United States
Environmental Protection Agency

Office of Water
Mail Code 4305T

EPA-820-F-14-010
September 2014

EPA Responses to Public Comments on "Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Withdrawal"

This document is a compilation of the 12 unique public comments received by the Environmental Protection Agency (EPA) on its proposed rule entitled "Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Withdrawal," and EPA's responses to those comments.

The proposal was published in the *Federal Register* (Volume 79, Number 63) on April 2, 2014. The 60-day public comment period ended on June 2, 2014. The original comments and any supporting documentation submitted by the public can be found in the official docket for this rulemaking at http://www.regulations.gov/ under Docket ID EPA-HQ-OW-2009-0596.

In this document, EPA responds to each comment separately. The 10 comment letters are shown as screen captures, but two anonymous comments are presented in italics. EPA includes the name of the commenter, and a link to each comment's location in the docket at http://www.regulations.gov. The EPA responses appear below each comment.

Anonymous

[Comment ID: EPA-HQ-OW-2009-0596-3096]

"Relinquishing control of oversight of Florida water-quality standards to FL DEP is a very bad idea. The state has proven inadequate to the job of protecting water quality in Florida and we need federal oversight by EPA. While there are good people working for FL DEP, politics and special-interests rule this state and constantly fight attempts to sustain a clean, healthy environment here. We need the EPA's numeric nutrient criteria to be applied here, not some qualitative measure that can be interpreted willy-nilly. As a professional biologist, I ask EPA to maintain its criteria in FL and not cede its authority to the state."

The EPA agrees that it is important to protect Florida's aquatic resources from nitrogen and phosphorus pollution; however, the EPA disagrees that federal numeric nutrient standards are necessary now that Florida has adopted and the EPA has approved state standards to address nitrogen and phosphorus pollution. The Clean Water Act assigns to the states the primary authority for setting water quality standards. The EPA's role is largely one of oversight, in which it reviews and approves or disapproves a state's new or revised water quality standards as they are adopted and submitted to the EPA. Florida now has state-adopted, EPA-approved criteria for lakes and springs that are applicable for Clean Water Act purposes. Thus there is no need for overlapping federal criteria for such waters.

The EPA also disagrees that withdrawing its federal water quality standards means that it is relinquishing its Clean Water Act oversight authority in Florida. Under section 303(d) of the Clean Water Act, monitoring data as well as other information must be used by the states every two years to develop a list of waters that will not meet water quality standards for a particular pollutant. The EPA reviews and approves or disapproves state 303(d) lists, and tracks impaired waters nationally. Similarly, Florida controls water pollution by issuing National Pollutant Discharge Elimination System (NPDES) permits to point sources that discharge pollutants into waters of the United States. The EPA retains oversight authority for such permits, pursuant to section 402(d) of the CWA and 40 C.F.R. 123.44(a), including the authority to review and comment on the permits before they are finalized.

The EPA requested comment on, and is limiting this final action to only the issue of withdrawing (and not finalizing) federal water quality standards applicable to Florida waters. Comments on the quality of Florida's water quality standards program or specific water quality standards adopted by Florida and approved by the EPA are outside the scope of this action.

Anonymous

[Comment ID: EPA-HQ-OW-2009-0596-3097]

"Since the 1950s, many environmental policies shifted to federal regulation due to states' inability to reverse environmental degradation. Many early federal regulations were not as successful because they were too dependent upon state and local authorities to implement policies. I believe that federal laws should be adapted to fit the needs of the state, based on their

ecological needs. It is great that the state and EPA agreed on appropriate water quality standards, however, distributing federal regulation to the state may have adverse impacts. Florida's fishing industry contributes at least $5 billion to the state's economy. Healthy fisheries rely on healthy coastal ecosystems. The EPA should still check to make sure the state is meeting the federal standards of the Clean Water Act. The EPA needs to work to encourage and empower the state to want to follow regulations. Decisions made by the state can better reflect their constituents, however, states and local authority are also concerned with their own employment and economic growth. To regulate your own entities would be a cost to the state's economic growth."

The EPA agrees that Florida's aquatic resources are important to Florida's economy and should be protected; however, the EPA disagrees that federal numeric nutrient standards are necessary now that Florida has adopted and the EPA has approved state standards to address nitrogen and phosphorus pollution. The Clean Water Act assigns to the states the primary authority for setting water quality standards. The EPA's role is largely one of oversight, in which it reviews and approves or disapproves a state's new or revised water quality standards as they are adopted and submitted to the EPA. Florida now has state-adopted, EPA-approved criteria for lakes and springs that are applicable for Clean Water Act purposes. Thus there is no need for overlapping federal criteria for such waters.

The EPA also agrees that it should continue to work with Florida and ensure that Clean Water Act requirements are met. Under section 303(d) of the Clean Water Act, monitoring data as well as other information must be used by the states every two years to develop a list of waters that will not meet water quality standards for a particular pollutant. The EPA reviews and approves or disapproves state 303(d) lists, and tracks impaired waters nationally. Similarly, Florida controls water pollution by issuing National Pollutant Discharge Elimination System (NPDES) permits to point sources that discharge pollutants into waters of the United States. The EPA retains oversight authority for such permits, pursuant to section 402(d) of the CWA and 40 C.F.R. 123.44(a), including the authority to review and comment on the permits before they are finalized.

The EPA requested comment on and is limiting this final action to only the issue of withdrawing (and not finalizing) federal water quality standards applicable to Florida waters. Comments on Florida's economy and state interests are outside the scope of this action.

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(850) 402-2954 FAX (850) 402-0139 1625 Summit Lake Drive, # 300 Tallahassee, FL 32317
www.mafmfg.com

May 6, 2014

Water Docket
U. S. Environmental Protection Agency
Mail Code2822T
1200 Pennsylvania Avenue, N.W.
Washington, D. C. 20460

Attention: Docket ID No.: EPA-HQ-OW-2009-0596

Re: *Water Quality Standards for the State of Florida's Lakes and Flowing Waters, Withdrawal*, 79 Federal Register 18494, Wednesday, April 2, 2014

To Whom It May Concern:

The Manufacturers Association of Florida (MAF) submits the following comments supporting EPA's proposed withdrawal of its federal numeric nutrient criteria as published in the Federal Register on April 2, 2014.

MAF represents the interests of Florida's manufacturers before state, federal and local agencies, and the Florida legislature, to ensure that this vital sector of the regulated community remains a major force in Florida's economic growth and stability. MAF members include owners and operators of facilities that lawfully discharge treated wastewater as authorized under NPDES discharge permits issued under Florida's EPA-approved NPDES permitting program. Permit conditions are included in NPDES permits to ensure that the permitted discharges do not cause or contribute to violations of surface water quality criteria developed and implemented by Florida's Department of Environmental Protection (FDEP or Department).[1]

NPDES permittees must comply with changes to applicable water quality criteria often at considerable expense to the permittee. Permittees must install additional pollution control equipment or alter treatment processes to meet the new criteria or to comply with wasteload allocations based upon the new criteria if a total maximum daily load is established for a receiving water.

Before the MAF was organized in early 2006, many Florida manufacturers were members of a predecessor organization called the Florida Minerals and Chemistry Council (FMCC). The FMCC was granted leave to intervene in the original numeric nutrient criteria citizen suit filed in 2008 and actively participated in the litigation. Current MAF members also participated as affected stakeholders, individually or as part of the FMCC, advocating for effective but scientifically sound criteria as both FDEP and EPA initiated rulemaking to translate Florida's longstanding narrative nutrient criterion and establish numeric criteria.

On November 30, 2012, EPA approved a suite of numeric nutrient criteria and thresholds adopted by the State of Florida. Based upon its approval of the FDEP criteria and thresholds, EPA has proposed to withdraw its federal criteria and also announced that it is no longer legally obligated to finalized gap-filling criteria as proposed on November 30, 2012. The MAF supports EPA's proposal to withdraw its criteria and allow FDEP's criteria and thresholds to go into effect.

EPA's withdrawal of its criteria is consistent with the District Court's Order Modifying the Consent Decree and is mandated by the Clean Water Act. (***Attachment 1***). Section 101(b) of

[1] Or, although rarely, criteria developed by EPA exercising its oversight authority.

the Clean Water Act establishes state primacy over water quality programs. Notwithstanding EPA's authority under section 303(c)(4)(B) to develop criteria for the states when necessary to comply with the CWA, section 303(c)(3) states that once EPA approves a new or revised standard submitted by a state, "such standard shall thereafter be the water quality standard for the applicable waters of that State." EPA approved Florida's numeric nutrient standards on November 30, 2012. Therefore, EPA's federal criteria must be withdrawn since EPA has approved state criteria that EPA has concluded are consistent with the CWA.

The District Court's order approved modification of the consent decree as a result of EPA having approved FDEP's statewide numeric nutrient standards rule and having modified the January 2009 determination in recognition of the state having reoccupied the field such that it is no longer necessary for EPA to promulgate criteria for the state of Florida. FDEP's adoption of its numeric criteria and thresholds "abrogated EPA's obligation under the consent decree to adopt its own rules."

The court made clear that neither EPA's January 14, 2009 determination nor the consent decree "was intended to change the Clean Water Act's allocation to the state of primary responsibility for setting water quality criteria." EPA has approved state lakes and springs criteria that serve the same purpose and function as the federal criteria (and employ the same numeric endpoints) making the withdrawal of the federal criteria a final step mandated by the Clean Water Act.

The MAF appreciates the opportunity to provide these comments and requests that EPA finalize its withdrawal of its federal numeric nutrient criteria for Florida waters.

Respectfully,

Winston K. Borkowski

Winston K. Borkowski
Hopping Green & Sams
On behalf of the Manufacturers Association of Florida

Copy to:

Nancy Stephens, Executive Director
Manufacturers Association of Florida

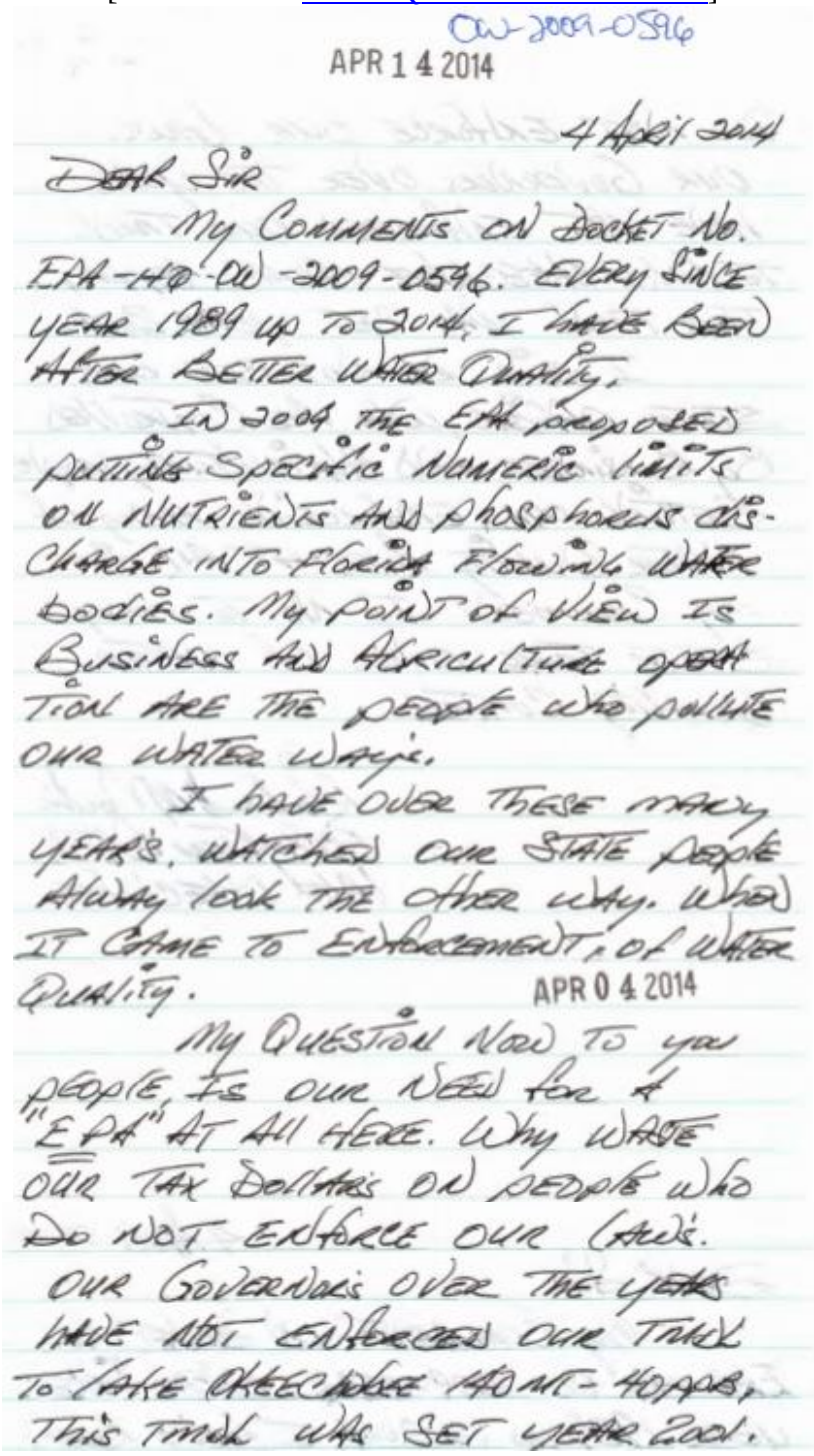
The EPA agrees that the following three sets of actions provide the basis for the EPA to withdraw (and not finalize) federal numeric nutrient standards applicable to Florida waters: (1) the EPA's November 30, 2012, June 27, 2013, and September 26, 2013 approvals of Florida-adopted numeric nutrient criteria and other water quality standards, (2) the EPA's November 30, 2012 and June 28, 2013 amended Clean Water Act section 303(c)(4)(B) determinations, and (3) the U.S. District Court's January 7, 2014 order modifying the consent decree to relieve the EPA of the obligation to finalize numeric nutrient criteria for various waters in Florida.

The EPA requested comment on and is limiting this final action to only the issue of withdrawing (and not finalizing) federal water quality standards applicable to Florida waters. Attachment 1 (a

copy of the U.S. District Court's January 7, 2014 order) remains in the original comment letter in the docket to this rulemaking but was not included in this document. Attachment 1 as well as comments on permits or total maximum daily loads are outside the scope of this action.

R. M. Norton

[Comment ID: EPA-HQ-OW-2009-0596-3099]



OW-2009-0596

APR 14 2014

4 April 2014

DEAR SIR

My COMMENTS ON DOCKET No. EPA-HQ-OW-2009-0596. EVERY SINCE YEAR 1989 UP TO 2014, I HAVE BEEN AFTER BETTER WATER QUALITY.

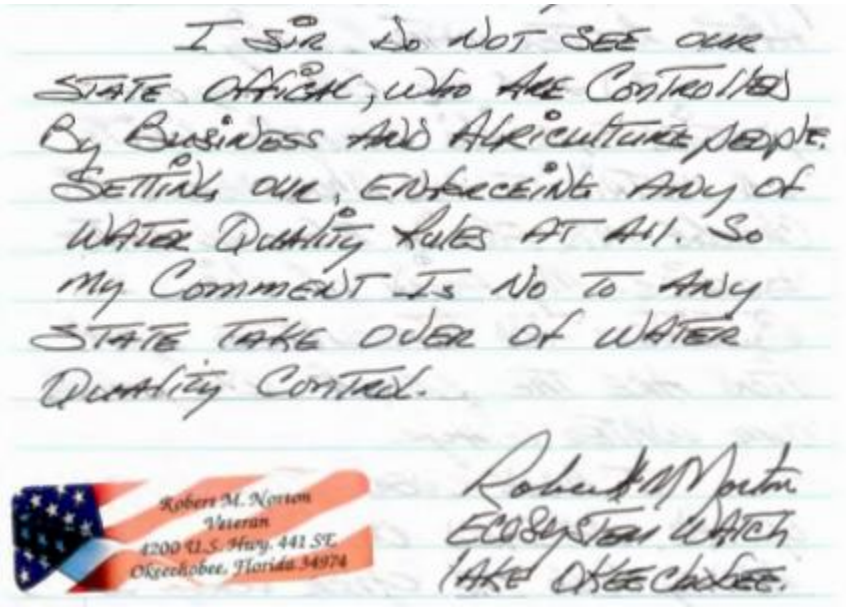
IN 2004 THE EPA PROPOSED PUTTING SPECIFIC NUMERIC LIMITS ON NUTRIENTS AND PHOSPHORUS DISCHARGE INTO FLORIDA FLOWING WATER BODIES. MY POINT OF VIEW IS BUSINESS AND AGRICULTURE OPERATION ARE THE PEOPLE WHO POLLUTE OUR WATER WAYS.

I HAVE OVER THESE MANY YEARS, WATCHED OUR STATE PEOPLE ALWAY LOOK THE OTHER WAY. WHEN IT CAME TO ENFORCEMENT, OF WATER QUALITY.

APR 04 2014

MY QUESTION NOW TO YOU PEOPLE, IS OUR NEED FOR A "EPA" AT ALL HERE. WHY WASTE OUR TAX DOLLARS ON PEOPLE WHO DO NOT ENFORCE OUR LAWS.

OUR GOVERNORS OVER THE YEARS HAVE NOT ENFORCED OUR TMDL TO TAKE EFFECT BY 40 MT - 40 APR, THIS TMDL WAS SET YEAR 2001.



The EPA agrees that it is important to protect Florida's aquatic resources from nitrogen and phosphorus pollution; however, the EPA disagrees that federal numeric nutrient standards are necessary now that Florida has adopted and the EPA has approved state standards to address nitrogen and phosphorus pollution. The Clean Water Act assigns to the states the primary authority for setting water quality standards. The EPA's role is largely one of oversight, in which it reviews and approves or disapproves a state's new or revised water quality standards as they are adopted and submitted to the EPA. Florida now has state-adopted, EPA-approved criteria for lakes and springs that are applicable for Clean Water Act purposes. Thus there is no need for overlapping federal criteria for such waters.

The EPA also agrees that it should continue to work with Florida and ensure that Clean Water Act requirements are met. Under section 303(d) of the Clean Water Act, monitoring data as well as other information must be used by the states every two years to develop a list of waters that will not meet water quality standards for a particular pollutant. The EPA reviews and approves or disapproves state 303(d) lists, and tracks impaired waters nationally. Similarly, Florida controls water pollution by issuing National Pollutant Discharge Elimination System (NPDES) permits to point sources that discharge pollutants into waters of the United States. The EPA retains oversight authority for such permits, pursuant to section 402(d) of the CWA and 40 C.F.R. 123.44(a), including the authority to review and comment on the permits before they are finalized.

The EPA requested comment on and is limiting this final action to only the issue of withdrawing (and not finalizing) federal water quality standards applicable to Florida waters. Attachment 1 (a copy of a news article announcing the EPA's proposed withdrawal rule) remains in the original comment letter in the docket to this rulemaking but was not included in this document. Comments on Florida's economy and state interests are outside the scope of this action.

FLORIDA ELECTRIC POWER COORDINATING GROUP, INC. (FCG)
1408 N. WESTSHORE BLVD., SUITE 1002
TAMPA, FLORIDA 33607-4512
(813) 289-5644 • FAX (813) 289-5646

May 1, 2014

Water Docket
U. S. Environmental Protection Agency
Mail Code2822T
1200 Pennsylvania Avenue, N.W.
Washington, D. C. 20460

Attention: Docket ID No.: EPA-HQ-OW-2009-0596

Re: *Water Quality Standards for the State of Florida's Lakes and Flowing Waters, Withdrawal*, 79 Federal Register 18494, Wednesday, April 2, 2014

To Whom It May Concern:

The Environmental Committee of the Florida Electric Power Coordinating Group, Inc. (FCG-EC) submits the following comments in support of the proposed withdrawal of the federal numeric nutrient criteria finalized as part of EPA's *Water Quality Standards for the State of Florida's Lakes and Flowing Waters* on December 6, 2010.

The FCG-EC represents investor-owned electric utilities, rural electric cooperatives, and municipal electric utilities on environmental issues affecting the electric utility industry. FCG-EC has been in existence since 1976 and currently has 30 members. FCG-EC members provide electricity to nearly 5 million customers in Florida, which represents over half of the State's electrical energy supply. FCG-EC member utilities lawfully discharge treated wastewater and cooling water as authorized by NPDES permits issued by the Florida Department of Environmental Protection (FDEP or Department) under the authority of its EPA-approved NPDES permitting program.

NPDES permits are issued only after the permit applicant demonstrates that discharges from its facilities will not cause or contribute to violations of applicable surface water quality standards. Pollution control equipment and processes necessary to meet a specific water quality criterion may be very costly and entail significant engineering and construction costs in addition to the cost of purchasing the appropriate materials and equipment. A change in the applicable surface water criteria may result in the need for additional expenditures or may render recent and costly investments for treatment equipment and processes obsolete. Notwithstanding the potential to obtain a compliance schedule, FCG-EC member utilities must comply with new or amended criteria at significant costs.

EPA's withdrawal of its criteria will allow the EPA-approved state criteria to go into effect providing the FCG-EC and its members with the regulatory certainty of one known set of standards allowing facilities to plan for compliance as NPDES permits come up for renewal.

The FCG-EC supports the withdrawal of criteria as proposed in the April 2, 2014 notice and asserts that the proposed withdrawal:

- Is legally mandated based upon EPA's approval of the State of Florida's nutrient standards on November 30, 2012 and is consistent with fundamental principles of cooperative federalism preserving state primacy in the establishment and implementation of state water quality standards.

- Fulfills EPA's commitments under the March 15, 2013 *Agreement in Principle* and *Path Forward*, to which EPA was a party with the Florida Department of Environmental Protection (FDEP), and,

- Is consistent with the *Order Modifying the Consent Decree* issued January 7, 2014, entered by the U. S. District Court for the Northern District of Florida.[1]

Additionally, the springs criteria to be withdrawn are substantively identical to the FDEP's EPA-approved criteria. EPA's 0.35 mg/L nitrate-nitrite criterion for Florida spring boils and vents is identical to FDEP's criterion and based on the same data and analyses.

With the exception of lakes falling within the phosphate rich Bone Valley (West Central nutrient region), EPA's criteria for lakes are the same numbers as those adopted by FDEP and approved by EPA. For lakes in the West Central nutrient region, FDEP adopted—and EPA approved—a total phosphorus criterion of *0.49* mg/L.

EPA's withdrawal of its federal criteria clears the legal logjam allowing FDEP's substantively identical criteria to become effective.

The withdrawal of EPA's criteria will result in the replacement of federal lake and springs criteria with State lakes and springs criteria that were the subject of a detailed evidentiary hearing and upheld by an administrative law judge (ALJ) before being approved by EPA as consistent with the federal Clean Water Act.

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[1] *Florida Wildlife Federation, et. al. v. McCarthy*, Case No. 4:08-cv-324-RH/CA, Document 463, January 7, 2014. Plaintiffs in the federal litigation filed a notice of appeal March 6, 2014, contesting the January 7th order. Plaintiffs/Appellants have not moved for a stay of the order and the filing of the notice of appeal does not affect or preclude the proposed withdrawal of the federal criteria.

FDEP's criteria were challenged under § 120.56 of Florida's Administrative Procedures Act by the same organizations who filed the federal citizens' suit. A six day evidentiary hearing was held before an ALJ appointed by Florida's Division of Administrative Hearings (DOAH). On June 7, 2012, the ALJ issued a 58 page final order (***Attachment 1***) approving Florida's existing narrative nutrient criterion and its numeric nutrient standards rule as lawful under FDEP's delegated legislative authority ruling that the state nutrient standards were neither arbitrary nor capricious. The same organizations appealed the ALJ's final order to the Florida First District Court of Appeals; the appellate court upheld the ALJ's final order without issuing an opinion.

On June 13, 2012, FDEP submitted its rule amendments setting out its numeric nutrient standards to EPA for review under § 303(c) of the Clean Water Act. On November 30, 2012, EPA approved Florida's numeric nutrient standards (***Attachment 2***) and modified the January 14, 2009 determination to reflect EPA's approval of FDEP's quantitative approach to the protection of downstream waters eliminating the need for federal criteria addressing downstream protection (***Attachment 3***). The modification of the January 2009 determination allowed EPA to do two things: take no action regarding downstream protective values of unimpaired lakes as that issue was remanded to EPA by the District Court's February 18, 2012 order; and, withdraw its downstream protection values for impaired lakes as approved the District Court in its February 18, 2012 order.

On March 15, 2013, EPA and FDEP entered an *Agreement In Principal* to which an agreed upon *Path Forward* was attached and incorporated by reference (***Attachment 4***). The agreement was contingent upon two events: FDEP adopting by reference a document titled *Implementation of Florida' Numeric Nutrient Standards*, dated March 11, 2013; and, the Florida Legislature passing legislation that would eliminate language in FDEP's numeric nutrient standards rule that conditioned the implementation of the state standards on EPA's approval of the state standards in their entirety.

On April 23, 2013, the Florida Environmental Regulation Commission approved the adoption of the FDEP implementation document (***Attachment 5***). On May 29, 2013, the Governor of Florida approved legislation (CS/SB 1808) consistent with the *Agreement In Principle* and *Path Forward* (***Attachment 6***).

DEP finalized the rule adopting the implementation document by reference and submitted it to EPA for review on June 27, 2013; EPA approved FDEP's implementation document on that same date (***Attachment 7***). On June 28, 2013, EPA provided a letter to FDEP notifying the state that EPA was once again modifying its January 2009 determination to reflect EPA's determination that the implementation document provided sufficient clarity to the EPA-approved FDEP definition of streams which would allow the state narrative criterion to apply to a limited set of waters for which the state determined it could not set numeric criteria based upon existing methodologies (***Attachment 8***).

FDEP's definition of streams subject to its new EPA-approved state numeric thresholds excluded a narrow set of waters for which FDEP concluded it was unable, based on existing data and methodologies, to derive scientifically defensible numeric criteria or thresholds. These waters included South Florida canals, marine lakes, tidally influenced flowing waters and conveyances primarily used for water management purposes with marginal or poor stream habitat components.[2] The ALJ presiding over the state administrative challenge found FDEP's exclusion of this limited set of waters to be reasonable stating that: "It is not irrational for the Department to apply its numeric nutrient criteria only to those streams for which it has sufficient data and understanding with respect to the response of flora and fauna to nutrients." Attachment 1 at page 25, paragraph 56.

While EPA has announced in its April 2, 2014 notice that it does not intend to finalize a rule that would establish federal criteria for the waters for which FDEP will retain the narrative nutrient criterion, any challenge of that decision would be directed to the June 28, 2013 modification of the January 2009 determination.

On the same date as the second modification of the January 2009 determination, June 28, 2013, EPA filed a *Motion to Modify Consent Decree* asking the federal District Court in Tallahassee to amend the consent decree to reflect EPA's reduced obligations resulting from EPA having modified its January 2009 determination on two occasions.

EPA filed four attachments in support of its motion which included:

1. A copy of EPA's *November 30, 2012* determination approving of Florida's Numeric Nutrient Standards Rule which included amendments to FDEP Rule Chapters 62-302 and 62-303 of the Florida Administrative Code (F.A.C.);

2. A copy of the *November 30, 2012* letter amending the January 14, 2009 Necessity Determination to conclude the numeric downstream protection values were not required under the 2009 determination;

3. The letter dated *June 27, 2013*, from James Giattina, Director of the Water Protection Division, EPA Region 4, to FDEP Secretary Herschel Vinyard, transmitting an attached determination document approving FDEP's Numeric Nutrient Standards Rule Implementation Document;

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[2] DEP's definition of streams subject to its EPA-approved state numeric nutrient thresholds excluded non-perennial streams dominated by wetland and/or terrestrial taxa (flora and fauna). EPA acknowledged that no numeric nutrient criteria are currently required for wetlands stating: "Additionally, this rule does not apply to wetlands, including non-perennial stream segments that function as wetlands because of fluctuating hydrologic conditions that typically result in the dominance of wetland taxa." 77 Fed. Reg. 74985, 74988 (Tuesday, December 6, 2010)

4. The letter dated *June 28, 2013* from Nancy Stoner, EPA's Acting Assistant Administrator, to Secretary Vinyard amending EPA's January 14, 2009 Necessity Determination to conclude that new or revised numeric nutrient criteria are not necessary for flowing waters in the South Florida Region (including the Everglades Agricultural Area and Everglades Protection Area), marine lakes, tidally-influenced flowing waters and conveyances primarily used for water management purposes with marginal or poor stream habitat components.

The environmental organizations contested EPA's motion and on July 30, 2013, filed a *Motion to Enforce Consent Decree*. On August 7, 2013, the District Court granted a motion filed by FDEP to participate as amicus curiae and accepted the Department's Amicus Memorandum (***Attachment 9***) which detailed the state's progress in completing its own rulemaking and obviating the need for EPA's gap-filling rules as proposed November 30, 2012—the same date of EPA's approval of the state numeric nutrient standards.

A hearing was held September 24, 2013 and on January 7, 2014 the District Court entered an order (***Attachment 10***) granting EPA's motion to modify the consent decree and denied the opponents' motion to enforce the consent decree noting that their remedy was to challenge EPA's November 2012 approval of the state standards and the November 2012 and June 2013 amendments of the January 2009 determination. To date no challenges have been filed and EPA's April 2, 2014 notice of withdrawal does not provide a forum for the plaintiff organizations to address those issues.

EPA's withdrawal of the December 6, 2010 criteria is consistent with the District Court's Order Modifying the Consent Decree and mandated by the Clean Water Act. Section 101(b) of the Clean Water Act establishes state primacy over water quality programs. Notwithstanding EPA's authority under CWA § 303(c)(4)(B), § 303(c)(3) states that once EPA approves a new or revised standard submitted by a state, "such standard shall thereafter be the water quality standard for the applicable waters of that State." EPA approved Florida's numeric nutrient standards on November 30, 2012. Therefore, EPA's federal criteria must be withdrawn since EPA has approved state criteria that EPA has concluded are consistent with the CWA.

The District Court's order approved modification of the consent decree as a result of EPA having approved FDEP's statewide numeric nutrient standards rule and having modified the January 2009 determination in recognition of the state having reoccupied the field such that it is no longer necessary for EPA to promulgate criteria for the state of Florida. FDEP's adoption of its numeric criteria and thresholds "abrogated EPA's obligation under the consent decree to adopt its own rules." Attachment 10 at page 10.

The court made clear that neither EPA's January 14, 2009 determination nor the consent decree "was intended to change the Clean Water Act's allocation to the state of primary responsibility for setting water quality criteria." Attachment 10 at page 16. EPA has approved state lakes and springs criteria that serve the same purpose and function as the federal criteria (and employ the same numeric endpoints) making the withdrawal of the federal criteria a perfunctory ministerial step.

The FCG-EC appreciates the opportunity to provide these comments and requests that EPA finalize its withdrawal of the federal criteria as proposed in its *Water Quality Standards for the State of Florida's Lakes and Flowing Waters, Withdrawal*, as published at 79 Federal Register 18494, Wednesday, April 2, 2014.

Sincerely,

Richard M. (Mike) Markey
Chair, Water Subcommittee, Environmental Committee
Florida Electric Power Coordinating Group, Inc.

Copt to:

Tanya Portillo, Director of Environmental Affairs
Florida Electric Power Coordinating Group, Inc.

The EPA agrees that the following three sets of actions provide the basis for the EPA to withdraw (and not finalize) federal numeric nutrient standards applicable to Florida waters: (1) the EPA's November 30, 2012, June 27, 2013, and September 26, 2013 approvals of Florida-adopted numeric nutrient criteria and other water quality standards, (2) the EPA's November 30, 2012 and June 28, 2013 amended Clean Water Act section 303(c)(4)(B) determinations, and (3) the U.S. District Court's January 7, 2014 order modifying the consent decree to relieve the EPA of the obligation to finalize numeric nutrient criteria for various waters in Florida.

The EPA requested comment on and is limiting this final action to only the issue of withdrawing (and not finalizing) federal water quality standards applicable to Florida waters. Attachments 1-10 (6/7/12 order by Florida's Division of Administrative Hearings; EPA's 11/30/12 approval of Florida's water quality standards; EPA's 11/30/12 amended determination; EPA and FDEP Agreement in Principle; Florida's April 2013 Implementation document; Florida Committee Substitute for Senate Bill No. 1808; EPA's 6/27/13 approval of Florida's water quality standards; EPA's 6/28/13 amended determination; Florida's 7/30/13 Amicus Memorandum; and the U.S.

District Court's January 7, 2014 order) remain in the original comment letter in the docket to this rulemaking but were not included in this document. Attachments 1-10 as well as comments on permits, total maximum daily loads, and the content of Florida's water quality standards are outside the scope of this action.

[Comment ID: EPA-HQ-OW-2009-0596-3101]

FWEA Utility Council

Protecting Florida's Clean Water Environment

P.O. Box 10755 • Tallahassee, Florida 32302 • (850) 425-3428

www.fweauc.org

May 21, 2014

Elizabeth Southerland, Director
Office of Science and Technology
U. S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
and,
Water Docket
U. S. Environmental Protection Agency
Mail Code2822T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Attention: Docket ID No.: EPA-HQ-OW-2009-0596

Re: *Water Quality Standards for the State of Florida's Lakes and Flowing Waters, Withdrawal*, 79 Federal Register 18494, Wednesday, April 2, 2014

Dear Director Southerland,

The Florida Water Environment Association (FWEA) Utility Council appreciates the opportunity to submit comments supporting the U.S. Environmental Protection Agency's (EPA's) proposal to withdraw federal numeric nutrient criteria applicable to Florida lakes and springs. EPA's decision to withdraw these finalized criteria, as well as its commitment not to finalize previously proposed stream and estuary criteria, will enable the State of Florida's comprehensive, EPA-approved nutrient water quality standards to go into effect and enhance Florida surface water protection.

The enclosed comments explain the FWEA Utility Council's interest in this administrative action and the Utility Council's position that the withdrawal is a legally valid and necessary action to enable the State of Florida's new nutrient water quality protections to go into effect.

Our core business is protecting the environment and public health

The FWEA Utility Council is the statewide umbrella organization of local government and private utilities in Florida that own and operate community wastewater treatment, disposal, reuse, and recycling facilities. FWEA Utility Council members provide essential wastewater treatment infrastructure and services for over 8 million Florida residents. Utility Council

members are subject to nutrient water quality criteria, as implemented through the National Pollutant Discharge Elimination System (NPDES) permitting program, total maximum daily load (TMDL) restoration program, and other state permitting programs.

FWEA Utility Council members share a commitment to environmental protection and scientifically sound environmental policies. It is with this shared commitment that the Utility Council offers its support for EPA's withdrawal of its nutrient criteria rulemakings.

EPA's withdrawal of its federal criteria is legally valid

EPA's withdrawal of federal nutrient criteria is the culmination of a comprehensive agreement between EPA and the State of Florida reestablishing the state's primacy in managing its own surface waters under the Clean Water Act. The withdrawal:

- Is legally mandated based upon EPA's approval of the State of Florida's nutrient standards on November 30, 2012;[1]
- Fulfills EPA's commitments under the March 15, 2013 *Agreement in Principle* and *Path Forward*, in which EPA and the Florida Department of Environmental Protection (FDEP) agreed on the remaining steps necessary for FDEP nutrient criteria rules to supplant EPA's nutrient criteria rulemakings;[2]
- Is consistent with EPA's amendments to its "necessity determination" under §303(c)(4)(B) of the Clean Water Act, regarding the need for numeric nutrient water quality criteria in Florida;[3] and
- Is consistent with the *Order Modifying the Consent Decree* issued January 7, 2014, entered by the U. S. District Court for the Northern District of Florida.[4]

FDEP's approved criteria are the result of lengthy and transparent public rulemaking processes. The Florida Environmental Regulation Commission amended and duly approved the state's first set of numeric nutrient criteria rules at a public hearing in December 2011.[5] The criteria were

[1] EPA's "Decision Document" approving amendments to Chapter 62-302 and 303, F.A.C. (Nov. 30, 2012), is attached as Exhibit 1.
[2] The *Agreement in Principle* and *Path Forward* are attached as Exhibits 2 and 3.
[3] The initial EPA determination letter, dated January 14, 2009 and attached as Exhibit 4, deemed numeric nutrient criteria necessary for certain Florida surface waters. The determination was amended to clarify that numeric downstream protection values are not necessary in a letter by Acting Assistant Administrator Stoner, dated November 30, 2012 and attached as Exhibit 5. EPA amended the determination again on June 28, 2013 to conclude that a limited subset of surface waters do not require numeric criteria. This final amendment to the determination is attached as Exhibit 6.
[4] The court's order is attached as Exhibit 7.
[5] The rule amendments and associated FDEP presentations to the Environmental Regulation Commission are attached as Exhibits 8 and 9.

based on an extensive technical record.[6] The state criteria for springs and lakes are notable for substantive similarities to the criteria EPA proposes to withdraw for the same water bodies.[7]

Notwithstanding the extensive technical foundation for the state criteria, a handful of advocacy groups challenged the criteria under § 120.56 of Florida's Administrative Procedures Act. A six day evidentiary hearing was held before an administrative law judge in the Florida's Division of Administrative Hearings. On June 7, 2012, the judge issued a 58 page final order upholding Florida's existing narrative nutrient criterion and its proposed numeric nutrient standards rule.[8] The advocacy groups appealed the ALJ's final order to the Florida First District Court of Appeals; the appellate court upheld the ALJ's final order without issuing an opinion.

After the validation of state's first phase of numeric nutrient rules, the State of Florida took several additional steps to enhance its comprehensive nutrient water quality standards. FDEP duly adopted numeric criteria for estuaries and coastal waters that were not covered by the December 2011 rules.[9] FDEP adopted detailed guidance governing the implementation of its nutrient criteria rules.[10] The Florida Legislature passed legislation approving FDEP's rulemakings and providing additional assurances that FDEP would implement its rules in a manner to ensure downstream protection.[11] EPA approved all of these state actions.

No federal legal challenges were filed against these new state water quality protections; however, environmental organizations contested EPA's motion to amend the consent decree governing the federal rulemaking process, apparently because the amendment to the consent decree would pave the way for the state criteria to supplant the federal criteria. The environmental organizations also filed a *Motion to Enforce Consent Decree*. On August 7, 2013, the District Court granted a motion filed by FDEP to participate as amicus curiae and accepted the Department's Amicus Memorandum which detailed the state's progress in completing its own rulemaking and obviating the need for EPA's gap-filling rules as proposed November 30, 2012—the same date of EPA's approval of the state numeric nutrient standards.[12]

A hearing was held September 24, 2013 and on January 7, 2014 the District Court entered an order granting EPA's motion to modify the consent decree and denied the opponents' motion to enforce the consent decree, noting that their remedy was to challenge EPA's November 2012 approval of the state standards and the November 2012 and June 2013 amendments of the January 2009 determination. To date no challenges have been filed and EPA's April 2, 2014

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[6] FDEP's technical support document is attached as Exhibit 10.

[7] EPA's 0.35 mg/L nitrate-nitrite criterion for Florida spring boils and vents is identical to FDEP's criterion and based on the same data and analyses. With the exception of lakes falling within the phosphate rich Bone Valley (West Central nutrient region), EPA's criteria for lakes are the same numbers as those adopted by FDEP and approved by EPA. For lakes in the West Central nutrient region, FDEP adopted—and EPA approved—a total phosphorus criterion of 0.49 mg/L.

[8] The state order upholding FDEP's nutrient criteria rules is attached as Exhibit 11.

[9] FDEP's rule amendments were codified in chapters 62-302 and 62-303, F.A.C., and also included in a report to the Governor of Florida, attached as Exhibit 12.

[10] FDEP's implementation guidance, "Implementation of Florida's Numeric Nutrient Standards," is attached as Exhibit 13

[11] *See*, 2013 Laws of Florida 71, attached as Exhibit 14.

[12] FDEP's Amicus Memorandum is attached to this letter as Exhibit 15.

notice of withdrawal does not provide a forum for the plaintiff organizations to address those issues.

EPA's withdrawal of the December 6, 2010 criteria is consistent with the District Court's Order Modifying the Consent Decree and mandated by the Clean Water Act. Section 101(b) of the Clean Water Act establishes state primacy over water quality programs. Notwithstanding EPA's authority under CWA § 303(c)(4)(B), § 303(c)(3) states that once EPA approves a new or revised standard submitted by a state, "such standard shall thereafter be the water quality standard for the applicable waters of that State." EPA approved Florida's numeric nutrient standards on November 30, 2012. Therefore, EPA's federal criteria must be withdrawn since EPA has approved state criteria that EPA has concluded are consistent with the CWA.

The District Court's order approved modification of the consent decree as a result of EPA having approved FDEP's statewide numeric nutrient standards rule and having modified the January 2009 determination in recognition of the state having reoccupied the field such that it is no longer necessary for EPA to promulgate criteria for the state of Florida. FDEP's adoption of its numeric criteria and thresholds "abrogated EPA's obligation under the consent decree to adopt its own rules."

The court made clear that neither EPA's January 14, 2009 determination nor the consent decree "was intended to change the Clean Water Act's allocation to the state of primary responsibility for setting water quality criteria." EPA has approved state lakes and springs criteria that serve the same purpose and function as the federal criteria (and employ the same numeric endpoints) making the withdrawal of the federal criteria a perfunctory ministerial step. All that remains for Florida's nutrient water quality standards program to fully go into effect is for EPA to take this final step.

EPA's withdrawal of federal criteria will allow new state water protections to begin paying environmental dividends

In addition to being legally valid, EPA's withdrawal of its nutrient criteria rulemakings will create numerous environmental benefits by allowing Florida to fully implement its comprehensive nutrient water quality standards.[13] In turn, FWEA Utility Council members will be able to develop compliance plans for the new state criteria and, where necessary, join with other stakeholders in the implementation water quality restoration projects through the state's nutrient TMDL program.

As determined by an independent Florida State University study,[14] these state criteria will be costly to implement, but the state criteria do not suffer from the myriad unintended economic and environmental consequences that led the National Academy of Sciences to criticize the EPA's economic analysis of its own federal criteria.[15]

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[13] The state criteria have extensive coverage. *See* FDEP GIS Data Review Numeric Nutrient Criteria (Feb. 2013), attached as Exhibit 16.
[14] The Florida State University Study is attached as Exhibit 17.
[15] The National Academy of Sciences study is attached as Exhibit 18.

In sum, the State of Florida has adopted innovative and cost-effective nutrient criteria rules, but these state rules are not yet legally effective; EPA must withdrawal its criteria first. The FWEA Utility Council supports EPA's withdrawal.

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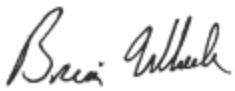
The FWEA Utility Council appreciates the opportunity to provide these comments and requests that EPA finalize its withdrawal of the federal criteria as proposed in its *Water Quality Standards for the State of Florida's Lakes and Flowing Waters, Withdrawal*, as published at 79 Federal Register 18494, Wednesday, April 2, 2014.

Respectfully Submitted,



Brian Wheeler
FWEA Utility Council President

The EPA agrees that the following three sets of actions provide the basis for the EPA to withdraw (and not finalize) federal numeric nutrient standards applicable to Florida waters: (1) the EPA's November 30, 2012, June 27, 2013, and September 26, 2013 approvals of Florida-adopted numeric nutrient criteria and other water quality standards, (2) the EPA's November 30, 2012 and June 28, 2013 amended Clean Water Act section 303(c)(4)(B) determinations, and (3) the U.S. District Court's January 7, 2014 order modifying the consent decree to relieve the EPA of the obligation to finalize numeric nutrient criteria for various waters in Florida.

The EPA requested comment on and is limiting this final action to only the issue of withdrawing (and not finalizing) federal water quality standards applicable to Florida waters. Attachments 1-18 (EPA's 11/30/12 approval of Florida's water quality standards; EPA and FDEP Agreement in Principle; EPA and FDEP Path Forward; EPA's 1/14/09 original determination; EPA's 11/30/12 amended determination; EPA's 6/28/13 amended determination; the U.S. District Court's January 7, 2014 order; Florida Chapters 62-302 and 62-303; Florida presentation to the Environmental Regulation Commission; Florida's technical support document; 6/7/12 order by Florida's Division of Administrative Hearings; Florida's Report to the Governor and Legislature; Florida's April 2013 Implementation document; 2013 Laws of Florida; Florida's 7/30/13 Amicus Memorandum; Florida's February 2013 GIS Data Review; Florida State University economic analysis; and the National Academy of Sciences review of EPA's economic analysis) remain in the original comment letter in the docket to this rulemaking but were not included in this document. Attachments 1-18 as well as comments on permits, total maximum daily loads, and the costs of implementing water quality standards are outside the scope of this action.

David. B. Jellerson
Director, Environmental
Mosaic Fertilizer, LLC
13830 Circa Crossing Drive
Lithia, FL 33547

Tel (813) 500-6474
Fax (813) 571-6913
E-mail:
david.jellerson@mosaicco.com
www.mosaicco.com

May 27, 2014

VIA E-MAIL [OW-DOCKET@EPA.GOV]

Water Docket
U.S. Environmental Protection Agency
Mail code: 2822T
1200 Pennsylvania Avenue NW
Washington, D.C. 20460
Attention: Docket ID No. EPA-HQ-OW-2009-0596

Re: Comments of Mosaic Fertilizer, LLC on EPA's Proposed Rule Withdrawing Water Quality Standards for the State of Florida's Lakes and Flowing Waters; EPA-HQ-OW-2009-0596

Dear Sir/Madam:

Mosaic Fertilizer, LLC ("Mosaic") appreciates the opportunity to offer comments on EPA's Proposed Rule withdrawing Water Quality Standards for the State of Florida's Streams and Downstream Protection Values for Lakes, 79 Fed. Reg. 18,494 (April 2, 2014) (referred to hereinafter as "the Withdrawal Rule"). For the reasons stated herein, Mosaic encourages EPA to finalize and approve the Withdrawal Rule, in order to expedite and effectuate Florida's nutrient regulation, approved by EPA, establishing numeric nutrient criteria in Florida. Similarly, Mosaic supports EPA's decision not to finalize Numeric Nutrient Criteria ("NNC") for Florida's estuaries and flowing waters. These steps will enable the nutrient regulation approved by Florida to go into effect, an outcome favored by the State of Florida, EPA, and a broad range of stakeholders, including local governments, utilities and regulated industries.

Mosaic

With its affiliates, Mosaic is the world's leading producer and marketer of concentrated phosphate and potash, two of the primary nutrients required for agricultural production. Our business engages in every phase of crop nutrition development, from the mining of phosphate rock to the production of crop nutrients, feed, and industrial products for customers throughout the globe. Our customer base includes wholesalers, retail dealers, and individual growers in more than 40 countries. Mosaic operates five mines and four concentrates plants in Florida that produce phosphate fertilizer and feed phosphate, as well as a concentrates plant in Louisiana that produces phosphate fertilizer. Our principal potash operations are located in the United States and Canada.

Mosaic has participated extensively in the ongoing dialog among EPA, FDEP and others to develop scientifically sound and practical approaches to regulating nutrients in Florida's waters. We have commented extensively on previous EPA nutrient promulgations, as well as on the nutrient regulation approved by the Florida Department of Environmental Protection ("FDEP"). Throughout this process, Mosaic has strived to provide alternative solutions and proposals that address constructively the important issue of nutrient impacts on Florida's waterways.

Background

The Withdrawal Rule is the culmination of a lengthy rulemaking and litigation process that began in 2008, when environmental organizations sued EPA for allegedly failing to establish federal NNC for Florida. EPA later settled that litigation, entering into a consent decree committing the Agency to establish Florida NNC by rulemaking ("Consent Decree"). To establish the predicate for federal authority to set water quality standards under the Clean Water Act, EPA issued a finding that new or revised water quality standards were "necessary" for Florida, pursuant to 33 U.S.C. § 303(c)(4)(B) (the "Necessity Determination"). On December 6, 2010 EPA published final rules establishing NNC for Florida's lakes and flowing waters. These NNC were challenged in the U.S. District Court for the Northern District of Florida, and upheld in part and remanded in part in a decision issued by Judge Hinkle in February of 2012. In 2013, in response to the 2012 remand order, EPA again proposed NNC for Florida's lakes and flowing waters ("the Remand Rule"), and also proposed NNC for Florida's coastal waters and estuaries.

On a parallel track, in June 2012 FDEP submitted a nutrient regulation to EPA for its approval. EPA approved the Florida nutrient regulation in November 2012. In 2013, FDEP developed and EPA approved an Implementation Document for the Florida nutrient regulation. To address certain respects in which the State approach differed from the EPA approach, EPA issued amendments to the Necessity Determination on November 30, 2012 and June 28, 2013. On January 7, 2014, the District Court for the Northern District of Florida approved modifying the Consent Decree. This decision cleared the way for the last step needed for the Florida nutrient regulation to go into effect: EPA withdrawal of the existing and pending EPA nutrient rules.

Comments

EPA proposes in the instant Withdrawal Rule to: (i) withdraw the federal NNC that were upheld by Judge Hinkle in 2012 (NNC for lakes, springs and certain downstream protection values); (ii) not finalize the Remand Rule; and (iii) not finalize the NNC proposed in November 2012 for Florida's estuaries and coastal waters. *See* 79 Fed. Reg. at 18,496. Mosaic supports the EPA proposal as fulfilling the Clean Water Act's ("CWA") mandate for cooperative federalism, and as a necessary step to facilitate implementation of a revised and improved system for regulating nutrients in Florida's waters.

The Withdrawal Rule, because it enables the Florida nutrient regulation to take effect, is consistent with the principles of cooperative federalism embodied in the Clean Water Act. *See* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution. . . ") The CWA provides that States have the primary role in setting water quality standards, with EPA reviewing and approving State-developed water quality standards. *See* 33 U.S.C. § 303(c)(2) & (3). By contrast, federal promulgation of state water quality standards is an exceptional and unusual event, considered by EPA to be "a course of last resort" and "symptomatic of something awry with the basic statutory scheme." 57 Fed. Reg. 60,848, 60,858 (Dec. 22, 1992). Here, the Florida nutrient regulation has been subject to exhaustive administrative review and judicial challenge in Florida, and has been approved by EPA under the Agency's standard process for reviewing new and revised water quality standards. Indeed, Judge

Hinkle, in approving the Motion to Modify the Consent Decree, stated that "Nothing in this record indicates that EPA's decision [to approve the Florida nutrient regulation] was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'" *Florida Wildlife Federation v. McCarthy*, No. 4:08cv324-RH/CAS2014 Westlaw 51360 at *11 (N. D. Fla. Jan. 7, 2014). Accordingly, there is no need for the extraordinary remedy of Federal establishment of nutrient criteria in Florida, beyond the normal oversight role prescribed by the CWA.

Furthermore, failure to adopt the Withdrawal Rule would needlessly delay and impede the implementation of regulations to control nutrient pollution in Florida's waters. Even though EPA has approved the Florida nutrient regulation and modified the Necessity Determination, and a federal court has amended the 2009 Consent Decree, the Florida nutrient regulation cannot take effect until EPA *withdraws* the proposed and final federal NNC. The Florida nutrient regulation contains a provision stating that it becomes effective only if EPA approves the Florida nutrient regulation in its entirety and "concludes rulemaking that removes federal numeric nutrient criteria in response to the approval." F.A.C. § 62-302.531(9). *See also* Act of May 31, 2013, Ch. 2013-71, Sec. 3 (available at http://laws.flrules.org/2013/71) (affirming that F.A.C. § 62-302.531(9) shall remain in place until EPA "withdraws all federal numeric nutrient criteria rules in the State of Florida and otherwise ceases all federal nutrient rulemaking in the State of Florida . . ."). Since EPA has not yet finalized nutrient regulations applicable to the bulk of Florida waters, failure to finalize the Withdrawal Rule would prevent the Florida nutrient regulation from becoming effective. The Florida nutrient regulation, approved by the Florida Environmental Regulation Commission, upheld by the Florida Court of Appeals, and approved by EPA, could not go into effect, and Florida waters would not be subject to any other nutrient regulation, since EPA's alternative nutrient program is not yet fully in place. For all stakeholders seeking an improved and updated framework for regulating nutrient water quality in Florida's waters, that would not be a favorable outcome.

Additionally, the Withdrawal Rule also serves the interests of regulatory clarity and consistency by ensuring that Florida regulated entities are subject to a single set of NNC requirements, and are not subject to multiple and potentially inconsistent state and federal requirements. Florida's federally approved nutrient regulation is highly protective and arguably the most comprehensive in the nation. EPA, the State of Florida and the regulated community share an interest in making compliance as straightforward and transparent as possible. Thus, even if the Florida nutrient regulation could be construed to allow some kind of overlap between the State and Federal rules (although Mosaic believes that the language of F.A.C. § 62-302.531(9) on its face makes clear that withdrawal of the Federal NNC is a prerequisite for the State rule to become effective) such an outcome would -- by making compliance unnecessarily burdensome and complex -- impede, rather than enhance, the protection of Florida waters from nutrient pollution.

Indeed, in many respects the Withdrawal Rule constitutes an administrative formality more akin to regulatory housekeeping than to a substantive rulemaking. EPA has made final decisions to approve the Florida nutrient regulation and to modify the Necessity Determination. Both of these decisions are -- subject to the normally applicable limits of standing and statutes of limitation, among others -- challengeable under the Administrative Procedure Act. Any entities seeking to challenge the substance

of EPA's decisions may exercise their right to do so, but opposing this Withdrawal Rule does not bring a challenge on the merits to EPA's actions, and serves only to delay and confound the establishment of the duly-approved Florida nutrient regulation.

Accordingly, Mosaic supports finalization of the Withdrawal Rule, and appreciates this opportunity to comment.

Sincerely,

David B. Jellerson
Senior Director, Environmental

DBJ/cas

The EPA agrees that the following three sets of actions provide the basis for the EPA to withdraw (and not finalize) federal numeric nutrient standards applicable to Florida waters: (1) the EPA's November 30, 2012, June 27, 2013, and September 26, 2013 approvals of Florida-adopted numeric nutrient criteria and other water quality standards, (2) the EPA's November 30, 2012 and June 28, 2013 amended Clean Water Act section 303(c)(4)(B) determinations, and (3) the U.S. District Court's January 7, 2014 order modifying the consent decree to relieve the EPA of the obligation to finalize numeric nutrient criteria for various waters in Florida. The EPA also agrees that the Clean Water Act assigns to the states the primary authority for setting water quality standards.

The EPA requested comment on and is limiting this final action to only the issue of withdrawing (and not finalizing) federal water quality standards applicable to Florida waters. Comments on the protectiveness of Florida's water quality standards are outside the scope of this action.

The Fertilizer Institute
Nourish, Replenish, Grow

June 2, 2014

Water Docket, U.S. Environmental Protection Agency
Mail code: 2822T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
ow-docket@epa.gov

Attention: Docket ID No. EPA-HQ-OW-2009-0596

RE: Comments on EPA's Proposed "Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Withdrawal," 79 Federal Register 18,494-18,497 (Apr. 2, 2014)

Dear Sir or Madam:

The Fertilizer Institute ("TFI") appreciates the opportunity to provide comments regarding the proposed rule, Water Quality Standards for the State of Florida's Lakes and Flowing Waters; Withdrawal ("Proposed Withdrawal"), published by the U.S. Environmental Protection Agency ("EPA") in the *Federal Register* on April 2, 2014 (79 Fed. Reg. 18,494).

Statement of Interest

TFI represents the nation's fertilizer industry including producers, importers, retailers, wholesalers and companies that provide services to the fertilizer industry. TFI members provide nutrients that nourish the nation's crops, helping to ensure a stable and reliable food supply. TFI's full-time staff, based in Washington, D.C., serves its members through legislative, educational, technical, economic information and public communication programs.

TFI members own and operate facilities in Florida and have an interest in ensuring the development of scientifically sound water quality standards. Many TFI members hold National Pollutant Discharge Elimination System ("NPDES") permits for discharges into Florida waters that would be affected by state or federal water quality standards.

General Comments

TFI strongly supports EPA's proposal to withdraw its federal numeric nutrient criteria applicable to waters of the State of Florida (*i.e.*, "Inland rule" or "Phase I rule") and to discontinue all further work on such criteria (*i.e.*, the "Coastal rule" or "Phase II rule"), given that the State of Florida has adopted, and EPA has approved, comprehensive numeric nutrient standards. EPA's federal criteria are clearly needlessly redundant in light of Florida's regulatory action. The federal criteria are also inconsistent with the Clean Water Act, which envisions state-promulgated standards and federal action only in two limited circumstances, neither of which is present in Florida. Withdrawal of all federal numeric nutrient criteria and discontinuance of

Capitol View
425 Third Street, S.W., Suite 950
Washington, DC 20024

202.962.0490
202.962.0577 fax
www.tfi.org

further efforts to promulgate such criteria would restore the federal-state balance that Congress envisioned when it passed the Clean Water Act in 1972, and it would eliminate any regulatory uncertainty that results from overlapping state and federal regulations.

TFI remains committed to the quality of Florida's waters, and it understands that scientifically sound, protective nutrient water quality standards are important to the State's economy and quality of life. Because we firmly believe that the State's nutrient program will effectively safeguard the State's waters, we support EPA's proposed withdrawal and urge the Agency to finalize the proposed rule.

Specific Comments

Withdrawal of EPA's Criteria Would Restore the Proper Federal-State Balance under the Clean Water Act

As outlined in EPA's proposal, the State of Florida has made tremendous progress in strengthening its nutrient regulation program since EPA first promulgated the Inland Rule in December 2010. In a nutshell, the State has put in place numeric nutrient criteria that cover all fresh water lakes, springs, estuaries, and coastal waters, as well as the majority of flowing waters in the State. Because EPA has approved the State's criteria and because EPA is no longer obligated under a consent decree to promulgate numeric nutrient criteria for any of Florida's waters, the Agency's proposed withdrawal of the Inland Rule and discontinuance of efforts to promulgate the Coastal Rule is the only appropriate course of action.

EPA's proposed withdrawal serves the "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution" and "to plan the development and use (including restoration, preservation, and enhancement) of land and water resources[.]"[1] By withdrawing all federal nutrient criteria, EPA would put the State of Florida back in its proper role as "the prime bulwark in the effort to abate water pollution."[2] Where, as here, the State has undertaken such extensive efforts with respect to nutrient regulation, there is no legal justification for federal criteria.

"In accord with Congress' intent to cast the states in the featured role in the promulgation of water quality standards, the EPA may step in and promulgate water quality standards itself only in limited circumstances."[3] Specifically, EPA may promulgate federal criteria only if "(1) it determines that a state's proposed new or revised standard does not measure up to CWA requirements *and* the state refuses to accept EPA-proposed revisions to the standard or (2) a state does not act to promulgate or update a standard but, in the EPA's view, a new or revised standard

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[1] 33 U.S.C. § 1251(b).

[2] *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991); *see also Am. Paper Inst. v. EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993) ("Under the CWA, [] water quality standards . . . are primarily the states' handiwork."); *Miss. Comm. on Nat. Res. v. Costle*, 625 F.2d 1269, 1275 (5th Cir. 1980) ("Congress did place primary authority for establishing water quality standards with the states. . . . The varied topographies and climates in the country call for varied water quality solutions.").

[3] *Am. Paper Inst.*, 996 F.2d at 349.

is necessary to meet CWA muster."[4] Without getting into the validity of EPA's determination (in January 2009[5]) that the second circumstance was applicable to Florida, it is clear that neither circumstance applies at this time. Florida has established numeric nutrient criteria for most of its waters,[6] and those that do not have numeric criteria are subject to a narrative nutrient criterion[7] that can be "translated" into numeric limitations on a site-specific basis. By virtue of its various 2012 and 2013 approvals of the State's rules, EPA has effectively proven that there is no statutory basis to step in and promulgate federal criteria or to keep in place any federal criteria that the Agency previously promulgated to fill a perceived gap in Florida's water quality standards.

EPA has long recognized the limits on its authority to establish water quality standards on behalf of states. For example, the Agency has acknowledged that "[f]ederal promulgation of State water quality standards should be a course of last resort. It is symptomatic of something awry with the basic statutory scheme."[8] With regard to nutrients in particular, the Agency recently reaffirmed its commitment to bolstering state action in its 2011 "Framework Memo."[9] Although EPA observed in that memorandum that the Clean Water Act provides it with a number of regulatory tools, it appropriately concluded that its "resources can best be employed by catalyzing and supporting action by states that want to protect their waters from nitrogen and phosphorus pollution," rather than, for example, stepping in and promulgating federal criteria.[10] To achieve that goal, the Agency offered eight recommended elements of a ***state*** framework for managing nitrogen and phosphorus pollution to serve as a "planning tool" intended to "encourage development and implementation of effective ***state*** strategies for managing nitrogen and phosphorus pollution."[11]

Consistent with the Framework Memo, EPA sensibly denied an overbroad petition urging EPA to promulgate federal numeric nutrient criteria for (i) all 50 states; (ii) the 31 states within the Mississippi-Atchafalaya River Basin; or (iii) the 10 states along the mainstem of the Mississippi River.[12] Among other things, EPA's denial letter reiterated that its "long-standing policy, consistent with the CWA, has been that ***states should develop and adopt standards in the first instance***, with the EPA using its own rulemaking authority only in cases where it disapproves a new or revised standard, or affirmatively determines that new or revised standards are needed to meet CWA requirements."[13] Again, neither of those circumstances is present at this time given the many administrative, legislative, and judicial developments in the State of Florida over the

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[4] *Id.* (citing 33 U.S.C. § 1313(c)(3)-(4)).
[5] *See* Letter from Benjamin Grumbles, US EPA, to Michael Sole, FDEP (Jan. 14, 2009).
[6] *See* Fla. Admin. Code r. 62-302.532(1)(k)-(w), (2); *Id.* r. 62-304.435(4)-(6); *id.* r. 62-304.330(9)-(11); Chapter 2013-71, Laws of Florida (Senate Bill 1808).
[7] F.A.C. r. 62-302.530(47)(b).
[8] Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance, 57 Fed. Reg. 60,848, 60,858 (Dec. 22, 1992).
[9] Memorandum from Nancy Stoner, Acting Assistant Administrator, U.S. EPA, to EPA Regional Administrators, Regions 1-10, "Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions" (Mar. 16, 2011).
[10] *See id.* at 2.
[11] *Id.* at 3 (emphasis added).
[12] *See* Letter from Michael Shapiro, Deputy Assistant Administrator, U.S. EPA Office of Water, to Kevin Reuther, MN Center for Environmental Advocacy (July 29, 2011).
[13] *Id.* at 5 (emphasis added).

past two years, which are catalogued in EPA's proposal and briefly highlighted in the next section of these comments.[14]

In short, EPA's should finalize its proposal to withdraw all federal nutrient water quality standards because the proposed action furthers both the Agency's long-standing policy and the goals and requirements of the Clean Water Act, which is to allow states to take the lead in setting water quality standards.

Given the Comprehensive Extent of the State of Florida's Nutrient Program, EPA Should Finalize Its Proposal to Withdraw the Federal Criteria

Florida has made tremendous progress in recent years by issuing an extensive set of EPA-approved numeric nutrient criteria for most of the State's waters. As a result of the State's recent efforts, all of Florida's Class I and III freshwater lakes, springs, estuaries, and coastal waters have numeric nutrient criteria. Likewise, most of the State's flowing waters have EPA-approved numeric nutrient criteria. The only waters that do not have numeric nutrient criteria (specifically, flowing waters in South Florida, tidally-influenced flowing waters, marine lakes, and water management conveyances) remain subject to Florida's narrative nutrient criterion, and the State is well positioned to make site-specific numeric interpretations of its criteria for these limited categories of waters.

The current regulatory landscape in Florida is drastically different from what it was in January 2009, when EPA made a determination under Clean Water Act Section 303(c)(4)(B)[15] that federal numeric nutrient criteria for all Class I and III waters in the State of Florida are necessary to meet the requirements of the Act.[16] Back then, all of Florida's Class I and III waters were subject to the State's narrative nutrient criterion, but EPA nevertheless determined that it was too inefficient, resource intensive, and time-consuming for the State to have to "translate" that criterion into numbers on a case-by-case basis, such as by establishing total maximum daily loads or effluent limitations in Section 402 permits.[17] It is important to remember that EPA never suggested that the narrative nutrient criterion (and the resulting site-specific numeric "translations") were unlawful or scientifically flawed. Instead, EPA's January 2009 determination was premised on its view that more waters needed numeric criteria in a more expeditious fashion. The State has done just that through its extensive numeric nutrient criteria rulemakings over the past two years.

The universe of waters that remain subject to only the narrative nutrient criterion is therefore far smaller than it was in 2009. For those waters that lack numeric nutrient criteria, the State determined that it could not derive reliable, scientifically sound numeric criteria by rule. Instead, the State determined that the better approach is to translate the narrative nutrient criterion on a site-specific basis. As an example, for flowing waters in South Florida Region, the State concluded there were inadequate data to develop numeric criteria. Nonetheless, the State is confident that it can efficiently and timely derive site-specific numeric interpretations of the

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[14] *See* 79 Fed. Reg. at 18,496-97.
[15] 33 U.S.C. § 1313(c)(4)(B).
[16] *See* Letter from Benjamin Grumbles, US EPA, to Michael Sole, FDEP (Jan. 14, 2009).
[17] *See id.* at 8-9.

narrative criterion in this Region. Such efforts would be facilitated by the phosphorus criterion in the Everglades Protection Area and the fact that there are very limited remaining Class I and III flowing waters in that region. The key point is that the State had a sound basis for concluding that it could not develop defensible, scientifically valid numeric criteria for certain, relatively limited, categories of Class I and III waters. Similarly, the State had a sound basis for concluding that it could "translate" the narrative criterion for these waters on a case-by-case basis in an efficient and timely manner. TFI commends EPA for recognizing that the critical assumption underlying its 2009 necessity determination (that Florida cannot efficiently and timely translate its narrative nutrient criterion for ***all*** waters on a site-specific basis) is no longer valid, and for revising that determination accordingly.[18] All that remains is for EPA to finalize the proposed withdrawal.

It is important to point out that Florida's numeric nutrient criteria rules for lakes, springs, and flowing waters were subject to a full evidentiary review by the Florida Division of Administrative Hearings, which resulted in a detailed Final Order by the Administrative Law Judge approving the rules.[19] That Final Order was upheld on appeal by the First District Court of Appeal on in early 2013.[20] Among other things, the Final Order upheld Florida's finding that it was not possible to develop defensible numeric criteria for certain waters in Florida and that the application of the narrative criterion is appropriate for those waters.[21] Those proceedings further demonstrate that there are no regulatory gaps in the State's nutrient program that necessitate federal criteria and that EPA's proposed withdrawal is warranted.

As the Florida Division of Administrative Hearings aptly put it, the State's "rulemaking effort was unusual in terms of time, cost, numbers of scientists involved, and the comprehensiveness of the investigations that were undertaken and the data that were reviewed."[22] Given that groundbreaking effort, there is no justification, legal or otherwise, for EPA to keep its numeric nutrient criteria in place or to issue any additional federal criteria.

Conclusion

TFI is pleased to have the opportunity to comment on this important issue. TFI commends EPA for approving the State of Florida's numeric nutrient criteria and for taking the appropriate actions to serve Congress's goal of having the State take the lead with respect to the promulgation of water quality standards. In light of the EPA-approved State criteria, EPA's amendments to the necessity determinations, and modification of the consent decree in *Florida Wildlife Federation v. EPA* (N.D. Fla. No. 08-cv-324), EPA should promptly withdraw its federal numeric nutrient criteria and discontinue all efforts to promulgate any additional criteria. If you have any questions regarding these comments, please do not hesitate to contact me at (202) 515-2700 or via email at wfoster@tfi.org.

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[18] *See* Letter from Nancy Stoner, Acting Assistant Administrator, US EPA, to Herschel Vinyard, Secretary, FDEP (June 28, 2013).
[19] *See Fla. Wildlife Fed'n v. Dep't of Envtl. Prot.*, 2012 WL 2118200 (Fla. Dep't of Admin. Hearings June 7, 2012).
[20] *See Fla. Wildlife Fed'n v. Dep't of Envtl. Prot.*, 108 So. 3d 1081 (Fla. 1st Dist. Ct. App. 2013).
[21] *See* 2012 WL 2118200, at *12.
[22] *See* 2012 WL 2118200, at *10.

Sincerely,

Wade Foster
Manager, Regulatory and Scientific Affairs

The EPA agrees that the following three sets of actions provide the basis for the EPA to withdraw (and not finalize) federal numeric nutrient standards applicable to Florida waters: (1) the EPA's November 30, 2012, June 27, 2013, and September 26, 2013 approvals of Florida-adopted numeric nutrient criteria and other water quality standards, (2) the EPA's November 30, 2012 and June 28, 2013 amended Clean Water Act section 303(c)(4)(B) determinations, and (3) the U.S. District Court's January 7, 2014 order modifying the consent decree to relieve the EPA of the obligation to finalize numeric nutrient criteria for various waters in Florida. The EPA also agrees that the Clean Water Act assigns to the states the primary authority for setting water quality standards.

The EPA requested comment on and is limiting this final action to only the issue of withdrawing (and not finalizing) federal water quality standards applicable to Florida waters. Comments on permits, petitions before the Agency, previously-issued EPA memoranda or determinations, state or federal court rulings, and the protectiveness, scope or content of Florida's water quality standards are outside the scope of this action.

1156 15TH Street, NW · Suite 500 · Washington, DC 20005
T 202.457.0825 · F 202.457.0864 · www.aradc.org

June 2, 2014

VIA Electronic Mail

Water Docket
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

RE: Docket ID # EPA-HQ-OW-2009-0596; FRL-18-OW; Water Quality Standards for the State of Florida's Lakes and Flowing Waters, Withdrawal; 79 Federal Register 18494

On behalf of the Agricultural Retailers Association (ARA), I submit the following comments in support of the EPA's proposed withdrawal of its federal numeric nutrient criteria as published in the Federal Register on April 2, 2014.

The Agricultural Retailers Association ("ARA") is a national non-profit trade organization for agricultural retailers and distributors of agronomic crop inputs with members covering all 50 states and representing over 70 percent of all crop input materials sold to America's farmers. ARA's mission is to advocate, influence, educate and provide services to support its members in their quest to maintain a profitable business environment adapt to a changing world and preserve their freedom to operate. ARA members, including many located in the state of Florida, provide their farmer customers with essential crop inputs like fertilizer, seed, pesticide, and equipment; application services and crop consulting services, including conservation methodology. Agricultural retailers and many distributors are unable to change the geography in which they operate in reaction to a dramatic change in the regulatory environment. Many ARA members hold National Pollutant Discharge Elimination System Permits, supply agricultural nutrients, or discharge agricultural nutrients through professional application and would have been financially harmed by EPA's proposed numeric nutrient criteria regulation for the State of Florida.

On November 30, 2012, EPA approved a number of numeric nutrient criteria and thresholds adopted by the State of Florida. EPA has proposed to withdraw its federal criteria and is no longer obligated to move forward on proposed regulations following the states action. In addition, on January 7, 2014 the U.S. District Court for the Northern District of Florida agreed that EPA is no longer obligated to promulgate NNC for any of Florida's waters. This decision is also consistent with Section 101(b) of the Clean Water Act establishing state primacy over water quality programs.

ARA appreciates the opportunity to provide these comments and requests that EPA finalize its withdrawal of the federal criteria as proposed in its *Water Quality Standards for the State of Florida's Lakes and Flowing Waters, Withdrawal,* as published at 79 Federal Register 18494 on Wednesday, April 2, 2014.
Thank you for your review and consideration of our written comments.

Sincerely,

Richard D. Gupton

Richard Gupton
Sr. Vice President, Public Policy & Counsel

The EPA agrees that the following three sets of actions provide the basis for the EPA to withdraw (and not finalize) federal numeric nutrient standards applicable to Florida waters: (1) the EPA's November 30, 2012, June 27, 2013, and September 26, 2013 approvals of Florida-adopted numeric nutrient criteria and other water quality standards, (2) the EPA's November 30, 2012 and June 28, 2013 amended Clean Water Act section 303(c)(4)(B) determinations, and (3) the U.S. District Court's January 7, 2014 order modifying the consent decree to relieve the EPA of the obligation to finalize numeric nutrient criteria for various waters in Florida. The EPA also agrees that the Clean Water Act assigns to the states the primary authority for setting water quality standards.

The EPA requested comment on and is limiting this final action to only the issue of withdrawing (and not finalizing) federal water quality standards applicable to Florida waters. Comments on permits are outside the scope of this action.

[Comment ID: EPA-HQ-OW-2009-0596-3106]

**COMMENTS BY EARTHJUSTICE
ON BEHALF OF FLORIDA WILDLIFE FEDERATION, ST. JOHNS RIVERKEEPER, SIERRA CLUB, CONSERVANCY OF SOUTHWEST FLORIDA, AND ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA
ON
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY'S PROPOSED RULE WITHDRAWING WATER QUALITY STANDARDS FOR THE STATE OF FLORIDA'S LAKES AND FLOWING WATERS
AND
DECLARING INTENT NOT TO FINALIZE PROPOSED RULES ON ESTUARIES, COASTAL WATERS, SOUTH FLORIDA WATERS, AND REMANDED PORTION OF INLAND WATERS RULE**

EPA Docket I.D. No. EPA-HQ-OW-2009-0596

Proposed Rule Published: 79 Fed. Reg. 18494 (April 2, 2014)

**Comments with Exhibits Submitted June 2, 2014
To
www.regulations.gov**

I. INTRODUCTION.

This letter sets out the comments of Earthjustice on behalf of Florida Wildlife Federation, St. Johns Riverkeeper, Sierra Club, Conservancy of Southwest Florida and Environmental Confederation of Southwest Florida ("Conservation Organizations") on: 1) EPA's proposed rule withdrawing federal numeric nutrient criteria for Florida's Class I and Class III freshwater lakes and springs, as well as downstream protection values for lakes, and a provision for developing site-specific alternative criteria (SSAC) in all water bodies and 2) EPA's declaration that it need not and will not be finalizing its November 30, 2012 rule addressing Florida's estuaries and coastal waters, inland waters in the South Florida Nutrient Watershed Region and the remanded portion of the inlands waters rule (streams criteria).

Earthjustice represents these organizations in the lawsuit that resulted in the Consent Decree which requires the proposal and finalization of federal numeric nutrient criteria rules for Florida. These comments address the need for more stringent standards in order to protect recreational uses, the need for downstream protection values, and the need for EPA standards for all streams in Florida.

These comments are to be read in the context of the fact that conditions in Florida's waters have worsened and continue to worsen during the time that EPA has been backing away from performing its duties under the Clean Water Act. For example, at the same time that EPA was seeking to escape from its obligations under the Consent Decree, the St. Lucie River was plagued by a persistent nutrient-fueled algae bloom that poses an imminent threat to anyone who uses or goes near the water, *see* Exhs. 24 & 25 (July 29, 2013 photographs of algae bloom and

public health warnings on St. Lucie River), and a massive algae outbreak destroyed over 60% of the seagrass beds in the Indian River Lagoon. Exh. 33.

The public interest is served not by further delay and avoidance, but by finalizing numeric nutrient water quality criteria that protect all Florida waters and the public from the effects of excessive nutrient pollution.

II. EPA'S WITHDRAWAL OF ITS FEDERAL NUMERIC NUTRIENT CRITERIA RULES IS ARBITRARY AND CAPRICIOUS BECAUSE THE STATE RULES UPON WHICH THE WITHDRAWAL RESTS ARE NOT IN EFFECT.

The Florida legislature has forbidden implementation of Florida's numeric nutrient criteria rules unless and until EPA withdraws its own rules. *See* Exh. 29 (Ch. 2013-71, Laws of Fla.) (repealing Ch. 62-302.531(9) (the rule's "poison pill" provision as a matter of law upon EPA's withdrawal of "all federal numeric nutrient criteria rules"). As set forth below, EPA is withdrawing its rules so that it will not be forced to implement numeric nutrient criteria in Florida – not because the state's rules comply with the Clean Water Act. Chapter 2013-71 made it clear that the legislature was only authorizing DEP to implement criteria the state had adopted, and that no state criteria could be implemented until EPA withdrew, in their totality, the federal rules. The provision regarding the withdrawal of the rules was then omitted from the Florida Statutes. Exh. 30 (Tracing Table for 2013 Session Laws). Under such circumstances, the decision to withdraw the court approved federal rules is arbitrary and capricious because the decision is not based on the Clean Water Act but on threats from the State of Florida.

III. EPA'S WITHDRAWAL OF ITS PROPOSED STREAM CRITERIA AND ACCEPTANCE OF DEP'S STREAM CRITERIA IS ARBITRARY AND CAPRICIOUS BECAUSE SCIENTISTS EPA CONSULTED HAVE REJECTED THE BASIS FOR FLORIDA'S NUMERIC NUTRIENT CRITERIA RULES FOR STREAMS.

In April 2013, at the same time EPA was repudiating its own rules, it convened a workshop of scientists to examine the setting of numeric nutrient criteria:

> EPA convened an expert workshop titled: "Nutrient Enrichment Indicators in Streams" to explore the science underlying novel approaches to numeric nutrient criteria development on April 16-18th, 2013. Twenty-two technical experts in the field of nutrient pollution indicators representing academic, state, federal, and international institutions met with agency staff at the U.S. EPA Potomac Yard Office in Arlington, Virginia. The workshop's goals were to gather independent scientific insight to identify 1) nutrient pollution indicators that are both sensitive to nutrient stress and predictive of impacts to higher trophic levels and 2) combined chemical and biological criteria approaches that protect aquatic life in streams.

Exh. 30 (available at: http://www2.epa.gov/sites/production/files/2013-09/documents/indicatorsworkshop.pdf).

The scientists at that workshop made the following conclusions:

> The workshop participants acknowledged that fish and macroinvertebrates are routinely monitored, and that the public recognizes the linkage between adverse effects on fish and invertebrates and impairment of designated uses. However, they concluded that general fish and macroinvertebrate indices (e.g., general stressor indices) are less sensitive nutrient pollution indicators than other indicators (such as algae). Also, there can be a significant temporal lag between high nutrient concentrations and adverse effects to these species, thus making it difficult to identify when aquatic life use is impaired.
>
> Where there is uncertainty around the relationship between nutrient concentrations and the health of the aquatic community, it may be useful to combine numeric nutrient criteria into a decision framework with other indicators. For example, a scientifically defensible approach would be to establish an upper nutrient concentration, above which designated uses are impaired, and a lower nutrient concentration, below which designated uses are attained. The concentrations between these upper and lower values make up a "grey zone", within which a numeric nutrient criterion, expressed as a decision framework, could be applied.

Exh. 30. Both of these findings reject the manner in which Florida rules determine whether a numeric nutrient criterion in a stream is being violated. The DEP rule relies upon a macroinvertebrate stressor index (known as the Stream Condition Index), and also failed to establish an upper nutrient concentration above which designated uses are impaired.

It is arbitrary and capricious for EPA to ignore the advice of scientists it consulted on the exact issue in question, particularly in the circumstance where the Florida streams rule both relies on a macroinvertebrate index (called the Stream Condition Index) and fails to contain an upper nutrient concentration above which water quality violations occur and designated uses are deemed impaired.

IV. EPA'S COURT APPROVED NUMERIC NUTRIENT CRITERIA RULES SHOULD NOT BE WITHDRAWN BECAUSE EPA'S MODIFICATION OF THE CONSENT DECREE IS ILLEGAL.

For more than fifteen years, EPA has recognized the need to adopt *numeric* nutrient water quality criteria to protect the waters of Florida. The Conservationists filed the lawsuit resulting in the Consent Decree at issue in 2008, alleging that EPA had a mandatory duty under the Clean Water Act ("CWA") to promulgate numeric nutrient criteria based on the agency's earlier determination that numeric water quality criteria were necessary to protect Florida waters from excessive nutrient pollution. During the course of the litigation, on January 14, 2009, EPA issued a formal determination under Section 303(c)(4)(B) of the Act ("2009 Determination") concluding that numeric nutrient criteria are necessary in Florida. Pursuant to a subsequent Consent Decree, as modified by the Court, EPA was required to publish final rules setting forth "numeric water quality criteria" for nutrients for: (1) all Class I and III "lakes and flowing waters" outside of the South Florida Region, including numeric default downstream protection values ("DPVs") for unimpaired lakes, no later than August 31, 2013; and (2) all Class I and III

"lakes and flowing waters" in the South Florida Region, and all Class I, II, and III "coastal and estuarine waters" no later than September 30, 2013. *See* ECF Nos. 153, 351, 395, 404.[1] The Consent Decree requires water quality criteria for nutrients consisting of "numeric values" that are protective of designated uses. ECF No. 153 at 4.

EPA modified is obligations under the Consent Decree by redefining the terms "lakes and flowing waters" and "estuarine waters" to exclude: (1) tidally-influenced flowing waters; (2) flowing waters used primarily for water management purposes; (3) flowing waters in the South Florida Region; (4) numeric downstream protection values ("DPVs"); and (5) marine lakes.

EPA asserted that its modifications to the Consent Decree exclude only a "relatively small number" of waters for which numeric nutrient criteria are required. In fact, EPA's modifications—together with its approval of Florida's rule redefining the term "stream"—results in the exemption of approximately two thirds of the flowing waters for which numeric nutrient criteria are required under the Consent Decree.[2] As justification, EPA contends that numeric nutrient criteria are "not necessary" for any tidal streams, flowing waters used primarily for water management, South Florida flowing waters, or downstream protection values because Florida "should have sufficient time and resources . . . , including the data and information gathered over the past several years, to interpret the narrative nutrient criterion on a case-by-case basis" for those waters. EPA asserted that these waters are "best addressed" by the existing narrative standard, EPA contends, because: (1) DEP will assess tidal streams individually and may someday establish site-specific criteria for those waters; (2) flowing waters used primarily for water management are presumptively subject to numeric criteria and polluting industries will not likely seek to exclude all of them, and where they do, the public may overcome the exemption by showing frequent recreational use; (3) South Florida waters, in addition to being few in number, are subject to the numeric phosphorous limitations applicable to the Everglades; and (4) numeric site-specific alternative criteria (*i.e.*, numeric DPVs) may someday be developed to protect unimpaired downstream waters if a multi-year trend analysis shows it necessary. According to EPA's own analysis, the Consent Decree requires numeric nutrient water quality

[1] All references to ECF numbers are to filings in FWF, *et al.* v. Jackson, Case No. 08-324, Northern District of Florida.

[2] The 4.2 square miles of marine lakes exempted from numeric criteria qualifies as a "relatively small number" and plaintiffs do not object to EPA's approach with regards to these lakes.

criteria for 46,218 linear miles of fresh flowing waters in Florida.[3] EPA's exemption of tidal streams from the Consent Decree would immediately exempt 6,333 stream miles from numeric criteria, even though EPA already proposed numeric values for all of those waters. EPA Mem. at 7 n.3;[4] 77 Fed. Reg. 74449. EPA's modification would exclude another 11,497 miles of Florida flowing waters used primarily for water management. Although those waters are presumptively subject to the state numeric standard, the vast majority are controlled by regulated industries and interested parties who are already preparing to file applications for exemption as soon as the FDEP rule becomes effective. DEP has been intimately involved in aiding the swift application for, and processing of, exemptions.

Moreover, to overcome the exemption, thereby subjecting those waters to numeric criteria, members of the public must affirmatively demonstrate "frequent" recreational use. The Consent Decree requires numeric criteria for nutrients for all Class III recreational use waters – not just those that can be proven to have "frequent" recreational use. EPA's Consent Decree modification also excludes all 3,403 miles of flowing waters in South Florida, including the Everglades Protection Area.[5] In addition to the thousands of miles of flowing waters EPA now proposes to exempt from the Consent Decree, EPA approved a state rule that also excludes an additional 8,710 miles of intermittent streams on the erroneous premise that those streams are wetlands. Finally, the Consent Decree requires EPA to establish specific numeric values by a date certain. EPA's proposed exemption of numeric DPVs results in a narrative downstream standard which could, at best, result in site-specific alternative criteria after many years of study. Thus, rather than excluding a "relatively small number of waters" from protection, EPA's

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[3] EPA's independent analyses show that there are 59,673 miles of fresh flowing waters in Northern and Peninsula Florida, another 11, 684 miles of fresh flowing waters in the South Florida Region, and 6,333 miles of tidal streams in Florida. Exh. 3: EPA/Tetratech Study, pp. 1-5. DEP has estimated that 23,191 miles of flowing waters are Class IV waters which are excluded from Consent Decree coverage, Exh. 13: Email for Justin Berke to Alex Porteous (1-23-13), and EPA has estimated that there are an additional 8,281 miles of Class IV waters in the South Florida Region. ECF No. 424-4, p. 4, n. 4. After excluding estimated Class IV waters, there are 46,218 miles of Class III waters in Florida waters subject to the Consent Decree. All Florida's surface waters are classified as Class III – Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife, except for certain waters which are described in Rule 62-302.400(16) of the Florida Administrative Code. Rule 62-302. 400(14), F.A.C. Among those exceptions are Class IV (Agricultural Water Supplies) waters which are described generically and not identified by name or location. Rule 62-302.400(16)(a), F.A.C.

[4] References to "EPA Mem." refer to ECF Doc. 424 in the District Court case.

[5] The Everglades Protection Area ("EPA") encompasses three water conservation areas and Everglades National Park. Rule 62-302.540(3)(c). Although EPA is correct that a 10 parts per billion ("ppb") phosphorous criterion applies to canals in the Everglades Protection Area, fewer than 300 miles of the total 3,403 miles of flowing waters in the South Florida Region are actually subject to that standard. Exh. 15D: Map of SFWMD Canals. Moreover, there will be no numeric nitrogen standard anywhere in South Florida and no other numeric phosphorous limits for the region – a clear violation of the requirements of the Consent Decree.

proposed modification (in conjunction with its conditional approval of the state rule) actually relieves the agency of its obligation to implement numeric nutrient criteria for 29,943 of the 46,216 miles (or approximately 65%) of flowing waters for which numeric values are required under the Consent Decree.

A. LEGAL STANDARDS GOVERNING MODIFICATION OF A CONSENT DECREE UNDER RULE 60(B).

Under Federal Rule of Civil Procedure 60(b), a court may modify a consent decree when "it is no longer equitable that the judgment should have prospective application," or "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(5) & (6). Such relief is not warranted, however, merely because a party finds that the consent decree "is no longer convenient." *Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 383 (1992). Indeed, the modification of a consent decree is an extraordinary remedy that should be approached with caution. *See e.g., Sierra Club v. Meiberg*, 396 F.3d 1021, 1034 (11th Cir. 2002) (holding that "[a] party seeking to modify a consent decree has a high hurdle to clear and the wind in its face," and declining to modify a consent decree "when the circumstances simply have not changed"); *Reynolds v. Roberts*, 202 F.3d 1303, 1312 (11th Cir. 2000) ("Long standing precedent evinces a strong public policy against judicial rewriting of consent decrees.").

A party seeking to modify a consent decree bears the burden of showing a "significant change" in factual or legal circumstances that: (1) makes compliance with the decree "substantially more onerous"; (2) makes the decree "unworkable" due to unforeseen obstacles; or (3) causes the enforcement of the decree to be "detrimental to the public interest." *Rufo,* 502 U.S. at 384. If the moving party meets its initial burden of establishing that a significant change in circumstance warrants modification of the decree, it must still demonstrate that the proposed modification is "suitably tailored to the changed circumstance." *Rufo,* 502 U.S. at 391.

B. MODIFICATION IS NOT APPROPRIATE BECAUSE EPA DELIBERATELY BROUGHT ABOUT THE PURPORTEDLY CHANGED CIRCUMSTANCES UPON WHICH IT RELIES.

EPA did not (and cannot) allege any significant change in facts or law that makes the establishment of numeric nutrient criteria for all Florida Class I, II, and III waters too onerous, unworkable, or contrary to the public interest.[6] Instead, EPA voluntarily and knowingly decided to simply conditionally approve a state rule that EPA admits does not satisfy the Consent Decree, and then amended its 2009 Determination to provide that numeric nutrient criteria are no longer necessary for the vast majority of Florida waters that are excluded from the scope of the state rule. These are not "significant changes" in factual or legal circumstances warranting the modification of the Consent Decree.

As an initial matter, where a defendant seeks to modify a consent decree based on changed circumstances, as EPA did here, it must also demonstrate that the alleged change was

[6] Indeed, in court filings, the agency admits that it can (and has in fact) developed numeric nutrient criteria for all of those waters.

"beyond the defendants' control . . . and not contemplated by the court or the parties when the decree was entered." *Rufo*, 502 U.S. at 381; *see also Benjamin v. Malcolm*, 156 F.R.D. 561, 564-65 (S.D.N.Y. 1994) (where consent decree required New York City jails to provide food to inmates prepared at a specialized facility, the new administration's "change of heart" about the economic merits of purchasing food for city jails from a facility located outside the city did not amount to a significant change of circumstances warranting modification of a consent decree); *Cronin v. Browner*, 90 F. Supp. 2d 364, 372 (S.D.N.Y. 2000) (where consent decree required EPA to finalize thermal discharge standards for industrial cooling water intake systems, the agency's later decision to conduct watershed cases studies before proposing a rule did not warrant modification of consent decree deadlines because EPA "should have anticipated the necessity" of such studies and the "decision to conduct watershed studies was taken on the basis of the Agency's own regulatory judgment"); *United States v. Catepillar, Inc.*, 227 F. Supp. 2d 73, 79, 90 (D.D.C. 2002) (where consent decree required engine manufacturer to meet pollution-reduction standards using a specific technology by a date certain, the manufacturer's "late-in-the-day decision" to "forego [that] technology in favor of developing another emission control strategy" did not warrant modification where manufacturer knew that it would be unable to meet the deadline with new approach).

EPA's change of heart about the merits of the Consent Decree or the necessity for numeric nutrient criteria for all Florida flowing waters does not constitute a change in circumstances justifying modification. Much like the defendants' deliberate decisions to change course and forego compliance with the consent decrees in *Benjamin*, *Cronin*, and *Caterpillar*, EPA has voluntarily and knowingly decided to withdraw its own proposed numeric criteria in favor of a state rule that EPA has long-recognized is deficient under the Consent Decree.[7] As early as November 2011, Nancy Stoner, Acting Assistant Administrator at EPA Headquarters, warned DEP that adoption of potential industry-sponsored exemptions would require EPA to step in and establish federal numeric criteria for those waters:

> EPA understands that the FDEP draft rule covers all Class III inland waters in Florida, except for canals in South Florida. EPA also understands, however, that there is interest from specific stakeholders in removing some canals outside of South Florida from coverage under this rule. Should these waters be removed from the rule, EPA would be unable to withdraw its promulgated numeric nutrient criteria for these waters.

Exh. 1: EPA Letter (November 11, 2011), p. 3.

Despite EPA's position, and again at the behest of industry lobbyists, DEP included additional exemptions from numeric nutrient criteria for flowing waters used primarily for water management, tidally-influenced streams, and intermittent streams, as well as a "poison-pill" provision that renders the entirety of the state rule ineffective unless EPA withdraws all federal rulemaking for nutrient criteria in Florida.[8] Exh. 2: Amendments. The "poison pill" strategy

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[7] By moving to modify, EPA effectively admits that the state rule does not impose numeric nutrient criteria on all Florida Class I, II, and III waters, as required by the Consent Decree.

[8] The rule reads in relevant part:

ultimately resulted in EPA reversing position and agreeing to seek to amend the Determination and to ask the court to modify the Consent Decree.

In their Response in Opposition to EPA's November 28, 2012 Motion To Extend Consent Decree Deadlines, ECF Doc. 408, the Conservationists pointed out that the effect of the industry-sponsored amendments, as determined by EPA's own consultant, was to exempt 72% of inland flowing waters outside of the South Florida Region from the Consent Decree's numeric nutrient criteria requirement.[9] ECF Docs. 410; 410-1. Rather than comply with the Consent Decree's requirements and finalize numeric criteria for the excluded waters (as it initially proposed to do), EPA negotiated a deal with DEP that would have the effect of terminating EPA's Consent Decree obligations.

Public records show that EPA objected that exempting canals resulted in about one-third of Consent Decree flowing waters being exempted from the numeric nutrient requirement. The Water Protection Division Director of EPA Region Four, Jim Giattina – the EPA official responsible for approving or disapproving DEP's rule – informed the director of DEP's Division of Environmental Assessment and Restoration, Drew Bartlett – the DEP official responsible for numeric nutrient criteria rulemaking – that EPA would only approve DEP rules if DEP could show that the "practical universe of exemptions" from numeric nutrient criteria for flowing waters was small, *i.e.*, "5% or so":

> Drew...See following for our discussion at 12:00...Jim
>
> Conveyances
> Option A: FL adopts presumptive NNC applicability, demonstrates practical universe of exclusion is small (5% or so), adopts a chl a NNC commensurate with Class III protection (e.g., 3-20 range or 6/20 low/high alkalinity lake values)
> Option B: FL adopts presumptive NNC applicability, demonstrates practical universe of exclusion is small (5% or so); EPA amends Determination that universe is small enough for narrative alone to work
>
> Tidal Creeks
> Option A: EPA amends Determination that NNC are not necessary (infeasible at this time, similar to wetlands situation)

> [T]hese rules shall be effective only if EPA approves these rules in their entirety, concludes rulemaking that removes federal numeric nutrient criteria in response to the approval, and determines, in accordance with 33 U.S.C. §1313(c)(3), that these rules sufficiently address EPA's January 15, 2009 determination. If any provision of these rules is determined to be invalid by EPA or in any administrative or judicial proceeding, then the entirety of these rules shall not be implemented.

Rule 62-302.531(9), F.A.C.

[9] EPA's analysis did not examine flowing waters in the South Florida Region which were part of EPA's Phase II rulemaking. Exh. 3: EPA/TetraTech Study, p. 1, n.1.

Tidal Segments
Option A: FL adopts procedure/policy that Level II WQBELs will be adopted for point source discharges; EPA accepts this as NNC coverage along with explanation that NNC apply on either side of these segments

Marine Lakes
Option A: FL adopts the freshwater lakes NNC
Option B: FL adopts chl a of 11
Option C: EPA amends Determination that universe is so small that narrative alone will workt

SF Flowing Waters
Option A: FL adopts EPA proposed DPVs (or IPVs) with delayed effective date in the manner of their plan for estuary/coastal waters
Option B: EPA accepts FL quantitative narrative as acceptable level of protection, amends Determination to that effect

Exh. 5: Email from Jim Giattina to Drew Bartlett (1-28-13).

In response to EPA's email setting out several options for reaching the goal of excluding less than five percent of Florida flowing waters, DEP issued an ultimatum:

Jim/Betsy,

We are taking steps to adopt the Numeric Nutrient Criteria Implementation Document into State rules and to educate legislative staff and representatives regarding the need for action in crafting a path forward. Additionally, we are moving forward with rule development to adopt numeric nutrient criteria in the Florida Administrative Code this spring and summer for the estuaries listed below.

In order for us to move forward with these actions, we need to know by March 8, 2013, whether in EPA's opinion this is:

- An approvable approach, and

- If adopted, passed, and approved, provides a path forward to State level criteria absent federal numeric nutrient criteria.

I have attached the Implementation Document and viable Legislative language along with the education materials underlying the approach.

I know we all look forward to bringing resolution for the NNC issue so we can both begin implementation of these very important rules.

Thank you,

Drew

Exh. 6: Email from Drew Bartlett to Betsy Southerland[10] and Jim Giattina (2-22-13).

On March 7, the day before DEP's deadline, Mr. Bartlett sent talking points to DEP Secretary Herschel Vinyard for the anticipated discussion:[11]

> The Department has built a consensus package of legislation and rulemaking to provide EPA a basis for exiting the State. This was offered to EPA on February 22, 2013, (two weeks ago) with a definitive date of March 8th for their response – due to legislative scheduling restrictions.
>
> Acting EPA Administrator Bob Perciasepe is expected to call to request a week extension to the March 8th, deadline.
>
> Talking Points
> The proposal was carefully crafted to create a consensus that would assure successful legislation.
> We are short on time.
> If EPA needs a week to prepare a positive response without including any counter-proposals or changes to the State's proposal, then a week can work.
> However, if EPA is asking for a week to hone a counter-proposal, the lost week would not fit legislative schedules.
> It could take at least a week to rebuild consensus (which itself is not certain), then time to brief legislative staff and committee chairs, which places us too far into session to accomplish the solution.
> We either need a counter-proposal now, or assurances that the week is leading up to acceptance of the State's proposal.

Exh. 7: Email from Drew Bartlett to Herschel Vinyard (3-7-13).

Those negotiations culminated with a series of closed door meetings and conference calls between EPA, DEP, and industry stakeholders on March 11, 2013, at the Tallahassee Regional Airport. Exh. 8: Email from Diana Thurman to Edward Smith (3-15-13) ("Drew actually met with EPA last Monday at the Tallahassee airport . . . they literally had meetings there all day which is the March 11, 2013 they talk about"). A little after 8:00 p.m., after the day-long meetings had concluded, updated draft documents were sent by Mr. Bartlett to EPA representatives and then to representatives of several of the polluting industries who were asked to distribute the documents to all meeting attendees. Exh. 9: Email from Drew Bartlett to Elizabeth Southerland and Jim Giattina (3-11-13); Exh. 10: Email from Drew Bartlett to David

[10] Elizabeth "Betsy" Southerland is the director of the Office of Science and Technology in EPA Headquarters and is the official in Washington responsible for developing water quality criteria including the Florida numeric nutrient criteria rule.

[11] The legislation that is referenced is attached as Exhibit 29.

Childs and representatives of the Florida League of Cities and the Florida Department of Agriculture (3-11-13) ("Hey guys. I don't have everyone's email address that was at the meeting today. Can you forward?"). The DEP official in charge of Florida's nutrient rulemaking, Drew Bartlett, later publicly congratulated the industry lobbyists, stating that the conveyance exemption was "well-played." Exh. 21A: Crooks Declaration.

Versions of what became known as the Path Forward and the Agreement in Principle were edited over the next several days. In the final version of the Path Forward, Giattina of EPA Region Four informed DEP that EPA had made the following edit:

> Drew…attached is the final. Note we removed the word "vast" from the second page so that it refers to "the majority of flowing waters". Thanks for your work on this…Jim

Exh. 11: Email from Drew Bartlett to Reena O'Brien (forwarding email for Jim Giattina to Drew Bartlett (3-14-13)).

The Plan Forward and Agreement in Principle were announced with great fanfare on March 15, 2013. Maps that accompanied the announcement could not be used by plaintiffs to examine the extent of the exemptions because DEP had engaged in a mapping process in which linear miles were converted to square miles by assuming an approximate width for different kinds of water bodies and then multiplying the length by the approximate width. Exh. 12: Email from Drew Bartlett to Kimberly Jackson (1-30-13) ("My next meeting with the Secretary and EPA leadership is at 8:15 in the am. So I'd like the latest update of these at the end of today so I can share. . . . and switching to surface area is getting critical so I hope we are landing that difficult task."); Exh. 4: Email from Justin Berke to James Silvanima (2-2-13) (migration from linear miles to square miles had been "dropped" on EPA and providing methodology for conversion). EPA has refused to turn over any of its exemption calculations except for the portion of the original calculations which plaintiffs obtained through a public records request to DEP.

As these documents make clear, EPA knowingly approved a state rule that fails to satisfy the Consent Decree, and then voluntarily agreed to amend its 2009 Determination and seek modification of the Consent Decree for the purposes of avoiding the state's so-called poison pill provision and terminating EPA's obligation under the Consent Decree to finalize numeric nutrient criteria for the Florida flowing waters excluded from the state rule.[12] As justification,

[12] EPA suggests that its revised determination strips the agency of its legal authority to comply with the Consent Decree and finalize numeric nutrient criteria for the waters excluded by the state rule. EPA Mem. at 19-20. Under the principle of separation of powers, EPA cannot unilaterally circumvent or nullify a settlement agreement codified as a consent decree by simply revising its 2009 Determination. Such a rule would render unenforceable virtually any consent decree to which a federal agency was a party. Furthermore, EPA's suggestion that it has no authority to promulgate additional numeric nutrient criteria is belied by the agency's approval of the state rule, which expressly reserved authority to revisit the approval and promulgate additional criteria if necessary. *See* ECF No. 413-1 (EPA November 30, 2012 Letter of Conditional Approval for DEP Rule).

EPA contends that, after further study, it has determined that numeric nutrient criteria are "not necessary" to protect Florida waters after all. EPA Mem. at 13. EPA's unilateral change of position about the need for numeric nutrient criteria in Florida or the merits of the Consent Decree's mandate, however, does not make compliance with the Consent Decree "unworkable" or "too onerous." *Rufo*, 502 U.S. at 384. In fact, EPA acknowledges that it can comply with the terms of the Consent Decree. The agency has simply chosen not to.[13] This is not a change in circumstances sufficient to warrant modification of the Consent Decree.

C. EPA'S PROPOSED MODIFICATION WILL RESULT IN THE EXEMPTION OF APPROXIMATELY TWO-THIRDS OF THE WATERS FOR WHICH NUMERIC NUTRIENT CRITERIA ARE REQUIRED UNDER THE CONSENT DECREE.

EPA asserts that it can escape its Consent Decree obligations because the number of miles of flowing streams exempted from numeric nutrient criteria is *de minimus*. An exemption of 65% of Florida's flowing streams in Florida from numeric nutrient criteria is not *de minimus*. It is particularly not so when measured against EPA's position that the Consent Decree prohibited it from terminating its Consent Decree obligations by means of approval of a DEP rule unless that rule practically excluded no more than 5% of flowing streams from the numeric nutrient requirement.

i. Intermittent Streams (8710 stream miles).

The Consent Decree excludes wetlands. Exh. 14: Consent Decree, ¶¶ 4, 8. It does not exclude intermittent streams. In April 2012, EPA's consultant determined that 8,421 miles of intermittent streams in Florida were exempted from numeric nutrient criteria by DEP's intermittent streams exception. Exh. 3: EPA/Tetratech Report, p. 4.[14] Estimation of miles of intermittent streams is a simple task because the United States Geologic Survey National Hydrologic Dataset ("NHD") identifies intermittent streams as a subset of flowing waters. Exh. 15: Palacio Declaration; Exh. 15A: Map of Intermittent Streams. The NHD stream classifications are based on the original 1:24,000-scale United States Geologic Survey topographic maps. Exh. 15: Palacio Declaration; Exh. 15B: Holt Quad Map Overlayed With NHD Intermittent Streams. As shown on the topographical maps, the United States classifies wetlands (marsh symbols) and intermittent streams (dashed and dotted blue lines) as separate waters. Exh. 15: Palacio Declaration. Using the attached U.S.G.S. quadrangle map for Holt, Florida as an example, there are intermittent streams that are unconnected to wetlands,

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[13] Correspondence between EPA and DEP reveals that EPA's changed position is based, at least in part, on a provision in the state rule that renders the renders the entirety of the state rule ineffective unless EPA withdraws all federal rulemaking for nutrient pollution in Florida. Modification is not warranted, however, merely because one party decides that "it is no longer convenient to live with the terms of the consent decree." *Rufo*, 502 U.S. at 383.

[14] Plaintiffs' consultant, using a recently updated NHD dataset, identified 8,710 miles of intermittent streams in Florida. Exh. 15: Palacio Declaration; Exh. 15A: Map of Intermittent Streams in Florida

intermittent streams that run through wetlands, and perennial streams that disappear into wetlands. Exh. 15C: Enlarged Holt Quad Map. However, the intermittent stream and the wetland are always shown as separate waters.

DEP assumes that the entirety of the intermittent streams NHD dataset will be exempted from numeric nutrient coverage on the theory that all intermittent streams are wetlands. Exh. 16: Email from Justin Berke to Kimberly Jackson (5-6-13) (NHD Features are attributed with one of four NHDFlowline codes – Ephemeral and Intermittent were removed from the final coverage); *see also* Exh. 17: Implementation Document at 50 (stream standards not intended to apply to stream segments more characteristic of a wetland).

Because DEP has excluded all intermittent stream miles from application of its rule based on its erroneous conclusion that intermittent streams and wetlands are synonymous, and because EPA has approved that rule and asserted that any further rulemaking obligations as to streams has been terminated, EPA has exempted 8710 miles of Consent Decree flowing waters from numeric nutrient criteria coverage.

ii. Flowing Waters Used for Water Management Purposes (11,497 stream miles)

EPA gave DEP two options with regards to its exception for flowing waters used for water management purposes. DEP had to either presume applicability of numeric criteria, demonstrate the practical universe of exclusion was small (5%), and adopt a chlorophyll a standard commensurate with the lake standard or DEP had to presume applicability of numeric criteria, demonstrate the practical universe of exclusion was small (5%), and EPA would amend the determination on the basis that the "universe is small enough for narrative alone to work." Exh. 5: Email from Jim Giattina to Drew Bartlett (1-28-13). In fact, DEP complied with neither option.

First, DEP's rule does not presumptively apply to all Consent Decree flowing waters because DEP's rule totally exempts flowing waters in the South Florida Region from numeric nutrient criteria. ECF Doc. 424-4, pp. 4-5 (stating that DEP's rule presumptively applies to only 90% of flowing waters calculated as 29,462 miles (32,735 total miles of flowing waters minus 3403 miles in South Florida Region)). Second, DEP made no effort to calculate the "practical universe of exclusion." Instead, EPA hypothesizes that some unknown lesser amount than the 11,497 miles of flowing waters used for water management purposes will be exempted from the numeric nutrient requirement because:

> In practice, the EPA believes that this exclusion will likely apply to less than 35% of fresh flowing waters because (1) it is likely that stakeholders will only be interested in pursuing the exclusion for a subset of potential water management conveyances, (2) the FDEP's public participation process may reveal information about frequent recreational activities; and (3) physical habitat assessment may reveal better conditions than specified in the FDEP's rules for establishing an exclusion.

ECF Doc. 424-1, p. 5.[15] EPA's assumptions are belied by the following facts.

1. "Conveyances" Are Already Identified and Mapped.

Under DEP rules, all that is required to qualify a flowing water as a "conveyance" is a showing that the original and current purpose of the flowing water is primarily water management and that the flowing water has limited biological function due to its construction or maintenance. Exh. 17: Implementation Document at 56. Qualification will be an easy task since many flowing waters used for water management purposes are controlled by water management districts or governmental entities which hold NPDES permits for MS4 systems. Both types of entities already have maps of their systems and their mission includes operation and maintenance of their canals and ditches. Exh. 15D: Map of SFWMD Canals; Exh. 18: DEP List of MS4 Permittees; Exh. 19: Sample MS4 Permit Form; Exh. 20: City of Edgewater Stormwater Page (with photographs of typical maintenance operations).

2. DEP and Polluting Industry Representatives are Actively Engaged in Educating Potential Applicants on How to File for a "Conveyance" Exemption and Applicants Are Being Urged to File for Exemptions As Soon as Possible.

The idea that entities potentially qualifying for an exemption will not apply for an exemption is implausible. DEP, the water management districts, and representatives from the polluting industries are actively participating in raising public awareness of the "conveyance" exception. As an example, the Florida Chamber of Commerce held its 27th Annual Environmental Permitting Summer School, attended by hundreds of attorneys, consultants, engineers, state and local government officials, developers, and land owners. Exh. 21: Polgar Declaration, ¶ 4. The summer school is produced in cooperation with the Florida Department of Environmental Protection and Florida's water management districts and Herschel Vinyard, the DEP Secretary, gave the keynote address. Exh. 21: Polgar Declaration, ¶¶ 4, 5 and attached brochure).

Several sessions were devoted either entirely to implementation of numeric nutrient criteria or discussed numeric nutrient criteria in the context of permitting. Exh. 21: Polgar Declaration, ¶¶ 6, 8 and attached brochure. Three of these sessions were chaired by attorneys who represent parties involved in numeric nutrient criteria litigation, *i.e.*, David Childs (Understanding Numerical Nutrient Criteria: Legal, Technical, Policy, And Implementation Issues), Terry Cole (Implementing Florida's Numeric Nutrient Criteria (Including Late-Breaking Developments)), and Winston Borkowski (Florida NPDES Update). Exh. 21: Polgar Declaration and attached brochure. Drew Bartlett, Director of DEP's Division of Environmental Assessment and Restoration, Department of Environmental Protection, the division responsible for numeric

[15] EPA came up with the 35% statistic by dividing 11,497 miles of "excluded conveyances" by 32,735 miles of "Class I and III flowing waters." EPA should have divided 11,497 miles of excluded conveyances by 29,462 miles since 3403 miles of flowing waters in the South Florida Region have already been excluded without any presumption of coverage. That results in an exemption of 39% of Consent Decree flowing waters even by EPA's estimate.

nutrient criteria rulemaking, was a panel member of three of the numeric nutrient sessions. Exh. 21: Polgar Declaration, ¶ 7 and attached brochure. At these sessions, the panelists gave detailed explanations of the exemption process, urged potential applicants to put together their applications in advance, urged potential applicants to send in their applications as soon as the rule was effective, and advised them that they expected the applications to be well received because DEP had pushed so hard for them. Exh. 21: Polgar Declaration, ¶¶ 9, 10, 11, 12.

As for the argument that information "may be revealed" that will prohibit application of the exemption, EPA has agreed to a deal which places on the Florida public the burden of proving that a Class III flowing water, which is designated under Florida law for recreational use, is, in fact, "*commonly* used for navigation, boat access, or other *frequent* recreational activities such as swimming or boating," before DEP it will be required to protect the Class III recreational uses with numeric nutrient criteria. Exh. 17: Implementation Document at 56. The Consent Decree requires numeric nutrient criteria for all Class III flowing waters and therefore all Class III flowing waters are covered regardless of the level of recreational use. Nothing in the Consent Decree permits an amendment to exempt from the numeric nutrient requirement only those Class III flowing waters which can be proven to have "frequent" recreational use.[16]

3. Tidally Influenced Creeks (6333 stream miles).

EPA's consultant estimated that 6,333 miles of tidal streams were exempted from numeric nutrient coverage by DEP's rule and that this was likely an underestimate because it did not include freshwaters that are tidally influenced. Exh. 3: EPA/Tetratech Report, p. 5. EPA has refused to turn over any of its rule coverage analyses other than that portion of the original 2012 analysis which plaintiffs discovered through a public records request to DEP. Numeric nutrient criteria for tidal creeks triggered exemption amendments because 40 industrial and wastewater dischargers with the potential to cause or contribute to impairments discharge directly to tidal creeks. Exh. 17: Implementation Document, p. 55. This number does not include the many municipal holders of NPDES stormwater permits who discharge into tidally influenced creeks through storm drains. Qualifying for a tidal creek exemption requires nothing more than minimal monitoring to show a water body segment fluctuates between predominately fresh and predominately marine waters. Exh. 17: Implementation Document, pp. 54-55.

4. South Florida Region (3,403 miles).

EPA's current estimate appears to be that there a total of 11,684 miles of flowing waters in the South Florida Region, 3,403 miles of which would be excluded from numeric nutrient criteria. ECF Doc. 424-4, p. 5. EPA asserts that this is a *de minimus* amount which does not require action by EPA under the Consent Decree, and that the South Florida Region does not need additional criteria because it is covered by Florida's Everglades Phosphorus Rule. Rule 62-302.540, F.A.C.

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[16] Florida does have a Class III-Limited designated use for waters with limited recreational use. However, no Florida waters are so classified and any Class III water must go through an intensive reclassification process which includes a public hearing to qualify for the less protective Class III-Limited use. *See* Rule 62-302.400(7) through (13), F.A.C.

First, and most obviously, the Everglades Phosphorus Rule, which establishes a 10 part per billion total phosphorus criterion for Class III waters in the Everglades Protection Area (defined as Water Conservation Areas 1 (Refuge), 2A, 2B, 3A and 3B, and Everglades National Park), does not establish numeric *nitrogen* criteria for any part of the South Florida Region. The Consent Decree requires EPA to set numeric water quality criteria for "nutrients." Exh. 14: Consent Decree, ¶ 3; *see also* 77 Fed. Reg. 74985, 74989-90 (describing harmful effects of nitrogen and phosphorus). The primary canals that run south from Lake Okeechobeee (Miami, Hillsboro, North New River, West Palm Beach, and L-8) serve as conduits for nitrogen polluted water from both Lake Okeechobee and the Everglades Agricultural Area to South Florida estuaries such as Biscayne Bay which is currently suffering from a major algae outbreak. Exh. 22: Miami Herald Article (7-19-13); Exh. 23: SFER 2013 (Map of TN Data). That same SFWMD map also shows the high nitrogen levels in the polluted waters flowing southward. Exh. 23: SFER 2013 (Map of TN Data).

Second, because the Everglades Phosphorus Rule only covers the Everglades Protection Area, it fails to provide any criteria for the primary canals through the Everglades Agricultural Area, which is the source, along with Lake Okeechobee, of much of the nitrogen and phosphorus pollution in the South Florida Region. Exh. 15D: Map of SFWMD Canals. It also fails to provide any numeric nutrient coverage for the thousands of miles of canals and ordinary flowing waters that that carry urban and agricultural water pollution into the estuaries on the Southern East and West Coasts. Indeed, the Everglades Phosphorus Rule covers only a few hundred miles of the estimated 3403 miles of flowing waters in the South Florida Region. Exh. 15D: Map of SFWMD Canals. The existence of the Everglades Phosphorus Rule does not excuse EPA's failure to comply with the Consent Decree.

5. Downstream Protection Criteria

EPA amended the Consent Decree to relieve the agency of its obligation to establish numeric downstream protection values ("DPV's") for nutrients by August 31, 2013. EPA Mot. to Modify at 11. DPVs are a form of numeric water quality criteria, and therefore the Consent Decree currently requires EPA to establish "numeric values" for any nutrient DPVs by August 31, 2013. See 75 Fed. Reg. at 75805-07 (EPA numeric nutrient criteria include DPVs are water quality criteria). Thus, in addition to exempting the great majority of Florida flowing waters from the scope of any numeric nutrient criteria, EPA seeks to avoid establishing *numeric* nutrient downstream protective values ("DPVs") for any Florida waters.

EPA suggests that DEP's *narrative* nutrient criteria will adequately protect downstream waters because DEP could someday establish site-specific alternative criteria ("SSAC") or numeric total maximum daily load ("TMDL") limitations for discrete water bodies if a multi-year nutrient "trend analysis" for a particular water body subject to numeric nutrient criteria demonstrates that a specific upstream limitation is necessary. The exemptions cover flowing waters used for water management, South Florida waters, tidal streams, and intermittent streams from the scope of any numeric nutrient criteria. DEP's narrative and site-specific approach to DPVs effectively ensures that no specific numeric downstream protective criteria will ever be established to protect those waters or waters downstream of them. Moreover, despite the

Consent Decree's mandate requiring specific numeric values by specific dates, EPA's proposed exemption of numeric DPV criteria results in a narrative downstream standard which could, at best, result in site-specific alternative criteria after many years of study. EPA's proposed modification contravenes the terms of the Consent Decree (*i.e.*, the establishment of specific numeric nutrient water quality criteria for all Class III waters by a date certain), and therefore the motion for modification must be denied. *Rufo*, 502 U.S. at 387-88.

For the reasons discussed above, the Consent Decree has been illegally modified by EPA. There was no evidentiary hearing at which the facts underlying EPA's decision could be explored. As set forth above, those facts show that EPA modified the consent decree and is now withdrawing its own rules to avoid having to implement numeric nutrient criteria in Florida. That decision is both arbitrary and capricious and violates the statutory mandates of the Clean Water Act.

V. EPA IS FACTUALLY AND LEGALLY REQUIRED TO PROMULGATE STANDARDS FOR ALL INLAND FLOWING WATERS, ALL SOUTH FLORIDA WATERS, AND ALL ESTUARINE WATERS.

Under the Consent Decree EPA was required to publish final rules setting forth "numeric water quality criteria" for nutrients for: (1) all Class I and III "lakes and flowing waters" outside of the South Florida Region, including numeric default downstream protective values ("DPVs") for unimpaired lakes, no later than August 31, 2013; and (2) all Class I and III "lakes and flowing waters" in the South Florida Region, and all Class I, II, and III "coastal and estuarine waters" no later than September 30, 2013. *See* ECF Nos. 153, 351, 395, 404. Under the Consent Decree, nutrient water quality criteria must consist of "numeric values." Exh. 14: Consent Decree at p. 4.[17] Unlike Total Maximum Daily Loads ("TMDLs"), which are site-specific, numeric criteria apply across geographic regions and classes of waterbodies. In contrast, a narrative standard requires a site-specific study for each waterbody. While Florida Department of Environmental Protection's ("DEP") nutrient rule for flowing waters includes a nutrient "threshold" for streams expressed in concentrations that cover five regions of the state, the "thresholds" serve only as supplemental information for site-specific studies. No determination of violation or compliance can ever be made without a site-specific study. Those DEP rules are not numeric nutrient criteria. Thus, EPA's approval[18] of the DEP rule does not relieve EPA of its obligation[19] to set numeric nutrient criteria for flowing waters.

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[17] EPA is excused from implementing numeric nutrient criteria for those waters for which DEP has adopted, and EPA has approved, numeric values for nutrient water quality criteria. ECF No. 153 ¶¶ 7, 9.

[18] *See* ECF No. 413-1, p. 3.

[19] EPA's Motion to Modify Consent Decree asserted specifically that if the motion were granted, EPA's remaining obligations would be limited to estuaries and coastal waters. ECF No. 424 at p. 20.

VI. FLORIDA DEP'S "THRESHOLDS" FOR FLOWING WATERS THAT WERE APPROVED BY EPA ARE NOT NUMERIC CRITERIA AND DO NOT SATISFY EPA'S OBLIGATIONS UNDER THE CONSENT DECREE WHICH MAKES WITHDRAWAL OF EPA'S RULES ARBITRARY AND CAPRICIOUS.

The Consent Decree requires EPA to finalize rulemaking setting forth numeric nutrient criteria for Florida's flowing waters unless EPA approves state criteria before the EPA rule is finalized. Exh. 14, pp. 4-5, at ¶ 3, 4, 6, 7. The DEP rule for flowing waters consists not of a numeric criterion for phosphorus and nitrogen, but of a complex set of requirements for site-specific studies of algae and aquatic plants ("Floral Measures"[20]), site-specific studies of the diversity and abundance of particular aquatic insects (the insect assessment measure referred to as the Stream Condition Index, or "SCI"[21]), along with a review of whether the particular water body exceeds one of the "Nutrient Thresholds." Rule 62-302.531(2)(c), F.A.C. These "thresholds" are the same phosphorus and nitrogen numbers proposed as numeric criteria in the proposed EPA rule for flowing waters. 77 Fed. Reg. 74985 at 74999, attached as Exh. 27. In contrast with the EPA rule, the Florida DEP rule's decisional matrix sets out 27 possible outcomes based on three sets of information—the Floral Measures, the SCI, and the nitrogen and phosphorus concentration levels. The color-coded matrix, shown in Exhibit 26, on page 23 of the plan for "Implementation of Florida's Numeric Nutrient Standards" is incorporated by reference as part of Rule 62-302.300(19), F.A.C. The decisional matrix shows boxes shaded red in circumstances where the standard is not attained. No decision of non-attainment can ever be made without a site-specific study[22] that demonstrates that a Floral Measure is not attained (*see* bottom row of chart) or a site-specific study showing that the aquatic insect assessment (SCI) fails. Similarly, the decisional matrix shows boxes shaded blue in circumstances when the standard is attained. No decision of attainment of the standard can ever be made absent site-specific studies employing at least the site-specific Floral Measures (*see* top row with squares shaded in blue).

Since the numeric limits on phosphorus and nitrogen cannot be used to determine compliance or violation without site-specific studies, they are not numeric water quality criteria – they are only supplementary information that goes along with site-specific studies. Thus, EPA's approval of the Florida DEP streams rule does not relieve EPA of it obligation to set numeric nutrient criteria for flowing waters which makes EPA's refusal to go forward with its own proposal for numeric nutrient criteria for streams arbitrary and capricious.

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[20] "Implementation of Florida's Numeric Nutrient Standards" at pp. 8-16, incorporated by reference as part of Section 62-302.300(19), F.A.C., attached as Exh. 26.

[21] Exh. 26, pp. 16-21.

[22] The DEP Implementation Plan, Exhibit 26 at p. 15, provides that if the study samples are during "typical conditions for the system," the narrative standard is not attained if the geometric mean of chlorophyll a samples is over 20 ug/L in more than year in three years. This is a numeric standard for a response variable – algae concentrations – but is not a numeric *nutrient* criterion because it only indicates that either phosphorus or nitrogen or both are too high.

VII. EPA'S APPROVAL OF THE STATE FLOWING WATERS RULE DOES NOT SATISFY ITS CONSENT DECREE OBLIGATIONS BECAUSE THE STATE RULE EXCLUDES INTERMITTENT STREAMS FROM ITS DEFINITION.

The Consent Decree defines the waters requiring numeric criteria as "inland surface waters that have been classified as Class I or Class III waterbodies [under state rules] excluding wetlands." Exh. 14: Consent Decree, ¶4, p.4 (bracketed material supplied). No other exception to flowing waters is set out in the Consent Decree and EPA's motion to modify the Consent Decree did not seek to exclude intermittent streams.

The DEP rules approved by EPA specifically define the term "stream" to mean a stream with "perennial flow." Rule 62-302.200 (36) F.A.C. A "perennial stream" is defined by the United States Geological Survey ("USGS") as a stream that "contains water throughout the year except for infrequent periods of severe drought." *See* USGS National Hydrography Dataset ("NHD") Feature Directory, *available at* http://nhd.usgs.gov/FeatureDirectory.pdf. Intermittent streams, in contrast, contain "water for only part of the year but more than after rainstorms and at snow melt." *Id.* Thus, the state rule for flowing waters—conditionally approved by EPA—does not apply to non-perennial streams, *i.e.*, intermittent streams. This conclusion is confirmed by a DEP email that explains that ephemeral and intermittent streams were omitted from final coverage of the DEP rule conditionally approved by EPA. *See* Exh. 16, Email from Justin Berke to Kimberly Jackson (5/6/13).

Further, it cannot be argued that these waters are wetlands. The USGS NHD identifies intermittent streams as a subset of flowing waters. Exh. 15: Darina Palacio Declaration. The NHD stream classifications are based on the original 1:24,000-scale United States Geological Survey topographic maps. As shown on these maps, the United States classifies wetlands (blue plants) and intermittent streams (dashed blue lines) as separate categories of waters.
The USGS quadrangle map for Holt, FL is an example of this. There are intermittent streams that are unconnected to wetlands, intermittent streams that run through wetlands, and intermittent streams that disappear into wetlands. Exh. 28: USGS Topographical map.[23] These features are readily apparent upon a closer inspection of the confluence of the Yellow and Shoal Rivers. Exh. 15C: Enlargement of Holt USGS Map (attached to Declaration). In grid 9, an intermittent stream, designated with blue dashes alternating with blue lines, passes through a wetland before reaching a perennial stream that branches into the Yellow River. In grid 8, an intermittent stream originates and continues through a wetland before ending in the Yellow River. In grid 5 and 8, an intermittent stream is shown as going from Claypit to the Yellow River without ever going through a wetland. In grid 7, Wilkinson Creek ends in a wetland that is adjacent to the Yellow River. *Id.* The intermittent stream and the wetland are always shown as separate waters.
In April 2012, EPA's consultant determined that there were 8,421 miles of intermittent streams in Florida that would be exempted from numeric nutrient criteria by DEP's intermittent streams exception. Exh. 3: EPA Tetratech Study, p. 4. Additionally, Conservationists' consultant, using a recently updated NHD dataset, identified and mapped 8,710 miles of intermittent streams in

[23] *Available at*: http://ims.er.usgs.gov/gda_services/download?item_id=5624996&quad=Holt&state=FL&grid=7.5X7.5&series=Map GeoPDF.

Florida. This dataset was overlaid onto a USGS quad map to make the intermittent streams clearly visible. Exh. 15: Palacio Declaration; Exh. 15A & 15B: Map of Intermittent Streams across all of Florida & Map of Intermittent Streams in Holt quadrangle (both attached to Declaration). EPA's obligation to establish numeric nutrient criteria for intermittent streams remains unfulfilled.

Lastly, Florida can expand the scope of waters that it affords Clean Water Act protection, but it lacks the legal authority to narrow that scope. Under existing law non-perennial streams can be waters of the United States and are readily distinguishable from wetlands.[24] The Consent Decree required numeric nutrient criteria for all Class I and Class III flowing waters. EPA's approval of the FDEP rule that fails to establish numeric nutrient criteria for intermittent streams and EPA's withdrawal of its rule which established criteria for such streams is unlawful because the decision is both arbitrary and capricious and in excess of statutory authority.

VIII. IMPACT OF APPEAL OF DISTRICT COURT DECISION AND INCORPORATION BY REFERENCE OF COMMENTS ON PROPOSED STREAMS RULE AND PROPOSED ESTUARIES RULE.

EPA states that it is no longer obligated to promulgate numeric nutrient criteria for any of Florida's waters as a result of the District Court's ruling on EPA's motion to modify the 2009 Consent Decree. It then states that it will not be finalizing its proposed rules for Florida's estuaries and coastal waters, inland waters in the South Florida Nutrient Watershed Region, or the remanded portions of the Inland Waters Rule (streams and DPV's for unimpaired lakes).

The District Court's ruling is currently on appeal in the Eleventh Circuit. If EPA were to lose that appeal, EPA would legally be required to repeal the withdrawal rule and reinstate the old rule, as well as move forward with its proposed rulemaking. Such an outcome suggests that EPA should not withdraw its own criteria until the outcome of the appeal is known.

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[24] "Tributaries do not need to flow perennially to have a significant nexus to downstream waters. Approximately 59% of streams across the United States (excluding Alaska) flow intermittently or ephemerally; ephemeral and intermittent streams are particularly prevalent in the arid and semi-arid Southwest, where they account for over 81% of streams. Levick *et al*. 2008. Despite their intermittent or ephemeral flow, these streams nonetheless perform the same important ecological and hydrological functions documented in the scientific literature as perennial streams, through their movement of water, nutrients, and sediment to downstream waters. *Id.* The importance of intermittent and ephemeral streams is documented in a 2008 peer-reviewed report by EPA's Office of Research and Development and the U.S. Department of Agriculture's Agricultural Research Service, which addresses the hydrological and ecological significance of ephemeral and intermittent streams in the arid and semi-arid Southwestern United States and their connections to downstream waters; the report is a state-of-the-art synthesis of current knowledge of the ecology and hydrology in these systems. *Id.*" *See* EPA Proposed Rule on Waters of the United States. https://www.federalregister.gov/articles/2014/04/21/2014-07142/definition-of-waters-of-the-united-states-under-the-clean-water-act#h-82

Furthermore, the Conservationists submitted extensive comments on the proposed rules. Those comments and their accompanying documents are incorporated by reference into the comments on this proposed rule. Exh. 31 (Comments on Inlands Waters Rule), Exh. 32 (Comments on Estuaries and South Florida Waters).[25]

Date: June 2, 2014

/s/ Monica K. Reimer
Monica K. Reimer
Attorney
Earthjustice
111 S. Martin Luther King, Jr. Blvd.
Tallahassee, Florida 32301
Counsel for the Conservationists

[25] The comments themselves are attached. The documents referenced in those comments which were previously submitted are hereby incorporated into these comments by reference.

The EPA agrees that it is important to protect Florida's aquatic resources from nitrogen and phosphorus pollution; however, the EPA disagrees that federal numeric nutrient standards are

necessary now that Florida has adopted and the EPA has approved state standards to address nitrogen and phosphorus pollution. The Clean Water Act assigns to the states the primary authority for setting water quality standards. The EPA's role is largely one of oversight, in which it reviews and approves or disapproves a state's new or revised water quality standards as they are adopted and submitted to the EPA. Florida now has state-adopted, EPA-approved criteria for lakes and springs that are applicable for Clean Water Act purposes. Thus there is no need for overlapping federal criteria for such waters.

The bases for the EPA's withdrawal of federal water quality standards in Florida are: (1) the EPA's November 30, 2012, June 27, 2013, and September 26, 2013 approvals of Florida-adopted numeric nutrient criteria and other water quality standards, (2) the EPA's November 30, 2012 and June 28, 2013 amended Clean Water Act section 303(c)(4)(B) determinations, and (3) the U.S. District Court's January 7, 2014 order modifying the consent decree to relieve the EPA of the obligation to finalize numeric nutrient criteria for various waters in Florida. EarthJustice's comments are directed at whether the EPA or the court should have reached the decisions set out above, rather than whether the EPA should, in light of those decisions, withdraw its federal water quality standards in Florida. The EPA considered substantially similar issues as those raised by EarthJustice in deciding to approve Florida's new or revised water quality standards and to amend its Clean Water Act section 303(c)(4)(B) determination. These issues were also specifically raised to and considered by the District Court in reaching its January 7, 2014 order modifying the consent decree. Now that decisions have been reached on these issues, the EPA believes it is appropriate to withdraw its federal water quality standards based on those decisions. The EPA recognizes that a decision from the Court of Appeals may affect that District Court decision and may make it necessary for the Agency to reconsider its obligations pursuant to the original January 14, 2009 determination and ensuing consent decree entered by the District Court on December 30, 2009.

The EPA requested comment on and is limiting this final action to only the issue of withdrawing (and not finalizing) federal water quality standards applicable to Florida waters. Attachments 1-34 (EPA's 11/2/11 letter to Florida; Florida proposed rule amendment; Tetra Tech Scope Comparison of EPA and FDEP Rules; personal email exchanges (attachments 4-13); EPA consent decree with Florida Wildlife Federation et al.; intermittent stream and South Florida canal analysis; personal email; Florida's April 2013 Implementation document; MS4 permittee list; MS4 permit form; City of Edgewater stormwater webpage; Polgar declaration; Biscayne Bay algae report; 2013 South Florida Environmental Report; Crooks declaration; St. Lucie River health warning; Stuart algae bloom photo; Florida's April 2013 Implementation document (excerpt); EPA's proposed Remand rule (excerpt); Holt map; Florida Committee Substitute for Senate Bill No. 1808; EPA September 2013 workshop on numeric nutrient criteria; Earthjustice comments on EPA's proposed Estuaries rule; Earthjustice comments on EPA's proposed Remand rule; Indian River Lagoon seagrass coverage graph; and Tracing Session Laws into Florida Statutes Table) remain in the original comment letter in the docket to this rulemaking but were not included in this document.. Attachments 1-34 as well as comments on EPA's 2009 consent decree with Florida Wildlife Federation et al. (or modification thereof), and the content, scope or protectiveness of Florida's water quality standards are outside the scope of this action.

Water Docket
U.S. Environmental Protection Agency
May 21, 2014

PASCO COUNTY, FLORIDA

"Bringing Opportunities Home"

DADE CITY (352) 521-2411
LAND O' LAKES (813) 996-2411
NEW PORT RICHEY (727) 847-8115
FAX (727) 815-7010

COUNTY ADMINISTRATOR'S OFFICE
WEST PASCO GOVERNMENT CENTER
8731 CITIZENS DRIVE, SUITE 340
NEW PORT RICHEY, FL 34654-5598
E-MAIL: pcadmin@pascocountyfl.net

VIA ELECTRONIC SUBMITTAL

May 21, 2014

U.S. Environmental Protection Agency
Docket Center
EPA West, Room 3334
1301 Constitution Avenue, NW
Washington, DC 20004

Re: Comments on 40 CFR Part 131
Docket ID No. EPA-HQ-OW-2009-0596
Federal Register/Vol. 77, No. 63, RIN 2040-AF50

Attention: Docket ID No. EPA-HQ-OW-2009-0596

Pasco County strongly supports the U.S. Environmental Protection Agency (EPA) proposal to withdraw Federal water quality standards applicable to waters of the State of Florida.

The State of Florida has adopted, and the EPA has approved, relevant State standards developed by the Florida Department of Environmental Protection (FDEP), including the implementation document, "Implementation of Florida's Numeric Nutrient Standards," that addresses the implementation of the State's numeric nutrient standards. Pasco County has been very involved throughout the process of developing numeric nutrient criteria and has provided FDEP with significant feedback throughout.

It is the County's opinion that the standards developed by the FDEP, adopted by the State of Florida, and approved by the EPA, are protective of Florida's waters while accounting for the natural variability in water quality that Florida's waters possess across the State.

Pasco County appreciates the EPA's efforts in working with the FDEP to develop these water quality standards. Thank you for the opportunity to provide comments. Please do not hesitate to contact me if you have any questions.

Pasco—Florida's Premier County
Serving Our Community to Create a Better Future

Water Docket
U.S. Environmental Protection Agency
May 21, 2014

Sincerely,

Michele L. Baker, M.B.A.
County Administrator

MLB/DRP/MdG/JDR/wpdata/sm/epawaterdocket_ltr_2014-05-21

Enclosure

cc: Michael J. Garrett, P.E., Public Works Director
Joseph D. Richards, Senior Assistant County Attorney

The EPA agrees that federal numeric nutrient standards are no longer necessary now that Florida has adopted and the EPA has approved state standards to address nitrogen and phosphorus pollution.

The EPA requested comment on and is limiting this final action to only the issue of withdrawing (and not finalizing) federal water quality standards applicable to Florida waters. Comments on the protectiveness, scope or content of Florida's water quality standards are outside the scope of this action.

OW-2009-0596

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
MARJORY STONEMAN DOUGLAS BUILDING
3900 COMMONWEALTH BOULEVARD
TALLAHASSEE, FLORIDA 32399-3000

RICK SCOTT
GOVERNOR

CARLOS LOPEZ-CANTERA
LT. GOVERNOR

HERSCHEL T. VINYARD JR.
SECRETARY

May 27, 2014

Water Docket
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue N.W.
Washington, D.C. 20460

Attention: Docket ID #EPA-HQ-OW-2009-0596

The Florida Department of Environmental Protection appreciates the Environmental Protection Agency's (EPA) proposal to withdraw federal numeric nutrient criteria (NNC) promulgated for Florida, and supports your intention not to finalize your proposals for Florida streams and estuaries. Your actions help fulfill the March 2013 federal-state agreement and path forward on NNC and enable the Department to comply with chapter 2013-71, Laws of Florida, regarding the implementation of these criteria.

Withdrawal of the federal NNC for lakes and springs will immediately eliminate rule duplication and your decision not to move forward on streams and estuaries will avoid future duplication. With these actions and your formal approval of our NNC, we are now positioned to implement and enforce state standards to protect Florida's nutrient-impaired rivers, lakes, springs, and estuaries.

With EPA's help, Florida has adopted the most comprehensive NNC in the United States, covering all lakes, rivers, springs, estuaries, and coastal waters, and the vast majority of streams. Our criteria are based on the same science as EPA's but also add biological metrics and trend tests tailored to Florida's unique and varied surface water characteristics.

Florida's NNC include unique elements critical to their successful implementation, including:

1. Recognition of more scientifically robust, site-specific interpretations of narrative nutrient criteria, like nutrient Total Maximum Daily Loads. This recognition establishes certainty in restoration goals and supports hundreds of millions of

dollars that local stakeholders have invested and will continue to invest in bringing nutrient-impaired waters back to health.

2. Incorporation of metrics for flora and fauna that more directly identify nutrient impairment.

3. Application as a spatial average in the waterbody, consistent with how NNC were derived. This approach enables practical application of the NNC across the range of nutrient sources and enables water quality credit trading, which can speed up restoration by seeking the most cost-effective solution in any given locale.

4. Downstream waters protection. In addition to Florida's narrative nutrient criteria, the Department has included trends tests for causal (Total Nitrogen, nitrate-nitrite, and Total Phosphorus) and response (chlorophyll a) variables that allow listing of waters in advance of actual impairment so that actions can move forward sooner.

5. Detailed implementation procedures for 303(d) impaired waters assessments and National Pollutant Discharge Elimination System permitting through incorporation of the document "Implementation of Florida's Numeric Nutrient Standards" (April 2013) into the standards.

We appreciate the opportunity to comment on EPA's proposed actions. And I want to add my personal thanks for collaborating with the Department on timely fulfilling the terms of the March 2013 agreement and path forward. Your actions will enable us to continue moving forward aggressively to implement the most comprehensive NNC in the country and assure cleaner water for Florida's future.

Sincerely,

Drew Bartlett, Deputy Secretary
Water Policy and Ecosystem Restoration

DB/dj

The EPA agrees that federal numeric nutrient standards are no longer necessary now that Florida has adopted and the EPA has approved state standards to address nitrogen and phosphorus pollution.

The EPA requested comment on and is limiting this final action to only the issue of withdrawing (and not finalizing) federal water quality standards applicable to Florida waters. Comments on the protectiveness, scope or content of Florida's water quality standards are outside the scope of this action.
