UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SIERRA CLUB and DANIEL RAMETTA,

Plaintiffs,

v. Case No: 8:20-cv-287-CEH-JSS

UNITED STATES ARMY CORPS OF ENGINEERS, TODD T. SEMONITE and ANDREW KELLY,

Defendants.
_____/

ORDER

This matter comes before the Court upon Plaintiffs' Motion for Leave to Amend Complaint and Memorandum of Law in Support [Doc. 57] and Intervenor/ Defendant's Response to Motion for Leave to Amend Complaint [Doc. 67]. In the motion, Plaintiffs assert that significant factual and procedural developments since the filing of the original complaint provide good cause for the amendment and that none of the factors that militate against granting leave are present. [Doc. 57 at p. 3]. The Court, having considered the motion, and being fully advised in the premises will deny Plaintiffs' Motion for Leave to Amend Complaint and Memorandum of Law in Support.

I. BACKGROUND

Plaintiffs Sierra Club and Dan Rametta filed this action on February 26, 2020, against the United States Army Corps of Engineers, its Commander and Chief of

Engineers Lt. Gen. Todd T. Semonite, in his official capacity, and the Commander and District Engineer for the Jacksonville District Colonel Andrew Kelly, also in his official capacity (the Federal Defendants). [Doc. 1]. In their complaint, Plaintiffs alleged that the Army Corp of Engineers violated various federal statutes when it issued Permit No: SAJ-2011-00551 for the Ridge Road Extension (RRE), a roadway project spanning 8.65 miles and requiring fill material to be deposited over 42.40 acres of high quality preserved wetlands in Pasco County, Florida. *Id.* ¶¶ 1-2. According to the complaint, the construction of the Ridge Road Extension will adversely affect the protected wetlands. *Id.* ¶ 1.

Count I alleges that Defendants violated the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (NEPA)[1] and the Administrative Procedures Act, 5 U.S.C. § 706 (APA) by failing to prepare a NEPA document that adequately addresses the serious issues raised by the Army Corp of Engineer's decisions to issue the RRE Permit. *Id.* ¶¶ 187-193. That document is an Environmental Impact Statement (EIS), which federal agencies are required to prepare if it is apparent that the action will "significantly" affect the human environment. *Id.* ¶ 63. If, however, the action's effects are unclear, the Army Corp of Engineers must first prepare an Environmental

[1] "The National Environmental Policy Act is the Nation's charter for protection of the environment. 40 C.F.R. § 1500.1(a). Its central goals are '[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation . . . .' 42 U.S.C. § 4321." [Doc. 1 ¶ 56].

Assessment to determine whether the significance of the effects establishes that a more extensive EIS analysis is necessary. In this case, the complaint alleges that the Army Corp of Engineers conducted the Environmental Assessment for the RRE Project, made a finding of no significant impact, and declined to prepare an EIS. *Id.* ¶ 12. In **Count II**, Plaintiffs allege that Defendants violated the Clean Water Act, 33 U.S.C. §1344 (CWA), and the APA in deciding to issue Permit No: SAJ-2011-00551, by failing to follow various procedural mandates, including holding a public hearing and adequately considering the significant effects upon wildlife and their habitat, including wetlands. *Id.* ¶¶ 194-197. Plaintiffs allege that the failure to follow the procedural mandates of NEPA and the CWA is arbitrary and capricious. [2] *Id.* ¶¶ 8, 11, 12.

Shortly after the complaint was filed, the Pasco County Board of County Commissioners[3] moved to intervene as an intervenor/defendant, pointing out in its motion that the RRE has been planned, designed and permitted, and will be constructed by it, and that it has relied on the RRE Permit and has expended significant time and resources in the development of the RRE and in obtaining other necessary approvals for the RRE. [Doc. 11 ¶¶ 2-3]. The Court granted that unopposed motion. [Doc. 14].

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[2] Plaintiffs also moved, *ex parte*, for a Temporary Restraining Order and/or Preliminary Injunction staying the Permit that permitted the construction of the Ridge Road Extension. [Doc. 2]. The Court denied ex parte relief, and following a hearing, denied the requested injunctive relief. [Doc. 35 at pp. 1-2, 8].

[3] The Pasco County Board of County Commissioners is the entity empowered to "[p]rovide and regulate . . . roads . . ." within Pasco County. [Doc. 11 ¶ 1 (citing Fla. Stat. § 125.01(m))].

On August 3, 2020, the Federal Defendants transmitted the administrative record to the Court, along with an affidavit from the Army Corp of Engineer's records custodian, certifying that the documents provided constituted the complete administrative record. [Doc. 47]. Following discussions between the parties, the Federal Defenders filed an amended index to the administrative record on September 21, 2020, and transmitted to the Court an additional ten documents as a supplement to the administrative record. [Doc. 49].

Just a week later, Plaintiffs moved to compel completion of the administrative record, arguing that 13 years of records—from the initial permit application in 1998 to the 2011 renewed process—were missing and that this obscured the complete picture and frustrated judicial review of the "decision to rubberstamp the construction of a road through a designated ecological preserve." [Doc. 50 at pp. 3, 12]. The Court determined that Plaintiffs did not meet their burden of providing concrete evidence that the documents sought to be added to the record "were before the decisionmakers," and denied the motion to compel completion of the administrative record. [Doc. 65 at p. 7]. In doing so, the Court reasoned that Plaintiffs failed to identify specific portions of the pre-2011 record that the Army Corp of Engineers relied on in deciding to issue the section 404 permit and the Court rejected, as unavailing, Plaintiffs' effort to characterize the application process as a continuous one dating back to 1998. *Id.* at pp. 7-8.

On November 25, 2020, Plaintiffs moved to amend the complaint, to add the United States Fish and Wildlife Service (FWS) as a defendant to the two existing

claims and to add four claims for relief pursuant to the Endangered Species Act, 16 U.S.C. § 1531 *et. seq.* (ESA)—two against the Army Corps of Engineers and two against FWS. [Doc. 57 at pp. 1-2]. In their motion, Plaintiffs claim that "[d]uring review of the Administrative Record, it became apparent . . . that there is no justification in the record for Defendant's reliance upon outdated wildlife surveys in assessing the project impacts upon endangered and threatened species" and that they provided notice of their intent to sue to Defendants and FWS as expeditiously as possible,[4] and they swiftly moved to amend once they were able to review the record and confirm their factual allegations which support their claims for relief in the Amended Complaint. *Id.* at pp. 3-4. They further argue that they are not seeking the amendment in bad faith or with a dilatory motive and that Defendants will not be prejudiced by allowing the amendment. *Id.* at pp. 4-6.

The Federal Defendants do not oppose the request for leave, but the Intervenor/Defendant Pasco County has filed a response, raising a number of reasons why the motion should be denied. [Doc. 57 at p. 2, Doc. 67]. Pasco County contends that Plaintiffs have unduly delayed in requesting the amendment and have offered no reasonable justification for the delay. [Doc. 67 at pp. 2, 4-8]. In fact, it explains that there are no newly discovered facts or changes in circumstances to justify granting leave to bring the ESA and related APA claims and that Plaintiffs had all the required

[4] This was done pursuant to 16 U.S.C. § 1540(g)(2)(A)(i), which provides that a citizen may not bring suit prior to sixty days after written notice of an alleged violation has been given to the Secretary, and to the alleged violator. [Doc. 57 at p. 4]. Plaintiffs provided notice on September 8, 2020. *Id.*

information to bring these claims earlier as evidenced by multiple references to the ESA and endangered species in the original complaint. *Id.* at pp. 4, 5, 6. Additionally, Pasco County contends that it will be prejudiced by the delay caused by adding the additional claims and that the amended complaint asks for relief to which the Court has already determined that the Plaintiffs are not entitled. *Id.* at pp. 2, 8-10.

II. LEGAL STANDARD

Pursuant to Rule 15 of the Federal Rules of Civil Procedure, a party may amend its complaint only with the opposing party's written consent or the court's leave after expiration of the period for amending a complaint as a matter of course. Fed. R. Civ. P. 15(a)(2). "[W]hen granting leave would require modifying a Rule 16 scheduling order, the movant must first show 'good cause.' " *Alexander v. AOL Time Warner, Inc.*, 132 F. App'x 267, 269 (11th Cir. 2005) (citing *Sosa v. Airprint Systems, Inc.,* 133 F.3d 1417, 1419 (11th Cir.1998)). "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). However, a court may deny leave to amend if there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment, etc." *McKinley v. Kaplan*, 177 F.3d 1253, 1258 (11th Cir. 1999).

The Federal Rules of Civil Procedure set forth additional rules which apply to the addition of a party to a lawsuit. This includes Rule 20, which states that:

"Persons . . . may be joined in one action as defendants if:

> **(A)** any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
>
> **(B)** any question of law or fact common to all defendants will arise in the action.

Fed. R. Civ. P. 20(a)(2). "[T]he court may at any time, on just terms, add or drop a party" on motion or on its own. Fed. R. Civ. P. 21. "[A]dding a party to a lawsuit pursuant to Rule 21 is left to the sound discretion of the trial court." *Lampliter Dinner Theater, Inc. v. Liberty Mut. Ins. Co.*, 792 F.2d 1036, 1045 (11th Cir. 1986).

III. DISCUSSION

Plaintiffs seek to add new claims and a new defendant to the lawsuit. They argue that there is good cause for the amendment because they only became aware of the facts supporting the new claims after the administrative record was docketed. They also argue that Defendants will not be prejudiced if the Court allows the amendment. Intervenor/Defendant Pasco County disagrees and raises several arguments as to why the Court should deny leave. Among other reasons, they contend that there is unreasonable delay in seeking leave because the same facts that form the bases of the new claims are raised in the complaint and no new facts have been discovered since the filing of the complaint.

As an initial matter, the Court notes that Plaintiffs' explanation as to why there is good cause to allow the amendment is conclusory.[5] However, upon review, the

[5] There is no explanation as to why the grounds for the new claims and new defendant were only then discovered. Additionally, there is no indication as to the diligent efforts taken with

allegations of the original complaint belie Plaintiffs' claim that the grounds for the new claims and the addition of the FWS as a defendant became apparent based on review of the administrative record. Thus, Plaintiffs have not shown good cause for amending the complaint at this point in the litigation.

The FWS' involvement

In the original complaint, Plaintiffs alleged that The Army Corp of Engineers must consult with FWS and must give "full consideration" to the views of the FWS "in deciding on the issuance, denial, or conditioning of individual or general permits." [Doc. 1 ¶ 103]. The complaint further described FWS' involvement in the process over the years and issuance of a Biological Opinion on September 20, 2019, which the Army Corp of Engineers relied on in preparing the Environmental Assessment of the RRE project, ultimately leading to the issuance of the Permit. *Id.* ¶¶ 140, 141 142, 146, 147, 148, 153, 175, 179. In doing so, Plaintiffs alleged that the Biological Opinion relied on stale surveys from 2013 and had a number of defects that resulted in an arbitrary and capricious issuance of the Permit *Id.* ¶¶ 176, 177. Based on these factual allegations regarding FWS in the proposed complaint, the Court cannot agree that Plaintiffs did not have a factual basis for claims against FWS when this action was initially filed.

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respect to determining whether Plaintiffs could assert ESA claims and claims against FWS. *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1232 (11th Cir. 2008) ("If [a] party was not diligent , the [good cause] inquiry should end.") (quoting *Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 609 (9th Cir.1992)).

Application of the ESA

Likewise, the original complaint alleges facts showing the application of the ESA and facts on which some of the claims are premised. There, Plaintiffs indicate that the Army Corp of Engineers is subject to environmental review under the ESA and that the individual Federal Defendants are responsible for ensuring the Army Corp of Engineer's compliance with the requirements under the ESA. *Id.* ¶¶ 45-47. They also allege that one of the defects of the Environmental Assessment,[6] conducted by the Army Corp of Engineers, was that it "advise[d] that the CORPS evaluated 'compliance with the 404(b)(1) Guidelines,' as well as completing consultation pursuant to the ESA for impacts to threatened and endangered species . . . yet failed to do an independent analysis when informed that surveys relied upon were nearly seven (7) years outdated." *Id.* ¶ 180(s). This is a clear indication that the Army Corp of Engineer's decision was subject to, and potentially ran afoul of the requirements of the ESA. An examination of the specific counts even further reflects that Plaintiffs could have raised the ESA claims in the original complaint.

The New Claims

Count III of the proposed complaint asserts that FWS violated the ESA and the APA by preparing a flawed biological opinion, and specifically alleges failures with respect to the assessment of effects on the eastern indigo snake and other procedural

[6] Again, that Environmental Assessment relied on FWS' Biological Opinion, which relied upon stale surveys from 2013. *Id.* ¶¶ 179, 175, 176.

failures. [Doc. 57-1 ¶¶ 282]. The flaws of the Biological Opinion were addressed in the original complaint, which went into great detail laying out the inadequacies of the assessment of the threat to the eastern indigo snake. [Doc. 1 ¶ 177]. In fact, the complaint alleged that the Biological Opinion "admits that '[l]ittle is known about the eastern indigo snake in the Action Area' . . . and references surveys . . . that do not accurately reflect the current number of eastern indigo snakes in the Action Area for an accurate analysis of impacts and potential takings." *Id.* The original complaint also listed specific procedural deficiencies, some of which are generally identified in the proposed complaint. For example, the proposed complaint alleges that the Biological Opinion failed, among other things, to consider all relevant information or information otherwise available and failed to establish a sufficient trigger for the preinitiation of consultation. [Doc. 57-1 ¶ 282]. In the original complaint, Plaintiffs alleged that the Biological Opinion "advises that FWS did not analyze the effects of development of the properties east of the Suncoast Parkway due to not having any information to assist with the analysis." [Doc. 1 ¶ 177]. Additionally, that complaint also noted that "[t]he obligation to consult is a continuing one," and referenced certain determinations in the Environmental Assessment regarding additional consultation, citing to the Biological Opinion on which these determinations were apparently based. *Id.* 104, p. 253. As such, facts supporting this claim were available to Plaintiffs when the original complaint was filed.

The original complaint also recited facts as to deficiencies in the Environmental Assessment as it relates to the effects of the project on the Florida scrub-jay and Red-

cockaded woodpecker, which forms the basis of the claim in **Count IV** of the proposed complaint. *Id.* ¶ 180. In its proposed complaint, Plaintiffs allege that FWS violated the ESA by concurring with the Army Corp of Engineers that its permitting decision is not likely to affect the Florida scrub-jay and Red-cockaded woodpecker and by relying on the outdated wildlife surveys. [Doc. 57-1 ¶¶ 285, 286]. They also allege that FWS should have engaged in formal consultation with the Army Corp of Engineers and should have prepared a biological opinion to address effects of the project on the subject species. *Id.* ¶ 287. The original complaint expressly states that the Biological Opinion "is completely devoid of any discussions of . . . the threatened Florida Scrub Jay, which despite not being sighted in the 2013 surveys, have been known to reside at the Starkey Wildlife Preserve and in the absence of current data could potentially be impacted." [Doc. 1 ¶ 177(l)]. It then alleges that the Army Corp of Engineer's determination of no effect on the scrub-jay and woodpecker failed to acknowledge the FWS' own guidance that surveys on which its determinations are made must reflect current conditions. *Id.* ¶¶ 180(z), (aa). These are the very same facts giving rise to the claim in Count IV of the proposed complaint such that the claim could have been asserted when this action was filed.

The claims in Counts V and VI of the proposed complaint could also have been asserted at that time. **Count V** alleges that the Army Corp of Engineers violated the ESA by relying on the flawed biological opinion to determine that its permitting decision will not jeopardize the eastern indigo snake. As noted in the discussion on Count III of the proposed complaint, the flaws of the Biological Opinion were

addressed in the original complaint and Plaintiffs addressed in great detail the inadequacies of the assessment of the threat to the eastern indigo snake. As to the allegation in **Count VI**, the effects of the project on the Florida scrub-jay and Red-cockaded woodpecker were also addressed in the original complaint as noted in the discussion on Count IV. As such, all these claims could have been raised in the original complaint.

Unreasonable Delay

"A district court may find undue delay when the movant knew of facts supporting the new claim long before the movant requested leave to amend, and amendment would further delay the proceedings." *Haynes v. McCalla Raymer, LLC*, 793 F.3d 1246, 1250 (11th Cir. 2015). In this case, ten months elapsed between Plaintiffs' filing of the lawsuit and their request to assert the new claims and add FWS as a defendant. Plaintiffs' motion for leave to amend was filed one week before their motion for summary judgment was due to be filed. Because the bases for the claims were apparent at the time the complaint was filed, the delay of ten months is unreasonable. *See Mahoney v. Owens*, 818 F. App'x 894, 898 (11th Cir. 2020) (court agreed that there was undue delay where leave to amend was sought five months after a motion for summary judgment and well after the close of discovery); *Sys. Unlimited, Inc. v. Cisco Sys., Inc.*, 228 F. App'x 854, 857 (11th Cir. 2007) (district court did not abuse its discretion in denying leave to amend where movant waited "more than seven months after the court pointed out that its complaint was missing several causes of

action, and more than three months after the motion to dismiss was denied, to amend its complaint."). This undue delay warrants denial of leave to amend.

Additionally, the Court agrees that the Intervenor/Defendant Pasco County will be prejudiced by further delay of this case. As set forth in its response to the motion for leave to amend, Phase I of the RRE project is approximately 40% complete and asphalt has been laid on about two miles of roadway. As of December 2020, no encounters with, or observations of State or Federally listed wildlife species had been reported during construction. [Doc. 62, p. 8-9].

Accordingly, it is hereby **ORDERED**:

1. Plaintiffs' Motion for Leave to Amend Complaint and Memorandum of Law in Support [Doc. 57] is denied.
2. Plaintiffs' Motion for Summary Judgment shall be filed on or before **June 16, 2021**. The Federal Defendants and Intervenor/Defendant's combined cross-motions for summary judgment and opposition to Plaintiffs' motion for summary judgment shall be filed on or before **August 4, 2021**. An amended Scheduling Order will be entered reflecting the remaining pretrial and trial deadlines.

DONE AND ORDERED in Tampa, Florida on April 16, 2021.

Charlene Edwards Honeywell
Charlene Edwards Honeywell
United States District Judge

Copies to:

Counsel of Record and Unrepresented Parties, if any