

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

Florida Clean Water Network, Inc., and

Linda L. Young

Plaintiffs,

vs.

United States Environmental Protection Agency,
and Lisa P. Jackson, Administrator, in her official
capacity, and

United States Environmental Protection Agency
Region 4, and A. Stanley Meiberg, acting
Regional Administrator, in his official capacity

Defendants.

Civil Action No: 4:09cv127 -
WS/WCS

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COMPLAINT

Plaintiffs FLORIDA CLEAN WATER NETWORK, INC and LINDA YOUNG
complain as follows:

INTRODUCTION

1. This case arises from the United States Environmental Protection Agency's (EPA) failure to perform its non-discretionary duties designated under the Federal Water Pollution Control Act (the "Clean Water Act" or CWA). Plaintiffs assert that EPA has failed to perform its non-discretionary duty to review, and approve or disapprove, Florida's list of impaired surface waters, pursuant to section 303(d) in the Clean Water Act, 33 U.S.C. § 1313(d). Plaintiffs have provided EPA and the United States Attorney General

with notice of their intent to bring suit, as required by section 505(b)(2) of the Clean Water Act, 33 U.S.C. 1365(b)(2), and now bring this action to require EPA to fulfill its non-discretionary duties.

PARTIES

2. Plaintiff Florida Clean Water Network Inc. ("FL CWN") is a Florida non-profit corporation, with headquarters in Tallahassee, Florida. FL CWN is an alliance of local and state conservation, recreation and civic groups, as well as individuals, with a common interest in protecting Florida's precious water resources. FL CWN works to strengthen state and national water policy; to protect and restore Florida's water resources; and to encourage and enable citizens to play an active role in the decision-making which affects waters in their local communities. Members of FL CWN reside all across the state, in each of the five basin groups which the Florida Department of Environmental Protection has developed to periodically assess water quality. They enjoy swimming, boating, fishing, and general recreation in and on the waterways across Florida, including each of the five basin groups, as well as observing the birds and other wildlife which inhabit Florida's waters.

3. Plaintiff Linda Young is a long-time resident of Florida, and a member of FL CWN. Ms. Young regularly uses many of the waterbodies in the state of Florida; she is an avid kayaker and canoeist, and enjoys sailing, swimming, snorkeling, water skiing, and other recreational water activities. Ms. Young frequently enjoys recreating in, among others, the Ichetucknee River, the Santa Fe River, the Apalachicola River, the Suwannee River, the Blackwater River, the Caloosahatchee River and Estuary, Florida Bay and

waters surrounding the Florida Keys, the St. Johns River, Coldwater Creek, Santa Rosa Sound, Juniper Creek, the Wakulla River, the St. Marks River, the Aucilla River, and numerous lakes and sinkholes in Leon County.

4. Plaintiffs are "citizens" as defined by section 505(g) of the Clean Water Act, 33 U.S.C. § 1365(g).

5. The acts and omissions of EPA alleged herein threaten to degrade water quality in Florida, and thus cause injury to the plaintiffs' (and their members') recreational, aesthetic, and environmental interests in a manner that this court can redress.

6. Defendant EPA is the United States agency responsible for implementing and enforcing the Clean Water Act, including Section 303(d); 33 U.S.C. § 1313(d).

7. Defendant Lisa P. Jackson serves as Administrator of EPA, and is sued in her official capacity only.

8. Defendant EPA Region 4 is responsible for implementing and enforcing the Clean Water Act in Florida, including Section 303(d); 33 U.S.C. § 1313(d).

9. Defendant A. Stanley Meiburg serves as acting Regional Administrator for EPA, Region 4 and is sued in his official capacity only.

10. Defendants EPA, Ms. Jackson, EPA Region 4, and Mr. Meiburg are hereafter referred to collectively as "EPA."

JURISDICTION AND VENUE

11. This court has subject matter jurisdiction over plaintiffs' claims pursuant to section 505(a)(2), the citizen suit provisions of the Clean Water Act, 33 U.S.C. 1365(a)(2), as well as pursuant to 28 U.S.C. § 1331, federal question jurisdiction.

12. The injunctive relief is requested pursuant to section 505(a)(2) of the Clean Water Act, 33 U.S.C. § 1365(a)(2). The declaratory relief is requested pursuant to 28 U.S.C. § 2201. Litigation costs are authorized by section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d).

13. Venue is appropriate in this judicial district and in this court. Defendants are agencies of the United States or officers or employees of the United States, one or more of the plaintiffs reside within this judicial district, and no real property is involved in this action. See 28 U.S.C. § 1391(e)(3) (2008).

14. On February 4, 2009, Plaintiffs sent written notice by certified mail to EPA and the United States Attorney General detailing the violations of the Clean Water Act alleged herein, and declaring Plaintiffs' intent to bring suit. More than sixty days have passed since that date.

BACKGROUND

15. Congress enacted the Clean Water Act (CWA) to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." See 33 U.S.C. § 1251(a) (2008). The CWA's purpose is to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." See 33 U.S.C. § 1251(a)(2).

16. Among other things, the CWA, Section 303, requires that the states establish and implement water quality standards (WQSs) for all waterbodies within the state, subject to approval by EPA. See 33 U.S.C. § 1313(a)-(c) (2008). WQSs have three components: (a) the designated use or uses of a water body, such as drinking water

supplies, or for fishing and swimming; (b) the water quality criteria necessary to permit the designated use; and (c) an antidegradation policy, intended to protect waters which currently meet or exceed their applicable water quality criteria. See 40 C.F.R. § 131.6 (2008). Water quality criteria may be expressed as “constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.” See 40 C.F.R. § 131.3(b) (2008). However, the state must establish WQSs at levels designed to protect the “public health or welfare, enhance the quality of the water and serve the purposes of [the Clean Water Act].” See 33 U.S.C. § 1313(c)(2)(a).

17. Water quality standards play an important role in maintaining the chemical, physical, and biological integrity of a state’s waterbodies. The standards are used to define the maximum permissible pollution levels in the waterbody that will support the designated uses. Section 303(d) in the CWA requires the states to identify and compile a list of waters within its boundaries which do not meet the applicable WQSs (the “303(d) List”). See 33 U.S.C. § 1313(d)(1)(A) (2008).

18. The state’s 303(d) List is crucial to restoring its overall water quality. For those waters listed on the 303(d) List, the CWA directs the states to establish pollution limits, called total maximum daily loads (TMDLs), for those pollutants which cause the waterbody not to attain water quality standards. See 33 U.S.C. § 1313(d)(1)(C) (2008). The TMDL describes the total amount of each pollutant, expressed as a load allocation or waste load allocation, a water body can receive *daily* without violating water quality standards. The CWA requires that the TMDL be established at a level necessary to meet water quality criteria, and ultimately support the designated uses. Id.

19. The state must submit the 303(d) List to EPA for review. EPA has a non-discretionary duty to review, and approve or disapprove, the 303(d) List within thirty (30) days from the date of submission. See 33 U.S.C. § 1313(d)(2) (2008). The CWA provides:

Each State shall submit to the Administrator from time to time . . . for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

See 33 U.S.C. § 1313(d)(2) (emphasis added).

20. Federal regulations implementing the Clean Water Act echo that EPA has a non-discretionary duty to review the state's adopted 303(d) List. The Code of Federal Regulations, 40 C.F.R. § 130.7(d), requires that "[e]ach State shall submit biennially to the Regional Administrator beginning in 1992 the list of waters, pollutants causing impairment, and the priority ranking including waters targeted for TMDL development within the next two years as required under paragraph (b) of this section." See 40 C.F.R. § 130.7(d)(1) (emphasis added). EPA must approve or disapprove the state's 303(d) List within thirty days:

The Regional Administrator shall either approve or disapprove such listing and loadings not later than 30 days after the date of submission. The Regional Administrator shall approve a list developed under Sec. 130.7(b) that is submitted after the effective date of this rule only if it meets the

requirements of Sec. 130.7(b). If the Regional Administrator approves such listing and loadings, the State shall incorporate them into its current WQM plan. If the Regional Administrator disapproves such listing and loadings, he shall, not later than 30 days after the date of such disapproval, identify such waters in such State and establish such loads for such waters as determined necessary to implement applicable WQS. The Regional Administrator shall promptly issue a public notice seeking comment on such listing and loadings. After considering public comment and making any revisions he deems appropriate, the Regional Administrator shall transmit the listing and loads to the State, which shall incorporate them into its current WQM plan.

See 40 C.F.R. § 130.7(d)(2) (emphasis added).

21. In Florida, EPA and the Florida Department of Environmental Protection (FDEP) together have worked to develop Florida's 303(d) List. In 1998 EPA signed a Consent Decree with the Florida Wildlife Federation, Inc., the Environmental Confederation of Southwest Florida, Inc., and Save Our Creeks, Inc., in which EPA agreed to develop a 303(d) List for the State of Florida. Pursuant to the Consent Decree, EPA published a comprehensive list of waterbodies in Florida which, in EPA's judgment, failed to attain state water quality standards (the "1998 List"). See Consent Decree, Florida Wildlife Federation, Inc. et al v. Carol M. Browner, Administrator, and the United States Environmental Protection Agency, Civil Action No. 4: 98CV356-WS (July 2, 1999).

22. However, under the terms of the Consent Decree, the State of Florida bears the primary responsibility to update and maintain the 1998 List. FDEP has adopted a watershed-based management approach to the list, which divides the state's hydrologic basins and watersheds into five separate groups. The state has created a yearly rotating schedule which it uses to develop the list of impaired surface waters, the "updates" to the 1998 List, in each of the five groups.

23. On August 28, 2002, FDEP adopted by Secretarial Order the first update to the 1998 List. The 2002 update addressed the impaired surface waters in Group 1, which include Tampa Bay, the Suwannee River basin, the Oklawaha River basin, Lake Okeechobee, the Everglades West Coast, the St. Marks and Ochlockonee River basins. FDEP also published a separate list of more than one hundred (100) Group 1 waters which it intended to delist from the original 1998 List. See In re: Group 1 Basins Verified List of Impaired Waters, *Order Adopting Verified List of Impaired Waters* (August 28, 2002), <http://www.dep.state.fl.us/water/tmdl/2002_303d_update.htm>.

24. FDEP submitted its Group 1 List and Delist to EPA for review on October 1, 2002. EPA reviewed the list, and published the results of its review in a formal decision document on June 11, 2003 (the "2003 Decision Document"). *Decision Document Regarding Department of Environmental Protection's § 303(d) List Amendment Submitted on October 1, 2002 and Subsequently Amended March 12, 2003* (June 11, 2003), <http://www.epa.gov/Region4/water/tmdl/florida/documents/EPA303d_decdoc.pdf>. In the 2003 Decision Document, EPA approved in part, and disapproved in part, the Group 1 lists: EPA approved the Group 1 list of impaired surface waters, but disagreed with many of the state's delisting decisions and ultimately added eighty (80) waterbodies back on the 303(d) List. *Id.* at App. K.

25. Since its 2003 Decision Document, EPA has not taken any further action to approve or disapprove Florida's 303(d) Lists.

COUNT I

The Environmental Protection Agency failed to perform its non-discretionary duty to review, and approve or disapprove, Florida's 303(d) List for waters in Groups 1 and 5.

26. Paragraphs one through twenty five are incorporated by reference.

27. On December 12, 2007, FDEP adopted by Secretarial Order the update to Florida's list of impaired surface waters in Group 5, which include the Everglades, Indian River Lagoon, Perdido Bay, Springs Coast, and the upper East Coast. See In re: Verified List of Impaired Waters for the Group 5 Basins, 2007, and the Delist List 2007, Order Adopting Verified List of Impaired Waters and Delisting of Waters (December 12, 2007), <http://www.dep.state.fl.us/legal/Final_Orders/2007/dep07-1348,etal.pdf>. FDEP also adopted a list of Group 5 waters which it proposed to delist from the 1998 List. Id.

28. Subsequently, on June 3, 2008, FDEP adopted by Secretarial Order an update to the 1998 List addressing the Florida Keys (categorized in Group 5) and revisiting and the waters in Group 1. See In re: Verified List of Impaired Waters for the Group 1 Basins, 2008, and the Delist List 2008, and Verified List of Impaired Waters for the Florida Keys (Group 5 Basin, 2008), Order Adopting Verified List of Impaired Waters and Delisting of Waters (June 3, 2008), <http://www.dep.state.fl.us/water/tmdl/docs/adoption-order_08-0848.pdf>.

29. On October 17, 2008, FDEP transmitted the lists for Groups 1 (Cycle II) and 5 to EPA for review. Pursuant to the Clean Water Act and its implementing regulations, EPA had thirty days in which to review, and either approve or disapprove, the

lists. See 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(2). The thirty day period for review has expired.

30. EPA has failed to perform its non-discretionary duty to approve or disapprove the Group 1 and 5 lists.

COUNT II

The Environmental Protection Agency failed to perform its non-discretionary duty to review, and approve or disapprove, Florida's 303(d) List for waters in Group 4

31. Paragraphs one through twenty five are incorporated by reference.

32. On May 3, 2006, FDEP adopted by Secretarial Order the update to the 1998 List for impaired surface waters in Group 4, which include Fisheating Creek, the Kissimmee watershed, the Nassau and St. Mary's watersheds, Pensacola Bay, Biscayne Bay, and the Withlacoochee River basin. See In re: Verified List of Impaired Waters for the Group 4 Basin, 2005/2006, Delist 2005/2006, and Revisions to the Verified List of Impaired Waters for the Group 3 Basins, Order Adopting Verified List of Impaired Waters and Delisting of Waters (May 3, 2006), <<http://www.dep.state.fl.us/water/tmdl/docs/15-ImpairedWatersOrder-5-12-06.pdf>>. On the same date, FDEP also adopted a list of Group 4 waters which it proposed to delist from the 1998 List.

33. Despite the clear directive in the Clean Water Act to do so, FDEP did not submit the Group 4 lists to EPA for review. See 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(1). EPA is aware Florida has adopted a 303(d) List for the waters in Group 4, but has not taken action to approve or disapprove the lists.

34. A state's failure to submit any 303(d) Lists to EPA, as required by section 303(d)(2) in the Clean Water Act, is in effect a *constructive submission* of no 303(d) Lists, and triggers EPA's non-discretionary duty to act.

35. FDEP's failure to submit the Group 4 lists to EPA for review must be treated as a constructive submission of *no* 303(d) List. EPA has a non-discretionary duty to review, and approve or disapprove, the empty lists.

36. In the alternative, FDEP's failure to submit the Group 4 lists to EPA must be treated as the constructive submission of those lists. EPA has a non-discretionary duty to review, and approve or disapprove, the Group 4 lists.

37. EPA has failed to perform its non-discretionary duty to review, and approve or disapprove, the lists.

COUNT III

The Environmental Protection Agency failed to perform its non-discretionary duty to review, and approve or disapprove, Florida's 303(d) List for waters in Group 3

38. Paragraphs one through twenty five are incorporated by reference.

39. On June 17, 2005, FDEP adopted by Secretarial Order the update to the 1998 List for impaired surface waters in Group 3, which include the Choctawhatchee River basin, the Upper St. Johns River, Sarasota Bay, Peace River and Myakka River basins, the Caloosahatchee River basin, Lake Worth Lagoon and Palm Beach Coast. See In re: Verified List of Impaired Waters for the Group 3 List 2004/05 List and Delist List, 2004/2005, Order Adopting Verified List of Impaired Waters and Delisting of Waters (June 17, 2005), <http://www.dep.state.fl.us/water/tmdl/docs/gp3_order.pdf>. On the same date,

FDEP also adopted a separate list of Group 3 waters which it proposed to delist from the 1998 List. Id.

40. Despite the clear directive in the Clean Water Act to do so, FDEP did not submit the Group 3 lists to EPA for review. See 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(1). EPA is aware Florida has adopted a 303(d) List for the waters in Group 3, but has not taken action to approve or disapprove the lists.

41. A state's failure to submit any 303(d) Lists to EPA, as required by section 303(d)(2) in the Clean Water Act, is in effect a *constructive submission* of no 303(d) Lists, and triggers EPA's non-discretionary duty to act.

42. FDEP's failure to submit the Group 3 lists to EPA for review must be treated as a constructive submission of *no* 303(d) List. EPA has a non-discretionary duty to review, and approve or disapprove, the empty lists.

43. In the alternative, FDEP's failure to submit the Group 3 lists to EPA must be treated as the constructive submission of those lists. EPA has a non-discretionary duty to review, and approve or disapprove, the Group 3 lists.

44. EPA has failed to perform its non-discretionary duty to review, and approve or disapprove, the lists.

COUNT IV

The Environmental Protection Agency failed to perform its non-discretionary duty to review, and approve or disapprove, Florida's 303(d) List for waters in Group 2

45. Paragraphs one through twenty five are incorporated by reference.

46. On May 27, 2004, FDEP adopted by Secretarial Order the update to the 1998 List for impaired surface waters in Group 2, which include Charlotte Harbor, the

Tampa Bay tributaries, the Lower and Middle St. Johns River, the Apalachicola and Chipola River basins, and the St. Lucie and Loxahatchee River basins. See In re: Verified List of Impaired Waters for the Group 2 Basins, Order Adopting Verified List of Impaired Waters (May 27, 2004), <http://www.dep.state.fl.us/water/tmdl/docs/Group2_Order.pdf>. On the same date, FDEP also adopted a list of Group 2 waters which it proposed to delist from the 1998 List. Id.

47. Despite the clear directive in the Clean Water Act to do so, FDEP did not submit the Group 2 lists to EPA for review. See 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(1). EPA is aware Florida has adopted a 303(d) List for the waters in Group 2, but has not taken action to approve or disapprove the lists.

48. A state's failure to submit any 303(d) Lists to EPA, as required pursuant to section 303(d)(2) in the Clean Water Act, is in effect a *constructive submission* of no 303(d) Lists, and triggers EPA's non-discretionary duty to act.

49. FDEP's failure to submit the Group 2 lists to EPA for review must be treated as a constructive submission of *no* 303(d) List. EPA has a non-discretionary duty to review, and approve or disapprove, the empty lists.

50. In the alternative, FDEP's failure to submit the Group 2 lists to EPA must be treated as the constructive submission of those lists. EPA has a non-discretionary duty to review, and approve or disapprove, the Group 2 lists.

51. EPA has failed to perform its non-discretionary duty to review, and approve or disapprove, the lists.

REQUEST FOR RELIEF

WHEREFORE, the plaintiffs respectfully request that the Court grant the following relief:

1. For Count I, plaintiffs request that the court declare EPA has failed to perform its non-discretionary duty to review, and approve or disapprove, the Group 1 and 5 lists, and order EPA to fulfill its non-discretionary duty;

2. For Counts II, III, and IV, if the court finds that Florida's failure to submit the Group 2, 3, and 4 lists must be treated as the constructive submission of an *empty* list, plaintiffs request that the court declare that EPA has failed to perform its non-discretionary duty to review, and approve or disapprove, the empty lists, and order EPA to fulfill its non-discretionary duty;

3. In the alternative, if the court finds that Florida's refusal to submit the Group 2, 3, and 4 lists for review, in violation of the Clean Water Act, must be treated as the constructive submission of those lists, plaintiffs request that the court declare that EPA has failed to perform its non-discretionary duty to review, and approve or disapprove, the Group 2, 3, and 4 lists, and order EPA to fulfill its non-discretionary duties;

4. Award the costs of litigation to the plaintiffs, including the reasonable attorney fees and expert witness fees; and

5. Provide any other relief as the Court deems proper.

Dated: April 8, 2009

Respectfully Submitted,

 (JST)

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