

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

AMERICAN CANOE ASSOCIATION, INC., )

Plaintiff, )

v. )

UNITED STATES ENVIRONMENTAL )  
PROTECTION AGENCY, et al. )

Defendants. )

---

RECEIVED  
FEB 12 12 42 PM '01  
H. MAYE  
U.S. DISTRICT  
COURT  
TA

civil No. 1:00CV02827

Judge Sullivan

FIRST AMENDED COMPLAINT

1. This suit arises out of the United States Environmental Protection Agency's deliberate, continuing shirking of its statutory obligations under the Clean Water and Administrative Procedure Acts. In March, 1998, EPA formally objected to a Clean Water Act discharge permit that the State of Florida had approved and was prepared to issue to a pulp and paper mill on the Fenholloway River.- EPA's objection soon triggered two separate, nondiscretionary EPA duties under the Clean Water Act. To this day, almost 3 years later, EPA has refused to fulfill either of these duties.

2. EPA's first non-discretionary duty is to hold a public hearing on its objections to the proposed permit: Despite the statutory command that EPA hold such a hearing - and EPA's own regulation requiring that the hearing be held "expeditiously" -- for almost 3 years EPA has steadfastly refused to obey the law.

3. EPA's second non-discretionary duty is to promulgate water quality standards for flow in the Fenholloway.River. Despite the statutory requirement that EPA "promptly" promulgate such standards, for almost 3 years EPA has refused to do so.

4. In addition to ignoring its mandatory duty to promulgate water quality standards for flow in the Fenholloway,, for almost three years EPA has refused to take any agency action on a formal petition from plaintiff American Canoe Association, Inc. ("ACA") which asked EPA to use its authority to establish both flow and other water quality standards for the river,

5. Despite these statutory mandates, EPA has buried its head in the sand and hoped this matter would just go away. But it has not, and EPA's dereliction of duty has resulted in enormous,, continuing environmental damage to the Fenholloway River,

#### PARTIES

6. The American Canoe Association, Inc. is a non-profit membership organization dedicated to the preservation and protection of America's natural areas, focusing primarily on rivers, streams, lakes, coastal waterways and their surrounding environments. Founded in 1880, ACA is incorporated in New York and has its headquarters in Springfield, Virginia. ACA has approximately 45,000 members nationwide and hundreds of members in Florida.

7. EPA is the United States agency primarily responsible for the implementation of the Clean Water Act, including the requirements that are the subjects of this lawsuit.

8. Christine Todd Whitman is the Administrator of the EPA. She is charged with the supervision and management of all EPA decisions and actions, including those at issue in this action. Ms. Whitman is being sued in her official capacity only.

9. A. Stanley Meiburg is the Acting Regional Administrator of EPA Region IV, which includes the State of Florida. Mr. Meiburg is charged with the oversight of EPA

decisions and actions within Region IV, including those at issue in this action. Mr. Meiburg is being sued in his official capacity only.

### JURISDICTION AND VENUE

10. This court has subject matter jurisdiction over the claims in this complaint pursuant to 28 U.S.C. § 1331 and 33 U.S.C. § 1365(a). The relief requested is authorized pursuant to 5 U.S.C. § 706, 28 U.S.C. § 2201, 28 U.S.C. § 2202, and 33 U.S.C. § 1365(a). As required by 33 U.S.C. § 1365, on November 16, 2000, ACA gave notice by certified mail, return receipt requested, to the Administrator of EPA and the Attorney General of the United States of ACA's intent to bring Claims I, VI, VII and VIII.

11. Venue is properly laid in this district pursuant to 28 U.S.C. § 1391 (e), as a substantial part of the events or omissions giving rise to the claim occurred here.

### FACTS

#### The Buckeye Mill and the Fenholloway River

12. Buckeye Florida LLP ("Buckeye") operates a pulp and paper mill in Perry, Florida (the "Buckeye Mill"). Pursuant to National Pollution Discharge Elimination System ("NPDES") Permit No. FLO000876, ("the Permit"), Buckeye discharges approximately 58 million gallons a day of industrial wastewater into the Fenholloway River. Because the Buckeye Mill draws its process water from well fields that would otherwise feed into the Fenholloway, for many miles downstream of the Mill Buckeye's effluent frequently makes up 100% of the River's flow.

13. The Permit was issued on June 25, 1984, and expired on June 30, 1989. At the time the Permit was issued, the Fenholloway River was classified by the Florida

Department of Environmental Protection (“FDEP”) as a Class V waterway (for “Navigation, Industrial and Utility” uses), the least protective classification under Florida law. Because the Fenholloway was so classified, the Permit contained correspondingly lenient limits -- for the most part none at all -- on the wide variety of pollutants, including toxic%, that the Buckeye Mill discharges. In fact, the few limits contained in the 1984 permit were apparently based on waivers of even the de *minimis* Class V water quality standards.’

### The River in a Pipe

14. Even though FDEP designated the Fenholloway a Class V waterbody when the Permit was issued in 1984, change was coming. In 1987, EPA formally disapproved the Class V designation on the grounds that it was not consistent with the requirements of the Clean Water Act. However, it was not until a decade later -- December 31, 1997 -- that FDEP finally upgraded the Fenholloway from a Class V waterbody to a Class III one. Florida law defines Class III waters as fit for “Recreation, Propagation and Maintenance of a Healthy, Well-balanced Population of Fish and Wildlife”. This designation is generally known as “Fishable/Swimmable”, and carries correspondingly more stringent water quality standards than Class V waters.

15. Upgrading the Fenholloway’s designation from Class V to Class III had major impacts on Buckeye, because Buckeye needed to reapply for a new NPDES permit, and its new permit would have to take account of these stricter water quality

---

‘EPA issued a subsequent NPDES permit to Buckeye in 1992, but for a variety of reasons EPA, FDEP and Buckeye contend that none of the effluent limits in the 1992 permit ever became effective.

standards. This was a problem for Buckeye, as it would have to make significant and expensive changes in its manufacturing or wastewater treatment processes, in order for its effluent to meet the Class III water quality standards.

16. Buckeye rose to the challenge and, on May 25, 1995, submitted a permit renewal application, breath-taking in its novelty. Instead of cleaning up its effluent to meet the Class III standards, Buckeye proposed building a 15-mile pipeline to carry the effluent downstream and dump it in the Fenholloway estuary. Even more remarkable, dumping the pollution downstream, rather than cleaning it up was only one of the proposal's major-environmental problems. Because the Mill sucks up the groundwater that would otherwise make up the River's flow, by piping that water downstream after Buckeye finished with it -- instead of discharging it back into the riverbed -- the new permit would literally eliminate several miles of the Fenholloway River for significant periods of time. In essence, Buckeye's River-in-a-Pipe plan was an attempt to reclassify the Fenholloway's designated uses once again, this time from Fishable-Swimmable to "Hikeable-Bikeable."

17. Most remarkable of all, on October 23, 1997, FDEP approved the River-in-a-Pipe scheme (the "Proposed Permit").

#### EPA's Objections to the Proposed Permit and the Requests for Public Hearing

18. Pursuant to Section 402(d)(2) of the Clean Water Act, on March 26, 1998, EPA formally objected to the Proposed Permit. EPA objected to the Proposed Permit's failure to adequately address numerous parameters, including dioxin, nutrients, dissolved oxygen and color, as well as to various procedural irregularities.

19. In its objection letter, EPA also told FDEP to “reconsider whether allowing a diversion of all or a significant portion of the current flow in the Fenholloway River will still allow the River to meet the designated uses of the new Class III standard (Fishable/Swimmable) applicable to the water body.” Thus EPA recognized that by approving the River in a Pipe scheme, FDEP had de *facto* changed the designated uses -- and attendant water quality standards -- of the Fenholloway from Fishable/Swimmable to some lesser classification; EPA’s objection thus constituted a determination, pursuant to Section 303(c)(3) of the Act, that these new water quality standards were not consistent with the requirements of the Act. Following this determination, Section 303(c)(3) gave Florida 90 days to submit revised water quality standards to EPA. Because Florida did not do so, Section 303(c)(3) and (c)(4) thereafter required EPA to “promptly prepare and publish proposed regulations” setting forth the appropriate revised or new water quality standards for the Fenholloway River.

20. Pursuant to Section 402(d)(4) of the Act, on June 23, 1998, FDEP requested that EPA hold a public hearing on EPA’s objections (the “Objections Hearing”). On or about the same date, Buckeye also requested that EPA hold a hearing on its objections.

ACA’s Standards Petition.

21. One week later, on June 30, 1998, ACA and other concerned parties petitioned EPA to use its discretionary authority under Section 303(c)(4)(8) of the Act to establish necessary water quality standards for the Fenholloway (the “Standards Petition”). Specifically, ACA asked that EPA propose and promulgate regulations

setting forth revised water quality standards for dissolved oxygen and color for the Fenholloway River, Fenholloway Estuary, and adjacent coastal waters of Taylor County, Florida, as well as a flow standard for the Fenholloway River. Alternatively, to the extent EPA's objections to the Proposed Permit were-not a determination that such revised standards were necessary to meet the requirements of the Clean Water Act, petitioners asked EPA to make such a determination.

22. Ironically, because Buckeye would continue to discharge under the grossly inadequate 1984 Permit until such time as this matter was resolved, ACA asked EPA to expedite agency action on the Standards Petition. By letter dated July 31, 1998, EPA acknowledged receipt of the Standards Petition.

EPA's Failures to Hold the Objections Hearing, Promulgate Water Quality Standards, and Take Action on the Standards Petition

23. Now, almost three years after the State of Florida asked EPA to hold the statutorily required Objections Hearing, EPA has failed to do so. Similarly, almost three years after Florida failed to submit revised water quality standards for the Fenholloway, EPA has failed to promulgate its own standards. Finally, almost three years after ACA formally petitioned EPA to use its statutory authority to establish necessary water quality standards for the Fenholloway, EPA has failed to take any action on the Standards Petition.

24. ACA, its members, and the general public have been and will continue to be severely injured by EPA's dereliction. FDEP and EPA have taken the position that the Buckeye Mill is entitled to continue discharging under the 1984 Permit until such time

as there is a new NPDES permit in place. Because there will be no new permit until after EPA holds the Objections Hearing, takes final agency action on the Standards Petition, and/or establishes a water quality standard for flow, Buckeye has and will continue indefinitely to discharge under the 1984 Permit, a permit utterly inadequate for meeting the Fenholloway's current water quality standards. ACA members routinely paddle other local rivers, such as the Chipola, the Aucilla, the Wacissa, the Sopchoppy, the Econfinna, the Wakulla, the St. Marks and the Suwanee, and would like to paddle the Fenholloway. However, they have been and continue to be prevented from doing so because of pollution discharged by Buckeye under the 1984 Permit. In addition, they face future injury from the River-in-a-Pipe scheme, which would drain the Fenholloway while dumping Buckeye's effluent in the Fenholloway estuary.

25. ACA believes that without the injunctive relief sought herein, EPA will not (a) hold the Objections Hearing, (b) take final agency action on the Standards Petition, and (c) promulgate water quality standards for the Fenholloway River.

#### CLAIM 1

#### **EPA Has Violated its Non-discretionary Duty to Hold the Objections Hearing**

26. ACA repeats and realleges the allegations of paragraphs 1 through 25 as if fully set forth herein.

27. Section 402(d)(4) of the Act, 33 USC §1342(d)(4) provides that if EPA objects to a proposed NPDES permit, "on request of the State, a public hearing shall be held by the Administrator on such objection." Following Florida's request that EPA hold the Objections Hearing, EPA's refusal to do so constitutes a violation of non-

'discretionary duty imposed by Section 402(d)(4).

### CLAIM II

#### EPA's Refusal to Hold the Objections Hearing is Arbitrary and Capricious

28. ACA repeats and realleges the allegations of paragraphs 1 through 27 as if fully set forth herein.

29. The Administrative Procedure Act, 5 U.S.C. §706(2)(A) and (C), requires that a reviewing court shall set aside an agency action if, *inter alia*, the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." "[A]gency action" subject to APA judicial review includes an agency's "failure to act." 5 U.S.C. §551(13).

30. Following the Florida and Buckeye requests that EPA hold the Objections Hearing, EPA's refusal to do so constitutes agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

### CLAIM III

#### EPA's Refusal to Hold the Objections Hearing is Agency Action Unlawfully Withheld or Unreasonably Delayed.

31. ACA repeats and realleges the allegations of paragraphs 1 through 30 as if fully set forth herein.

32. Under the APA, a court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). EPA's failure to hold the Objections Hearing, let alone in the "expeditious manner" required by 40 CFR 123.44(f),

constitutes the unlawful withholding and unreasonable delay of agency action.

**CLAIM IV**

**EPA's Refusal to Act on the Standards Petition is Arbitrary and Capricious**

33. ACA repeats and realleges the allegations of paragraphs 1 through 32 as if fully set forth herein

34. EPA's refusal to take any final agency action on the Standards Petition constitutes agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right under 5 U.S.C. § 706(2)(A) and (C).

**CLAIM V**

**EPA's Refusal to Act on the Standards Petition is Agency Action Unlawfully Withheld or Unreasonably Delayed.**

35. ACA repeats and realleges the allegations of paragraphs 1 through 34 as if fully set forth herein.

36. EPA's refusal to take any final agency action on the Standards Petition constitutes the unlawful withholding and unreasonable delay of agency action under 5 U.S.C. § 706(1).

**CLAIM VI**

**EPA Has Violated its Mandatory Duty to Promulgate a Water Quality Standard for Flow in the Fenholloway River**

37. ACA repeats and realleges the allegations of paragraphs 1 through 36 as if fully set forth herein

38. Because FDEP's approval of the Proposed Permit constituted a *de facto* change in the designated uses of the Fenholloway River, and thus a corresponding

change in water quality standards, EPA's objection to the Proposed Permit constituted a determination, pursuant to Section 303(c)(3), 33 U.S.C. 1313(c)(3), that these new water quality standards were not consistent with the requirements of the Act. Following this determination, Section 303(c)(3) gives Florida 90 days to submit revised water quality standards to EPA. Because Florida did not do so, Section 303(c)(3) and (c)(4) thereafter required EPA to "promptly prepare and publish proposed regulations" setting forth the appropriate revised or **new** water quality standards for the Fenholloway River.

39. Almost three years have elapsed since EPA was required to promptly prepare **and** publish such standards, and EPA has not done so. Thus EPA has violated its non-discretionary duty to promptly prepare and publish a water quality standard for flow in the Fenholloway River

#### **CLAIM VII**

#### **Alternatively, EPA Has Failed to Fulfill its Non-Discretionary Duty to Review Changes to Water Quality Standards**

40. ACA repeats and realleges the allegations of paragraphs 1 through 39 as if fully set forth herein.

41. **Alternatively**, if EPA's March 26, 1998 permit objections do not constitute **review** and determination of state water quality standards under Section 303(c)(3), then EPA has failed to fulfill its non-discretionary duty under Section 303(c)(3) to review FDEP's approval of the Proposed Permit as a revised water quality standard and determine whether the change was consistent with the requirements of the Act.

#### **CLAIM VIII**

#### **Alternatively, EPA Has Failed to Fulfill its Non-Discretionary Duty to Promulgate Revised or New Water Quality Standards**

42. ACA repeats and realleges the allegations of paragraphs 1 through 41 as if fully set forth herein.

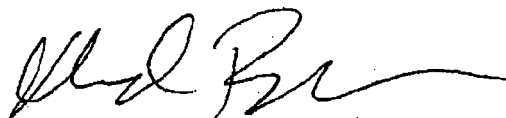
43. Alternatively, if FDEP's approval of the Proposed Permit does not constitute approval of a new or revised water quality standard under Section 303(c), EPA's permit objection nonetheless constitutes "a determination that a revised or new standard is necessary" to meet the requirements of the Act, pursuant to Section 303(c)(4)(B) of the Act, and thus EPA has failed to fulfill its non-discretionary duty to promptly prepare and publish a water quality standard for flow in the Fenholloway River.

RELIEF REQUESTED

WHEREFORE, ACA requests the following relief:

- A. An order requiring EPA to hold the required Objections Hearing immediately;
- B. An order requiring EPA to take final agency action on the Standards Petition immediately;
- C. An order requiring EPA to immediately prepare and publish proposed regulations establishing a water quality standard or flow in the Fenholloway River;
- D. An order requiring EPA to pay ACA's costs and expenses, including attorneys fees; and
- E. Such other relief as the Court may deem just and proper.

Respectfully submitted,



DAVID BOOKBINDER  
DC Bar No. 455525

American Canoe Association, Inc.  
7432 Alban Station Boulevard  
Suite B-232  
Springfield, VA 22150-2311  
(703) 451-0141

Attorney for Plaintiff

February 9, 2001