

No. 10-10886-E and No. 10-11121-E

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

SOUTH FLORIDA WATER MANAGEMENT DISTRICT
Intervenor/Appellant,

FLORIDA WATER ENVIRONMENT ASSOCIATION UTILITY COUNCIL
Intervenor/Appellant,

v.

LISA P. JACKSON, Administrator of United States Environmental Protection
Agency, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendants/Appellees,

FLORIDA WILDLIFE FEDERATION, INC., SIERRA CLUB INC.,
ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC.,
ST. JOHNS RIVERKEEPER, INC., CONSERVANCY OF SOUTHWEST
FLORIDA, INC.,
Plaintiffs/Appellees,

On Appeal from the United States District Court for the Northern District of
Florida, Case No. 4:08-cv-00324-RH-WCS

**INITIAL BRIEF OF APPELLANT
FLORIDA WATER ENVIRONMENT ASSOCIATION UTILITY COUNCIL**

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*On behalf of Intervenor/Appellant
FWEA Utility Council*

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-10886-E and No. 10-11121-E

FLORIDA WATER ENVIRONMENT ASSOCIATION UTILITY COUNCIL,
et al., Appellant/Intervenor

v.

LISA JACKSON, et al.,
Appellee/Defendant

On Appeal from the United States District Court for the
Northern District of Florida, Case No. 4:08-cv-00324-RH-WCS

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rules 26.1-1 and 26.1-3, Appellant/Intervenor, the Florida Water Environment Association Utility Council (“Utility Council”), by and through its undersigned counsel, hereby certifies that the Utility Council is a specifically constituted entity created by the bylaws of the Florida Water Environment Association, Inc. (“FWEA”). The FWEA is a non-governmental corporate entity organized under the laws of Florida. The FWEA does not have a parent corporation. No publicly held corporation owns ten percent or more of the FWEA’s stock. The Utility Council is authorized to litigate on behalf of and otherwise represent the interests of the FWEA on matters affecting FWEA’s

wastewater utility members. The Utility Council further certifies that, based on the information available to it, the following is a complete list of all persons and entities that have an interest in the outcome of this case.

Alves, James Steven

American Farm Bureau Federation

Borkowski, Winston Kirk

Brannon, Brown, Haley & Bullock, P.A.

Childs, David William

Cole, Terry

Conservancy of Southwest Florida, Inc.

Crowley, Kevin X.

Duffey, Amy Christine

Earthjustice – Tallahassee, FL

Environmental Confederation of Southwest Florida, Inc.

Florida Cattleman's Association

Florida Citrus Mutual, Inc.

Florida Engineering Society

Florida Farm Bureau Federation

Florida Fruit and Vegetable Association

Florida Minerals and Chemistry Council, Inc.

Florida Pulp and Paper Association Environmental Affairs, Inc.

Florida Stormwater Association

Florida Water Environment Association Utility Council

Florida Wildlife Federation, Inc.

Forthman, Carol Ann

Green, Darby Meginniss

Guest, David G.

Hinkle, The Honorable Robert L.

Hopping Green & Sams, P.A.

Jackson, Lisa P.

Jazil, Mohammad Omar

Mann, Martha Collins

Mitchell, Matthew Calieb

Northwest Florida Water Management District

Oertel, Fernandez, Cole & Bryant, P.A.

Pennington, Moore, Wilkinson, Bell & Dunbar, P.A.

Pettit, Christopher L.

Reimer, Monica Kidd

Rizzardi, Keith W.

St. Johns Riverkeeper, Inc.

Sierra Club, Inc.

South Florida Water Management District

Southeast Milk, Inc.

Southwest Florida Water Management District

State of Florida Department of Agriculture

Stinson, Robert Del

Suwannee River Water Management District

Toth, Brian

United States Environmental Protection Agency

Respectfully submitted,

s/ Mohammad O. Jazil

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STATEMENT REGARDING ORAL ARGUMENT

The Florida Water Environment Association Utility Council respectfully requests oral argument in this case. The case raises issues of critical importance to the organization and its members who must comply with the requirements of the Clean Water Act. The issues presented also have significant implications for the system of cooperative federalism embodied in many of the Nation's seminal environmental statutes, including the Clean Water Act. The Florida Water Environment Association Utility Council therefore submits that oral argument is appropriate and necessary.

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STATEMENT OF JURISDICTION

I. District Court’s Subject Matter Jurisdiction

The district court had original jurisdiction over this case brought by Florida environmental groups against the U.S. Environmental Protection Agency (“EPA”) under the Clean Water Act (“CWA”), 33 U.S.C. §§ 1251 *et seq.*¹ *See id.* at § 1365(a); 28 U.S.C. § 1331. The environmental groups and EPA negotiated a consent decree, which the district court approved over the objection of thirteen intervenors, including the Florida Water Environment Association Utility Council (“Utility Council”). (R. 152; 153).

II. Timeliness of Appeal

The Utility Council’s appeal from the district court’s December 30, 2009 order entering the decree is timely. After the court entered the 2009 consent decree, the Utility Council filed a motion for rehearing and reconsideration within 28 days. (R. 159). The January 27, 2010 motion was thus timely. *See Fed. R. Civ. P. 59(e)*. The district court denied the motion on January 29, 2010. (R. 161).

On February 25, 2010, the South Florida Water Management District (“SFWMD”) filed its notice of appeal. (R. 162). SFWMD’s appeal was timely

¹ This brief refers to sections of the CWA as codified in the most recent publication of the U.S. Code, and the 2009 versions of the Florida Statutes (“Fla. Stat.”), Florida Administrative Code (“Fla. Admin. Code”) and Code of Federal Regulations (“C.F.R.”). References to the record begin with “R.” followed by the document number as it appears in the district court’s docket below; where appropriate, page and paragraph numbers are also provided preceded by “at.”

filed within 30 days of the district court's order denying the motion for reconsideration. Fed. R. App. P. 4(a)(4)(A)(iv). The Utility Council then filed its notice of appeal on March 10, 2010, within 14 days of SFWMD's notice of appeal. (R. 169). The Utility Council's notice of appeal was thus timely. Fed. R. App. P. 4(a)(3).

III. Appellate Jurisdiction

This Court has jurisdiction over the Utility Council's appeal. The district court's order entering the consent decree is a final judgment under 28 U.S.C. § 1291. *See Johnson v. Lodge #93 of the Fraternal Order of Police*, 393 F.3d 1096, 1099 (10th Cir. 2004). Moreover, as detailed in its filings below and this brief, the Utility Council has standing to bring the appeal. *See, e.g., Ne. Florida Contractors v. Jacksonville*, 508 U.S. 656, 663-64 (1993). The Utility Council is an association of public and private utilities in Florida that provide an essential public service – the operation and maintenance of domestic wastewater collection, treatment, disposal, reuse and recycling facilities – to over 7 million Floridians. (R. 89 at 4-5). Utility Council members serve their communities in accordance with the requirements of the CWA, including the Total Maximum Daily Load (“TMDL”) and National Pollutant Discharge Elimination System (“NPDES”) programs. (*Id.*). The 2009 consent decree alters this CWA regime, and due to its entry, the Utility Council and its members have suffered and will imminently suffer pecuniary harm

fairly traceable to the decree. (*Id.*). An order vacating the consent decree is likely to redress the harm. The Utility Council thus has standing to bring this appeal.

See Ne. Florida Contractors, 508 U.S. at 663-64.

STATEMENT OF ISSUES

The district court's order approving the 2009 consent decree raises three issues on appeal. First, at issue is whether the 2009 consent decree conflicts with the injunctive relief granted under a still-effective 1999 consent decree entered by the same court in a separate suit. (*Compare* R. 36-1 *with* R. 153). Second, at issue is whether the 2009 consent decree unreasonably limits EPA's consideration of public comments in contravention of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 500 *et seq.* *See* (R. 110 at 6-8). Third, at issue is whether the district court abused its discretion by failing to hold an evidentiary hearing before entering a consent decree in a legally and factually complex case. *See* (R. 102 at 19-20; 136).

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of the district court's order approving a consent decree, and subsequent denial of the motion to reconsider the order. (R. 152; 160; 161). The Utility Council and twelve other intervenors objected to the 2009 consent decree's entry. *See generally* (R. 152). The court approved the 2009 consent decree without addressing the decree's conflict with Florida nutrient TMDLs created under the 1999 consent decree or adequately considering the contravention of the APA's public comment provisions. (*Id.*). The court also declined to hold an

evidentiary hearing to resolve the complex and disputed facts in this case. (R. 102 at 19-20; 136). This appeal followed and was consolidated with a similar appeal filed by the SFWMD. *See* April 27, 2010 Order Granting Motion to Consolidate.

II. Statement of Facts

The CWA promotes the attainment and maintenance of the designated uses of surface waters, such as fishing and swimming. *See* 33 U.S.C. §§ 1313(c)-(d). In 1998, several Florida environmental groups sued EPA under the CWA and sought the promulgation of TMDLs for Florida’s waters so that pollutant loading – including excess nutrient loading – would be reduced and Florida’s waters would achieve and maintain designated uses. *See* (R. 36-1). EPA and the environmental groups settled the suit in 1999 with the entry of a consent decree. (*Id.*).

In July 2008, similarly situated environmental groups – represented by the same counsel – filed this separate suit against EPA under the CWA seeking to ensure that Florida’s waters achieve and maintain their designated uses.² (R. 1 at ¶¶ 27-29). This time the groups asserted that EPA had determined in a 1998 guidance document that narrative water quality criteria for nutrients in virtually all States – including Florida – were inadequate under the CWA. (*Id.* at ¶¶ 32-35). They argued that EPA thus had a nondiscretionary duty to promulgate numeric

² The environmental groups sued both EPA and its Administrator in her official capacity. For the sake of brevity, this brief refers to both EPA and its Administrator as “EPA.”

nutrient criteria for Florida under the CWA. *See* (R. 56). EPA disagreed. *See* (R. 66). EPA stated that there was no duty because the 1998 guidance document included no determination that Florida’s narrative criterion was inadequate or that the CWA required Florida to have numeric nutrient criteria. (*Id.* at 4-5). In January 2009, however, EPA issued a letter to the Florida Department of Environmental Protection (“FDEP”) stating that Florida’s narrative nutrient criterion was inadequate and Florida needed numeric nutrient criteria. (R. 55-6, at 1-3). EPA and the environmental groups then negotiated the 2009 consent decree, which prescribes deadlines for promulgating numeric nutrient criteria. (R. 153).

The Utility Council, among others, objected to judicial approval of the consent decree. *E.g.*, (R. 110; 142). The Utility Council and others argued that the requirements of the 2009 consent decree would negatively impact Florida’s TMDL program, in part by creating a conflict with the site-specific numeric nutrient limits created by the TMDL program, as required by the still-effective 1999 consent decree entered by the court. (R. 36-1; 89 at 5 and 9; 106 at 12; 107 at 4; 115 at 5, 7 and 11; 115-9 ¶¶ 7-18; 127 at 9-10; 142 at 33; 155-1; 159). The Utility Council and others also argued that because evidence concerning the need for the 2009 consent decree was disputed, an evidentiary hearing was needed. (R. 102 at 6-7). The district court, however, entered the decree without holding an evidentiary

hearing. (R. 136; 152). The court also denied the Utility Council's motion to reconsider the order. (R. 161).

Since this appeal arises against the backdrop of a complex regulatory scheme – the CWA – the following discussion provides an overview of the regulatory framework. The issue of excess nutrients, Florida's existing TMDL program, and the facts leading to the 2009 consent decree are also discussed.

A. An Overview of the CWA

Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). Congress expressly empowered the States – not EPA – with primary authority to implement the CWA. 33 U.S.C. § 1251(b). The CWA requires each State to adopt water quality criteria and, where necessary, TMDLs to ensure that waters achieve and maintain their designated uses. *Id.* at §§ 1313(c)-(d).

Water quality criteria may be expressed in narrative or numeric form. 40 C.F.R. § 130.7(c)(1). Numeric criteria provide measureable pollutant limits. Narrative criteria provide a qualitative statement. Both numeric and narrative criteria are set at levels necessary for waters to achieve and maintain their designated uses. 40 C.F.R. § 130.3. “[N]either the [CWA] itself nor the regulations require that any numeric criteria be established. Water quality criteria may be, and often are, totally narrative.” *Envtl. Defense Fund v. Costle*, 657 F.2d

275, 288 (D.C. Cir. 1981); *see also*, *PUD No. 1 of Jefferson County v. City of Washington Dep't of Ecology*, 511 U.S. 700, 717 (1994).

Utility Council members are regulated to ensure that applicable water quality criteria, including Florida's existing narrative nutrient criterion, are met. Specifically, surface water discharges from wastewater treatment facilities must obtain NPDES permits. 33 U.S.C. § 1342. NPDES permits contain technology-based effluent limitations that reflect the pollution reduction achievable based on particular equipment or process changes. They may also include water quality-based effluent limitations to ensure the receiving waters achieve and maintain water quality criteria that support designated uses. *See id.* at § 1311(b).

If particular surface waters do not achieve their designated uses with respect to nutrients or other parameters, States must establish TMDLs for these waters. 33 U.S.C. § 1313(d)(1)(A) and (C). TMDLs, like water quality criteria, must ensure that waters can achieve and maintain their designated uses. *Id.* at §§ 1313(c)-(d); 40 C.F.R. §§ 130.2(g)-(j) and 130.7. Specifically, TMDLs are established at “level[s] necessary to implement the applicable water quality [criteria].” 33 U.S.C. § 1313(d)(1)(C). Where the applicable water quality criterion is a narrative criterion, a TMDL translates the narrative statement into a precise, measurable limit. *See Fla. Admin. Code r. 62-304*; 40 C.F.R. § 130.2(i). The TMDL-based numeric limits establish “the maximum amount of a particular pollutant that can

pass through a waterbody each day without water quality [criteria] being violated.” *Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). This pollutant load is allocated to NPDES permittees and others, such as agriculture. Fla. Admin Code r. 62-304; *see also* 40 C.F.R. §§ 122.44(d) and 130.2(g)-(i).

Although States have the primary responsibility to establish water quality criteria and TMDLs, EPA may intervene in limited circumstances. 33 U.S.C. §§ 1251(b), 1313(c)-(d). For example, when a State fails to adopt any standards or when EPA determines the State standards are inadequate, EPA must “promptly” promulgate federal standards. *Id.* at § 1313(c)(3) and (4).

B. The Problem of Excess Nutrients

Excess nutrients present a complex water quality (and regulatory) problem. As FDEP has succinctly explained,

Nutrients are unlike any other “pollutant” regulated by the federal Clean Water Act (CWA). Most water quality criteria are based on a toxicity threshold, evidenced by a dose-response relationship, where higher concentrations can be demonstrated to be harmful, and acceptable concentrations can be established at a level below which adverse responses are elicited (usually in laboratory toxicity tests). In contrast, nutrients are not only present naturally in aquatic systems, they are absolutely necessary for the proper functioning of biological communities, and are sometimes moderated in their expression by many natural factors.

Therefore, the development of protective [numeric] nutrient criteria is immensely more complicated than that for toxic substances. It must be recognized that nutrients should not be regulated at levels that are artificially lower than those concentrations required for normal ecosystem functioning. If humans were to reduce nutrients below the

levels that natural aquatic systems are accustomed to, adverse biological effects (disruption of trophic dynamics, loss of representative taxa) would occur. This would be counter to the CWA charge in Section 101 to “protect the physical, chemical, and biological integrity” of the state’s waters and, coincidentally, against Florida law, which prohibits FDEP from conducting remediation for natural conditions.

(R. 63-2 at 11). Recognizing this complexity, Florida utilizes a narrative water quality criterion for nutrients. The criterion states that “in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna.” Fla. Admin. Code r. 62-302.530(47)(b). This narrative criterion has been and continues to be translated into numeric limits for many of Florida’s waters through the State’s TMDL program.

C. The 1999 Consent Decree and Florida’s TMDL Program

Florida’s current TMDL program traces its origin to a 1999 consent decree entered by the court below in a separate case. *See Florida Wildlife Fed’n v. Browner*, 4:98-CV-2560-WS (N.D. Fla. July 2, 1999); (R. 36-1). The 1999 consent decree was signed by an EPA representative and counsel for the environmental groups in this case.³ (R. 36-1 at 19-20). The 1999 decree

³ Around the same time that the district court entered the 1999 consent decree, the Florida Legislature passed the Florida Watershed Restoration Act (“FWRA”). Fla. Laws 99-223. FWRA established the State’s current TMDL program. Fla. Stat. § 403.067(1). Among other things, the FWRA directed the Florida Department of Environmental Protection to set TMDLs and load allocations “for the attainment of water quality standards and the restoration of impaired waters.” *Id.* at §§ 403.067(2)-(7). FDEP thereafter adopted its Impaired Waters Rule, which

establishes a priority schedule for the promulgation of TMDLs for waters throughout Florida. (*Id.*). It requires that TMDLs be established to, among other things, curb excess nutrients. (*Id.* at 7, 22-31) (listing waters impaired by, among other things, excess nutrients).

To date, FDEP has adopted – and EPA has approved – 79 nutrient TMDLs for Florida waterbodies. *See* Fla. Admin. Code r. 62-304; (R. 155-1) (providing TMDLs adopted by rule as of December 7, 2008). For some major water systems, such as the Indian River and Lower St. Johns River, FDEP promulgated distinct nutrient TMDLs for different waterbody segments. *See* Fla. Admin. Code r. 62-304.145, .415, and .510. All of these nutrient TMDLs include numeric nutrient limits designed to protect the designated use of the waters. *See, e.g.,* Fla. Admin. Code r. 62-304.506(5) (setting numeric limits of 0.286 mg/L Nitrate and 0.065 mg/L Total Phosphorus for Rock Springs Run). The numeric nutrient limits are expressed in terms of mass loads (e.g., pounds per year) or concentrations (e.g., milligrams per liter) and address one or more nutrient parameter (i.e., total phosphorus (TP), total nitrogen (TN), or nitrate-nitrogen). The TMDLs also often include specific load allocations expressed in terms of percent reductions or mass-loads for nutrient sources, including wastewater treatment utilities. *See, e.g.,* Fla.

includes a framework for analyzing the nutrient health of waters and making impairment determinations. Fla. Admin. Code r. 62-303.350, .353 and .450.

R. Admin. r. 62-304.520(8)(a) (setting waste load allocations of 12,173 lbs/yr-TN and 916 lbs/yr-TP for the Vero Beach Wastewater Treatment Facility).

In addition to creating specific numeric limits by rule, Florida implements its nutrient TMDLs through Basin Management Action Plans (“BMAPs”). (R. 55-6 at 5). Florida’s BMAP program “assembles groups of stakeholders to develop plans in order to implement State-adopted and EPA-approved TMDLs.” (*Id.*) This program addresses implementation schedules, methods for evaluating effectiveness, funding strategies, best management practices, and future pollutant loadings. (*Id.*).

As EPA has noted, Florida’s BMAP program is augmented by other “innovative” programs designed to prevent harm from excess nutrients. (*Id.* at 5-6). Major domestic wastewater treatment facilities near Tampa Bay and Key West, for instance, must achieve effluent nutrient concentrations of 3mg/L Total Nitrogen and 1mg/L Total Phosphorus. (*Id.* at 5); *see also* Fla. Stat. § 403.086. Watershed-based programs further limit nutrient pollution in the Everglades Protection Area, Wekiva Springs, and Indian River Lagoon System. (*Id.* at 5-6.) And Florida’s stormwater rules limit nutrient loads from stormwater runoff. *See generally* Fla. Admin. Code r. 62-40.432(1)-(5). State nutrient water quality programs have paid great dividends over the years, particularly with respect to phosphorus levels in

Florida waters. (R. 127, Ex. D at ix-x) (showing a precipitous decline in phosphorus concentrations since the early 1980s).

D. The 2009 Consent Decree and Water Quality Criteria

Notwithstanding Florida's progress in limiting nutrient loading under its existing nutrient water quality programs (including the TMDL program as mandated under the 1999 consent decree), various environmental groups filed a complaint in this case alleging the quality of Florida's waters is deteriorating because of excess nutrients. (R. 1 at ¶¶ 17-25). The groups further asserted that Florida's narrative nutrient criterion was responsible for the decline, and that EPA had made a determination to this effect in a national guidance document from 1998. (*Id.* at ¶¶ 29-43). According to the groups, this alleged determination under § 1313(c)(4)(B) of the CWA triggered EPA's nondiscretionary duty to promptly promulgate numeric nutrient standards for Florida. *See* (R. 56). EPA denied these allegations. (R. 66 at 4-5). EPA also denied the allegation that Florida had "not adopted or proposed numeric nutrient standards." (R. 24 at ¶ 48).

Prior to any ruling on the merits, however, EPA issued a letter that ostensibly determined that Florida's narrative nutrient criterion was inadequate; Florida needed numeric nutrient criteria to comply with the CWA.⁴ (R. 55-6 at 1-

⁴ The Utility Council, among others, filed a lawsuit challenging the validity of this determination. *See Florida Water Env't Ass'n Utility Council v. Jackson*, Case No. 4:09-CV-428-RH/WCS (N.D. Fla. 2009). This case is pending.

10). The January 2009 letter stated that “determining, on a water-by-water basis for thousands of waters, the levels of nutrients that would ‘cause an imbalance in natural populations of aquatic flora or fauna’ is a difficult, lengthy, and data-intensive undertaking.” (*Id.* at 3). The letter concluded that replacing the narrative criterion with generalized numeric criteria for all State waters would remedy the purported delays associated with translating the criterion into site-specific limits in the NPDES and TMDL programs. (*Id.* at 3-4).

EPA created no administrative record in support of its January 2009 determination. (R. 102 at 12). The other parties and the district court could thus only evaluate the determination based on its bare text and a few internal EPA memoranda filed in the case. (R. 55 at 11-13; 89 at 33-35).

Soon after the January 2009 letter, the environmental groups filed a new notice of intent to sue EPA based on the purported determination, and sought leave to amend their complaint. (R. 71 at ¶ 8). The court granted leave, and the environmental groups filed a Third Amended Complaint in July 2009. (R. 81; 85). The complaint alleged that the January 2009 letter triggered EPA’s duty to promptly promulgate numeric nutrient criteria for Florida. (R. 81 at ¶ 3).

EPA and the environmental groups then negotiated the 2009 consent decree. (R. 153). The decree directs EPA to propose numeric nutrient criteria for all of Florida’s lakes and flowing waters by January 14, 2010 and to finalize the criteria

by October 15, 2010. (*Id.* at ¶¶ 4-6). It also directs EPA to propose numeric nutrient criteria for all of Florida’s estuaries and coastal waters by January 14, 2011 and finalize the criteria by October 15, 2011. (*Id.* at ¶¶ 8-10). EPA may escape these deadlines if the State of Florida first promulgates (and EPA approves) numeric nutrient criteria; the parties to the decree agree to an extension in the schedule; the court grants permission to extend the schedule; or the court dissolves or modifies the decree. (*Id.* at ¶¶ 3-11 and 22).

Neither the Utility Council nor the twelve other intervenors in this case participated in the discussions leading up to the consent decree. In August 2009, EPA and the groups moved to enter the decree. (R. 90). The district court allowed all parties – including intervenors and amici curiae – to file briefs, declarations and other written evidence concerning the 2009 consent decree. (R. 136). Requests for an evidentiary hearing were denied. (*Id.*). The court approved the decree after hearing oral arguments. (R. 152). The Utility Council asked the court to reconsider the order entering the consent decree. (R. 159). The court declined. (R. 161). The Utility Council appealed. (R. 169).

III. Standards of Review

Judicial interpretations of contracts and statutes are reviewed *de novo*. *Tobin v. Michigan Mut. Ins. Co.*, 398 F.3d 1267, 1274 (11th Cir. 2005). Thus, the Court should review *de novo* the issues of whether the 2009 consent decree

conflicts with the 1999 consent decree or impermissibly limits meaningful public comments under the APA. *Id.*; *see also Johnson*, 393 F.3d at 1101-02 (recognizing that a conflict between a consent decree and another written agreement is reviewed *de novo*); *United States v. City of Hialeah*, 140 F.3d 968, 973 (11th Cir. 1998). An abuse of discretion standard applies to the district court's decision to enter the decree without holding an evidentiary hearing. *See, e.g., Stovall v. City of Cocoa*, 117 F.3d 1238, 1240-44 (11th Cir. 1997).

SUMMARY OF THE ARGUMENT

This case is a tale of two consent decrees. Two conflicting solutions to the same problem, arrived at in two different cases, spanned by ten years, creating significant negative legal and policy consequences.

The district court erred when it entered the consent decree in this case, because it overrides a still-effective consent decree entered ten years prior in a separate case. The first consent decree, entered in 1999, requires the establishment of TMDLs – including nutrient TMDLs – for Florida waters that are (or were) failing to meet their designated uses. TMDLs are promulgated under § 1313(d) of the CWA. To date, Florida has promulgated 79 nutrient TMDLs for Florida surface waters. Each of the nutrient TMDLs include site-specific numeric limits that are set at levels protective of the designated use of the waterbodies.

The second consent decree, entered in 2009, requires the establishment of numeric nutrient criteria for all Florida surface waters. Water quality criteria are promulgated under § 1313(c) of the CWA. Like TMDLs, water quality criteria are set at levels protective of the designated use of waterbodies. The 2009 consent decree mandates numeric nutrient criteria for all Florida waters, including those waters with nutrient limits promulgated in accordance with the 1999 consent decree. While EPA acknowledged the overlap between the two consent decrees in another ongoing federal case, it failed to similarly alert the district court in this case. Also, EPA has not produced any evidence whatsoever demonstrating that the TMDLs promulgated in accordance with the 1999 consent decree are somehow invalid or inadequate. In fact, these TMDLs were approved by EPA prior to judicial approval of the 2009 consent decree. The 2009 consent decree dismantles Florida's progress in implementing the still-effective 1999 consent decree without explanation. EPA should have alerted the court to the overlap between the two consent decrees it signed and negotiated so that the court could evaluate the issue. Because EPA failed to do so, the district court erred by entering the unreasonable consent decree.

The consent decree also impermissibly hampers EPA's options for considering public comments, because EPA is required to finalize the criteria by dates certain, unless EPA seeks and secures the permission of litigants or the court

to extend the finalization deadline. The finalization deadline renders the consent decree unreasonable.

The district further abused its discretion by failing to conduct any manner of evidentiary hearing prior to entering the consent decree. This is a legally and factually unique case, in which a federal agency thwarted Florida's primacy under the CWA; hastily overturned State water policy based on a contested factual predicate; failed to produce an administrative record in support of its decision; and entered into a bilateral consent decree with Plaintiff-environmental groups over the objections of thirteen intervening parties. The complex nature of this case combined with the paucity and contested nature of the record led to facially incorrect factual and legal conclusions in the order approving the consent decree. Only an evidentiary hearing to test the factual predicate for the 2009 consent decree would correct these errors.

The district court's order entering the consent decree should therefore be reversed, the 2009 consent decree vacated, and the case remanded with directions to expressly exclude existing nutrient TMDLs and conduct an evidentiary hearing regarding the contested facts that serve as predicates for the 2009 consent decree.

ARGUMENT

I. THE DISTRICT COURT ERRED BY APPROVING THE 2009 CONSENT DECREE, WHICH ABRUPTLY UNRAVELS IMPLEMENTATION OF THE 1999 CONSENT DECREE.

The district court erred in entering the 2009 consent decree and ruling that the conflict between 1999 and 2009 consent decree was substantively and procedurally unfounded. Consent decrees “always contain injunctive relief.” *City of Hialeah*, 140 F. 3d at 974 (citations omitted). Thus, before entering a consent decree, a court should “take care to avoid overlapping or conflicting injunctive commands.” *United States v. City of Jackson, Miss.*, 519 F.2d 1147, 1152 n.10 (5th Cir. 1975). Further, a court may not place a judicial imprimatur on a decree that is logically, factually or legally unreasonable. *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc). When the underlying “suit seeks to enforce a statute,” a court must also ensure that a consent decree “is consistent with the public objectives sought to be attained by Congress” *Id.* (citations omitted). And the court should not enter a consent decree without the consent of a party whose rights would be affected. *City of Hialeah*, 140 F.3d at 978-81.

EPA admits that “promulgation of numeric criteria for nutrients provided for in the consent decree may impact TMDLs established in Florida” – the injunctive relief granted under the 1999 consent decree. (R. 106 at 12). EPA admits this because waters with TMDL-based nutrient limits promulgated in accordance with

the 1999 consent decree are not excluded by the 2009 consent decree. *See* (R. 153). The 2009 consent decree expressly excludes certain waters from the reach of numeric limits EPA must promulgate under the 2009 decree. (*Id.* at ¶¶ 4, 8, 10, 11). These exclusionary paragraphs make no mention of surface waters with existing, TMDL-based nutrient limits. (*Id.*). Thus, TMDL waters are included. *See In re Celotex Corp.*, 487 F.3d 1320, 1334 (11th Cir. 2007) (the express mention of one thing in a contract excludes all others).

The failure to exclude waters with TMDL-based numeric nutrient limits under the 1999 consent decree is logically unreasonable. *See City of Miami*, 664 F.2d at 441. Existing TMDL-based numeric limits promulgated in accordance with the 1999 consent decree are site-specific. The new limits contemplated by the 2009 consent decree will inherently be based on less precise, more general analysis. EPA's January 2009 letter – the impetus for the 2009 consent decree – acknowledges as much. In the letter, EPA asserted that the translation of Florida's narrative nutrient criterion on a water-by-water basis in the NPDES and TMDL programs takes a great deal of time. (R. 55-6 at 3-4). EPA averred that the resulting site-specific limits are precise, but the process for developing them is too slow. *See (Id.)*. EPA thus concluded that more general numeric nutrient limits would overcome the perceived drawbacks of translating the narrative criterion into site-specific numeric limits. (*Id.*). But the 2009 consent decree applies to waters

for which the State has already completed a site-specific analysis and created site-specific nutrient limits pursuant to the 1999 consent decree. This outcome is not logically reasonable. EPA should not spend ten years leading Florida and its regulated public down the primrose path of implementing the 1999 consent decree via site-specific TMDL promulgation, nutrient limit derivation, and load allocation implementation, only to subject these very same TMDL waters to the promulgation of generalized nutrient standards in accordance with the new 2009 consent decree.

The consent decree's failure to exclude waters that already have EPA-approved, TMDL-based numeric nutrient limits is also legally unreasonable and contrary to "the public objectives sought to be attained by Congress" in the CWA. *City of Miami*, 664 F.2d at 441. Congress directed EPA to implement the CWA in an efficient manner, avoiding "needless duplication and unnecessary delays." 33 U.S.C. § 1251(f). Under the 2009 consent decree, however, the opposite occurs. The 1999 consent decree requires the promulgation of nutrient TMDLs and associated numeric limits to protect the designated use of applicable waterbodies. *See* 33 U.S.C. §§ 1313(c)-(d); 40 C.F.R. §§ 130.2(j) and 130.7. The 2009 consent decree requires the promulgation of numeric nutrient criteria to similarly protect the designated uses of waterbodies, including waterbodies that already have numeric nutrient limits because of the 1999 consent decree.

The 2009 consent decree's grant of equivalent but less precise injunctive relief than the 1999 consent decree is unnecessary, ill-advised and contrary to good jurisprudence. *See City of Jackson, Miss.*, 519 F.2d at 1152 n.10. The requirement to promulgate standards for waterbodies that already have existing site-specific limits at best destabilizes – and at worst completely unravels – a more precise program for protecting designated uses from excess nutrients. This creates an immediate conflict with the 1999 consent decree. Utility Council members, among other stakeholders, currently make expenditures to ensure compliance with the 79 nutrient TMDLs established by FDEP (and approved by EPA), including in the Lower St. Johns River, Indian River, and other major State water systems. The 2009 consent decree directs EPA to re-promulgate nutrient limits for these waters without the Utility Council's consent. *See City of Hialeah*, 140 F.3d at 978-81.

EPA acknowledged the immediacy of impact of the 2009 consent decree on numeric nutrient endpoints promulgated in accordance with the 1999 consent decree. In an ongoing challenge to EPA-approved nutrient TMDLs for Lake Okeechobee tributaries, EPA filed a joint motion for stay based on a stated belief that “the promulgation of numeric criteria for nutrients provided for in the consent decree may impact TMDLs established in Florida.” (R. 106 at 12). This understated characterization of the problem further indicates that the 2009 consent decree creates immediate “needless duplication and unnecessary delays” in

implementing the CWA. 33 U.S.C. § 1251(f). The unwinding of the 1999 consent decree by the 2009 consent decree is legally unreasonable.

Lastly, the district court erred in ruling that the conflict between the 1999 consent decree and 2009 consent decree was procedurally unfounded. The Utility Council adequately raised its concerns regarding the conflict between the 2009 and 1999 consent decree, and the issue is preserved for appeal. Whether a party has preserved an issue for appeal is a prudential, not jurisdictional, consideration.

Dean Witter Reynolds v. Fernandez, 741 F.2d 355, 360 (11th Cir. 1984). Further, whether two consent decrees conflict is a question of law subject to *de novo* review, *City of Hialeah*, 140 F.3d at 973, and “[w]ith issues subject to *de novo* review on appeal, [this Court’s] scope of review is at its broadest and [its] willingness to decide without the benefit of a district court ruling should increase commensurately,” *Macklin v. Singletary*, 24 F.3d 1307, 1311-12 (11th Cir. 1994).

The negative impact of the 2009 consent decree on Florida’s TMDL program was before the district court. The Utility Council noted that its members are subject to Florida’s federally approved TMDL program. (R. 89 at 5). The Utility Council stated “an interest in continuing to be regulated by the current Florida statutory and administrative framework, substantive portions of which, if the January 14, 2009 necessity determination is ratified, will cease to exist.” (R. 89 at 9). Additionally, the Utility Council brought before the court’s attention

EPA's aforementioned motion for stay of a case involving TMDLs, in which EPA acknowledged "the promulgation of numeric criteria for nutrients provided for in the consent decree may impact TMDLs established in Florida." (R. 106 at 12).

The Utility Council and others also raised Florida's TMDL program in attacking the reasonableness of the 2009 consent decree.⁵ Counsel for eight of the other nonconsenting intervenors argued that "this [the 2009 consent decree] could throw the whole TMDL program that has been developed for the Saint [sic] Johns River, the longest river in Florida, into turmoil and probably not be able to implement it, while we try to figure out how you discharge to the river with very low numbers." (R. 142 at 33); *see also* (R. 115 at 5, 7 and 11; 115-9 ¶¶ 7-18). The Florida Department of Agriculture and Consumer Services, noted that Florida already "applies waterbody specific numeric nutrient levels to be met when developing [TMDLs]," and that "[t]hese numeric limits are based on an evaluation of the effect that any course will have on the nutrient levels in the specific receiving waterbody, i.e., that the prescribed limits will not result in an imbalance of flora and fauna." (R. 107 at 4). Prior to the entry of the 2009 consent decree, the nonconsenting intervenors also entered into the record the 1999 consent decree. (R. 36-1). Finally, the Plaintiff-environmental groups responded to the

⁵ The district court requested that the intervening parties avoid parroting each other's arguments in filings and during the hearing on the consent decree. (R. 102 at 14). The intervening parties cooperated with this request. *See* (R. 142 at 33).

nonconsenting intervenors' arguments in which, according to the environmental groups, intervenors explained "that Florida already has a TMDL program and setting numeric standards is duplicative, less accurate and will nullify the extraordinary progress being made through the TMDL program." (R. 127 at 10). The 2009 decree's impact on Florida's TMDL program was thus before the court.

The order approving the consent decree did not, however, address the impact of the 2009 consent decree on Florida's TMDL program or the numeric nutrient limits promulgated thereunder. To the contrary, the court incorrectly stated that Florida had failed to "adopt or even propose numeric standards – not by December 31, 2003, and not by today, as 2009 draws to a close." (R. 152 at 3). The order then focused on the 2009 consent decree's impact on Florida's narrative nutrient criterion, and stated that "[t]he intervenors have no right to pollute Florida's waters or to introduce nutrients into them without numeric limits." (*Id.* at 13). The order thus concluded that "the decree does not abridge the rights of the nonconsenting intervenors." (*Id.* at 8). The Utility Council then moved for rehearing and reconsideration to seek a correction to the court's legal and factual misapprehensions. (R. 159); *see also Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) ("a motion for reconsideration is appropriate where the court has misapprehended the facts, a party's position, or the controlling law"). This motion directly called the court's attention to the impact of the 2009 consent

decree on the continuing implementation of the 1999 consent decree. (R. 159).

The district court found, however, that the Utility Council's motion for reconsideration raised "an assertion for the first time" that "the consent decree may require action that is inconsistent with action required under a consent decree entered ten years ago in a different case." (R. 161 at 1). The court thus concluded that the issue was procedurally unfounded. (*Id.*).

It is appropriate for this Court to address the issue of a conflict between the two decrees, regardless of whether this Court agrees with the district court's conclusion that the Utility Council inadequately alerted the district court to the conflict between the 1999 consent decree and the 2009 consent decree. *See Dean Witter Reynolds*, 741 F.2d at 360; *City of Hialeah*, 140 F.3d at 973; *Macklin*, 24 F.3d at 1311-12. The dysfunction created by the conflicting consent decrees is too important to ignore. Given the 2009 consent decree's effective override of State water policy, there is also a particularly compelling need for this Court to consider it. *See* 33 U.S.C. § 1251(b) (giving States the primary responsibility to implement the CWA); *City of Miami*, 664 F.2d at 441 (noting that when the lawsuit seeks to enforce a statute, the most important factor as to public policy is whether the decree comports with the goals of Congress).

The conflict between the 2009 and 1999 directly and immediately impacts Utility Council members who have been and are complying with their NPDES

permits or similar State administered permits by making expenditures to implement nutrient TMDLs established under the 1999 consent decree. *See City of Hialeah*, 140 F.3d at 978-81. Because the 2009 consent decree overwrites existing nutrient TMDLs created pursuant to the 1999 consent decree, it is unreasonable and should be vacated. *See City of Miami*, 664 F.2d at 441.

II. THE DISTRICT COURT ERRED IN APPROVING THE 2009 CONSENT DECREE, BECAUSE IT UNREASONABLY LIMITS EPA CONSIDERATION OF PUBLIC COMMENTS.

The 2009 consent decree requires EPA to either finalize criteria by certain dates or seek an extension of time from the Plaintiff-environmental groups or the court. (R. 153 at ¶¶ 3-11 and 22). These provisions render the consent decree unreasonable.

The APA requires EPA to provide an opportunity for public comments on its proposed rules, and EPA must consider any submitted comments. 5 U.S.C. § 553(c); *see also*, 5 U.S.C. § 604(a)(2) (requiring that agencies explain any changes made in the final rule in response to public comments). Specifically, “section 553(c) requires agencies to afford interested persons an opportunity to participate in public rule making through submission of written data, views, or arguments,” and it “requires consideration of whatever data and views are submitted.” *Mortgage Investors Corp. of Ohio v. Gober*, 220 F.3d 1375, 1379 (Fed. Cir. 2000). “Consideration of comments as a matter of grace is not enough” for EPA to

comply with § 553(c) of the APA. *Advocates for Hwy. & Auto Safety v. Fed. Hwy. Admin*, 28 F.3d 1288, 1292 (D.C. Cir. 1994) (citing *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988)). Rather, EPA must consider submitted comments “with a mind that is open to persuasion.” *Id.*

The 2009 consent decree hinders an open agency mind. The consent decree requires EPA to finalize its nutrient criteria rules by specified dates. (R. 153 at ¶¶ 3-11). EPA may only extend its deadlines for finalization by securing permission of the Plaintiff-environmental advocates or the court. (*Id.* at ¶ 22). Under this framework, EPA is not free to be convinced by the public that all or a portion of a proposed nutrient criteria rule should not be finalized or should be reconsidered, because EPA must consider the comments under the rubric of the consent decree’s non-statutory deadlines and procedural hurdles. *See Advocates for Hwy. & Auto Safety*, 28 F.3d at 1292. The consent decree thus impermissibly chills EPA’s discretion in deciding whether to finalize the rule. *Cf. Natural Res. Def. Council v. Whitman*, 2001 WL 1221774, 8 (N.D. Cal. 2001) (holding that a consent decree does not impermissibly constrain EPA’s discretion in promulgating a rule, in part because “[t]he consent decree sets no deadlines for the promulgation of any final rule, thus allowing EPA to consider all information required by law”). This outcome runs counter to the APA’s public participation requirements and thus renders the 2009 consent decree unreasonable.

III. THE DISTRICT COURT ERRED BY NOT CONVENING AN EVIDENTIARY HEARING.

The district court had a duty to ensure that the decree “represents a reasonable *factual* and legal determination” so that the court “does not put the court’s sanction on and power behind a decree that violates Constitution, statute or jurisprudence.” *City of Miami*, 664 F.2d at 441 (emphasis added). Since the underlying suit in this case seeks to enforce a statute and the district court’s order was predicated on several factual determinations, an evidentiary hearing was essential to ensure that the decree comports with Congressional goals in the CWA. *Id.* The court’s failure to conduct a hearing in this circumstance constituted an abuse of discretion. *See S.E.C. v. Smyth*, 420 F.3d 1225, 1230 (11th Cir. 2005) (“A district court abuses its discretion when, in reaching a decision, it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous”) (citations omitted). Accordingly, the district court should also be instructed to conduct an evidentiary hearing to ascertain the reasonableness of the consent decree.

The 2009 consent decree does not represent a reasonable factual determination. EPA’s January 2009 necessity determination spawned the negotiation and proposed entry of the 2009 Consent Decree. (R. 89 at 34; 90 at 2-4). EPA, however, produced no administrative record supporting the 2009 determination, because “no record of decision” and “no administrative record”

exist. (R. 102 at 12). The other parties and the district court could thus only evaluate the determination based on its bare text and a few internal EPA memoranda provided in litigation filings. These internal EPA memoranda indicate that EPA reached its determination after only a brief deliberation over the holidays and that EPA's desire to settle the lawsuit to limit its precedential value was a compelling, if not controlling, factor. (R. 89 at 33-39).

The absence of a record and the deficient process used to arrive at the January 2009 determination help explain the numerous factual errors in the determination itself. (R. 116 at 2-5). Notably, the determination failed to acknowledge the fifty percent decrease in phosphorus levels in Florida waters since the early 1980s. (R. 55-6 at 6). In fact, the determination erroneously reported that the Total Phosphorus has remained constant at an average of 0.15 mg/l; the FDEP report EPA apparently relied upon indicated that the current average was approximately 0.05 mg/L, down from an early 1980s' average of 0.10 mg/l. (*Compare* R. 55-6 at 6 *with* R. 127, Ex. D at ix-x). Additionally, the determination failed to shed light on EPA's previous denial of the allegation that the State of Florida had "not adopted or proposed numeric nutrient standards." (R. 24 at ¶ 48). Filings and oral argument by the Utility Council and other intervenors took EPA to task on these issues; however, the district court specifically denied a request by the

intervenor to test the evidence underlying the consent decree prior to its entry. (R. 136).

Despite the lack of an administrative record supporting the determination and the record evidence to the contrary, the order approving the consent decree included numerous factual conclusions, including that Florida had not adopted or proposed numeric nutrient standards; that “nutrient pollution of the State’s navigable waters continued and in many instances grew worse;” and that Florida’s narrative standard “proved inadequate.” (R. 152 at 3-4). These are not reasonable factual conclusions. *See City of Miami*, 664 F.2d at 441. Rather, the order indicates that this case presents a rare set of circumstances in which the district court’s denial of requests for an evidentiary hearing constituted an abuse of discretion. *Cf. United States v. Metro. St. Louis Sewer Dist. (MSD)*, 952 F.2d 1040, 1044 (8th Cir. 1992) (holding in a CWA enforcement action that “absence of substantial factual issues supports the District Court’s decision not to hold an evidentiary hearing” concerning consent decree); *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 94 (1st Cir. 1990) (an evidentiary hearing is not required “when a court is merely deciding whether monetary settlements comprise fair and reasonable vehicles for disposition of Superfund claims”).

The CWA’s framework supports the conclusion that an evidentiary hearing is needed. In crafting the CWA, Congress cast the States as the lead player; EPA

assumes an oversight role. The CWA codifies Congress's intent "to recognize, preserve, and protect the primary responsibilities and rights of States." 33 U.S.C. § 1251(b). Congress "recognize[d] that the States should have a significant role in protecting their own natural resources" and thus gave States "a strong voice in regulating their own pollution." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490 (1987); *see also, Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1272 (5th Cir. 1980). Consistent with the States' featured role, Congress only allows EPA to impose federal standards when EPA determines new standards are "necessary" for a State under the CWA. 33 U.S.C. § 1313(c)(4)(B). Such federal action is extraordinary. As EPA has noted, "Federal promulgation of State water quality standards should be a course of last resort. It is symptomatic of something awry with the basic statutory scheme." 57 Fed. Reg. 60848, 60858 (Dec. 22, 1992).

The 2009 consent decree places a judicial imprimatur on a federal override of State water policy. Given the extraordinary nature of a federal promulgation of State water quality standards and the Congressional preference for State control over water policy, the district court abused its discretion by failing to ensure that an adequate factual predicate existed prior to entering the consent decree. *See City of Miami*, 664 F.2d at 441.

CONCLUSION

Accordingly, the district court's order entering the 2009 consent decree should be reversed, the consent decree vacated, and the case remanded with directions to expressly exclude existing nutrient TMDLs and conduct an evidentiary hearing regarding the contested facts that serve as predicates for the consent decree.

Respectfully submitted on this the 7th day of June 2010:

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CERTIFICATE OF COMPLIANCE

This, the Appellant's principal brief, does not exceed 30 pages. *See* 11th Cir. R. 32-4. A certificate of compliance in accordance with Rule 32(a)(7)(C) is therefore unnecessary.

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I hereby certify that a true and correct copy of this brief has been furnished
via U.S. mail, on this the 7th day of June 2010, to the foregoing:

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