

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

BOB PERCIASEPE,¹ Acting Administrator
of the United States Environmental
Protection Agency; and the UNITED
STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

NOTICE TO THE COURT

Defendants Bob Perciasepe, in his official capacity as Acting Administrator of the United States Environmental Protection Agency, and the United States Environmental Protection Agency (collectively “EPA” or “the Agency”) hereby notify the Court of an agreement in principle between EPA and the Florida Department of Environmental Protection (“FDEP” or “Department”) with regard to adoption of numeric nutrient water quality criteria for the State of Florida’s waters.

¹ Mr. Perciasepe is substituted for former Administrator Lisa P. Jackson pursuant to Fed. R. Civ. P. 25(d).

As described below and in the attached documents, EPA and FDEP have worked together to build upon the agencies' respective experiences in deriving numeric water quality criteria for nutrients in Florida's waters. The result of this collaborative effort is an agreement for a path forward that, like the Clean Water Act, recognizes the primary role of states in adopting water quality standards. On March 15, 2013, EPA and FDEP released two documents, an Agreement in Principle and a Path Forward, which set forth their agreement.

EPA is providing the Court with notice of the Agreement in Principle and Path Forward to apprise the Court of EPA's and FDEP's collaborative efforts, and also to inform the Court of anticipated effects on EPA's obligations under the consent decree entered by the Court on December 31, 2009. See Attachments 1 and 2 (Agreement in Principle and Path Forward). If FDEP and the Florida State Legislature take the actions that are described in the Agreement in Principle and Path Forward, EPA expects to amend the determination made in January 2009 under Section 303(c)(4)(B) of the Clean Water Act ("CWA") to narrow its scope. Such an amendment of the determination would warrant modification of the consent decree. EPA will seek the Court's approval of any proposed modification to the consent decree as early as possible.

BACKGROUND

This Court has presided over this matter since 2008, when several environmental organizations filed a CWA citizen suit to enforce an alleged nondiscretionary duty on the part of EPA to promulgate numeric water quality criteria for nutrients in the State of Florida's waters. ECF No. 4 (First Amended Complaint). Pursuant to CWA Section 303(c)(4)(B), when the Administrator makes a determination that new or revised water quality standards are necessary, EPA must promptly propose such standards. 33 U.S.C. § 1313(c)(4). EPA must thereafter finalize any such standards within 90 days of publication of the proposed standards unless by that date the state has adopted the necessary standards and EPA has approved them. Id.

Plaintiffs here claimed that a nondiscretionary duty to promulgate numeric nutrient criteria was triggered when EPA allegedly made a determination in 1998 that numeric nutrient criteria are necessary in Florida to meet the requirements of the CWA. ECF No. 4 at ¶¶ 2, 47. EPA denied that it had made a determination in 1998 that numeric nutrient criteria are necessary in the State of Florida. ECF No. 24 at ¶¶ 2, 47. However, during the course of the litigation, on January 14, 2009, then Assistant Administrator Benjamin Grumbles signed a determination pursuant to CWA Section 303(c)(4)(B) that numeric nutrient criteria are necessary in

Florida. Following the January 14, 2009 determination, Plaintiffs amended their complaint to include a claim that EPA had not “promptly” proposed numeric nutrient criteria as required by CWA Section 303(c)(4)(B), ECF No. 81 at 24-25 (Count III). EPA and Plaintiffs then engaged in settlement discussions that led to the consent decree that (1) set a schedule for two phases of rulemaking by EPA to establish numeric nutrient criteria for waters in Florida and (2) provided that EPA would be relieved of these obligations if the State of Florida submitted and EPA approved numeric nutrient criteria before any action by EPA was due. ECF No. 153 (Consent Decree) at ¶¶ 4-11. The Court entered the consent decree on December 30, 2009.

Consistent with the terms of the consent decree, EPA promulgated final numeric nutrient criteria for lakes, springs, and flowing waters (outside of the South Florida Region) (“the Phase 1 Rule”) on November 15, 2010. 75 Fed. Reg. 75,805-07 (Dec. 6, 2010); 40 C.F.R. § 131.43(c)(1)-(3). The Phase 1 Rule also included numeric downstream protection values (“DPVs”) for the protection of downstream lakes and a site-specific alternative criteria provision. *Id.* at 75,805-07; 40 C.F.R. § 131.43(c)(2)(ii),(e). The Phase 1 Rule and EPA’s underlying 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, and upheld all challenged portions of the Phase 1 Rule with the exception of the stream criteria and default DPVs for unimpaired lakes. ECF No. 351 at 84-85 (Order of February 18, 2012). The Court modified the consent decree to require EPA to re-propose or issue final rulemaking with respect to such stream criteria and default DPVs for unimpaired lakes. Id. at 85.

In June 2012, the State of Florida submitted its own nutrient water quality criteria to EPA for review and approval or disapproval under CWA Section 303(c). The State's nutrient rules include numeric criteria for lakes, springs, some flowing waters and some estuaries and coastal waters, as well as other, non-numeric criteria to protect downstream waters. On November 30, 2012, EPA approved all portions of the State's nutrient rules that constituted new or revised water quality standards. In its approval letter, EPA stated that it "intended to work closely with FDEP to arrive at a path forward" that would result in actions by the State that may eliminate the need for federally-promulgated numeric nutrient criteria. ECF No. 413 (Notice to Court), Attachment 1 at 2. On the same day, EPA also took final action to amend its January 2009 determination under Clean Water Act Section 303(c)(4)(B). As set forth in the November 2012 amended determination, EPA

concluded that while the provisions in FDEP's nutrient rules for protection of downstream waters do not themselves consist of numeric values, they are designed to ensure attainment and maintenance of the water quality standards of downstream waters as required by the CWA and its implementing regulations, 40 C.F.R. § 131.10(b), and that numeric DPVs are thus not necessary in Florida.

Finally, in addition to the other actions taken that same day, on November 30, 2012, EPA signed proposed numeric criteria for (1) the flowing waters not covered in Florida's EPA-approved rules and default DPVs for unimpaired lakes (Phase 1 Rule remand) and (2) the coastal and estuarine waters not covered in Florida's rules as well as south Florida flowing waters (Phase 2 Rule), as required by the consent decree and this Court's orders modifying the decree. On December 10, 2012, EPA filed a Notice to the Court of Agency Action notifying the Court of these actions taken by EPA on November 30, 2012. ECF No. 413.

Those portions of the Phase 1 Rule that were upheld by the Court became effective for Clean Water Act purposes on January 6, 2013. EPA's January 4, 2013 motion for approval to finalize an administrative stay of those provisions, ECF No. 414, is presently pending before the Court.

Under the terms of the consent decree, EPA is currently required to sign for publication a notice of final rulemaking (1) with respect to Phase 1 waters

remanded to EPA by the Court (i.e., those flowing waters outside of the South Florida Region that Florida did not include in its EPA-approved rules and default DPVs for unimpaired lakes) no later than August 31, 2013, and (2) with respect to Phase 2 waters (flowing waters in the South Florida Region, and coastal and estuarine waters that Florida did not cover in its EPA-approved rules) no later than September 30, 2013.² ECF Nos. 395, 404.

EPA AND FDEP AGREEMENT IN PRINCIPLE AND PATH FORWARD

EPA and FDEP announced the Agreement in Principle and Path Forward on March 15, 2013, setting forth the agencies' goal of ensuring State adoption of numeric nutrient criteria that, if approved by EPA, would render the promulgation of federal water quality standards unnecessary.

The key actions contemplated by this agreement relate to (1) FDEP's adoption of numeric nutrient criteria for the remaining coastal and estuarine waters before EPA's consent decree deadline of September 30, 2013, and (2) EPA's amendment of the 2009 determination (and subsequent amendment of the consent decree) addressing the scope of waters that require numeric nutrient criteria before EPA's consent decree deadlines of August 31 and September 30, 2013.

² As stated above, under the terms of the consent decree, EPA is excused from issuing final criteria for those waters for which Florida has adopted, and EPA has approved, numeric nutrient criteria. ECF No. 152 at 5-6, ¶¶ 7, 9.

A. COASTAL AND ESTUARINE WATERS (EPA'S PHASE 2 RULE)

On November 30, 2012, EPA approved FDEP's new or revised numeric nutrient criteria for estuaries and coastal waters along the South and Southwest Coasts of Florida, including Tampa Bay, Clearwater Harbor, Sarasota Bay, Charlotte Harbor, Clam Bay, and South Florida coastal waters. On that same day, EPA also proposed numeric nutrient criteria for coastal and estuarine waters not covered by numeric nutrient criteria adopted by FDEP and approved by EPA.

The Agreement in Principle and Path Forward provide that FDEP and EPA will take several actions regarding coastal and estuarine waters through December 2014.

First, under the terms of the Agreement in Principle and Path Forward, FDEP is pursuing passage of legislation in the Florida State Legislature that would direct FDEP to establish by rule or final order numeric nutrient criteria for all coastal and estuarine water segments without such criteria by December 1, 2014. Attachment 3 (proposed legislation). The proposed legislation would also establish a narrative water quality standard for those waters until numeric nutrient criteria are adopted by rule or final order, by providing that the applicable water quality

standard for nutrients shall be the waters' current "unimpaired" conditions.³

Finally, the proposed legislation would direct FDEP to calculate the numeric values that will represent the current conditions of those unimpaired waters until other numeric nutrient criteria are adopted by rule or final order. The proposed legislation would direct FDEP to submit those numeric values to the Legislature and the Governor no later than August 1, 2013. If the proposed legislation is enacted, the Path Forward provides that FDEP will work with EPA to derive the interim numeric values.

Second, the Path Forward describes FDEP's commitment to work to establish by rule numeric nutrient criteria for some of the remaining estuarine and coastal water segments by July 1, 2013, or as soon thereafter as possible. As part of the agencies' collaborative effort, EPA has been working with FDEP as the state agency develops these criteria, and has been considering, *inter alia*, the technical work underlying EPA's proposed Phase 2 Rule for coastal and estuarine waters.

Third, the Path Forward provides that before August 1, 2013, FDEP will submit to EPA for review under CWA Section 303(c): (1) the narrative water

³ The Path Forward explains that the "interim numeric values, reflecting the current unimpaired conditions, will be values that EPA and FDEP mutually determine are based on the best monitoring and modeling data available at the time and protective of the designated uses." Attachment 2 at 1.

quality standard enacted by the Legislature together with FDEP's calculated numeric values representing current unimpaired conditions of those waters for which FDEP has not adopted numeric nutrient criteria by rule or order, and (2) any other numeric criteria adopted by rule or order. EPA will review FDEP's submittal and expects to reach a final CWA Section 303(c) approval or disapproval decision before the September 30, 2013 consent decree deadline for EPA to take final action on its proposed Phase 2 Rule for coastal and estuarine criteria.

If FDEP submits nutrient criteria as described above for all of the remaining coastal and estuarine waters covered by EPA's November 30, 2012 proposed rule, and EPA approves those criteria pursuant to CWA Section 303(c) before September 30, 2013, EPA would not be obligated to take final rulemaking action for such waters pursuant to paragraph 11 of the consent decree.

B. WATERS THAT WILL NOT HAVE NUMERIC NUTRIENT CRITERIA UNDER FDEP'S RULES

As noted above, EPA approved FDEP's nutrient rules for lakes, streams and springs in Florida on November 30, 2012. However, the State's rules specifically exclude some waters from coverage by numeric nutrient criteria, and provide that the State's existing narrative nutrient criteria will continue to be the applicable water quality standard for these excluded waters. Fla. Admin. Code r. 62-302.531(1). Specifically, for purposes of numeric nutrient criteria, FDEP's

definition of a “stream” excludes the following waters: (1) non-perennial stream segments with periods of dessication resulting in a dominance of wetland or terrestrial taxa; (2) wetlands; (3) stream segments that exhibit lake characteristics; (4) tidally-influenced water segments; and (5) conveyances primarily used for water management purposes with marginal or poor stream habitat components. Fla. Admin. Code r. 62-302.200(36); 62-302.531(2)(c). In addition, FDEP’s definition of a “lake” applies to fresh waterbodies and thus excludes a small number of lakes comprised of marine, rather than fresh, water. Fla. Admin. Code r. 62-302.200(16). Finally, the State’s numeric nutrient criteria do not apply to flowing waters in the South Florida Region, Fla. Admin. Code r. 62-302.531(2)(c).

EPA has sought clarification from FDEP regarding how these exclusions will be implemented so as to better understand the scope of waters that will be excluded from the State’s numeric nutrient criteria. Under the terms of the Agreement in Principle and Path Forward, FDEP will adopt in rule FDEP’s “Implementation of Florida’s Numeric Nutrient Standards” dated March 11, 2013. That document describes how FDEP will implement the State’s nutrient rules.⁴

⁴ An earlier iteration of the implementation document was originally submitted to EPA in support of the State’s nutrient rules in 2012. Several environmental groups thereafter filed a petition before the Florida Division of Administrative Hearings challenging the implementation document as an administrative rule that should have been adopted via the rulemaking process under Florida Law. The Path

The implementation document includes, inter alia, a chapter clarifying the definition of a stream under Florida's nutrient rules. The implementation document makes clear that the State's numeric nutrient stream criteria apply to all Class I or III streams unless a specific stream is identified by FDEP as excluded from coverage by those criteria. Attachment 4 (Implementation Document) at 50. After the implementation document is adopted in rule, FDEP intends to submit the rule to EPA for review under CWA Section 303(c), which EPA anticipates will be in May 2013.

In deciding whether a particular waterbody is excluded from the stream numeric nutrient criteria, FDEP will provide public notice and request information relevant to the application of water quality standards to the affected waterbody. Attachment 4 at 56. The public may then submit any information for FDEP's consideration. FDEP will maintain an administrative record of such decisions, which will be available to the public. Particularly as to the exclusion for conveyances and hydrologically modified waterbodies primarily used for water management purposes, such relevant information includes the purpose of the waterbody such as flood protection, stormwater management, irrigation, water supply, navigation, boat access to an adjacent waterbody, or frequent recreational

Forward recognizes that FDEP will adopt in rule the revised implementation document.

use. Id. If a waterbody is commonly used for navigation, boat access, or other frequent recreational activities such as swimming or boating, then the waterbody's primary purpose is not water management and FDEP's numeric nutrient criteria will apply to the waterbody. Id.

EPA has carefully considered the State's nutrient rules that EPA approved on November 30, 2012 and supporting documentation, including the implementation document that FDEP is to submit to EPA for review under CWA Section 303(c) in May of this year. EPA believes that those approved criteria, combined with FDEP's adoption and EPA approval of numeric nutrient criteria for Florida's remaining estuaries and coastal waters by September 30, 2013, will result in numeric nutrient criteria for the majority of Florida's Class I, II, and III surface waters.⁵ Because the extent of Florida waters that would not be covered by

⁵ The State's adoption in 2012 of numeric nutrient criteria for lakes and springs, approved by EPA on November 30, 2012, combined with FDEP's actions outlined in the Path Forward, will result in numeric nutrient criteria for 100% of the Class I, II and III estuaries, coastal waters, freshwater lakes, and springs in the State.

As to inland, fresh flowing waters, EPA's current best estimate is that under FDEP's rules numeric nutrient criteria would presumptively apply to 90% of Florida's Class I and III fresh flowing waters (29,462 linear miles). Included in this figure are 11,497 linear miles (35% of fresh flowing waters) that may be determined to be water management conveyances. These conveyances are presumptively covered by numeric nutrient criteria under the actions outlined in the Path Forward, although FDEP's rules do allow parties to provide information to FDEP for a determination that a waterbody is a water management conveyance

numeric nutrient criteria will be limited, EPA further believes that FDEP should be able to implement the existing narrative criterion for nutrients for those waters in an effective and efficient manner, consistent with the Clean Water Act.

Based on the above, EPA expects to amend its January 2009 Section 303(c)(4)(B) determination to state that numeric nutrient criteria are not necessary for the limited scope of waters in Florida that will not have numeric nutrient criteria, but that will remain covered by the State's narrative nutrient criterion. Any such amendment of the determination would take place only after FDEP adoption of the implementation document into rule, submission of the rule to EPA for review, and EPA approval of the portions of the rule that are water quality standards. EPA anticipates that such actions would occur in May 2013, and that the determination could be amended shortly thereafter, in June 2013. EPA would

that meets the "stream" exclusion described above. If FDEP determines that a waterbody should be excluded, the numeric nutrient criteria would not apply to that conveyance. The remaining 10% of fresh flowing waters (3,403 linear miles in the South Florida Region) and 5,903 linear miles of non-wetland tidal waters would not be covered by numeric nutrient criteria but would be covered by FDEP's existing narrative nutrient criterion, which will continue to remain in effect for all waters.

EPA notes that it has estimated all flowing waters in linear miles. FDEP has done a comparable comparison of NNC coverage, based on square miles. That analysis is available at:

<http://www.dep.state.fl.us/water/wqssp/nutrients/docs/fdep_epa_nnc_coverage_comparison.pdf> .

then seek the Court's modification of the consent decree to reflect EPA's amended determination.⁶ EPA would also propose to withdraw the Phase 1 Rule in June 2013, following amendment of the determination.

CONCLUSION

EPA is committed to working with the State of Florida, as envisioned by the Clean Water Act, to ensure the protection and maintenance of Florida's waters. EPA will continue to keep the Court apprised of the status of the events described in the Agreement in Principle and Path Forward document, and will seek relief from the Court where necessary.

Respectfully submitted,

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⁶ As noted in the Notice to the Court of Agency Action filed on December 10, 2012 (ECF No. 413), EPA has already amended its determination to reflect EPA's conclusion that protection of downstream waters does not require numeric DPVs. EPA intends to file a single motion for modification of the consent decree that addresses both the previous amendment and the anticipated amendment of the determination.

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Dated: April 5, 2013

/s/ Martha C. Mann
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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 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
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