

In examining the evidence submitted in Plaintiffs' response, the Court will assume that Mr. George Elmaraghy's affidavit is one source of authority to support this position. (Doc. No. 21-6). Mr. Elmaraghy attests that he was a thirty-nine year employee of Ohio's EPA. (Doc. No. 21-6, p. 1, ¶ 1). Mr. Elmaraghy further attests that due to a lack of resources since 2002, Ohio's EPA decided to incorporate manure management plans, included in the Department of Agriculture's permits to operate program, into discharge elimination permits for concentrated feeding operations. (Doc. No. 21-6, p. 2, ¶ 13). Mr. Elmaraghy's affidavit is supported by other evidence submitted by the Plaintiffs. (Doc. No. 21-4).

Citing *The Fund for Animals v. Kempthorne*, 538 F.3d 124 (2d Cir. 2008), Plaintiffs argue that requiring the manure plan to be a condition in obtaining a discharge eliminaton permit

constitutes an improper partial transfer of authority from Ohio's EPA to the Department of Agriculture. (Doc. No. 21, p. 11). *Kempthorne* does not support Plaintiffs' position. To the contrary, it undermines their argument.

In *Kempthorne*, environmental organizations brought an action challenging a public resource depredation order issued by the Fish and Wildlife Service as to double-crested cormorants. *Kempthorne*, 538 F.3d at 126. In addressing the propriety of the delegation issue, the *Kempthorne* court stated:

> Delegation of statutory responsibility by federal agencies and officers to outside parties is problematic because "lines of accountability may blur, undermining an important democratic check on government decision-making," *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir.), *cert. denied*, 543 U.S. 925 (2004), and because outside parties, whether private or sovereign, might not "share the agency's national vision and perspective," *id*. at 566 (internal quotation marks omitted). We agree with the D.C. Circuit that, absent statutory authorization, such delegation is impermissible. *Id*.
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> . . . .
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> An agency delegates its authority when it shifts to another party "almost the entire determination of whether a specific statutory requirement . . . has been satisfied," *U.S. Telecom*, 359 F.3d at 567, or where the agency abdicates its "final reviewing authority," *Nat'l Park & Conservation Ass'n v. Stanton*, 54 F.Supp. 2d 7, 19 (D. D.C. 1999). Agencies may seek advice and policy recommendations from outside parties, but they may not "'rubber-stamp' decisions made by others under the guise of seeking their 'advice.'" *U.S. Telecom*, 359 F.3d at 568. If all it reserves for itself is "the extreme remedy of totally terminating the [delegation agreement]," *Nat'l Park*, 54 F.Supp. 2d at 20, an agency abdicates its "final reviewing authority," *id*. at 19.

*Kempthorne*, 538 F.3d at 132–33.

Plaintiffs' allegations and evidence establish that the Ohio EPA has not shifted "almost [its] entire determination" authority to the Department of Agriculture. The Ohio EPA requires a

manure management plan in order to obtain a discharge elimination permit for a concentrated feeding operation because the plan is mandated by federal law.

What appears to be confusing the Plaintiffs is that both the Ohio EPA, pursuant to federal law, and the Ohio Department of Agriculture, pursuant to state law, both require manure management plans. The State of Ohio, through state law, copied the federal requirements so an applicant could submit an identical manure management plan to each agency.

Under Ohio Admin. Code Chapter 3745–33, Ohio EPA applications for all national discharge elimination permits must contain the same information required under 40 C.F.R. Parts 122 to 125. The Ohio EPA must review the application and any supplemental information for completeness and sufficiency prior to issuing any discharge elimination permit. *See* Ohio Adm. Code 3745–33–03 and 3745–33–04.

Ohio's EPA's issuance of a discharge elimination permit must comply with the current regulations, including 40 C.F.R. Parts 121–22 and 40 C.F. R. Part 412. Therefore, an applicant for a discharge elimination permit is required to file a manure management plan which meets the federal requirements for the permit. (Doc. No. 26-1, p. 2, ¶ 3). The manure management plan must comply with 40 C.F.R. § 122.42(e) and 40 C.F.R. Parts 412 and 412.4(c). Further, the Ohio EPA is responsible for reviewing a manure management plan for federal compliance. (Doc. No. 26-1, p. 2, ¶ 3).

Under 40 C.F.R. § 122.21(i), applicants for a discharge elimination permit must develop and implement a manure management plan. The regulation requires site specific data. The permit applicant is responsible for collecting the required information for the manure management plan and submitting the information to the Ohio EPA for review. (Doc. No. 26-1, p. 3, ¶ 5).

The administrative rules of the Ohio Department of Agriculture regarding manure management plans were created to comply with federal requirements. (Doc. No. 26-1, p. 3, ¶ 6). As a result, the Ohio EPA will accept the manure management plans submitted to the Department of Agriculture if those plans contain the same site specific information required by federal regulations. (Doc. No. 26-1, p. 3, ¶ 5).

Even though a permit applicant may submit to the Ohio EPA a manure management plan which was developed to satisfy Ohio's permit to operate requirements (Doc. No. 26-1, p. 3, ¶ 6), the plan is still reviewed by the Ohio EPA and will only be allowed to be used in the discharge elimination permit application if the plan satisfies federal regulations and the Clean Water Act. (Doc. No. 26-1, p. 4, ¶ 7). The incorporation simply results in a permit applicant from having to submit two separate manure management plans. (Doc. No. 26-1, p. 4, ¶ 7). Because the Ohio EPA is required to conduct an independent and meaningful review of all manure management plans for discharge elimination permit applications (Doc. No. 26-1, p. 5, ¶ 9), no transfer of authority has been made to the Ohio Department of Agriculture regarding manure management plans. (Doc. No. 26-1, p. 5, ¶ 10).

In addition to bringing their action under § 1365(a), the Plaintiffs allege that the Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331. As the Sixth Circuit explained in *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 624–25 (6th Cir. 2010):

> 28 U.S.C. § 1331, generally granting federal question jurisdiction, confers jurisdiction on federal courts to review agency action. A plaintiff properly invokes § 1331 jurisdiction when she pleads a colorable claim arising under the Constitution or laws of the United States.
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> . . . However, jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. Even so, a claim invoking federal-question jurisdiction under 28 U.S.C. § 1331 . . . may be dismissed for want of subject-matter jurisdiction if it is not

> colorable, i.e., if it is immaterial and made solely for the purpose of obtaining jurisdiction or is wholly insubstantial and frivolous. We previously have explained the propriety of dismissal on this basis:
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> > Dismissal for lack of subject-matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy. This requirement of substantiality or non-frivolousness of the federal question refers to whether there is any legal substance to the position the plaintiff is presenting.

(citations and internal quotation marks omitted). *See also Aichai Hu v. Holder*, 335 F. App'x 510, 514 (6th Cir. 2009) ("A claim is not colorable if it is immaterial and asserted only to support jurisdiction, or if it is utterly insubstantial and frivolous.") (cited with approval by *Hamdi*, 620 F.3d at 625).

Plaintiffs have failed to establish a private cause of action under § 1365(a). Further, Plaintiffs' assertion that the Ohio EPA improperly delegated its authority regarding concentrated feeding permits to the Ohio Department of Agriculture is completely devoid of merit. The facts simply do not show that Ohio's EPA and Department of Agriculture have engaged in any conduct which violates a federal statute or regulation. Thus, under *Hamdi*, dismissal under Rule 12(b)(1) is appropriate.

The agencies are also entitled to summary judgment as a matter of law. The facts establish that the Ohio EPA is the government agency with the authority to issue national pollutant discharge elimination system permits for concentrated animal feeding operations. That agency continues to issue such permits. The authority to issue these permits has not been transferred to the Ohio Department of Agriculture either *de facto* or *de jure*. Therefore, as the Plaintiffs have

failed to provide evidence that the Defendant agencies have violated a federal statute or regulation, the Defendants are entitled to summary judgment as a matter of law.

## IV. Conclusion

Accordingly, Defendants' motions to dismiss for lack of subject matter jurisdiction and for summary judgment (Doc. Nos. 15, 17) are granted.

IT IS SO ORDERED.

s/ *David A. Katz*
DAVID A. KATZ
U. S. DISTRICT JUDGE