

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA**

FLORIDA WILDLIFE FEDERATION, INC.;
SIERRA CLUB, INC.; CONSERVANCY
OF SOUTHWEST FLORIDA, INC.,
ENVIRONMENTAL CONFEDERATION
OF SOUTHWEST FLORIDA, INC.; AND
ST. JOHNS RIVERKEEPER, INC.,

Plaintiffs,

Case No. 4:08-cv-00324-RH-WCS

v.

LISA P. JACKSON, Administrator of the
United States Environmental Protection Agency;
and THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

**PLAINTIFFS' MOTION FOR STAY
AND SUPPORTING MEMORANDUM OF LAW**

Plaintiffs file this motion to stay this case pending expiration of the sixty-day notice period required by section 505(b)(2) of the Clean Water Act. As grounds for this motion, plaintiffs state:

1. The original complaint in this case was filed on July 17, 2008. An amended complaint which added additional standing allegations was filed prior to the defendants' answer on August 5, 2008.

2. On January 6, 2009, plaintiffs, with EPA's consent, filed a second amended complaint which alleged that EPA had a mandatory duty to promptly propose and publish water quality standards as a result of its determination that numeric nutrient standards were necessary

for all states, that determination having been made in 1998 as part of EPA's Clean Water Action Plan.

3. On January 14, 2009, eight days after the filing of the Second Amended Complaint, Benjamin Grumbles, EPA's Assistant Administrator for the Office of Water, sent Michael Sole, Secretary of the Florida Department of Environmental Protection ("FDEP") a letter in which EPA and FDEP agreed that numeric nutrient standards were necessary for the state of Florida.

4. The Grumbles letter was sent as a direct consequence of this lawsuit and both EPA and the intervenors used the Grumbles letter to legally and factually support their motions for summary judgment.

5. At the summary judgment hearing on April 2, 2009, a question was raised as to the propriety of a further amendment to the complaint that would add a citizen suit claim based on the Grumbles letter.

6. After a brief consultation during the hearing, counsel for plaintiffs expressed doubt about such an amendment but after further research have concluded that such an amendment would be appropriate.

7. Plaintiffs will seek leave of this court to file an amended supplemental pleading under Rules 15(a) and 15(b), Federal Rules of Civil Procedure, which pleading will incorporate EPA's actions since the filing of the Second Amended Complaint and will add a citizen suit claim based on the Grumbles letter.

8. Citizen suits brought to enforce mandatory duties under the Clean Water Act are subject to the sixty-day notice provisions of section 505(b)(2) of the Act. Although it is not

entirely clear to what extent this notice requirement is applicable to amended pleadings,¹ plaintiffs have decided to file a sixty-day notice letter in an abundance of caution. A 60 day notice letter informing EPA of plaintiffs' intent to file an amended supplemental complaint is being served as of this date.

9. Plaintiffs have conferred with counsel for EPA and the intervenors. The United States has been contacted and has not formally expressed a position on this motion. However, the United States stated on the record of the hearing of April 2, 2009 that it would not oppose such an amendment. Tr. 4/2/09 at p. 46. Counsel for the two sets of intervenors have been consulted and have both declined to give a position agreeing to or opposing this motion.

MEMORANDUM OF LAW

Pursuant to section 505(b) of the Clean Water Act, no lawsuit can be commenced under the citizen suit provision of the Act until sixty days after the Administrator has been given notice of such action. Failure to comply with the notice requirement mandates dismissal of the lawsuit. *National Environmental Foundation v. ABC Rail Corp.*, 926 F.2d 1096, 1097-98 (11th Cir. 1991). Section 505(b) of the Clean Water Act states that notice must be provided prior to an action being "commenced." However, EPA regulations require that a notice letter alleging a failure on the part of the Administrator to act must describe that action with "reasonable specificity." 40 C.F.R. § 135.3(b). The original notice letter (attached as Exhibit A to the Second Amended Complaint) could not and did not reference the Grumbles letter as the basis for a mandatory duty claim because it had not yet been issued. Therefore, EPA regulations could be interpreted as requiring an amended sixty-day notice letter as a prerequisite to raising new

¹ Section 505(b) states that no action may be "commenced" until requisite notice is given.

mandatory duty claims against EPA that rely in whole or in part on the recent Grumbles letter. That notice letter is being served as of this date.

A federal court, sitting as a court of equity, has the inherent power to guide litigation to a just and equitable conclusion. *ITT Community Development Corp. v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978). Plaintiffs request a stay of this case until June 9, 2009, so that it may amend and supplement their pleading to raise additional claims after the expiration of section 505(b) sixty-day notice period. The claims they will seek to add to their complaint are based upon actions that EPA took in direct response to plaintiffs' lawsuit and which post-date the filing of plaintiffs' Second Amended Complaint. EPA and the Intervenor used those actions to support their motions for summary judgment which are currently under advisement.

Granting a stay until expiration of the sixty-day notice period is appropriate under the circumstances of this case. Leave to amend a complaint under Rule 15(a), Federal Rules of Civil Procedure, or leave to supplement under 15(d), Federal Rules of Civil Procedure, "should be freely given when justice so requires." *McGrotha v. Fed Ex Ground Package System, Inc.*, 2007 WL 640457 (M.D. Ga. 2007). For the motion to be denied, a "substantial reason" justifying the denial must be present. *Laurie v. Alabama Court of Criminal Appeals*, 256 F.3d 1266, 1274 (11th Cir. 2001). Substantial reasons justifying denial include undue delay, bad faith, dilatory motive on the part of the movant, or undue prejudice to the opposing party. *Id.* None of those factors are present in this case. At the summary judgment hearing, counsel for EPA expressed the view that EPA would not oppose an amendment to plaintiffs' complaint based on the Grumbles letter if plaintiffs sought leave from the court to do so. Tr. 4/2/09 at p. 46.

WHEREFORE, plaintiffs respectfully request that this court grant a stay of sixty days until June 9, 2009 (the expiration of the section 505(b) sixty-day notice period) at which time plaintiffs will then move for leave to amend and supplement their pleading.

Dated this 9th day of April 2009.

Respectfully Submitted,

/s/Monica K. Reimer
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Clerk of Court using CM/ECF on this 9th day of April, 2009. I also certify that the foregoing document is being served on this day to the following Service List in the manner specified.

/s/Monica K. Reimer

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FLORIDA WILDLIFE FEDERATION, INC.;)
SIERRA CLUB, INC.; CONSERVANCY)
OF SOUTHWEST FLORIDA, INC.,)
ENVIRONMENTAL CONFEDERATION)
OF SOUTHWEST FLORIDA, INC.; and)
ST. JOHNS RIVERKEEPER, INC.)
) Case No.: 4:08cv324
Plaintiffs,)
) Tallahassee, Florida
vs.) April 2, 2009
) 11 A.M.
LISA P. JACKSON, Administrator)
of the United States Environmental)
Protection Agency; and THE UNITED)
STATES ENVIRONMENTAL PROTECTION AGENCY,)
)
Defendants.)
)
_____)
)
FLORIDA PULP AND PAPER ASSOCIATION)
ENVIRONMENTAL AFFAIRS, INC.,)
THE FLORIDA FARM BUREAU FEDERATION,)
SOUTHEAST MILK, INC., FLORIDA FRUIT)
AND VEGETABLE ASSOCIATION, AMERICAN)
FARM BUREAU FEDERATION, FLORIDA)
STORMWATER ASSOCIATION, FLORIDA)
CATTLEMAN'S ASSOCIATION, and)
FLORIDA ENGINEERING SOCIETY,)
)
Intervenor-Defendants,)
)
and)
)
SOUTH FLORIDA WATER MANAGEMENT DISTRICT,)
)
Intervenor-Defendant.)
)

TRANSCRIPT OF SUMMARY JUDGMENT MOTIONS
BEFORE THE HONORABLE ROBERT L. HINKLE,
CHIEF UNITED STATES DISTRICT JUDGE

JUDY A. NOLTON, RMR

Official United States Court Reporter

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1 bring an EPA suit. And I believe that that may be why the
2 plaintiffs pursued this under the citizen-suit provision,
3 rather than saying that there was an action taken, and a final
4 agency action. Also, I guess, they may have been prohibited
5 from bringing the suit under the statute of limitations,
6 but --

7 THE COURT: But leave that aside, I mean, I guess,
8 why can't it be a citizen suit? Why can't they bring a
9 citizen suit that says a determination was made on
10 January 14th, '09; therefore, the administrator has to promptly
11 prepare and publish proposed regulations setting forth revised
12 or new water quality standards; haven't done it, enter an
13 injunction, tell them to do it.

14 MS. MANN: And I would not oppose such an amendment,
15 if the plaintiffs sought leave from the court to do so. I
16 believe we would defend it the same way that we are defending
17 it in our papers now, which is that EPA, frankly, doesn't
18 believe that using the guidance criteria that was published in
19 2000 is the preferred or most appropriate way to establish
20 numeric criteria for nutrients in Florida, especially given --
21 and you may look at this with some skepticism, but especially
22 in light of the large data set that we have here.

23 THE COURT: Okay. But if two years is too long, then
24 you wouldn't have to enter an order that said promulgate the
25 guidelines as the standards, but you could say do it within