

Citizen Suit Enforcement/Clean Water Act: Federal Court Addresses Challenge to U.S. Army Corps of Engineers Approval of Mitigation Bank Instrument



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

01/03/2024

A United States District Court (D. South Carolina) (“Court”) addressed in a December 27th Order and Opinion (“Order”) an issue arising out of a Clean Water Act citizen suit action challenging the United States Army Corps of Engineers’ and United States Environmental Protection Agency’s (“EPA”) approval of a mitigation bank instrument (“MBI”). See *Frederick Stuhr, et al. v. U.S. Army Corps of Engineers*, 2023 WL 8934549.

The Court considered whether the citizen suit Notice Letter provided adequate notice under the Clean Water Act.

Plaintiffs challenged the U.S. Army Corps of Engineers and United States Environmental Protection Agency approval of an MBI. An MBI is the legal document for the establishment, operation, and use of a mitigation bank.

A mitigation bank is a defined area where wetlands, streams, or riparian areas are restored, established, enhanced, and/or preserved for the purpose of offsetting unavoidable adverse environmental impacts elsewhere. Such offsets are necessary because the Corps and EPA have had in place for a number of years a no net loss of wetlands policy in the United States.

Plaintiffs brought two causes of action under the Administrative Procedures Act challenging the Corps’ approval. They also filed a Clean Water Act citizen suit action. The Order addresses the citizen suit action.

Section 505 of the Clean Water Act authorizes any person with standing to sue any person who is alleged to be in violation of certain Clean Water Act requirements. The United States District Courts have jurisdiction to enforce the Clean Water Act and apply appropriate civil penalties under Section 309 of the Clean Water Act. In other words, the Clean Water Act provides a supplementary enforcement mechanism that can be utilized by citizens in appropriate circumstances to bring an action alleging violation of certain Clean Water Act provisions.

The Clean Water citizen suit provision also allows actions against the Corps or EPA for failure to perform a nondiscretionary duty.

The Federal Defendants (Corps and EPA) moved to dismiss the Plaintiffs' cause of action under the Clean Water Act arguing that they failed to meet certain notice requirements.

Plaintiffs responded that their Notice Letter provided adequate notice under the Clean Water Act's requirements.

The Court notes that the Clean Water Act provides that no citizen suit:

. . . may be commenced . . . prior to 60 days after the Plaintiff has given notice of such action to the Administrator. 33 U.S.C. § 1365(b).

Further, such notice:

. . . shall be given in such manner as the Administrator shall prescribe by regulation.

The regulation requires that the Notice shall:

1. identify the provision of the Act which requires such act or creates such duty;
2. describe with reasonable specificity the action taken or not taken by the Administrator which is alleged to constitute a failure to perform such act or duty; and
3. state the full name, address and telephone number of the person giving the notice.

Cited by the Court is the Fourth Circuit Court of Appeals in *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 399-400 (4th Cir. 2011) which provides:

. . . The requirement of adequate notice does not mandate that citizen plaintiffs list every specific aspect or detail of every alleged violation. Instead, "[n]otice given by a citizen plaintiff under the Clean Water Act thus must provide the alleged violator with enough information to attempt to correct the violation and avert the citizen suit.

The Federal Defendants argued that the Court lacked subject matter jurisdiction because the Plaintiffs' Notice Letter focused on the approval of Point Farm's MBI. They argued that if the Corps' failure to perform a nondiscretionary duty under the Clean Water Act is the basis for the claim, then there was an obligation to identify this inaction to allow evaluation of the allegation so an attempt could be made to correct the purported violation.

The Court determines that, regardless, there is subject matter jurisdiction because adequate notice has been provided. It cites the Fourth Circuit Case for the proposition that:

. . . it is "quite clear that both the Corps and the EPA are responsible for the issuance of permits under the CWA and enforcement of their terms," such that citizens may "sue the Administrator and join the Corps when the Corps abdicates its responsibility to make reasoned wetlands determinations and the Administrator fails to exercise the duty of oversight imposed by section 1344(c)."

The Court finds that the Plaintiffs' Notice Letter identified the alleged flaws in the Corps' decision making and then filed suit. Cited in support was the Plaintiffs' allegation that the Corps erred by granting the MBI even though Point Farm does not own the salt marsh. Plaintiffs were noted to have referenced the Corps' "Guidelines for Preparing a Compensatory Mitigation Plan" which are stated to advise against granting a permit when the applicant does not have sufficient control over the land. Also cited is Plaintiffs' allegation that the Corps erred in granting the permit because there was no real threat to the salt marsh and, regardless, Point Farm failed to remove those threats.

The Court determines that the Notice Letter provided the reader the ability to determine that the Corps allegedly failed to make a reasoned decision and that EPA is also allegedly at fault because it concurred in the decision. The citations in the Notice Letter informed the reader both:

- Where the violations stem from
- Allow the reader to remedy them

The Court also rejects the argument that the failure to provide telephone numbers in the Notice was a fatal flaw. It again cites a Fourth Circuit decision warning against an overly technical application of regulatory requirements.

The Corps and EPA also argue that the plain language of the Clean Water Act citizen suit provision only authorizes suit against the Administrator of EPA as opposed to the Corps. The Court rejects this argument holding that the Fourth Circuit has held that the Clean Water Act citizen suit provision authorizes suit against the Corps.

The Corps and EPA's argument that the Plaintiffs failed to allege a nondiscretionary duty that the Corps was required to be performed is also rejected. Cited is Plaintiffs' allegation that the Corps erred by failing to consider the objections of sister agencies and the public contrary to 33 C.F.R. 332.8(b), (2), (4).

Finally, the Court rejects the Corps and EPA's argument that EPA's authority under Section 404(c) of the Clean Water Act is discretionary. As a result, the Plaintiffs argued that an action could not be maintained against EPA. The Fourth Circuit addressed and rejected this argument stating that the EPA Administrator may be sued if there is a failure to exercise the duty of oversight imposed by Section 1344(c).

The Court denies the Corps and EPA's Motion to Dismiss.

A copy of the Order can be downloaded [here](#).