IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISON

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

Plaintiffs,

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

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

Defendants.
_____/

MOTION TO INTERNVENE AND HOLD PROCEEDINGS IN ABEYANCE MEMORANDUM IN SUPPORT THEREOF AS SUBMITTED BY THE FLORIDA WATER ENVIRONMENT ASSOCIATION UTILITY COUNCIL, INC.

The Florida Water Environment Association Utility Council, Inc. (Utility Council), through its undersigned counsel, respectfully submits its motion to intervene as Defendants pursuant to Fed. R. Civ. P. 24 (Rule 24) and hold proceedings in abeyance. In accordance with N.D. Fla. Loc. R. 7.1(A), a memorandum of law with citation to authorities accompanies this motion.

Motion to Intervene & Hold Proceedings in Abeyance

On August 18, 2009, the U. S. Environmental Protection Agency (EPA) executed a Consent Decree in the instant case. ***Exhibit 1***. The Consent Decree has the effect of ratifying a January 14, 2009 "necessity determination" in which former EPA Assistant Administrator Ben Grumbles advised Mike Sole, Secretary of the Florida Department of Environmental Protection

(DEP), that: "This letter constitutes a determination under the Clean Water Act (CWA) section 303(c)(4)(B) that new or revised water quality standards for nutrients are necessary to meet the requirements of the CWA for the State of Florida."

However, the Utility Council asserts, and a document submitted by EPA in this case confirms, that Assistant Administrator Grumbles issued the January 14, 2009 necessity determination to settle this action and encourage the August 18, 2009 Consent Decree. ***Exhibit 2***. The necessity determination was not the product of a deliberative process by which the former Assistant Administrator met his burden of "marshalling conclusive evidence of 'necessity' for Federally promulgated water quality standards." 57 Fed. Reg. 60848.

In late December, 2008, (then) EPA Assistant Administrator Luis Luna provided a memorandum to former EPA Administrator Stephen Johnson in which he requested that the Administrator grant Mr. Grumbles a one-time delegation to sign a necessity determination for the State of Florida to settle or perhaps even win this case. Mr. Luna stated:

> EPA does not agree with the plaintiffs' allegation that we made a CWA determination in our 1998 Strategy[1] that numeric nutrient criteria are necessary for Florida to meet the requirements of the CWA. There is, however, some risk that the court could agree with the plaintiffs that the 1998 Strategy constitutes a CWA determination that nutrient criteria are necessary for Florida. Such a ruling could spur similar litigation in other states. Presently, 49 states have one or more 303(d) listings for waters impaired by nutrients. (Emphasis added).
>
> The litigants have highlighted that water quality in Florida is declining due to nutrient pollution and that numeric criteria are need to address the environmental degradation. In response to this lawsuit, we believe that we should collect and analyze nutrients-related information pertaining to Florida and decide whether to make a Section 303(c)(4)(B) determination that revised nutrient standards are necessary for the State of Florida to meet the requirements of the CWA. Making such a determination could give EPA a basis to propose a settlement to the plaintiffs or to request that the court dismiss the case. While making a determination may not resolve the litigation, we believe it is an option

[1] Plaintiffs initially alleged that EPA's 1998 *National Strategy for the Development of Regional Nutrient Criteria* was the document serving as a necessity determination; in their first amended complaint, the plaintiffs alleged that it was a 1998 *Clean Water Action Plan*, coauthored with the U. S. Department of Agriculture, that was the document triggering EPA's mandatory duty to promulgate numeric nutrient criteria for Florida.

> we should seriously consider and therefore are requesting delegation of authority. A CWA Section 303(c)(4)(B) can only be made by the Administrator or the Administrator's duly authorized delegate. (Emphasis added).

Administrator Johnson approved Mr. Luna's memorandum and signed the delegation on Monday, December 29, 2008. With weekends and federal holidays excluded, Mr. Grumbles—who did not heretofore have the authority to make a necessity determination for Florida—had only 11 working days, between December 29, 2008 and January 14, 2009, to make such a determination.

The August 18, 2009 Consent Decree presumes the legitimacy of the January 14, 2009 necessity determination. However, on August 14, 2009, the Utility Council delivered a letter to EPA Administrator Lisa Jackson providing the requisite 60-day notice of the Utility Council's intent to file a citizens' suit attacking the legitimacy of the necessity determination. ***Exhibit 3***. On August 24, 2009, the Florida Minerals & Chemistry Council, Inc., also filed a 60-day letter with EPA also challenging the January 2009 necessity determination. ***Exhibit 4***.

The Utility Council seeks to intervene in this action to request that the Court place this action in abeyance and stay any action as to the Consent Decree, at a minimum, until the 60-day periods afforded EPA have expired and the Utility Council has an additional 10 days thereafter to file its citizens' suit. This requested stay or abeyance period would thus end on November 2, 2009. If EPA agrees to rescind its January 14, 2009 necessity determination, the Consent Decree may be rendered moot. If, however, EPA fails to rescind its January 14, 2009 necessity determination, as requested in the 60-day letter, any citizen suit filed by the Utility Council may eventually be consolidated with the instant action.

The requested stay will not prejudice any party to this action or result in undue delay. On July 20, 2009, the Court granted Plaintiffs' request for 60-day stay to pursue settlement

negotiations with EPA. The stay will not expire until September 18, 2009. As of the time of the filing of this motion, the Consent Decree has not been submitted to the Court by EPA or the plaintiffs. The Utility Council filed its 60-day notice with EPA on August 14, 2009, prior to the execution of the Consent Decree.

Wherefore, the Utility Council respectfully requests that this Court grant it intervenor status under Fed. R. Civ. P. 24 and enter an order holding all proceedings in this matter in abeyance, and specifically withhold any actions that may be construed as an approval of the August 18, 2009, Consent Decree. At a minimum, the Utility Council requests that the abeyance remain in place until the EPA has exhausted its 60-day notice periods. If, after exhausting the 60-day notice periods, the EPA takes no action on the Utility Council's notice of intent to sue, the Utility Council asks that it receive another 10 days within which to file its citizens' suit pursuant to § 505 of the Clean Water Act.

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AND HOLD PROCEEDINGS IN ABEYANCE

In support of its motion to intervene and hold these proceedings in abeyance, the Utility Council provides the following.

I. Introduction

The Florida Water Environment Association Utility Council, Inc. (Utility Council) is an association of Florida local government and private utilities which own and operate domestic wastewater treatment, disposal, reuse, and recycling facilities. Utility Council members serve over 7 million Florida residents. Many Utility Council members discharge treated domestic wastewater to Florida surface waters under the authority of state discharge permits issued by the Florida Department of Environmental Protection (DEP) consistent with the State's EPA-approved NPDES permit program. Permit conditions imposed by DEP, or EPA exercising its

statutory oversight authority, are derived from, based upon, and implement, the State's federally approved Water Quality Standards Program and Total Maximum Daily Load (TMDL) program.

A change in policy as to any one program, the Water Quality Standards Program, NPDES permitting program, or TMDL program, changes the regulatory framework under which Utility Council members must plan projects, upgrade equipment, seek permit renewals, obtain financing and set utility rates.

Wastewater treatment is costly, and unnecessarily stringent water quality criteria that are not based upon sound science drain resources that could be more effectively employed protecting Florida waters by other means. The January 2009 necessity determination was not based upon science or any new revelations about Florida water quality discovered between December 29, 2008 and January 14, 2009. The Utility Council intends to test the validity of the necessity determination and has filed a letter indicating its intent to sue, which is a condition precedent to the initiation of a citizens' suit under § 505 of the Clean Water Act. If this Court approves the August 18, 2009, Consent Decree while the 60-day period remains pending, the Court will have given tacit approval as to the legitimacy of the January 14, 2009 necessity determination. The Utility Council seeks to intervene to ask this Court to postpone its review, and perhaps approval, of the Consent Decree until EPA responds, or chooses not to respond, to the Utility Council's notice-of-intent to sue.

II. Argument

A. Permissive Intervention

This Court allowed several parties to intervene in this action (Doc. 48) under Fed Rule Civ. Procedure 24(b) which provides for permissive intervention at the discretion of this Court. The Utility Council did not seek to intervene at that time in that the only issue raised in the initial and first amended complaints was whether a 1998 EPA document triggered a non-discretionary

duty as to EPA; at that time, EPA appeared to be defending the suit. The permissive intervenors were also defending the suit.

The August 18, 2009, Consent Decree has substantially changed the nature of the instant action. The Utility Council has submitted notice of its intent to sue EPA under the citizens' suit provision of the Clean Water Act to address the EPA Administrator's failure to discharge his non-discretionary duty to restrict his January 2009 necessity determination to Clean Water Act considerations. Limiting the precedential effect of this action, and trying to avoid similar suits, is not a legitimate basis for declaring Florida's water quality program (and narrative nutrient criterion) to be in violation of the Clean Water Act. The extraordinary act of EPA invading State primacy and stepping in to promulgate federal numeric nutrient criteria for the State of Florida cannot be justified to "give EPA a basis to propose a settlement to the plaintiffs or to request that the court dismiss the case."

The Utility Council must allow the 60-day period to elapse before filing its own citizens' suit to challenge the litigation strategy-based necessity determination. The Utility Council is concerned that the final entry of the Consent Decree, which is premised upon the January 14, 2009, necessity determination, will compromise the Utility Council's ability to pursue its citizens' suit claim as to the legitimacy of that very same necessity determination.

A party seeking to intervene permissively under Rule 24(b) must show (1) that its "application to intervene is timely" and (2) that its "claim or defense and the main action have a question of law or fact in common." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). According to the U.S. Supreme Court, Rule 24(b) "plainly dispenses with any requirement that the intervenor shall have a direct and personal or pecuniary interest in the subject of the litigation." *Securities & Exchange Com'n v. U.S. Realty & Imp. Co.*, 310 U.S.

434, 459 (1940). Further, "[t]he words 'claim or defense' manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit . . ." *Diamond v. Charles,* 476 U.S. 54, 76 (1986) (O'Connor, J., concurring) (emphasis added). The Utility Council satisfies the requirements of Rule 24(b), and so it respectfully requests that this Court grant the Utility Council leave to intervene permissively.

(1) The Utility Council's application to intervene is timely

The Court may consider four factors in evaluating the timeliness of a motion to intervene. The factors are: (1) the length of time during which the intervenor knew or reasonably should have know about his or her interest in the proceeding before requesting leave to intervene; (2) the extent of any prejudice to existing parties in the litigation due to a failure by the intervenor to request intervention as soon as he or she actually knew or reasonably should have known of an interest in the proceeding; (3) the extent of any prejudice to the intervenor if intervention is denied; and (4) the existence of unusual circumstances militating for or against intervention. *See Reeves v. Wilkes,* 754 F.2d 965, 968-69 (11th Cir. 1985). In considering these four factors, however, the Court might "keep in mind that '[t]imeliness is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice.'" *Georgia v. U.S. Army Corp. of Engineers*, 302 F.3d 1242, 1259 (11th Cir. 2002) (quoting *Chiles*, 865 F.2d at 1213). Nevertheless, consideration of these four factors supports the conclusion that the Utility Council filed its motion in a timely fashion.

The Plaintiffs filed their Third-Amended Complaint on July 2, 2009 and requested a 60-day stay of these proceeding to participate in negotiations with EPA. The 60-day stay was granted and has not yet expired. The Utility Council acquired a copy of the proposed Consent

Decree in this case on August 19, 2009. After learning of the proposed consent decree, the Utility Council has moved with all deliberate speed to intervene in this proceeding. Since the 60-day stay has not yet expired, and the Court has not taken action as to the Consent Decree, the existing parties will not be unduly prejudiced by the Utility Council's intervention. In fact, the Utility Council will know if EPA intends to take action as to the 60-day citizens' suit letter well before EPA's January 2010 deadline for proposing numeric nutrient criteria for Florida's fresh surface waters. As such, the Utility Council has filed this motion in a timely fashion.

(2) The Utility Council's interests involve questions of law or fact which are common to the main claim in this action

In the February 2, 2009 Order Granting Leave to Intervene, the Court noted that the "sole issue to be decided is whether the EPA made a determination that Florida's existing narrative water quality standards for nutrient pollution are inadequate." (Doc. 48). Much has changed since then. At the April 2, 2009, hearing of the various motions and cross-motions for summary judgment, EPA played its determination card by presenting the January 14, 2009, necessity determination to obviate the need to discuss whether the 1998 Clean Water Action plan had the same effect. As calculated, the January 2009 necessity determination resulted in Plaintiffs amending their complaint again and seeking a stay of these proceedings to negotiate a settlement of this matter with EPA—and only EPA. Those negotiations resulted in the August 18, 2009 Consent Decree which was signed after the Utility Council's 60-day letter had been delivered to EPA—challenging the legitimacy of the January 14, 2009, necessity determination.

The Utility Council has two separate interests that share common questions of law and fact with the issues in this action. First, the Utility Council has an interest in ensuring that the August 18, 2009 Consent Decree does not ratify the January 2009 determination as valid, i.e., that the Consent Decree at least provides for the possibility that the January 2009 decree is

invalid. Second, the Utility Council has an interest in continuing to be regulated by the current Florida statutory and administrative framework, substantive portions of which, if the January 14, 2009 necessity determination is ratified, will cease to exist.

(i) The Utility Council has an interest in ensuring that the Consent Decree in this case does not presume that the January 2009 determination is valid.

According to Mr. Luna's memorandum to the EPA Administrator, the EPA did not consider its 1998 *National Strategy for the Development of Regional Nutrient Criteria* sufficient to trigger the EPA's duty to promulgate water quality standards. However, to avoid similar litigation in the other forty-nine States, the EPA, through Assistant Administrator Grumbles, issued a hastily drafted determination only for Florida in January 2009. The Utility Council, as its notice of intent to sue under the Clean Water Act citizens' suit provision makes clear, intends to challenge the validity of the January 2009 determination. If approved by this Court, the Consent Decree will end this action before the Utility Council's citizen suit may be initiated.

Litigation such as this often ends with consent decrees that stretch into the distant future. *See, e.g., Florida Wildlife Fed'n, Inc. v. Browner,* No. 4:98CV356-WS, Consent Decree (N.D. Fla., Tallahassee Division, June 30, 1998); *Sierra Club v. Hankinson,* 296 F.3d 1021, 1026-28 (N.D. Ga. 2002). The Consent Decree in this case is predicated on the validity of the January 2009 determination. The original parties to this dispute have no interest in challenging the validity of the January 2009 determination letter. The Plaintiffs will not challenge the January 2009 determination because it provides the trigger for the EPA's non-discretionary duty to set numeric standards. The Defendants, as Mr. Luna's memorandum shows, will not challenge for fear of focusing the present suit on the 1998 document, which if the Court finds to be a determination, would spawn similar suits in the other forty-nine states. Thus, the Consent Decree will continue to reflect the parties' belief that the January 2009 determination is valid. If

the Utility Council prevails in its citizens' suit against the EPA and its Administrator, the original parties' belief, as reflected in the August 18, 2009 Consent Decree, will prove to be false.

However, because a consent decree is part contract and part judicial decree, *see, e.g., Rufo v. Inmates of the Suffolk County Jail*, 502 U.S. 367, 378 (1992), the Utility Council, if it is not allowed to intervene and seek a stay of this Court's review of the Consent Decree, will face significant challenges in undoing any decree that ratifies and codifies the validity of the January 2009 determination, *see, e.g., United States v. S. Florida Water Mgmt. Dist.*, 922 F.2d 704, 709 (11th Cir. 1991); Douglas Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. Chi. Legal F. 103, 119-121 (1987).[2] In *S. Fla. Water Mgmt. Dist.*, farmers sought to intervene in the federal government's action against the water management district. *S. Fla. Water Mgmt. Dist*, 922 F.2d at 706. The district judge denied intervention. *Id.* at 708-09. On appeal, the Eleventh Circuit Court of Appeals reversed. *Id.*

According to the court, the farmers had a legally protectable right to participate and comment in the action where narrative water quality standards were being translated into numeric standards; thus, the farmers had a right to intervene under Rule 24(a). *Id.* at 710. The court went on to discuss what would happen if the farmers were not allowed to intervene. The court noted that if the farmers could not intervene, they would remain free to challenge the final numeric standards in another forum. *Id.* at 709. However, the court warned, that "a subsequent court would likely be reluctant, as a practical matter, to issue a decision that conflict[][ed] with

[2] Professor Laycock argues that the mere existence of a consent decree may prevent or hinder third parties, i.e., parties that did not play a part in drafting the consent decree, from protecting their interests. Professor Laycock discusses the following examples involving A, B, and C where C is the third party: (1) if C objects to what A and B have agreed to, A and B can point to a judicial decree and tell C that it settles the issue conclusively; (2) A and B will be more reluctant to give in to C's demands if faced with contempt sanctions; (3) the judge will be reluctant to spend time on a case he or she thought was off the docket and will therefore "not be favorably disposed to plaintiffs who subsequently reopened the matter and sought to litigate it"; and (4) the court will likely give the consent decree undue weight in subsequent litigation. Professor Laycock's concerns may be particularly pronounced in an instance, such as this, where the Consent Decree sets a schedule for the EPA's promulgation of numeric nutrient criteria for the entire State of Florida.

the District Court's order in the present case." *Id.* This, according to the court, "provide[][d] a further basis for concluding that the Farm Interests' have shown a potential impairment of their rights sufficient to establish intervention." *Id.* As additional support of this basis for granting intervention, the Court cited Judge Anderson's dissenting opinion from an earlier Eleventh Circuit case where the Judge "agreed with the court that the plaintiffs were not parties to the prior [employment discrimination] litigation which resulted in the consent decree" but concluded that the plaintiffs could still be prejudiced by "certain practical consequences . . . from the consent decree." *Id.* at 709, fn8 (citing *In re Birmingham Reverse Discrimination Employment Litigation,* 833 F.2d 1492, 1502-03 (11th Cir. 1987) (Anderson, J., dissenting)).

In short, the August 18, 2009 Consent Decree, if approved by this Court, would afford the January 2009 necessity determination a level of legitimacy that the Utility Council may be forced to overcome once the 60-day waiting periods have expired. The Utility Council has an interest in avoiding the need to overcome this judicial imprimatur; thus, the Utility Council has an interest in intervening in this action to ask for a stay. *See S. Fla. Water Mgmt. Dist.*, 922 F.2d at 709.

Additionally, allowing the Utility Council to intervene to ask this Court to withhold any actions that may be construed as an approval of the August 18, 2009 Consent Decree will further the public interest in sound judicial administration. The EPA cannot usurp Florida's role in setting its own water quality standards without a valid determination. The Utility Council's imminent citizens' suit has put January 2009 determination, and by extension the August 18, 2009 Consent Decree, in question. Thus, allowing the Utility Council to intervene, and withholding approval of the August 18, 2009 Consent Decree while its fundamental premise is tested, will preserve judicial resources. Such intervention will also aid the Court when the Court

reviews the inevitable Consent Decree in this case to "ensure that it is 'fair, adequate, and reasonable; that the proposed decree [does] not violate the Constitution, a statute or other authority; [and] that it is consistent with the objectives of Congress.'" *Conservation Law Found. of New England, Inc. v. Franklin*, 989 F.2d 54, 58 (1st Cir. 1993) (quoting *Durrett v. Hous. Auth.*, 896 F.2d 600, 604 (1st Cir. 1990)).

(ii) The Utility Council has an interest in continuing to be regulated by the current Florida statutory and administrative scheme, substantive portions of which, if Plaintiffs succeed in this lawsuit, will be cease to exist.

The courts have recognized that "the interests of those who are governed by [statutory] schemes are sufficient to support intervention." *Chiles*, 565 F.2d at 1213 (quoting Wright, Miller & Kane, *Federal Practice and Procedure* § 1908 at 285). In this action, the Plaintiffs are asking this Court to enter an "injunction against Defendants requiring them to promptly set numeric nutrient standards for Florida's lakes, flowing water, estuaries, and coastal waters." (Doc. 81). Stated differently, the Plaintiffs are asking the Court, by finding that the EPA has made a determination, to substitute federally devised numeric water quality criteria for the State's existing narrative nutrient criterion. Such a finding would not only invalidate the existing nutrient standards, but also dispense with the State's administrative process for developing them. *See* § 403.804, Fla. Stat. (2009) (creating the mechanism for the Florida Environmental Regulation Commission to develop water quality standards through administrative rulemaking).

As the Introduction notes, many of the Utility Council's members are regulated under the current Florida statutory and administrative framework. *See* § 403.0885, Fla. Stat. (2009) (establishing the "state-administered NPDES program"). These members also regularly participate in the State development of water quality standards through the existing State administrative process. The right to continued participation under the State statutory and

regulatory framework would cease to exist if the Court grants Plaintiffs' the relief they seek—or approves a Consent Decree effecting that relief.

Accordingly, for the reasons set forth above, the Utility Council respectfully requests that this Court allow it to intervene permissively pursuant to Rule 24(b).

C. Intervention Under Rule 24(a)

The Utility Council is concerned as to the possible effect of the August 18, 2009, Consent Decree on its ability to pursue its citizens' suit challenging the underlying January 14, 2009, necessity determination. To that end, the Utility Council wishes to bring the pending citizens' suits to this Court's attention and ask that any action by this Court that may result in the approval of the Consent Decree (and at least tacitly the necessity determination) be stayed. While the Utility Council may accomplish its goal if permitted to intervene permissively under Rule 24(b), the Utility Council believes that it qualifies for intervention under Rule 24(a) as well.

Intervention under Rule 24(a) requires that: (1) the application to intervene be timely, (2) the applicant have an interest relating to the property or transaction which is the subject of the action, (3) the applicant be so situated that the disposition of the proceeding may impede or impair his ability to protect that interest, and (4) the existing parties to the action cannot adequately represent the applicant's interest. *See Sierra Club, Inc. v. Leavitt*, 488 F. 3d 904, 910 (11th Cir. 2007). Once a party establishes all of the prerequisites for intervention under Rule 24(a), intervention must be allowed. *See Loyd v. Alabama Dep't of Corrections*, 176 F.3d 1336, 1340-41 (11th Cir. 1999). Because the Utility Council satisfies all four parts of the Rule 24(a) intervention test, the Utility Council respectfully requests that this Court allow intervention pursuant to Rule 24(a).

(1) The Utility Council's application to intervene is timely

The threshold issue is whether the Utility Council filed its motion in a timely fashion. *See Sierra Club*, 488 F.3d at 910. For the reasons discussed in Part II (A)(1), the Utility Council filed this motion to intervene in a timely fashion.

(2) The Utility Council has substantial, protectable interests related to the subject matter of this action

The second issue this Court must consider is whether the Utility Council has an interest relating to the property or transaction which is the subject of this action. *See Sierra Club*, 488 F.3d at 910. In considering whether the Utility Council has an interest in the subject of this action, the Court may note that the Utility Council's interest need not be identical to the main claims in a legal sense. *See Chiles*, 865 F.2d at 1213-14. Instead, the judicial inquiry into whether the Utility Council has an interest is necessarily a flexible one that must focus on the particular facts and circumstances of the case. *Id.* The interests described in Part II (A)(2)(i), and (ii) are legally protectable interests sufficient to fulfill the second requirement for Rule 24(a) intervention.

(3) The Utility Council's interest may be impaired by disposition of this action

The third issue this Court may consider is whether the Utility Council's interests may be impaired by the Court's disposition of this action. *See Sierra Club*, 488 F.3d at 910. As the Eleventh Circuit Court of Appeals noted, "[t]he nature of the [intervenors'] interest and the effect that the disposition of the lawsuit will have on their ability to protect that interest are closely related issues." *Chiles,* 865 F.2d at 1214. As discussed in Part II (A)(2) of this memorandum, if the original parties continue in these proceedings without the Utility Council, they will settle the case based on the untested assumption that the January 2009 determination was valid. The Utility Council believes that this assumption, once tested by the courts, will prove to be false. Yet none of the original parties to this dispute have an interest in cautioning the Court of this

possibility. Thus, without the intervention of the Utility Council, the foundation of any consent decree in this case will be a potentially false assumption; an assumption that, once part of a judicial decree, may be difficult to overcome. The Utility Council's interests, as the August 18, 2009 Consent Decree makes plain, may be impaired by the disposition of this action.

(4) The Utility Council's interests may not be adequately represented by the Defendants and existing intervenors

The fourth issue the Court must consider is whether the Utility Council's interests will be adequately represented by the Defendants and existing intervenors. *See Sierra Club,* 488 F.3d at 910. This requirement is satisfied if the Utility Council shows that representation of its interests "may be" inadequate; the burden of making this showing is "minimal." *Chiles*, 865 F.2d at 1214 (*quoting Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Furthermore, even if the interests are identical, a difference in emphasis or strategy may be sufficient to show that the Utility Council will not be adequately represented. *Id.* at 1214-15.

As the discussion in Part II (A)(2)(i) of this memorandum illustrates, the original parties to this suit have no interest in challenging the validity of the January 2009 determination which serves as the basis of the August 18, 2009 Consent Decree negotiated by the original parties. Thus, disposition of this action based only on what the original parties decide to include or exclude from this decree, will impair the Utility Council's interest in having only a valid determination trigger the EPA's non-discretionary duty.

Additionally, none of the parties that have been allowed to intervene in this action have filed 60-day letters with EPA and their actions may not adequately protect the Utility Council's interest in maintaining its citizens' suit action once the 60-day period has expired. The South Florida Water Management District (SFWMD) and the agricultural associations, at least to date, have not challenged the validity of the January 2009 determination. Stated differently, the

SFWMD and agricultural associations may have a different litigation strategy. Asking these intervenors to become familiar with the Utility Council's concerns and then to articulate those concerns before the Court is impractical. As such, the Utility Council has made the "minimal" showing necessary to demonstrate that the Defendants and existing intervenors may not adequately represent the Utility Council's interests. *See Chiles*, 865 F.2d at 1214.

For the reasons discussed in Part II (B), the Utility Council has met the requirements to intervene in this action as a matter of right pursuant to Rule 24(a).

III. Conclusion

For the reasons set forth above, the Utility Council respectfully requests that this Court grant it intervenor status under Rule 24 and enter an order holding all proceedings in this matter in abeyance. Specifically, the Utility Council requests that the abeyance remain in place until the EPA has exhausted its 60-day notice periods. If, after exhausting the 60-day notice periods, the EPA takes no action on Utility Council's notice of intent to sue, the Utility Council asks that it receive another 10 days within which to file its citizens' suit pursuant to § 505 of the Clean Water Act.

The Utility Council also respectfully asks this Court to consider this motion and the accompanying memorandum of law as sufficient to satisfy the pleading requirement of Rule 24(c). In this and other Circuits, a motion may satisfy the pleading requirement so long as it is non-prejudicial, i.e., so long as it clearly spells out the Intervenor's position in the case. *See, e.g., Piambo v. Bailey,* 757 F.2d 1112, 1121 (11th Cir. 1985) (holding that an intervenor who filed a motion to stay with his motion to intervene satisfied the requirements of Rule 24(c) "because his motion to intervene, and the accompanying papers, clearly spelled out his position," thus making "[a]n additional 'pleading' which merely replicated these documents . . .

surplusage"); *Danner Constr. Co., Inc. v. Hillsborough County*, 2009 WL 2525286, *2 (M.D. Fla. 2009) (holding that intervenor, who attached a motion to dismiss as an attachment to its motion to intervene fulfilled the requirements of Rule 24(c)); *Petrik v. Reliant Pharm., Inc.*, 2007 WL 3283170, *2-3 (M.D. Fla. 2007) (holding that because the intervenors' "motion to intervene and stay clearly spell[ed] out their position in this case, the failure to attach a formal pleading could not have prejudiced plaintiff"); *Frank M. Sheesley Co. v. St. Paul Fire & Marine Ins. Co.*, 239 F.R.D. 404, 411-12 (W.D. Penn. 2006) (finding that the court could consider a motion to intervene that did not contain a pleading, but instead, contained a motion to compel arbitration and stay proceedings). The Utility Council believes that this motion and the accompanying documents clearly articulate its position. As such, to save the Court from duplicative documents, the Utility Council respectfully requests this Court to consider this motion and accompanying documents sufficient to fulfill the requirements of Rule 24(c).

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(B)

The undersigned, counsel for the Utility Council, certify that they have conferred with counsel for the existing parties in this action. Counsel for the Plaintiffs were contacted by e-mail correspondence and asked to confirm that Plaintiffs would oppose the Utility Council's motion to intervene; Plaintiffs counsel had not responded by the time of this filing. Counsel for the U. S. Department of Justice, representing EPA, takes no position on the Utility Council's motion. Counsel for the industrial and agricultural intervenors does not object to the Utility Council's motion to intervene; counsel for the South Florida Water Management District does not object to the Utility Council motion.

Respectfully submitted by:

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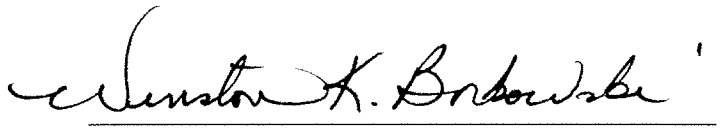
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically filed on August 25, 2009. The following counsel are to receive notice via the U. S. District Court Electronic Case Filing System:

David G. Guest Monica Kidd Reimer 111 South Martin Luther King, Jr., Blvd. Tallahassee, Florida 32301 Counsel for Plaintiffs.	Martha Collins Mann U. S. Department of Justice 601 D Street, N. W., Suite 8000 Washington, D. C. 20026-3986 Robert Del Stinson U. S. Department of Justice 111 North Adams Street, 4th Floor Tallahassee, Florida 32301 Counsel for EPA and Administrator Jackson.
Terry Cole Oertel, Fernandez Cole & Bryant 301 S. Bronough Street, Suite 100 Post Office Box 1110 Tallahassee, Florida 32301-1110 Counsel for Intervenors the 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.	Keith W. Rizzardi South Florida Water Management District 3301 Gun Club Road, MSC-1410 West Palm Beach, Florida 33406 Counsel for Intervenor the South Florida Water Management District.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. 4:08-cv-00324-RH-WCS

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

Plaintiffs,

vs.

LISA P. 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

CONSENT DECREE

Exhibit 1

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Intervenor-Defendant. /

WHEREAS, Plaintiffs Florida Wildlife Federation, Inc.; Sierra Club, Inc.; Conservancy of Southwest Florida, Inc.; Environmental Confederation of Southwest Florida, Inc.; and St. Johns Riverkeeper, Inc. ("Plaintiffs") filed their original Complaint on July 17, 2008 pursuant to section 505(a)(2) of the Clean Water Act ("CWA"), 33 U.S.C. § 1365(a)(2).

WHEREAS, Plaintiffs filed their First Amended Complaint on August 5, 2008, and their Second Amended Complaint on January 6, 2009.

WHEREAS, Plaintiffs' original and Amended Complaints each allege that Defendants Lisa P. Jackson and the United States Environmental Protection Agency (collectively "EPA") failed to perform a non-discretionary duty to set numeric nutrient criteria for the State of Florida as required by CWA Section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B).

WHEREAS, Section 303(c)(4)(B) of the CWA, 33 U.S.C. § 1313(c)(4)(B), provides that EPA's Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved in any case where the Administrator determines that a revised or new water quality standard is necessary to meet the requirements of the CWA.

WHEREAS, Plaintiffs' Second Amended Complaint alleged that the 1998 Clean Water Action Plan constituted a determination by the Administrator that new or revised water quality standards for nutrients were necessary to meet the requirements of the CWA.

WHEREAS, on January 14, 2009, EPA's Assistant Administrator, pursuant to a one-time

delegation of authority by the Administrator, made a determination under Section 303(c)(4)(B) of the CWA, 33 U.S.C. § 1313(c)(4)(B), that new or revised water quality standards for nutrients are necessary in the State of Florida.

WHEREAS, on April 9, 2009, Plaintiffs mailed EPA a notice of intent, pursuant to the requirements of Section 505(b)(2) of the CWA, 33 U.S.C. § 1365(b)(2), to sue EPA for failure to perform its nondiscretionary duty to promptly propose new water quality standards for nutrients in the State of Florida in connection with the January 14, 2009 determination.

WHEREAS, the Court has granted Plaintiffs' motion to amend their Second Amended Complaint to add those claims set forth in their April 9, 2009 notice of intent.

WHEREAS, Plaintiffs and EPA (collectively "the Parties") wish to effectuate a settlement of the above-captioned matter without continued litigation.

WHEREAS, Plaintiffs and EPA have agreed to meet on an informal basis to discuss EPA's progress toward the proposal and finalization of water quality standards for nutrients in Florida;

WHEREAS, the Parties consider this Decree to be an adequate and equitable resolution of the claims in the above-captioned matter.

WHEREAS, the Court, by entering this Decree, finds that the Decree is fair, reasonable, in the public interest, and consistent with the CWA, 33 U.S.C. §§ 1251-1387.

NOW THEREFORE, without trial or determination of any issue of fact or law, and upon the consent of the Parties, it is hereby ORDERED, ADJUDGED and DECREED that:

I. GENERAL TERMS

1. This Court has subject matter jurisdiction over the claims set forth in the Third

Amended Complaint to order the relief contained in this Decree. Venue is proper in the United States District Court for the Northern District of Florida.

2. Plaintiffs and EPA shall not challenge the terms of this Decree or this Court's jurisdiction to enter and enforce this Decree. Upon entry, no party shall challenge the terms of this Decree.

II. TERMS OF AGREEMENT

3. Numeric water quality criteria for nutrients proposed pursuant to this consent decree will consist of numeric values that EPA determines are protective of the designated uses of waters addressed by the requirements in Paragraphs 4 through 11.

4. Except as provided in Paragraph 5 below, the appropriate EPA official shall, by January 14, 2010, sign for publication in the Federal Register proposed regulations setting forth numeric water quality criteria for lakes and flowing waters in the State of Florida, pursuant to section 303(c) of the Clean Water Act, 33 U.S.C. 1313(c). "Lakes and flowing waters" are inland surface waters that have been classified as Class I or III waterbodies pursuant to Rule 62-302.400, F.A.C., excluding wetlands.

5. The requirements of Paragraph 4 shall not apply to any item in Paragraph 4 for which, on or before January 14, 2010, the State has submitted new or revised water quality standards for such item and EPA has approved such standards pursuant to section 303(c)(3) of the Clean Water Act. Any such approval by EPA shall be in writing and signed by the EPA official with the authority to make such approvals.

6. Except as provided in Paragraph 7 below, EPA shall, by October 15, 2010, sign for publication in the Federal Register a notice(s) of final rulemaking addressing each of the

items identified in Paragraph 4 for which EPA signed a notice(s) of proposed rulemaking pursuant to Paragraph 4 of this Decree.

7. The requirements of Paragraph 6 shall not apply to any item identified in Paragraph 6 for which on or before October 15, 2010, the State submits new or revised water quality standards for such item and EPA has approved such standards pursuant to section 303(c)(3) of the Clean Water Act. Any such approval by EPA shall be in writing and signed by the EPA official with the authority to make such approvals.

8. Except as provided in Paragraph 9 below, the appropriate EPA official shall, by January 14, 2011, sign for publication in the Federal Register proposed regulations setting forth numeric water quality criteria for coastal and estuarine waters in the State of Florida, pursuant to section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c). "Coastal waters" are waters of the Gulf of Mexico and Atlantic Ocean that are not classified as estuarine or open ocean, that are within the three-mile territorial seas of Florida (see CWA section 502(8)), and that have been classified as Class I, II, or III waterbodies pursuant to Rule 62-302.400, F.A.C., excluding wetlands. "Estuarine waters" are predominantly marine regions of interaction between rivers and nearshore ocean waters, where tidal action and river flow mix fresh and salt water. Estuarine waters are bays, mouths of rivers, and lagoons, that are within the boundaries of the State of Florida, and that have been classified as Class I, II, or III waterbodies pursuant to Rule 62-302.400, F.A.C., excluding wetlands.

9. The requirements of Paragraph 8 shall not apply to any item in Paragraph 8 for which, on or before January 14, 2011, the State has submitted new or revised water quality standards for such item and EPA has approved such standards pursuant to section 303(c)(3) of

the Clean Water Act. Any such approval by EPA shall be in writing and signed by the EPA official with the authority to make such approvals.

10. Except as provided in Paragraph 11 below, EPA shall, by October 15, 2011, sign for publication in the Federal Register a notice(s) of final rulemaking addressing each of the items identified in Paragraph 8 for which EPA signed a notice(s) of proposed rulemaking pursuant to Paragraph 8 of this Decree.

11. The requirements of Paragraph 10 shall not apply to any item identified in Paragraph 10 for which on or before October 15, 2011, the State submits new or revised water quality standards for such item and EPA has approved such standards pursuant to section 303(c)(3) of the Clean Water Act. Any such approval by EPA shall be in writing and signed by the EPA official with the authority to make such approvals.

III. ATTORNEYS' FEES AND COSTS

12. The Parties agree that Plaintiffs are entitled to reasonable attorneys' fees and costs accrued as of the Effective Date of this Consent Decree on all claims asserted in their Third Amended Complaint. The Parties will attempt to reach agreement as to the appropriate amount of the recovery. Plaintiffs shall file any request for attorneys' fees within sixty (60) of the Effective Date of this Consent Decree. EPA shall have forty-five (45) days to respond to Plaintiffs' fee request.

IV. EFFECTIVE DATE

13. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the District Court does not enter this Consent Decree, the obligations set forth in this Consent Decree are null and void.

V. REMEDY, SCOPE OF JUDICIAL REVIEW

14. Nothing in this Consent Decree shall be construed to confer upon the Court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Consent Decree, except for the purpose of determining EPA's compliance with this Consent Decree.

15. Nothing in this Consent Decree alters or affects the standards for judicial review, if any, of any final EPA action.

VI. RELEASE BY PLAINTIFFS

16. Upon entry of this Consent Decree by the Court, this Consent Decree shall constitute a complete and final settlement of all claims that were asserted, or that could have been asserted, by Plaintiffs against Defendants relating to the allegations in the Third Amended Complaint.

17. Plaintiffs hereby release, discharge, and covenant not to assert (by way of the commencement of an action, the joinder of the Administrator and/or EPA in an existing action, or in any other fashion) any and all claims, causes of action, suits or demands of any kind whatsoever in law or in equity that they may have had, or may now have, against Defendants related to the allegations in the Third Amended Complaint, expressly including any allegation that EPA has failed to promptly propose and to promulgate numeric nutrient standards in Florida for lakes, flowing waters, estuarine waters, and coastal waters under CWA section 303(c), 42 U.S.C. § 1313(c). Plaintiffs expressly reserve the right to challenge in any forum and on any ground the lawfulness of any nutrient water quality criteria EPA ultimately promulgates pursuant to CWA § 303(c), 33 U.S.C. § 1313(c). Defendants reserve all defenses to any such challenge.

VII. TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS

18. When EPA's obligations under Paragraphs 4 through 11 have been completed, and the Plaintiffs' claims for costs of litigation have been resolved pursuant to the process described in Paragraph 12, this Consent Decree shall terminate. Upon termination of the Consent Decree, the above-captioned matter shall be dismissed with prejudice. The Parties shall file the appropriate notice with the Court so that the Clerk may close the file.

VIII. FORCE MAJEURE AND APPROPRIATED FUNDS

19. The obligations imposed upon EPA under this Decree can only be undertaken using appropriated funds. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that the Administrator obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable federal statute.

20. The Parties recognize that the performance of this Consent Decree is subject to fiscal and procurement laws and regulations of the United States which include, but are not limited to, the Anti-Deficiency Act, 31 U.S.C. § 1341, et seq. The possibility exists that circumstances outside the reasonable control of EPA could delay compliance with the obligations in this Consent Decree. Such situations include, but are not limited to, a government shutdown; catastrophic environmental events requiring immediate and/or time-consuming response by EPA; and extreme weather events (including but not limited to drought and hurricanes). Should a delay occur due to such circumstances, any resulting failure to fulfill any obligation set forth herein shall not constitute a failure to comply with the terms of this Consent Decree, and any deadline so affected shall be extended one day for each day of the delay. EPA will provide Plaintiffs with reasonable notice in the event that EPA invokes this Paragraph. Any

dispute regarding such invocation shall be resolved in accordance with the dispute resolution provision of Paragraph 21.

IX. DISPUTE RESOLUTION

21. In the event of a dispute between the Parties concerning the interpretation or implementation of any aspect of this Decree, the disputing Party shall provide the other Party with a written notice outlining the nature of the dispute and requesting informal negotiations. If the Parties cannot reach an agreed-upon resolution within thirty (30) days after receipt of the notice, any Party may move the Court to resolve the dispute.

X. MODIFICATIONS AND EXTENSIONS

22. The deadlines set forth in Paragraphs 4 through 11 above may be extended by written agreement of the Parties with notice to the Court. To the extent the Parties are not able to agree on an extension of any deadline set forth in this Consent Decree, EPA may seek modification of the deadline in accordance with the procedures specified below.

A. If EPA files a motion requesting modification of any date or dates established by this Consent Decree totaling more than thirty (30) days for each date and provides notice to Plaintiffs at least thirty (30) days prior to filing such motion, and files the motion at least sixty (60) days prior to the date for which modification is sought, then the filing of such motion shall, upon request, automatically extend the date for which modification is sought. Such automatic extension shall remain in effect until the earlier of (i) a dispositive ruling by this Court on such motion, or (ii) the date sought in such motion. EPA may seek only one extension under this subparagraph for each date established by this Consent Decree.

B. If EPA files a motion requesting modification of a date or dates established by this Consent Decree totaling thirty (30) days or less for each date, provides notice to Plaintiffs at least fifteen (15) days prior to the filing of such motion, and files the motion at least seven (7) days prior to the date for which modification is sought, then the filing of such motion shall, upon request, automatically extend the date for which modification is sought. Such extension shall remain in effect until the earlier of (i) a dispositive ruling by this Court on such motion, or (ii) the date sought in the motion. EPA may seek only one extension under this subparagraph for each date established by this Consent Decree.

C. If EPA does not provide notice pursuant to Subparagraphs 22.A or 22.B above, EPA may move the Court for a stay of the date for which modification is sought. EPA shall give notice to Plaintiffs as soon as reasonably possible of its intent to seek a modification and/or stay of the date sought to be modified.

D. If the Court denies a motion by EPA to modify a date established by this Consent Decree, then the date for performance for which modification had been requested shall be such date as the Court may specify.

E. Any motion to modify the schedule established in this Consent Decree shall be accompanied by a motion for expedited consideration.

XI. CONTINUING JURISDICTION

23. The Court retains jurisdiction for the purposes of resolving any disputes arising under this Consent Decree, and issuing such further orders or directions as may be necessary or appropriate to construe, implement, modify, or enforce the terms of this Consent Decree, and for granting any further relief as the interests of justice may require.

XII. AGENCY DISCRETION

24. Except as provided herein, nothing in this Decree shall be construed to limit or modify any discretion accorded the Administrator by the CWA, the APA, or by general principles of administrative law in taking the actions that are the subject of this Decree.

25. Nothing in this decree shall be construed as an admission of any issue of fact or law.

XIII. NOTICE AND CORRESPONDENCE

26. Any notices required or provided for by this Decree shall be made in writing, via electronic mail or other means, and sent to the following:

For Plaintiffs:

DAVID G. GUEST
MONICA K. REIMER
111 South Martin Luther King Blvd.
P.O. Box 1329
Tallahassee, FL 32301
dguest@earthjustice.org
mreimer@earthjustice.org

For Defendants:

MARTHA C. MANN
United States Department of Justice
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
martha.mann@usdoj.gov

BARBARA PACE
U.S. Environmental Protection Agency
Office of General Counsel
Mail Code 2355A

1200 Pennsylvania Ave., N.W.
Washington, DC 20460
pace.barbara@epa.gov

XV. REPRESENTATIVE AUTHORITY

27. The undersigned representatives of each Party certify that they are fully authorized by the Party they represent to bind that Party to the terms of this Decree.

COUNSEL FOR PLAINTIFFS:

Dated: 8/18/09

DAVID G. GUEST
MONICA K. REIMER
111 South Martin Luther King Blvd.
P.O. Box 1329
Tallahassee, FL 32301

COUNSEL FOR DEFENDANTS:

Dated: 19 August 2009

JOHN C. CRUDEN
Acting Assistant Attorney General
Env. & Natural Resources Division

MARTHA C. MANN
United States Department of Justice
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
Phone (202)305-0897
Fax (202) 514-2664
martha.mann@usdoj.gov

SO ORDERED.

Dated: _____

_____

ROBERT L. HINKLE
United States District Judge

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 22

OFFICE OF
ADMINISTRATION
AND RESOURCES
MANAGEMENT

Exhibit 2

MEMORANDUM

SUBJECT: One-time Delegation of Authority for the Purpose of Determining Pursuant to Section 303(c)(4)(B) of the Clean Water Act Whether the State of Florida Needs New or Revised Water Quality Standards for Nutrients

FROM: Luis A. Luna
Assistant Administrator

TO: Stephen L. Johnson
Administrator

ISSUE

The purpose of this memorandum is to request a one-time Delegation of Authority to the Assistant Administrator for the Office of Water to determine pursuant to Section 303(c)(4)(B) of the Clean Water Act (CWA) whether the State of Florida needs new or revised water quality standards for nutrients. This authority may not be redelegated.

BACKGROUND

On July 17, 2008, plaintiffs Florida Wildlife Federation, Inc. and other environmental groups filed a lawsuit alleging that EPA failed to perform a nondiscretionary duty to promptly propose numeric nutrient criteria for Florida. *Florida Wildlife Federation, et al. v. EPA*, No. 4:08cv00324 (N.D. Fla.). The plaintiffs allege that EPA made a CWA section 303(c)(4)(B) determination in 1998 that numeric criteria for nitrogen and phosphorus were necessary in Florida in order to meet the requirements of the CWA. The plaintiffs maintain that EPA made this determination in its 1998 "National Strategy for the Development of Regional Nutrient Criteria." The plaintiffs allege that this determination triggered EPA's nondiscretionary duty to promptly propose federal criteria for Florida. Because Florida has not adopted numeric nutrient criteria, the plaintiffs seek a declaration from the court that EPA has failed to perform its

nondiscretionary duty under Section 303(c)(4) to promptly propose numeric nutrient standards for Florida, and they ask the court to require EPA to take this action.

EPA does not agree with the plaintiffs' allegation that we made a CWA determination in our 1998 Strategy that numeric nutrient criteria are necessary for Florida to meet the requirements of the CWA. There is, however, some risk that the court could agree with the plaintiffs that the 1998 Strategy constitutes a CWA determination that nutrient criteria are necessary in Florida. Such a ruling could spur similar litigation in other states. Presently, 49 states have one or more 303(d) listings for waters impaired by nutrients.

The litigants have highlighted that water quality in Florida is declining due to nutrient pollution and that numeric nutrient criteria are needed to address the environmental degradation. In response to this lawsuit, we believe that we should collect and analyze nutrients-related information pertaining to Florida and decide whether to make a Section 303(c)(4)(B) determination that revised nutrient standards are necessary for the State of Florida to meet the requirements of the CWA. Making such a determination could give EPA a basis to propose a settlement to the plaintiffs or to request that the court dismiss the case. While making a determination may not resolve the litigation, we believe it is an option we should seriously consider and therefore are requesting delegation of authority. A CWA Section 303(c)(4)(B) determination can only be made by the Administrator or the Administrator's duly authorized delegate.

REVIEW AND ANALYSIS

The Office of Human Resources determined that the proposed Delegation is a one-time Temporary Delegation, and thus is not subject to an Agency-wide review via the Directives Clearance process. Per OHR Directive rules, proposed Temporary Delegations of Authority do not require Agency-wide review since these delegations are in effect for limited duration ranging from one day not to exceed one year, and do not automatically renew without being submitted for a new approval. The Office of General Counsel concurs with this request, and this authority may not be redelegated.

RECOMMENDATION

I recommend that the Administrator delegate the authority to the Assistant Administrator for the Office of Water to make a CWA Section 303(c)(4)(B) determination.

Approved: _____

Stephen L. Johnson
Administrator

Date: DEC 2 9 2008

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 2 9

THE ADMINISTRATOR

MEMORANDUM

SUBJECT: One-time Delegation of Authority for the Purpose of Determining Pursuant to Section 303(c)(4)(B) of the Clean Water Act Whether the State of Florida Needs New or Revised Nutrient Standards

TO: Benjamin H. Grumbles
Assistant Administrator, Office of Water

I hereby delegate to the Assistant Administrator for the Office of Water the authority to determine, pursuant to Section 303(c)(4)(B) of the Clean Water Act, whether the State of Florida needs new or revised water quality standards for nutrients.

This delegation is limited to the purposes stated above and may be exercised only within the limitations of the Clean Water Act. This authority may not be re-delegated.

Stephen L. Johnson

FWEA UTILITY COUNCIL

Protecting Florida's Clean Water Environment

P.O. Box 2814 ○ Windermere, FL 34786-2814
Phone: 407-363-7751 ○ Fax: 407-370-3595

August 13, 2009

Lisa Jackson, Administrator
U. S. Environmental Protection Agency
1200 Pennsylvania Avenue, N. W.
Ariel Rios Building, Mail Code: 1101A
Washington, D.C. 20460

Re: Notice of Intent to File Suit under § 505 of the Clean Water Act
Failure to Perform Mandatory Duty – Determination of Necessity
Florida Numeric Nutrient Criteria

Dear Administrator Jackson:

This correspondence is submitted on behalf of the Florida Water Environment Association Utility Council, Inc. (Utility Council), to give notice of its intent to file suit under § 505 of the Clean Water Act.

The U. S. Environmental Protection Agency (EPA), acting through (then) Assistant Administrator Benjamin Grumbles, failed to perform a proper "necessity determination" prior to his January 14, 2009, declaration that numeric nutrient criteria must be developed for the State of Florida—and only the State of Florida. The Assistant Administrator failed to exercise his nondiscretionary duty to consider the appropriate criteria in performing the necessity determination; the Assistant Administrator based his decision upon factors beyond the scope of the Clean Water Act and failed to base the necessity determination upon evidence justifying the extraordinary act of EPA promulgating federal water quality criteria in lieu of the State.

The Utility Council

The Florida Water Environment Association Utility Council, Inc. (Utility Council) is an association of Florida local government utilities in which own and operate domestic wastewater treatment, disposal, reuse, and recycling facilities. Utility Council members serve a population of over 7 million Florida residents. A significant number of Utility Council members discharge treated domestic wastewater to Florida surface waters under the authority of state discharge permits issued by the Florida Department of Environmental Protection (DEP) consistent with the State's EPA-approved NPDES permit program. Permit conditions imposed by DEP, or EPA exercising its statutory oversight authority, are derived from, based upon, and implement, the State's federally approved Water Quality Standards Program and Total Maximum Daily Load (TMDL) program. A change in policy as to any one program dramatically changes the regulatory

Exhibit 3

framework under which Utility Council members must plan projects, upgrade equipment, seek permit renewals, obtain financing and set utility rates.

The Necessity Determination as Litigation Strategy

On January 14, 2009, Benjamin H. Grumbles, former EPA Assistant Administrator, forwarded a letter to Michael Sole, Secretary, Florida Department of Environmental Protection (DEP), which stated: "This letter constitutes a determination under the Clean Water Act (CWA) section 303(c)(4)(B) that new or revised water quality standards for nutrients are necessary to meet the requirements of the CWA for the State of Florida."

The release of the January 14, 2009, determination, referred to herein as the "necessity determination," was not the product of careful deliberation by the Assistant Administrator but a litigation strategy intended to limit the precedential effect of a pending citizens' suit.[1]

The plaintiffs in the pending suit, filed in August 2008, alleged that EPA had failed to perform a nondiscretionary duty to promptly promulgate numeric nutrient criteria for Florida after having released a 1998 Clean Water Action Plan (CWAP). The plaintiffs argued that the 1998 CWAP was a formal necessity determination which triggered EPA's mandatory duty to promulgate numeric nutrient criteria for the State of Florida.

Mr. Grumbles did not receive authority to sign the January 14, 2009, necessity determination until two weeks before the determination was released. Assistant Administrator Luis Luna submitted a memorandum to Administrator Stephen Johnson requesting:

> [A] "one time Delegation of Authority to the Assistant Administrator for the Office of Water Policy to determine pursuant to Section 303(c)(4)(B) of the Clean Water Act (CWA) whether the State of Florida needs new or revised water quality standards for nutrients. This authority may not be redelegated.

Assistant Administrator Luna explained:

> EPA does not agree with the plaintiffs' allegation that we made a CWA determination in our 1998 Strategy[2] that numeric nutrient criteria are necessary

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[1] *Florida Wildlife Federation, et. al. v. EPA*, No. 4:08-CV-00324 (N. D. Fla.)

[2] Plaintiffs initially alleged that EPA's 1998 *National Strategy for the Development of Regional Nutrient Criteria* was the document serving as a necessity determination; in their first amended complaint, the plaintiffs alleged that it was a 1998 *Clean Water Action Plan*, coauthored with the U. S. Department of Agriculture, that was the document triggering EPA's mandatory duty to promulgate numeric nutrient criteria for Florida.

> for Florida to meet the requirements of the CWA. There is, however, some risk that the court could agree with the plaintiffs that the 1998 Strategy constitutes a CWA determination that nutrient criteria are necessary for Florida. Such a ruling could spur similar litigation in other states. Presently, 49 states have one or more 303(d) listings for waters impaired by nutrients. (Emphasis added).
>
> The litigants have highlighted that water quality in Florida is declining due to nutrient pollution and that numeric criteria are needed to address the environmental degradation. In response to this lawsuit, we believe that we should collect and analyze nutrients-related information pertaining to Florida and decide whether to make a Section 303(c)(4)(B) determination that revised nutrient standards are necessary for the State of Florida to meet the requirements of the CWA. Making such a determination could give EPA a basis to propose a settlement to the plaintiffs or to request that the court dismiss the case. While making a determination may not resolve the litigation, we believe it is an option we should seriously consider and therefore are requesting delegation of authority. A CWA Section 303(c)(4)(B) determination can only be made by the Administrator or the Administrator's duly authorized delegate. (Emphasis added).

Administrator Johnson approved Mr. Luna's memorandum and signed the delegation on Monday, December 29, 2008.

With weekends and federal holidays excluded, Mr. Grumbles—who heretofore did not have the authority to make a necessity determination for the State of Florida—had only 11 working days between December 29, 2008 and January 14, 2009, to make such a determination. In just 11 days, Mr. Grumbles determined that the State of Florida—and only the State of Florida—needed numeric nutrient criteria for the State to remain in compliance with the Clean Water Act and that the State's longstanding EPA-approved narrative nutrient criterion now violated the Clean Water Act.

The Utility Council asserts, and EPA's own documents suggest, that a necessity determination is a deliberative process requiring that the Administrator provide evidence to support EPA's invading the State's primacy, as guaranteed under § 101(b) of the Act, and taking what the Act may be read to characterize as the extraordinary act of EPA promulgating federal water quality standards in lieu of allowing the State—with local knowledge of its own waters—to do so.

This concept is expressed best by EPA in its attempt to explain why the federal agency did not have to go through a more detailed "determination" process prior to promulgating criteria for priority toxic pollutants. 57 Fed. Reg. 60848. In distinguishing the unique "Congressional determination of necessity" EPA relied upon to promulgate the criteria for toxic pollutants, EPA stated:

> In normal circumstances, it might be argued that to exercise section 303(c)(4)(B) the Administrator might have the burden of marshalling conclusive evidence of "necessity" for Federally promulgated water quality standards.

Id. at 60858. In the instant case, EPA was faced with "normal circumstances" but failed to marshal any, much less conclusive, evidence that *federal* numeric nutrient criteria are necessary for Florida waters.

In its motion for summary judgment in the pending citizens' suit, EPA states:

> Although the terms "determine" or "determination" as used in Section 303(c)(4)(B) are not defined by the Act or its implementing regulations, EPA documents that lack certain minimum findings do not quality as "determinations" for purposes of Section 303(c)(4)(B). In particular, an EPA document is insufficient to constitute a "de facto" determination that new or revised water quality standards are necessary for a particular state if the document contains no evidence that the administrator reviewed the relevant existing state standard or determined that such standard is inadequate to meet the requirements of the CWA. (Emphasis added).

In this case, the Assistant Administrator was granted limited authority to sign a necessity determination for the purpose of giving "EPA a basis to propose a settlement to the plaintiffs or to request that the court dismiss the case." (Emphasis added).

Failure to Perform a Nondiscretionary Duty

The Administrator, or in this case the Administrator's designee, has a nondiscretionary duty to consider the appropriate criteria in making a necessity determination under § 303(c)(4)(B). Those criteria may not exceed those intended by Congress in adopting the Act. Settlement of a citizens' suit is not an appropriate consideration.

EPA cannot credibly argue that Mr. Grumbles, as the Administrator's designee, marshaled "conclusive evidence of necessity for Federally promulgated water quality standards" for Florida waters in the 11 working days between his one-time authorization to conduct a necessity determination and his signing of the January 14, 2009, letter. While the letter gives examples of environmental problems that may be caused by excessive nutrients, none of the examples is unique to Florida nor were the circumstances mentioned in the letter newly discovered between December 29, 2008 and January 14, 2009.

There is no credible evidence that any substantive scientific or technical analyses were conducted to support the necessity determination underscoring that the determination was performed as a litigation strategy.

The Administrator, through his designee, failed to exercise a nondiscretionary duty to marshal conclusive evidence to justify federally promulgated water quality criteria for Florida waters.

Failure to Consider Appropriate Criteria Supporting Necessity Determination

The January 14, 2009, necessity determination has significant legal and practical consequences. The necessity determination triggers EPA's mandatory duty to promptly promulgate numeric nutrient criteria for Florida. At the same time, the January 14th determination declares Florida's water quality program—and specifically DEP's narrative nutrient criterion—in violation of the Clean Water Act.

Consequently, the Assistant Administrator was compelled to assure that the necessity determination was the product of a deliberative process by which he carefully considered whether it was necessary for EPA, with no local knowledge of Florida waters, to step in and take control of Florida's water quality standards program.

At a minimum, to properly exercise his duty to consider the appropriate factors in making his necessity determination, the Assistant Administrator should have established a record demonstrating that he considered whether:

- The development of statewide numeric nutrient criteria in Florida is feasible.
- Florida's existing water quality program was sufficiently deficient to compel federal intervention.
- Numeric nutrient criteria are necessary only in Florida.

As noted, Assistant Administrator Luna's memorandum of December 2008 establishes that litigation strategy, in lieu of water quality considerations, was the purpose of the necessity determination. Assistant Administrator Grumbles failed to consider the appropriate factors in making his January 14, 2009 necessity determination.

Had the Assistant Administrator performed a careful and deliberative review of the salient factors, he would have considered the following factors.

The Development of Scientifically Defensible Numeric Nutrient Criteria is Not *Currently* Feasible for Florida Waters

EPA guidance recommends that the states develop numeric nutrient criteria following one of three primary means: 1) a dose-response approach; 2) a reference waters approach; or 3) an all-waters approach.

Since the publication of EPA's 1998 National Strategy for the Development of Regional Nutrient Criteria, Florida has devoted several years and untold expert-hours to examining the relationship between nutrient concentrations and biological response variables in pursuing the dose-response approach to deriving numeric nutrient criteria. Beginning in 2001, DEP appointed a special Technical Advisory Committee (TAC) to assist the State in bringing the best minds to bear on the Department's goal of establishing scientifically defensible numeric nutrient criteria following EPA's preferred dose-response approach. To date, DEP scientists have been unable to confirm a sufficient relationship between nutrient concentrations and biological response variables from which scientifically defensible criteria may be derived.

Additional research, and guidance from the numeric nutrient TAC, would be needed for DEP scientists to isolate a sufficient relationship between nutrient concentrations and the appropriate response variables to develop numeric nutrient criteria appropriate for Florida waters. Even then the diversity of Florida's surface waters would compel a more site specific effort whereby numeric nutrient criteria would have to be established for specific geologic and climatic regions if not water body by water body.

The January 14, 2009, necessity determination compels EPA to establish numeric nutrient criteria for fresh waters by January 14, 2010, and for marine waters by January 14, 2011. DEP's scientists, many of whom have decades of experience working on Florida waters, could not possibly complete their efforts to establish a sufficient dose-response relationship to derive meaningful criteria within 12 to 24 months of the necessity determination. If Florida's water quality experts cannot establish scientifically defensible criteria in 12 to 24 months applying their years of experience to their own database, EPA staff cannot do so by desk-top analyses in Atlanta or Washington, D. C.

EPA's recommended alternatives to the dose-response approach are not scientifically defensible. The reference water approach is based upon looking at a statistical distribution of the nutrient data from waters considered to be minimally impacted and representing the best of the best of the State's surface waters. The statistical distribution results in a bell-shaped curve when plotted out as a graph. Using the reference water or benchmark approach, a line is arbitrarily drawn on the curve at a certain "percentile."

EPA has arbitrarily determined that the line be drawn at the 75th percentile to establish numeric nutrient criteria. Applying the reference stream or benchmark approach, 25% of the State's best waters fail to meet the applicable criterion. Waters that fail to meet applicable water quality criteria are considered to be impaired and, under the TMDL program, must be restored to meeting standards. The reference water approach would force the State to "restore" 25% of its best waters that, by definition, do not need to be restored since they were literally used to set the standard.

More fundamentally, reference waters, particularly streams, are selected based upon their biological health. The biological health of a reference water is measured using

biological response variables such as chlorophyll-a, the stream condition index (SCI) or similar biological metric. To date, Florida scientists have been unable to confirm a relationship between nutrient concentration and biological response variables sufficient to establish a dose-response relationship in streams. If there is no relationship between nutrient concentrations and biological response one cannot reverse the two and develop criteria by locating waters demonstrating a desirable biological response and measuring nutrient concentrations in those waters.

The reference water or benchmark approach is facially invalid. The method is based upon a presumed relationship between biology and nutrient concentrations where none is shown to exist and results in arbitrarily declaring a proportion of the State's best waters as impaired. There is no statistical or scientific validity to such an approach.

The all-waters alternative recommended by EPA is even less defensible. Applying the all-waters approach, a statistical distribution of all nutrient data is examined (not just data from reference waters) and then a line is drawn at the 25th percentile. This approach results in declaring 75% of the State's surface waters as impaired and requiring restoration under the TMDL program. There is no relationship between the number derived and the nutrient concentrations necessary that would assure that Florida's surface waters are meeting their respective designated uses.

The Assistant Administrator failed to exercise his nondiscretionary duty to consider the appropriate factors in making his necessity determination for Florida; in pursuing a means to address the pending citizens' suit, the Assistant Administrator failed to properly consider the feasibility of establishing statewide numeric nutrient criteria for the State of Florida especially under the time constraints imposed.

Federally Promulgated Numeric Nutrient Criteria Are Unnecessary

Florida has long recognized that numeric nutrient criteria, if feasible, could be a useful tool to supplement the State's existing narrative nutrient criterion. The State's attempts to derive numeric criteria predate the Clean Water Act and the establishment of EPA. As noted, since 1998, DEP has devoted significant resources to establishing scientifically valid numeric nutrient criteria. The Department's recent efforts, facilitated by its numeric nutrient TAC, have brought the State closer to its goal of supplementing its narrative nutrient criterion with numeric criteria.

The narrative criterion is a useful tool and has been used in conjunction with the Department's impaired waters rule to identify and address nutrient related water quality issues throughout the State. The Department's efforts to develop numeric nutrient criteria have run parallel with its development and implementation of its impaired waters program. Florida's two-list approach to identifying impaired waters has been endorsed by a National Academy of Science committee specifically created to examine science-based approaches to identifying waters in need of restoration through the TMDL program. Nutrient enriched water bodies throughout the State of Florida have been

identified as impaired; the development of TMDLs for many of those waters has been scheduled, is in progress or has been completed.

In pursuing resolution of the law suit, the Assistant Administrator failed to consider whether Florida's water quality program—and existing narrative nutrient criterion—was so deficient as to justify federal intervention and promulgation of federal water quality criteria.

Numeric Criteria Present Implementation Issues

Had the Assistant Administrator exercised his duty to consider only those factors within the purview of the Clean Water Act in making his necessity determination, he would have considered the feasibility of implementing numeric criteria in Florida. Many publicly owned treatment works (POTWs) have spent millions of dollars employing advanced wastewater treatment (AWT) which under Florida law restricts domestic wastewater discharges to 3.0 mg/l total nitrogen (TN) and 1.0 mg/l (TP). In response to the January 14, 2009, necessity determination, the Florida DEP proposed draft state criteria for flowing waters applying the reference waters approach using the 90th percentile (but for TP in the Bone Valley region of Florida which was set at the 75th percentile). The proposed criteria are fractions of the discharge limits allowed under AWT.

DEP's proposed criteria are as follow:

Geographic Area	Total Phosphorus shall not exceed an annual geometric mean concentration of:	Total Nitrogen shall not exceed an annual geometric mean concentration of:
Panhandle Nutrient Region	0.069 mg/L	0.82 mg/L
North Central Nutrient Region	0.322 mg/L	1.73 mg/L
North East Nutrient Region	0.101 mg/L	1.73 mg/L
Peninsular Nutrient Region	0.116 mg/L	1.73 mg/L
Bone Valley Nutrient Region	0.415 mg/L	1.73 mg/L
South Florida Nutrient Region	To be determined	To be determined

It is anticipated that EPA would apply the 75th percentile for each nutrient region resulting in much more stringent criteria. If these criteria are applied as ambient surface water criteria, no domestic wastewater facility in Florida will be able to consistently meet them.

Numeric Criteria Were Mandated Only for Florida

The basis of declaring numeric nutrient criteria for Florida—and only Florida—is highlighted in Administrator Luna's December 2008 memorandum to Administrator Johnson in which he states:

> There is, however, some risk that the court could agree with the plaintiffs that the 1998 Strategy constitutes a CWA determination that nutrient criteria are

> necessary for Florida. Such a ruling could spur similar litigation in other states. Presently, 49 states have one or more 303(d) listings for waters impaired by nutrients. (Emphasis added).

Had Assistant Administrator Grumbles exercised his non-discretionary duty to consider only those factors within the scope of the Clean Water Act, in making his necessity determination, he would have not considered the utility of his decision in preventing nationwide litigation and he would not have singled out the State of Florida without due consideration of the impact of his decision upon a single state and the impact upon Florida water quality caused by nutrient loads from upstream states.

Singling out Florida for federally promulgated numeric nutrient criteria imposes an unfunded mandate upon Florida—and only Florida—granting utilities and industries across the country an economic (and in some cases competitive) advantage over similarly situated entities in Florida. Florida ratepayers and tax payers will bear the financial burden as local government officials struggle to meet scientifically indefensible numeric nutrient criteria in Florida. The January 14, 2009, necessity determination—while perhaps strategically convenient for EPA—made the State of Florida a less desirable place to live or do business. The necessity determination creates a nutrient tax only applicable to Florida residents and businesses.

While the plaintiffs in the citizen suit asserted that EPA's 1998 *nation-wide* guidance documents declared the need for numeric nutrient criteria, only Florida was subjected to such treatment. However, to properly consider the impact of additional states, the Administrator must perform a proper necessity determination marshaling conclusive evidence that EPA must impose federally promulgated numeric nutrient criteria in each state under consideration. As to each state, the Administrator, or designee, has a duty to consider only those factors squarely within the purview of the Clean Water Act.

The Assistant Administrator Based the Necessity Determination on Factors Beyond the Scope of the Clean Water Act

The Assistant Administrator failed to exercise a nondiscretionary duty to base his January 14, 2009, necessity determination on factors within the scope of the Clean Water Act. The prospect of settling or winning a lawsuit is not a proper consideration and relying upon same—as clearly established in Mr. Luna's December 2008 memorandum—inappropriately replaced the consideration of determinative factors including the need and feasibility of imposing federally promulgated numeric nutrient criteria in the State of Florida and only the State of Florida.

While administrative agencies like EPA are afforded deference in making decisions related to their areas of expertise, that deference does not allow an agency to

base its decisions upon administrative convenience or litigation strategy in lieu of statutorily mandated criteria.[3]

Accordingly, the Utility Council requests that the current EPA Administrator rescind Mr. Grumbles January 14, 2009, necessity determination. If the Administrator chooses to assess the need for federally promulgated numeric nutrient criteria in Florida, the Utility Council asserts that, at a minimum, the Administrator must marshal sufficient evidence to demonstrate her review of the factors detailed above. Due to the regulatory impact of such a decision, the Utility Council suggests that EPA publish any necessity determination made by the Administrator in the federal register and accept public comment related to the determination prior to finalizing any such action.

Most importantly, the Utility Council requests that the precedential effect of pending citizens' suit be excluded from consideration should the Administrator rescind Mr. Grumbles January 14, 2009, determination and revisit the issue of numeric nutrient criteria for the State of Florida.

HOPPING GREEN & SAMS

Winston K. Borkowski

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James S. Alves
David W. Childs

On behalf of:
Florida Water Environment Association Utility Council

Enclosures: December 22, 2008 Delegation of Authority Request
December 29, 2008 One-Time Delegation of Authority

Copy to:

The Honorable Eric Holder, Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N. W.
Washington, D. C. 20530-0001

[3] *See, e.g.*, Sarasota v. E.P.A., 799 F.2d 674 (11th Cir. 1986) (while decision to award grant to City was within EPA's discretion, EPA improperly applied new guidelines and only the Court would be able to determine which guidelines were the appropriate ones to use and to direct EPA to reconsider the grant application based on proper standards); *see also*, RITE v. Costle, 650 F.2d 1312 (5th Cir. 1981) (citizen suit standing available to contest EPA failing to review application for permit on the merits and applying arbitrary geographical limitations).

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Attorneys and Counselors

August 24, 2009

Lisa Jackson, Administrator
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1200 Pennsylvania Avenue, N. W.
Ariel Rios Building, Mail Code: 1101A
Washington, D.C. 20460

Re: Florida Minerals and Chemistry Council, Inc.
Notice of Intent to File Suit under § 505 of the Clean Water Act
Failure to Perform Mandatory Duty – Determination of Necessity
Florida Numeric Nutrient Criteria

Dear Administrator Jackson:

This correspondence is submitted on behalf of the Florida Minerals and Chemistry Council, Inc., to give notice of its intent to file suit under § 505 of the Clean Water Act.

The U. S. Environmental Protection Agency (EPA), acting through (then) Assistant Administrator Benjamin Grumbles, failed to perform a proper "necessity determination" prior to his January 14, 2009, declaration that numeric nutrient criteria must be developed for the State of Florida. The Assistant Administrator based his decision upon factors beyond the scope of the Clean Water Act and failed to base the necessity determination upon evidence justifying the extraordinary act of EPA promulgating federal water quality criteria in lieu of the State.

The Florida Minerals and Chemistry Council

The Florida Minerals and Chemistry Council, Inc. (FMCC) is an association of Florida mineral processors, chemical manufacturers, distributors, transporters, and suppliers. Established in 1983, the FMCC has been dedicated to building a greater spirit of cooperation and understanding among its members, government and the public. The FMCC leadership works closely with federal, state and local officials to address issues arising from legislation and regulation affecting the manufacturing community. Many FMCC members discharge treated wastewater to Florida surface waters under the authority of state discharge permits issued by Florida Department of Environmental Protection (DEP) consistent with the State's EPA-approved NPDES permit program. The permit conditions imposed by DEP, or EPA exercising its statutory oversight authority, are derived from, based upon, and implement, the State's federally approved Water Quality Standards Program and Total Maximum Daily Load (TMDL) program. FMCC members are affected by any change in policy within the Water Quality Standards Program, NPDES permitting program, or TMDL program. Such policy changes affect the

Exhibit 4

regulatory framework under which FMCC members must plan projects, upgrade equipment, seek permit renewals and obtain financing.

Improper Criteria Applied to Necessity Determination

On January 14, 2009, Benjamin H. Grumbles, former EPA Assistant Administrator, forwarded a letter to Michael Sole, Secretary, Florida Department of Environmental Protection (DEP), which stated: "This letter constitutes a determination under the Clean Water Act (CWA) section 303(c)(4)(B) that new or revised water quality standards for nutrients are necessary to meet the requirements of the CWA for the State of Florida."

An EPA memorandum establishes that the release of the January 14, 2009, determination, referred to herein as the "necessity determination," was a litigation strategy intended to limit the precedential effect of a pending citizens' suit.[1]

The plaintiffs in the pending suit, filed in August 2008, alleged that EPA had failed to perform a nondiscretionary duty to promptly promulgate numeric nutrient criteria for Florida after having released a 1998 Clean Water Action Plan (CWAP). The plaintiffs argued that the 1998 CWAP was a formal necessity determination which triggered EPA's mandatory duty to promulgate numeric nutrient criteria for the State of Florida.

Mr. Grumbles did not receive authority to sign the January 14, 2009, necessity determination until two weeks before the determination was released. Assistant Administrator Luis Luna submitted a memorandum to Administrator Stephen Johnson requesting "a one time Delegation of Authority to the Assistant Administrator for the Office of Water Policy to determine pursuant to Section 303(c)(4)(B) of the Clean Water Act (CWA) whether the State of Florida needs new or revised water quality standards for nutrients." Assistant Administrator Luna explained in his memo that:

> EPA does not agree with the plaintiffs' allegation that we made a CWA determination in our 1998 Strategy[2] that numeric nutrient criteria are necessary for Florida to meet the requirements of the CWA. There is, however, some risk that the court could agree with the plaintiffs that the 1998 Strategy constitutes a CWA determination that nutrient criteria are necessary for Florida. Such a ruling could spur similar litigation in other states. Presently, 49 states have one or more 303(d) listings for waters impaired by nutrients. (Emphasis added).

[1] *Florida Wildlife Federation, et. al. v. EPA*, No. 4:08-CV-00324 (N. D. Fla.)

[2] Plaintiffs initially alleged that EPA's 1998 *National Strategy for the Development of Regional Nutrient Criteria* was the document serving as a necessity determination; in their first amended complaint, the plaintiffs alleged that it was a 1998 *Clean Water Action Plan*, coauthored with the U. S. Department of Agriculture, that was the document triggering EPA's mandatory duty to promulgate numeric nutrient criteria for Florida.

***

> Making such a determination could give EPA a basis to propose a settlement to the plaintiffs or to request that the court dismiss the case. While making a determination may not resolve the litigation, we believe it is an option we should seriously consider and therefore are requesting delegation of authority. A CWA Section 303(c)(4)(B) determination can only be made by the Administrator or the Administrator's duly authorized delegate. (Emphasis added).

Administrator Johnson approved Mr. Luna's memorandum and signed the delegation on Monday, December 29, 2008. With weekends and federal holidays excluded, Mr. Grumbles—who heretofore did not have the authority to make a necessity determination for the State of Florida—had only 11 working days between December 29, 2008 and January 14, 2009, to make such a determination.

EPA documents establish that a necessity determination is a deliberative process requiring that the Administrator provide evidence to support EPA's invading the State's primacy, as guaranteed under § 101(b) of the Act, and taking what the Act may be read to characterize as the extraordinary act of EPA promulgating federal water quality standards in lieu of allowing the State—with local knowledge of its own waters—to do so.

This concept is articulated by EPA in its attempt to explain why the federal agency did not have to go through a more detailed "determination" process prior to promulgating criteria for priority toxic pollutants. 57 Fed. Reg. 60848. In distinguishing the unique "Congressional determination of necessity" EPA relied upon to promulgate the criteria for toxic pollutants, EPA stated:

> In normal circumstances, in might be argued that to exercise section 303(c)(4)(B) the Administrator might have the burden of marshalling conclusive evidence of "necessity" for Federally promulgated water quality standards.

Id. at 60858. In the instant case, EPA was faced with "normal circumstances" but failed to marshal any, much less conclusive, evidence that *federal* numeric nutrient criteria are necessary for Florida waters.

In its motion for summary judgment in the pending citizens' suit, EPA states:

> Although the terms "determine" or "determination" as used in Section 303(c)(4)(B) are not defined by the Act or its implementing regulations, EPA documents that lack certain minimum findings do not qualify as "determinations" for purposes of Section 303(c)(4)(B). In particular, an EPA document is insufficient to constitute a "de facto" determination that new or revised water quality standards are necessary for a particular state if the document contains no evidence that the administrator reviewed the relevant existing state standard or

> determined that such standard is inadequate to meet the requirements of the CWA. (Emphasis added).

In the instant case, EPA confirms that the Assistant Administrator was granted limited authority to sign a necessity determination for the purpose of giving "EPA a basis to propose a settlement to the plaintiffs or to request that the court dismiss the case." (Emphasis added).

Failure to Perform a Nondiscretionary Duty

The Administrator, or in this case the Administrator's designee, has a nondiscretionary duty to consider the appropriate criteria in making a necessity determination under § 303(c)(4)(B). Those criteria may not exceed those intended by Congress in adopting the Act. Settlement of a citizens' suit is not an appropriate consideration.

EPA cannot establish that Mr. Grumbles, as the Administrator's designee, marshaled "conclusive evidence of necessity for Federally promulgated water quality standards" for Florida waters in the 11 working days between his one-time authorization to conduct a necessity determination and his signing of the January 14, 2009, letter. While the letter gives examples of environmental problems that may be caused by excessive nutrients, none of the examples is unique to Florida nor were the circumstances mentioned in the letter newly discovered between December 29, 2008 and January 14, 2009.

The Administrator, through his designee, failed to exercise a nondiscretionary duty to marshal conclusive evidence to justify federally promulgated water quality criteria for Florida waters.

Failure to Consider Appropriate Criteria Supporting Necessity Determination

The January 14, 2009, necessity determination has significant legal and practical consequences. The necessity determination triggers EPA's mandatory duty to promptly promulgate numeric nutrient criteria for Florida. At the same time, the January 14th determination declares Florida's water quality program—and specifically DEP's narrative nutrient criterion—in violation of the Clean Water Act.

Consequently, the Assistant Administrator was compelled to ensure that the necessity determination was the product of a deliberative process by which he carefully considered whether it was necessary for EPA, with no local knowledge of Florida waters, to step in and take control of Florida's water quality standards program.

At a minimum, to properly exercise his duty to consider the appropriate factors in making his necessity determination, the Assistant Administrator should have established a record demonstrating that he considered whether:

- The development of statewide numeric nutrient criteria in Florida is feasible.
- Florida's existing water quality program was sufficiently deficient to compel federal intervention.
- Numeric nutrient criteria are necessary only in Florida.

As noted, Assistant Administrator Luna's memorandum of December 2008 establishes that litigation strategy, in lieu of water quality considerations, was the purpose of the necessity determination. Assistant Administrator Grumbles failed to consider the appropriate factors in making his January 14, 2009 necessity determination.

Federal Intervention is Unnecessary

Florida has long recognized that numeric nutrient criteria, if feasible, could be a useful tool to supplement the State's existing narrative nutrient criterion. The State's attempts to derive numeric criteria predate the Clean Water Act and the establishment of EPA. As noted, since 1998, DEP has devoted significant resources to establishing scientifically valid numeric nutrient criteria. The Department's recent efforts, facilitated by its numeric nutrient TAC, have brought the State closer to its goal of supplementing its narrative nutrient criterion with numeric criteria.

The narrative criterion is a useful tool and has been used in conjunction with the Department's impaired waters rule to identify and address nutrient related water quality issues throughout the State. The Department's efforts to develop numeric nutrient criteria have run parallel with its development and implementation of its impaired waters program. Florida's two-list approach to identifying impaired waters has been endorsed by a National Academy of Science committee specifically created to examine science-based approaches to identifying waters in need of restoration through the TMDL program. Nutrient enriched water bodies throughout the State of Florida have been identified as impaired; the development of TMDLs for many of those waters has been scheduled, is in progress or has been completed.

Significantly, by letter dated September 28, 2007, EPA approved the Department's September 2007 *State of Florida Numeric Nutrient Criteria Development Plan.* Under the 2007 plan, the Department would have until 2011 before EPA would consider the State to be untimely in its pursuit of State numeric nutrient criteria. But for the citizens' suit and the potential to limit its precedential effect, the necessity determination articulated no basis for EPA's unilateral repeal of its approval of the State's 2007 criteria development plan and its acceleration of the plan's timelines.

In pursuing resolution of the law suit, the Assistant Administrator failed to consider whether Florida's water quality program—and existing narrative nutrient

criterion—was so deficient as to justify federal intervention and promulgation of federal water quality criteria.

Numeric Criteria Were Mandated Only for Florida

The basis of declaring numeric nutrient criteria for Florida—and only Florida—is highlighted in Administrator Luna's December 2008 memorandum to Administrator Johnson in which he states:

> There is, however, some risk that the court could agree with the plaintiffs that the 1998 Strategy constitutes a CWA determination that nutrient criteria are necessary for Florida. Such a ruling could spur similar litigation in other states. Presently, 49 states have one or more 303(d) listings for waters impaired by nutrients. (Emphasis added).

Had Assistant Administrator Grumbles exercised his non-discretionary duty to consider only those factors within the scope of the Clean Water Act, in making his necessity determination, he would have not considered the utility of his decision in preventing nationwide litigation and he would not have singled out the State of Florida without due consideration of the impact of his decision upon a single state and the impact upon Florida water quality caused by nutrient loads from upstream states.[3]

Singling out Florida for federally promulgated numeric nutrient criteria imposes an unfunded mandate upon Florida—and only Florida—granting utilities and industries across the country an economic (and in some cases competitive) advantage over similarly situated entities in Florida. Florida ratepayers and tax payers will bear the financial burden as local government officials struggle to meet scientific indefensible numeric nutrient criteria in Florida. The January 14, 2009, necessity determination—while perhaps strategically convenient for EPA—made the State of Florida a less desirable place to live or do business. The necessity determination creates a nutrient tax only applicable to Florida residents and businesses.

While the plaintiffs in the citizen suit asserted that EPA's 1998 *nation-wide* guidance documents declared the need for numeric nutrient criteria, only Florida was subjected to such treatment. However, to properly consider the impact of additional states, the Administrator must perform a proper necessity determination marshaling conclusive evidence that EPA must impose federally promulgated in each state under consideration. As to each state, the Administrator, or designee, has a duty to consider only those factors squarely within the purview of the Clean Water Act.

[3] At an August 20, 2009 meeting of Florida's Environmental Regulation Commission, counsel for plaintiffs in the citizens' suit suggested that Florida was singled out because that was the only state in which he had filed suit; counsel noted that he had not worked directly with Department staff throughout DEP's efforts to establish numeric nutrient criteria but he had worked with the State "indirectly through EPA."

The Assistant Administrator Based the Necessity Determination on Factors Beyond the Scope of the Clean Water Act

The Assistant Administrator failed to exercise a nondiscretionary duty to base his January 14, 2009, necessity determination on factors within the scope of the Clean Water Act. The prospect of settling or winning a lawsuit is not a proper consideration and relying upon same—as clearly established in Mr. Luna's December 2008 memorandum—inappropriately displaced the consideration of determinative factors including the need and feasibility of imposing federally promulgated numeric nutrient criteria in the State of Florida and only the State of Florida.

While administrative agencies like EPA are afforded deference in making decisions related to their areas of expertise, that deference does not allow an agency to base its decisions upon administrative convenience or litigation strategy in lieu of statutorily mandated criteria.[4]

The FMCC requests that the current EPA Administrator rescind Mr. Grumbles January 14, 2009, necessity determination. If the Administrator chooses to assess the need for federally promulgated numeric nutrient criteria in Florida, the FMCC suggests that, at a minimum, the Administrator must marshal sufficient evidence to demonstrate her review of the factors detailed above. Due to the regulatory impact of such a decision, the FMCC requests that EPA publish any necessity determination made by the Administrator in the federal register and accept public comment related to the determination prior to finalizing any such action.

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