Section 404/Clean Water Act Citizen Suit Action: Federal District Court Addresses Standing Issue

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

02/05/2021

A United States District Court ("Court") in a January 29th Order addressed a standing issue that arose in a Clean Water Act citizen suit action. See The Glynn Environmental Coalition, Inc., et al. v. Sea Island Acquisition, LLC, 2021 WL 313626.

The citizen suit action involved alleged Section 404 Clean Water Act violations.

Plaintiffs The Glynn Environmental Coalition, Inc. ("GEC") and Center for a Sustainable Coast, Inc. ("CSC"), along with Jane Fraser ("Fraser") (collectively "Plaintiffs") brought an Amended Complaint against Defendant Sea Island Acquisition, LLC ("Sea Island") alleging violations of Section 404 of the Clean Water Act.

Sea Island moved to dismiss the Amended Complaint for lack of standing.

In 2013 the United States Army Corps of Engineers ("Corps") authorized Sea Island to fill 0.49 acres of wetland on St. Simons Island, Georgia, pursuant to Nationwide Permit 39 ("NWP 39"). The Plaintiffs allege that Sea Island failed to construct a commercial structure on the wetland in violation of NWP 39. They contended that Sea Island never had plans to build a commercial structure and as a result was required to obtain an individual Section 401 and 404 permit to fill the wetland.

Plaintiffs argued that filling the wetland harmed surrounding vegetation and habitat along with the aesthetic and recreational uses of Dunbar Creek. Dunbar Creek is downstream of the wetland. They further alleged that the water quality of Dunbar Creek was diminished since the filling of the wetland.

Fraser is stated to be a member of both GEC and CSC. Further, Fraser owns an interest in real property that is in the immediate vicinity of the wetland. In addition she is described as enjoying recreation in and enjoys the aesthetics of the wetlands and marshes on St. Simons and Sea Island. Finally, she is indicated to be an active member of numerous conservation and environmental protection organizations and alleged she would have attended public meetings about the subject wetland if any had taken place. This allegation is referenced in support of the argument that Sea Island's obtaining an individual permit (as opposed to NWP 39) would have required a public notice and comment period.

The Court notes that to establish standing under Article III of the United States Constitution, the Plaintiffs have the burden to show:

1. [they have] suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged

> action of the defendant; and [(3)] it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Plaintiffs asserted that standing is proper because Fraser has standing to sue in her individual capacity and GEC and CSC have associational standing. Nevertheless, the Court notes that if Fraser has standing, it need not decide whether GEC and CSC have standing. As long as one party has standing, the other parties may remain in the suit without a standing injury.

The Court divides the Plaintiffs' alleged injuries into two categories:

- Environmental
- Procedural

As to the environmental injury, the Plaintiffs are stated to have alleged the importance of wetlands in terms of serving as natural barriers to filter pollutants, etc. However, no specific allegations that the fill of the wetland caused pollution in Dunbar Creek are found to have been cited. The Court states:

Plaintiffs have not alleged with specificity that the fill of 0.49 acres of Subject Wetland in fact caused an increase of pollution in Dunbar Creek or any property in its vicinity. The mere possibility of pollution is not enough.

The Court similarly rejects Fraser's statement that the filling of the wetland caused disturbance to habitats surrounding the wetland. It notes that there is not an allegation that there is any specific disturbance to Fraser's property. Also referenced is an absence of identification of specific harm to Dunbar Creek.

Fraser does state that she had derived aesthetic pleasure from the wetland and has noticed a decrease in natural vegetation and wildlife in its immediate area. She further stated that a significant difference in water quality has been observed. However, the Court agrees with Sea Island's argument that it is not explained specifically how alleged diminished water quality and habitats have infringed on Fraser's recreational or aesthetic pursuits.

The Court also rejects the Plaintiffs' argument that their situation is similar to the standing issue in *Sierra Club v. U.S. Army Corps of Engineers*, 935 F. Supp. 1556 (S.D. Ala. 1996). The organizational Plaintiffs had alleged that their members regularly use and enjoy the environment, waters, wetlands, air and lands of Alabama (including Dog River). The court in that case found standing. However, the Court in this case distinguishes it, noting that Fraser did not allege she recreated in the wetland prior to its fill.

The Court also distinguished Plaintiffs' citation to *Sierra Club v. Tenn. Valley Auth*., 430 F.3d 1337 (11th Cir. 2005) in which an organizational member had regularly seen plumes of smoke from a power plant as a bridge was crossed over the Tennessee River. It distinguished this decision because the organizational member also alleged that it was frightening to breathe the polluted air and had refrained from boating and hunting in the area because of the power plant emissions. The Court in this case states:

If merely driving by Dunbar Creek and alleging a change in its water clarity was enough to establish an injury-in-fact, then anyone driving past it could establish standing.

The alleged procedural injuries were then addressed. The Court stated to establish an injury-in-fact that is procedural in nature, a "plaintiff must demonstrate that the procedures in question are designed to protect some threatened concrete interest of his." Because the Court determined that the Plaintiffs had not suffered a concrete injury, it found that they therefore did not have standing to assert procedural injuries.

Sea Island's Motion to Dismiss was granted.

A copy of the Order can be downloaded here.