

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

FLORIDA WILDLIFE FEDERATION, INC.,
SIERRA CLUB, INC., CONSERVANCY
OF SOUTHWEST FLORIDA, INC.,
ENVIRONMENTAL CONFEDERATION OF
SOUTHWEST FLORIDA, INC., and
ST. JOHNS RIVERKEEPER, INC.,

Plaintiffs,

v.

Case No.: 4:08-cv-00324-RH-WCS

LISA JACKSON, Administrator
of the United States Environmental
Protection Agency, and the
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

FLORIDA PULP AND PAPER
ASSOCIATION ENVIRONMENTAL
AFFAIRS, INC., the FLORIDA FARM
BUREAU FEDERATION, SOUTHEAST
MILK, INC., FLORIDA CITRUS MUTUAL,
INC., FLORIDA FRUIT AND VEGETABLE
ASSOCIATION, AMERICAN FARM
BUREAU FEDERATION, FLORIDA
STORMWATER ASSOCIATION, FLORIDA
CATTLEMAN'S ASSOCIATION, and
FLORIDA ENGINEERING SOCIETY,

Intervenor-Defendants

And

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Intervenor-Defendant.

**MEMORANDUM OF LAW
IN OPPOSITION TO MOTION FOR ENTRY OF CONSENT DECREE**

Intervenors, FLORIDA PULP AND PAPER ASSOCIATION ENVIRONMENTAL AFFAIRS, INC., the FLORIDA FARM BUREAU FEDERATION, SOUTHEAST MILK, INC., FLORIDA CITRUS MUTUAL, INC., FLORIDA FRUIT AND VEGETABLE ASSOCIATION, AMERICAN FARM BUREAU FEDERATION, FLORIDA STORMWATER ASSOCIATION, FLORIDA CATTLEMAN'S ASSOCIATION, and FLORIDA ENGINEERING SOCIETY (the "Association Intervenors"), by and through undersigned counsel, submit the following in opposition to the pending motion for entry of a consent decree (document 90). The Association Intervenors request leave to adopt, by reference, the memorandum and expert declarations submitted separately by the Florida Water Environment Association Utility Council, Inc. (Utility Council) and the Florida Minerals and Chemistry Council, Inc. (FMCC). Those declarations will be cited herein as the "Blancher Declaration" and the "Durbin Declaration." The Association Intervenors have also filed 8 separate declarations with this memorandum, referred to herein as "Attachments."

This matter comes before the Court on a Motion to Enter a Consent Decree proposed by EPA and Plaintiffs, which would establish a fixed schedule for EPA to propose numeric nutrient criteria. EPA claims the ability to establish a firm schedule for the adoption of those criteria, although no agency can claim to have established a

scientifically defensible way to do so. As EPA presents the issue:

To the extent a party wishes to challenge whether it is possible, in the time provided in the proposed consent decree, to develop scientifically defensible numeric nutrient criteria, EPA is prepared to argue that any evidence a party may present would be entitled to little weight in light of the expertise of EPA in developing the schedule for the development of numeric nutrient criteria

[EPA, Response by EPA To Intervenors' Motion For Fairness Hearing On Proposed Consent Decree, Document 98 at 5 (citation omitted)]. The Consent Decree, in plain terms, will dictate a timetable for the scientific method. EPA may claim some innate ability to establish schedules. Unfortunately, its current approach is inconsistent with any claim of scientific expertise. The consent agreement is a matter of short term litigation strategy that promotes the short-term, institutional interests of EPA. The above statement demonstrates the attempt to use the judicial branch to foreclose any meaningful public input, including the input of qualified Florida scientists. The residents of the State of Florida deserve better.

The Association Intervenors in declarations filed with this memorandum show that the proposed Consent Decree between EPA and Plaintiffs is unreasonable and contrary to the public interest. In the preface to this memorandum, the Association Intervenors will briefly summarize the analysis provided in the declarations filed with this memorandum. Next, the Associations will present legal argument based upon EPA's description of the questions that this Court should consider upon presentation of the proposed consent decree: first, whether the consent decree is reasonable; and second, whether the consent decree is contrary to the public interest. The proposed consent decree is not reasonable, it is contrary to the public interest, and it serves no practical

purpose other than to place a judicial gloss on a flawed regulatory initiative and an attempt to avoid scientific and public scrutiny. The proposed consent decree will be devastating to Florida's economy without advancing the goals of the Clean Water Act. On this basis the Court should deny the Motion to Approve the Consent Decree.

SUMMARY OF FACTS DEMONSTRATED BY DECLARATIONS

It is appropriate to begin with the current condition of Florida's economy in order to understand the context of the Association Intervenors' objections. While the United States and much of the global economy have experienced the most severe economic downturn since the Great Depression of 1930s, the recession in Florida has been more serious than the rest of the nation. Florida began its recession before the rest of the nation, the magnitude of the downturn has been larger than the rest of the nation, and the near-term prospects for a meaningful rebound are comparatively dim. [Morrell Declaration, Attachment 5 at 3 ¶ 3]. An additional major cost (such as additional costs for nutrient treatment) for local government, Florida agriculture, or Florida business may affect the economic recovery of the state economy and employment in the state. [Id. at 8]. Additional costs placed on Florida dischargers, which are not placed on equivalent dischargers in other states, may affect the ability of Florida to compete and attract new businesses and jobs. [Id. at 9 ¶ 20]. As phrased by the Senior Research Fellow for Florida Tax Watch: "Florida, experiencing some of the worst economic conditions in the nation, is not the place to experiment with expensive new requirements, particularly when they are not applied in other parts of the country or in neighboring states." [Id.]

To illustrate the costs associated with EPA's proposal, the Association Intervenors

have provided the declarations of the Chief Engineer for the Clay County Utility Authority [Bolam Declaration, Attachment 8], the Director of Utility Operations for Pinellas County, and Jim Sartori, a Florida farmer. Utility operators who have already gone to extraordinary lengths to comply with nutrient reductions under the Total Maximum Daily Load program, will be forced to implement extraordinary capital costs for installation of new treatment systems and for operational costs, including power consumption costs for operation of reverse osmosis systems. [Bolam Declaration, Attachment 8]. Florida farmers will need to modify their operations in such a way that they will be placed at a competitive disadvantage with farmers in Canada, Mexico, and other states in order to comply with new standards [Sartori Declaration, Attachment 1].

On the other hand, there is no information at the present time to support the hypothesis that any set of numeric nutrient criteria will be protective of waters in the State of Florida. As exhaustively detailed in the accompanying declarations, scientific analysis has not progressed to the point where an agency can adopt a defensible set of numeric criteria that would govern regions within the state, as opposed to the state's current method of regulating water bodies on a site-specific basis. The effect of the consent decree would be to mandate a fixed, unachievable deadline.

I. THE SETTLEMENT IS UNREASONABLE

The consent decree at issue in this case will have extraordinary effects on the State of Florida. Presumably, the consent decree will advance the interests of only the Plaintiffs. This Consent Decree may at least in the short term, assist EPA in its institutional goal to avoid litigation and end its participation in this lawsuit. The consent

decree does an admirable job of advancing those interests. However, operating under the reasonable presumption that the consent decree should be based upon EPA's regulations for the development of water quality criteria, the proposed consent fails to follow EPA's own rules in the development and adoption of water quality standards.

The Association Intervenors concur with EPA that the Court should consider the reasonableness of the proposal. Where a proposed decree affects third parties (such as the Association Intervenors and the residents of Florida, in general), the Court must be satisfied that the effect on them is neither unreasonable nor proscribed. Stovall v. City of Cocoa, 117 F.3d 1238, 1242 (11th Cir. 1997); U.S. v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981). The court should also consider the nature of the litigation and the purposes to be served by the decree. If the suit seeks to enforce a statute, the decree must be consistent with the public objectives sought to be attained by Congress. Id. In considering the reasonableness, appropriateness and adequacy of a proposed consent decree, a court should consider: (1) the nature and extent of potential hazards; (2) the availability and likelihood of alternatives to the consent decree; (3) whether the decree is technically adequate to accomplish statutory goals; (4) the extent to which the consent decree furthers the goals of the statutes which form the bases of the litigation; (5) the extent to which approval of the consent decree is in the public interest; and (6) whether the consent decree reflects the relative strength or weakness of the case. U.S. v. Wisconsin Elec. Power Co. 522 F.Supp.2d 1107, 1118 (E.D. Wis. 2007). Applying those standards, the proposed consent decree is unreasonable and inappropriate.

A summary review of the foregoing factors indicates that the proposed consent

decree is unreasonable. While there is a potential hazard from excessive nutrient pollution, if EPA continues on its current approach there is simply no way of knowing whether its regulatory approach will be effective to abate any hazard. There are reasonable alternatives to the proposal. Among other things, EPA can defer to the State of Florida in its continued development of numeric nutrient standards and the agencies can propose an appropriate solution at the proper time. Furthermore, as observed in the Blancher Declaration, the implementation of Florida's existing TMDL program is likely to yield analysis which can serve as a basis for a rational set of defensible numeric criteria. [Blancher Declaration at 7 ¶ 38]. The Consent Decree is not technically adequate to accomplish the goals of the Clean Water Act, and does not further the goals of the statutes which form the basis for the underlying litigation.

For the reasons described in the argument below, the agreement is contrary to the public interest. Finally, the consent decree does not reflect the strength or weakness of the case, as prosecuted by Plaintiffs. Instead, the relief exceeds any remedy that could be directed toward EPA.

These proceedings have revolved around two legal theories: first, that at some time in the distant past, EPA inadvertently made a determination under section 303(c)(4)(B) of the Clean Water Act that numeric standards are necessary; and second, the theory that EPA has breached its duty, to promptly adopt water quality standards once that determination was announced. With respect to the first issue, for the reasons stated in prior motions for summary judgment, the Plaintiffs never set forth a credible theory that prior to this year, EPA had made such a determination. Now that EPA has

announced its determination, any potential relief on that claim is rendered moot. With respect to the claim that EPA has breached its duty regarding the promptness of its action, it is possible to characterize the state of EPA's ability to adopt a standard in two ways. Hypothetically, when EPA announced its determination that numeric nutrient standards are necessary for Florida, it did or did not have the scientific ability to adopt a standard at that time. If it did not have that ability (which would appear to be the case, based on the content of its announcement), it is reasonable to suppose that EPA had a valid defense to a claim that it had failed to act promptly. In light of the information provided in the Association Intervenors' declarations, EPA could not reasonably be accused of unreasonably delaying action. If it did have the ability to adopt the standard when it made the determination, the consent decree is of no benefit because there is simply no reason that EPA has not yet proposed a standard for rulemaking. For practical purposes, EPA was left at most with a minor dispute on the possible timing of its rule adoption. From the broader perspective on the merits of the litigation, EPA's proposed consent decree does not adequately account for the weakness of Plaintiffs' case.

In assessing the reasonableness of the consent decree, the Association Intervenors request that the Court consider its declarations on the merits of EPA's regulatory initiative, and whether the consent decree would advance the purposes of the Clean Water Act. To begin, under EPA regulations, water quality standards must have a valid scientific basis.

States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.

40 C.F.R. 131.11(a). Based upon the detailed opinions summarized below, EPA's approach is contrary to the scientific method and therefore cannot be based on sound scientific rationale. The State of Florida undertook an exhaustive and costly effort to collect data, yielding the most extensive database in the nation. Notwithstanding the volume of data available, neither EPA nor the State of Florida have been able to develop a coherent cause and effect relationship between the addition of nutrients (i.e., nitrogen and phosphorus) and biological water impairment that would enable the development of a unitary standard. The effect of nutrients also depends upon other variables, which will differ from site to site (such as residence time, canopy cover, water color, or effects of differing habitat). As a result, it is not possible to develop a standard based upon an observed "dose response" approach.

In the absence of relationships that would support a dose-response approach, EPA is left with alternate approaches which do not purport to rely upon observed cause-and-effect relationships. Under those alternate approaches, EPA would establish a statistical distribution of nutrient data, depict the data on a graph, and then select a cut-off point at a certain place on the graph; the numeric standard is set at that point. For example, the "reference stream" approach may show a distribution of nutrient concentrations in a set of waters minimally affected by human activities. EPA's approach would simply draw the line at the 75th percentile of that distribution, without further analysis.

A similar approach was taken by EPA in the development of standards for metal concentration in sewage sludge, as reported in Leather Indus. v. EPA, 40 F. 3d 392 (D.C. Cir. 1994). In that case, EPA sent out questionnaires to a number of utilities and

performed sampling to obtain a range of pollutant concentrations in sewage sludge, setting a standard based on the 99th percentile of that range. EPA applied that standard in "Table 3" within its regulation, and falling below the numbers on that table would have allowed facilities to avoid additional regulation. By statute, EPA was obligated to adopt regulations "adequate to protect human health and the environment from reasonably anticipated adverse effects." Leather Indus., 40 F. 3d at 401. (citing 33 U.S.C. § 1345(d)(2)(D)). The D.C. Circuit reasoned that because the approach was not related to risk, the 99% cap was invalid. Part of the reasoning of that holding is particularly apt in considering the merits of EPA's prospective approach.

Clearly, the EPA's mandate to establish standards "adequate to protect public health and the environment from any reasonably anticipated adverse effects of each pollutant," 33 U.S.C. § 1345(d)(2)(D), does not give the EPA blanket one-way ratchet authority to tighten standards. Cf. Contract Courier v. Research & Special Programs Admin., 924 F.2d 112, 115 (7th Cir.1991) ("Statutes do more than point in a direction, such as 'more safety.' They achieve a particular amount of that objective, at a particular cost in other interests. An agency cannot treat a statute as authorizing an indefinite march in a single direction.").

Leather Indus. v. E.P.A. 40 F.3d 392, 401 n. 14. (D. C. Cir. 1994). This case is directly analogous, with one qualification that makes EPA's approach even more egregious. EPA's resulting numeric criteria would not merely create a safe harbor, or an exemption from the potential for additional regulation. Without any pretense of assessing whether that number may be over-protective or under-protective, that number will be the final number for regulatory purposes. It is indefensible to propose a fixed percentage of a data set as a basis for a regulation, when that percentage has no bearing to a cause-and-effect relationship. If EPA is to embark upon an arbitrary and capricious result -- to be nothing

other than a “one-way ratchet” (Leather Indus., supra) -- it should do so without a mandate from this Court.

The Declarations submitted with this memorandum underscore the inherent substantive flaws in EPA's current approach. To elaborate upon the more essential information provided in those declarations:

(A) Under the regulatory approach currently in effect, Total Maximum Daily Loads (TMDLs) are established by Florida DEP on a site-specific basis. [Blancher Declaration, at 6 ¶ 34-35]. This program allows Florida DEP to address nutrient issues in the 1,700 rivers and streams within the State of Florida, as well as 7,712 lakes, ponds, and reservoirs, on a site-specific basis. [Blancher Declaration at 6-7 ¶ 32-38].

(B) Nutrients are needed to support healthy, well-balanced populations of natural flora and fauna in surface waters. [Blancher Declaration at 3 ¶ 13].

(C) There are currently three categories of methods that could be employed to adopt a numeric standard for the State of Florida: (1) the dose-response approach; (2) the “reference site” approach, and (3) the “all sites” approach. [Federico Declaration, Attachment 2 at 3 ¶ 3].

(D) Florida DEP has been unable to determine dose-response relationships between levels of nutrients and adverse responses in streams and flowing waters, in such a way as to adopt statewide or regional standards. [Federico Declaration, Attachment 2 at 4 ¶ 5; Blancher Declaration at 4 ¶ 20]. The expression of nutrients is site-specific and depends on other variables such as residence time, canopy cover, color, and other factors such as habitat and hydrology which may affect biological response. [Federico

Declaration, Attachment 2 at 4 ¶ 5].

(E) The “reference site” approach is an inference model which does not demonstrate that exceeding the threshold will result in impairment to aquatic life in a given water body. [Federico Declaration, Attachment 2 at 5 ¶ 6]. Again, alternate variables can affect how nutrients respond in waters. [Federico Declaration, Attachment 2 at 5 ¶ 6]. EPA’s reference approach does not demonstrate whether the designated uses of the water body will be protected. [Gallagher Declaration, Attachment 6 at 6 ¶ 14].

(F) The “all sites” approach is used when there are insufficient reference sites. This approach would base impairment upon a lower range of all known sites, i.e., setting the standard based upon the 25th percentage distribution of all sites of undetermined ecological quality. [Federico Declaration, Attachment 2 at 5 ¶7].

(G) The reference stream and all sites approach have a number of deficiencies that render them inappropriate for deriving numeric criteria. [Blancher Declaration at 5-6 ¶¶ 23-28]. Most notably, there is absolutely no demonstrable relationship between (a) the nutrient concentrations selected by the cutoff percentage and (b) the health of the surface water. [Blancher Declaration at 5 ¶ 28].

(H) The “dose response” approach is the only scientifically defensible approach for establishing numeric nutrient standards for the State of Florida. [Blancher Declaration at 4 ¶ 19].

(I) Confounding variables make it impossible to establish cause and effect relationships between nutrients and response on a state-wide or regional level. [Federico Declaration, Attachment 2 at 6 ¶ 8]. The point at which nutrients become excessive, and

cause undesirable conditions, varies from water body to water body. [Blancher Declaration at 3 ¶16]. Based upon variability in Florida waters, statewide nutrient criteria cannot be developed. [Blancher Declaration at 3-4, ¶¶ 16, 17].

(J) Florida's complex geology results in variability among soil types, as well as variability in natural concentrations of nutrients in the water. [Durbin Declaration, Attachment 4 at 3 ¶ 6]. As a result, some lakes have naturally higher biological productivity, particularly with respect to algal growth, to the point that the abundance of algae leads to green water. [Durbin Declaration, Attachment 4 at 3 ¶ 6].

(K) EPA's approach has largely ignored the natural variability of conditions in lakes. [Durbin Declaration, Attachment 4 at 3 ¶ 7]. Florida DEP has compiled data on nutrient concentrations in 30 lakes that experience minimal human alteration, each of which provide full support for the most sensitive designated uses, and which have healthy biological communities. [Durbin Declaration, Attachment 4 at 3-5]. A review of those data indicates a wide range of nitrogen and phosphorus concentrations, such that a substantial number of those unimpaired waters would exceed expected numeric nutrient limits. [Durbin Declaration, Attachment 4 at 5 ¶ 10]. EPA's approach does not consider cause and effect or evaluate confounding factors that may influence the effect of nutrients. [Gallagher Declaration, Attachment 6 at 6 ¶ 14].

(L) Macroinvertebrates serve as "sentinel" organisms for assessing the effects of nutrients and disturbance on aquatic environments. [DeBusk Declaration, Attachment 3 at 3 ¶ 4]. An extensive study of regional canals in South Florida showed that among other things, canals with relatively low nutrient concentrations did not have a healthy

macroinvertebrate community. [DeBusk Declaration, Attachment 3 at 4 ¶ 6]. Studies of nutrient concentrations and macroinvertebrate populations support the conclusion that habitat limitations and physical factors, rather than relative nutrient concentrations, are a greater factor than nutrient concentrations. [DeBusk Declaration, Attachment 3 at 4-7]. A long term study showed that macroinvertebrate communities in central Florida streams had “little response” to the removal of a large portion of phosphorus. [Debusk Declaration, Attachment 3 at 4 ¶ 8]. Other factors, such as habitat quality, have determined the relative health of those communities. [DeBusk Declaration, Attachment 3 at 5 ¶ 11, 6 ¶ 12].

(M) If a “reference sites” or “all-sites” approach were to be applied, the result will result in costs of compliance that are unreasonable in relationship to any benefit to be obtained. [Federico Declaration, Attachment 2 at 7 ¶ 11; DeBusk Declaration at 6 ¶ 14].

(N) EPA cannot propose, in a scientifically defensible manner, numeric criteria for nutrients for the State of Florida in freshwater lakes and streams on a regional or statewide basis by January 14, 2010. [Federico Declaration, Attachment 2 at 7 ¶ 11-12.] EPA cannot adopt, in a scientifically defensible manner, numeric criteria for nutrients in Florida streams and lakes by October 15, 2010. [Federico Declaration, Attachment 2 at 7 ¶ 12; Blancher Declaration at 3 ¶ 12]. EPA cannot propose, in a scientifically defensible manner, statewide numeric nutrient criteria for Florida marine and estuarine waters by the January 14, 2011. [Blancher Declaration at 3 ¶ 12; see also Gallagher Declaration, Attachment 6 at 7 ¶ 18]. The Consent Decree thus sets arbitrary, unreasonable, and unattainable deadlines, and commits EPA to do the impossible.

[Blancher Declaration at 6 ¶ 31]. Expedience is not a justification for bypassing sound scientific methods to develop numeric nutrient criteria. [Gallagher Declaration, Attachment 6 at 6 ¶ 16].

For the reasons stated separately by the Utility Council and FMCC, the Consent Decree is founded on an indefensible and invalid declaration by EPA. The Association Intervenors would also submit that EPA in entering into the Consent Decree has failed to follow the letter and spirit of the Regulatory Flexibility Act. The Act requires federal agencies to analyze the impact of their regulatory actions on small entities (small businesses, small non-profit organizations and small jurisdictions of government) and, where the regulatory impact is likely to be "significant", affecting a "substantial number" of these small entities, seek less burdensome alternatives for them. 5 U.S.C. § 603. Both current and proposed federal regulations are subject to the RFA. With the short time allowed between notice and promulgation of the regulation establishing numeric nutrient criteria for Florida, there is insufficient time to consult with and consider means of ameliorating large costs on small entities, as required by the RFA.

Finally the Association Intervenors submit that under the language of the Clean Water Act, it is difficult to discern a rational basis for the conclusion that the adoption of numeric standards for the State of Florida is necessary to meet the requirements of the Clean Water Act. The Clean Water Act has no general mandate for the adoption of numeric standards. Natural Resources Defense Council, Inc. v. U.S. E.P.A. 16 F.3d 1395, 1405 (4th Cir. 1993). Based upon the current state of knowledge, EPA cannot meet the deadline to propose a scientifically defensible set of standards. Without the ability to

adopt scientifically defensible standards, EPA cannot comply with its own essential regulations for the implementation of the Clean Water Act. For the foregoing reasons, the Association Intervenors join in the request that EPA's January 14, 2009 decision be afforded no weight. Furthermore, for the foregoing reasons, the Association Intervenors submit that the consent decree should not be approved because it is unreasonable.

II. THE SETTLEMENT IS CONTRARY TO THE PUBLIC INTEREST

The Association Intervenors also agree with EPA that the Court should consider the public interest, and determine whether the proposed decree adequately protects and is consistent with the public interest. Wisconsin Elec. Power Co., 522 F. Supp. 2d at 1111. A consent decree should not be approved where the proposed decree is contrary to the public good. See Kelley v. Thomas Solvent Co., 717 F. Supp. 507, 515 (W.D. Mich. 1989).

For the reasons described above, the consent decree is contrary to the public good. The consent decree is not the result of a compromise among private parties, or even the result of a serious effort to reach a middle ground in a public policy dispute. Rather, it would endorse an overly simplified, indefensible solution to a complex question. The consent decree will not advance the goals of the Clean Water Act, will place an unnecessary and inequitable burden on the State of Florida and its residents, and will lead to an enormous waste of public resources. The Association Intervenors respectfully request that the Court decline to approve the proposed Consent Decree.

WHEREFORE, the Association Intervenors respectfully request the following relief:

- (a) That the Court deny the motion for entry of the consent decree and reserve jurisdiction on the merits of the pending action;
- (b) That the Court consider the presentation of live testimony for consideration of material disputes of fact that may arise from the filing of declarations;
- (c) And such other and further relief deemed just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Memorandum of Law in Opposition to Motion for Entry of Consent Decree has been filed electronically through the United States District Court for the Northern District of Florida's electronic case filing system this 6th day of October, 2009, which shall electronically serve the following counsel of record:

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