IN THE UNITED STATES DISTRICT COURT
OF THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

FLORIDA WILDLIFE FEDERATION,
ALFRED J. DAVIS and CINDY DAVIS,

Plaintiffs,

Case No.

v.

GINA McCARTHY, Administrator of the United States Environmental Protection Agency; GWENDOLYN KEYES FLEMING, Regional Administrator of the United States Environmental Protection Agency Region IV; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Defendants.
_____/

COMPLAINT FOR DECLARATORY AND
PROSPECTIVE INJUNCTIVE RELIEF

Plaintiffs, Florida Wildlife Federation (FWF) and Alfred J. Davis and Cindy Davis (Davises) bring this twenty-three (23) count action against Defendant, Gina McCarthy, EPA Administrator; Defendant, Gwendolyn Keyes Fleming, the Regional Administrator for U.S. EPA Region IV; and Defendant, U. S. Environmental Protection Agency (EPA). This complaint seeks declaratory judgment and prospective injunctive relief.

INDEX TO COMPLAINT

INTRODUCTION

1. This a twenty-three (23) count complaint seeking declaratory and prospective

injunctive relief pursuant to the federal Clean Waters Act (CWA), 33 U.S.C. §§ 1251(a) et. seq. and the Administrative Procedures Act (APA), 5 U.S.C. §§ 553 and 701-706, to enforce and implement the antidegradation water quality provisions of the CWA and the State of Florida's adopted antidegradation water quality standards (WQSs).

2. The twenty-three (23) counts of this complaint consist of four (4) CWA citizen suit counts, and nineteen (19) APA counts.

JURISDICTION

3. This court has jurisdiction over the CWA Counts I, IV, VII, and X pursuant to 33 U.S.C. §1365 (CWA citizen suit provision), 28 U.S.C. §1331 (federal question), and 28 U.S.C §1361 ("Action to compel an officer of the United States to perform his duty") concerning the Defendants mandatory, non-discretionary CWA duties.

4. This court has jurisdiction over APA Counts II, III, V, VI, VIII-XIV, and XI-XXIII pursuant 5 U.S.C. §553 and §§701-706 (APA), 28 U.S.C. §1331 (federal question), and 28 U.S.C. §1361 (Action to compel an officer of United States to perform duty). The APA authorizes federal courts to apply applicable laws and meaningful standards, and to set aside unlawful agency actions from which legal consequences will flow. 5 U.S.C. § 706(2); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

5. The FWF provided the Defendants with more than 60 days written notice of the violations of the law alleged in this complaint in the form and manner required by the CWA. See, 33 U.S.C. §1365(b)(2).

6. The Davises provided the Defendants with more than 60 days written notice of the violations of the law alleged in this complaint in the form and manner required by the CWA. See, 33 U.S.C §1365(b)(2). On December 20, 2010, the Davises entered a Settlement Agreement

with EPA (2010 Settlement Agreement) with respect to Counts VI and VII of the Davises Amended Complaint in the Davises' June 9, 2009 action against the Defendants (M.D. Fla. Case No. 8:09-cv-1070-EAK). The Davises 2009 Amended Count VI was an APA challenge to EPA's 2008 Decision Document approval of Florida's 2007 Impaired Waters Rule (IWR). The Davises 2009 Amended Count VII was a CWA challenge to EPA's 2009 approval of the Florida's Section 303(d) list of WQLS (impaired waters).

7. The Defendants have not complied with the 2010 Settlement Agreement, and the Davises have the right under the 2010 Settlement Agreement to refile their 2009 Amended Counts VI and VII against the Defendants under the APA.

8. The FWF and the Davises have repeatedly attempted to settle their current issues with the Defendants, and have been unsuccessful.

9. A current actual, justiciable controversy exists between the parties. The FWF and the Davises are entitled to declaratory judgment and prospective remedial injunctive relief to redress current and prospective harms to the FWF and the Davises. The requests for declaratory judgment and prospective remedial injunctive relief are in the public interest because they seek compliance with the CWA and Florida WQSs, and seek to cure the identified violations of the CWA and the APA.

VENUE

10. Venue is proper in the Tampa Division of the Middle District of Florida pursuant to 28 U.S.C. Section 1391(e). A substantial number of FWF members reside in the Middle District of Florida, and the FWF has two offices in the Middle of District of Florida. The Davises reside in Pinellas County which is located in the Tampa Division of the Middle District of Florida.

THE PARTIES

The Florida Wildlife Federation

11. Plaintiff, Florida Wildlife Federation (FWF) is duly incorporated under the laws of the State of Florida as a not for profit conservation protection corporation. The FWF has its office headquarters is in Tallahassee, Florida, and has regional offices with field representative employees in Naples and St. Augustine, Florida. The FWF has over 14,000 members and approximately 60,000 supporters.

12. The members of FWF use and enjoy the surface waters of the State of Florida for recreational and aesthetic purposes, including fishing, boating, canoeing, kayaking, swimming, wading, research, photography, and observation of Florida's aquatic ecosystems.

13. The corporate purposes of the FWF include the protection of the environment, protecting and conserving fish and wildlife resources, and the protection of the air and water quality of the State of Florida and the nation. For decades the FWF has been actively advocating and litigating pursuant to the CWA for the protection and improvement of surface water quality in the State of Florida. Examples of such FWF advocation and litigation include: FWF's involvement in the Everglades Consent Decree litigation (United States v. South Florida Water Management District, U.S. District Court, Southern District, Case No. 88-1886-CIV-Moreno); litigation concerning the back pumping of polluted water containing loathsome concoctions of chemicals into Lake Okeechobee (Florida Wildlife Federation v. South Florida Water Management District, 570 F.3d 1210 (11th Cir. 2009)(back pumping water litigation); a challenge to EPA's Water Transfer Rule (Friends of Everglades and Florida Wildlife Federation v. U.S. EPA, Eleventh Circuit Case No. 08-13652, and U.S. District Court, Southern District, Case No. 08-21785); litigation concerning Total Maximum Daily Loads (TMDL's) in Florida (Florida

Wildlife Federation v. Browner, U.S. District Court, Northern District, Case No. 4:98CV356); and litigation over the failure of the State of Florida and EPA to timely enact numeric nutrient water quality standards in Florida. Florida Wildlife Federation v. South Florida Water Management District, 647 F.3d 1296 (11th Cir. 2011) (numeric nutrient WQS litigation).

14. The FWF frequently represents the rights and interests of its members who have used and enjoyed, and will in the future use and enjoy, the waters of Florida for fishing, boating, swimming, wading, research, and aesthetic purposes. The Defendants actions challenged in this complaint are final agency actions which adversely affect the substantial interests and rights of FWF members to use and enjoy Florida's surface waters. FWF members are currently suffering injuries in fact, and will in the suffer injuries in fact, by the subject challenged agency actions of the Defendants. Florida and EPA have been using, and are continuing to use, the challenged 2009 and 2010 Section 303(d) WQLSs lists and identified pollutants for development of TMDLs which are not based upon Florida's antidegradation WQS, Florida's minimum WQSs ("Free Froms"), sediment pollution data, causative facts such as water withdrawals, and water transfers. The foreseeable injuries are within the zone of protection of the CWA and APA. These injuries are fairly traceable to the Defendants' challenged actions, and these injuries are likely to be redressed by a decision favorable to the FWF in this action.

The Davises

15. The Davises reside at 2790 45th Street South, Gulfport, Florida 33711, which is waterfront property on the Clam Bayou estuary in south Pinellas County. The Davises own and have operated, and in the future will frequently operate, boats and canoes in the Clam Bayou estuary and other waters through Florida that are protected by Florida's WQSs, including Florida's antidegradation WQSs and implementation methodology. As they recently have used

and enjoyed, the Davises in the future will use and enjoy many of the 309 water bodies which have been designated as Outstanding Florida Waters (OFWs),.

16. The Defendants final agency actions challenged in this action adversely affect the Davises' substantial future interests and rights to use and enjoy Florida's surface waters, especially including the waters of the Clam Bayou estuary. The Davises have suffered, and in the future will suffer, concrete and particularized actual injuries in fact by the subject challenged actions. These injuries are within the zone of protection of the CWA and APA. Florida and EPA have been using, and are continuing to use, the challenged 2009 and 2010 Section 303(d) WQLSs lists and identified pollutants for development of TMDLs which are not based upon Florida's antidegradation WQS, Florida's minimum WQSs ("Free Froms"), sediment pollution data, causative facts such as water withdrawals, and water transfers. The Davises' injuries are fairly traceable to the Defendants' challenged actions, and these injuries are likely to be redressed by a decision favorable to the Davises in this action.

Defendant, Gina McCarthy

17. Defendant, Gina McCarthy, is the EPA Administrator. She is charged with the supervision and management of the CWA, including the mandatory and non-discretionary duties of the CWA. She is sued in this action only in his official capacity. Her official address is Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

Defendant, Gwendolyn Keyes Fleming

18. Defendant, Gwendolyn Keyes Fleming is the Regional Administrator for EPA Region IV, the region which includes the State of Florida. She is charged with implementing the CWA in the State of Florida, including reviewing and approving or disapproving Florida's Section 303(d) impaired waters documents and lists, and reviewing and approving or

disapproving Florida's WQSs and IWR. She is sued in this action only in her official capacity. Her official address is U.S. EPA, Sam Nunn Atlanta Federal Center, 61 Forsyth St., S.W., Atlanta, GA 30303-3104.

Defendant, Environmental Protection Agency

19. Defendant, Environmental Protection Agency (EPA) is an agency of the federal government which has the primary statutory responsibility under the CWA to protect and restore the surface waters of the United States from pollution, whose headquarters are located at Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

CWA OVERVIEW

20. The CWA is a comprehensive water quality statute enacted by Congress in 1972 as Public Law 92-500. The CWA is designed "to restore, and maintain the chemical, physical, and biological integrity of the nation's waters," and to obtain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 704 (1994). "To achieve these ambitious goals, the CWA provides two sets of water quality measures, effluent limitations and water quality standards." Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992); PUD No. 1of Jefferson County, 511 U.S. at 712-713.

21. The Supreme Court has explained that "state water quality standards provide 'a supplemental basis....so that numerous point sources, despite individual compliance with [technology based] effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.'" PUD No. 1 of Jefferson County, 511 U.S. at 704 (quoting EPA v. California ex rel State Water Resources Council Bd., 426 U.S. 200, 205 n. 12 (1976); Arkansas v. Oklahoma, 503 U.S. at 101; Kentucky Water Alliance v. Johnson, 540 F.3d 466, at

471 (6th Cir. 2008).

22. Effluent limitations are "any restriction established by a state or Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents ... from point sources..into navigable waters...". CWA §502(11). Effluent limitations can be technology-based limitations, or water quality-based limitations. CWA §301(b)(1).

A. CWA WQS requirements

23. CWA §303(a)-(c) direct states to establish WQSs. See, 33 U.S.C. §1313(a)-(c).

24. The CWA purpose of state WQSs is to "protect public health or welfare, enhance the quality of water and serve the purposes of the Act." 33 U.S.C. §1313(c)(2)(A). State CWA based WQSs establish water quality goals for a specific waterbody, and provide the basis for regulatory controls. See, EPA Guidance, February 22, 1994, Interpretation of Federal Antidegradation Regulatory Requirement. State WQSs apply to both point and non-point sources.

25. State WQSs must describe the desired condition of a waterbody and consist of three principal elements: (1) the designated beneficial uses of the states waters, such as public water supply, recreation, protection and propagation of fish and shellfish, protection of aquatic life, protection of wildlife uses, and navigation; (2) water quality criteria which define the amounts of pollutants, in either numeric or narrative form, that the waters can contain without impairment of their designated beneficial uses; and (3) antidegradation standards, which are designed to protect and maintain existing uses and limitations on degradation of high quality waters whose quality exceeds that necessary to support designated beneficial uses. See, 33 U.S.C. §1303(a)-(c); 33 U.S.C. §1342(p)(3)(B)(iii)(state WQSs must be sufficient to "maintain existing beneficial uses of navigable waters, preventing further degradation"); 40 C.F.R. § 131.12 (requires state WQSs

contain antidegradation standards and implementation methods); PUD No. 1 of Jefferson County v. Washington Department of Ecology, 511 U.S. 700, 704-05 (1994) (state WQSs must include antidegradation requirements); ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1320 (11th Cir. 1990)(the state antidegradation policy must be "consistent with and at least as stringent as the federal anti-degradation rule. 40 C.F.R. 131.12."); EPA Water Quality Handbook, Chapter 4, Antidegradation, §4.4.2, Aquatic Life/Wildlife Uses.

26. "To determine the water quality standard, a state designates the use for which a given body of water is to be protected (fishing, for example), and then determines the level of water quality needed to safely allow that use. That level becomes the water quality standard for that body of water." Sierra Club v. Meiburg, 296 F.3d 1021, 1025 (11th Cir. 2002). See, 33 U.S.C. §1313; 40 C.F.R. §130.7(b)(3); 40 C.F.R. §131.12; 40 C.F.R. 131.3(I).

27. State WQSs play a critical role in a state's water quality management program required by the CWA, including: (1) setting WQSs for for all surface water bodies; (2) monitoring water quality to provide information regarding water quality-based decisions; (3) preparing water quality inventory reports pursuant to CWA §305(b); (4) preparing CWA §303(d) lists of WQLSs; (5) calculating TMDLs that contain waste load allocations (WLAs) for point source(s) of pollution and load allocations (LAs) for non-point sources of pollution; (6) implementing the CWA §319 management plan for a state's control strategy of non-point sources of pollution; and (7) developing CWA §402 NPDES permits. See, EPA Guidance, February 22, 1994, Interpretation of Federal Antidegradation Regulatory Requirement.

28. Antidegradation policy is the third component of state WQSs required by the CWA. The CWA requires states to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy...". 40 C.F.R. § 131.12(a).

29. Antidegradation regulations are an integral part of the CWA, and provide important protections that are critical to the fulfillment of the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." See, Tier 2 Antidegradation Review and Significance Thresholds, dated August 10, 2005, from Ephraim S. King, Director of EPA Office of Science and Technology, to Water Management Division Directors, Regions 1-10 (King Memorandum). Antidegradation WQSs provides "a greater opportunity to protect human health and wildlife values, achieve healthy watersheds, and fulfill in a more cost-effective manner the CWA's primary objective to restore and maintain the nation's waters." March 21, 2011, EPA memorandum, Denise Keehner, Director, Office of Wetlands, Oceans, and Watersheds, to all EPA Water Division Directors of EPA Regions 1-10,

30. Antidegradation policy must be part of state WQSs which serve as the regulatory basis for water quality-based treatment controls and strategies beyond the technology-based level of treatment required by CWA sections 301(b) and 306. Id.

31. The first federal antidegradation policy was made on February 8, 1968, by the Secretary of the U.S. Department of Interior. Antidegradation was included in EPA's first WQSs Regulation on November 28, 1975 (40 Fed.Reg. 55340-41), and was slightly refined and re-promulgated by EPA on November 8, 1983. (48 Fed.Reg. 51400).

32. Antidegradation criteria was further incorporated in CWA Section 303(d)(4)(B) through the 1987 amendments to the CWA, and the 1990 Great Lakes Critical Program Act in CWA Section 118(c)(2) requiring the Great Lakes water quality guidance include antidegradation policies and implementation procedures. See, Pud No. 1 of Jefferson County, Supra at 705. Specifically, CWA §303(d)(4)(B) allows the revision of certain effluent limitations or state WQSs "only if such revision is subject to and consistent with the

antidegradation policy established under [the CWA]."

33. EPA's antidegradation policy and methods of implementation are the minimum requirements which states must include in state WQSs. See, EPA Water Quality Handbook, Chapter: Antidegradation). EPA's current regulations at 40 C.F.R §131.12 require each state to "develop and adopt a statewide antidegradation policy and identify the methods for implementing such policy." (e.s.). Florida has not identified methods to implement the Tier 2 baseline assimilative capacity or the Tier 2.5 OFW existing ambient water quality in Section 303(d) and 40 C.F.R. §130.7(b) impaired water assessments and evaluations.

B. CWA antidegradation requirements

34. A statewide antidegradation policy must be consistent with 40 C.F.R. §131.12, and contain at least three levels of antidegradation water quality protection: Tier 1, Tier 2, and Tier 3. See, EPA Water Quality Handbook, Chapter 4: Antidegradation.

35. Because the CWA antidegradation policy regulates and protects against aquatic resource degradation, not individual sources of degradation, antidegradation WQSs are not based the number of discharges nor whether the discharge is point source or non-point sources. Rather, antidegradation WQSs are based upon whether the ambient water quality of waterbodies are degraded (lowered) by any and all of the pollutant loads into the waterbodies, whether point source or non-point source, whether the pollution sources is permitted or not permitted. No waterbodies are excepted from antidegradation policy and review for compliance with antidegradation policy. See, 40 C.F.R. §130.12; 40 C.F.R. §130.7(b)(3); Kentucky Waterway Alliance, 540 F.3d 466, at 484-85 (6th Cir. 2008). The CWA requires state antidegradation review be applied not only during the permit issuance process, but also during the mandatory CWA Section 303(d) impaired waters assessment and listing of WQLSs by states and the EPA.

See, 40 C.F.R. §130.12; 40 C.F.R. §130.7(b)(3); Kentucky Waterway Alliance, 540 F.3d 466, at 484-85 (6th Cir. 2008). See also, paragraph 27 above.

36. The central purpose of the antidegradation regulations is to protect the assimilative capacity of water bodies. See, King Memorandum. In short, a water body's assimilative capacity is a measurement of the amount by which its aquatic resource quality exceed levels necessary to support the designated use of the waterbody. Ibid. The degree of the assimilative capacity of a water body is the baseline for Tier 2 antidegradation review of cumulative degradation. The antidegradation regulation review process ensures that the baseline assimilative capacity of waters is maintained and protected so as to avoid further degradation. Kentucky Waterway Alliance, 540 F.3d 466, at 484-85 (6th Cir. 2008).

37. The CWA requires Tier 1 antidegradation protection be applied by states to all surface waters, and that the state Tier 1 protection require that "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. § 131.12(a)(1). Existing uses include shellfish harvesting and collection, recreational uses in and on waters, wildlife uses, aquatic life uses, and wildlife uses, which existed on and after November 28, 1975, regardless of whether these existing uses are adopted as designated uses by the state. See, EPA Water Quality Handbook, Chapter 4: Antidegradation.

38. The CWA requires Tier 2 antidegradation protection standards be applicable to all high quality waters, which are waterways where "the quality of the waters exceed levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." See, 40 C.F.R. § 131.12(a)(2). Thus, all surface waters must be subject to Tier 2 antidegradation review to determine if high quality waters exists, and high water quality waters do exist, the assimilative capacity must be maintained and protected . See, Kentucky Waterway

Alliance, 540 F.3d 466, at 484-85 (6th Cir. 2008).

39. Tier 2 assimilative capacity "shall be maintained and protected unless the State finds, after full satisfaction of the intergovernmental coordination and public participation provisions of the state's continuing planning process, that allowing lower water quality is necessary to accommodate important economic and social development in the area in which the waters are located." See, 40 C.F.R. § 131.12(a)(2).

40. Establishment of antidegradation assimilative capacity baseline is necessary to review and prevent repeated or multiple changes in water quality to result in significant cumulative water quality degradation by permitted and exempt activities. Id. The assimilative baseline should remain fixed unless action improves the assimilative water quality capacity, at which time the baseline should be adjusted accordingly. Id.

41. Establishing this baseline assimilative capacity is fundamental and mandatory for states performing the required CWA Section 303(d) assessment and evaluation of whether surface waters are achieving attainment with state adopted antidegradation WQSs. In order for a state to perform such CWA antidegradation implementation, the state must first establish the baseline assimilative capacity of Tier 2 waters.

42. EPA's regulation at 40 C.F.R. §131.12(a)(2) requires the Tier 2 review process adopted by states "assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost-effective and reasonable best management practices for non-point source control" in Tier 2 waterbodies. See, 40 C.F.R. § 131.12(a)(2)). The CWA and the text of 40 C.F.R. 131.12(a)(2) do not provide any exception to Tier 2 antidegradation review.

43. EPA's antidegradation guidance provides that degradation is not necessary to

accommodate important economic or social development if it could be partially or completely prevented through implementation of state controls of non-point sources of pollution. See, EPA Guidance, February 22, 1994, Interpretation of Federal Antidegradation Regulatory Requirement. States must prove that degradation of assimilative capacity could not be partially or completely prevented through implementation of water pollution controls within the state's statutory and regulatory authority. Such state pollution controls include the following.

a. Implement new source performance standards on all new and existing point source discharges in the watershed of the waterbody.

b. Require more stringent effluent limitations, including lowering effluent limitation levels of all point sources discharges in the watershed of the waterbody to actual current loadings of the discharge(s).

c. Order the point or method of discharges changed.

d. Limit the duration or volume of discharges.

e. Require all new and existing stormwater management systems discharging within the watershed of the water body achieve at least 95% reduction of the average annual load of pollutant(s) at issue required by Fla.Admin.Code R. 62-25.025(9).

f. Regulate the water quality affects of water quantity uses which degrade the baseline assimilative capacity for the subject assimilative capacity water quality parameter.

g. Require NPDES MS4 permits for all stormwater discharges that are a significant contributor within the watershed of the pollutant at issue in the waterbody.

h. Implement stricter effluent limitations on point source stormwater discharges in the watershed of the waterbody, including requiring clear, specific and measurable performance standards in NPDES MS4 permits that are enforceable and prohibit violation of WQSs.

i. Implement stormwater control measures within the watershed of the subject waterbody require redeveloped sites to retrofit stormwater systems.

j. Implement stormwater control measures in MS4 permits which require the identification of stormwater pollution hotspots within the watershed of the subject water body, and the use pollution prevention actions in the identified hotspots.

k. Require local governments in the watershed of the waterbody with stormwater management systems to exercise land use control measures to reduce the pollutant load at issue, including runoff volume reduction, peak flow reduction, and increasing runoff treatment levels.

l. Regulation and control activities which have adverse cumulative and secondary impacts on surface water quality, including requiring triennial septic tank inspection and necessary retrofitting within the watershed of the waterbody.

m. Cost effective and reasonable tightening up of best management practices on non-point sources within the watershed of the waterbody for the pollutant at issue.

44. CWA Section 303(d)(4)(B) mandates that any revision to effluent limitation standards for Tier 2 waters established by TMDL WLAs be "consistent with the antidegradation policy established under this section." 33 U.S.C. §1313(d)(4)(B). This means it is mandatory that Section 303(d) impaired waters assessments and lists of WQLSs by both the states and the EPA evaluate whether the ambient water quality of state waters are attaining state antidegradation WQSs.

45. Section 131.12(a)(3) requires states to adopt Tier 3 antidegradation WQSs for waters "[w]here high quality waters constitute an outstanding National resource, such as waters of National and State parks and wildlife refuges and waters of exceptional recreational or ecological significance, that water quality shall be maintained and protected." See, 40 C.F.R.

§131.12(a)(3)." Kentucky Waterway Alliance, 540 F.3d at 471. Florida has not yet adopted any Tier 3 waters.

C. EPA review of state WQSs

46. While the CWA places primary authority on states for setting WQSs, the CWA places upon EPA the mandatory, non-discretionary duty to review new or revised state WQSs standards as they are adopted by states. See, 33 U.S.C. § 1251(b) and §1313(c). EPA must review WQSs adopted by states to ensure consistency with the requirements of the CWA.

47. Section 303(c) of the CWA provides two distinct mechanisms by which EPA oversees state WQSs. First, states must submit all new or revised standards to EPA for approval or disapproval, and EPA has the mandatory duty to review state WQSs to ensure the consistency of the standards with the requirements of the CWA. Second, even in the absence of any submission of new or revised standards by a state, CWA §303(c)(4)(B) allows EPA to publish revised WQSs for a state "in any case where the Administrator determines that a new or revised standard is necessary to meet the requirements of the Act." This allows EPA to assess the current sufficiency of previously approved WQSs in light of changed circumstances or new data, and ensures that state waters will continue to meet the goals of the CWA even if a state fails to submit new or revised WQSs to EPA.

48. If EPA identifies violations of the CWA, EPA must notify the state within 90 days and specify the changes needed to comply with the CWA. See, 33 U.S.C. § 1313(c)(3).

49. If the state does not adopt EPA's proposed changes within 90 days of notification by EPA, EPA must itself promulgate the WQSs changes needed to comply with the CWA. See, 33 U.S.C. § 1313(c)(4).

50. A state may revise its WQSs and implementation criteria only if the change complies

with the antidegradation requirements of the CWA. See, 33 U.S.C. §1313(d)(4)(B); 40 C.F.R. §131.12; Florida Public Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1073(11th Cir. 2004).

Florida's definition of surface WQSs

51. In Fla.Admin.Code Chapter 62-302, Florida defined WQSs as follows.

> "(42) "Water quality standards" shall mean standards composed of designated present and future most beneficial uses (classification of waters), the numerical and narrative criteria, incuding Site Specific Alternative Criteria, applied to the specific water uses or classification, the Florida antidegradation policy, and the moderating provisions, sush as variances, mixing zones,rule rovisions, or exceptions." (e.s.). (Fla.Admin.Code R. 62-302.200(42)).

Florida's antidegradation WQSs

52. Florida first enacted its antidegradation policy in 1971 when Section 403.088(2)(b), Fla. Stat. was enacted, and read as follows.

> "(b) If the department finds that the proposed discharge will reduce the quality of the receiving waters below the classification established for them, it shall deny the application and refuse to issue a permit. If the department finds that the proposed discharge will not reduce the quality of the receiving waters below the classification established for them, it may issue an operation permit if it finds that such degradation is necessary or desirable under federal standards and under circumstances which are clearly in the public interest." (e.s.).

Since 1971, Section 403.088(2)(b), Fla. Stat. has allowed discharges to degrade the 1971 assimilative capacity of a receiving water only if degradation is: (1) necessary or desireable under federal standards and (2) under circumstances "clearly in the public interest." However, Florida never enacted the 1971 antidegradation assimilative capacity of Florida waters necessary to implement this Florida antidegradation statutory duty.

53. FDEP first enacted regulations containing antidegradation WQSs and implementation criteria on March 1, 1979, then located at then Fla.Admin.Code Rule 17-4.242 and

Fla.Admin.Code R. 17-3.011(6) & (8).

54. The 1979 Fla.Admin.Code R. 17-3.011(6) & (8) read as follows.

> "(6) The quality of waters which exceeds the minimum quality necessary to support the designated use of those waters shall be protected and enhanced."
>
> * * *
>
> "(8) The highest protection shall be afforded to Outstanding Florida Waters."

55. The Florida's 1979 OFW standards established the existing ambient water quality of the OFW as the OFW WQSs, and prohibited the degradation of the OFW existing ambient water quality. See, Fla.Admin.Code R. 62-4.242(2).

56. Subsequent to March 1, 1979, Florida made several amendements to its antidegradation WQSs, including amendments in 1989 resulting from litigation by ManaSota-88, Inc. against EPA concerning EPA's failure to promulgate antidegradation rule amendments after EPA determined revisions to Florida's antidegradation rules where necessary to satisfy CWA requirements. ManaSota-88, Inc. v. DeHihns, Case No. 88-425-CIV-T-15A (Middle District of Florida). The issues in that suit are listed in appellate court opinion which denied intervention by the Florida Electric Power Coordinating Group. ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1319-22 (11th Cir. 1990) (CWA and APA suit requesting the court order EPA: to promulgate antidegradation WQSs consistent with CWA; to identify Florida waters where WQSs were not being met; and to establish TMDLs for identified impaired waters).

57. Florida's current antidegradation WQSs consist of four tiers: Tier 1, Tier 2, Tier 2.5, and Tier 3. Antidegradation WQSs for Tier 1 and 2 are set forth in Fla.Admin.Code R. 62-302.300, and the antidegradation WQSs for Tier 2.5 and 3 are set forth in Fla.Admin.Code R.62-302.700 and Fla.Admin.Code R. 62-4.242(2) & (3). Florida's adopted antidegradation WQSs are must be applied when: (1) Florida and EPA are identifying WQLSs and calculating TMDLs

under Section 303(d); (2) when Florida is developing NPDES permit limitations, (3) when Florida, EPA, and the US Army Corps of Engineers are evaluating proposed discharges of dredge and fill material, and (4) when Florida is performing water quality certification under §401 of the CWA. See, 40 C.F.R. §131.21(d).

Tier 1

58. Florida's current adopted Tier 1 "existing use" antidegradation WQS is in two locations in Fla.Admin.Code Chapter 62-302. Tier 1 existing uses are defined in Fla.Admin.Code R. 62-302.200(14) as "any actual beneficial use of the waterbody on or after November 28, 1975." An actual beneficial use does not need to be a uses designated by Florida's water classification system. Florida's Tier I WQS are set forth in Fla.Admin.Code R. 62-302.300(14) which provides that

> "[e]xisting uses and the level of water quality necessary to protect the existing uses shall be fully maintained and protected. Such uses may be different or more extensive than the deisgnated use."

Tier 2

59. Florida's current Tier 2 antidegradation WQSs are located in Fla.Admin.Code R. 62-302.300(12),(17) & (18), and Fla.Admin.Code R. 62-4.242(1), and prohibit degradation of the assimilative capacity ot Teir 2 waters unless the degradation is necessary and desireable under federal standards and under circumstances clearly in the public interest. Florida's Tier 2 WQSs and permitting requirements do not quantify the amount, if any, of the Tier 2 assimilative capacity that might be degraded by a new pollution source if the new source is necessary and desireable under federal standards and under circumstances clearly in the public interest. The CWA requires that cumulative degradation of Tier 2 waters be de minimis after taking into consideration all degradation sources, whether permitted or exempted from permitting. Kentucky

Water Alliance v. Johnson, 540 F.3d 466, at 471 (6th Cir. 2008).

Tier 2.5

60. Florida's Tier 2.5 requirements are located in Fla.Admin.Code R. 62-302.700 and Fla.Admin.Code R. 62-4.242(2). Tier 2.5 is Florida's antidegradation WQS for water bodies designated as Outstanding Florida Waters (OFW).

61. Fla.Admin.Code R. 62-302.700(1) reads in pertinent part as follows.

> "62-302.700 **Special Protection, Outstanding Florida Waters, Outstanding National Resource Waters**.
>
> "(1) It shall be the Department policy to afford the highest protection to Outstanding Florida Waters and Outstanding National Resource Waters. No degradation of water quality, other than that allowed in subsections 62-4.242(2) and (3), F.A.C., is to be permitted in Outstanding Florida Waters and Outstanding National Resource Waters, respectively, notwithstanding any other Department rules that allow water quality lowering."

62. Florida has designated 309 water bodies as Tier 2.5 OFWs, with a list these OFWs provided in Fla.Admin.Code R. 62-302.700(9).

63. Fla.Admin.Code R. 62-4.242(2)(a) provides that

> "[n]o permit or water quality certification shall be issued for any proposed activity or discharge within Outstanding Florida Waters, or which significantly degrades, either alone or in combination with other sources or activities, any Outstanding Florida Waters, unless the applicant affrimatively demonstrates that: .... the proposed activity or discharge is clearly in the public interest, and .... the existing ambient ambient water quality within Outstanding Florida Waters will not be lowered as a result of the proposed activity or discharge...".

64. Fla.Admin.Code R. 62-4.242(2)(c) provides as follows.

> "(c) For purpose of this section the term 'existing ambient water quality' shall mean (based upon the best scientific information available) the better of either (1) that which could reasonable be expected to have existed for the baseline year of an Outstanding Florida Water designation or (2) that which existed during the year prior to the date of a permit application. It shall include daily, seasonal, and other cyclic fluctuations, taking into consideration the effects of actual allowable discharges for which Department permits were issued or applications for such

permits were filed and complete on the effective date of the designation.

65. Fla.Admin.Code R. 62-302.700(8) provides as follows.

> "(8) For each Outstanding Florida Water listed under subsection 62-302.700(9), F.A.C., the last day of the baseline year for defining the existing ambient water quality (paragraph 62-4.242(2)(c), F.A.C.) is March 1, 1979, unless otherwise indicated. Where applicable, Outstanding Florida Water boundary expansions are indicated by date(s) following "as mod." under subsection 62-302.700(9), F.A.C. For each Outstanding Florida Water boundary which expanded subsequent to the original date of designation, the baseline year for the entire Outstanding Florida Water, including the expansion, remains March 1, 1979, unless otherwise indicated."

Tier 3

66. Florida's Tier 3 Outstanding National Resource Waters (ONRW) requirements are located in Fla.Admin.Code R. 62-302.700 and Fla.Admin.Code R. 62-4.242(3).

67. Fla.Admin.Code R. 62-4.242(3) prohibits discharges or activities subject to FDEP permitting from causing degradation of water quality of listed ONRW. Currently Florida has not designated any waters as ONRWs.

CWA Section 303(d) impaired waters criteria

68. Section 303(d)(1)(A) of the CWA requires each state to identify and prioritize those waters where technology-based controls "are not stringent enough to implement any water quality standards applicable to such waters." 33 U.S.C. §1313(d)(1)(A). The CWA implementing regulations applicable for the identification and prioritization of such waters that do not achieve or attain adopted state WQSs are at 40 C.F.R. §130.7. EPA regulations at 40 C.F.R. §130.7(b)(1) require states to identify WQLSs where effluent limitations and pollution control requirements such as best management practices are "not stringent enough to implement any water quality standards applicable to such waters." See, 40 C.F.R. §130.7(b)(1)(iii).

69. "Section 303(d) of the CWA is the critical part of the CWA's pollution prevention and watershed protection mandate." Friends of the Swan River, Inc. v. U.S. EPA, 130 F.Supp 2d 1184 1188 (D. Mont. 1999). Section 303(d) is the interface between CWA and state pollution control requirements and state adopted WQSs. Ibid. Section 303(d) utilizes a water quality assessment approach to identify WQLSs and to develop LAs to insure that appropriate pollution control requirements and effluent limitations are in place on point and non-point pollution load source to achieve compliance with WQSs, including compliance with state adopted antidegradation WQSs which prohibit further degradation of water quality. Ibid.

70. EPA's implementing regulations provide that surface waters which do not meet state adopted WQSs are "water quality limited segments," which 40 C.F.R. §130.2(j) defines as:

> "Any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act."

"Water quality limited segments" may also referenced by EPA in documents as "WQLS," impaired waterbodies' or "impairment"

71. EPA's implementing regulations further provide that under 40 C.F.R. §130.7(b), the term WQSs applicable to the process to identify and list WQLSs refers to WQSs established under Section 303 of the CWA, "including numeric criteria, narrative criteria, water body uses, and antidegradation requirements." See, 40 C.F.R. 130.7(b)(3). See also, 40 C.F.R. §131.21(d).

72. Section 303(d) and 40 C.F.R. §130.7(b)-(d) impose duties upon both the states and EPA to assess and evaluate water quality data and information to identify "water quality limitedsegments" on a list, prioritize WQLSs, and establish the load for pollutants causing, or expected to cause, violations of the applicable WQSs.

73. State 303(d) lists are required to identify waters that are partially meeting or not meeting designated uses, threatened waterbodies, waterbodies calculated or predictively modeled to not attain applicable WQSs, and waterbodies for which water quality problems have been reported by government agencies, members of the public, or academic institutions. See, 40 C.F.R. §130.7(b)(5).

74. EPA's implementing regulation at §130.7(b)(5) mandates that states "shall assemble and evaluate all existing and available water-quality related data and information to develop the list required by [40 C.F.R.] §§ 130.7(b)(1) and 130.7(b)(2)."

75. States must submit documentation to support the state's listing, or not listing, of specific surface waters. See, 40 C.F.R. 130.7(b)(6). This requires Florida to describe the methodology Florida used to develop the list, a description of the data and information used to identify the waters listed, a rationale for any decision to not use any existing readily available data and information, especially including not using historic data and information to assess the status of Florida waters attaining Florida's antidegradation WQSs, and any other reasonable information requested by EPA. For the WQLS identified pursuant to 40 C.F.R. §130.7(b)(1), each state "shall establish" TMDLs for all pollutants preventing or expected to prevent attainment of WQSs as identified pursuant to §130.7(b)(1). See, 40 C.F.R. §130.7(c)(1)(ii). Requiring state to assess and evaluation of available water quality data and information related pollutants preventing or expected to prevent attainment state antidegradation WQSs is a mandatory, non-discretionary duty of the Defendants.

76. CWA §303(d) assessments and WQLSs lists are the basis for the development of TMDLs. See, 40 C.F.R. §130.7(c). CWA §303(d)(4)(B) mandates WLAs of TMDLs must be "consistent with the antidegradation policy established under the Act."

77. EPA's impaired waters and TMDL regulations mandate that TMDLs must be "established for all pollutants preventing or expected to prevent attainment of water quality standards as identified pursuant to paragraph (b)(1) of this section." 40 C.F.R. §130.7(c)(1)(ii). EPA regulation 40 C.F.R. §130.7(b)(3) states that

> "For purposes of listing waters under §130.7(b), the term 'water quality standards applicable to such waters' and 'applicable water quality standards' refer to those water quality standards established under section 303 of the Act , including numeric criteria, narrative criteria, waterbody uses, and antidegradation requirements."

78. To date, neither Florida nor EPA have performed a Section 303(d) assessment whether Florida's waterbodies are attaining Florida's antidegradation WQSs. To date, no TMDL developed for the surface waters of the State of Florida by Florida and EPA has considered Florida's antidegradation WQSs. Therefore, no TMDL developed to date for Florida waters is consistent with the antidegradation policy established under the CWA as required by CWA §303(d)(4)(B) and 40 C.F.R. §130.7(c)(1)(ii). To correct this CWA violation, the Defendants must perform their mandatory, non-discretion to assess and evaluate Florida antidegradation WQSs in Section 303(d) assessment and listing of WQLSs.

79. The Defendants have the mandatory, non-discretionary duty to review and approve, or disapprove, state submitted Section 303(d) assessment and impaired water lists. See, 33 U.S.C. §1313(d)(2); 40 C.F.R. §130.7(d)(2). EPA's review of a state's Section 303(d) list must ensure that the list of WQLSs are consistent with state WQSs, including the state antidegradation WQSs. Ibid; 40 C.F.R. §130.7(b)(2) & (3). The Defendants must approve, or disapprove, a state submitted Section 303(d) list of WQLSs not later than 30 days after the date of submittal by the state. See, 40 C.F.R. §130.7(d)(2). If the Defendants disapprove a state's list, no later than 30 days after the date of disapproval, the Defendants must identify the WQLSs and "establish such

loads for such waters as determined necessary to implement applicable WQS." See, 40 C.F.R. §130.7(d)(2).

Florida's Impaired Waters Rule

80. On May 26, 1999, in accordance with CWA Section 303(d), the Florida Legislature enacted the Florida Watershed Restoration Act (WRA), which became effective on June 10, 2002. See, Section 403.067, Fla. Stat. Florida's WRA directed the Florida Department of Environmental Protection (FDEP) to develop and adopt by rule a methodology to identify waters that are not attaining Florida's adopted WQSs, waters which Florida must list on its CWA Section 303(d) list. See, Section 403.067(2) & (3), Fla. Stat. This Florida Legislative directive includes ordering FDEP to identify waters that are not attaining Florida's antidegradation WQSs.

81. On April 26, 2001, FDEP adopted Florida's IWR (Fla.Admin.Code Chapter 62-303) which established a methodology for Florida to identify a list of water bodies that do not meet Florida's WQSs. Florida's IWR does not include methodology to identify and list waters that do not meet Florida's antidegradation WQSs.

82. FDEP used Florida's 2002 IWR in the preparation of FDEP's 2002 list of impaired waters, and submitted Florida's 2002 Section 303(d) list to EPA. EPA reviewed FDEP's 2002 list of impaired waters and issued a Decision Document dated June 11, 2003 which approved the list.

83. On December 2, 2002, a citizen suit was filed against the EPA. The U.S. Court of Appeals for the Eleventh Circuit held that Florida's use Florida's IWR methodology in developing Florida's Section 303(d) impaired waters list might have modified or amended Florida adopted WQSs. Thus, in making its review of Florida's 2002 Section 303(d) impaired waters list EPA had the mandatory, non-discretionary duty to "make a threshold determination

whether Florida's IWR complied with the requirements of the Clean Water Act, including its antidegradation policy." Fla. Public Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1078 (11th Cri. 2004). The law of this circuit is that the CWA and its implementing regulations provide clear and specific directives to EPA that state impaired waters rules must comply with the antidegradation policy of the CWA and state antidegradation WQSs, and that EPA must provide a thorough review of state impaired water rules. The appellate court remanded the case.

84. On remand, in July of 2005, EPA issued a Determination on Referral finding that several portions of Florida's 2002 IWR constituted new or revised WQSs, and pursuant to CWA Section 303(c) EPA disapproved those portions of the Florida's IWR.

85. In 2007, the U.S. District Court and the U.S. Court of Appeals upheld EPA's 2005 Determination in a challenge which alleged that additional portions of the IWR were new or revised WQSs. Sierra Club, Inc. v. Leavitt, 488 F.3d 904 (11th Cir. 2007).

86. Florida subsequently amended the IWR on three separate dates to address the procedural issue that lead to EPA's disapproval, and to make substantive and editorial changes to the IWR. On September 28, 2006, December 5, 2006, and June 26, 2007, Florida's Environmental Regulation Commission (ERC) adopted amendments to Florida's IWR.

87. On September 14, 2007, FDEP submitted Florida's amended 2007 IWR to EPA for review pursuant to CWA Section 303(c). Florida's 2007 IWR included provisions that were new or revised WQSs which FDEP had adopted following the legal procedures required by 40 C.F.R. §131.5(a)(3) for a state to follow when revising or adopting state WQSs.

88. On February 19, 2008, EPA issued a Determination Document of its review of Florida's 2007 amended IWR (2008 IWR Determination Document). This 2008 IWR

Determination Document made two significant agency decisions. First, EPA listed IWR provisions which EPA determined were new or revised WQS, and determined those listed new or revised WQSs were consistent with the requirements of the CWA. Second, and most importantly, this 2008 EPA IWR Determination Document held that "no provision of Florida's IMR methodology relates to the antidegradation," a major portion of Florida's WQSs. See, 2008 EPA IWR Determination Document, pg. 8.

89. Neither Florida's submittal of the 2007 IWR documents to EPA, nor the 2008 EPA IWR Determination Document, provided any explanation or justification for the absence of methodology relating to antidegradation water quality data and information to be used in preparing Florida's Section 303(d) list of WQLSs. As a matter of law, without methodology relating to Florida's antidegradation WQSs, Florida's IWR cannot be found by EPA to be consistent with the requirements of Section 303(d)(4)(B) and 40 C.F.R. §130.7(b)(2)&(3).

90. Assembling and evaluating all existing water quality data and information relating to Florida's adopted antidegradation WQSs is essential and necessary to perform a Section 303(d) assessment of whether Florida antidegradation WQSs are being attained in Florida's surface waters. In order to establish a Tier 2 assimilative capacity baseline, Florida must assemble and evaluate all available ambient water quality data and information for each surface water body. Establishment of the Tier 2 assimilative capacity baseline is necessary to determine the cumulative ambient water quality effect of: (1) effluent limitations of permitted discharges point source, (2) narrative effluent limitations of NPDES municipal separate storm sewer systems (MS4), (3) pollution loads of non-point sources, (4) pollutant loads which Florida has exempted from Tier 2 antidegradation review, (5) water quantity alterations which adversely affect water

quality but which Florida has exempted for CWA review, and (6) water transfers between Florida waterbodies.

91. Florida's 2007 IWR which EPA approved in 2008 did not contain any methodology for assessing Florida's antidegradation WQSs. Without antidegradation implementation methodology for assessing all available water quality data and information related to evaluating whether Florida's surface water bodies are attaining Florida's antidegradation WQSs, Florida's 2007 IWR is a modification and revision of Florida's antidegradation WQSs. The absence of antidegradation implementation methodology in Florida's 2007 IWR is the equivalent of the repeal or abandonment by Florida of the implementation of Florida's antidegradation WQSs.

92. EPA's determination that the 2007 IWR had no provision to assess water quality and information for attainment of Florida's antidegradation WQSs was an EPA finding and determination that Florida's revised 2007 IWR did not comply with the antidegradation requirements of the CWA. This EPA determination had three separate effects. First, this was an EPA determination that the 2007 IWR failed to meet the minimum requirements of Section 303(d) and 40 C.F.R. §130.7(d)(2) for an impaired waters antidegradation methodology. Second, this was an EPA determination that Florida's 2007 IWR methodology refused to implement Florida's antidegradation WQSs, an adopted state regulatory refusal which constituted the amendment, revision, or abandonment of Florida's antidegradation WQSs in a manner indirect conflict with the requirements of the CWA. See, 33 U.S.C. §303(c)(2)(A); 33 U.S.C. §303 (c)(3) & (4); 33 U.S.C. §303(d)(4)(B); 40 C.F.R. §130.7(b)(2)&(3); Fla. Public Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1078 (11th Cir. 2004); Miccosukee Tribe of Florida. v. United States, 105 F.3d 599 (11th Cir. 1997). Third, this EPA determination

required EPA to independently evaluate whether the ambient water quality in Florida waterbodies was attaining Florida's antidegradation WQSs. See, 40 C.F.R. §130.7(d)(2).

93. EPA's 2008 IWR Decision Document determination that Florida's 2007 IWR had no provision to assess water quality and information for attainment of Florida's antidegradation WQSs obligated EPA to disapprove Florida's 2007 IWR.

94. EPA's 2008 approval of Florida's 2007 IWR was arbitrary, capricious, and otherwise not in accordance with law, and it was beyond the authority of EPA. Additionally, EPA's 2008 Decision Document approval of Florida's 2007 IWR was in excess of EPA's authority.

95. The law requires EPA when reviewing Florida's IWR to made a "determination whether the Impaired Waters Rule complied with the requirements of the Clean Water Act, including its anti-degradation policy." Fla. Public Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1078 (11th Cir. 2004).

96. EPA's 2008 IWR Decision Document failed to offer any explanation or rationale how Florida's 2007 IWR without methodology and implementation criteria related to Florida's the antidegradation WQSs could comply with the requirements of the CWA and its regulations.

97. EPA's 2008 approval of Florida's 2007 IWR was a direct failure of EPA to follow its own regulations.

98. The absence of antidegradation implementation methodology in Florida's 2007 IWR is a revision of Florida's antidegradation WQSs which fails to comply with the requirements of the CWA.

Florida's submitted Section 303(d) assessments and lists of WQLSs

99. In 1988 EPA was sued because Florida had failed to identify WQLSs (impaired waters) and failed to develop and assign TMDLs to those waters. ManaSota-88, Inc. v. Tidwell, 896 F.2d 1318, 1322 (11th Cir. 1990).

100. In 1992, based upon settlement of 1988 ManaSota-88 litigation, Florida submitted a Section 303(d) assessment and WQLSs list to EPA. This 1992 Section 303(d) assessment and WQLSs list has been updated by Florida submittals to EPA in 1998 and 2003.

101. Since 2002, FDEP has divided its surface water resources into 29 major watersheds, and organized these watersheds into five basin groups for Section 303(d) assessment and identification purposes. FDEP's assessment basin groups are named Group One through Group Five basins, and are on a five year update rotation cycle. Each FDEP assessment group represents appropriately twenty percent (20%) of Florida's watersheds, with each of these assessment groups is subdivided into watersheds by means of water body identification numbers (WBID).

102. Since 2002 FDEP has attempted to submit one assessment group to EPA Region IV each year. FDEP records indicate FDEP has submitted to EPA Region IV Section 303(d) assessments for these basins in the following years.

* Group One basin submittals in 2002, 2009, and 2013.

* Group Two basin submittals in 2004 and 2009.

* Group Three basin submittals in 2005 and 2010.

* Group Four basins submittals in 2006 and 2010

* Group Five basins submittals in 2009 and 2012

103. EPA Region IV records indicate that on October 17, 2008, Florida submitted to EPA updated Section 303(d) reassessments and revised lists of WQLSs for the Group One and Group

Five basins, these being updates of Florida's 2003 Section 303(d) assessment and list of WQLSs. On August 17, 2009 Florida amended its October, 17, 2008 submission to include a Group Two basin for EPA's review. EPA Region IV combined these three FDEP Section 303(d) assessments and referred to them as the "2009 Update." See, EPA's 2009 Amended Decision Document, pg. 3.

104. The 2009 Update provided that all other water bodies included in Florida's 2003 Section 303(d) list which were not delisted remained on the Section 303(d) list after this reassessment. The Group One basin included Tampa Bay. The Group Five basin, known as the Springs Coast, included Boca Ciega Bay in Pinellas County, and extended northward to the mouth of the Withlacoochee River which lies between Citrus County and Levy County.

105. Florida used its 2007 IWR methodology in performing its Section 303(d) assessment of Group One, Group Two, and Group Five basins submitted to EPA on August 17, 2009. Florida did not assemble or evaluate the existing available antidegradation water quality data and information, nor did Florida evaluate whether Florida's waterbodies in these three basins attained or achieved compliance with Florida's antidegradation WQSs. To date, Florida has never established the baseline Tier 2 assimilative capacity of any Florida's waterbody.

106. EPA's September 2, 2009 Amended Decision Document Regarding Florida's Section 303(d) List Amendments to for Groups One, Group Two, and Group Five basins (2009 Amended Decision Document) determined that:

> "EPA's regulations expressly provide that "[f]or purposes of listing waters under Section 130.7(b), the term 'water quality standards applicable to such waters' and 'applicable water quality standards' refer to those water quality standards established under section 303 of the Act, including numeric criteria, narrative criteria, water body uses, and antidegradation requirements. 40 C.F.R. 130.7(b)(3). EPA's review of state section 303(d) ensures that those lists identify

> water quality limited segments with existing state [EPA-Approved water quality] standards. ”(e.s.). (2009 Amended Decision Document, pg. 8).

107. In reviewing Florida’s 2009 Update of Florida’s Section 303(d) list of WQLSs (impaired waters), EPA stated that it considered Florida’s IWR methodology, but that EPA measured the adequacy of Florida’s list only against EPA-approved state WQSs, relevant provisions of the CWA, and EPA’s implementing regulations. See, 2009 Amended Decision Document, footnote 7, pg. 15. However, EPA did not assess Florida’s antidegradation WQSs data and information.

108. EPA’s 2009 Amended Decision Document for Florida’s 2009 list of WQLSs (impaired waters) stated that EPA

> “was unsure whether the methodology [of Florida’s IWR] was a reasonable method for identifying [WQLSs], the Region [EPA Region IV] conducted further waterbody and data analysis. Where EPA determined that FDEP’s application of the IWR did not properly implement Florida’s approved water quality standards, EPA addressed that inconsistency as part of this 303(d) list process...The Agency reviewed FDEP’s waterbody assessment for all designated uses, based upon Florida’s water quality standards.”

109. While this EPA statement is a determination that the 2009 Update did not assess and evaluate all available water quality-related data and information based upon Florida’s WQSs, EPA Region IV only did an independent assessment of water quality-related data and information against some of Florida’s WQSs, but EPA did not perform an independent assessment and evaluation of attainment of Florida’s antidegradation WQSs and Free From WQSs. EPA did not assess and evaluate available water quality-related data and information concerning: (1) the ambient water quality of Florida water columns and sediments are attaining Florida’s antidegradation WQSs, (2) whether Florida sediments are attained Florida’s Free From WQSs, (3) whether water quantity flow reductions and alterations of timing of flows attains

Florida's WQSs, and (4) whether water transfers attain Florida's WQS, including attainment of Florida's antidegradation WQSs and "Free From" WQSs.

110. EPA's 2009 Amended Decision Document did not explain or provide any rationale for: (1) EPA's failure to assess and evaluate the subject Florida surface waters for attainment of Florida's antidegradation WQSs; (2) EPA's failure to assess and evaluate attainment of Florida's WQSs in sediments (antidegradation and Free From WQSs); (3) EPA's failure to assess and evaluate whether water quantity flow reductions and alterations of timing of flows attains Florida's WQSs, and (4) EPA's failure to assess and evaluate the whether downstream waterbodies attain Florida's WQSs after water transfers.

111. The 2009 Amended Decision Document list of impaired waters (WQLSs) is based upon assessment of water quality against Class I, II, and III WQSs, but not Florida's antidegradation WQSs as required by the CWA. See, 40 C.F.R. 130.7(b)(3).

112. Florida's 2009 Update, and EPA's 2009 Amended Decision Document failed to assess and evaluate available water quantity data and information to determine whether water quantity flow reductions and alterations of timing of surface water flows adversely affects attainment of Florida's WQSs.

113. Florida's 2009 Update and EPA's 2009 Amended decision Document failed to assess and evaluate water quality data and information whether the water transfers of surface waters adversely affects downstream waters attain Florida's WQSs.

114. On May 13, 2010, EPA Region IV took action on Florida's Update to Florida's Section 303(d) list of WQLSs in Florida's Group Three basin. EPA's May 13, 2010 Decision Document approved Florida's Group Three basin update of Section 303(d) list of WQLSs (impaired waters), a list which was not based upon an assessment and evaluation of

antidegradation water quality data and information. Neither FDEP nor EPA made any evaluation or determination whether the subject waterbodies were attaining compliance with Florida's antidegradation WQSs.

115. EPA's May 13 Decision Document did not explain or provide any rationale for EPA's failure to assess and evaluate the subject Group Three basin surface waters for attainment of Florida's antidegradation WQSs.

116. On December 21, 2010, EPA Region IV took action on Florida's Update to Florida's Section 303(d) lists of WQLSs in Florida's Group Four basin. EPA's December 21, 2010 Decision Document approved Florida's Group Four basin update of Section 303(d) list of WQLSs, a list which was not based upon an assessment and evaluation of antidegradation water quality data and information. Neither FDEP nor EPA made any evaluation or determination whether the subject waterbodies were attaining compliance with Florida's antidegradation WQSs. EPA's December 21 Decision Document did not explain or provide any rationale for EPA's failure to assess and evaluate the subject Group Three basin surface waters for attainment of Florida's antidegradation WQSs.

117. EPA's December 21, 2010 Decision Document once again determined, as did the EPA's 2009 Amended Decision Document (see, paragraph 93 above), that:

> "EPA's regulations expressly provide that "[f]or purposes of listing waters under Section 130.7(b), the term 'water quality standards applicable to such waters' and 'applicable water quality standards' refer to those water quality standards established under section 303 of the Act, including numeric criteria, narrative criteria, water body uses, and antidegradation requirements. 40 C.F.R. 130.7(b)(3). EPA's review of state section 303(d) ensures that those lists identify water quality limited segments with existing state [EPA-Approved water quality] standards. "(e.s.). (December 21, 2010 Decision Document, pg. 9).

Despite this EPA repeatedly made determination that the CWA mandates Section 303(d) lists of WQLSs be based upon evaluation of whether Florida waters attain compliance with Florida's antidegradation WQSs, EPA has never required Florida to perform such a Section 303(d) antidegradation assessment and evaluation, nor has EPA ever itself independently performed such a mandatory Section 303(d) antidegradation assessment and evaluation.

The Davises' 2009 Suit

118. On June 9, 2009, the Davises filed suit against EPA, the EPA administrator, and the EPA Regional Administrator of EPA Region IV in this court in the Middle District of Florida, Tampa Division. (M.D. Fla. Case No. 8:09-cv-1070-EAK).

119. Count VI of the Davises 2009 Amended Complaint sought review of EPA's 2008 IWR Decision Document approval Florida's 2007 IWR, and Count VII of the Amended Complaint sought review of EPA's approval of the Florida's CWA Section 303(d) lists of impaired waters. See, Doc. #31 of Case No. 8:09-cv-1070-EAK.

120. The Davises filed their 2009 law suit out of concern for implementing and enforcing the CWA's antidegradation policy and implementation criteria, especially including the protection of Tier I "existing uses," protection of Tier II assimilative capacity, and the need to prevent the degradation of the existing ambient water quality in OFWs, especially Clam Bayou of Boca Ciega Bay in south Pinellas County.

2010 Settlement Agreement between EPA and the Davises

121. On December 20, 2010, approximately 32 months ago, the Davises and EPA entered a settlement agreement (2010 Settlement Agreement) concerning the Davises Counts VI and VII of their 2009 Amended Complaint. The 2010 Settlement Agreement stated that the agreement shall not be admitted for any purpose in any proceeding without prior notice to and the express

consent of EPA. EPA has not yet expressed consent to the introduction of the Settlement Agreement. It was expressly agreed by the Davises and EPA that agreement was not an admission of fact or law.

122. The 2010 Settlement Agreement provided the Davises reserved the right to petition EPA to initiate rulemaking on the issue of MS4 permits to implement the CWA's antidegradation WQSs and restoration of Section 303(d) listed impaired waters, and the opportunity to challenge in any appropriate forum the lawfulness of any antidegradation policy implementation methodology EPA ultimately promulgates pursuant to CWA 303(c).

123. The 2010 Settlement Agreement generally provided that when reviewing Florida's next Section 303(d) list for Group 5, EPA would consider all Florida WQSs, including antidegradation requirements, and it would consider all existing and readily available water quality related data and information. As part of this review, EPA would consider Florida's WQSs in Fla.Admin.Code R. 62-4.242, 62-302.500, 62-302.200, 62-302.300, and 62-302.700.

124. If EPA disapproved Florida's next Group 5 Section 303(d) list submission for failure to appropriately assess whether the State's Group 5 waters are attaining WQSs, including antidegradation requirements, EPA would identify those waters not identified by Florida that EPA determines not to be attaining any applicable WQS and take action to add such waters to Florida's Group 5 Section 303(d) list pursuant to CWA Section 303(d)(2) and 40 C.F.R. §130.7(d)(2).

125. On Sunday, December 26, 2010, the Tampa Bay Times published an article regarding the 2010 Settlement Agreement. This Times article quoted Wyn Hornbuckle, public affairs specialist at the U.S. Department of Justice, stating that "The EPA intends to issue

national guidance on how antidegradation requirements should be incorporated into states' review of their waters."

126. On December 20, 2010, the Davises agreed to allow EPA until 2012 to perform these mandatory, non-discretionary Section 303(d)(1) and 40 C.F.R. §130.7 antidegradation WQSs assessment and evaluation duties in order for EPA to develop a pilot process to implement the mandatory, non-discretionary antidegradation duties of Section 303(d) and 40 C.F.R. §130.7(b). Now, over two and one-half (2 ½) years after executing the 2010 Settlement Agreement, EPA still has not performed its mandatory, non-discretionary Section 303(d) and 40 C.F.R. §130.7(b) antidegradation WQSs evaluation duties.

127. On December 21, 2010, EPA took final action approving Florida's Group Four basin update to the Section 303(d) assessment and list of WQLSs, an assessment and WQLSs list which were not based upon assessment and evaluation of Florida's antidegradation WQSs.

128. On January 18, 2011, James D. Giattina, Director, Water Protection Division, EPA Region IV, signed and issued an EPA Decision Document which identified 5 additional WQLSs in Florida's Group Four basin, an EPA determination that Florida's Section 303(d) assessment and WQLSs list was improperly based upon Florida's IWR methodology.

EPA antidegradation actions since 2010 Settlement Agreement

129. During meetings in with states in November and December, 2010, and February, 2011, EPA gave notice to states that it was considering WQSs changes in EPA's regulations during the summer of 2011 and requested comments. Specifically, EPA gave notice it was considering regulatory changes to 40 C.F.R. Part 131, EPA's WQS section of CWA implementation regulations. The EPA notice stated that among the WQSs changes under consideration by EPA included considering requiring states to adopt more detailed

antidegradation implementation requirements in state WQSs. EPA advised states that EPA was considering such WQSs regulation changes because states have a wide variety of ways of providing antidegradation WQSs implementation, and that EPA believed states are not appropriately implementing the antidegradation WQSs.

130. On March 17, 2011, the Association of State and Interstate Water Pollution Control Administration (ASIWPCA) submitted written comments to EPA concerning EPA's notice. ASIWPCA recommended EPA give states time to refine their implementation procedures, allowing for refinement through EPA guidance. FWF and the Davises respectfully disagree with the ASIWPCA. The CWA and EPA's implementing regulations currently require states to adopt antidegradation WQS implementation criteria, and EPA guidance policy statements cannot make substantive changes to the existing enacted EPA antidegradation regulations. See, 5 U.S.C. §553(b)(3); Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995)(" if an agency adopts 'a new position inconsistent with' an existing regulation, or effects 'a substantive change in the regulation, notice and comment are required."). EPA must comply with its current existing regulations which clearly require states to assess attainment of state antidegradation WQSs in Section 303(d) assessments and evaluations. Agency failure to follow its own regulations is arbitrary and capricious. Simmons v. Block, 782 F.2d 1545, 1550 (11th Cir.1986).

131. On March 21, 2011, EPA issued a memorandum from Denise Keehner, Director, Office of Wetlands, Oceans, and Watersheds, to all EPA Water Division Directors of EPA Regions 1-10, providing guidance on issues including state Section 303(d) assessments of waterbodies attainment of antidegradation WQSs. The memorandum recognized that water quality assessments by states have focused on whether numeric and narrative WQSs are being attained, but noted that consideration of antidegradation WQSs provides "a greater opportunity

to protect human health and wildlife values, achieve healthy watersheds, and fulfill in a more cost-effective manner the CWA's primary objective to restore and maintain the nation's waters." The memorandum further stated that the "EPA intends to work with States and other stakeholders to determine whether State antidegradation requirements have been obtained."

132. Based upon information and belief, in April of 2011, EPA engaged approximately 10 states on the issue concerning antidegradation and Section 303(d) listing of WQLSs.

133. Based upon information and belief, in late 2011 or early 2012, EPA forwarded for review an EPA antidegradation implementation guidance to the Office of Information and Regulatory Affairs (OIRA) located within the Office of Management and Budget (OMB). The FWF and the Davises attempted to obtain copies of the OIRA documents on this subject, but they have been successful only in obtaining the March 17, 2011 ASIWPCA letter.

134. Florida was scheduled to submit it Group Five basin cycle 2 Section 303(d) assessment and WQLSs list update on by the end of 2011. On or about May 23, 2012, Florida belatedly submitted its final Group Five basin cycle 2 Section 303(d) assessment and WQLSs list to EPA Region IV. To date, after more than 14 months since formal submission to EPA Region IV, EPA has not yet issued a Decision Document concerning this Florida submittal.

135. Based upon information and belief, EPA has not to date issued any national guidance or proposed regulations regarding how state antidegradation WQSs should be considered when assessing waters pursuant to Section 303(d) of the CWA.

Petition No. 1 to initiate rulemaking

136. On June 8, 2012, over 13 months ago, the FWF and the Davises petitioned EPA to initiate rulemaking to related to Section 303(d) assessments and lists of WQLSs. This petition made two requests. First, the petition requested EPA initiate rule making for the development

and promulgation of national regulations that address how antidegradation requirements of adopted state WQSs must be considered by states and the EPA when assessing waters pursuant to CWA §303(d). Second, this petition requested EPA initiate rulemaking to amend 40 C.F.R. §130.7(b)(5) by adding new subsection 130.7(b)(5)(v) pertaining to the data and information that must be assembled and evaluated by states when assessing waters pursuant to Section 303(d) for compliance with the antidegradation requirements of applicable state WQSs.

137. Existing C.F.R. §130.7(b)(5), with the proposed new underlined §130.7(b)(5)(v), reads as follows.

> "(5) Each State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the list required by §§130.7(b)(1) and 130.7(b)(2). At a minimum 'all existing and readily available water quality-related data and information' includes but is not limited to all of the existing and readily available water quality-related data and information about the following categories of waters:
>
> * * *
>
> "(v) Waters identified by the State as not meeting the antidegradation requirements of applicable water quality standards. At a minimum, the process to identify whether waters meet the antidegradation requirements of applicable water quality standards shall include all existing data and information concerning Tier 1existing shellfish, recreational, and aquatic life uses and associated water quality-related data and information on and after November 28, 1975; all existing water quality-related data and information since November 28, 1975 for calculating the baseline assimilative capacity of Tier 2 waters, and degradation of the Tier 2 baseline assimilative capacity; if a state has adopted Tier 2.5 criteria, all existing water quality-related data and information germane to establishing the applicable baseline existing ambient water quality of the Tier 2.5 waters; and all water quality-related data and information concerning the baseline water quality of Tier 3 outstanding national waters."

138. Promulgation of the new §130.7(b)(5)(v) proposed by the FWF and the Davises is timely and beneficial to EPA to begin performing EPA's mandatory, non-discretionary Section 303(d) duty to implement the antidegradation requirements of applicable water quality standards.

139. The proposed new §130.7(b)(5)(v) will more specifically require states to assemble and evaluate all existing and readily available water quality-related data and information concerning the antidegradation requirements of applicable state water quality standards, which then ties this antidegradation water quality-related data and information assembly and evaluation by states with existing §130.7(b)(6) which requires states to describe the data and information the state used, and to provide a rationale for any state decision not to use any existing water quality-related data and information described in §130.7(b)(5). Descriptions of such data and information used by the state, along with a statement of a state rationale for any decision not to use any existing and readily available antidegradation water quality-related data and information is necessary for EPA to properly review determinations by states to list or not list waters for antidegradation reasons.

140. To date, no state has ever performed this impaired waters assessment using the antidegradation state WQSs as required by CWA §303(d) and 40 C.F.R. §130.7(b). Nor has any state assembled and evaluated all existing and readily available water quality-related data and information relating to implementing applicable antidegradation requirements of applicable water quality standards under the current language of §130.7(b)(5). Nor has any state submitted documentation to support the state decisions not to use any existing and readily available water quality-related data and information for assessment of state waters for impairment under antidegradation standards and criteria, as required by §130.7(b)(6).

141. EPA has never performed it's mandatory, non-discretionary duty to assess waters for compliance with the antidegradation requirements of state water quality standards when reviewing state submitted Section 303(d) lists of impaired waters, nor has EPA ever disapproved the state Section 303(d) lists which have failed to assess state adopted antidegradation WQSs.

142. EPA has made determinations that states and EPA have not been complying with the existing Section 130.7(b) regulation, and that further detail on how to assess and identify waterbodies using state adopted antidegradation WQSs would be beneficial to EPA, states, and the public.

143. EPA has not yet acted upon the June 8, 2012 petition to initiate rulemaking. EPA has neither initiated rulemaking, nor has EPA rejected this petition to initiate rulemaking.

144. EPA has unlawfully withheld and unreasonably delayed action on the June 8, 2012 petition to initiate rulemaking. See, 5 U.S.C. §706(1) (unlawfully withheld or unreasonably delayed action in violation of the APA).

Petition No. 2 to initiate rulemaking

145. On July 10, 2012, over 12 months ago, the FWF petitioned EPA to initiate rulemaking to promulgate the necessary revisions to the current Florida antidegradation WQSs in order to met the minimum requirements of the CWA. Sara Hisel-McCoy, Director, Standards and Health Protection Division, EPA's Office of Science and Technology has acknowledged receipt of this petition, and has advised the FWF and the Davises that EPA is reviewing the July 10, 2012 petition.

146. This petition requests EPA initiate rulemaking to promulgate antidegradation WQSs implementation standards in Florida's WQSs regulations because Florida has not adopted appropriate antidegradation WQSs implementation criteria, as evidenced by Florida's IWR and Florida's failure to implement Florida's antidegradation WQSs in Section 303(d) assessments.

147. The FWF's undersigned legal counsel has participated in a conference call with Ms. Hisel-McCoy and other EPA staff regarding FWF's July 10, 2012 petition. EPA has not yet

acted upon this petition to initiate rulemaking. EPA has neither initiated rulemaking, nor has EPA rejected this petition to initiate rulemaking.

148. EPA has unlawfully withheld and unreasonably delayed action on the June 8, 2012 petition to initiate rulemaking. See, 5 U.S.C. §706(1) (unlawfully withheld or unreasonably delayed action in violation of the APA).

Petition No. 3 to initiate rulemaking

149. August 8, 2012, approximately 12 months ago, the FWF and the Davises petitioned EPA to initiate rulemaking to promulgate an amendment of Fla.Admin.Code R. 62-624.500(2) concerning the standards for Florida to use when issuing or denying an application for an individual NPDES MS4 permit.

150. Currently Fla.Admin.Code R. 62-624.500(2) reads as follows.

> **"Standards for Issuing or Denying Individual Permits.**
> * * *
> (2) The Department shall issue an MS4 only if the applicant affirmatively provides the Department with reasonable assurance that the stormwater management program will achieve a reduction of the discharge of pollutants from the MS4 to the Maximum Extent Practicable in accordance with 40 CFR 122.26."

This language does not reference necessary water quality-based effluent limitations as required the CWA.

151. The FWF and the Davises have petitioned EPA to promulgate the following underlined revision to Fla.Admin.Code R. 62-624.500(2).

> **"Standards for Issuing or Denying Individual Permits.**
> * * *
> (2) The Department shall issue an MS4 only if the applicant affirmatively provides the Department with reasonable assurance that the stormwater management program will achieve a reduction of the discharge of pollutants from the MS4 to the Maximum Extent Practicable, and such other provisions determined to be appropriate for the control of such pollution. Other provisions determined to be appropriate for the control of such pollution are effluent

> limitations in the permit which contain clear, specific, measurable and enforceable water pollution controls, with milestones, benchmarks, and time frames, that require the discharge comply with applicable wasteload allocations requirements and not cause or contribute to the violation of Water Quality Standards.

152. This petition to initiate rulemaking language is based upon the requirements of 33 U.S.C. §1342(p)(3)(B)(iii) and 40 C.F.R. §122.44(d)(1). The CWA standard for NPDES MS4 permits is to have "controls which reduce the discharge of pollutants to the maximum extent practicable ....and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (e.s.). See, 33 U.S.C. §1342(p)(3)(B)(iii); Defenders of Wildlife v. Browner, 191 F.3d 1159, 1166 (9th Cir. 1999).

153. EPA's 2010 "MS4 Permit Improvement Guidance" provides MS4 permit requirements must be clear, specific, measurable, and enforceable, and must contain permit conditions consistent with the requirements of load allocations in applicable TMDLs.

154. On April 15, 2010, EPA Region IV made a determination that, pursuant to 40 C.F.R. §122.44(d)(1)(vii)(B), NPDES MS4 permits issued by Florida must contain conditions that are consistent with the assumptions and requirements of WLAs in applicable TMDLs, the MS4 permits conditions must be clear, specific, and measurable in terms of required water quality controls, time-frames and milestones, and explain how the measures implemented will address the WLA. See, April 15, 2010 letter from James D. Giattina to the Director, FDEP Division of Water Resource Management.

155. EPA has not yet acted upon the subject August 8, 2012 petition to initiate rulemaking. EPA has neither initiated rulemaking, nor has EPA rejected this petition to initiate rulemaking.

156. EPA has unlawfully withheld and unreasonably delayed action on the August 8, 2012 petition to initiate rulemaking. See, 5 U.S.C. §706(1) (unlawfully withheld or unreasonably delayed action in violation of the APA).

EPA's Failure to implement 2010 Settlement Agreement

157. In May of 2012, Florida formally submitted its updated Group Five basin Section 303(d) evaluation and WQLSs list to EPA Region IV. The Group Five Section 303(d) documents which Florida has submitted to EPA to date do not contain assessment and evaluation of whether Florida's Group Five basin waterbodies are attaining compliance with Florida's antidegradation WQSs, nor do these documents contain any evaluation, determination, or assessment of Tier 2 assimilative capacity, or the OFW existing ambient water quality of 309 OFW, of waterbodies in the Group Five basin.

158. In response to request by the FWF and the Davises for documents pursuant to Florida's Public Records Acts, FDEP admitted in writing to the FWF and the Davises that it has never performed either the determination and assessment of Tier 2 assimilative capacity, nor the OFW existing ambient water quality of the 309 designated OFWs in Florida for Section 303(d) assessment.

159. FDEP further admitted on the administrative record of FDEP's November 15, 2012 Triennial Review public hearing at FDEP's Bob Martinez Center, 2600 Blair Stone Road, in Tallahassee, Florida, that FDEP has never performed either the determination and assessment of Tier 2 assimilative capacity, nor the OFW existing ambient water quality of 309 OFW, for Section 303(d) assessment. This FDEP Triennial Review public hearing was attended by two EPA representatives from EPA's Region IV office, one of whom was Lauren Petter.

160. To date, EPA has not performed an antidegradation review of Florida's Group Five basin Section 303(d) list of WQLSs, or any other Florida Section 303(d) list of WQLSs. EPA has never performed an independent EPA evaluation of available Florida antidegradation water quality-related data and information to establish Tier 2 assimilative capacities for Florida waterbodies, nor has EPA independently evaluated Florida's OFW existing ambient water quality data and information.

161. In 2013, pursuant to the dispute resolution terms of the 2010 Settlement Agreement, the Davises and EPA held a dispute resolution meeting, and the parties have been unable to resolve the Settlement Agreement implementation dispute within 45 days of that meeting.

162. Pursuant to the 2010 Settlement Agreement, the Davises' remedy at this time is to bring an action to reassert the claims in Counts VI and VII of their 2009 Amended Complaint, which the Davises are doing in more detail in the APA claims in Counts II, III, V, VI, VIII, IX, XI-XX of this complaint.

Count I
Defendants failed to perform mandatory, non-discretionary duty to require Florida to assemble and evaluate available antidegradation water quality data and information
(CWA citizen suit- injunctive action)

163. Count I is a CWA citizen suit pursuant to 33 U.S.C. 1365 by the FWF against each of the three Defendants, seeking declaratory judgement and prospective injunctive relief.

The parties

164. The FWF re-alleges paragraphs 10-14 and 17-19 above.

FWF has standing

165. The FWF has suffered an actual and a reasonably foreseeable future threatened injury by the Defendants' unlawful failure to perform their mandatory, non-discretionary duties

under Section 303(d)(1) and 40 C.F.R. §130.7(b) to require Florida to assemble and evaluate all available water quality-related information and establish the baselines for Florida's antidegradation WQSs. The Defendants' unlawful actions have caused, and continue to cause, the FWF a procedural injury and to cause the FWF members a surface water quality degradation injury. The Defendants' unlawful actions continue to degrade of the surface water quality throughout the State of Florida, degradation which continues to injure the FWF's members use and enjoyment surface waters, and continues to prevent the proper CWA restoration of surface waters to CWA required antidegradation WQS levels. These injuries to the FWF and its members are directly traceable to the Defendants unlawful actions, and the FWF's injuries are likely to be redressed by a favorable decision.

166. The FWF has no adequate remedy at law, and issuance of the requested prospective remedial injunction order is in the public interest because it cures violations of the CWA and the APA. Monetary compensation to the FWF would circumvent environmental laws, and would be contrary to the environmental protection interests of the FWF and the interests of the public.

Jurisdiction and venue

167. The FWF re-alleges paragraphs 3, 5, and 8-10 above.

The Count I claim

168. The FWF re-alleges paragraphs 20-117, 129-135 and 157-162 above.

169. The Defendants have unlawfully failed to perform EPA's clear and specific mandatory, non-discretionary duties to require Florida to assemble and evaluate all available water quality-related information, and establish the assimilative capacity baselines for Florida's antidegradation WQSs, duties which Section 303(d)(1) and 40 C.F.R. §130.7(b) clearly mandate Florida perform.

170.The Defendants have the mandatory, non-discretionary duty to review and approve, or disapprove, Florida's submitted Section 303(d) impaired water lists. See, 33 U.S.C. §1313(d)(2); 40 C.F.R. §130.7(d)(2). EPA's review of Florida's submitted Section 303(d) list must ensure that lists of WQLSs by FDEP are consistent with Florida's antidegradation WQSs. Ibid.

171. The Defendants have a mandatory, non-discretionary duty to approve, or disapprove, Florida's Section 303(d) list of WQLSs not later than 30 days after the date Florida submitted the lists to EPA. See, 40 C.F.R. §130.7(b)(2). The Defendants have not yet acted upon Group Five basins assessment and WQLSs list which FDEP submitted to EPA on May 23, 2012.

172. No Florida Section 303(d) list of WQLSs submitted to EPA has ever complied with the requirements of 40 C.F.R. §130.7(b).

173. The Defendants have failed to require the Florida to assemble and evaluate all of the available water quality-related data and information, as mandated under the current language of 40 C.F.R. §130.7(b)(5).

174. The Defendants have failed to require Florida establish the existing antidegradation assimilative capacity of Florida's Tier 2.0 antidegradation waters and the Tier 2.5 antidegradation OFW existing ambient water quality, as mandated under the current language of 40 C.F.R. §130.7(b)(5).

175. To date, neither the State of Florida nor the EPA have performed the impaired waters assessment for Florida's antidegradation WQSs as required by CWA §303(d)(1) and 40 C.F.R. §130.7(b).

176. To date, the State of Florida has not submitted documentation to support Florida's decisions not to use any existing and readily available water quality-related data and information

for assessment of state waters for impairment under antidegradation WQSs and criteria, as required by §130.7(b)(6).

177. The Defendants' failure to require Florida to assemble and evaluate all of the available water quality-related data and information, and to establish the existing antidegradation assimilative capacity of Florida's Tier 2.0 antidegradation waters and the Tier 2.5 antidegradation OFW existing ambient water quality, allows Florida to eliminate implementation of Florida's antidegradation WQSs without any thorough EPA Section 303(c)(2)(A) review.

178. The FWF requests the court declare that the Defendants have unlawfully failed to perform their mandatory, non-discretionary duties under CWA Section 303(d) and 40 C.F.R. §130.7(b) to require the Florida to assemble and evaluate all available water quality-related information and establish the baselines for Florida's antidegradation WQSs.

179. The FWF requests the court declare EPA's 2009 Amended Decision Document, EPA's May 13, 2010 Decision Document, and EPA's December 21, 2010 Decision Document each to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore invalid.

180. The FWF requests the court grant the following prospective remedial injunctive relief.

A. Order the Defendants to require Florida to assemble and evaluate all of the available water-quality related data and information and to use this data and information to determine whether Florida's water bodies attain Florida's antidegradation WQSs.

B. Order the Defendants to require Florida to establish the existing antidegradation assimilative capacity of Florida's Tier 2.0 antidegradation waters.

C. Order the Defendants to require Florida to establish the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309 designated OFWs.

WHEREFORE, the FWF respectfully request the Court grant the following relief.

A. Declare the Defendants have unlawfully failed to perform their mandatory, non-discretionary duties under CWA Section 303(d) and 40 C.F.R. §130.7(b) to require the Florida to assemble and evaluate all available water quality-related information and establish the baselines for Florida's antidegradation WQSs.

B. Declare EPA's 2009 Amended Decision Document approval of Florida's Section 303(d) updates of Group One, Group Two, and Group Five assessments and WQLSs lists to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore invalid.

C. Declare EPA's May 13, 2010 Decision Document approval of Florida's Section 303(d) update of Florida's Group Three basin assessment and WQLSs lists to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore invalid.

D. Declare EPA's December 21, 2010 Decision Document approval of Florida's Section 303(d) update of Florida's Group Four basin assessment and WQLSs lists to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore invalid.

E. Issue a prospective remedial injunction which orders each of the three Defendants to perform their following mandatory, non-discretionary duties under CWA Section 303(d) and 40 C.F.R. §130.(7)(b). FWF requests the prospective remedial injunction order the Defendants to: (1) specifically direct Florida to assemble and evaluate all of the available water-quality related data and information concerning whether Florida's water bodies in Groups One Basin through Group Five Basin attain Florida's antidegradation WQSs; (2) specifically to direct Florida to establish the existing antidegradation assimilative capacity all of Florida's Tier 2.0 antidegradation waters; (3) specifically direct Florida to establish the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309 designated OFWs; and (4) specifically

direct Florida to determine whether Florida's surface waters are attaining Florida's antidegradation WQSs.

F. Award the FWF its costs and reasonable attorney fees; and

G. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count II
Defendants' failure to require Florida to assemble and evaluation available antidegradation water quality data and information was arbitrary, capricious, or otherwise not in accordance with law
(APA action-Section 706(2)(A))

181. Count II is pursuant to §706(2)(A) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

182. The FWF and the Davises re-allege paragraphs 10-19 above.

FWF and the Davises have standing

183. The FWF re-allege paragraphs 165-166 above. The Davises re-allege paragraphs 157-162 above.

184. EPA's 2009 Amended Decision Document, EPA's May 13, 2010 Decision Document, and EPA's December 21, 2010 Decision Document, are agency actions which adversely affect the interests and rights of the FWF and the Davises. The FWF and the Davises have suffered an actual or threatened injury by the Defendants' failure to perform their mandatory, non-discretionary duties under Section 303(d) and 40 C.F.R. §130.7(b) to require the State of Florida to assemble and evaluate all available water quality-related information and establish the baselines for Florida's antidegradation WQSs.

185. This unlawful action by the Defendants has caused, and will continue to cause in the future, a procedural injury to the Davises and the FWF, and a continuing degradation of surface water quality injury to the Davises and the FWF and its members. The FWF and the Davises are suffering legal wrongs within the meaning of the CWA and the APA because of the Defendants subject actions. The foreseeable degradations of Florida's surface water quality will in the future adversely affect the use and enjoyment Florida's surface waters by the Davises and the members of the FWF. The Defendant's unlawful actions is a continuing injury to the restoration of surface waters to antidegradation WQS levels. These injuries are directly traceable to the Defendants unlawful actions, and are injuries likely to be redressed by a favorable decision by this court.

186. The FWF and the Davises have no adequate remedy at law for the CWA violations by the Defendants. Issuance of the requested remedial compliance injunction order is in the public interest because it cures the identified violations of the CWA and the APA. Monetary compensation to the FWF and the Davises would circumvent environmental laws, and is contrary to the interests of the FWF, the Davises, and the public.

Jurisdiction and venue

187. The FWF and the Davises re-allege paragraphs 4, 6-10, and 167 above.

188. The APA confers a general cause of action upon persons "adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. §702. The FWF and the Davises have an APA cause of action because the CWA statute and regulations provide meaningful standards and mandates against which to judge the Defendants' actions. The express language of the CWA and its regulations, the structure of the CWA statutory and regulatory scheme, the objects of the CWA and its regulations, and the nature of the administrative action involved establish the APA cause of action of the FWF and the Davises. The agency discretion

exception of 5 U.S.C. §701(2) is very limited and is not applicable to this situation. Conservancy of Southwest Florida, et. al. v. U.S. Fish and Wildlife Service, 677 F.3d 1073 (11th Cir. 2012) (§701(2) agency discretion exception preclusion of APA review is uncommon).

The Count II claim

189. The FWF and the Davises incorporate paragraphs 20-117, 129-135, 157-162 and 169-180 above.

190. EPA's 2009 and 2010 Decision Documents regarding Florida's Section 303(d) assessment and evaluation of WQLSs are arbitrary, capricious, and otherwise not in accordance with law because EPA failed, without explanation or rationale, to perform EPA's mandatory, non-discretionary duties created by the clear and specific directives of Section 303(d) and 40 C.F.R. §130.7 to require Florida to assemble and evaluate the available water quality-related data and information to establish the necessary baseline antidegradation water quality levels for Florida's Tier 2 and Tier 2.5 to implement Florida's antidegradation WQSs. See, Conservancy of Southwest Florida v. U.S. Fish and Wildlife Service, 677 F.3d 1073 (fn 9) (11th Cir. 2012) ("The APA's arbitrary-and-capricious standard requires the agency to 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made,' and "[a]gency action is arbitrary and capricious if the agency has 'entirely failed to consider an important aspect of the problem' or has 'offered an explanation for its decision that runs counter to the evidence before the agency.'"). Agency failure to follow its own regulations is arbitrary and capricious. Simmons v. Block, 782 F.2d 1545, 1550 (11th Cir.1986).

191. Without established antidegradation Tier 2 and Tier 2.5 baselines, Florida's antidegradation WQSs are not capable of proper implementation. Section 303(d) assessment of

whether Florida's waters are attaining Florida's antidegradation WQSs is not possible without antidegradation baselines.

192. The 2009 and 2010 Decision Documents did not articulate how EPA can approve Florida's 2009 and 2010 Section 303(d) assessments and lists of WQLSs when Florida failed to perform the clear and specific antidegradation WQSs assessment and evaluation directives of CWA and its implementing regulations. No rational connection has been provided by EPA concerning how Florida and EPA can evaluate whether Florida's waterbodies are attaining compliance with Florida's antidegradation WQSs without assembling and evaluating available antidegradation water quality-related data and information. EPA did not explain how it determined whether ambient water quality of waterbodies is attaining Florida's antidegradation WQSs when the antidegradation baselines have not been established. Without Florida having established antidegradation Tier 2 and Tier 2.5 baselines Florida can neither implement Florida's antidegradation WQSs in Florida's permitting program, nor can Florida or EPA assess whether waterbodies are attaining Florida's antidegradation WQSs. See, National Wildlife Federation v. Norton, 332 F.Supp.2d 170 (D.D.C. 2004). (FWS failed to make or articulate a rational connection between the record facts and its 'no jeopardy' decision and failed to provide a proper analysis of the cumulative impact...").

193. EPA's 2009 Amended Decision Document; EPA's May 13, 2010 Decision Document, and EPA's December 21, 2010 Decision Document approved Florida's updates of Section 303(d) assessments and lists of WQLSs in all five of Florida's basin groups, that being Group One through Group Five, without articulating any rational basis or analysis concerning whether Florida's failure to assemble and evaluate available water quality-related data and

information was consistent with the requirements of Section 303(d) and 40 C.F.R. §130.7(b), was arbitrary, capricious, and otherwise not in accordance with law.

194. Florida's failure to ever perform at any time the above described Section 303(d) antidegradation WQSs assessment was a defacto approval of Florida's amendment of Florida's antidegradation WQSs without any EPA CWA Section 303(c)(2)(A) review. The Defendants' approval of Florida's failure to assemble and evaluate all of the available water-quality related data and information and establish the existing antidegradation assimilative capacity of Florida's Tier 2.0 antidegradation waters and the Tier 2.5 antidegradation OFW existing ambient water quality illegally allows Florida to eliminate implementation of Florida's antidegradation WQSs without any EPA Section 303(c)(2)(A) review.

195. The FWF and the Davises request the court declare that EPA's 2009 Amended Decision Document, EPA's May 13, 2010 Decision Document, and EPA's December 21, 2010 Decision Document each to are arbitrary, capricious, or not in accordance with law, and therefore each to be invalid.

196. The FWF and the Davises request the court grant the following prospective remedial injunctive relief.

A. Order the Defendants to require Florida to assemble and evaluate all of the available water-quality related data and information and to use this data and information to determine whether Florida's water bodies attain Florida's antidegradation WQSs.

B. Order the Defendants to require Florida to establish the existing antidegradation assimilative capacity of Florida's Tier 2.0 antidegradation waters.

C. Order the Defendants to require Florida to establish the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309 designated OFWs.

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare that the Defendants have arbitrarily, capriciously, or otherwise not in accordance with the law, failed to perform EPA's mandatory, non-discretionary duty under CWA Section 303(d) and 40 C.F.R. §130.7(b) to require Florida's 2009 and 2010 Section 303(d)(1) updated assessment and lists of WQLSs for in Group One thorough Group Five basins, to assemble and evaluate all available water quality-related information and establish the baselines for Florida's antidegradation WQSs.

B. Declare EPA's 2009 Amended Decision Document approval of Florida's 2009 update of Florida's Section 303(d)(1) assessment and lists of WQLSs in Group One, Group Two, and Group Five, to be arbitrary, capricious, and not in accordance with CWA §303(d)(1) and 40 C.F.R. §130.7(b), and therefore each to be invalid.

C. Declare EPA's May 13, 2010 Decision Document of approval of Florida's Section 303(d)(1) 2009 update of the Group Three basin to be arbitrary, capricious, and not in accordance with CWA §303(d)(1) and 40 C.F.R. §130.7(b), and therefore invalid.

D. Declare EPA's December 21, 2010 Decision Document of approval of Florida's Section 303(d)(1) 2009 update of the Group Four basin to be arbitrary, capricious, and not in accordance with CWA §303(d)(1) and 40 C.F.R. §130.7(b), and therefore invalid.

E. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties under CWA Section 303(d) and 40 C.F.R. §130.(7)(b). The injunction should order each of the three Defendants: (1) to direct Florida to assemble and evaluate all of the available water-quality related data and information concerning whether Florida's water bodies in Groups One basin through Group Five basin attain

Florida's antidegradation WQSs; (2) to direct Florida to establish the existing antidegradation assimilative capacity all of Florida's Tier 2.0 antidegradation waters; (3) to direct Florida to establish the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309 designated OFWs; and (4) to determine whether Florida's surface waters are attaining Florida's antidegradation

F. Award the FWF and the Davises their costs and reasonable attorney fees; and

G. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count III
Defendants' action not to require Florida to assemble and evaluate all available antidegradation water quality data and information was in excess of Defendants' authority
(APA action–Section 706(2)(C)

197. Count III is an action suit pursuant to §706(2)(C) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

198. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

199. The FWF re-allege paragraphs 165-166 and 184-186 above. The Davises re-allege paragraphs 157-162 and 184-186 above.

Jurisdiction and venue

200. The FWF and the Davises re-allege paragraphs 4, 6-10, and 188 above.

The Count III claim

201. The FWF and the Davises re-allege paragraphs 20-117, 129-135, 157-162, 169-180, 190-196 above.

202. The FWF and the Davises allege that the Defendants' 2009 and 2010 Decision Documents which approved Florida's Section 303(d) assessments and lists of WQLSs for Florida Group One through Group Five basins waters are in excess of the Defendants' authority.

203. Section 303(d) and 40 C.F.R. §130.7 provide clear and specific directives that require Florida to assemble and evaluate the available water quality-related data and information to establish the necessary baselines antidegradation water quality levels for Florida's Tier 2 and Tier 2.5 antidegradation WQSs.

204. The Defendants have no authority to exempt the State of Florida from the clear and specific mandates of CWA Section 303(d) and 40 C.F.R. §130.7(b) which require Florida to assemble and evaluate the available antidegradation related water quality-related data and information, and establish the baselines for Florida's antidegradation WQSs, namely, to establish the existing assimilative capacity of Florida's Tier 2 waters and the Tier 2.5 OFW existing ambient water quality of each of the 309 designated OFWs.

205. The Decision Documents did not articulate any authority which allows EPA to approve Florida's Section 303(d) assessments and lists of WQLSs without first assembling and evaluating available antidegradation water quality-related data and information. Without establishment of baselines for Florida's antidegradation WQSs, implementation and assessment of attainment with Florida's antidegradation WQSs is not possible.

206. The Decision Documents provided no rational explanation how Florida and EPA can evaluate whether Florida's waterbodies are attaining compliance with Florida's

antidegradation WQSs without assembling and evaluating available antidegradation water quality-related data and information.

207. It is factually and legally impossible for either Florida or the EPA to determine whether collectively pollution loads are preventing Florida water bodies from attaining Florida antidegradation WQSs. Determination whether the ambient water quality attaining Florida's antidegradation WQSs necessities the establishment of the Tier 2 assimilative capacity baselines and OFW Tier 2.5 baseline OFW ambient water quality. Calculation of Florida's Tier 2 baseline assimilative capacities and baseline OFW existing ambient water levels for all 309 OFWs is necessary to assess the cumulatively effects of pollution loads on Florida's water bodies. Pollution loads which adversely affect antidegradation WQSs include: (1) pollution loads of effluent limitations of permitted point source discharges; (2) pollution loads of narrative effluent limitations on NPDES MS4 discharges; (3) pollution loads of non-point sources; (4) pollutant loads of activities which Florida has exempted from Tier 2 and Tier 2.5 antidegradation permit review such as BMPs, general permits, generic permits, etc.; (5) water quantity alterations which adversely affect water quality; and (6) water transfers between Florida waterbodies. See, paragraphs 27 and 90 above.

208. The Defendants' have no authority to allow an amendment of Florida's antidegradation WQSs without compliance with the WQSs review requirements of CWA Section 303(c). See, 33 U.S.C. §

209. Florida's failure to ever perform at any time the above described Section 303(d) antidegradation WQSs assessment is also a defacto amendment of Florida's antidegradation WQSs which the Defendants have approved without any EPA CWA Section 303(c)(2)(A) review. The Defendants' failure to require Florida to assemble and evaluate all of the available

water-quality related data and information and establish the existing antidegradation assimilative capacity of Florida's Tier 2.0 antidegradation waters and the Tier 2.5 antidegradation OFW existing ambient water quality allows Florida to eliminate implementation of Florida's antidegradation WQSs without any EPA Section 303(c)(2)(A) review.

210. The FWF and the Davises request the court declare that EPA's 2009 Amended Decision Document, EPA's May 13, 2010 Decision Document, and EPA's December 21, 2010 Decision Document each to be in excess of the Defendants' authority, and therefore invalid.

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare that the Defendants have exceeded their authority by approving Florida's 2009 and 2010 CWA Section 303(d) lists of WQLS without first assembling and evaluating available antidegradation WQS data and information as mandated by CWA Section 303(d) and 40 C.F.R. §130.7(b), and that these EPA 2009 and 2010 approvals each are therefore invalid.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties under CWA Section 303(d) and 40 C.F.R. §130.(7)(b). The injunction should order each of the three Defendants: (1) to direct Florida to assemble and evaluate all of the available water-quality related data and information concerning whether Florida's water bodies in Groups One through Group Five basins attain Florida's antidegradation WQSs; (2) to direct Florida to establish the existing antidegradation assimilative capacity all of Florida's Tier 2.0 antidegradation waters; and (3) to direct Florida to establish the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309

designated OFWs; and (4) to determine whether Florida's surface waters are attaining Florida's antidegradation WQSs.

C. Award the FWF and the Davises their costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count IV
Defendants failed to perform mandatory, non-discretionary duty to independently evaluate the available antidegradation water quality data and information when reviewing Florida's Section 303(d) lists
(CWA citizen suit- injunctive relief request)

211. Count IV is a CWA Section 1365 citizen suit by the FWF against each of the three Defendants, seeking declaratory judgement and prospective injunctive relief.

The parties

212. The FWF re-alleges paragraphs 10-14 and 17-19 above.

The FWF has standing

213. The FWF re-alleges paragraphs 165-166, and 184-186 above.

Jurisdiction and venue

214. The FWF re-alleges paragraphs 3, 5, and 8-10 above.

The Count IV claim

215. The FWF re-alleges paragraphs 20-117, 129-136, 157-162, 169-180 and 190-196 above.

216. Because Florida failed to establish antidegradation baselines for Florida's antidegradation WQSs, the Defendants had a clear and specific mandatory, non-discretionary duty to independently establish such antidegradation baselines for Florida's antidegradation WQSs. Once the Defendants failed to require Florida to assess and evaluate existing and readily

available antidegradation water quality-related data and information to list WQLSs, and to use such data and information to establish baselines for Florida's antidegradation WQSs; then the Defendants had a mandatory duty to independently assess such data and information, and use such data and information to establish baselines for Florida's antidegradation WQSs so that the Defendants could conduct an assessment of whether Florida's Section 303(d) impaired waters assessment and WQLSs on Florida's antidegradation WQSs complied with the antidegradation policy of the CWA and whether Florida's water bodies are attaining Florida's antidegradation WQSs. See, Fla. Public Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1078 (11th Cir. 2004)(EPA had the mandatory, non-discretionary duty to "make a threshold determination whether the Impaired Waters Rule complied with the requirements of the Clean Water Act, including its antidegradation policy."); 33 U.S.C §303(d)(4)(B).

217. Florida's submittals of Section 303(d) assessments and lists of WQLSs did not include baseline antidegradation water quality levels for Florida's antidegradation WQSs. The Defendants had a mandatory duty to either order Florida to establish such antidegradation water quality baselines, or for the Defendants to independently establish such baseline antidegradation water quality lines for the purpose of throughly reviewing the effect of Florida's Section 303(d) assessments and lists of WQLSs on Florida's antidegradation WQSs.

218. The absence of baseline antidegradation water quality levels constituted an illegal revision of Florida's antidegradation WQSs and implementation criteria. The Defendants' have no authority to allow Florida to indirectly amend Florida's antidegradation WQSs by Florida refusing to implement Florida's antidegradation WQSs. The Defendants have a mandatory, non-discretionary duty to perform a thorough review CWA Section 303(c) of the effects of Florida's Section 303(d) assessment and lists of WQLSs on Florida's antidegradation WQSs.

219. The Defendants unlawfully failed to perform their mandatory, non-discretionary duties: (1) to independently evaluate the existing and readily available antidegradation water quality-related data and information for Florida's surface waters, (2) to independently establish the baseline Tier 2 assimilative capacity for applicable Florida waters, (3) to independently establish Tier 2.5 OFW "existing ambient water quality" for all of the 309 OFWs, and (4) to perform a thorough Section 303(c) review of the effects of Florida's 303(d) assessment and lists of WQLSs on Florida's antidegradation WQSs.

WHEREFORE, the FWF respectfully request the Court grant the following relief.

A. Declare that the Defendants have unlawfully failed to perform EPA's non-discretionary duty under CWA Section 303(d) and 40 C.F.R. §130.7(b) to independently establish the baseline antidegradation assimilative capacity all of Florida's Tier 2.0 antidegradation waters; and 2) promptly establish the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309 designated OFWs.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties under CWA Section 303(d) and 40 C.F.R. §130.(7)(b). The injunction should order each of the three Defendants: (1) to direct Florida to assemble and evaluate all of the available water-quality related data and information concerning whether Florida's water bodies in Groups One basin through Group Five basin attain Florida's antidegradation WQSs; (2) to direct Florida to establish the existing antidegradation assimilative capacity all of Florida's Tier 2.0 antidegradation waters; and (3) to direct Florida to establish the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309 designated OFWs; and (4) to determine whether Florida's surface waters are attaining Florida's antidegradation WQSs.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

COUNT V
Defendants Section 303(d) 2009 and 2010 Decision Documents are arbitrary, capricious, or not in accordance with law because the Defendants failed to independently assess and evaluate the available antidegradation water quality data and information.
(APA action-Section706(2)(A))

220. Count V is an action suit pursuant to §706(2)(A) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

221. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

222. The FWF re-allege paragraphs 165-166 and 184-186 above. The Davises re-allege paragraphs 157-162 and 184-186 above.

Jurisdiction and venue

223. The FWF and the Davises re-allege paragraphs 4, 6-10, and 188 above.

The Count V claim

224. The FWF and the Davises re-allege paragraphs 20-117, 129-135, 157-162, 169-180, 190-195, 202-210, and 216-219 above.

225. EPA's 2009 and 2010 Decision Documents related to Florida's Section 303(d) assessment and evaluation of WQLSs are arbitrary, capricious, and otherwise not in accordance with law. These EPA Decision Documents, without explanation or rationale, failed to

independently evaluate the existing and readily available antidegradation water quality-related data and information for Florida's surface waters, and failed to establish for Florida the baseline Tier 2 assimilative capacity for Florida waters and the Tier 2.5 OFW "existing ambient water quality" for all of the 309 OFWs in Florida.

226. Without establishment of baselines for Florida's antidegradation WQSs, it is impossible for more Florida and the Defendants to perform their clear and specific mandatory, non-discretionary Section 303(d) and 40 C.F.R. §130.7(b) duties to assess whether the ambient water quality of Florida's waters are attaining Florida's antidegradation WQSs.

227. The Defendants applicable Decision Documents totally failed to articulated a rational connection between EPA's approval of Florida's updated 2009 and 2010 Section 303(d) assessments and lists of WQLSs and EPA's failure to independently assess and evaluate available water quality data and information against Florida's antidegradation WQSs.

228. No explanation has been provided by EPA concerning how Florida and EPA can evaluate whether Florida's waterbodies are attaining compliance with Florida's antidegradation WQSs without assembling and evaluating available antidegradation water quality-related data and information. EPA did not explained how it determined whether FDEP permitted discharges, discharges exempted by Florida from antidegradation review at permit issuance (BMPs, FEP general permits, FDEP stormwater permits, etc.), and non-point source discharges, are cumulatively causing water quality degradation in violation of Florida's antidegradation WQSs.

229. The Defendants have failed to provide a proper analysis of why EPA failed to independently assemble and evaluate all available water quality-related antidegradation WQSs data and information of current cumulative ambient water quality of Florida's waterbodies in relationship to the CWA mandate that states and EPA assess whether Florida antidegradation

WQSs are being attained. See, National Wildlife Federation v. Norton, 332 F.Supp.2d 170 (D.D.C. 2004) (FWS did articulate a rational connection between the record facts and its 'no jeopardy' decision).

230. EPA's 2009 Amended Decision Document; EPA's May 13, 2010 Decision Document, and EPA's December 21, 2010 Decision Document approved Florida's updates of Section 303(d) assessments and lists of WQLSs in all Florida five basin groups, that being Group One basin through Group Five basin, are inconsistent with the requirements of Section 303(d) and 40 C.F.R. §130.7(b).

231. Florida's failure to ever perform at any time the above described Section 303(d) antidegradation WQSs assessment was a defacto amendment Florida's antidegradation WQSs without any EPA CWA Section 303(c)(2)(A) review.

232. Defendants failed to independently assess and evaluate the available antidegradation water quality-related data and information necessary to thoroughly review the effects of Florida's Section 303(d) lists on implementation and attainment of Florida's antidegradation WQSs.

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare that the Defendants have arbitrarily, capriciously, and otherwise not in accordance with the law, failed to perform EPA's mandatory, non-discretionary duty to independently assess and evaluate the available antidegradation water quality-related data and information necessary to thoroughly review the effects of Florida's Section 303(d) lists on implementation and attainment of Florida's antidegradation WQSs.

B. Declare EPA's 2009 Amended Decision Document approval of Florida's 2009 update of Florida's Section 303(d)(1) assessment and lists of WQLSs in Group One, Group Two, and Group Five, to be arbitrary, capricious, and not in accordance with CWA §303(d)(1) and 40 C.F.R. §130.7(b), and therefore each to be invalid.

C. Declare EPA's May 13, 2010 Decision Document of approval of Florida's Section 303(d)(1) 2009 update Group Three to be arbitrary, capricious, and not in accordance with CWA §303(d)(1) and 40 C.F.R. §130.7(b), and therefore invalid.

D. Declare EPA's December 21, 2010 Decision Document of approval of Florida's Section 303(d)(1) 2009 update Group Four to be arbitrary, capricious, and not in accordance with CWA §303(d)(1) and 40 C.F.R. §130.7(b), and therefore invalid.

E. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties under CWA Section 303(d) and 40 C.F.R. §130.7(b). The injunction should order each of the three Defendants: (1) to direct Florida to assemble and evaluate all of the available water-quality related data and information concerning whether Florida's water bodies in Groups One through Group Five attain Florida's antidegradation WQSs; (2) to direct Florida to establish the existing antidegradation assimilative capacity all of Florida's Tier 2.0 antidegradation waters; and (3) to direct Florida to establish the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309 designated OFWs; and (4) to determine whether Florida's surface waters are attaining Florida's antidegradation WQSs.

F. Award the FWF and the Davises their costs and reasonable attorney fees; and

G. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

COUNT VI
Defendants Section 303(d) 2009 and 2010 Decision Documents are in excess of the Defendants' authority because the Defendants failed to perform their mandatory duty to independently assess and evaluate the available antidegradation data and information
(APA action-Section706(2)(C)

233. Count VI is an action suit pursuant to §706(2)(C) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

234. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

235. The FWF re-allege paragraphs 165-166 and 184-186 above. The Davises re-allege paragraphs 157-162 and 184-186 above.

Jurisdiction and venue

236. The FWF and the Davises re-allege paragraphs 4, 6-10, and 188 above.

The Count VI claim

237. The FWF and the Davises re-allege paragraphs 20-117, 129-135, 157-162, 169-180, 190-195, 202-210, 225-232 above.

238. EPA's 2009 and 2010 Decision Documents of Florida's Section 303(d) assessment and evaluation of WQLSs are in excess of EPA's authority because these Decision Documents failed to independently evaluate the existing and readily available antidegradation water quality-related data and information for Florida's surface waters, and failed to establish for Florida the baseline Tier 2 assimilative capacity for Florida waters and the Tier 2.5 OFW "existing ambient water quality" for all of the 309 OFWs in Florida.

239. EPA not only has a mandatory duty to independently assemble and evaluate the available antidegradation related water quality-related data and information, EPA also has a mandatory duty to independently establish the baselines for Florida's antidegradation WQSs.

240. Without established baselines for Florida's antidegradation WQSs, it is impossible for either Florida or EPA to perform their mandatory, non-discretionary Section 303(d) and 40 C.F.R. §130.7(b) duties to assess whether the ambient water quality of Florida's waters are attaining Florida's antidegradation WQSs.

241. The 2009 EPA Amended Decision Document and the two 2010 EPA Decision Documents and their approvals are each in excess of EPA's authority because EPA did not articulate any rationale for EPA's failure to establish the existing antidegradation assimilative capacity of Florida's Tier 2.0 antidegradation waters and the Tier 2.5 antidegradation OFW existing ambient water quality of designated OFWs.

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare that the Defendants have illegally acted in excess of their authority by approving Florida's 2009 and 2010 Section 303(d) updated assessment and lists of WQLSs for in Group One thorough Group Five basins, without the Defendants independently assessing and evaluate all available water quality-related data and information, and establishing the antidegradation baselines water quality levels per waterbody evaluating whether Florida's antidegradation WQSs are being attained.

B. Declare the Defendants failed to perform their mandatory duty to independently assess and evaluate the available antidegradation water quality-related data and

information necessary to thoroughly review the effects of Florida's Section 303(d) lists on implementation and attainment of Florida's antidegradation WQSs.

C. Declare EPA's May 13, 2010 Decision Document of approval of Florida's Section 303(d)(1) 2009 update Group Three basin to be in excess of the Defendants' authority, and therefore invalid.

D. Declare EPA's December 21, 2010 Decision Document of approval of Florida's Section 303(d)(1) 2009 update Group Four basin to be in excess of the Defendants' authority, and therefore invalid.

E. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties under CWA Section 303(d) and 40 C.F.R. §130.(7)(b). The injunction should order each of the three Defendants: (1) to direct Florida to assemble and evaluate all of the available water-quality related data and information concerning whether Florida's water bodies in Groups One basin through Group Five basin attain Florida's antidegradation WQSs; (2) to direct Florida to establish the existing antidegradation assimilative capacity all of Florida's Tier 2.0 antidegradation waters; and (3) to direct Florida to establish the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309 designated OFWs; (4) to determine whether Florida's surface waters are attaining Florida's antidegradation WQSs; and (5) to perform their mandatory, non-discretionary duty to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs.

F. Award the FWF and the Davises their costs and reasonable attorney fees; and

G. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count VII
Defendants Section 303(d) 2009 and 2010 Decision Documents failed to perform the Defendants' mandatory, non-discretionary duty to disapprove Florida's Section 303(d) WQLSs lists which did not assess and evaluate the antidegradation data and information
(CWA citizen suit- injunctive action)

242. Count VII is a CWA Section 1365 citizen suit by the FWF against each of the three Defendants, seeking declaratory judgement and prospective injunctive relief.

The parties

243. The FWF re-alleges paragraphs 10-14 and 17-19 above.

FWF has standing

244. The FWF re-alleges paragraphs 165-166 above.

Jurisdiction and venue

245. The FWF re-alleges paragraphs 3, 5, and 8-10 above.

The Count VII claim

246. The FWF re-alleges paragraphs 20-117, 129-135, 157-162, 167-176, 196-203, and 225-232 above.

247. Count VII alleges the Defendants have a clear and specific mandatory, non-discretionary CWA duty under Section 303(d) and 40 C.F.R.§130.7(b) to disapprove Florida's 2009 and 2010 Section 303(d) assessments and lists of WQLS in Florida's Group One basin through Group Five basin because in each of these assessments by Florida failed to evaluate all existing and readily available water quality-related data and information to determine whether

current water quality in Florida's waters complies with Florida's antidegradation WQSs. The Defendants' approvals of these Florida's Section 303(d) lists constitute new or revised Florida's antidegradation WQSs and implementation criteria which EPA has a mandatory, non-discretionary duty pursuant to Section 303(c)(2)(A) to review.

248. Section 303(d)(1)(A) of the CWA requires each state to identify and prioritize those waters where technology-based controls "are not stringent enough to implement any water quality standards applicable to such waters." 33 U.S.C. §1313(d)(1)(A). WQSs applicable to Florida's surface waters unquestionably includes Florida's antidegradation WQSs.

249. States must submit documentation to support the state's listing or not listing of specific surface waters. See, 40 C.F.R. 130.7(b)(6). This includes requiring Florida to describe the methodology used to develop the list, a description of the data and information used to identify the waters listed, a rationale for any decision to not use any existing readily available data and information, especially including not using historic data and information to assess the status of Florida waters attaining Florida's antidegradation WQSs, and any other reasonable information requested by EPA.

250. The Defendants can only meet these mandatory, non-discretionary duties and deadlines by requiring states to assemble and evaluate all available water quality-related data and information, and requiring states establish the baselines for antidegradation WQSs.

251. The FWF requests the court declare that the Defendants have unlawfully failed to perform their mandatory, non-discretionary duties under CWA Section 303(d) and 40 C.F.R. §130.7(b) to disapprove Florida's 2009 and 2010 Section 303(d) assessments and lists of WQLSs.

252. The FWF requests the court declare EPA's 2009 Amended Decision Document, EPA's May 13, 2010 Decision Document, and EPA's December 21, 2010 Decision Document each to be in violation of the CWA §303(d)(1) and 40 C.F.R. §130.7(b), and therefore invalid.

253. The FWF requests the court grant prospective remedial injunctive relief by: (1) ordering the Defendants to require Florida to assemble and evaluate all of the available water-quality related data and information concerning whether Florida's water bodies attain Florida's antidegradation WQSs; (2) by ordering the Defendants to require Florida to establish the existing antidegradation assimilative capacity of Florida's Tier 2.0 antidegradation waters and the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309 designated OFWs; (3) to determine whether Florida's surface waters are attaining Florida's antidegradation WQSs; and (4) to perform their mandatory, non-discretionary duty to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs.

WHEREFORE, the FWF respectfully request the Court grant the following relief.

A. Declare EPA's 2009 Amended Decision Document approval of Florida's Group One, Group Two, and Group Five updates of Florida's Section 303(d) assessment and WQLSs lists to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore each to be invalid.

B. Declare EPA's May 13, 2010 Decision Document approval of Florida's Update of Florida's Group Three basin Section 303(d) assessment and WQLSs list to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore invalid.

C. Declare EPA's December 21, 2010 Decision Document approval of Florida's Update of Florida's Group Four basin Section 303(d) assessment and WQLSs list to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore invalid.

D. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties under CWA Section 303(d) and 40 C.F.R. §130.7(b). The injunction should order each of the three Defendants: (1) to direct Florida to assemble and evaluate all of the available water-quality related data and information concerning whether Florida's water bodies in Groups One basin through Group Five basin attain Florida's antidegradation WQSs; (2) to direct Florida to establish the existing antidegradation assimilative capacity all of Florida's Tier 2.0 antidegradation waters; (3) to direct Florida to establish the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309 designated OFWs; (4) to determine whether Florida's surface waters are attaining Florida's antidegradation WQSs; and (5) to perform their mandatory, non-discretionary duty to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs.

E. Award the FWF its costs and reasonable attorney fees; and

F. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

COUNT VIII
Approvals in Defendants Section 303(d) 2009 and 2010 Decision Documents are arbitrary, capricious, or not in accordance with law because the Section 303(d) WQLSs list was not based upon assessment of whether Florida waters attained Florida's antidegradation WQSs
(APA action-Section706(2)(A))

254. Count VIII is a citizen suit pursuant to the §706(2)(A) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

255. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

256. The FWF re-allege paragraphs 165-166 and 184-186 above. The Davises re-allege paragraphs 157-162 and 184-186 above.

Jurisdiction and venue

257. The FWF and the Davises re-allege paragraphs 4, 6-10, and 188 above.

The Count VIII claim

258. The FWF and the Davises re-allege paragraphs 20-117, 129-136, 157-162,169-180, 190-195, 202-210, 226-232, and 247-253 above.

259. The Defendants approvals of Florida's 2009 and 2010 Section 303(d) lists and analysis of WQLS are arbitrary, capricious, and otherwise not in accordance with law because the Decision Documents did not provide any rationale for EPA's approval of Florida's 2009 and 2010 Section 303(d) assessments and lists of WQLS in Group One through Group Five basins which failed to evaluate whether current water quality in Florida's waters complies with Florida's antidegradation WQSs.

260. The Defendants' approvals of these Florida's Section 303(d) lists constitute illegal revisions of Florida's antidegradation WQSs and implementation criteria without any EPA review to determine whether Florida's 2009 and 2010 Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs.

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare EPA's 2009 Amended Decision Document approval of Florida's Group One, Group Two, and Group Five updates of Florida's Section 303(d) assessment and WQLSs lists to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore each is invalid.

B. Declare EPA's May 13, 2010 Decision Document approval of Florida's Update of Florida's Group Three basin Section 303(d) assessment and WQLSs list to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore invalid.

C. Declare EPA's December 21, 2010 Decision Document approval of Florida's Update of Florida's Group Four basin Section 303(d) assessment and WQLSs list to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore invalid.

D. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties under CWA Section 303(d) and 40 C.F.R. §130.7(b). The injunction should order each of the three Defendants: (1) to direct Florida to assemble and evaluate all of the available water-quality related data and information

concerning whether Florida's water bodies in Groups One basin through Group Five basin attain Florida's antidegradation WQSs; (2) to direct Florida to establish the existing antidegradation assimilative capacity all of Florida's Tier 2.0 antidegradation waters; (3) to direct Florida to establish the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309 designated OFWs; (4) to determine whether Florida's surface waters are attaining Florida's antidegradation WQSs; and (5) to perform their mandatory, non-discretionary duty to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs.

E. Award the FWF its costs and reasonable attorney fees; and

F. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

COUNT IX
Approvals in Defendants Section 303(d) 2009 and 2010 Decision Documents are in excess of Defendants' authority because the Section 303(d) WQLSs list was not based upon assessment of whether Florida waters attained Florida's antidegradation WQSs (APA action-Section706(2)(C))

261. Count IX is a citizen suit pursuant to §706(2)(C) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

262. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

263. The FWF re-allege paragraphs 165-166 and 184-186 above. The Davises re-allege paragraphs 157-162 and 184-186 above.

Jurisdiction and venue

264. The FWF and the Davises re-allege paragraphs 4, 6-10, and 188 above.

The Count IX claim

266. The FWF and the Davises re-allege paragraphs 20-114, 126-133, 153-158,166-176, 184-190, 218-223, and 247-253 above.

267. Since 2007, the Defendants review of Florida's Section 303(d) lists and analysis of WQLSs has been in excess of the Defendants' authority because the Defendants have failed to perform their clear and specific mandatory, non-discretionary duties under Section 303(d) and 40 C.F.R. §130.7 to disapprove Florida's September 2, 2009 and December 21, 2010 Florida Section 303(d) assessments and lists of WQLSs.

268. The Defendants have mandatory, non-discretionary duties to disapprove of these Florida Section 303(d) assessments and lists of WQLSs because the assessments failed to evaluate all existing and readily available water quality-related data and information to determine whether current water quality in Florida's waters complies with Florida's antidegradation WQSs.

269. The Defendants' approvals of these Florida's Section 303(d) lists constitute illegal revisions of Florida's antidegradation WQSs and implementation criteria without any EPA review to determine whether Florida's 2009 and 2010 Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to

determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs.

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare EPA's 2009 Amended Decision Document approval of Florida's Group One, Group Two, and Group Five updates of Florida's Section 303(d) assessment and WQLSs lists to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore each to be invalid.

B. Declare EPA's May 13, 2010 Decision Document approval of Florida's Update of Florida's Group Three basin Section 303(d) assessment and WQLSs list to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore invalid.

C. Declare EPA's December 21, 2010 Decision Document approval of Florida's Update of Florida's Group Four basin Section 303(d) assessment and WQLSs list to be in violation of the CWA §303(d) and 40 C.F.R. §130.7(b), and therefore invalid.

D. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties under CWA Section 303(d) and 40 C.F.R. §130.7(b). The injunction should order each of the three Defendants: (1) to direct Florida to assemble and evaluate all of the available water-quality related data and information concerning whether Florida's water bodies in Groups One basin through Group Five basin attain Florida's antidegradation WQSs; (2) to direct Florida to establish the existing antidegradation assimilative capacity all of Florida's Tier 2.0 antidegradation waters; (3) to direct Florida to establish the Tier 2.5 antidegradation OFW existing ambient water for each of Florida's 309 designated OFWs; (4) to determine whether Florida's surface waters are attaining Florida's

antidegradation WQSs; and (5) to perform their mandatory, non-discretionary duty to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs.

E. Award the FWF its costs and reasonable attorney fees; and

F. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count X
Defendants Section 303(d) 2009 and 2010 Decision Documents failed to perform their mandatory, non-discretionary duty to thoroughly review whether Florida's Section 303(d) impaired waters assessments and lists of WQLSs revise or modify Florida's antidegradation WQSs
(CWA citizen suit- injunctive action)

270. Count X is a CWA Section 1365 citizen suit by the FWF against each of the three Defendants, seeking declaratory judgement and prospective injunctive relief.

The parties

271. The FWF re-alleges paragraphs 10-14 and 17-19 above.

FWF has standing

272. The FWF re-alleges paragraphs 162-163 above.

Jurisdiction and venue

273. The FWF and the Davises re-allege paragraphs 3, 5, and 8-10 above.

The Count X claim

274. The FWF re-alleges paragraphs 20-114, 126-133, 153-158, 166-176 and 196-203 above.

275. Defendants Section 303(d) 2009 and 2010 Decision Documents failed to perform their clear and specific mandatory, non-discretionary duty to thoroughly review whether Florida's Section 303(d) impaired waters assessments and lists of WQLSs revise or modify Florida's antidegradation WQSs. See, Fla. Public Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1078 (11th Cir. 2004); Miccosukee Tribe of Florida. v. United States, 105 F.3d 599 (11th Cir. 1997).

276. When reviewing Florida's Section 303(d) assessments and lists of WQLSs, the Defendants must make a determination whether the Florida Section 303(d) documents complied with the requirements of the CWA, including its anti-degradation policy." See, Fla. Public Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1078 (11th Cir. 2004); Miccosukee Tribe of Florida. v. United States, 105 F.3d 599 (11th Cir. 1997).

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare EPA's 2009 Amended Decision Document approval of Florida's Group One, Group Two, and Group Five updates of Florida's Section 303(d) assessment and WQLSs lists to be in violation of the Defendants mandatory duties under Section 303(c), and therefore invalid.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of

assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count XI
Defendants Section 303(d) 2009 and 2010 Decision Document approvals are arbitrary, capricious, or not in accordance with law because, without rationale, the documents failed to thoroughly review whether Florida's Section 303(d) and lists of WQLSs have revised or modified Florida's antidegradation WQSs
(APA Section 706(2)(A))

277. Count XI is a citizen suit pursuant to §706(2)(A) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

278. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

279. The FWF re-allege paragraphs 165-166 and 184-186 above. The Davises re-allege paragraphs 157-162 and 184-186 above.

Jurisdiction and venue

280. The FWF re-allege paragraphs 4, 8-10 and 188 above. The Davises re-allege paragraphs 4, 6-10 and 188 above.

The Count XI claim

281. The FWF and the Davises re-allege paragraphs 20-114, 126-133, 153-158, 166-176, 196-203, and 247-253 above.

282. The Defendants approvals of Florida's 2009 and 2010 Section 303(d) lists and analysis of WQLS are arbitrary, capricious, and otherwise not in accordance with law because, without explanation or rationale, the Decision Documents did not perform their clear and specific mandatory, non-discretionary duty to thoroughly review whether Florida's Section 303(d) impaired waters assessments and lists of WQLSs have revised or modified Florida's antidegradation WQSs.

283. The Defendants' approvals of these Florida's Section 303(d) lists constitute illegal revisions of Florida's antidegradation WQSs and implementation criteria without any EPA review to determine whether Florida's 2009 and 2010 Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs. See, Fla. Public Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1078 (11th Cir. 2004); Miccosukee Tribe of Florida. v. United States, 105 F.3d 599 (11th Cir. 1997); 33 U.S.C. §303(c); 33 U.S.C. §303(d)(4)(B).

284. When reviewing Florida's Section 303(d) assessments and lists of WQLSs, the Defendants must make a determination whether the Florida Section 303(d) documents complied with the requirements of the CWA, including its anti-degradation policy." See, Fla. Public Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1078 (11th Cir. 2004); Miccosukee Tribe of Florida. v. United States, 105 F.3d 599 (11th Cir. 1997).

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare EPA's 2009 Amended Decision Document approval of Florida's Group One, Group Two, and Group Five updates of Florida's Section 303(d) assessment and WQLSs lists to be in violation of the Defendants mandatory duties under Section 303(c), and therefore invalid.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count XII
Defendants Section 303(d) 2009 and 2010 Decision Documents are in excess of the Defendants' authority because the documents approved Florida's Section 303(d) assessments without performing a thorough review whether Florida's Section 303(d) and lists of WQLSs have revised or modified Florida's antidegradation WQSs (APA Section 706(2)(C))

285. Count XII is a citizen suit pursuant to §706(2)(C) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

286. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

287. The FWF re-allege paragraphs 165-166 and 184-186 above. The Davises re-allege paragraphs 157-162 and 184-186 above.

Jurisdiction and venue

288. The FWF and the Davises re-allege paragraphs 4, 6-10 and 188 above.

The Count XII claim

289. The FWF and the Davises re-allege paragraphs 20-117, 129-136, 157-162, 169-180 190-196, and 247-253 above.

290. The Defendants approvals of Florida's 2009 and 2010 Section 303(d) lists and analysis of WQLS are arbitrary, capricious, and otherwise not in accordance with law because, without explanation or rationale, the Decision Documents did not perform their clear and specific mandatory, non-discretionary duty to thoroughly review whether Florida's Section 303(d) impaired waters assessments and lists of WQLSs have revised or modified Florida's antidegradation WQSs.

291. The Defendants' approvals of these Florida's Section 303(d) lists constitute illegal revisions of Florida's antidegradation WQSs and implementation criteria without any EPA review to determine whether Florida's 2009 and 2010 Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs.

292. When reviewing Florida's Section 303(d) assessments and lists of WQLSs, the Defendants must make a determination whether the Florida Section 303(d) documents complied with the requirements of the CWA, including its anti-degradation policy." See, Fla. Public

Interest Research Group Citizen Lobby, Inc. v. EPA, 386 F.3d 1070, 1078 (11th Cir. 2004); Miccosukee Tribe of Florida. v. United States, 105 F.3d 599 (11th Cir. 1997).

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare EPA's 2009 Amended Decision Document and 2010 Decision Documents approvals of Florida's Group One through Group Five basins updates of Florida's Section 303(d) assessment and WQLSs lists to be in violation of the Defendants mandatory duties under Section 303(c), and therefore invalid.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count XIII
Defendants Section 303(d) 2009 and 2010 Decision Documents are arbitrary, capricious, and not in accordance with law because the documents failed to articulate any rationale why the Defendants' failed to perform their mandatory, non-discretionary duty to disapprove Florida's Section 303(d) assessments and evaluations which failed to assess and evaluate the available sediment pollution data and information under Florida's "Free From" WQSs
(APA Section 706(2)(A))

293. Count XIII is a citizen suit pursuant to §706(2)(A) of the APA by the FWF and the

Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

294. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

295. The FWF re-allege paragraphs 165-166, and 184-186 above. The Davises re-allege paragraphs 157-162, and 184-186 above.

Jurisdiction and venue

296. The FWF and the Davises re-allege paragraphs 4, 6-10 and 188 above.

The Count XIII claim

297. The FWF and the Davises re-allege paragraphs 20-117, 129-136, 157-162, 169-180 190-196, 202-210, 257-263 above.

298. The CWA and EPA's implementing regulations mandate that states WQSs include standards for aquatic sediments. See, 33 U.S.C. §303(c)(2)(B). Florida has adopted EPA-approved WQSs applicable to aquatic sediments, that being Florida's both Florida's antidegradation WQSs (Tier 2 and Tier 2.5) and Fla.Admin.Code R. 62-302.500(1)(a)(4) &(6), a narrative minimum WQS known as the "Free From" standards.

299. Florida's "Free From" WQSs at Fla.Admin.Code R. 62-302.500(1)(a)(4)&(6) provide that

> "All surface waters of the State shall at all places and at all times be free form:
> * * *
> (a) Domestic, industrial, agricultural or other man-induced non-thermal components of discharges which, alone or in combination with other substances or in combination with other components of discharges (whether thermal or non-thermal);
> * * *

(4) Are acutely toxic; or

* * *

(6) Pose a serious danger to the public health, safety, or welfare."

300. Aquatic sediments must be "free from", at all times and all places, components of discharges which, alone or in combination with other substances or in combination with other components of discharges are acutely toxic to aquatic organisms. Discharges of Polycyclic Aromatic Hydrocarbons (PAHs) which accumulate in aquatic sediments at levels which are acutely toxic to aquatic organisms are prohibited by Fla.Admin.Code R. 62-302-500(1)(a)(4).

301. Aquatic sediments must be "Free From" PAH substances which are either acutely toxic or which "pose a serious danger to the public health, safety, or welfare."

302. The translator mechanism for Fla.Admin.Code R. 62-302.500(1)(a)(4) include Florida's 1994 Florida Coastal Waters "Sediment Quality Assessment Guidelines" (SQAGs). Florida's 1994 Florida Coastal Waters SQAGs established Probable Effects Level (PELs) as the lower limit of probable effects range. The 1994 SQAGs study was based upon assessment of sediment effects in five coastal waters, including Tampa Bay. The 1994 SQAGs Tampa Bay testing found one hundred percent (100%) acute toxicity when organisms were exposed to two or more pollutants at PELs. Existence of two or more PELs in estuarine sediments is pollution at a level that can reasonably expected to interfere with the designated Class III use of estuaries.

303. Extensive sediment data and information for Florida's surface waters show sediment pollution at levels which are both: (1) acutely toxic in violation of Fla.Admin.Code R. 62-302.500(1)(a)(4), and threatened to soon be in violation of Fla.Admin.Code R. 62-302.500(1)(a)(4), and (2) either currently, or soon will, "pose a serious danger to the public health, safety, or welfare."

304. Pollutants in aquatic sediments constitute pollution in the ambient waters of the Florida, and protection against such pollution is necessary to protection aquatic life from acute and chronic toxicity, and bioconcentration by aquatic organisms. Current data and information establish accumulation in fish tissue which pose danger to the fish and to humans who consume such contaminated fish.

305. In a Section 303(d) assessment whether a water body should be placed on the State's Section 303(d) list, the State and EPA are both mandated to evaluate all existing and readily available water quality-related data and information, including sediment and fish tissue data and information, to determine whether Florida waters are attaining Florida's antidegradation WQSs and Florida's "Free From" WQSs.

306. Defendants Section 303(d) 2009 and 2010 Decision Documents are arbitrary, capricious, and otherwise not in accordance with law because, without explanation or rationale, the Decision Documents did not perform their clear and specific mandatory, non-discretionary duty to disapprove Florida's Section 303(d) assessment and evaluations which failed to assess and evaluate the available sediment data and information under Florida's antidegradation WQSs and Florida's "Free Form" WQSs.

307. The Defendants' approvals of these Florida's Section 303(d) lists constitute illegal revisions of Florida's antidegradation WQSs and implementation criteria without any EPA review to determine whether Florida's 2009 and 2010 Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs and Florida's "Free Form" WQSs.

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare EPA's 2009 and 2010 Decision Document approvals of Florida's Group One through Group Five basins updates of Florida's Section 303(d) assessment and WQLSs lists to be in violation of the Defendants clear and specific mandatory duties under Section 303(c) &(d), and 40 C.F.R. §130.7(b)-(d), and therefore invalid.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties: (1) to determine whether Florida's surface waters are attaining Florida's antidegradation WQSs and Florida's "Free From" WQSs in aquatic sediments and fish tissue; and (2) to perform their mandatory, non-discretionary duty to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation WQSs and Florida's "Free From" WQSs applicable to aquatic sediments and fish tissue.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count XIV
Defendants Section 303(d) 2009 and 2010 Decision Documents are in excess of the Defendants' authority because the Defendants failed to perform their mandatory, non-discretionary duty to disapprove Florida's Section 303(d) assessment and evaluations which failed to assess and evaluate the available sediment data and information under Florida's "Free Form" WQSs

(APA Section 706(2)(C))

308. Count XIV is a citizen suit pursuant to §706(2)(C) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

309. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

310. The FWF re-allege paragraphs 165-166, and 184-186 above. The Davises re-allege paragraphs 157-162, and 184-186 above.

Jurisdiction and venue

311. The FWF and the Davises re-allege paragraphs 4, 6-10 and 188 above.

The Count XIV claim

312. The FWF and the Davises re-allege paragraphs 20-117, 129-136, 157-162, 169-180, 190-196, and 298-307 above.

313. Defendants Section 303(d) 2009 and 2010 Decision Documents are in excess of the Defendants' authority because the Defendants failed to perform their clear and specific mandatory, non-discretionary duty to disapprove Florida's Section 303(d) assessment and evaluations which failed to assess and evaluate the available sediment data and information under Florida's antidegradation WQSs and Florida's "Free Form" WQSs applicable to aquatic sediments and fish tissue.

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare EPA's 2009 and 2010 Decision Document approvals of Florida's Group One through Group Five updates of Florida's Section 303(d) assessment and WQLSs lists to be in violation of the Defendants mandatory duties under Section 303(c) &(d), and 40 C.F.R. §130.7(b)-(d), and therefore each is invalid.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties: (1) to determine whether Florida's surface waters are attaining Florida's antidegradation WQSs and Florida's "Free From" WQSs in aquatic sediments and fish tissue; and (2) to perform their mandatory, non-discretionary duty to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due to the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's antidegradation and "Free From" WQSs applicable to aquatic sediments and fish tissues.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count XV
Defendants Section 303(d) 2009 and 2010 Decision Documents are arbitrary, capricious, and not in accordance with law because the documents failed to articulate any rationale why the Defendants' failed to perform their mandatory, non-discretionary duty to disapprove Florida's Section 303(d) assessments and evaluations which failed to assess and evaluate the available water quality data and information of water quality impairments related to water flow reductions (water quantity issues)
(APA Section 706(2)(A))

314. Count XV is a citizen suit pursuant to §706(2)(A) of the APA by the FWF against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

315. The FWF re-alleges paragraphs 10-14, and 17-19 above.

The FWF has standing

316. The FWF re-allege paragraphs 165-166, and 184-186 above.

Jurisdiction and Venue

318. The FWF re-alleges paragraphs 4, 8-10 and 188 above.

The Count XV claim

319. The FWF re-alleges paragraphs 20-117, 129-136, 157-162, 166-180 and 202-210 above.

320. While the CWA does not regulate water quantity usage, the U.S. Supreme Court has held that the CWA unquestionably regulates all activities that degrade surface water quality. The U.S. Supreme Court has held that "[i]n many cases, water quantity is closely related to water quality; a lowering of the water quantity in a body of water could destroy all of the designated uses, be it drinking water, recreation, navigation or, as here, as a fishery." PUD No. 1 of Jefferson County, 511 U.S. at 719. The Supreme Court has expressly held that "there is recognition in the Clean Water Act itself that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution." PUD No. 1 of Jefferson County, 511 U.S. at 719.

321. The CWA definition of pollution (33 U.S.C. §1362(19)) includes the "the effects of reduced water quantity," and §304 of the CWA "recognizes that water 'pollution' may result from 'changes in the movement, flow, or circulation of any navigation waters..., including changes caused by the construction of dams." 33 U.S.C. §1314(f)." PUD No. 1 of Jefferson

County, 511 U.S. at 719-20. Consideration of the water quality impacts of stream flow alterations, flow reductions and sudden flow increases, is necessary to implement Florida's WQSs. See, PUD No. 1 of Jefferson County, 511 U.S. at 718-19.

322. The linkage of Florida's WQSs standards to consumptive use permitting is recognized by SJRWMD's Rule 40C-2.301(4)(k), which provides that consumptive use must comply with Florida's WQSs. Water withdrawals can cause, and have caused, the failure to attain Florida's WQSs, including Florida's antidegradation WQSs.

323. Florida's antidegradation Tier 1WQSs require the protection and maintenance of existing fish and shellfish use. Reductions in fresh water flow in the Florida's waterbodies can adversely affect, and have adversely affected, existing fishing, shellfishing and oyster harvesting uses. Examples of such adverse affects of water withdrawals on water quality which Florida and the Defendants have not assessed and evaluated under Section 303(d) and 40 C.F.R. §130.7(b) include water withdrawals from the Apalachicola River and the down gradient Apalachicola Bay waters, and from the springsheds of Florida's major springs, including Rainbow Springs, Crystal Springs, Homosassa Springs, and Wakulla Springs.

324. Water withdrawals from the Apalachicola River and the down gradient Apalachicola Bay waters have degraded, and failed to protect and maintain the existing uses of fishing and oyster harvesting in the Apalachicola River and the down gradient Apalachicola Bay waters.

325. Florida's antidegradation Tier 2 WQS protects the baseline assimilative capacity of Tier 2 waterbodies. Water withdrawals from the Apalachicola River and the down gradient Apalachicola Bay waters have degraded, and failed to protect and maintain the existing uses of fishing and oyster harvesting in the Apalachicola River and the down gradient Apalachicola Bay waters.

326. Florida's antidegradation Tier 2.5 WQS prohibits the degradation of the baseline existing ambient water quality of Florida's 309 OFWs, many of which are major springs and the down-gradient waters of the major springs.

327. Apalachicola Bay was designated by Florida as an OFW in March 1, 1979 and August 8, 1994. See, Fla.Admin.Code R. 62-302.700(9)(f)(2); Fla.Admin.Code R. 62-302.700(9)(h)(2); Fla.Admin.Code R. 62-302.700(9)(m)(1).

328. Apalachicola River was designated by Florida as an OFW in March 1, 1979 and August 8, 1994. See, Fla.Admin.Code R. 62-302.700(9)(i)(1).

329. Section 303(d) assessment and evaluation must include impacts of water withdrawals on downstream protection, including antidegradation WQSs. The CWA implementing regulations mandate that the designated uses of a waterbody

> "and the appropriate criteria for those uses...shall take into consideration the water quality standards of downstream waters and shall ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters." 40 C.F.R. §131.10(b).

Section 303(d) assessments and evaluation of whether waterbodies are attaining WQSs must include assessment of downstream water quality impacts. See, Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992) (EPA properly required upstream activities not cause or contribute to violations of WQSs in downstream waters).

330. The Defendants Section 303(d) 2009 and 2010 Decision Documents are arbitrary, capricious, and not in accordance with law because the documents failed to articulate any rationale why the Defendants' failed to perform their clear and specific mandatory, non-discretionary duty to disapprove Florida's Section 303(d) assessments and evaluations which

failed to assess and evaluate the available water quality-related data and information of water quality impairments related to water flow reductions.

331. The Defendants failed to perform their clear and specific mandatory, non-discretionary duties to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due to the absence of assessment and evaluation of Florida's refusal to review the water quality impacts of water withdrawals on attaining Florida's antidegradation.

WHEREFORE, the FWF respectfully requests the Court grant the following relief.

A. Declare EPA's 2009 and 2010 Decision Document approvals of Florida's Group One through Group Five basins updates of Florida's Section 303(d) assessment and WQLSs lists to be in violation of the Defendants mandatory duties under Section 303(c) &(d), and 40 C.F.R. §130.7(b)-(d), and therefore invalid.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties: (1) to determine whether Florida's surface waters are attaining Florida's antidegradation WQSs and Florida's "Free From" WQSs in aquatic sediments and fish tissue; and (2) to perform their mandatory, non-discretionary duty to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's "Free From" WQSs applicable to water withdrawals.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count XVI
Defendants Section 303(d) 2009 and 2010 Decision Documents are in excess of the Defendants' authority because the Defendants' failed to perform their mandatory, non-discretionary duty to disapprove Florida's Section 303(d) assessments and evaluations which failed to assess and evaluate the available water quality data and information of water quality impairments related to water flow reductions (water quantity issues)
(APA Section 706(2)(C))

332. Count XVI is a citizen suit pursuant to §706(2)(C) of the APA by the FWF against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

333. The FWF re-alleges paragraphs 10-14, and 17-19 above.

The FWF has standing

334. The FWF re-allege paragraphs 165-166, and 184-186 above.

Jurisdiction and venue

335. The FWF re-alleges paragraphs 4, 8-10 and 188 above.

The Count XVI claim

336. The FWF re-alleges paragraphs 20-117, 129-136, 157-162, 169-180, 190-196, 298-306, 313, and 320-330 above.

337. Defendants Section 303(d) 2009 and 2010 Decision Documents are in excess of the Defendants' authority because the Defendants failed to perform their clear and specific mandatory, non-discretionary duty to disapprove Florida's Section 303(d) assessment and evaluations which failed to assess and evaluate the water quality effects of water withdrawals on Florida's WQSs.

WHEREFORE, the FWF respectfully requests the Court grant the following relief.

A. Declare EPA's 2009 and 2010 Decision Document approvals of Florida's Group One basin through Group Five basin updates of Florida's Section 303(d) assessment and WQLSs lists to be in violation of the Defendants mandatory duties under Section 303(c) &(d), and 40 C.F.R. §130.7(b)-(d), and therefore invalid.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties: (1) to determine whether Florida's water withdrawals are cuasing or contributing to failure of Florida surface waters to attain Florida's WQSs; and (2) to perform their mandatory, non-discretionary duty to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs which did not assess or evaluate water quality impacts of water withdrawals were new or revised Florida WQSs implementation criteria.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count XVII
Defendants Section 303(d) 2009 and 2010 Decision Documents are arbitrary, capricious, or not in accordance with law because the documents failed to articulate why the Defendants' failed to perform their mandatory, non-discretionary duty to disapprove Florida's Section 303(d) assessments and evaluations which failed to assess and evaluate the available water quality data and information related to water quality impairment associated with water transfers between WBIDs.
(APA Section 706(2)(A))

338. Count XVII is a citizen suit pursuant to §706(2)(A) of the APA by the FWF against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

339. The FWF re-alleges paragraphs 10-14, and 17-19 above.

The FWF has standing

340. The FWF re-allege paragraphs 165-166, and 184-186 above.

Jurisdiction and venue

341. The FWF re-alleges paragraphs 4, 8-10 and 188 above.

The Count XVII claim

342. The FWF re-alleges paragraphs 20-117, 129-137, 157-162, 169-180, 190-198, 202-210, 298-306, 313, 320-330 and 336-337 above.

343. Defendants Section 303(d) 2009 and 2010 Decision Documents are arbitrary, capricious, or not in accordance with law because the documents failed to articulate any rationale why the Defendants' failed to perform their clear and specific mandatory, non-discretionary duty to disapprove Florida's Section 303(d) assessments and evaluations which failed to assess and evaluate the available water quality-related data and information of WQSs impairment and foreseeable impairment related to water transfers between Florida's basins which Florida identifies by means of Water Body Identification Numbers (WBIDs). The Defendants Decision Documents failed to assess and evaluate whether water transfers from the Everglades Agricultural Area (EAA) canals into Lake Okeechobee, and from Lake Okeechobee to the Caloosahatchee River and the St. Lucie River and Indian River Lagoon, are causing or contributing to the failure of Lake Okeechobee, the Calooashatchee River, and the St. Lucie River and Indian River Lagoon to attain Florida's antidegradation WQSs and Florida's "Free From" minimum WQS criteria applicable to all surface waters at all times and all places.

344. The linkages between Section 303(d) and water transfers between WBIDs in Florida waters are Florida's WQSs, Florida's TMDL implementation program, and the clear and specific mandatory duties of Florida and the Defendants to protection downstream WQSs and uses.

345. Florida has defined its adopted WQSs as the standards needed for designated uses (classification of waters), the numerical and narrative criteria, and the Florida antidegradation policy. See, Fla.Admin.Code R. 62-302.200(42). Florida's WQSs are set forth in Fla.Admin.Code R. 62-4.242 (Antidegradation); 62-302.200 (Definitions); 62-302.300 (Findings, Intent and Antidegradation); 62-302.500 (Minimum Criteria); 62-302.530 (Water Quality Criteria–numeric and narrative); and 62-302.700 (Special Protection, OFW, ONRW).

346. The applicable Florida WQSs include the minimum criteria set forth in Fla.Admin.Code R. 62-302.500(1)(a) which provides that "[a]ll surface waters of the State shall at all places and at all times be free form" substances which alone, or in combination with other substances, "are acutely toxic" or "[p]ose a serious danger to the public health, safety, or welfare."

347. The applicable WQSs for designated Florida uses of surface water bodies are set forth in Fla.Admin.Code R. 62-302.530 (Table; Surface Water Criteria).

348. As set forth above, the applicable Florida antidegradation WQSs are Tier 1, Tier 2 and Tier 2.5 OFW.

349. Florida has based its CWA Section 303(d) list of WQLSs, and Florida's TMDL recovery program for WQLSs, on Florida's WBIDs. See, Section 403.067(1), Fla. Stat. (2012).

350. Florida's WBIDs are both assessment units and water quality management units to implement the Section 303(d) impaired waters program. Florida's implementation of water

quality-based effluent limitations to implement state WQSs is based upon Florida's WBID system.

351. Florida's Section 303(d) WBIDs assessment and recovery units are drainage basins, lakes, lake drainage areas, springs, rivers and streams, segments of rivers and streams, coastal, bay and estuarine waters in Florida. Florida's WBID polygons roughly delineate the drainage basins surrounding the waterbody assessment units.

352. Florida's water quality-based effluent limitation program, and Florida's TMDL program to restore impaired WQLSs, is "through coordinated control of point and non-point sources of pollution" under Florida's regulatory system which is broader than the CWA's NPDES regulatory system. See, Section 403.067(1), Fla. Stat. (2012). Florida's water pollution control program has the authority to regulate non-point sources, agricultural pollution sources, and water transfers.

353. The Defendants Section 303(d) assessment must review and evaluate attainment of any and all Florida WQSs, including Florida's antidegradation WQS and Florida's "Free From" WQSs. Any Florida downstream waterbody which receives discharges or water transfers must be assessed under Section 303(d) for determination whether the waterbody is attaining all of Florida's WQSs. Water transfer of water with components that combine with the components of the ambient waters of the subject waterbody are subject to Florida's antidegradation WQSs and Florida's "Free From" WQSs. The Defendants must assess the combination of substances and components transferred with substances in the ambient downstream waters.

354. The transfers of surface waters from WBIDs in the EAA to WBIDs of downstream lake and estuarine waters is not only a transfer from one Florida WBID to another Florida

WBIDs, it is also a transfer of water between different Florida basin groups with different components and different WQS impacts.

355. Florida's grouping of the downstream waterbodies receiving water transfers is as follows.

* Lake Okeechobee is in Florida's Group One basin waters.

* St. Lucie River waters are in Florida's Group Two basin waters.

* Caloosahatchee River is in Florida's Group Three basin waters.

* EAA is in Florida's Group Five basin area.

356. These four basin groups have ecologically distinct surface waters with distinct surface water quality and distinct flora and fauna from each other. The EAA canals are polluted canal waters flowing through agricultural lands, and the canals are designated by Florida as Class III waters. Lake Okeechobee is an lake system designated by Florida as Class I Potable Water Supplies. The Caloosahatchee River and St. Lucie River are estuaries designated by Florida as Class III waters. All of these waters are subject to Florida's Tier 2 antidegradation review and protection).

357. Florida's division of these downstream waters by WBIDs establishes the boundaries for Section 303(d) WQLSs and the subsequent TMDL pollution load and allocation of loads to restore the WQLSs.

358. Neither the Section 303(d) assessments which identify downstream WQLSs, nor the related TMDLs and related load allocations, have assessed and taken into account downstream nitrogen, suspended and dissolved solids, various chemicals, and toxic blue-green algae by-products caused by the EAA and Lake Okeechobee water transfers downstream.

359. Florida's Section 303(d) assessment and evaluation process is in direct conflict with the requirements of Section 303(d) and 40 C.F.R. §130.7(b) which requires Florida and EPA to identify distinct navigable waterbodies from each other for water quality attainment and assessment purposes, including downstream protection. The transfer of water with pollutants from one distinct navigable waterbody to another distinct navigable waterbody must be assessed and evaluated under Section 303(d), especially given Florida adopted WQSs, Florida's Section 303(d) assessment methodology, and Florida's broader water control program authority for implementation and enforcement of water quality-based effluent limitations developed in the Section 303(d) process.

360. The Eleventh Circuit Court of Appeals has described the water in the EAA canals as a "loathsome concoction of chemical contaminants including nitrogen, phosphorous, and un-ionized ammonia. The water in the canals is full of suspended and dissolved solids and has a low oxygen content." Friends of the Everglades v. SFWMD, 570 F.3d 1210, 1214 (11th Cir. 2009). This loathsome concoction of chemical contaminants and water pollution is transferred by pumps from the EAA canals (Florida's Group Five basin waters) to into Lake Okeechobee (Florida's Group One basin waters). The waters of Lake Okeechobee are then transferred to the St. Lucie River (Florida's Group Two basin waters), and the Caloosahatchee River (Florida's Group Three basin waters).

361. In Friends of the Everglades v. S. Fla. Water Mgmt. Dist., Case 9:02-cv-80309-CMA, Docket Entry 694: Order on Remedies, the federal District Court held that "the [EAA] backpumping at issue creates a significant risk of triggering a toxic algal bloom that could cause serious injury to humans and death to wildlife." The backpumping water transfers cause and contribute to toxic blue-green algae which causes horrific problems for the St. Lucie and

Caloosahatchee estuaries, due to massive water transfers Lake Okeechobee in order to maintain the over-drainage of the EAA. In 2005, the water transfer from Lake Okeechobee exceeded 900 billion gallons.

362. The St. Lucie River Estuary and the Indian River Lagoon are in critical condition due to large water transfers of polluted freshwater from Lake Okeechobee and the EAA. Discharges now exceed 4.5 billion gallons per day. The water has high levels of phosphorus, nitrogen, and pesticides, while depositing over 500 cubic yards of sediment into the estuaries daily during the discharges. The water transfers also cause and contribute to salinity shock from sudden discharges of billions of gallons of freshwater to estuaries and their submerged aquatic vegetation (SAV).

363. Direct impacts of the discharges include fish with lesions, dying oyster populations, loss of SAV habitat, and declines in existing fishing uses. Waters being impacted include two Florida OFW Aquatic Preserves, the Indian River Lagoon National Estuary, NOAA Essential Fish Habitat, EPA Critical Habitat for Seagrass, the St. Lucie Inlet State Preserve Reefs, and St. Lucie Nearshore Reefs nominated for National Marine Sanctuary. The impacted estuaries and coastal ecosystems are habitat for over 4,300 species of plants and animals, including 33 endangered and threatened species.

364. Water transfers to the Caloosahatchee River have likewise caused adverse direct WQS impacts, fish with lesions, salinity shock, and loss of SAV.

365. The Defendants failed to thoroughly review the effects of Florida's Section 303(d) lists and causative pollutants on implementation and attainment of Florida's WQSs. Specifically, the Defendants did not thoroughly assess the effect of Florida's WQLSs list, identified impairment parameters, the scope of Florida's proposed TMDL on the upstream pollution loads

of water transfers on the downstream waters (i.e., whether Florida's pollution control program failure to fully address and abate pollutants in water transfers from preventing downstream waters from attaining Florida's WQSs is revise or amendment of Florida's WQSs as they apply to downstream waters of water transfers).

366. The Defendants did not thoroughly review whether Florida's Section 303(d) methodology, a methodology which did not properly review and protect downstream waters from adverse water quality impacts of water transfers on attainment of Florida's WQSs, is defacto revise and amendment of Florida's WQSs and implementation criteria. Florida's Section 303(d) methodology fails to protect downstream waters with protective values resulting from upstream transfer of polluted water, the effects of which is Florida's de facto amendment of the WQSs and implementation criteria.

367. By not listing downstream waters as WQLSs due to the causative pollutants from upstream water transfers prevents the downstream waters from being restored by TMDLs which alter pollutant loads from upstream water transfers by pollution control measures in the upstream WBIDs prior to transfers of the pollutants to downstream waters.

WHEREFORE, the FWF respectfully requests the Court grant the following relief.

A. Declare EPA's 2009 and 2010 Decision Document approvals of Florida's Section 303(d) Group One through Group Five updates failing to assess water transfers effects on downstream WQSs, including antidegradation WQSs and Free From WQSs to be in violation of the Defendants mandatory duties under Section 303(c) &(d), and 40 C.F.R. §130.7(b)-(d), and therefore invalid.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties: (1) to determine whether

Florida's surface waters transfers are preventing attaining Florida's WQSs in downstream waters; and (2) to perform their mandatory, non-discretionary duty to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida WQSs and implementation criteria due the absence of assessment and evaluation of water transfer impacts on downstream waters.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count XVIII
Defendants Section 303(d) 2009 and 2010 Decision Documents are in excess of the Defendants' authority because the Defendants' failed to perform their mandatory, non-discretionary duty to disapprove Florida's Section 303(d) assessments and evaluations which failed to assess and evaluate the available water quality data and information related to water quality impairment associated with water transfers between WBIDs.
(APA Section 706(2)(C))

368. Count XVIII is a citizen suit pursuant to §706(2)(A) of the APA by the FWF against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

369. The FWF re-alleges paragraphs 10-14, and 17-19 above.

The FWF has standing

370. The FWF re-allege paragraphs 165-166, and 184-186 above.

Jurisdiction and venue

371. The FWF re-alleges paragraphs 4, 8-10 and 188 above.

The Count XVIII claim

372. The FWF re-alleges paragraphs 20-117, 129-136, 157-162, 169-180, 202-210, 298-307, 313, 320-330, 336-337, and 343-365 above.

373. Defendants Section 303(d) 2009 and 2010 Decision Documents are in excess of authority because the documents failed to articulate any rationale why the Defendants' failed to perform their clear and specific mandatory, non-discretionary duty to disapprove Florida's Section 303(d) assessments and evaluations which failed to assess and evaluate the available antidegradation and acute toxicity water quality-related data and information of WQSs impairment and foreseeable impairment related to water transfers between Florida's basins which Florida identifies by means of Water Body Identification Numbers (WBIDs).

WHEREFORE, the FWF respectfully requests the Court grant the following relief.

A. Declare EPA's 2009 and 2010 Decision Document approvals of Florida's Group One through Group Five basin updates of Florida's Section 303(d) assessment and WQLSs lists to be in violation of the Defendants mandatory duties under Section 303(c) &(d), and 40 C.F.R. §130.7(b)-(d), and therefore invalid.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties: (1) to determine whether Florida's downstream surface waters are attaining Florida's WQSs after water transfers; and (2) to perform their mandatory, non-discretionary duty to determine whether Florida's 2009 Update and 2010 Updates of Florida's Section 303(d) assessment and lists of WQLSs were new or revised Florida antidegradation WQSs and implementation criteria due the absence of assessment and evaluation of available water quality-related data and information to determine if Florida surface water are attaining compliance with Florida's after water transfers.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count XIX
EPA's 2008 IWR Decision Document is arbitrary, capricious, or not in accordance with law because: (1) the document approved Florida's 2007 IWR without articulating any rationale for Florida's Section 303(d) failure to contain any methodology assess whether Florida waters attain Florida's antidegradation WQSs, and (2) the document failed to perform the mandatory review of Florida's IWR as new or revised antidegradation WQS (APA Section 706(2)(A))

374. Count XIX is a citizen suit pursuant to §706(2)(A) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

375. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

376. The FWF re-allege paragraphs 10-16, 165-166, and 184-186 above. The Davises re-allege paragraphs 15-16, 157-162, and 184-186 above.

Jurisdiction and venue

377. The FWF and the Davises re-allege paragraphs 4, 6-10 and 188 above.

The Count XIX claim

378. The FWF re-alleges paragraphs 20-117, 129-136, 157-162, 169-180, 202-210, 298-307, 313, 320-330, 336-337, and 343-365 above.

379. EPA's 2008 IWR Decision Document is arbitrary, capricious, or not in accordance with law because: (1) the EPA Decision Document approves Florida 2007 IWR which is in direct conflict with Section 303(d)(4)(B) because the 2007 IWR revises and amends Florida's

antidegradation WQS in a manner inconsistent with the antidegradation policy of the CWA; (2) the EPA Decision Document approved Florida's 2007 IWR without articulating any rationale for Florida's Section 303(d) failure to contain any methodology assess whether Florida waters attain Florida's antidegradation WQSs, and (3) the EPA Decision Document failed to perform the mandatory review of Florida's IWR as new or revised Florida antidegradation WQS.

380. The Defendants Decision Document determined that Florida's IWR antidegradation implementation policies are nonexistent, but the document did not set forth any explanation or rationale how the Florida's 2007 IWR could be approved without any antidegradation implementation methodology or policy.

381. Once the Document made the determination that Florida's IWR antidegradation implementation policies are nonexistent, the mandatory procedural steps fall under the guidance of Section 303(c)(4), which requires the Defendants to publish proposed antidegradation implementation methodology and policy for Florida's IWR. See, Section 303(d)(4)(B).

382. Florida's 2007 IWR states in Fla.Admin.Code R. 62-303.150(1) that the FDEP must follow the methodology of Florida's IWR in developing Florida's planning lists and study lists which Florida submits to EPA pursuant to CWA Section 303(d). This rule prohibits Florida from submitting to EPA, pursuant to CWA Section 303(d)(1), any waterbody or waterbody segment (WQLS) listed as impaired unless FDEP determines the impairment and the causative pollutant(s) contributing to the impairment pursuant to the IWR methodology. FDEP must use Florida's IWR methodology, and no other impaired waters methodology. In other words, Florida's IWR prohibits FDEP from assessing attainment of Florida antidegradation WQSs because Florida's IWR contains no antidegradation WQS assess and evaluation methodology. Because Florida's list of impaired waters is the only list for which FDEP will develop TMDLs,

Florida's IWR has essentially revised and amended Florida's antidegradation WQSs and prohibited implementation of Florida's antidegradation WQSs.

383. The effect of Florida's IWR on Florida's antidegradation WQSs is further established by Fla.Admin.Code R. 62-303.200(7) which defines "impaired water" to mean a waterbody or waterbody segment that does not meet its applicable water quality standards as set forth in Fla.Admin.Code Chapters 62-302 and 62-4, as determined by the methodology in IWR, due in whole or in part to discharges of pollutants from point or non-point sources. This Florida IWR definition of "impaired water" revises and amends Florida's antidegradation WQSs by eliminating and excluding Florida's antidegradation WQSs from being used by Florida to identify and list impaired waters. This definition is in direct conflict with the CWA requirements of 40 C.F.R. §130.7(b) and is arbitrary, capricious, and not in accordance with law, and EPA's Decision Documents are therefore invalid.

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare EPA's 2008 Decision Document approval of Florida's 2007 IWR to arbitrary, capricious, or otherwise not in accordance with law, and therefore invalid.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties to to publish proposed antidegradation implementation methodology and policy for Florida's IWR.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Count XX
Defendants' 2008 IWR Decision Document approval of Florida's 2007 IMR was in excess of the Defendants' authority because: (1) Florida's IWR failed to contain any methodology to assess and identify impaired waters based upon Florida's antidegradation WQSs as required by the CWA, and (2) the document failed to perform the mandatory Section 303(c)(2)(A) review of Florida's IWR as a new or revised Florida's antidegradation WQS.
(APA Section 706(2)(C))

384. Count XX is a citizen suit pursuant to §706(2)(A) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

385. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

386. The FWF re-allege paragraphs 10-14, 165-166, and 184-186 above. The Davises re-allege paragraphs 15-16, 157-162, and 184-186 above.

Jurisdiction and venue

387. The FWF and the Davises re-allege paragraphs 4, 6-10 and 188 above.

The Count XX claim

388. The FWF re-alleges paragraphs 20-117, 129-136, 157-162, 169-180, 190-198, 202-210, 298-307, 313, 320-330, 336-337, and 343-365 above.

389. EPA's 2008 IWR Decision Document is in excess of the Defendants' authority because: (1) the document approved Florida's 2007 IWR without articulating any rationale for Florida's Section 303(d) failure to contain any methodology assess whether Florida waters attain Florida's antidegradation WQSs, and (2) the document failed to perform the clear and specific mandatory duty to review Florida's IWR as new or revised antidegradation WQS.

390. The Defendants Decision Document determined that Florida's IWR antidegradation implementation policies are nonexistent, but the document did not set forth any explanation or rationale how the Florida's 2007 IWR could be approved without any antidegradation implementation methodology or policy.

391. Once the Document made the determination that Florida's IWR antidegradation implementation policies are nonexistent, the mandatory procedural steps fall under the guidance of Section 1313(c)(4), which requires the Defendants to publish proposed antidegradation implementation methodology and policy for Florida's IWR.

392. Florida's 2007 IWR states in Fla.Admin.Code R. 62-303.150(1) that the FDEP must follow the methodology of Florida's IWR in developing Florida's planning lists and study lists which Florida submits to EPA pursuant to CWA Section 303(d). This rule prohibits Florida from submitting to EPA, pursuant to CWA Section 303(d)(1), any waterbody or waterbody segment (WQLS) listed as impaired unless FDEP determines the impairment and the causative pollutant(s) contributing to the impairment pursuant to the IWR methodology. FDEP must use Florida's IWR methodology, and no other impaired waters methodology. In other words, Florida's IWR prohibits FDEP from assessing attainment of Florida antidegradation WQSs because Florida's IWR contains no antidegradation WQS assess and evaluation methodology. Because Florida's list of impaired waters is the only list for which FDEP will develop TMDLs, Florida's IWR has essentially revised and amended Florida's antidegradation WQSs and prohibited implementation of Florida's antidegradation WQSs.

393. The effect of Florida's IWR on Florida's antidegradation WQSs is further established by Fla.Admin.Code R. 62-303.200(7) which defines "impaired water" to mean a waterbody or waterbody segment that does not meet its applicable water quality standards as set

forth in Fla.Admin.Code Chapters 62-302 and 62-4, as determined by the IWR methodology, due in whole or in part to discharges of pollutants from point or non-point sources. This Florida IWR definition of "impaired water" revises and amends Florida's antidegradation WQSs by eliminating and excluding Florida's antidegradation WQSs from being used by Florida to identify and list impaired waters. This definition is in direct conflict with the CWA requirements of 40 C.F.R. §130.7(b)&(c) and is arbitrary, capricious, and not in accordance with law, and EPA's Decision Documents are therefore invalid.

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare EPA's 2008 Decision Document approval of Florida's 2007 IWR to arbitrary, capricious, or otherwise not in accordance with law, and therefore invalid.

B. Issue a prospective remedial injunction which orders each of the three Defendants to perform their mandatory, non-discretionary duties to to publish proposed antidegradation implementation methodology and policy for Florida's IWR.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary

Count XXI
EPA is unlawfully withholding or unreasonably delaying action on the June 8,2012 petition of the FWF and the Davises to EPA to initiate rulemaking to promulgate revisions to EPA's regulations at 40 C.F.R. §130.7(b)(5) necessary to implement the Section 303(d) assessment and WQLSs listing requirements of the CWA.
(APA Section 706(1))

394. Count XXI is a citizen suit pursuant to §706(1) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

395. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

396. The FWF re-allege paragraphs 165-166 and 184-186 above. The Davises re-allege paragraphs 157-162 and 184-186 above.

Jurisdiction and venue

397. The FWF re-allege paragraphs 10-14, 165-166, and 184-186 above. The Davises re-allege paragraphs 15-16, 157-162, and 184-186 above.

The Count XXI claim

398. The FWF re-alleges paragraphs 20-117, 129-136, 157-162, 169-180, 190-198, 202-210, 298-307, 313, 320-330, 336-337, and 343-365 above.

399. EPA is unlawfully withholding or unreasonably delaying action on the June 8,2012 petition of the FWF and the Davises to EPA to initiate rulemaking to promulgate revisions to EPA's regulations at 40 C.F.R. §130.7(b)(5) to implement the Section 303(d) assessment and WQLSs listing requirements of the CWA with more specificity.

400. The FWF and the Davises have the right to petition EPA to initiate pursuant to APA §553(e) provides that "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." See, First Amendment of the Federal Constitution (right to petition the government).

401. APA § 555(b) requires EPA to "proceed to conclude a matter presented to it" and that it do so "within a reasonable time." APA §706(1) provides that a reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed." APA §706(a) coupled with APA §555(b) indicates congressional intent that agencies should act within reasonable time

frames and that courts may compel agency action that has been improperly withheld or unreasonably delayed.

402. EPA's delay of over one year has been unreasonable in light of the national importance of implementing the antidegradation WQSs requirements of the CWA, especially given it that these antidegradation requirements have been in effect for over 40 years and EPA has not yet performed EPA's mandatory duty to implement the antidegradation WQSs requirements in Section 303(d) impaired waters assessments. Further EPA delay in implementing the CWA's antidegradation requirements is unreasonable and should not be tolerated.

403. EPA has publicly stated that since late 2010, EPA has known that states are not appropriately implementing the antidegradation WQSs.

404. For years EPA has admitted that no state, nor the EPA, has ever performed a Section 303(d) assessment and evaluation to determine whether state antidegradation WQSs are being attained in state waters, more than three decades after states enacted antidegradation WQSs.

405. It is unreasonable for EPA to ignore the FWF and Davises' June 8, 2012 petition to initiate rulemaking given EPA's March 21, 2011, memorandum issued by Denise Keehner, Director, Office of Wetlands, Oceans, and Watersheds, to all EPA Water Division Directors of EPA Regions 1-10, recognizing that states water quality assessments have focused on whether numeric and narrative WQSs are being attained, but that consideration of antidegradation WQSs provides " a greater opportunity to protect human health and wildlife values, achieve healthy watersheds, and fulfill in a more cost-effective manner the CWA's primary objective to restore and maintain the nation's waters." The memorandum further stated that the "EPA intends to

work with States and other stakeholders to determine whether State antidegradation requirements have been obtained."

406. EPA's 2008 Decision Document concerning Florida's 2007 IWR determined that Florida IWR did not contain any antidegradation methodology for Section 303(d) impaired waters assessments. This EPA determination obligated EPA to promulgate antidegradation methodology for Section 303(d) impaired waters assessments. This EPA obligation requires EPA to either promulgate such methodology specifically for Florida, or to promulgate revisions to EPA's regulation at §130.7(b)(5) as proposed by the FWF and Davises, or similar language. EPA has unreasonably delayed to initiate such rulemaking or deny the petition to initiate such rulemaking. Such inaction by EPA should be held to be unreasonable and EPA ordered to take action deny or initiate rulemaking within 60 days.

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

A. Declare that EPA has unlawfully withheld or unreasonably delayed action on the June 8, 2012 petition to initiate rulemaking filed by the FWF and the Davises.

B. Issue a prospective remedial injunction which orders EPA to take action, within 60 days of the order, on the June 8, 2012 petition to initiate rulemaking filed by the FWF and the Davises.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary.

Count XXII
EPA is unlawfully withholding or unreasonably delaying action on the July 10, 2012 petition of the FWF to EPA to initiate rulemaking to promulgate clarity and detail to the current Florida antidegradation WQSs in order

to met the requirements of the CWA.
(APA Section 706(1))

407. Count XXII is a citizen suit pursuant to §706(1) of the APA by the FWF against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

408. The FWF re-alleges paragraphs 10-14 and 17-19 above.

The FWF has standing

409. The FWF re-alleges paragraphs 10-18, 166-168, and 180-182 above.

Jurisdiction and venue

410. The FWF re-alleges paragraphs 4, 6-10 and 183 above.

The Count XXII claim

411. The FWF re-alleges paragraphs 20-117, 129-136, 157-162, 169-180, 190-198, 202-210, 298-307, 313, 320-330, 336-337, and 343-365 above.

412. EPA is unlawfully withholding or unreasonably delaying action on the July 10, 2012 petition of the FWF to EPA to promulgate the necessary clarity and implementation criteria in t Florida antidegradation WQSs in order to met the requirements of the CWA.

413. The FWF has the right to petition EPA to initiate pursuant to APA §553(e) provides that "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." See, First Amendment of the Federal Constitution (right to petition the government).

414. APA § 555(b) requires EPA to "proceed to conclude a matter presented to it" and that it do so "within a reasonable time." APA §706(1) provides that a reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed." APA §706(a) coupled with

APA §555(b) indicates congressional intent that agencies should act within reasonable time frames and that courts may compel agency action that has been improperly withheld or unreasonably delayed.

415. EPA's delay of over one year has been unreasonable in light of the national importance of implementing the antidegradation WQSs requirements of the CWA, especially given it that these antidegradation requirements have been in effect for over 40 years and EPA has not yet performed EPA's mandatory duty to implement the antidegradation WQSs requirements in Section 303(d) impaired waters assessments. Further delay by EPA in implementing the CWA's antidegradation requirements is unreasonable and should not be tolerated.

416. EPA has publicly stated that since late 2010, EPA has known that states are not appropriately implementing the antidegradation WQSs.

417. For years EPA has admitted that no state, nor the EPA, has ever performed a Section 303(d) assessment and evaluation to determine whether state antidegradation WQSs are being attained in state waters, more than three decades after states enacted antidegradation WQSs.

418. It is unreasonable for EPA to ignore the FWF's July 10, 2012 petition to initiate rulemaking given EPA's March 21, 2011, memorandum issued by Denise Keehner, Director, Office of Wetlands, Oceans, and Watersheds, to all EPA Water Division Directors of EPA Regions 1-10, recognizing that states water quality assessments have focused on whether numeric and narrative WQSs are being attained, but that consideration of antidegradation WQSs provides " a greater opportunity to protect human health and wildlife values, achieve healthy watersheds, and fulfill in a more cost-effective manner the CWA's primary objective to restore and maintain the nation's waters." The memorandum further stated that the "EPA intends to

work with States and other stakeholders to determine whether State antidegradation requirements have been obtained."

419. EPA's 2008 Decision Document concerning Florida's 2007 IWR determined that Florida IWR did not contain any antidegradation methodology for Section 303(d) impaired waters assessments. This EPA determination obligated EPA to promulgate antidegradation methodology for Section 303(d) impaired waters assessments. This EPA obligation requires EPA to either promulgate such methodology specifically for Florida, or to promulgate revisions to EPA's regulation at §130.7(b)(5) as proposed by the FWF and Davises, or similar language. EPA has unreasonably delayed to initiate such rulemaking or deny the petition to initiate such rulemaking. Such inaction by EPA should be held to be unreasonable and EPA ordered to take action deny or initiate rulemaking within 60 days.

WHEREFORE, the FWF respectfully requests the Court grant the following relief.

A. Declare that EPA has unlawfully withheld or unreasonably delayed action on the July 10, 2012 petition to initiate rulemaking filed by the FWF.

B. Issue a prospective remedial injunction which orders EPA to take action, within 60 days of the order, on the July 10, 2012 petition to initiate rulemaking filed by the FWF.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary

Count XXIII
EPA is unlawfully withholding or unreasonably delaying action on the August 8, 2012 petition of the FWF and the Davises to EPA to initiate rulemaking to promulgate amendment of Fla.Admin.Code R. 62-624.500(2) concerning the standards for issuing or denying an application for an individual NPDES municipal separate storm sewer systems permit.

(APA Section 706(1))

420. Count XXIII is a citizen suit pursuant to §706(1) of the APA by the FWF and the Davises against each of the three Defendants, seeking declaratory judgment and prospective injunctive relief.

The parties

421. The FWF and the Davises re-allege paragraphs 10-19 above.

The FWF and the Davises have standing

422. The FWF re-allege paragraphs 165-166 and 184-186 above. The Davises re-allege paragraphs 157-162 and 184-186 above.

Jurisdiction and venue

423. The FWF and the Davises re-allege paragraphs 4, 6-10 and 188 above.

The Count XXIII claim

424. The FWF re-alleges paragraphs 20-117, 129-136, 157-162, 169-180, 202-210, 290-296, and 311-317 above.

425. EPA is unlawfully withholding or unreasonably delaying action on the August 8, 2012 petition of the FWF and the Davises to EPA to initiate rulemaking to promulgate 146. August 8, 2012, almost 12 months ago, the FWF and the Davises petitioned EPA to initiate rulemaking to promulgate an amendment of Fla.Admin.Code R. 62-624.500(2) concerning the standards for Florida to use when issuing or denying an application for an individual NPDES MS4 permit.

426. Currently Fla.Admin.Code R. 62-624.500(2) reads as follows.

"Standards for Issuing or Denying Individual Permits.

* * *

> (2) The Department shall issue an MS4 only if the applicant affirmatively provides the Department with reasonable assurance that the stormwater management program will achieve a reduction of the discharge of pollutants from the MS4 to the Maximum Extent Practicable in accordance with 40 CFR 122.26."

This language does not reference necessary water quality-based effluent limitations as required the CWA.

427. The FWF and the Davises have petitioned EPA to promulgate the following underlined revision to Fla.Admin.Code R. 62-624.500(2).

> **"Standards for Issuing or Denying Individual Permits.**
> * * *
> (2) The Department shall issue an MS4 only if the applicant affirmatively provides the Department with reasonable assurance that the stormwater management program will achieve a reduction of the discharge of pollutants from the MS4 to the Maximum Extent Practicable, and such other provisions determined to be appropriate for the control of such pollution. Other provisions determined to be appropriate for the control of such pollution are effluent limitations in the permit which contain clear, specific, measurable and enforceable water pollution controls, with milestones, benchmarks, and time frames, that require the discharge comply with applicable wasteload allocations requirements and not cause or contribute to the violation of Water Quality Standards.

428. This petition to initiate rulemaking language is based upon the requirements of 33 U.S.C. §1342(p)(3)(B)(iii) and 40 C.F.R. §122.44(d)(1). The CWA standard for NPDES MS4 permits is to have "controls which reduce the discharge of pollutants to the maximum extent practicable [MEP]....and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (e.s.). See, 33 U.S.C. §1342(p)(3)(B)(iii); Defenders of Wildlife v. Browner, 191 F.3d 1159, 1166 (9th Cir. 1999).

429. EPA's 2010 "MS4 Permit Improvement Guidance" provides MS4 permit requirements must be clear, specific, measurable and enforceable, and contain permits conditions consistent with the requirements of WLAs in applicable TMDLs. On April 15, 2010, EPA

Region IV made a determination that, pursuant to 40 C.F.R. §122.44(d)(1)(vii)(B), NPDES MS4 permits issued by Florida must contain conditions that are consistent with the assumptions and requirements of WLAs in applicable TMDLs, the MS4 permits conditions must be clear, specific and measurable in terms of required water quality controls, timeframes and milestones, and explain how the measures implemented will address the WLA. See, April 15, 2010 letter from James D. Giattina to the Director, FDEP Division of Water Resource Management.

430. EPA has not yet acted upon the subject August 8, 2012 petition to initiate rulemaking. EPA has neither initiated rulemaking, nor has EPA rejected this petition to initiate rulemaking.

431. EPA has unlawfully withheld and unreasonably delayed to act on the August 8, 2012 petition to initiate rulemaking. See, 5 U.S.C. §706(1) (unlawfully withheld or unreasonably delayed action in violation of the APA).

432. The FWF and the Davises have the right to petition EPA to initiate pursuant to APA §553(e) provides that "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." See, First Amendment of the Federal Constitution (right to petition the government).

433. APA § 555(b) requires EPA to "proceed to conclude a matter presented to it" and that it do so "within a reasonable time." APA §706(1) provides that a reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed." APA §706(a) coupled with APA §555(b) indicates congressional intent that agencies should act within reasonable time frames and that courts may compel agency action that has been improperly withheld or unreasonably delayed.

WHEREFORE, the FWF and the Davises respectfully request the Court grant the following relief.

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B. Issue a prospective remedial injunction which orders EPA to take action, within 60 days of the order, on the August 8, 2012 petition to initiate rulemaking filed by the FWF and the Davises.

C. Award the FWF its costs and reasonable attorney fees; and

D. Any other relief this Court deems necessary

Respectfully submitted,

/S/

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Certificate of Service

I certify that a copy of the above complaint was served by electronic mail to the following individuals, this 10th day of August, 2013.

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/S/
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