COMMENTS BY EARTHJUSTICE
ON BEHALF OF FLORIDA WILDLIFE FEDERATION, ST. JOHNS RIVERKEEPER, SIERRA CLUB, CONSERVANCY OF SOUTHWEST FLORIDA, AND ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA
ON
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
PROPOSED RULE ON WATER QUALITY STANDARDS FOR THE STATE OF FLORIDA'S LAKES AND FLOWING WATERS; PROPOSED RULE; STAY

EPA Docket I.D. No. EPA-HQ-OW-2009-0596

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To
www.regulations.gov

I. INTRODUCTION

This letter and its attachments set out the comments of Earthjustice on behalf of Florida Wildlife Federation, St. Johns Riverkeeper, Sierra Club, Conservancy of Southwest Florida and Environmental Confederation of Southwest Florida ("Conservation Organizations") on EPA's proposed rule that would, again, stay the effective date of EPA's Final Rule setting forth Water Quality Standards for the State of Florida's Lakes and Flowing Waters until November 15, 2013. Earthjustice represented these organizations in the lawsuit that resulted in the Consent Decree which required the proposal and finalization of this rule.

II. COMMENTS IN OPPOSITION TO STAY

The Conservation Organizations submit that EPA's proposed stay of the effective date of its numeric nutrient criteria for the State of Florida's flowing waters, lakes and springs is patently unlawful for the reasons set forth below:

A. The Stay Violates the Consent Decree

This case concerns the failure and refusal of EPA to comply with the requirements of the Clean Water Act that are set out in 33 U.S.C. § 313(c)(4)(B), which statutory requirements have been construed by judicial precedents enforcing that section against EPA. Those violations spanned over a decade of inaction and resulted in a Consent Decree entered into by EPA and the above-named parties well over three years ago. That Consent Decree was approved by the federal court after an intense legal battle in which most polluting industries in the state of Florida, along with their allies in state-government, sought to thwart approval of the Consent Decree on myriad legal and factual grounds. The federal court's approval was appealed to the 11th Circuit Court of Appeals by South Florida Water Management District, the sewage

association and the electric utility association. After briefing and oral argument, that court entered a strongly-worded order dismissing the appeal.

The Consent Decree enforces the unambiguous requirements of the Clean Water Act by requiring EPA to promptly propose and finalize numeric nutrient criteria for Florida waters. *Florida Wildlife Federation et al. v. Lisa Jackson and the Environmental Protection Agency*, case number 4-08- CV-00324 ECF Doc. 152 (Order Approving Consent Decree). The Consent Decree requires final rules for Florida's inland waters to be established by November, 2010. Instead, EPA is now proposing a stay that would result in there being no numeric criteria for Florida waters for long after the deadline in the Consent Decree. This violates the letter and spirit of the Consent Decree. In addition, EPA seeks this stay for an improper and illegal purpose, *i.e.*, to wait for the state (and the associations of polluting industries collaborating with the state) to resolve the dilemma created when the Florida Environmental Regulation Commission acceded to the polluting industries' demand that the state exempt from its new nutrient rules 72% of Peninsular and Panhandle Florida's flowing waters. To cement that and other exemptions in the state nutrient rules, polluting industries also demanded that the Florida Environmental Regulation Commission accede to their demands that the rules contain a proviso – known as the "poison pill" provision. *See* Rule 62-302-531(9), Fla. Admin. Code. That proviso makes the effectiveness of the rules contingent on certification by EPA that the new rules satisfy in its entirety the requirements of the Clean Water Act as it concerns the establishment of numeric nutrient criteria in the state of Florida. Thus, EPA would be faced with the choice of approving an exemption of 72 percent of all flowing waters in the Peninsula and Panhandle, all flowing waters in South Florida, and the vast majority of Florida estuaries. This exemption amounts to all by a very small fraction of the waters of Florida that are subject to the requirements of the Consent Decree. The basis for the delay in the effective date for the EPA rules established pursuant to the Consent Decree is to allow the state to engage in yet more negotiations with polluting industries about what new nutrient standards could be established in the vast majority of waters that are exempted without triggering Rule 62-302-531(9), Fla. Admin. Code.

The Clean Water Act provides no excuse for delay based on consultation or negotiations with states. In *Raymond Proffitt Foundation v. U.S. E.P.A.*, 930 F. Supp. 1088, 1098 (E.D. Pa. 1996), EPA determined that Pennsylvania's water quality standards were inadequate, but then deferred to the State's "consensus building" process for developing revised standards instead of promptly preparing and publishing proposed regulations itself. The court held that EPA's deferral to the state timetable violated the plain meaning of the statute:

> Once EPA has disapproved the state standard, the ball is in EPA's court. Nothing in the Act authorizes the EPA to defer to the state or to put off its obligation to proceed to fulfill its mandatory duty until the state promulgation process is finished. To conclude otherwise is to allow the Administrator to abdicate the will of the Congress to the timetable of a state. Pennsylvania's ongoing reg-neg process is on a separate track and it may or may not succeed in conforming to the national requirements. Whatever the state's program is, and no matter how well-meaning its reg-neg procedure is concerning the time and course it is expected to take, it is neither an exemption nor an excuse to forestall the EPA in carrying out its § 1313(c) duty.

Id. The same holds true here. EPA's obligation under the Consent Decree is to set enforceable numeric nutrient criteria for Florida's waters and that obligation is violated by the terms of the proposed rule.

B. The Proposed Rule and the Proposed Stay are Unlawful because they are based on an Unlawful Approval of FDEP's Rule

EPA's rule covers only those waters not exempted by the State, on the theory that other inland waters are covered by the newly approved FDEP rules. However, in its approval, EPA Region 4 states that the approval is "subject to" a number of conditions including: 1) FDEP being able to implement the state rule in compliance with DEP's newly minted "Implementation Document" upon which EPA relies for its approval despite the fact that Florida law prohibits implementation unless that Document is formally adopted as an administrative rule under section 120.56(4), Florida Statutes; 2) "interpreting" the "poison pill" provision in Rule 62-302-531(9), Fla. Admin. Code to disregard its plain meaning, so as to "allow" EPA to propose and if necessary promulgate criteria for waters exempted by DEP's rule; and 3) the District Court's consent to EPA's request to modify the Consent Decree to not require numeric nutrient criteria to protect downstream waters. EPA Region IV Approval Letter, p. 3.

EPA lacks the statutory authority to issue "conditional approvals." Unlike the Clean Air Act, the Clean Water Act has no provision for conditional approval of state action – EPA has only the authority to approve or disapprove water quality standards under section 303(c) of the Clean Water Act. Furthermore, even it were to have such statutory authority, that exercise is unlawfully exercised here. Under EPA guidance, conditional approvals are a "limited exception" for "correcting minor deficiencies" and only after the state commits, in writing, to a schedule to correct the deficiencies with compliance normally expected in 90 days or less. *EPA Guidance for the Use of Conditional Approvals for State Water Quality Standards*. None of those requirements are met here. A state rule that exempts all but a small fraction of the waters in Florida which EPA acknowledges must be covered by numeric nutrient criteria is not a minor deficiency. Nor is a "poison pill" provision that makes the entire state rule ineffective. Nor is removal of a requirement for downstream protective values which EPA found were both necessary and possible but now seeks to eliminate. Nor is a finding that FDEP's rule is not approvable unless implemented in accordance with a state water quality standards "Implementation Document" that FDEP is legally prohibited from implementing unless it is adopted by a formal administrative rule under section 120.56(4), Florida Statutes.

EPA's approval letter attempts to "cure" the deficiency created by the exemption of 72% of Peninsular and Panhandle flowing waters from numeric criteria by stating that it is EPA's "understanding" that FDEP's numeric criteria apply to all Florida's Class I/III flowing waters "unless and until FDEP makes an affirmative determination that a particular water body meets one of the exclusions under F.A.C. 62-302.200(36)." EPA's "understanding" is belied by the position FDEP has taken with regards to this issue in state court:

> The Department was not required to derive a numeric interpretation for the existing (and still applicable) narrative water quality criteria for *all* waters of the state. Therefore, for

> various water bodies--including ditches and canals used for water management purposes--numeric criteria have not yet been derived. Such streams without numeric nutrient criteria (as the ALJ found) continue to maintain their previous Class III "designated use" and to be subject to the pre-existing narrative criteria.

DEP Answer Brief, Fla. 1st Dist. Ct. of Appeal Case No. 12-3320, pp. 14-15.

Lastly, EPA's approval is conditioned on the federal court approving a modification to the Consent Decree so as to remove the requirement for numeric nutrient criteria to protect downstream waters. This is not a "condition" that can be corrected through state action. EPA lacks the authority to condition an approval on an as yet unknown action to be taken at some unknown time by a federal court.

C. The "Proposed Rule" Process is a Delay Strategy that Contravenes the Consent Decree

EPA has already employed notice and comment rulemaking for the purpose of issuing the proposed rule. Notice and comment rulemaking is entirely unnecessary because the text of the rule is entirely unchanged; once the "explanation" provided by EPA is approved by the court, the rule can go into effect.

EPA states the remand proposal is not a new exercise of federal authority. EPA Region 4 Approval Letter, p. 2. The Conservation Organizations agree. EPA has not altered the criteria in the Final Rule. At most, it has provided a new interpretation of that rule which would normally be found in the preamble of a rule and not the codified regulation. Interpretative rules are not subject to the requirement for notice and comment rulemaking. Once EPA receives approval of its action from the district court (at this time the Conservation Organizations take no position on EPA's action), the rules governing all Florida waters, and not just the rules governing those exempted by FDEP can go immediately into effect and provide the numeric nutrient criteria which EPA deemed necessary in 1998 and again in 2009.

D. Conclusion

For these reasons, the proposed rule is in direct violation of the Consent Decree, the Clean Water Act, and its implementing rules. The exhibits attached to and incorporated into these comments confirm the facts set forth therein.

Sincerely,

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Exhibits (1-15) Attached