

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA WILDLIFE FEDERATION,
INC.; et al.,
Plaintiffs,

vs.

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.

**EPA’S MOTION FOR APPROVAL TO STAY PORTIONS OF
EPA’S INLAND WATERS RULE**

Defendants Lisa P. Jackson, in her official capacity as Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency (collectively “EPA” or “the Agency”) hereby move for the Court’s approval of an administrative stay until November 15, 2013 of portions of EPA’s “Water Quality Standards for the State of Florida’s Lakes and Flowing Waters,” a rule signed by Administrator Jackson on November 14, 2010. Specifically, EPA seeks approval to promulgate a stay of the provisions of the rule previously upheld by this Court that establish (1) numeric nutrient criteria for

Florida's lakes and springs, (2) default downstream protection values for impaired lakes, and (3) model-based downstream protection values.^{1/}

EPA conferred with Plaintiffs to the Consent Decree in this case (ECF No. 153). However, at the time of the filing of this motion, Plaintiffs had not communicated to EPA their position as to the granting of this motion.

INTRODUCTION

As the Court is well aware, EPA and Plaintiffs entered into a consent decree that set a schedule for EPA to perform non-discretionary duties consistent with the requirements of Section 303(c)(4)(B) of the Clean Water Act, 33 U.S.C.

§ 1313(c)(4)(B), following a determination by EPA that numeric water quality criteria for nutrients are necessary in the State of Florida. ECF No. 153. The consent decree set a schedule for two phases of rulemaking by EPA and provided that EPA would be relieved of proposing or taking final action on proposed numeric nutrient criteria to the extent the State of Florida submitted numeric nutrient criteria and EPA approved those criteria. *Id.* at ¶¶4-11.

On November 14, 2010, the Administrator signed for publication the first rule ("Rule" or "the Phase 1 Rule"), that set numeric nutrient criteria for lakes,

^{1/} EPA does not seek approval to stay or extend any consent decree obligation to propose or take final action on numeric nutrient criteria for flowing waters (i.e., streams). Nor does EPA seek a stay of the site-specific alternative criteria provision of the rule, which went into effect on February 4, 2011.

springs, and flowing waters (outside of the South Florida Region). 75 Fed. Reg. 75,761 (Dec. 6, 2010); 40 C.F.R. § 131.43(a)-(d). The Rule also included criteria for the protection of downstream lakes (“downstream protection values”) and a site-specific alternative criteria provision. Id. at 75,805-07; 40 C.F.R. § 131.43(c)(2)(ii), (e). The site-specific alternative criteria provision went into effect on February 4, 2011. 75 Fed. Reg. at 75,805. The remaining portions of the Rule were originally scheduled to take effect on March 6, 2012.

The Rule, and EPA’s determination that numeric nutrient criteria are necessary in Florida, were subsequently challenged by a number of parties representing diverse interests. Following summary judgment briefing and oral argument, this Court upheld EPA’s determination under Clean Water Act Section 303(c)(4)(B) as a reasonable exercise of EPA’s authority under the Act, and upheld all challenged portions of the Rule, with the exception of the stream criteria and default downstream protection values for unimpaired lakes. ECF No. 351 at 84-85 (Order of February 18, 2012). The Court stated that each valid provision of the Rule would take effect on March 6, 2012, or on an extended date approved by the Court, unless by such date the provision was superseded by a State rule approved by EPA. Id. at 85.

On March 5, 2012, this Court approved EPA’s motion for an extension of

the March 6, 2012 effective date to July 6, 2012, which EPA sought to allow the State to submit its own nutrient rules for EPA approval. ECF No. 361. The State submitted its nutrient rules for EPA approval or disapproval on June 13, 2012. EPA thereafter filed an unopposed motion for approval to extend the effective date to January 6, 2013.² ECF No. 398. The Court granted the motion, and the current effective date for the numeric nutrient criteria upheld by the Court is January 6, 2013. ECF No. 401.

On November 30, 2012, EPA took action to approve the State of Florida's nutrient rules. Based upon its review of the State's rules, EPA also amended its prior determination under Clean Water Act Section 303(c)(4)(B) to reflect EPA's conclusion that Florida's quantitative approach to downstream protection, in combination with protective, scientifically sound numeric nutrient criteria for upstream and downstream waterbodies, are sufficient to meet Clean Water Act requirements and thus numeric downstream protection values are not necessary in Florida. See EPA's Notice to the Court of Agency Action, ECF No. 413 at 1-7. On the same day, the Administrator signed a notice of proposed rulemaking to administratively stay the numeric nutrient criteria previously upheld by this Court

² As stated in the motion, the State could not formally submit its nutrient rules to EPA for review until a state administrative appeal proceeding was resolved in June 2012. ECF No. 398 at ¶ 8. The additional time was requested to allow EPA to complete review of the State nutrient rules and supporting materials. Id. at ¶ 10.

until November 15, 2013. 77 Fed. Reg. 74,449 (Dec. 14, 2012) (Attachment 1).

As explained in the proposed rule, there are two reasons for the stay. First, the stay would allow EPA to conclude working with the State to clarify interpretation of the “all-or-nothing” or “poison pill” provision and implementation of the State’s nutrient rules for the waters they cover, including flowing waters, before taking action to withdraw EPA’s numeric nutrient criteria for waters covered under the State rules. Attachment 1, 77 Fed. Reg. at 74,451. Second, the stay would allow EPA to initiate rulemaking to withdraw EPA’s nutrient criteria for waters covered under the State’s rules. *Id.* The comment period on the proposed administrative stay closed on December 28, 2012. *Id.* at 74,449. EPA received four comments in response to the proposed stay, three of which favor a stay.

Before EPA takes final action on its proposed stay, EPA seeks the Court’s approval.

ARGUMENT

A. There is Good Cause for the Stay.

Typically, when EPA approves state-submitted water quality criteria that apply to the same pollutants and waters covered by federally-promulgated water quality criteria, as is the case here, EPA takes action to withdraw the federally-promulgated criteria. *See* 40 C.F.R. § 131.21(c)(2). As discussed below, however,

the more appropriate course here is to stay the numeric criteria provisions already previously upheld by the Court.

1. A Stay Until November 15, 2013 Would Allow for Clarification of the Implementation of the State Nutrient Rules.

There presently exists a lack of clarity as to the State's implementation of its rules. The State rules provide that the rules:

shall be effective only if EPA approves these rules in their entirety, concludes rulemaking that removes federal numeric nutrient criteria in response to the approval, and determines, in accordance with 33 U.S.C. § 1313(c)(3), that these rules sufficiently address EPA's January 14, 2009 determination. If any provision of these rules is determined to be invalid by EPA or in any administrative or judicial proceeding, then the entirety of these rules shall not be implemented.

Fla. Admin. Code r. 62-302.531(9) (emphasis added). This condition has been variously described as an "all-or-nothing" or "poison pill" provision. EPA interprets the emphasized portion as not prohibiting EPA from establishing numeric criteria for nutrients for waters that are not covered by the State's rule, *i.e.*, "gap-filling."^{3/} EPA has been in discussion with the State as to the scope of this "all-or-nothing" provision in the State rules, and anticipates clarification from the

^{3/} As noted in the Notice of Agency Action taken on November 30, 2012, in approving the State's rules EPA explicitly reserved its authority to revisit the approval if EPA's interpretation is inconsistent with the State's or rejected by a proper judicial authority. EPA's Nov. 30, 2012 Letter Regarding Approval at 3 (Attachment 2).

State in the near future.^{4/}

There is a further lack of clarity resulting from a petition currently pending before the Florida Division of Administrative Hearings challenging an implementation document developed by the Florida Department of Environmental Protection in connection with the State nutrient rules. The petition asserts that the implementation document constitutes an administrative rule that should have been adopted via the rulemaking process under Florida Law. The State did not submit the implementation document to EPA for review as a new or revised water quality standard under Clean Water Act Section 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A), and EPA has taken no action on the implementation document. However, in approving the State's nutrient rules, EPA reserved its right to withdraw or modify its approval if the State's implementation of its rules is not consistent with the implementation document and other supporting documents submitted by the State. Attachment 2 at 3. If the state administrative petition results in a finding that the implementation document must go through the state rulemaking process, it is

^{4/} On November 30, 2012, EPA proposed numeric nutrient criteria for those waters not covered by the State's rules, and solicited comment on the possibility of promulgating numeric nutrient criteria for all flowing waters should the State's rule not take effect due to EPA's "gap-filling" proposal, see 77 Fed. Reg. 74,985, 74,988 (Dec. 18, 2012). EPA has sought comment on the proposal, and expects to receive comment from the State by the close of the comment period on February 1, 2013. Id. at 74,985.

possible that EPA will withdraw its approval of the State rules in whole or in part.

In light of these uncertainties, EPA believes it appropriate to stay the EPA-promulgated lakes criteria, springs criteria, and downstream protection values that are scheduled to become effective on January 6, 2013. Such stay would preserve the federally-established criteria if EPA later determines that all or a portion of its approval of the State rules should be withdrawn because (1) the implementation document is invalidated, withdrawn, or revised, or (2) the State does not interpret the “all-or-nothing” provision in a manner that would allow EPA to establish numeric nutrient criteria for waters not covered by the State rules.

2. A Stay Until November 15, 2013 Would Allow EPA to Seek Modification of the Consent Decree With Respect to Downstream Protection Values.

As noted in EPA’s Notice of Agency Action, EPA intends to seek a modification of the consent decree to eliminate the requirement that EPA take final action to establish numeric downstream protection values. ECF No. 413 at 6. EPA believes that such a modification is warranted because the approach taken by the State in its nutrient rules is protective of downstream waters. Until the Court takes action on a motion to modify the consent decree, EPA believes it is appropriate to stay the downstream protection values previously upheld by the Court.

3. A Stay Until November 15, 2013 Would Allow for Consistent Implementation of Numeric Nutrient Criteria.

As commenters from the regulated community have noted, a stay of EPA's lakes and springs criteria would prevent confusion resulting from different water quality criteria for the same waters. See Attachments 3-5 (Comments submitted on behalf of the National Association of Clean Water Agencies, Mosaic Fertilizer LLC, and the Fertilizer Institute) Although the State and federal criteria for lakes and springs are nearly identical, there are some differences that could create confusion with respect to permitting or other actions. As mentioned above, a stay would allow EPA to proceed with rulemaking to withdraw (1) the federally-promulgated numeric nutrient criteria for lakes and springs covered by the State rules (once there is clarification as to the implementation of the State nutrient rules), and (2) the downstream protection values that are not required in light of EPA's amended determination (subject to modification of the consent decree by this Court).

B. Plaintiffs' Comments Opposing A Stay Are Misplaced.

The only comment EPA received that was not supportive of the proposed stay was submitted by the Plaintiffs to the consent decree. See Attachment 6 (Comments submitted on behalf of the Florida Wildlife Federation, St. Johns Riverkeeper, Sierra Club, Conservancy of Southwest Florida, and Environmental

Confederation of Southwest Florida). Plaintiffs' objections are unfounded.

First, Plaintiffs assert that the stay violates the "letter and spirit of the Consent Decree." Attachment 6 at 2. However, no provision of the consent decree prohibits its modification to allow a stay of the federally-promulgated criteria. Moreover, the consent decree, like Section 303(c)(4)(B), recognizes the State's authority to adopt and EPA's authority to approve state water quality criteria, which obviates the need for federally-promulgated criteria for corresponding waters.

Contrary to Plaintiffs' assertion, Attachment 6 at 2, the problem is not that there will be no nutrient criteria in place; rather, the problem is that there are two applicable nutrient rules for the same waters in place. Once the issue of State implementation is clarified, EPA may take action to withdraw the federally-promulgated nutrient criteria, leaving the State criteria as the controlling water quality standards.

Second, Plaintiffs' concerns with the "all-or-nothing" provision of the State rules are simply not relevant to a stay of the criteria for lakes, springs, and downstream protection values. Plaintiffs assert that the provision could be read such that the State Rules "satisfy in [their] entirety the requirements of the Clean Water Act as it concerns the establishment of numeric nutrient criteria in the

[S]tate of Florida.” Attachment 6 at 2. As an initial matter, such an interpretation is not consistent with the State Rules themselves, which identify future nutrient criteria scheduled to be adopted by the State for estuarine waters. Further, any concerns Plaintiffs have with a lack of nutrient criteria for streams or inland flowing waters not covered by the State Rules are obviated the fact that EPA has proposed or solicited comment on promulgating numeric nutrient criteria for all flowing waters in the State. See 77 Fed. Reg. 74,985 (Proposed Rule). In any event, it is unclear how any question as to the scope of coverage for inland flowing waters or streams mitigates against a stay as to lakes, springs, and downstream protection values.

Finally, Plaintiffs’ assertion that a stay would be unlawful because EPA’s approval of the State nutrient rules is unlawful, Attachment 6 at 3, is without merit. Plaintiffs are mistaken in characterizing EPA’s approval of the State nutrient rules as “conditional.” Id. While EPA explicitly reserved its right to withdraw or amend the approval, the approval was not conditional. See Attachment 2 at 3. And, as discussed above, Plaintiffs’ concern that some flowing waters may not be covered under the State’s nutrient rules is not relevant to EPA’s request that the Court approve a stay with respect to other waters.

CONCLUSION

For the reasons set forth above, EPA requests that the Court permit EPA to stay the lakes and springs criteria, and the downstream protection criteria previously upheld by the Court, until November 15, 2013.

Respectfully Submitted,

PAMELA C. MARSH
United States Attorney
ROBERT D. STINSON
Florida Bar No. 319406
Assistant United States Attorney
111 North Adams Street, 4th Floor
Tallahassee, FL 32301
Tel: (850) 942-8430

IGNACIA S. MORENO
Assistant Attorney General

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/s/ Martha C. Mann
MARTHA C. MANN
Florida Bar No 155950
NORMAN L. RAVE, JR.
U.S. Department of Justice
Environment and Natural Resources
Division
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-2986
martha.mann@usdoj.gov
norman.rave@usdoj.gov
Telephone: (202) 514-2664 (Mann)
(202) 616-7568 (Rave)
Facsimile: (202) 514-8865

Of Counsel for Defendants:

Peter Z. Ford
Heidi Nalven
Office of General Counsel
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460

Carol Baschon
Office of Regional Counsel, Region 4
United States Environmental Protection Agency
61 Forsyth Street SW
Atlanta, GA 30303

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2013, the foregoing was filed with the United States District Court for the Northern District of Florida's electronic filing system, to which all registered attorneys of record are to be provided notice of this filing.

/s/ Martha C. Mann
MARTHA C. MANN
United States Department of Justice
Environment and Natural Resources
Division