

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

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

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

Plaintiffs,

vs.

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

Defendants,

CONSENT DECREE

FLORIDA PULP AND PAPER
ASSOCIATION ENVIRONMENTAL
AFFAIRS, INC., the FLORIDA FARM
BUREAU FEDERATION, SOUTHEAST
MILK, INC., FLORIDA CITRUS MUTUAL,
INC., FLORIDA FRUIT AND VEGETABLE
ASSOCIATION, AMERICAN FARM
BUREAU FEDERATION, FLORIDA
STORMWATER ASSOCIATION, FLORIDA
CATTLEMAN'S ASSOCIATION, and
FLORIDA ENGINEERING SOCIETY,

Intervenor-Defendants,

and

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Intervenor-Defendant. /

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I. GENERAL TERMS

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

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

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

II. TERMS OF AGREEMENT

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

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

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

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

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

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

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

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

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

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

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

III. ATTORNEYS' FEES AND COSTS

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

IV. EFFECTIVE DATE

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

V. REMEDY, SCOPE OF JUDICIAL REVIEW

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

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

VI. RELEASE BY PLAINTIFFS

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

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

VII. TERMINATION OF CONSENT DECREE AND DISMISSAL OF CLAIMS

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

VIII. FORCE MAJEURE AND APPROPRIATED FUNDS

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

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

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

IX. DISPUTE RESOLUTION

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

X. MODIFICATIONS AND EXTENSIONS

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

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

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

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

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

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

XI. CONTINUING JURISDICTION

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

XII. AGENCY DISCRETION

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

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

XIII. NOTICE AND CORRESPONDENCE

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

For Plaintiffs:

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

MARTHA C. MANN
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Mail Code 2355A

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

XV. REPRESENTATIVE AUTHORITY

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

COUNSEL FOR PLAINTIFFS:

Dated: 8/18/09



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

COUNSEL FOR DEFENDANTS:

Dated: 19 August 2009

JOHN C. CRUDEN
Acting Assistant Attorney General
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SO ORDERED.

Dated: _____

ROBERT L. HINKLE
United States District Judge