UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA PUBLIC INTEREST RESEARCH GROUP CITIZEN LOBBY, INC., et al.,

Plaintiffs,

v. 4:02cv408-WS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the court is the defendants' motion for summary judgment. Doc. 28. The plaintiffs filed a response (doc. 46) in opposition to the motion, and the parties were advised (doc. 32) that the motion would be taken under advisement as of a date certain.

The plaintiffs filed this action under the citizen suit provision of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a), against the United States Environmental Protection Agency ("EPA"), the Administrator of the EPA ("Administrator"), and the Regional Administrator of Region 4 (collectively, "Defendants"). Among other things, the plaintiffs allege that the Administrator failed to perform her nondiscretionary duty to determine if alleged revisions to Florida's water quality standards are consistent with the CWA. The

Entered on docket 5/29 by M
(Rules 58 & 79(a) FRCP or 32(d)(1) & 55 FRCRP)
Copies sent to: Susan Mann, Borkowski, Ludder, Suhltager

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plaintiffs also seek relief under the Administrative Procedures Act ("APA"), 5 U.S.C. § 706, for agency action unlawfully withheld or unreasonably delayed.

Defendants contend that the Administrator had no mandatory duty to act under the CWA because the challenged actions taken by the State of Florida did not--they maintain--constitute revisions to the State's water quality standards. Because citizen suit jurisdiction depends on whether Florida revised its water quality standards, thus invoking a mandatory duty on the part of the Administrator to review such revision, this court must determine--as a matter affecting subject matter jurisdiction--whether Florida, in fact, revised its water quality standards as alleged by the plaintiffs.

I. THE CLEAN WATER ACT

The objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve that goal, the CWA regulates two potential sources of water pollutants: point sources and non-point sources. A "point source" is defined in the CWA as "any discernible, confined and discrete conveyance...from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). In other words, a point source offers a particular point--such as "a pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft"--from which the amount of a discharged pollutant may be measured. Id. While not specifically defined in the CWA, non-point source pollution is understood to be any pollution that does not result from the discharge or addition of pollutants from a single discrete source. Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 166 n. 28 (D.C.Cir. 1982) (explaining that non-point source

pollution is defined by exclusion and includes all water quality problems not involving a discharge from a point source). Examples of non-point source pollution include runoff of pesticides from farmlands and runoff of vehicle residue from roads.

The CWA makes unlawful "[t]he discharge of any pollutants" from point sources except as authorized by statute. 33 U.S.C. § 1311(a). Under the CWA's National Pollution Discharge Elimination System ("NPDES") program, all facilities that discharge pollutants from point sources into waters of the United States are required to obtain permits. 33 U.S.C. § 1342. Such permits must establish technology-based effluent limitations that incorporate increasingly stringent levels of pollution control technology over time. 33 U.S.C. § 1311(b)(1)(A), (B), b(2). The EPA has delegated to the State of Florida the responsibility for administering the NPDES program within Florida's borders.

When the NPDES system for regulating point sources fails to adequately clean up certain rivers, streams or smaller water segments, the CWA requires use of water quality standards. 33 U.S.C. § 1313(a)-(c). A water quality standard consists of "the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). "Water quality criteria" establish the amounts of pollutants that a state's waters may contain without impairment of the waters' designated uses. States must adopt numerical water quality criteria for specific toxic pollutants for which the EPA has published numerical criteria pursuant to 33 U. S. C. § 1314(a) if such toxic pollutants can reasonably be expected to interfere with the designated uses of a particular waterway. 33 U.S.C. § 1313(c)(2)(B). For other pollutants, states may establish numerical values based on scientifically defensible

methods or may establish narrative criteria if numeric criteria cannot be ascertained. 40 C.F.R. § 131.11(b).

Whenever a state revises or adopts a new water quality standard, such new or revised standard must be submitted to the EPA for review and approval. 33 U.S.C. § 1313(c)(2). If the EPA determines that the standard is consistent with the applicable requirements of the CWA, that standard becomes the water quality standard for the applicable waters of the state until the EPA either approves or promulgates a new standard. 40 C.F.R. § 131.21(c)(2), (e). If the standard is found to be inconsistent with the CWA's requirements, the EPA notifies the state, specifying the changes needed to meet the requirements. If the specified changes are not adopted by the state within ninety days after the date of notification, the EPA must promulgate the standard.

Section 303(d)(1) of the CWA requires states to identify those water within its boundaries for which point source control measures, expressed and implemented as effluent limitations, are inadequate to meet applicable water quality standards. Specifically, section 303(d)(1)(A) requires that:

> (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

33 U.S.C. § 1313(d)(1)(A). Each body of water so identified is known as a "water quality limited segment" ("WQLS"). 40 C.F.R. § 130.2(j).

For each pollutant in a WQLS, a level of permissible pollution--called a "total maximum daily load" ("TMDL")--must be calculated. 33 U.S.C. §§ 1313(d)(1)(A), (C). A TMDL represents the maximum quantity of a pollutant that a WQLS can receive on a daily basis without violating the applicable water quality standard. The TMDL calculations are meant to ensure that the combined impact of point source discharges and non-point source pollution are addressed. As described by the Eleventh Circuit:

> Each TMDL serves as the goal for the level of that pollutant in the waterbody to which that TMDL applies, allocating the total "load"--the amount of pollutant introduced into the water, see 40 C.F.R. § 130.2(e)--specified in that TMDL among contributing point and non-point sources. The theory is that individual-discharge permits will be adjusted and other measures taken so that the sum of that pollutant in the waterbody is reduced to the level specified by the TMDL. As should be apparent, TMDLs are central to the Clean Water Act's water-quality scheme because...they tie together point-source and non-point-source pollution issues in a manner that addresses the whole health of the water.

Sierra Club v. Meiburg, 296 F.3d 1021, 1025 (11th Cir.2002).

Except for the year 2000, states have been required since1992 to submit their section 303(d) lists of substandard waters and related TMDLs to the EPA for review and approval or disapproval. 33 U.S.C. § 1313(d)(2). If the EPA approves a state's list and TMDLs, the state must incorporate the list and loads into its "continuing planning process," the requirements for which are set forth in section 303(e) of the CWA. 33 U.S.C. § 1313(e). If it disapproves a state's list and TMDLs, the EPA must itself establish the list and loads.

Section 505(a)(2) of the CWA allows citizens to sue the EPA in federal district

court for alleged failures "to perform any act or duty under [the CWA] which is not discretionary with the Administrator." 33 U.S.C. § 1365(a)(2). As noted by the Eleventh Circuit in Miccosukee Tribe of Indians of Florida v. United States, 105 F.3d 599, 602 (11th Cir. 1997), "[a] clearly mandated, nondiscretionary duty imposed on the Administrator is a prerequisite for federal jurisdiction under the CWA citizen suit provision."

II. THE ADMINISTRATIVE PROCEDURES ACT

The APA authorizes the federal courts "to compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). For agency action to be unreasonably delayed or unlawfully withheld, there must be a nondiscretionary duty imposed upon an agency to undertake a particular action. Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1238 (10th Cir. 2002) (explaining that "[u]nder either the 'unreasonably delayed' or 'unlawfully withheld' prongs of § 706(1), federal courts may order agencies to act only where the agency fails to carry out a mandatory, nondiscretionary duty").

III. THE FLORIDA IMPAIRED WATERS RULE

In 1999, this court approved a consent decree in Florida Wildlife Federation, Inc. v. Browner, Case No. 4:98cv356-WS, a suit in which several environmental groups sought to compel the EPA to establish TMDLs for waters on Florida's 1998 section 303(d) list. Under the decree, and consistent with a multi-year timetable ending in 2011, the EPA committed to establish for the State of Florida, if the State failed to do so, TMDLs for waters on Florida's 1998 section 303(d) list. Doc. 30, Ex. 1.

In response to the consent decree entered in Case No. 4:98cv356-WS, the Florida Legislature enacted the Florida Watershed Restoration Act ("WRA"), codified at section 403.067, Florida Statutes. Among other things, the WRA directed the Florida Department of Environmental Protection ("FDEP") to develop and adopt by rule "a methodology for determining those waters which are impaired" and which, therefore, are required to be included on the state's section 303(d) list of surface waters or segments for which TMDLs must be determined. Fla. Stat. § 403.067(3)(b). The WRA requires that the listing methodology "shall provide for consideration as to whether water quality standards codified in chapter 62-302, Florida Administrative Code, are being exceeded, based on objective and credible data, studies and reports." Id.

On April 26, 2001, after an extended rule-making process that involved, *inter alia*, review and initial approval by the EPA, FDEP adopted Chapter 62-303, Florida Administrative Code, entitled "Identification of Impaired Surface Waters" ("IWR"). The stated purpose of the IWR is "to interpret existing water quality criteria and evaluate attainment of established designated uses as set forth in Chapter 62-302, F.A.C., for the purposes of identifying water bodies or segments for which TMDLs will be established." Fla. Admin. Code r. 62-303.100(3). The rule specifically provides that "[i]t is not the intent of this chapter to establish new water quality criteria or standards, or to determine the applicability of existing criteria under other provisions of Florida law." Id. Such language was included in the rule in response to the EPA's having expressed concern that several provisions in an early draft rule were "likely to be considered to be revisions to the State's water quality standards, and as such, will require review and approval by

EPA." Doc. 16, Ex. 3 at 2.

By letter dated April 26, 2001, the EPA expressed its view of the rule as follows:

> As you know, EPA has reviewed the draft IWR on various occasions as the Rule has proceeded in development, and we have had many discussions with your staff regarding the Rule. As a result of these discussions, many modifications to the IWR have been adopted to address inconsistencies between the IWR and federal guidance and regulation. We believe the IWR, as it is now drafted, has resolved almost all of EPA's earlier concerns.
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> EPA also expressed concern that a few provisions of the IWR could potentially be viewed as a change to the State's water quality standards (WQS) regulations, and as such would need review by EPA to determine if the IWR and the WQS regulations are consistent. In response to this concern, the IWR has been modified to clarify that the IWR expresses how the State implements its WQS rules for Section 303(d) listing purposes only, and does not change any existing WQS regulation. While EPA believes this revision to the IWR should resolve any discrepancies with the State's WQS regulations, the State is advised that if a water body exceeds a State numeric criteria due to natural conditions, and therefore is not listed on the State's Section 303(d) list, EPA would expect the State to concurrently pursue adoption of appropriate site-specific criteria, if necessary under the WQS regulations.
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> ....
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> I appreciate the efforts you and your staff have made to address EPA's concerns regarding the IWR. The State developed the IWR through an extensive public participation process, and has produced a draft Rule that documents a method for determining water quality impairment of State waters. We commend the State for the process used, and for being one of the first states to take on this ambitious and controversial challenge. It is our view that because the State used a technical advisory group to develop the Rule which included a cross-section of the public including scientists and statisticians, and the State has gone through a formal Rule

> review procedure, that EPA should give the State as much discretion as possible in defining its methodology.

Doc. 16, Ex. 5.

On May 13, 2002, following an extended administrative rule challenge filed by a number of parties, including four of the five plaintiffs here, an administrative law judge entered a 437-page final order upholding the rule. Doc. 9, Ex. 3. That final order is currently pending appeal before Florida's First District Court of Appeal in Lane v. Department of Environmental Protection, Consolidated Case No. 1D02-2043. A stay pending appeal was denied, and the rule became effective on June 10, 2002.

On August 28, 2002, FDEP adopted its first verified list of impaired waters applying the listing methodology set out in the IWR. According to FDEP, such list is "the first in a number of lists integral to a multi-phased rotating basin approach to watershed management." Doc. 9, Ex. B at 10. As explained by FDEP, "[t]he rotating basin approach is a long-term multi-faceted program designed to implement the TMDL program applying an iterative process of examining specific basins at staggered five-year intervals." Id. On October 1, 2002, FDEP's first verified list was submitted to the EPA for review as required by the CWA. 33 U.S.C. § 1313(d)(2); 40 C.F.R. 130.7(d). That review process has not yet been completed and has not been challenged in this action.

In reviewing the State of Florida's 2002 section 303(d) list, the EPA must determine whether the State properly identified waters not meeting the State's existing approved water quality standards. To the extent that the State's assessment

methodology results in a list that is inconsistent with the State's approved water quality standards, EPA would address that inconsistency as part of the section 303(d) list approval/disapproval process. 40 C.F.R. § 130.7(b), (d)(2). If the EPA approves a list of impaired waters that is not consistent with the State's approved water quality standards, that action can be challenged under the APA.

IV. THE ALLEGATIONS

The plaintiffs' complaint contains six counts. In Counts 1 through 5, the plaintiffs allege that particular provisions of the IWR constitute revisions of Florida's water quality standards and that the EPA failed to review those provisions for consistency with the requirements of the CWA. Each of those counts is pleaded in the alternative for breach of a nondiscretionary duty actionable under the citizen's suit provision of the CWA or for the unlawful withholding or unreasonable delay of agency action actionable under the APA. In Count 6, as an alternative to Counts 1 through 5, the plaintiffs allege that (1) the IWR provisions identified in Counts 1 through 5 are policies affecting the application and implementation of Florida's water quality standards within the meaning of 40 C.F.R. § 131.13[1], and (2) the EPA unlawfully withheld or unreasonably delayed agency action when it failed to approve or disapprove those policies.

V.

Critical to all of the plaintiffs' claims is the allegation that the EPA had a

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[1] 40 C.F.R. § 131.13 provides: "States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances. Such policies are subject to EPA review and approval."

mandatory duty to review the challenged provisions of the IWR under 33 U.S.C. § 1313 and/or 40 C.F.R. § 131.13. Absent such a duty, neither the CWA nor the APA provides a basis for jurisdiction over the plaintiffs' claims.

Intervenor FDEP, as the agency which promulgated the IWR, contends that the IWR did not trigger the EPA's duty of review under 33 U.S.C. § 1313 or 40 C.F.R. § 131.13 because the IWR was intended to do nothing more, and in fact does nothing more, than set forth a section 303(d) listing methodology to be used in the TMDL process. The EPA, as an agency with unique experience and expertise relating to the CWA, agrees that it has no duty to review the IWR under 33 U.S.C. § 1313 or 40 C.F.R. § 131.13.

Florida's current EPA-approved water quality standards were codified in the Florida Administrative Code, chapter 62-302, after completion of the required rule-making process. Under the CWA, these standards "shall...be the water quality standard[s] for the applicable waters of [Florida]" until such time as the EPA approves new or revised standards. 33 U.S.C. § 1313(c)(3); see also 40 C.F.R. § 131.21(c)(2)[2], (e)[3].

To modify or amend Florida's water quality standards, FDEP must comply with

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[2] 40 C.F.R. § 131.21(c)(2) provides: "If [a] State...adopts a water quality standard that goes into effect under State...law on or after May 30, 2000, [then] once EPA approves that water quality standard, it becomes the applicable water quality standard for purposes of the Act."

[3] 40 C.F.R. § 131.21(e) provides: "A State['s]...applicable water quality standard for purposes of the Act remains the applicable standard until EPA approves a change, deletion, or addition to that water quality standard, or until EPA promulgates a more stringent water quality standard."

the rule-making procedures set forth in Florida's Administrative Procedure Act. Fla. Stat. ch. 120.54. FDEP has engaged in no such rule-making process to modify or amend Florida's water quality standards, and the EPA has approved no modifications or amendments to the standards currently codified in chapter 62-302. As a matter of law, therefore, the water quality standards set forth in chapter 62-302 remain the water quality standards for the State of Florida notwithstanding FDEP's adoption of the IWR.

By its own terms, the IWR was and is intended to provide a methodology for identifying bodies of water that are not attaining the State of Florida's approved water quality standards and that, therefore, must be included on the State's section 303(d) list. Under the CWA, the EPA must review and approve Florida's section 303(d) list before it becomes the applicable section 303(d) list for purposes of the CWA. The CWA, as well as the EPA's implementing regulations, require the EPA to consider a state's existing, EPA-approved water quality standards when reviewing a state's section 303(d) list. 33 U.S.C. 1313(d)(2); 40 C.F.R. § 130.7(b)(1)(, (3), and (4). If Florida's listing methodology has resulted in a section 303(d) list that is inconsistent with the state's existing, EPA-approved water quality standards codified in chapter 62-302, the EPA would be required to disapprove the list, in whole or in part, and make its own listing decisions as appropriate. 40 C.F.R. § 130.7(d)(2). The listing methodology set forth in the IWR, in other words, cannot possibly have the effect of revising Florida's water quality standards or policies affecting those standards, provided that the EPA complies--as it must--with the requirements of the CWA.

In sum, the EPA and FDEP persuasively argue, and this court finds, that the

State of Florida, through the IWR, has neither formally, nor in effect, established new or modified existing water quality standards or policies generally effecting those water quality standards. The EPA thus had, and has, no nondiscretionary duty to review the IWR under 33 U.S.C. § 1313 or 40 C.F.R. § 131.13. This court, therefore, has no jurisdiction to grant the relief requested by the plaintiffs.

Accordingly, it is ORDERED:

1. Defendant's motion for summary judgment (doc. 28) is GRANTED.

2. The clerk shall enter judgment in favor of Defendants and against the plaintiffs.

3. Costs shall be taxed against the plaintiffs.

DONE AND ORDERED this 29th day of May, 2003.

William Stafford

WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

From: Michael Levy
To: Craig J. Wilson; Ken Harris; Thomas Mumley; Tom Howard
Date: 6/16/03 5:42:34 PM
Subject: Fwd: FL TMDL lawsuit

The attached decision upholds EPA's decision not to approve or disapprove Florida's Impaired Waters Rule (IWR) as though it is a water quality standard or a policy affecting a water quality standard (subject to section 303(c) procedures) . There are three important things to note about this federal court decision:

First, it is a District Court (trial court) decision, and is not binding authority on other courts anywhere, least of all in the 9th Circuit. It will most certainly be appealed. If the decision is affirmed by the Circuit Court of Appeals in Florida, then it will have a significant persuasive effect (not a binding effect) in California, as the different Circuit Courts of Appeal look to each others' decisions for nonbinding guidance.

Second, the District Court did not render an opinion about whether Florida's IWR was consistent or inconsistent with Florida's water quality standards. The Court did not reach that issue.

Third, the Court only held that the IWR need not be treated by EPA as a standards revision (under section 303(c)) so long as EPA makes its decision on the listing recommendations submitted to it based on Florida's water quality standards themselves (and not on what the IWR would require). EPA may not use Florida's IWR to decide whether to approve or disapprove Florida's lists or any particular listing. If EPA uses Florida's IWR for such decisions, and a decision on any water is inconsistent with the applicable water quality standard, EPA can be sued under the federal Administrative Procedures Act for violating federal law (failing to implement an applicable water quality standard). In other words, so long as EPA does not treat the IWR as modifying the water quality standards, EPA need not treat the IWR as a change to those standards. According to this Court, it is not the IWR that is important. It is whether the decisions rendered pursuant to the IWR are consistent with the applicable water quality standards, and whether EPA's decisions, irrespective of the IWR, are consistent with those standards.

Also, as I've previously stated, just because Florida's courts have approved Florida's IWR under Florida law, that does not mean that California's courts will approve a similar rule under California law.

Please let me know if you have any questions about this case.

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CC: Craig M. Wilson; Ted Cobb