

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

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

Plaintiffs,

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

v.

STEPHEN L. JOHNSON, Administrator of the
United States Environmental Protection Agency;
and THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

**SECOND AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF**

INTRODUCTION

Plaintiffs—Florida Wildlife Federation, Inc.; Sierra Club, Inc.; Conservancy of Southwest Florida, Inc.; Environmental Confederation of Southwest Florida, Inc.; and St. Johns Riverkeeper, Inc.—bring the following complaint against Stephen L. Johnson and the United States Environmental Protection Agency (“EPA”) for failing to comply with their non-discretionary duty to promptly set numeric nutrient criteria for the state of Florida as directed by section 303(c)(4)(B) of the Clean Water Act. This complaint seeks a declaratory judgment and injunctive relief.

NATURE OF THE CASE

1. This citizen's suit is brought pursuant to section 505(a)(2) of the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C § 1365(a)(2), to compel the United States Environmental Protection Agency ("EPA") to perform its non-discretionary duty mandated by section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), of the CWA. That provision requires EPA to "promptly" propose a new or revised water quality standard for a state once it has made a determination that the standard is necessary to meet the requirements of the CWA.

2. In 1998, EPA's administrator determined that prompt development of numeric standards for the nutrients phosphorus and nitrogen by the State of Florida (and indeed all other states) was necessary to meet the requirements of the CWA. EPA action is required here in order to achieve sufficient protection of Florida's waters because the State of Florida has failed to develop these standards.

3. The United States Environmental Protection Agency's duty under the CWA is to protect public health and the environment. Both the letter and the spirit of its mandate require that it promptly develop numeric nutrient standards to protect the waters—and the people—of the State of Florida.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this claim by virtue of 33 U.S.C. § 1365(a) ("Citizen suits" provision of the Clean Water Act) because this complaint alleges a failure of the Administrator to perform a duty which is non-discretionary under the act. Additionally, jurisdiction exists under 5 U.S.C. § 701-706 (Administrative Procedure Act); 28 U.S.C § 1331 ("Federal question"); 28 U.S.C § 1361 ("Action to compel an officer

of the United States to perform his duty”); and 28 U.S.C. §§ 2201-2202 (“Creation of remedy” and “Further relief” provisions establishing power to issue declaratory judgments in cases of actual controversy).

5. Venue is proper in this judicial district and in this court under 28 U.S.C § 1391(e) because no real property is involved in this action and first named plaintiff, Florida Wildlife Federation, resides or maintains its principal place of business in Tallahassee, Florida which is located in the Northern District of Florida.

6. Plaintiffs have provided Defendants with at least sixty days written notice of the violations of law alleged herein in the form and manner required by the CWA (33 U.S.C. § 1365(b)(2)). A copy of the notice is attached as exhibit “A.”

THE PARTIES

7. Plaintiff Florida Wildlife Federation (“Federation”) is a Florida statewide non-profit conservation and education organization with its principal place of business in Tallahassee, Florida. It is a membership-based organization with approximately 13,000 members throughout Florida. The organization’s mission includes the preservation, management, and improvement of Florida’s water resources and its fish and wildlife habitat. The Federation represents its members in state and federal litigation brought to preserve and protect Florida’s river, lakes, and estuaries.

8. Plaintiff Sierra Club, Inc. (“Sierra Club”) is a non-profit public benefit corporation with its principal place of business in San Francisco, California. Sierra Club consists of members living throughout the state and around the nation. There are approximately 30,000 members living in the State of Florida. The Sierra Club represents the interests of its members in state and federal litigation, public policy advocacy, administrative

proceedings, and before state, local, and federal lawmakers. The Sierra Club is very involved in advocacy regarding issues related to preserving wetlands, improving water quality, and stopping factory farm runoff. All of these activities support Sierra Club's mission to explore, enjoy, and protect the wild places of the earth and educate and enlist humanity to protect and restore the quality of the natural and human environment.

9. Plaintiff Conservancy of Southwest Florida, Inc. ("CSF") is a Florida non-profit corporation with its primary place of business in Naples, Florida. There are approximately 6,000 CSF members residing throughout Florida. CSF is a grassroots organization devoted to protecting the land, water and wildlife of Southwest Florida. CSF works to protect both the quality and quantity of southwest Florida's water resources through education, monitoring, litigation, and preservation.

10. Plaintiff Environmental Confederation of Southwest Florida ("ECOSWF") is a Florida non-profit corporation with its primary place of business in Sarasota, Florida. ECOSWF has approximately 50 members consisting of business entities, governmental agencies and other organizations and individuals living in Southwest Florida. ECOSWF is a regional coalition which focuses its efforts on protecting the conservation interests of Southwest Florida, including Charlotte, Collier, DeSoto, Lee, Manatee, and Sarasota Counties. ECOSWF accomplishes its goals through active stewardship of Southwest Florida's wildlife, water, soil and air, through citizen participation and education, through legal challenges aimed at preserving Florida's waters, and by its support of preservation and conservation.

11. Plaintiff St. Johns Riverkeeper, Inc. ("Riverkeeper") is a Florida non-profit membership-based corporation with its primary place of business in Jacksonville, Florida.

Riverkeeper is dedicated to the protection, preservation, and restoration of the ecological integrity of the St. Johns River watershed for current users and future generations.

Riverkeeper monitors the environmental quality in the St. Johns River and its tributaries. It has over 1000 members who use and enjoy the waters of the St. Johns River for boating, fishing, and observing birds and other wildlife in the St. Johns River watershed. Riverkeeper organizes regular boat trips for its members and citizens to learn more about the river and how they can participate in its management.

12. Each of the Plaintiffs files this action on its own behalf and on behalf of its members in an effort to protect their health, economic, recreational, aesthetic, scientific and conservation interests in the waters of Florida.

13. Defendant Johnson is the Administrator of the United States Environmental Protection Agency. He is charged with the supervision and management of the CWA, including mandates under 33 U.S.C. § 1313(c)(4)(B) which are at issue here. Mr. Johnson is sued in his official capacity only.

14. Defendant United States Environmental Protection Agency (“EPA”) is an agency of the federal government, which has the primary statutory responsibility under the CWA to protect the waters of the United States from pollution.

15. Defendants’ headquarters are at Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

STANDING

16. Members of the Federation, Sierra Club, CSF, ECOSWF, and Riverkeeper use and enjoy waters throughout the state for a variety of purposes, including, but not limited to,

wading, walking, swimming, canoeing, sailing, sport boating, wildlife observation, photography, personal and commercial research, sport and commercial fishing, and collecting aquatic life for personal and commercial consumption.

17. Their ability to use Florida waters for these purposes is being harmed because failure to adopt numeric nutrient standards in Florida has resulted in excessive levels of nitrogen and phosphorus in Florida water bodies – which EPA admits is a direct cause of toxic blue-green algae blooms.

18. Blue-green algae (also known as cyanobacteria) produce “dermatotoxins” that can create severe dermatitis and are known tumor promoters; “neurotoxins” which interfere with nerve cell function; and “hepatotoxins” which attack the liver. Exposure to blue-green algae toxins through ingestion, dermal contact or inhalation can cause rashes, skin and eye irritation, allergic reactions, gastrointestinal upset, serious illness, and even death.

19. Blue-green algae toxins can contaminate drinking water supplies, endanger public health, and result in the shut down of drinking plants that rely on surface waterbodies as their drinking water source.

20. The frequency of toxic blue-green algae blooms is increasing in lakes, rivers, streams, reservoirs, and estuaries throughout Florida.

21. From mid-July to mid-October 2005, major portions of the St. Johns River suffered a toxic blue-green algae bloom which was dubbed “The Green Monster” for the fluorescent green slime created on the surface of the water. Toxin levels were recorded at 50 – 140 times above the World Health Organization’s suggested recreational limits and many people reported respiratory problems, raw throats, and irritated eyes. Photographs of this bloom are attached as exhibits “B1” and “B2.”

22. From mid-August to mid-October 2005, almost the entirety of the Caloosahatchee River in Southwest Florida suffered a massive blue-green algae bloom following excessive releases of nutrient laden water from Lake Okeechobee. Attached as exhibit “C1” is a photograph of this algae bloom.

23. Beginning in mid-June 2008, a toxic blue-green algae bloom occurred north of the Franklin Lock on the Caloosahatchee River. The Olga Water Treatment Plant, which obtains its source water from the Caloosahatchee and which provides drinking water for 30,000 people, was forced to shut down as a result of this bloom. Photographs of this bloom are attached as exhibits “D1” and “D2.” Exhibit “D2” shows the Olga Treatment plant beside the pea-green soup river.

24. In August to September 2005, the St. Lucie River and estuary suffered a massive toxic algae bloom also caused by releases of nutrient polluted water from Lake Okeechobee. Toxin levels in the St. Lucie River and estuary during this bloom were three hundred times above suggested drinking water limits and sixty times above suggested recreational limits. Attached as exhibits “E1” and “E2” are photographs of the St. Lucie algae bloom.

25. In addition, Florida’s estuaries and coastal oceans have been plagued with harmful algae blooms associated with nutrient over-enrichment including macroalgae (seaweed) blooms, which displace seagrass and overgrow coral reef ecosystems, and novel and toxic dinoflagellate (red tide) blooms. Attached as exhibit “F1” is a photograph of a face-guarded lifeguard on a deserted Volusia County beach during a toxic red tide event in October 2007. This bloom moved from the Southwest Florida coast, around the tip of Florida, and up the Atlantic Coast to Flagler, Volusia, and Brevard Counties. It lingered for

several months, causing massive fish kills and angering tourists and residents who were unable to enjoy the beach.

26. From June 2006 through August 2006, three visitors to Wakulla Springs, hailed as the crown jewel of North Florida, reported skin irritations after swimming in the spring. One of the visitors experienced burning and itching after coming out of the water and the other two broke out in rashes, all thought to be caused by elevated levels of algae toxins. Over twenty similar incidents were reported at nearby Ichetucknee Springs, located northwest of Fort White, from June 2002 – August 2006. Additionally, the springhead of Wakulla Springs is now covered with thick, green algal mats. Attached as exhibit “G1” is a series of photographs of these mats gathering on hydrilla as well as the springhead. High nitrate and phosphorous levels in the spring have contributed to the algae blooms, resulting in lower oxygen levels in the water. This depletion chokes out native plant growth and provides a nutrient rich environment where algae and hydrilla, which covers the surface water of the spring without regular removal, flourish.

27. As Lake Munson’s primary inflow and outflow stream, Munson Slough continues to experience an influx of nutrients that contribute to high levels of algae growth within its boundaries and beyond. Attached as exhibit “H1” is a picture of an algae bloom within drainage to the slough. In December 2006, a large fish kill from algae hepatotoxins in the lake prompted an investigation by the Florida Fish and Wildlife Conservation Commission (the Commission). A study prepared by McGlynn Laboratories Inc. for the Commission concluded that the water entering Lake Munson is not clean enough to support a healthy Lake ecosystem. The report went on to state that during the previous two years, an algae hepatotoxin, known as microcystin, had been present in every water sample collected,

and at levels far above water quality standards set by the World Health Organization (WHO). As of May 2006, samples indicated algae toxin levels in the Lake were twenty-six times higher than the drinking water standard recommended by the WHO. A photograph of a researcher wearing protective breathing gear as he collects water samples after a toxic bloom is attached as exhibit “H2.” Another major concern is the proximity of the lake and southern outflow of the slough to connected sinks, which lead directly to the underground aquifer system running throughout most of the state. Consequently, drainage from the slough could threaten contamination of the area’s drinking water.

28. Plaintiffs and their respective members who use and enjoy these water bodies and coastal areas, and other rivers, lakes, and coastal waters around the state which are being similarly affected, have been, are being, and—unless the relief prayed for herein is granted—will continue to be adversely affected and irreparably injured by Defendants’ unlawful failure to perform its non-discretionary duty under 33 U.S.C. § 1313(c)(4)(B).

BACKGROUND AND FACTS

29. The Clean Water Act was enacted by Congress in 1972 to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” 33 U.S.C § 1251(a). The CWA further declared that “it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.” 33 U.S.C. § 1251(a)(1).

30. In order to meet this end, 33 U.S.C. § 1313 requires the states to establish water quality standards and provides a schedule to effectuate this process. It directs that the standards “shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of the [the Clean Water Act].” 33 U.S.C § 1313(c)(2).

31. The CWA, as one means of maintaining or achieving those standards, mandates that EPA “promptly prepare and publish” revised or new water quality standards for navigable waters “in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of [the Clean Water Act].” 33 U.S.C § 1313(c)(4)(B).

32. The vast majority of water quality standards are expressed in numeric terms. For example, Florida’s water quality standard for mercury is expressed as 0.012 micrograms per liter of water.

33. However, Florida has a “narrative” water quality standard for nutrients: *“Nutrients: In no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora and fauna.”* Rule 62-302.530(47)(b), Fla. Admin. Code.

34. The result of having a narrative rather than a numeric standard is that there is no measurable, objective, water quality baseline against which to measure progress in decreasing nutrient pollution, nor is there any measurable, objective means of determining whether a water quality violation has occurred.

35. On October 18, 1997, the 25th anniversary of the Clean Water Act, Vice President Gore directed the Administrator of the EPA and the Secretary of Agriculture to work with others to develop a comprehensive Action Plan within 120 days to improve and strengthen water pollution control efforts across the country. 62 Fed. Reg. at 60448-60449.

36. The Vice President’s initiative stated that:

EPA will identify the major sources of nitrogen and phosphorus in our waters, and identify actions to address those sources. In particular, EPA will accelerate water quality criteria for waters in every geographic region of the country. Specifically, EPA will establish a schedule so that EPA and the states are implementing a criteria

system for nitrogen and phosphorus runoff for lakes, rivers, and estuaries by the year 2000.

62 Fed. Reg. at 60448.

37. In response, Carol Browner, then administrator of EPA, along with the Secretary of Agriculture, developed a Clean Water Action Plan that “charts a course toward fulfilling the original goal of the Clean Water Act – ‘fishable and swimmable’ waters for all Americans.”

38. The availability of the Clean Water Action Plan was noticed by EPA and the Department of Agriculture in the Federal Register on March 24, 1998. A copy of the relevant portions of the Plan are attached as exhibit “I.”

39. Inside the front cover of the Clean Water Action Plan is a letter signed by EPA Administrator Carol Browner and the Secretary of Agriculture formally submitting the Plan they had adopted to Vice President Gore.

40. The letter from the EPA Administrator states that the Plan “provides a blueprint for restoring and protecting the nation’s precious water resources” and “proposes aggressive new actions to strengthen the program” including new initiatives to “strengthen polluted runoff controls.”

41. The section of the Plan titled “Strong Polluted Runoff Controls” states in part:

Polluted runoff is the greatest source of water quality problems in the United States today. Polluted runoff is rainwater and snowmelt that moves across the land, picking up pollutants and delivering them to streams, rivers, lakes, wetlands, and coastal waters. . . . About 70 percent of impaired rivers and streams and 49 percent of lakes are impaired by runoff or discharges from agriculture. While the nation has begun to make progress in controlling polluted runoff, meeting clean water act goals in the next decade and beyond will require picking up the pace.

42. A subsection of the “Strong Polluted Runoff Controls” is titled “Reduce Nutrient Over-enrichment” and states in part:

Excessive nutrient loadings . . . result in excessive growth of macrophytes or phytoplankton and potentially harmful algal blooms (HAB) leading to oxygen declines, imbalance of aquatic species, public health risks, and a general decline of the aquatic resource. Nutrient over-enrichment has also been strongly linked to the large hypoxic zone in the Gulf of Mexico and to recent outbreaks of *Pfiesterias* along the mid-Atlantic Coast.

State water quality reports indicate that over-enrichment of water by nutrients (nitrogen and phosphorus) is the biggest overall source of impairment of the nation's rivers and streams, lakes and reservoirs, and estuaries. In the 1996 National Water Quality inventory, states reported that 40 percent of surveyed rivers, 51 percent of surveyed lakes and 57 percent of surveyed estuaries were impaired by nutrient enrichment.

43. The Plan states that “research to improve the basis for understanding and assessing nutrient over-enrichment problems is critical to better control of nutrient levels in waters and to meeting the nation’s clean water goal.”

44. Thus:

EPA is developing a strategy to establish an objective, scientifically sound basis for assessing nutrient over-enrichment problems. Specifically, EPA will develop nutrient criteria – numerical ranges for acceptable levels of nutrients (i.e., nitrogen and phosphorus) in water. Unlike other criteria that EPA has developed, nutrient criteria will be established as a menu of different numeric values based on the type of water body (i.e., river, estuary, lake) and the region of the country in which the water is located. It is vital that this work be done to provide the technical basis for pollution reduction plans.

EPA will develop nutrient criteria for the various water body types and ecoregions of the country by the year 2000. Under the Clean Water Act, states use pollutant criteria established by EPA as the basis for adopting water quality standards. Within three years of EPA issuance of applicable criteria, all states and tribes with water quality standards should have adopted water quality standards for nutrients. Where a state fails to adopt a water quality standard for nutrients within the three-year period, EPA will begin to promulgate the nutrient criteria appropriate to the region and water body type. When promulgated, the EPA standard would apply until a state or tribe adopts, and EPA approves, a revised standard.

45. The “Key Action” for the “Reduce Nutrient Over-enrichments” initiative states:

KEY ACTION: EPA will establish, by the year 2000, numeric criteria for nutrients (i.e., nitrogen and phosphorus) that are tailored to reflect the different types of water bodies (e.g., lakes, rivers, and estuaries) and the different ecoregions of the country, and will assist states in adopting numeric water quality standards based on these criteria over the following three years. If a state does not adopt appropriate nutrient standards, EPA will begin the process of promulgating nutrient standards.

46. The Clean Water Action Plan, and in particular the section in the Clean Water Action Plan titled “Reduce Nutrient Over-enrichment,” constitutes a determination by the EPA Administrator that promulgation of numeric nutrient standards is necessary to meet the requirements of the Clean Water Act.

47. This determination was then implemented through EPA’s *National Strategy for the Development of Regional Nutrient Criteria* which was published in the Federal Register in June 1998. 63 Fed. Reg. 34648. Slides from a powerpoint presentation by EPA Region 4’s Regional Nutrient Coordinator explaining the relationship are attached as exhibit “J.”

48. As EPA explains in the federal register notice:

A number of states have identified the specific concentration levels at which nutrient overenrichment occurs in their waters, but many states have not adopted such nutrient criteria into their water quality standards. As a result, nutrient overenrichment problems are underestimated and the response authorities of the Clean Water Act and other laws are not fully engaged.

63 Fed. Reg. at 34649.

49. The “Key Action” of the 1998 Strategy is identical to the “Key Action” of the Clean Water Action Plan that addresses reducing nutrient overenrichment:

KEY ACTION: EPA will establish, by the year 2000, numeric criteria for nutrients (i.e., nitrogen and phosphorus) that are tailored to reflect the different types of water bodies (e.g., lakes, rivers, and estuaries) and the different ecoregions of the country, and will assist states in adopting numeric water quality standards based on these criteria over the following three years. If a state does not adopt appropriate nutrient standards, EPA will begin the process of promulgating nutrient standards.

50. In the Strategy EPA states:

Adding nutrient criteria to State water quality standards is essential for Federal, State, and local agencies, and the public, to better understand, identify, and manage nutrient overenrichment problems in surface waters

51. Thus, as required by the Clean Water Action Plan, EPA required all states to develop numeric nutrient standards that were protective of a water body's "designated uses"¹ by 2003, or EPA would develop standards for them.²

52. For example, Florida has designated the section of the Caloosahatchee River where the Olga Water Treatment Plant is located (and where the algae bloom photographs attached as exhibits D1 and D2 were taken) for use as "Potable Water Supplies." It is readily apparent that the Florida's narrative nutrient standards have not been protective of the river's use as a drinking water source given that the plant had to be closed due to an algae bloom fueled by excessive nutrients. The purpose of EPA's requirement that states must set numeric standards was to prevent exactly such an event from occurring.

¹ The Clean Water Act requires states to designate the uses to be made of every navigable water body. 33 U.S.C. §1313(c)(2)(A). Florida has five classes of designated uses. The designated uses of less stringently regulated classifications are included within the designated uses of more stringently regulated classifications.

Class I - Potable Water Supplies

Fourteen general areas throughout the state including: impoundments and associated tributaries, certain lakes, rivers, or portions of rivers, used as a drinking water supply.

Class II - Shellfish Propagation or Harvesting

Generally coastal waters where shellfish harvesting occurs.

Class III - Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife

The surface waters of the state are Class III unless described in rule 62-302.400 F.A.C.

Class IV - Agricultural Water Supplies

Generally located in agriculture areas around Lake Okeechobee.

Class V - Navigation, Utility and Industrial Use.

Currently, there are not any designated Class V bodies of water. The Fenholloway River was reclassified as Class III in 1998

² This date was subsequently changed to 2004 because EPA was delayed in getting out its guidance documents.

53. In May 2006, Florida's Integrated Water Assessment (a report which by law is submitted to EPA) found that fifty percent of Florida's river and stream miles, sixty percent of Florida's lakes (excluding the 730 square miles of Lake Okeechobee which is itself impaired due to nutrient pollution), and sixty percent of the square miles of Florida's estuaries had poor water quality. Nutrient pollution was the major source of concern.

54. The Assessment's list of major water quality concerns included: 1) documentation of increasing levels of nutrients in Florida's surface waters since the 1970s, 2) water quality declines in springs associated with increases in nitrate levels (nitrate is also a nutrient); 3) freshwater harmful algal blooms which were increasing in frequency, duration, and magnitude which posed a significant threat to surface drinking water resources and recreational areas; 4) abundant populations of blue green algae (cyanobacteria) capable of producing health threatening toxins in rivers and lakes; and 5) the finding of levels of these cyanotoxins above suggested guidelines in finished drinking water from some drinking water facilities.

55. On May 25, 2007, EPA's Office of Water issued a bleak report on the states' efforts to develop numeric nutrient criteria over the preceding nine years. As of that date, virtually no progress had been made. The majority of states were still at the level of collecting data and many were only beginning the criteria process.

56. In the section of this memo titled "Why Action is Needed," EPA explained that:

High nitrogen and phosphorus loading, or nutrient pollution, results in harmful algal blooms, reduced spawning grounds and nursery habitats, fish kills, oxygen-starved hypoxic or 'dead' zones, and public health concerns related to impaired drinking water sources and increased exposure to toxic microbes such as cyanobacteria. Nutrient problems can exhibit themselves locally or much further downstream leading

to degraded estuaries, lakes and reservoirs, and to hypoxic zones where fish and wildlife can no longer survive.

57. The memo further explained that numeric nutrient criteria were needed to address this “major source of environmental degradation” because “[a]s any environmental professional understands, we can’t effectively manage what we can’t measure.”

58. As of today, Florida has failed to develop numeric nutrient criteria for phosphorus and nitrogen.

59. Moreover, Defendants have failed to take action by promptly setting numeric nutrient criteria for the state of Florida as mandated by the CWA.

COUNT I

CLAIM FOR DECLARATORY RELIEF

60. Plaintiffs hereby incorporate all preceding paragraphs of this complaint and all allegations contained within them.

61. Defendants determined that numeric nutrient criteria were necessary to meet the requirements of the CWA in 1998 and then developed, through notice and comment, a strategy for implementing that determination.

62. Both the determination and its implementation required that states either adopt such standards by 2003 or have EPA set the standards for them.

63. Since that time, Florida has neither adopted nor proposed numeric nutrient standards and EPA has set no numeric standards for nutrients in Florida.

64. Defendants’ failure to promptly promulgate its own numeric nutrient criteria for Florida is a failure to perform their non-discretionary duty under section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), of the CWA.

65. Based on the foregoing facts, Plaintiffs request a declaration of Defendants' failure to perform their non-discretionary duty under section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), of the CWA.

COUNT II

CLAIM FOR INJUNCTIVE RELIEF

66. Plaintiffs hereby incorporate all preceding paragraphs of this complaint and all allegations contained within them.

67. Plaintiffs have no adequate remedy at law for these violations.

68. Each day on which EPA violates its duty to protect the water of Florida causes severe and irreparable environmental degradation and heightened public health risks because of the continuing pollution in violation of water quality standards.

69. Therefore, Plaintiffs are entitled to injunctive relief set forth in the prayer to prevent injury to themselves and the public.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Florida Wildlife Federation, Inc.; Sierra Club, Inc.; Conservancy of Southwest Florida, Inc.; Environmental Confederation of Southwest Florida, Inc.; and St. Johns Riverkeeper, Inc. respectfully request this Honorable Court to enter the following relief:

(1) a declaratory judgment against Stephen L. Johnson, as Administrator, and the United States Environmental Protection Agency that their failure to promptly set numeric nutrient standards for the state of Florida stands in violation of their non-discretionary duty mandated by section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), of the Clean Water Act;

(2) an injunction against Defendants, requiring them to promptly set numeric nutrient standards for the state of Florida;

(3) an award of litigation costs, including reasonable attorney and expert witness fees, as authorized in section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d); and,

(4) any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between Plaintiffs and Defendants.

RESPECTFULLY SUBMITTED this 6th day of January, 2009.

/s/Monica K. Reimer
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with the Clerk of Court using CM/ECF on this 6th day of January, 2009. I also certify that the foregoing document is being served on this day to the following Service List in the manner specified.

Martha C. Mann
U.S. Department of Justice
Environmental and Natural Resource Division
Environmental Defense Section
P.O. Box 23986
Washington, D. C. 20026-3986
CM/ECF