UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE FUND FOR ANIMALS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civ. No. 03-677 (RMU)**
	)	
DALE HALL, et al.,	)	
	)	
Defendants,	)	
	)	
THE U.S. SPORTSMEN'S ALLIANCE FOUNDATION, et al.,	)	
	)	
Defendant-Intervenors.	)	
	)	

PLAINTIFFS' MOTION FOR LEAVE TO SUPPLEMENT THE COMPLAINT AND MEMORANDUM IN SUPPORT THEREOF

Pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, Plaintiffs seek leave to file a Supplemental Complaint (attached as Exhibit 1) in this action for the sole purpose of challenging three additional final regulations issued by the U.S. Fish and Wildlife Service ("FWS") that, like the six rules at issue in this lawsuit, also expand hunting on National Wildlife Refuges throughout the country. See 68 Fed. Reg. 57,308 (October 2, 2003); 69 Fed. Reg. 54,350 (Sept. 8, 2004); 70 Fed. Reg. 54146 (Sept. 13, 2005). All three of the regulations were issued while this litigation was pending and suffer from the same lack of analysis of cumulative impacts that is mandated by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq., as the rules already under review in this case.

Indeed, because these three additional rules were also promulgated without the mandatory consideration of the cumulative impacts to migratory birds, threatened and endangered species, and other sensitive Refuge resources under NEPA, the FWS decided to include these rules in the

agency's "new" NEPA process that was completed at the end of May 2007. See Defs.' Supplemental Brief Regarding Further Judicial Action at 5 (Docket No. 66) (hereafter "Defs. Supp. Br.").

Accordingly, because the gravamen of Plaintiffs' claim in this case is that the FWS has never adequately addressed the cumulative impacts of expanding hunting at National Wildlife Refuges throughout the country, the FWS's new rules should be included in this case since the "Environmental Assessments for these [new] openings or expansions are not materially different from those the Court adjudged to be inadequate." Defs. Supp. Br. at 5 (Docket No. 66). Moreover, granting Plaintiffs leave to file a supplement complaint will not substantially delay this case. As reflected in the parties' Joint Motion to Stay the Briefing Schedule, the FWS has represented that it needs until at least September 30, 2007 to produce the Administrative Record for the agency's post-hoc NEPA process that concluded at the end of May 2007. Adding whatever additional records are necessary for review of the additional FWS regulations should not take considerably longer, and, in any event, Defendants are certainly not prejudiced by any short delay that supplementing the complaint might cause.

Plaintiffs' counsel has consulted with Federal Defendants' counsel, who represents that Federal Defendants oppose this motion, and Defendant-Intervenors' counsel, who represents that intervenors will take a position on this motion once it is filed.

BACKGROUND

Plaintiffs' original Complaint challenged six regulations issued by the FWS that expand hunting at over 30 National Wildlife Refuges throughout the country. Plaintiffs claimed that the FWS violated NEPA in issuing the regulations without adequately reviewing the synergistic

cumulative impacts of the vast expansion of hunting on Refuges to sensitive resources at Refuges in particular regions and migratory bird flyways, or the overall impacts to the Refuge System as a whole. On August 31, 2006, this Court granted Plaintiffs' motion for summary judgment, finding that the FWS violated NEPA by failing to "consider the cumulative impacts of increased hunting." The Fund for Animals v. Hall, 448 F. Supp. 2d 127, 129 (D.D.C. 2006).

In response to the Court's decision, and without withdrawing or suspending the rules, the FWS undertook a new, post-hoc NEPA process that concluded in May 2007. See Defs.' Notice of Filing (Docket No. 74). Federal Defendants contend that this NEPA process fulfills its NEPA duties for the six rules included in Plaintiffs' original complaint, as well as the three additional rules issued since this case was filed. See Defs.' Notice of Filing (Docket No. 74) (Federal Defendants notice of filing "documents evidencing [the FWS's] compliance with [NEPA]"); see also Defs. Supp. Br. at 5 (Docket No. 66). It is Plaintiffs' position that this new NEPA process once again fails "to demonstrate that the FWS has analyzed the cumulative impacts of its decisions to allow various kinds of hunting at over 30 National Wildlife Refuges throughout the country," Plfs.' Response to Federal Defs.' Notices to the Court, at 1 (Docket No. 76) and that, in any event, pursuant to established administrative law, the FWS's post-hoc NEPA process is irrelevant to the legality of the rules that were all adopted by the agency prior to the new NEPA process. In June, 2007 the Court ordered the parties to file renewed motions for summary judgment on Plaintiffs' original claim. See Minute Order (June 28, 2007).

Since this lawsuit was filed in March of 2003, the FWS has issued three additional rules expanding hunting on approximately 29 Wildlife Refuges, 26 of which are not already at issue in

the lawsuit.[1] Recognizing that the additional rules suffer from the same defects as those at issue in the case, the FWS included them in its new NEPA process explaining that "the Environmental Assessments for these openings or expansions are not materially different from those the Court adjudged to be inadequate due to an insufficient cumulative impacts analysis." Defs. Supp. Br. at 5 (Docket No. 66); id. (explaining that the agency decided to "conduct additional NEPA on the openings or expansions reflected in the 2003, 2004 and 2005 rules promulgated subsequent to the filing of plaintiffs' Complaint"). Accordingly, Plaintiffs sought Defendants' consent to supplement the complaint to include these three rules issued by the FWS since the lawsuit was filed. Federal Defendants opposed this modest request.

ARGUMENT

As the Court of Appeals has explained, a supplemental complaint "sets forth 'transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented.'" United States v. Hicks, 283 F.3d 380, 385 (D.C. Cir. 2002) (quoting Fed. R. Civ. P. 15(d)). Where such events have transpired, "Rule 15(d) is used to set forth new facts that update the original pleading or provide the basis for additional relief." Id. at 386 (other citations omitted). Such supplemental pleadings enable courts to award complete relief in one action by

[1] The three additional rules and the Refuges where hunting was expanded are: 68 Fed. Reg. 57,308 (October 2, 2003) (opening the Wapanocca, Grand Cote, Northern Tallgrass Prairie, Boyer Chute, DeSoto, Big Branch Marsh, and North Platte Refuges to one or more kinds of hunting); 69 Fed. Reg. 54,350 (Sept. 8, 2004) (opening the Waccamaw, Crescent Lake, Mountain Longleaf, Red River, Trinity Rivers, Cross Creeks, Tennessee, Big Oaks, Big Branch Marsh, and Savannah Refuges to one or more kinds of hunting); 70 Fed. Reg. 54146 (Sept. 13, 2005) (opening the Assabet River, Great Meadows, Moosehorn, Oxbow, Silvio O. Conte, Wertheim, Cahaba River, Julia Butler Hansen, Stones Lakes, Glacial Ridge, Squaw Creek, Sacramento River, and Stewart B. McKinney Refuges to one or more kinds of hunting). The Julia Butler Hansen, Big Oaks, and Trinity Rivers Refuges are already a part of this lawsuit, and the Big Branch Marsh Refuge was affected by both the 2003 and 2004 rules.

avoiding additional costs, delay, and the waste of judicial resources. See New Amsterdam Cas. Co. v. Waller, 323 F.2d 20, 28-29 (4th Cir. 1963).

Motions to supplement pleadings "are to be 'freely granted when doing so will promote the economic and speedy disposition of the entire controversy between the parties, will not cause undue delay or trial inconvenience, and will not prejudice the rights of any of the other parties to the action.'" Hall v. C.I.A., 437 F.3d 94, 101 (D.C. Cir. 2006) (quoting Wright et al., Federal Practice and Procedure, § 1504, at 186-87); Banks v. York, 448 F. Supp. 2d 213, 214 (D.D.C. 2006); see also Health Ins. Ass'n of America v. Goddard Claussen Porter Novelli, 213 F.R.D. 63, 66 (D.D.C. 2003) ("the court should freely grant a party's request to file a supplemental pleading 'when the supplemental facts connect it to the original pleading'") (internal citations omitted). Under Rule 15, the burden is generally on the non-moving party to persuade the court "to deny" the motion. See Dove v. Washington Metro. Area Transit Auth., 221 F.R.D. 246, 247 (D.D.C. 2004); Nurriddin v. Goldin, 382 F. Supp. 2d 79, 88 (D.D.C. 2005).

Here, permitting Plaintiffs to supplement their complaint to challenge the three additional rules issued by the FWS that expand hunting throughout the Refuge System will aid in the speedy and efficient resolution of the controversy between the parties over the need for adequate analysis of the cumulative impacts of such rules. Indeed, particularly in light of Federal Defendants admission that "the Environmental Assessments for these [subsequent] openings or expansions are not materially different from those the Court adjudged to be inadequate," Defs. Supp. Br. at 5 (Docket No. 66) (emphasis added), it is clear that Plaintiffs' supplemental complaint would not alter the theory of this case. See Health Ins. Ass'n of America, 213 F.R.D.

at 66 ("the court should freely grant a party's request to file a supplemental pleading 'when the supplemental facts connect it to the original pleading'") (internal citations omitted).

Thus, rather than filing another lawsuit challenging these three rules based on the same legal theory, Plaintiffs seek to supplement the complaint. This will provide the most expeditious means of resolving the controversy over the adequacy of the FWS's NEPA review as to all of the Refuges that have been impacted by the FWS's decision to vastly expand hunting since 1997. See Young Women's Christian Ass'n of the Nat'l Capital Area, Inc. v. Allstate Insurance Co. of Canada, 214 F.R.D. 1, 3 (D.D.C. 2003) (noting the Court has "broad discretion in determining whether to allow supplemental pleadings in the interests of judicial economy and convenience") (internal citations omitted).[2]

Plaintiffs' motion is also timely made. Although the Court has ordered the parties to prepare renewed motions for summary judgment, see Minute Order (June 28, 2007), the FWS must first produce the Administrative Record for its new NEPA process, which will delay that briefing in any event. See Joint Motion to Set Aside the Summary Judgment Briefing Schedule. Moreover, as this Court has recognized, and "the D.C. Circuit teaches, a court should not deny leave to amend based solely on the time elapsed between the filing of the complaint and the request for leave to amend." Dove v. Washington Metropolitan Area Transit Authority, 221 F.R.D. 246, 248 (D.D.C. 2004) (citing Atchinson v. District of Columbia, 73 F.3d 418, 426 (D.C. Cir. 1996)); see also Block v. First Blood Associates, 988 F.2d 344, 350 (2d Cir. 1993) (internal citations omitted) (permitting amendment four years after the complaint was filed). Indeed, at

[2] Plaintiffs note that since 2005, Federal Defendants have not adopted any further rules expanding hunting on National Wildlife Refuges. See Defs. Supp. Br. at 6 (Docket No. 66) ("there will be no new openings or expansions of refuge hunting for the 2006-07 season").

this juncture when an Administrative Record is still to be filed and the parties have not yet prepared their renewed motions for summary judgment, it can hardly be said that Plaintiffs unduly delayed their motion to supplement.[3]

For these same reasons, Defendants certainly will not be unduly prejudiced if Plaintiffs are allowed to supplement their complaint. Prejudice to the non-moving party "must in fact be 'undue,'" which means "a denial 'of the opportunity to present facts or evidence which would have been offered had the amendment been timely.'" Dove, 221 F.R.D. at 248 (internal citations omitted). Here, Defendants will suffer no such harm, since the Administrative Procedure Act provides for review on the basis of the Administrative Record, see 5 U.S.C. § 706, which has yet to be produced.

Moreover, Federal Defendants' admission that the NEPA documents for the three additional rules "are not materially different from those the Court adjudged to be inadequate," Defs. Supp. Br. at 5 (Docket No. 66), demonstrates that the defects in the NEPA process for the three additional rules are "'substantially identical'" to those of the six rules already under review in this case. See Aftergood v. C.I.A., 225 F. Supp. 2d 27, 31 (D.D.C. 2002) (internal citation omitted). Indeed, Plaintiffs' supplemental claims and requested relief are consistent with the original Complaint, and Plaintiffs assume they will make the same legal arguments if the

[3] In fact, Plaintiffs had assumed that in light of this Court's ruling and the FWS's representation that it would undertake a NEPA review of the cumulative impacts of the three additional rules last fall, see Defs. Supp. Br. at 5, that the FWS would adequately address the cumulative impacts of expanding hunting at all of the Refuges that have been opened to one kind of hunting or another since 1997. However, it became clear after the FWS completed its new NEPA process that the same problems that Plaintiffs originally complained about remain an issue. Thus, it was not until this summer that Plaintiffs realized that this case would be on-going and that the three additional rules, with their substantially similar NEPA defects, should therefore be added.

additional rules are challenged. Thus, "granting the plaintiff[s'] motion will not surprise or prejudice" defendants. Id.; see also Montgomery Environmental Coalition v. Fri, 366 F. Supp. 261, 266 (D.D.C. 1973) ("In the instant case, the violations alleged in the supplemental pleadings do not create surprise nor prejudice the rights of the defendants as they are a continuation of the same violations alleged in the [earlier] complaint").[4]

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their Motion to Supplement the Complaint.

Respectfully submitted,

/s/ Tanya Sanerib

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Dated: August 16, 2007

[4] Nor can Defendants argue they did not receive sufficient notice of Plaintiffs' interest in the three additional rules promulgated by the FWS expanding hunting on Refuges. Plaintiffs submitted detailed comments to the FWS on these three rules explaining their NEPA defects, and have referenced the three additional rules on several occasions, see e.g., Plfs.' Mtn. for S. Judgment at 13 n.2 (Docket No. 47); Plfs. Supplemental Br. on the Need for Appropriate Relief at 2 n.1 (Docket No. 65). Thus, upon learning that production of the Administrative Record would take several weeks, Plaintiffs request to supplement their complaint to include the three additional rules should have come as no surprise to Defendants.