Case No. 12-12119

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GULF RESTORATION NETWORK, INC.,
Plaintiffs-Appellant,

v.

ADMINISTRATOR, UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,
Defendants-Respondents.

On Appeal from the
United States District Court for the Northern District of Florida
Case No. 4:08-cv-324-RH-WCS

INITIAL BRIEF OF APPELLANTS, DESTIN WATER USERS, INC., SOUTH WALTON UTILITY CO., INC., EMERALD COAST UTILITIES AUTHORITY, CITY OF PANAMA CITY, FLORIDA LEAGUE OF CITIES, INC., AND FLORIDA STORMWATER ASSOCIATION

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CERTIFICATE OF INTERESTED PERSONS

In accordance with 11th Cir. R. 26.1-2(c), the above referenced Appellants hereby state that the following is a list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, any publicly held company that owns 10 percent or more of a party's stock, and other identifiable entitles related to a party:

1. Agricultural Retailers Association
2. Alves, James Steven
3. American Farm Bureau Federation
4. Ard, Shirley & Rudolph, P.A.
5. Arnold & Porter, LLP
6. Baschon, Carol
7. Beveridge & Diamond, PC
8. Bondi, Pamela Jo
9. Borkowski, Winston Kirk
10. Brannon, Brown, Haley & Bullock
11. Brennan, Amy Wells

12. CF Industries, Inc.

13. Childs, David William

14. Chung, David Yolun

15. City of Panama City, Florida

16. Cole, Terry

17. Conservancy of Southwest Florida, Inc.

18. Crowell & Moring, LLP

19. Crowley, Kevin X.

20. Destin Water Users, Inc.

21. Earthjustice – Tallahassee, Florida

22. Eisenberg, Henry Charles

23. Emerald Coast Utilities Authority

24. Emmanuel, Sheppard & Condon

25. Environmental Confederation of Southwest Florida, Inc.

26. Ettinger, Albert Franklin

27. Fertilizer Institute

28. Florida Cattlemen's Association

29. Florida Electric Power Coordinating Group, Inc.

30. Florida Farm Bureau Federation

31. Florida Fertilizer & Agrichemical Association

32. Florida Fruit and Vegetable Association

33. Florida League of Cities, Inc.

34. Florida Minerals and Chemistry Council, Inc.

35. Florida Pulp and Paper Association Environmental Affairs, Inc.

36. Florida Stormwater Association, Inc.

37. Florida Water Environment Association Utility Council

38. Florida Wildlife Federation, Inc.

39. Forthman, Carol Ann

40. Frost, Don Joaquin Jr.

41. Glogau, Jonathan Alan

42. Green, Darby Meginniss

43. Guest, David G.

44. Gulf Restoration Network, Inc.

45. Gunster Yoakley & Stewart

46. Hansen, Karen Marie

47. Hinkle, Honorable Robert L. – United States District Court Judge, Northern District of Florida

48. Hopping Green & Sams, P.A.

49. Jackson, Lisa P.

50. Jazil, Muhammad Omar

51. Karpatkin, Jeremy

52. Law Office of William D. Preston

53. Lombard, Eduardo S.

54. Malone, Elizabeth Ann

55. Mann, Martha Collins

56. Marsh, Pamela C.

57. Matthews, Frank E.

58. Mitchell, Matthew Calieb

59. Moine, Pamela Adele

60. Mosaic Company, Inc.

61. Murphy, Julie Marie

62. Nalven, Heidi

63. National Association of Clean Water Agencies

64. National Cattlemen's Beef Association

65. Natural Resources Defense Council

66. Northwest Florida Water Management District

67. Nutt, James Edward

68. Oertel, Fernandez, Bryant & Atkinson, P.A.

69. Oertel, Kenneth G.

70. Okaloosa County Board of County Commissioners

71. Patterson, Patrick Michael

72. Pennington, Moore, Wilkinson, Bell & Dunbar

73. Pettit, Christopher Liam

74. Preston, William Douglas

75. Putnam, Adam H. – Florida Commissioner of Agriculture

76. Rave, Norman L. Jr

77. Reimer, Monica Kidd

78. Rizzardi, Keith W.

79. Rudolph, John Allan Jr

80. Schwartz, Richard Edward

81. Sherrill, Honorable William C. Jr – United States Magistrate Judge, Northern District of Florida

82. Shirley, Michael Scott

83. Sierra Club, Inc.

84. Skadden, Arps, Slate, Meagher & Flom, LLP

85. Sotsky, Lester

86. South Florida Water Management District

87. South Walton Utility, Co., Inc.

88. Southeast Milk, Inc.

89. Southwest Florida Water Management District

90. St. John's Riverkeeper, Inc.

91. State of Florida

92. State of Florida Department of Agriculture

93. Stinson, Robert Del

94. Suwannee River Water Management District

95. Toth, Brian C.

96. United States Environmental Protection Agency

97. United States of America

98. Vezina, Lawrence & Piscitelli, P.A.

99. Vezina, W. Robert III

100. Wolff, Daniel W.

STATEMENT REGARDING ORAL ARGUMENT

Destin Water Users, Inc., South Walton Utility Co., Inc., Emerald Coast Utilities Authority, City of Panama City, Florida League of Cities, Inc. and Florida Stormwater Association respectfully request oral argument in this case. The case raises issues of critical importance to the organization and its members who must comply with the requirements of the Clean Water Act. The issues presented also have significant implications for the system of cooperative federalism embodied in many of the Nation's seminal environmental statutes, including the Clean Water Act. The issues involved in the case are both complex and highly technical, and the Court would benefit from further discussion and explanation of the facts and issues at oral argument. Therefore, the Appellants listed above submit that oral argument is appropriate and necessary in this case.

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STATEMENT OF JURISDICTION

I. District Court's Subject Matter Jurisdiction

The district court had original jurisdiction over this case under federal question jurisdiction, 28 U.S.C. § 1331; the federal Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq*; the Regulatory Flexibility Act, 5 U.S.C. §§ 601 *et seq*; and the Clean Water Act, 33 U.S.C. §§ 1251 *et seq*.

II. Timeliness of Appeal

The appeal from the district court's February 18, 2012, Order on the Merits and the February 22, 2012, Judgment on the same is timely. On April 18, 2012, the Appellants filed their notice of appeal. The Appellants' appeal was timely filed within 60 days of the district court's Order on the Merits, and 56 days after the Judgment on the same. The Appellants' notice of appeal was thus timely pursuant to Fed. R. App. P. 4(a)(1)(B)(ii), which provides for 60 days to appeal if one of the parties is a United States agency—in this case the United States Environmental Protection Agency is a party.

III. Appellate Jurisdiction

This Court has jurisdiction over the Appellants' appeal. The district court's Order on the Merits and Judgment on the same is a final judgment under 28 U.S.C. § 1291. The United States Supreme Court has held that a final decision is

typically one from which the district court completely disassociates itself from the case. See Mohawk Industries, Inc. v. Carpenter, 130 S.Ct. 599, 605 (2009).

The Order on the Merits adjudicated the validity of a water quality rule adopted by the Environmental Protection Agency, which set numeric limits on the concentrations of nutrients that would be allowed in fresh water bodies of the State of Florida. The court below declared some parts of the rule valid, and other parts invalid. However, this appeal only concerns the criteria deemed valid by the court below.

The parts of the Final Judgment on appeal will not be subjected to any further proceedings before Judge Hinkle or through a reevaluation by EPA. Thus, those parts of the Final Judgment affirming the validity of EPA's water quality criteria are clearly appealable. These criteria are not subject to modification or reevaluation. They are presently applicable and enforceable by EPA in all NPDES permitting decisions under the Clean Water Act. This appeal is the only opportunity these Appellants will have for this Court to review the correctness of Judge Hinkle's validation of these criteria, and to provide redress to the Appellants' concerns.

STATEMENT OF ISSUES

Appellants raise two issues in this appeal: (a) whether EPA's certification that its rule establishing final numeric water quality criteria for lakes, flowing waters, and springs within the State of Florida will not have a significant impact on small entities under the Regulatory Flexibility Act (5 U.S.C. § 601, *et seq.*) was correct; and (b) whether EPA's numeric standards are contrary to law in that the rule exceeds the powers delegated to EPA through the Clean Water Act.

STATEMENT OF THE CASE

This is an appeal from a decision of the U.S. District Court, Northern District of Florida (Judge Robert Hinkle). The decision adjudicated the validity of a water quality rule adopted by the Environmental Protection Agency ("EPA"). EPA's rule set numeric limits on the concentrations of nutrients (nitrogen and phosphorus) that would be allowed in fresh water bodies of the State of Florida.

Under the Clean Water Act ("CWA"), EPA normally relies on each state to formulate its own water quality standards, subject to EPA's approval, and to implement and enforce them through the state's designated agencies. In Florida, that agency is the Florida Department of Environmental Protection ("DEP"). Florida has had a narrative water quality standard for nutrients which forbade "nutrient concentrations of a body of water (to) be altered so as to cause an

imbalance in natural populations of aquatic flora or fauna." Fla. Admin. Code 62-302.530(47)(b). This rule has received EPA's approval.

EPA's rulemaking efforts in this matter officially began upon the issuance of a "necessity determination" entered by letter from Benjamin H. Grumbles, Assistant Administrator, Office of Water, EPA, to Michael Sole, Secretary, Florida Department of Environmental Protection, dated January 14, 2009. EPA issued this determination pursuant to 33 U.S.C. § 1313(c)(4), within the CWA. (AR010957) In this determination, EPA recognized the years of hard work Florida's DEP had undertaken to adopt numeric nutrient standards but still had not done so. The necessity determination stated EPA would overstep and preempt Florida's efforts and adopt its own numeric standards for nutrients in Florida. Section 1313 of the CWA allows the EPA to promulgate and impose water quality standards upon a state if a determination is made that: "a revised or new standard is necessary to meet the requirements of this chapter." 33 U.S.C. § 1313(c)(4)(B). Essentially, EPA's statement politely described it had run out of patience with Florida's efforts to adopt numeric nutrient standards; EPA was going to do so for Florida on its own, under 33 U.S.C. § 1313.

Following the January 24, 2009 necessity determination, EPA, on January 26, 2010, published in the Federal Register notice of its intent to impose water quality standards for nitrogen and phosphorus for Florida waters. (AR029960)

On December 6, 2010, EPA published the final numeric water quality criteria for "lakes, flowing waters, and springs within the State of Florida" in the Federal Register. (AR086766) This rule set numeric standards for a group of water bodies in Florida. For lakes:

TABLE C-17 – EPA'S NUMERIC CRITERIA FOR FLORIDA LAKES

Lake Color[a] and Alkalinity	Chl-a (mg/L)	TN (mg/L)	TP (mg/L)
Colored Lakes[c]	0.020	1.27 (1.27-2.23)	0.05 (0.05-0.16)
Clear Lakes High Alkalinity[d]	0.020	1.05 (1.05-1.91)	0.03 (0.03-.03-0.09)
Clear Lakes Low Alkalinity[e]	0.006	0.51 (0.51-0.93)	0.01 (0.01-0.03)

The numbers in the parenthetical brackets in table C-17 give an allowable range to reflect "ambient conditions based on data at least the immediately preceding three years in a particular lake." (AR086782) Thus, the criteria for the three classes of lakes listed above in table C-17 sets limits for total nitrogen at between .51-1.27 parts per million (mg/L) unless reliable data from the immediately preceding three years allows a slightly higher range. For phosphorus, the allowable limits were set between .01-.05 mg/L.

For flowing waters, the rule set different ranges for the allowable concentrations of nitrogen and phosphorus. For freshwater streams, EPA divided the state into five regions and set standards for total nitrogen (TN) and phosphorus (TP) according to the following table. (AR086777)

TABLE B-1 – EPA'S NUMERIC CRITERIA FOR FLORIDA STREAMS

Nutrient watershed region	Instream protection value criteria	
	TN (mg/L)	TP (mg/L)
Panhandle West[a]	0.67	0.06
Panhandle East[b]	1.03	0.18
North Central[c]	1.87	0.30
West Central[d]	1.65	0.49
Peninsula[e]	1.54	0.12

Thus, the allowable limits for TN ranged from between .67-1.87 parts per million (mg/L) and for TP .06-.49 (mg/L). For springs, EPA set a numeric standard for TN at .35 mg/L. (AR086789)

The rule also created a method for determining "downstream protection values," or "DPVs," which were designed to protect lakes from phosphorus and nitrogen in streams flowing into lakes. For each lake, the DPV would be a maximum concentration or load limit, measured at the point where a stream would flow in the lake. Where site-specific information would be available, EPA would set DPVs through computer modeling on a case-by-case basis.

According to EPA's December 6, 2010 publication in the Federal Register, the above water quality standards were to "be applicable CWA water quality criteria for purposes of implementing CWA programs, including permitting under the NPDES program. . ." (AR086789) This means these criteria will be applied to all discharge permit applications and decisions which are made under the CWA. The acronym NPDES stands for the permit system under the CWA. EPA's

December 6, 2010 publication assumed the State of Florida would willingly implement EPA's newly promulgated numeric nutrient rule. Its notice stated:

> As discussed above, the State of Florida will determine how best to meet these Federal numeric criteria in a way that most effectively meets the needs of its citizens and environment. FDEP is the primary agency responsible for implementing CWA programs in the State of Florida. As such, EPA defers to FDEP in administering applicable CWA programs consistent with the CWA and EPA's implementing regulations. EPA has worked closely with the State to address nitrogen/phosphorus pollution problems in Florida. EPA will continue to collaborate with FDEP as the State implements EPA's Federally-promulgated numeric criteria.

(Fed Reg. Vol. 75, No. 233 at p. 75786; AR086790) In its publication of its notice of January 26, 2010 to adopt a rule, EPA included a statement as to compliance with the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601, *et seq.* That statement included the following:

> Under the CWA WQS program, states must adopt WQS for their waters and must submit those WQS to EPA for approval; if the Agency disapproves a state standard and the state does not adopt appropriate revisions to address EPA's disapproval, EPA must promulgate standards consistent with the statutory requirements. EPA also has the authority to promulgate WQS in any case where the Administrator determines that a new or revised standard is necessary to meet the requirements of the Act. These state standards (or EPA-promulgated standards) are implemented through various water quality control programs including the NPDES program, which limits discharges to navigable waters except in compliance with an NPDES permit. The CWA requires that all NPDES permits include any limits on discharges that are necessary to meet applicable WQS.
>
> Thus, under the CWA, EPA's promulgation of WQS establishes standards that the State implements through the NPDES permit process. The State has discretion in developing discharge limits, as

> needed to meet the standards. This proposed rule, as explained earlier, does not itself establish any requirements that are applicable to small entities. As a result of this action, the State of Florida will need to ensure that permits it issues include any limitations on discharges necessary to comply with the standards established in the final rule. In doing so, the State will have a number of choices associated with permit writing. While Florida's implementation of the rule may ultimately result in new or revised permit conditions for some dischargers, including small entities, EPA's action, by itself, does not impose any of these requirements on small entities; that is, these requirements are not self-implementing. Thus, I certify that this rule will not have a significant economic impact on a substantial number of small entities.

The RFA requires Federal agencies to prepare an analysis of the impact a rule has on "small entities" unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. As can be seen from the above, EPA certified this rule will not have a significant economic impact on small entities. EPA re-certified this conclusion in the December 6, 2010 publication of the final rule. (AR086807)

EPA's rationale for that conclusion was based on its above quoted statement. The statement contains an assumption that Florida's DEP will take over the implementation of EPA's rule and that "the State has discretion in developing discharge limits, as needed to meet the standards." (AR030009) There is nothing in this record to support EPA's statement that DEP will implement this rule. The record indicates the opposite is true. It is also axiomatic that DEP cannot alter or modify an EPA rule.

During the comment period after EPA's January 26, 2010 Federal Register notice, the Florida DEP advised EPA that it would be impossible for DEP to implement the rule. See letter to EPA from Jerry Brooks dated April 28, 2010. (AR046956-AR046960 at p. AR046959) where DEP stated even if DEP's concerns were addressed in the final rule, the proposed effective date "is untenable." Mr. Brooks, DEP, Director Division of Environmental Assessment and Restoration, also stated that under state law, the Florida DEP must adopt the EPA rule as its own before they could be implemented by DEP. This was expected to take two years, if it occurred at all. Mr. Brooks stated: "Assuming the promulgated criteria address the concerns expressed in our comments, only then can Florida take action to implement those criteria and such actions will take time." (Emphasis added) (AR046959) Mr. Brooks went on to add: "The Department will need to adopt the criteria . . . into rules." Further, as the State of Florida was one of the parties who sued EPA in District Court alleging the rule to be invalid; it has always been apparent Florida has no intention of adopting EPA's rule as its own. As EPA's published notice, quoted above, states, EPA's Water Quality Standards will be implemented "through the NPDES permit process." EPA's following statement that ". . . EPA's promulgation of water quality standards establishes standards that the State implements through the NPDES permit process" is not correct. It is only true if the State is in a position to

implement EPA's pre-emptive rule, which Florida has indicated it cannot and will not do.

Additionally, the record before EPA contains volumes of criticisms the State of Florida submitted to EPA before the publication of the final rule on December 6, 2010. At that time, EPA was fully aware Florida was unwilling to assist with the implementation of this rule. The record is clear that EPA would have to directly implement this rule on its own when it was finalized. EPA's notice under the RFA that this rule is not "self-executing" is unexplained. The rule sets out the necessary and applicable criteria that will be directly applied to every discharger that requires a NPDES permit. Every entity that discharges to waters of the United States through a point source must obtain such a permit under the CWA. To get such a permit, the discharger must comply with the effluent standards in EPA's rule. The record does not support EPA's statement that this rule is not "self-executing." However, whatever EPA meant by that expression cannot change the direct applicability of this rule to all NPDES permits issued under the CWA. EPA recognized this in its above quoted statement: "The CWA requires that all NPDES permits include any limits on discharges that are necessary to meet applicable Water Quality Standards."

Four Appellants in this case are entities which operate wastewater treatment plants. The Florida League of Cities, Inc. is an association whose members are all

cities and municipalities, many of whom operate their own wastewater utilities and stormwater treatment systems. The Florida Stormwater Association, Inc. is an association whose members operate stormwater systems. All these entities discharge treated effluent which requires discharge permits or have members which do so.

This case, being filed under the Federal APA (5 U.S.C. § 500, *et seq*.) was a review of EPA's rule based on the record before EPA. By Order dated June 1, 2011, Judge Hinkle denied requests to obtain discovery or to present testimony in the proceeding. (R. 267) The record included numerous comments submitted to EPA, EPA studies, its responses and materials, scientific reports from regulated industries, agencies of the State of Florida and the like. The record contains over 100,000 pages.

EPA received many comments from operators of wastewater treatment plants which lamented that EPA's allowable numbers for nutrients were not achievable by any existing technology. For example, Richard Griswold, General Manager of Appellant, Destin Water Users, Inc. ("DWU"), submitted comments on April 27, 2010. (AR046813-AR046824) DWU is a utility that provides potable water and waste water treatment services. Mr. Griswold stated the only available technology for stripping nutrients out of wastewater to the degree required by this rule is reverse osmosis ("R.O."). EPA, in its answer to the complaint filed by

Destin Water Users, in paragraph 30, denied that the rule requires the use of reverse osmosis. (R. 223) EPA also concluded: "Treatment using reverse osmosis also requires substantial amounts of energy and creates disposal issues as a result of large volume of concentrate that is generated." (See Footnote 172 of EPA's December 6, 2010 Federal Register publication at AR086798) If R.O. is not applicable, wastewater treatment plants must use existing advanced technology known as biologic nutrient removal ("BNR"). In the Federal Register Publication of this rule, EPA stated: "Nitrogen and phosphorus removal technologies that are available can reliably attain an annual average total nitrogen (TN) concentration of 3.0 mg/L or less and an annual average total phosphorous (TP) concentration of approximately 0.1 mg/L or less." For this statement of what level of nutrient reduction can be achieved by BNR, EPA referred to its own 2008 publication, "Municipal Nutrient Removal Technologies Reference Document." EPA goes on to say that while R.O. may have the potential to further reduce nutrients, "EPA believes that implementation of reverse osmosis applied on such a large scale" is not "practical or necessary." This is from EPA's December 6, 2010 publication of this Final Rule in the Federal Register. (AR086798)

This record describes the extent BNR can achieve the standards and criteria imposed by the rule in question. EPA's publications provide that information. In a 2007 publication of EPA's Bureau of Water entitled "Biological Nutrient Removal

Processes and Cost" the constituents of the forms of nitrogen and phosphorous in wastewater are described. At page 2 of this publication, all four constituents of wastewater which contain nitrogen are listed, with the technology limits, in milligrams per liter, to reduce nitrogen. By adding the columns, it is clear that EPA has recognized the technology limits for biologic nutrient removal of nitrogen can achieve no better than 3 mg/L. (AR128780) For all types of receiving waters in this rule, the allowable limit for total nitrogen is far below this number. As determined by EPA, nitrogen reduction, through BNR wastewater treatment processes, cannot reduce nutrients close to the concentrations the rule requires. For phosphorous the same exists. The technology limit for total phosphorous removal is shown to be approximately .15 mg/L for the two forms of phosphorous identified. The Administrative Record further indicates EPA's published documentation of the capacity of wastewater treatment systems to remove nutrients. See "Municipal Nutrient Removal Technologies" Reference Document, Volume 1 (EPA September 2008). (AR020189-AR020456) Page 3 of this Treatise (AR020209) clearly indicates that the nitrogen levels in this rule are non-attainable. It states: "Technologies are available to reliably attain an annual average of 0.1 milligram per liter (mg/L) or less for TP and 3 mg/L or less for TN." (AR020209) EPA's phosphorus criteria for clear lakes, with low alkalinity is .01 mg/L, clear lakes with high alkalinity is .03 mg/L. These levels are not achievable

at any advanced waste water treatment facility in the U.S. As shown below, EPA is aware of this.

EPA undertook an economic analysis of this rule. Its conclusions are contained in a report dated November 2010, entitled "Economic Analysis of Final Water Quality Standards for Nutrients and Lakes and Flowing Waters in Florida." (AR087552) This report is referenced at p. 75793 of the Federal Register December 6, 2010 publication of the final rule. (AR086797) Chapter 4 of this report addresses the economic impact of the rule on Wastewater Treatment Plants. Page 4-2 of this report states: "For advanced nutrient removal, technologies are available to reliably attain an annual average of 3 mg/L for TN and 0.1 mg/L or less for TP." (AR087615) The report goes on to say these levels of treatment "are the target levels of treatment for this analysis;" that statement is repeated at p. 75794 of the December 6, 2010 Federal Register notice of this rule. (AR086798) Thus, in all regards, EPA concedes the rule sets limits on nutrients which even the most advanced nutrient removal technologies cannot achieve. In its own report of the economic impact of the rule on wastewater plants, EPA did not evaluate the cost of achieving the rule's nutrient criteria, it used the levels of treatment it recognizes can be attained (.1 mg/L for TP; 3 mg/L for TN) by existing technology. Thus, EPA assumed advanced wastewater treatment facilities would not be able to attain the reductions of nutrients in their discharges that conformed

to the rule and would be discharging treated effluent far in excess of these water quality standards. Its economic evaluation used the technically possible treatment levels, not the rule's levels, as the target of the analysis. The rule requirement for P concentrations in clear lakes is at least 10 times lower than can be achieved by existing technology. The best level of existing treatment technologies and systems which currently exist cannot comply with the rule's criteria.

In its response to these comments, EPA has not disputed that existing wastewater technology cannot meet the allowable levels of nitrogen and phosphorus required by its rule. In EPA's December 6, 2010 Federal Register publication, it appears to recognize that Wastewater Treatment Plants will not be able to comply with this rule. On page 75794 of that publication (AR086798), EPA states that if "state of the art BNR technology" combined with other potential treatments result in non-compliance with this rule, it would be "reasonable to assume" these entities would attempt to explore other avenues to obtain compliance, including, variances, site specific alternative criteria, and the like. Thus, EPA, in recognizing that Wastewater Treatment Plants cannot comply with this rule, is pointing them toward ways to avoid compliance with the rule by seeking a variance or other alternatives to the requirements of its rule.

Following EPA's adoption of its numeric rule for Florida, a host of entities, including the State of Florida, filed suit in U.S. District Courts challenging the

validity of the EPA nutrient rule. These cases were consolidated before Judge Hinkle. All parties filed Motions for Summary Judgment. Judge Hinkle held a lengthy session for oral argument on these motions, on January 9, 2012. He issued an eighty-six page "Order on the Merits" on February 18, 2012. (R. 351) A Judgment on these findings and determinations was entered on February 22, 2012. (R. 353)

In his Order, Judge Hinkle ruled: (1) EPA validly determined that new standards for nutrients were necessary for Florida's waters to meet Clean Water Act requirements; and (2) EPA's rule setting numeric nutrient criteria is valid in all respects except for the stream criteria and the default downstream-protection criteria for unimpaired lakes, which he determined to be invalid.

The Appellants also raised the contention that EPA failed to comply with the RFA. Judge Hinkle agreed with EPA on this issue. He determined that EPA's position was correct, as follows:

> The Administrator's certification is unassailable. The rule and its numeric nutrient criteria only *indirectly* impact small entities. The *direct* effect is on the State of Florida. *See* 75 Fed. Reg. at 75803 (AR086807). It will fall to the state to implement the criteria. The state may do so, for example, through limits in National Pollutant Discharge Elimination System ("NPDES") permits, and the limits may exactly match the criteria. But nothing mandates that result. When, as here, a rule's only effect on small entities will be indirect, an agency may properly make a no-impact certification. *See, e.g., Michigan v. EPA*, 213 F.3d 663, 688-89 (D.C. Cir. 2000) (per curiam) (upholding a no-impact certification because the Administrator's requirement that a state revise its state implementation plan to reduce

> nitrous-oxide emissions did not directly regulate small entities; it was left to the state to determine which entities it would regulate in order to obtain the required reduction).

Following that ruling, this appeal followed. These Appellants raise two issues in this appeal: (a) whether EPA's certification that the rule will not have a significant impact on small entities under the RFA (5 U.S.C. § 601, *et seq.*) was correct; and (b) whether EPA's numeric standards are contrary to law in that the rule exceeds the powers delegated to EPA through the CWA.

EPA, in its "combined response" to Motions for Summary Judgment by all the Plaintiffs below, did not respond to the Appellants' contention that this rule was contrary to law in that it set standards and criteria which were not technologically achievable by even the best available technology. Instead, EPA characterized these arguments as "claims of excessive costs." (R. 300 at p. 174) These Appellees did not base any request for relief on the extreme costs this rule would mandate; the contentions below and in this appeal are founded on the non-existence of available technology to achieve the concentrations of nutrients required by these standards.

EPA's only implicit response to the above issue was to say that some discharges "may" yet be permittable if the receiving waters could absorb them without exceeding the rule criteria. (R. 300 at p. 175) The record below contains no indication whether this is a realistic possibility or just a theoretical possibility.

What is known is that EPA's numeric tolerances in this rule represent desirable goals, not prevalent conditions. Thus, in the fashion that the rule was developed, the applicable numbers will rarely, if ever, allow discharges which exceed them.[1] What is certain is that under the permit system of the CWA, "An NPDES permit must incorporate limits necessary to meet applicable water quality standards. 33 U.S.C. § 1311(b)(1)(C)." (R. 300 at p. 175) It is a clear statement by EPA that the nutrient limits in this rule will be controlling in permit decisions. That is why EPA took the unusual step of forcing this rule upon Florida. As Mr. Grumble's declaration of this necessity stated, EPA's "numeric criteria would ensure that criteria are in place that will protect the designated uses of Florida's waters. . ." (AR010960) Thus, the rule is mandatory, not just guidance.

SUMMARY OF THE ARGUMENT

This case concerns whether EPA has exceeded its authority under the CWA by adopting water quality criteria, which will be applied in permitting decisions. The criteria set limits for the concentrations of Phosphorus and Nitrogen in Florida's fresh waters. The limits in the rule cannot be met by any existing

[1] The numeric limits in the rule were derived by using data from "healthy" water bodies (i.e., those low in nutrients). Thus, as a statistical exercise, most existing water bodies covered by the rule will have ambient conditions which exceed the rule criteria. This makes it unlikely most water bodies will have the capacity to receive treated wastewater and yet comply with the allowable nutrient concentrations. EPA's description of the derivation of the water quality standards for lakes is found in 75 Fed. Reg., No. 233, December 6, 2010, at pp. 75778-75784. (AR086782-AR086788]

technology. EPA recognizes this in its technical documents and in the record it created in this case. The Clean Water Act allows EPA to set water quality standards, but only those which can be met by the best available existing technology. In other words, EPA is allowed to set strict, but not impossible limits. No technology exists which can satisfy this rule. Thus, the rule exceeds the powers Congress delegated to EPA in the Act. By definition, that renders the rule beyond EPA's authority and invalid. Further, EPA failed to follow the requirements of the RFA which requires it to evaluate the impact of the rule on "small entities." It wrongly certifies the rule will have no direct impact on small entities. EPA and Judge Robert Hinkle were incorrect to conclude the rule will have no direct impact on small entities. The rule is mandatory. It will control and guide all permitting decisions under the CWA. Thus, the decision below that the RFA did not apply to this rulemaking effort should be reversed.

ARGUMENT

I. EPA'S CERTIFICATION UNDER THE REGULATORY FLEXIBILITY ACT THAT THE RULE WOULD HAVE NO SUBSTANTIAL ECONOMIC IMPACT ON SMALL ENTITIES WAS ERRONEOUS, AS WAS JUDGE HINKLE'S AGREEMENT WITH THAT POSITION.

There is no dispute here that a substantial number of entities who will be regulated by this Act are small entities. DWU, South Walton Utility Co., Inc. ("SWU") and many members of the Florida League of Cities and Florida

Stormwater Association are small entities. The gravamen of EPA's argument is that this rule will have only an indirect, not a direct, effect on small entities. Judge Hinkle agreed with this characterization.

EPA's rationale, as described above, explained its certification of no issue under the RFA in this fashion:

> While Florida's implementation of the rule may ultimately result in new or revised permit conditions for some dischargers, including small entities, EPA's action, by itself, does not impose any of these requirements on small entities; that is, these requirements are not self-implementing.

Curiously, a few lines above that quotation, EPA stated:

> As a result of this action, the State of Florida will need to ensure that permits it issues include any limitations on discharges necessary to comply with the standards established in the final rule. (AR086807)

EPA asserted this rule will have no direct impact on dischargers. Yet, EPA acknowledged, someone, either Florida DEP or EPA itself, will apply the rule in permit decisions and require compliance with it. Judge Hinkle agreed with EPA's statement. But he stated the only entity upon which the rule will have a direct impact is the State of Florida itself. This is a curious conclusion. Within this record, there is no documentation that the State of Florida needs to apply for or holds an NPDES permit. It is also clear, as described below, Florida cannot be forced to implement or apply EPA's rule.

A. Can EPA require Florida to adopt and enforce its regulations?

The legal answer is no, as a matter of state law and based on fundamental principles of federalism in the United States Constitution.

A Florida administrative agency is a creature of statute, and can only do what it is authorized to do by the Legislature. See, e.g., Ocampo v. Department of Health, 806 So.2d 633, 634 (Fla. 1st DCA 2002). There is no authority, in rule or statute, for DEP to enforce federal water quality standards which have not been incorporated by reference in Florida law. The Florida Legislature has not authorized agencies generally, or DEP specifically, to implement federal regulations, guidance documents, or memoranda of agreement unless they have been adopted as rules of the Florida agency. An effort to implement such a regulation, guidance document, or memorandum as a regulatory standard (or other statement of general applicability) would be strictly forbidden unless DEP undertook formal rulemaking to adopt the federal authority. See § 120.54(1)(a), Fla. Stat. To do so it would, at the very least, require legislative authority. Florida Statutes are specific in this regard. See § 120.54(1)(e), Fla. Stat.: "No agency has inherent rule-making authority . . ." Florida Statutes only allow DEP to adopt rules which implement Florida law.

In interpreting its statutory authority, DEP has consistently ruled that it lacks authority to adjudicate issues of federal law. DEP has, through published final

orders, consistently concluded that it lacks jurisdiction to adjudicate the issue of compliance with federal law. See Rowe v. Oleander Power Project, L.P., 22 F.A.L.R. 1173, 1177 (Fla. DEP 1999) ("both federal and Florida case law holds that claims based on alleged violations of federal laws are beyond the jurisdiction of a state administrative proceeding"), citing Curtis v. Taylor, 648 F. 2d 946, 948 (5th Cir. 1980); Miccosukee Tribe v. South Florida Water Management District, ER F.A.L.R. 98:119 (Fla. DEP 1998), aff'd per curiam, 721 So.2d 389 (Fla. 3d DCA 1998).

The federal government cannot compel a state to enact or administer a federal regulatory program. See Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144, 188 (1992). Although the federal government may offer "incentives" (see New York v. United States, 505 U.S. at 188) for states to act consistently with the policies of federal agencies, the federal government cannot compel states to do so.

If Florida cannot be forced to adopt EPA's water quality criteria, what does EPA's statement that the rule is not self-implementing mean? EPA notices in the Federal Register are clear that the new criteria are mandatory and will control the discharge limits in all NPDES permits. How this is not "self-implementing" is unclear. It is like saying statutory speed limits are not "self-implementing" because the Highway Patrol writes the tickets. Even were it correct that the rule is

not "self-implementing," is that relevant to this issue? What difference does it make who implements it? The rule still has the same effect. EPA's position is sophistry at its best (or worst). Even if Florida could implement and enforce the rule, it has no discretion to change the criteria. Florida's duty would be ministerial. Every discharge permit issued or modified under the new criteria will be required to comply with these standards. This is certainly a direct, not an indirect impact. Thus, EPA's premise for failure to comply with the RFA is illusory and contrived. Judge Hinkle's assumption of his February 18, 2012 Order that: "It will fall to the State to implement the criteria" is not correct. (R. 351 at p. 83) Florida's obligations under the CWA only apply to implementing its own water quality standards, which must be approved by EPA. This rule is not one of those. The Florida Legislature has never authorized DEP to enforce or apply federal rules. As described above, EPA cannot require DEP to enforce and apply EPA's rule. Thus, under this record, it will fall upon EPA to implement its rule, not the Florida DEP.

The contention by EPA, agreed to by the lower tribunal, that EPA's rule will only indirectly affect dischargers, is clearly incorrect. It is based on an assumption, not supported by this record, that Florida will incorporate EPA's rule into its permit program. When a conclusion is based on a false premise, it is flawed. It was error for the lower tribunal to assume Florida would apply EPA's rule as if it were its own.

B. The rule will have a direct effect on small entities.

In his affirmation of EPA's certification that this rule did not require compliance with the RFA, Judge Hinkle relied upon the decision in Michigan v. EPA, 213 F. 3d 663 (D.C. Cir. 2000). The circumstances in that decision were very different from this case. There, EPA requested Michigan to tighten its nitrous-oxide standards to reduce emissions. EPA did not instruct Michigan how to accomplish this, what criteria to adopt, or upon whom the burden would fall. EPA did not preempt Michigan by adopting its own rule. Certainly in that case, EPA's action had no direct effect upon small entities, as it was the State alone which changed its emission criteria (Michigan could have exempted small entities). This case is the counterpoint. As Judge Hinkle described in detail in his findings, EPA had for years requested Florida to adopt numeric nutrient standards, but Florida had not done so even after almost 10 years of "study." So EPA, like the Little Red Hen, stepped in and did the job itself, pre-empting Florida's lack of action.

EPA's rule will directly control all NPDES permit decisions. EPA's notice in the Federal Register confirms this. In reality, it doesn't matter whether EPA or Florida implements the rule; the effect is the same. There can be no other conclusion but that EPA's rule will have a direct impact on all dischargers, many

of whom are small entities. That triggers the obligation of EPA to comply with the RFA.

5 U.S.C. § 601, *et. seq*., or the Regulatory Flexibility Act, requires agencies to consider the economic impact of their regulatory proposals on small entities, analyze alternatives to minimize that impact, and make the analyses available for public comment. The only exception to this requirement is where the regulation will not have a substantial impact on a significant number of small entities.

The RFA allows for the agency to avoid making an analysis of the economic impact of its regulatory proposals if "the head of the agency certifies that the Rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). EPA, certified that the EPA final would not have a significant economic impact on a substantial number of small entities. EPA explained its failure to comply with the RFA with the following statement: "This final rule does not itself establish any requirements that are applicable to the small entities." The Appellants assert that EPA's certification was in error and that the EPA should be compelled to comply with the requirements of the RFA.

EPA's conclusion that the numeric nutrient criteria will not impact small entities as defined under the RFA is patently incorrect. The EPA final rule on numeric nutrient criteria for the state of Florida will have an enormous economic

on small entities, which include the Appellants. When it adopted the Rule, EPA made statements as to who the Rule would be affected by it. EPA specifically found that Industries discharging pollutants to lakes and flowing waters in the State of Florida would be affected. EPA also found that publicly-owned treatment works ("POTWs") which discharge pollutants into lakes and flowing waters and entities responsible for managing stormwater runoff in Florida would be affected. (AR086769) In its Economic Analysis of its Rule, EPA stated the following: (a) For WWTPs using advanced BNR, capital costs to comply, were estimated at up to $219,000,000.00 (AR086799); (b) For stormwater dischargers, up to $747,000,000.00 in just capital costs (AR086802); (c) For agriculture, annual costs are estimated at almost $23,000,000.00 (AR086804). Annual costs are only those which are continuous and persistent. Despite this, the EPA certified the Rule will have no significant direct impact on small entities. Thus, for stormwater and wastewater alone, EPA estimated the Rule would requires nearly one billion dollars in capital expenses.

Despite finding that the Rule would, in fact, be highly costly to small entities in the state of Florida, EPA paradoxically concluded that the Rule would have no significant and economic affect on small entities. It is difficult to comprehend how EPA came to this conclusion, in light of the fact that every entity, large or small,

that discharges or will discharge into Florida's fresh waters will be subject to this rule. Permits may not be issued without complying with the EPA Rule.

EPA's certification of no impact was published in the Federal Register on December 6, 2010 at 75 Fed. Reg. 75762-75803. There is no rationale in the record which explains or supports EPA's contention that the Final Rule will not impact the small entities which are the Appellants. In its Final Rule, EPA unequivocally stated which entities could potentially be *directly* impacted by the Final Rule. The "potentially affected entities" were, according to EPA, "industries discharging pollutants to lakes and flowing waters in the State of Florida; publicly-owned treatment works discharging pollutants to lakes and flowing waters in the State of Florida; and entities responsible for managing stormwater runoff in Florida." Despite EPA *explicitly* stating which entities could be *directly affected* by the Final Rule, EPA certified that the Rule will not have a significant direct impact on small entities.

An agency is under "no obligation to conduct a small entity impact analysis of effects on entities which it does not regulate." Motor & Equipment Manufacturers Association v. Nichols, 142 F.3d 449, 476 (D.C.Cir. 1998). In American Trucking Associations, Inc. v. EPA, 175 F.3d 1027 (D.C. Cir. 1999), the D.C. Circuit Court of Appeals held that EPA had properly certified, under the RFA, that its revised National Ambient Air Quality Standards ("NAAQS") which

it established for ozone and particulate matter under the Clean Air Act would not have a significant economic impact on a substantial number of small entities, *because* the NAAQS does not regulate small entities directly, but rather affects state implementation plans ("SIPs"), through which states have broad discretion in regulating small entities.

SIPs under the Clean Air Act are similar to the NPDES program under the CWA. Under the Clean Air Act, each state has the "primary responsibility" for ensuring that its air meets NAAQS. State of Michigan v. EPA, 805 F.2d 176, 179(6th Cir. 1986); CAA § 107(a), 42 U.S.C. § 7407(a). In order for states to fulfill their responsibility, each state must submit to the EPA Administrator a state implementation plan which provides for the attainment of NAAQS within its borders. Id. The Administrator then must approve a SIP if it meets the criteria set forth in the Clean Air Act. Id. Therefore, states have wide discretion in determining the manner in which they will achieve compliance with the NAAQS. American Trucking Associations, Inc. v. EPA, 175 F.3d 1027, 1044 (D.C. Cir. 1999). However, if a State fails to submit a SIP which complies with the Clean Air Act, the EPA must "adopt an implementation plan of its own, *which would require the EPA to decide what burdens small entities should bear*." Id. at 1044. This is nearly identical to the situation in which the EPA has found itself. Under the CWA, if a state fails to meet water quality rule promulgation criteria under the

Section 303(c) of the CWA, the EPA Administrator is required to "promptly promulgate promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved…" See 303(c)(4)(B). EPA has done just this by promulgating new water quality standards for nutrients for the state of Florida. As such, EPA must conduct a regulatory flexibility analysis.

The D.C. Circuit Court of Appeals subsequently explained in Cement Kiln Recycling Coal v. EPA, 255 F.3d 855 (D.C. Cir. 2001) that the "application of the RFA does turn on whether particular entities are the 'targets' of a given rule. The statute requires that the agency conduct the relevant analysis or certify 'no impact' for those small businesses that are 'subject to' the regulation, that, those to which the regulation 'will apply.'" Cement Kiln Recycling Coal at 869; citing from Mid-Tex Elec. Coop. v. FERC, 773 F.2d 327 (D.C.Cir. 1985).

Here, there is no doubt that the Appellants are the "targets" of the EPA Final Rule. In its necessity determination made by EPA Assistant Administrator, Benjamin Grumbles, on January 14, 2009, which began this rule adoption process, EPA appears to belie its certification of no impact. For instance, EPA stated that Florida's then-significant and on-going efforts to implement nutrient criteria "were not adequate" to meet the requirements of the CWA. In light of its necessity determination, EPA promulgated the Rule which is the subject of this Appeal.

II. EPA'S RULE IS CONTRARY TO LAW IN THAT IT EXCEEDS THE POWERS CONGRESS DELEGATED TO EPA UNDER THE CLEAN WATER ACT

The contention in this argument is that EPA's rule requires a level of treatment which cannot be attained by the best existing technology. The CWA only permits EPA to require "the best available technologically achievable" or is "technologically and economically achievable" (33 U.S.C. § 1314(b)(2)(A)); or "the best conventional pollutant control technology. . ." (33 U.S.C. § 1311(b)(2)(E)); or "the best practicable control technology currently available. . ." (33 U.S.C. § 1314(b)(1)(A)). For municipal stormwater dischargers, the CWA requires "controls to reduce the discharge of pollutants to the maximum extent practicable. . ." (33 U.S.C. § 1342(p)(3)(B)(iii)).

EPA's authority is delegated to it by Congress. It may not act beyond the power it has been granted by the CWA. Under the CWA, the EPA is required to impose and enforce "technology-based effluent limitations and standards through individual NPDES permits." Rybacheck v. U.S.E.P.A., 904 F.2d 1276, 1282-1283 (9th Cir. 1989); see 33 U.S.C. § 1342. When it enacted the CWA, Congress specified a number of methods in which EPA could impose and enforce these limitations in NPDES permits. Id. at 1283. For example, the CWA requires the EPA to establish effluent limitations which require dischargers to use the "best practicable control technology currently available" ("BPT") within the industry.

Id.; see also 33 U.S.C. § 1311(b)(1)(A), § 1314(b)(1)(A). The EPA defines BPT as "the average of the best existing performance by plants of various sizes, ages and unit processes within each industrial category or subcategory." EPA v. National Crushed Stone Ass'n, 449 U.S. 64, 76 n. 15, 101 S.Ct. 295, 303 n. 15, 66 L.Ed.2d 268 (1980).

In arriving at a BPT for a particular industry, EPA is directed to consider several factors, including the total cost of the application of the technology in the relation to the effluent reduction benefits which are to be achieved. BP Exploration & Oil, Inc. v. U.S.E.P.A., 66 F.3d 784, 789 (6th Cir. 1996). Once EPA has set BPT, it must set the standard for "best available technology economically achievable" ("BAT") for toxic pollutants. BAT calls for more stringent control technology which is both technologically available and economically achievable. Id. at 790. The factors which EPA is to consider when setting BAT are the cost of achieving such effluent reduction and the non-water quality environmental impact including the energy requirements of the technology. Id; 33 U.S.C. § 1314(b)(2)(B).

It should be noted that conventional pollutants are treated differently from toxic pollutants. For conventional pollutants, the standard, "best conventional pollutant control technology" ("BCT") is designed to control conventional pollutants which do not require the high level of strictness required by BAT. BP

Exploration at 790. Conventional pollutants include biochemical oxygen demand (BOD), total suspended solids (TSS) (non-filterable), pH, fecal coliform, oil and grease. 40 C.F.R. § 401.16.

EPA defines "non-conventional" pollutants under the Code of Federal Regulations as "parameters that are neither conventional pollutants (40 C.F.R. § 401.16), nor "toxic" pollutants (40 C.F.R. § 401.15). Non-conventional pollutants include nitrogen and phosphorous, which are the two nutrients subject to the Final Rule. The statutory standard for existing point sources which discharge non-conventional pollutants is the "best available technology *technologically achievable*." 33 U.S.C. § 1311(b)(2)(A) (emphasis added). Among the factors which EPA is to consider in its assessment of the best available technology include the "cost of achieving such affluent reduction." 33 U.S.C. § 1314(b)(2)(B); see Entergy Corporation v. Riverkeeper, Inc., 129 S.Ct. 1498 (2009) (Appendix to opinion of the Court). In determining the economic achievability of a technology, the EPA must consider the "cost" of meeting BAT limitations, but it is not required to compare this cost with the benefits of effluent reduction. Rybachek v. USEPA, 904 F.2d at 1290-1291. In this case, regardless of cost, the discharge limits in this rule far exceed what can be achieved by any existing wastewater treatment processes. The record in this case and EPA's own technical manuals confirm this conclusion.

In sum, the rule EPA adopted sets heroic goals for wastewater and stormwater facilities. EPA recognizes existing technology cannot meet these standards or criteria. This is evident in EPA's economic analysis of the impact of the rule on these operations. In assessing the costs of compliance, EPA did not evaluate the cost of reducing nutrient discharges to meet the criteria in this rule, it only costed out the levels existing technology can attain. Those levels far exceed the numeric requirements of the rule. This is a tacit admission; the rule sets impossible standards. Further, the statement EPA published in the Federal Register, quoted infra, to the effect that variances could be available cannot be validated by the exculpatory. An illegal zoning ordinance cannot be validated by the possibility of obtaining a variance. EPA has gone beyond the powers Congress delegated to it under the Clean Water Act. By definition, that makes this rule invalid.

CONCLUSION

The lower court erred when it determined EPA was not required to comply with the RFA. The rule clearly mandates strict and expensive pollution control technology (which does not even exist) and imposes those standards on every small entity which is required to obtain an NPDES permit. That alone triggers the RFA's burdens upon EPA. Further, the rule has adopted discharge limits which cannot be obtained by existing technology. This violated the Clean Water Act, as

EPA cannot adopt discharge criteria which cannot be met even by the best existing technology. EPA's statement that it may be possible for these entities to obtain relief from the rule through a variance or the like is diversionary – it does not justify or validate the rule. Thus, this Court must reverse Judge Hinkle on all parts of his Final Judgment which upheld this rule or require EPA to comply with the Regulatory Flexibility Act.

Respectfully submitted on this the 27th day of June 2012:

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 7,632 words.

/s/ Kenneth G. Oertel
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 27th day of June, 2012, a copy of the foregoing was served on counsel of record for all parties through the Court's Notice of Electronic Filing system. A copy is also being sent by first class U.S. mail to the individuals listed below who are not registered for electronic filing.

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