IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED
MAY 14 2003
ROBERT D. DENNIS, CLERK
U.S. DIST. COURT, WESTERN DIST. OF OKLA.
BY ______ DEPUTY

PAPER, ALLIED-INDUSTRIAL, CHEMICAL AND ENERGY WORKERS INTERNATIONAL UNION ("PACE") AND THE PONCA TRIBE ("TRIBE"),

Plaintiffs,

v.

CONTINENTAL CARBON COMPANY,

Defendant.

CIV-02-1677-R

DOCKETED

ORDER

Before the Court is the motion of Defendant Continental Carbon Company to dismiss Plaintiffs' Complaint pursuant to Rule 12(b)(1) and (6), F.R.Civ.P. In support of its motion, Defendant asserts that the Court lacks jurisdiction over Plaintiffs' citizen suit under the Clean Water Act, 33 U.S.C. § 1251 *et seq*., specifically 33 U.S.C. § 1365(a), because such suit is barred by 33 U.S.C. § 1319(g)(6)(A)(ii). This is so, Defendant asserts, because the Oklahoma Department of Environmental Quality has already commenced and is diligently prosecuting an action under Oklahoma law comparable to the Clean Water Act ("CWA"). Additionally, Defendant asserts that Plaintiffs lack standing to maintain a citizen suit against Defendant because Plaintiffs have failed to show that their members have suffered injuries in fact fairly traceable to Defendant's conduct.

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A citizen suit is barred under § 1319(g)(6)(A)(ii) when three requirements are satisfied: 1) the state must have "commenced" an enforcement procedure against the polluter; 2) the state must be "diligently prosecuting" the enforcement proceedings; and 3) the state's statutory enforcement scheme or the state statute under which the state is proceeding must be comparable to the federal scheme in 33 U.S.C. § 1319(g). *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376, 379 (8th Cir. 1994), *cert. denied*, 513 U.S. 1147, 115 S.Ct. 1094, 130 L.Ed.2d 1062 (1995). *See McAbee v. Fort Payne*, 318 F.3d 1248, 1250 & n. 8 (11th Cir. 2003).

Plaintiffs dispute that their third claim – based upon Defendant's alleged failure to monitor and report discharges – has been the subject of a state enforcement action. Additionally, they assert that the state law under which the Oklahoma Department of Environmental Quality has commenced and is prosecuting enforcement proceedings is not "comparable" to subsection (g) of Section 1319 because its "public participation" provisions and judicial review provisions are not substantially similar or sufficiently comparable to those in § 1319(g), *citing McAbee v. Fort Payne*, 318 F.3d at 1254-56 and *Jones v. City of Lakeland, Tennessee*, 224 F.3d 518, 524 (6th Cir. 2000). Finally, they assert that their claims for declaratory and injunctive relief are in no event barred because the plain text of Section 1319(g)(6)(A)(ii) bars only a citizen suit for a civil penalty.

On February 12, 2002, the ODEQ issued a Notice of Violation ("NOV") No. I-36000130-02-1 to Defendant for alleged violations of ODEQ rules, including discharges into

the waters of the state without a permit, pursuant to Okla. Stat. tit. 27A, § 2-3-502 and the Oklahoma Administrative Code. *See* Exhibit "A" to Defendant's Brief. The ODEQ and Defendant entered into a Consent Order, Case No. 02-116, on May 6, 2002, to resolve issues of alleged noncompliance under ODEQ rules. See Exhibit "B" to Defendant's Brief. The ODEQ and Defendant entered into another Consent Order on June 20, 2002 to resolve issues regarding depth to groundwater below Defendant's lagoons. *See* Exhibit "C" to Defendant' Brief. On April 11, the ODEQ and Defendant entered into an Addendum to the Consent Order, Case No. 02-116, in which they agreed to resolve issues relating to previous permit applications and depth to groundwater in the upcoming permit renewal process. *See* Exhibit "D". The Addendum references Okla. Stat. tit. 27A, § 2-6-205(A) and several rules of the Oklahoma Administrative Code. *See id.* at p. 3.

> The comparability requirement may be satisfied so long as the state law contains comparable penalty provisions which the state is authorized to enforce, has the same overall enforcement goals as the federal CWA, provides interested citizens a meaningful opportunity to participate at significant stages of the decision-making process, and adequately safeguards their substantive interests.
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> *Arkansas Wildlife Federation*, 29 F.3d at 381.

Defendant asserts that Oklahoma's statutory scheme pursuant to which the ODEQ acted meets these requirements. The Court agrees with Defendant that Oklahoma in its Oklahoma Water Quality Code, Okla. Stat. tit. 27A, § 2-6-101 *et seq.* has the same overall enforcement goals as the federal CWA. Under Okla. Stat. tit. 27A, § 2-3-502, pursuant to which the

ODEQ issued the NOV, civil penalties of $10,000 per violation per day, with no cap, may be assessed. Under Section 2-6-206, cited in the Consent Order (Exhibit "C" to Defendant's Brief at p. 4), the ODEQ may assess a civil penalty of $10,000 per violation per day, with a $125,000 cap. These civil penalty provisions are comparable to those found in the Clean Water Act, which provides for a class I civil penalty of $10,000 per violation with a cap of $25,000 and a class II civil penalty of $10,000 per day with a cap of $125,000. 33 U.S.C. § 1319(g)(2)(A) & (B).

The "public participation" provisions under the CWA provide for public notice before the assessment of a civil penalty, 33 U.S.C. § 1319(g)(4)(A); that persons who comment on proposed assessment of a penalty get notice of any hearing and of an order assessing such penalty, 33 U.S.C. § 1319(g)(4)(B), and a "reasonable opportunity" to be heard and present evidence at any hearing, id.; and that persons who commented on a proposed assessment of a civil penalty may petition for a penalty hearing, if a hearing is not held, 33 U.S.C. § 1319(g)(4)(C).

Under Okla. Stat. tit. 27A, § 2-6-206, no public notice is required at the time of the NOV, the penalty assessment, hearing or order and there is no provision for public comment at any stage of the process. *See* Okla. Stat. tit. 27A, § 2-6-206. However, the section does provide as follows:

> Any person having any interest connected with the geographic area or waters or water system affected, including but not limited to any aesthetic, recreational, health, environmental, pecuniary or property interest, which interest is or may be adversely affected, shall have the right to intervene as a

> party in any administrative proceeding before the Department, or in any civil proceeding, relating to violations of the Oklahoma Pollutant Discharge Elimination System Act or rules, permits or orders issued hereunder.
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> Okla. Stat. tit. 27A, § 2-6-206(B).

The right to intervene provided by the above-quoted subsection is, however, of limited utility without any provision for public notice of administrative proceedings.

Section 2-3-503 likewise makes no provision for public notice at the time of any NOV, penalty assessment, hearing or order. That section makes no provision for public comment at any stage and no provision is made for public intervention or for members of the public to request a penalty hearing.

Obviously, for a state law to have comparable "public participation" provisions to that of the Clean Water Act, it need not have public participation provisions identical to those in the CWA; it need only have enough like characteristics or qualities to make comparison appropriate. *See* Webster's Third New International Dictionary 461 (1967) (defining comparable at 1a). Under that standard, the Court finds that the "public participation" provisions in Okla. Stat. tit. 27A, § 2-6-206 and in Okla. Stat. tit. 27A, § 2-3-503 are not comparable to those in 33 U.S.C. § 1319(g). Any doubt concerning whether Oklahoma's "public participation" provisions are comparable to those in Section 1319(g) may be resolved by reference to the legislative history of the 1987 amendments to the Clean Water Act. Senator John Chafee, the principal author and sponsor of those amendments, said as follows:

> [T]he limitation of 309(g) [codified at 33 U.S.C. § 1319(g)] applies only where a State is proceeding under a State law that is comparable to Section 309(g).

> For example, in order to be comparable, a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g); it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements of section 309(g).
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> 133 Cong. Rec. S737 (daily ed., Jan. 14, 1987) (quoted in *McAbee v. Fort Payne*, 318 F.3d at 1256).

Because the state law(s) under which the ODEQ is prosecuting an action against Defendant is not comparable to 33 U.S.C. § 1319(g), the bar to this citizen's suit under Section 1319(g)(6)(A)(ii) does not apply and the Court is not deprived of subject matter jurisdiction over this suit by virtue of that section. It is, therefore, unnecessary for the Court to reach Plaintiffs' other arguments.

Simultaneously with their response to Defendant's motion to dismiss Plaintiffs filed affidavits of the Chairman of Continental Carbon's bargaining unit for the local chapter of Plaintiff Union and of the Director of Environmental Management for Plaintiff Tribe and a First Amended Complaint. The Court treats Defendant's motion to dismiss for lack of standing as directed to that amended complaint.

An association has standing to bring suit on behalf of its members if a) its members would have standing to sue in their own right; b) the interests it seeks to protect are germane to the organization's purpose; and c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *American Forest & Paper Association v. United States Environmental Protection Agency*, 154 F.3d 1155, 1158-9 (10th

Cir. 1998), *citing United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 553, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996). "To meet the constitutional minimum for standing, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000) (*en banc*). Thus, to satisfy the first element of associational standing, this means that Plaintiffs must each allege or show that one of its members 1) has suffered an "injury in fact," i.e. an invasion of a judicially cognizable interest which is a) concrete and particularized and b) actual or imminent, not conjectural or hypothetical; 2) that there is a causal connection between the injury and the conduct complained of, that is, the injury must be fairly traceable to the challenged action of the Defendant and not the result of independent action of some third party not before the court; and 3) that it is likely and not merely speculative that the injury will be redressed by a favorable decision. *American Forest & Paper Association v. United States Environmental Protection Agency*, 154 F.3d at 1158, quoting *Bennett v. Spear*, 520 U.S. 154, 117 S.Ct. 1154, 1163, 137 L.Ed.2d 281 (1997). Each Plaintiff must also allege or show that its member also has standing to bring suit under the Clean Water Act. However standing under the Clean Water Act reaches the outer limits of constitutional standing. *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d at 155, citing *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 16, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981). The Clean Water Act

confers standing on "any person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). This language confers standing on a "broad category of potential plaintiffs" who "can claim some sort of injury" whether it is actual or threatened, economic or noneconomic. *Friends of the Earth, Inc.*, 204 F.3d at 155, quoting *National Sea Clammers*, 453 U.S. at 16-17, 101 S.Ct. 2615, 69 L.Ed.2d 435. Accordingly, if members of Plaintiff organizations meet the constitutional requirements for standing, they necessarily will meet the statutory requirement as well. *Id.*

Defendant asserts that Plaintiffs have failed to allege or show that one or more of their members have suffered an "injury in fact" and that the injury is "fairly traceable" to Defendant. Any deficiencies in this regard in Plaintiffs' original Complaint have now been cured. The United States Supreme Court has said that "environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreation values of the area will be lessened by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 183, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). In *Friends of the Earth*, members of the plaintiff organization had standing to sue when they made specific allegations as to their reluctance to fish, hike, picnic, bird watch, wade or walk near the allegedly polluted water. Plaintiffs have met that pleading standard for their members. Additionally, Plaintiff Tribe has alleged other injuries in fact that are potentially economic injuries – that members are reluctant to fish in and eat fish from the Arkansas River because of the increase in pollution, have

reduced their consumption of fish and have had to obtain other sources of food, First Amended Complaint at ¶ 8A; that members who pick mushrooms along the riverbanks concerned with the increased pollution have had to reduce their dependence on mushrooms as a source of food, *id.* at ¶ 8B; and that members who have relied on shallow water wells for drinking and other purposes, concerned about contamination of ground water, have had to spend money to obtain alternative sources of drinking water. *Id.* at ¶ 8D. Plaintiffs' allegations are supported by the affidavits filed with Plaintiffs' Response to Defendant's Motion to Dismiss.

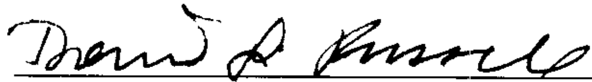
Defendant asserts that Plaintiffs have failed to show that pollutants allegedly discharged by Defendant "causes or contributes to the kinds of injuries alleged by the plaintiffs," Defendant's Brief at p. 21, quoting *Natural Resource Defense Council, Inc. v. Watkins*, 954 F.2d 974, 980 (4th Cir. 1992) and that Plaintiffs "have not alleged that their injury is a direct result of Defendant's conduct." *Id.* Defendant states that "[w]ithout a substantial allegation that discharges from Continental Carbon's plant actually reach the Arkansas River through some actual physical connection or pathway, Plaintiffs have failed to satisfy the 'fairly traceable' prong." *Id.* at p. 22.

The Plaintiffs' allegations and reasonable inferences therefrom satisfy the "fairly traceable" prong of standing. Plaintiffs allege that Defendant discharges pollutants into retention lagoons bottomed in close proximity to groundwater and that pollutants in these lagoons, which are near the Arkansas river, reach the Arkansas River through groundwater

drainage into the river and rain events. Additionally, Plaintiffs allege that Defendant has discharged and is discharging pollutants from the lagoons to the waters of the United States, including to an area which discharges to the Arkansas River. *See* First Amended Complaint at ¶ 13.

In accordance with the foregoing, Defendant's motion to dismiss Plaintiffs' First Amended Complaint is DENIED.

IT IS SO ORDERED this 14th day of May, 2003.



DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE