



FWEA Utility Council

Protecting Florida's Clean Water Environment

P.O. Box 10755 • Tallahassee, Florida 32302 • (850) 425-3428

www.fweauc.org

February 1, 2013

Via Electronic Submission

Elizabeth Southerland, Director
Office of Science and Technology
U. S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
and,
EPA Water Docket
Docket ID No. EPA-HQ-OW-2009-0596
U. S. Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue, N. W.
Washington, D. C. 20460

Regarding: EPA's Proposal to "Gap-Fill" Florida's Approved Numeric Nutrient Standards with EPA's Re-proposed Streams Criteria

Dear Director Southerland,

The Florida Water Environment Association (FWEA) Utility Council appreciates the opportunity to provide the following comments on the U.S. Environmental Protection Agency's (EPA's) proposal to "gap-fill" Florida's approved numeric nutrient standards rule with EPA's re-proposed streams criteria. For the reasons provided in this comment letter, the FWEA Utility Council believes that EPA's proposed gap-filling exercise is unwarranted and will not benefit the environment. To the contrary, the proposal is likely to result in less protection for Florida waters and will misdirect limited governmental resources. The FWEA Utility Council respectfully requests that EPA withdraw its proposed rule.

By way of background, the FWEA Utility Council is an association of 51 local government and private utilities in Florida that own and operate domestic wastewater treatment, disposal, reuse, and recycling facilities. FWEA Utility Council members provide essential wastewater treatment infrastructure and services for over 8 million Florida residents. The membership is highly

diverse, both in terms of the communities served and the way utility members serve them, but Utility Council members share a commitment to environmental protection and scientifically sound environmental policies. It is with this shared commitment that the Utility Council offers the following comments.

EPA has provided insufficient time for meaningful public comment

As an initial matter, the FWEA Utility Council is concerned that EPA has provided an inadequate amount of time for the Utility Council and its members to carefully analyze and prepare comments on this highly technical rulemaking.

The District Court of the Northern District of Florida invalidated EPA's numeric nutrient criteria rules for Florida's freshwater streams on February 18, 2012. The Court remanded the rules to EPA and directed the agency to either (1) promulgate new, valid criteria or (2) provide a legally and scientifically sufficient justification for the invalidated criteria. EPA chose the latter option, and after nine months of preparing new technical documentation and analysis, EPA re-proposed the same invalidated streams criteria with a differing technical basis and now aimed at a much more limited subset of flowing waters. At the same time, EPA proposed additional federal criteria and technical support documentation for Florida estuaries, South Florida canals, and coastal waters, and EPA approved a comprehensive nutrient standards rule promulgated by the State of Florida. Many of the FWEA Utility Council's utility members are affected by all three of these EPA actions and are evaluating the combined impact of the three proposals.

EPA first publicly noticed its actions on November 30, 2012 and then officially published its proposed federal nutrient criteria rules on December 18, 2012. The streams criteria rulemaking notice states that EPA will only accept public comments on the streams re-proposal until February 1, 2013, which amounts to a 45-day public comment period, if Christmas, New Year's, Martin Luther King Jr. Day, and weekends are included. Apparently cognizant that this is an inadequate opportunity for public comment, EPA's rule proposal explains that "[b]ecause of EPA's obligation to sign a notice of final rulemaking on or before August 31, 2013 under Consent Decree, the Agency regrets that it will be unable to grant any requests to extend this deadline."

The U.S. Administrative Procedure Act (APA) requires agencies to give the public an opportunity to provide meaningful comment.¹ EPA cannot engage in a rulemaking process that falls short of its obligations under the APA. Further, a consent decree cannot direct EPA to take actions in contravention of a federal statute.² If the August Consent Decree deadline frustrates the APA's notice and comment process, then EPA should seek an extension to the deadline. EPA, however, has sought no such extension. The FWEA Utility Council respectfully urges

¹ See 5 U.S.C.A. § 553(c); see also, *International Union, United Mine Workers of America v. Mine Safety and Health Admin.*, 407 F. 3d 1250, 1259 (D.C. Cir. 2005) (holding that the APA's public notice and comment process is "designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review.").

² See, e.g. *Wash. v. Penwell*, 700 F.2d 570, 573 (9th Cir. 1983); *Dunn v. Carey*, 808 F.2d 555, 559-560 (7th Cir. 1986).

EPA to adhere to its APA duties and take the steps necessary to extend this public comment period.

The purpose and scope of this nutrient rulemaking is only to engage in an unnecessary “gap-filling” of Florida’s comprehensive, approved nutrient standards program

EPA explains the purpose and scope of its streams criteria proposal as follows:

For this proposal, EPA is re-proposing the same numeric nutrient criteria for total nitrogen (TN) and total phosphorus (TP) for Florida streams not covered by EPA-approved State rulemaking, as included in EPA’s final rule, with further explanation of how the proposed numeric streams criteria will ensure the protection of the Florida’s Class I and III designated uses.³

Thus, EPA’s proposal only purports to “gap-fill” the approved Florida rule, and EPA takes this action to “ensure the protection” of the designated uses of Florida waters. While the stated goal of this narrow rulemaking may be laudable, a close analysis of the State’s nutrient rule and EPA’s so-called “gap-filling” exercise unveils the fallacious underpinning of the EPA proposal and demonstrates that this rulemaking will not create the claimed environmental benefits.

In promulgating its numeric nutrient standards rule, the Florida Department of Environmental Protection (FDEP) more narrowly defined the term “stream” than EPA had in its 2010 nutrient criteria rulemaking. Namely, FDEP distinguished between perennial freshwater streams and certain other flowing waters.⁴ As explained by FDEP in the technical support materials for its nutrient rule, FDEP defined “streams” to exclude managed conveyances, urban ditches, tidally influenced streams, and intermittent streams, because there was an inadequate scientific basis for applying numeric criteria to these subsets of flowing waters.⁵ FDEP’s decision is rooted in the limitations of the reference condition approach used to derive the numeric nutrient limits.

The reference condition approach involves making assumptions about a particular water body’s biological health by comparing its pollutant levels to the pollutant levels of a healthy “reference” water body that has similar physical characteristics.⁶ FDEP noted that the waters used as reference sites to set FDEP’s numeric thresholds were physically dissimilar to the particular water bodies falling outside of FDEP’s streams definition.⁷ Thus, consistent with EPA guidance,⁸ it would not be appropriate to apply the thresholds to these distinct water bodies. Further, the stream condition index (SCI), which the FDEP rule uses to analyze the biological health of natural freshwater streams, is wholly inapplicable to urban storm water ditches,

³ 77 Fed. Reg. at 74985 (emphasis added).

⁴ Fla. Admin. Code R. 62-302.200(36).

⁵ FDEP, *Technical Support Document: Development of Numeric Nutrient Criteria for Florida Lakes, Spring Vents and Streams*, 4-5 available at <http://www.dep.state.fl.us/water/wqssp/nutrients/docs/tsd-nnc-lakes-springs-streams.pdf>.

⁶ See, EPA, Aquatic Life Use Support, at <http://water.epa.gov/scitech/swguidance/standards/criteria/aqlife/biocriteria/ref2.cfm>.

⁷ FDEP, *Technical Support Document*, supra note 5, at 4-5.

⁸ EPA, *Nutrient Criteria Technical Guidance Manual: Rivers and Streams*, 11, 17-26 (July 2000).

routinely dry stream beds, or dynamic tidally influenced stream segments.⁹ Accordingly, FDEP determined that certain types of flowing waters would not be subject to Florida's numeric nutrient thresholds and biological metrics.

The exclusion of these particular water bodies from FDEP's streams definition does not mean that the waters are left bare, with no protection of their designated uses from nutrient over-enrichment. To the contrary, FDEP supplements its applicable narrative nutrient criterion with important measures to ensure that these waters' designated uses are protected. For instance, FDEP promulgated a new nutrient trends analysis, whereby these (and other) waters will have their nutrient levels monitored, and a potentially harmful uptick in reported nutrient levels will result in the water bodies being placed on the Clean Water Act's 303(d) list and in the queue for total maximum daily load (TMDL) development.¹⁰ Other FDEP protective steps include:

- Translating the narrative nutrient criterion into Level II nutrient water quality based effluent limits for discharges into healthy water bodies and applying that information as site specific standards;¹¹
- Translating the narrative nutrient criterion into TMDLs for impaired water bodies and applying that information as site specific standards;¹²
- Applying detailed implementation requirements for TMDLs, including the development of Basin Management Action Plans and requiring the use of best management practices by non-point sources;¹³
- Presuming that flowing waters fit within the definition of "streams" until a water body-specific evaluation identifies the water as not being stream in the rotating basin evaluation of the state's TMDL program or in the National Pollutant Discharge Elimination (NPDES) program;¹⁴
- Requiring downstream nutrient protection for all surface waters;¹⁵
- Applying a dissolved oxygen criterion to all surface waters;¹⁶
- Applying a chlorophyll-a metric of 20 µg/L to help Florida identify and restore impaired flowing waters via Florida's Impaired Waters Rule;¹⁷
- Collecting and utilizing the most extensive database of nutrient water quality information in the nation;¹⁸

⁹ FDEP, *Sampling and Use of the Stream Condition Index (SCI) for Assessing Flowing Waters: A Primer*, (Oct. 24, 2011).

¹⁰ Fla. Admin. Code R. 62-303.351(5).

¹¹ Fla. Admin. Code R. 62-302.300(13), 62-302.351(2)(a)1.d, 62-650.200-.500.

¹² Fla. Admin. Code R. 62-302.351(2)(a)1.a.

¹³ Fla. Stat. § 403.067.

¹⁴ FDEP, *Implementation of Florida's Numeric Nutrient Standards*, 21 *et seq.* (Sept. 2012), available at http://www.dep.state.fl.us/water/wqssp/nutrients/docs/nnc_implementation.pdf.

¹⁵ Fla. Admin. Code R.62-302.531(4).

¹⁶ Fla. Admin. Code R.62-302.530.

¹⁷ Fla. Admin. Code R.62-303.351(4).

¹⁸ FDEP captures, stores, and reports chemical, physical, and biological water quality data in an extensive, publicly accessible "STORET" database. As FDEP explains, "Florida STORET is the primary application used by the FDEP in support of IWR assessments and the development of Total Maximum Daily Loads (TMDLs), and it also provides data crucial to many other programs, including the development of water quality criteria and Basin Management

- Requiring stormwater performance standards to reduce nutrient loadings with a goal of meeting predevelopment conditions;¹⁹
- Requiring domestic wastewater treatment utilities reuse reclaimed water to the extent environmentally, technically, and economically feasible;²⁰ and
- Requiring even dischargers to ground water to provide reasonable assurances that their discharges do not cause or contribute to the impairment of surface waters.²¹

These above-listed nutrient water quality protection measures apply to managed conveyances, urban ditches, and the other water bodies falling outside of FDEP's streams definition. The nature and extent of these State measures hardly bespeak of a "gap" in water quality protection. Rather, they reflect a comprehensive scheme for the protection of water quality within the State. Indeed, the State of Florida has greatly exceeded the state nutrient regulation goals set by EPA in its March 16, 2011 memorandum to Regional Administrators entitled, "Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reduction."²²

In addition to the absence of a need for EPA's regulatory proposal, there is also an absence of an adequate scientific basis for EPA's proposed regulations. Again, it must be noted that EPA's proposed rulemaking only applies numeric criteria to a limited subset of Florida's flowing freshwaters – a fundamentally different endeavor from EPA's 2010 rulemaking. EPA only proposes to apply numeric criteria to certain urban storm water conveyances, ditches, tidally influenced stream segments, and certain types of non-perennial streams.²³ As noted above, this is the exact same subset of flowing waters for which FDEP specifically determined there is an inadequate scientific basis for applying the same set of numeric limits EPA now seeks to impose. FDEP scientists determined -- consistent with EPA's guidance on using the reference condition methodology -- that it would be a misapplication of the reference condition approach to apply numeric criteria to water bodies with dissimilar physical characteristics from those water bodies used as reference condition points. EPA's proposed rule, preamble, and technical support document proceed with this misapplication of the reference condition approach and are a clear departure from FDEP's scientific findings.

Not only does EPA turn a blind eye to FDEP's scientific conclusions, EPA's technical support document is disconnected from the scope of this rulemaking. EPA's technical support document attempts to demonstrate that there is a positive correlation (but not causation) between failing SCI scores and high nutrient levels for freshwater streams.²⁴ The technical support

Action Plans (BMAPs), to name just a few." FDEP, STORET Program, at <http://www.dep.state.fl.us/water/storet/faq.htm>.

¹⁹ Fla. Admin. Code R. 62-40.431-.432.

²⁰ Fla. Stat. § 373.250.

²¹ Fla. Admin. Code R. 62-610.850(1)(a), 610.800(1).

²² This memo, written by EPA Acting Assistant Administrator Nancy Stoner, identifies eight "Recommended Elements of a State Framework for Managing Nitrogen and Phosphorus Pollution." It is available at http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/upload/memo_nitrogen_framework.pdf.

²³ The rule also notably applies only to a subset of those waters that happen to fall north of Lake Okeechobee

²⁴ EPA, *Technical Support Document for EPA's Proposed Rule for Numeric Nutrient Criteria to Protect Florida's Streams and the Downstream Protection of Unimpaired Lakes* (Nov. 30, 2012).

document, however, does not address the validity of applying reference condition numbers from natural freshwaters to physically dissimilar water bodies. Indeed, the technical support document applies to streams generally and is not tailored to EPA's limited rule proposal for urban storm water conveyances, concrete and rip-rap lined ditches, and tidally influenced stream segments. EPA's use of its technical support document is akin to a fertilizer application manual for orange groves being used to support setting fertilizer application rates for carrots, corn, and apple orchards. The technical support document is disconnected from the rule that it purportedly supports. This is a critical error, because water quality criteria must be based on EPA guidance or other sound scientific information.²⁵

Even if one assumed that EPA was attempting to justify its rule for the scope of waters to which it applies, the technical support document's reliance on the SCI does not withstand scrutiny. The SCI is a biological health assessment that measures stream biological health for freshwater streams using benthic macro-invertebrates.²⁶ As FDEP technical support documentation and EPA-approved technical guidance make clear, the SCI is inapplicable to urban storm water conveyances, ditches, tidally influenced stream segments, and certain types of non-perennial streams, because these particular water bodies routinely have failing SCI scores for reasons that have nothing to do with nutrient levels. It is unsurprising, of course, that a non-perennial stream (that is dry for days and weeks over the course of a year), a concrete lined ditch (that flushes every time it rains), or a tidally influenced stream (with highly variable salinity levels that shift with the ebb and flow of the tides) would not score high on an index based on the populations of freshwater macro-invertebrate species. Accordingly, the purported correlation between a failing SCI score and high nutrient levels is meaningless for the non-perennial streams, concrete lined ditches, tidally influenced stream segments and other water bodies that are the subject of this EPA rulemaking. The FDEP statements quoted in EPA's technical support document regarding the correlation between SCI and nutrient levels are inapposite (and highly misleading), because FDEP used the SCI for an entirely distinct set of water bodies that are not the subject of this rulemaking. Thus, EPA's technical support document fails to support EPA's proposed rule.

In addition to these serious flaws, EPA still has not addressed the fundamental problem underlying EPA's reference condition based nutrient criteria: the EPA criteria are not set at levels that will prevent harmful nutrient loadings. It was this error that led Judge Hinkle to invalidate EPA's nutrient criteria rules in the first instance.²⁷ EPA's rule proposal and technical support document still fail to acknowledge the unique attributes of nutrients and how these attributes frustrate reliance on a reference condition approach to setting criteria. Simply stated, the level of nutrients that water bodies need for biological health -- as well as the nutrient levels that create problems -- varies from water body to water body. As FDEP has explained,

[n]utrients 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

²⁵ 40 C.F.R. § 131.11(b).

²⁶ Fla. Admin. Code R. 62-302.200(37).

²⁷ *Florida Wildlife Federation, Inc. v. Jackson*, 853 F.Supp.2d 1138, 1168-69 (N.D. Fla. 2012).

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 nutrient criteria is immensely more complicated than that for toxic substances.²⁸

EPA's Science Advisory Board has also advised that with respect to nutrients, "statistical associations may not be biologically relevant and do not prove cause and effect," and "in order to be scientifically defensible, empirical methods must take into consideration the influence of other variables."²⁹ The many natural variables impacting the expression of nutrients in a flowing water body include stream biology, color, shading, flow rate, pH, etc.³⁰ EPA's proposed reference condition criteria fail to take into account these confounding variables and consequently lack a causative correlation between nutrient levels and harmful imbalances of flora and fauna. Thus, the criteria will not assist regulatory authorities in making water quality management decisions.

This past summer, the Santa Fe River demonstrated the significance of this shortcoming. The Santa Fe River suffered a significant algae bloom due to high temperatures, low rainfall, and slightly elevated nutrient levels. The biological metrics in FDEP's approved rule would have correctly identified this River as impaired. EPA's reference condition nutrient criteria, however, would have identified the River as attaining federal nutrient standards and thus not impaired by nutrients.³¹

In sum, if EPA decides to finalize its "gap-filling" criteria, the result would be a significant step backwards in Floridians' efforts to protect their water bodies from nutrient over-enrichment. The patchwork of federal and state criteria will inhibit the implementation of the state's TMDL and NPDES programs and it will make the jobs of domestic wastewater treatment utility operators much more difficult. It will not, however, improve environmental protections. The FWEA Utility Council respectfully requests that EPA withdraw its proposed nutrient criteria rules.

²⁸ FDEP, State of Florida Numeric Nutrient Criteria Development Plan, 1 (March 2009).

²⁹ EPA, Science Advisory Board, *Processes and Effects Committee Advisory Report*, at 2, 24 (April 27, 2010).

³⁰ *Id.* at 1. ("The empirical stressor-response framework described in the Guidance [developed by EPA for promulgating nutrient standards] is one possible approach for deriving numeric nutrient criteria, *but the uncertainty associated with estimated stressor-response relationships would be problematic if this approach were used as a 'stand alone' method because statistical associations do not prove cause and effect.*") (emphasis added), available at [http://yosemite.epa.gov/sab/sabproduct.nsf/95eac6037dbec075852573a00075f732/E09317EC14CB3F2B85257713004BED5F/\\$File/EPA-SAB-10-006-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/95eac6037dbec075852573a00075f732/E09317EC14CB3F2B85257713004BED5F/$File/EPA-SAB-10-006-unsigned.pdf); see also, FDEP, *Main Concerns with the Environmental Protection Agency's Proposed Numeric Nutrient Criteria for Florida's Lakes and Flowing Waters* published January 26, 2010 (Feb. 15, 2010); FDEP, *FDEP Comments on Proposed Criteria for the Protection of Streams and Springs/Clear Streams* (April 28, 2010); see also, FDEP, *Sampling and Use of the Stream Condition Index (SCI) for Assessing Flowing Waters: A Primer*, supra note 9.

³¹ See, David Whiting, *FDEP Algal Bloom Monitoring Results for the Santa Fe River Pre- and Post- Tropical Storm Debby*, (Aug. 16, 2012), available at http://www.alachuacounty.us/Depts/EPD/WaterResources/GroundwaterAndSprings/SFRSBWG%20Presentations/120816_Santa%20Fe%20River%20Algal%20Bloom%20Monitoring.pdf.

EPA failed to prepare any new analysis of the economic impacts of its proposed gap-filling criteria, despite criticisms from an independent National Research Council panel that EPA's prior economic analysis was based on unreasonable assumptions

On March 6, 2012, an independent National Research Council (NRC) panel issued a report criticizing EPA's estimated implementation and compliance costs for EPA's 2010 lakes, springs, and streams numeric nutrient criteria. The panel concluded that EPA made invalid and unreasonable assumptions for all impacted sectors: municipal wastewater treatment plants; industrial plants; urban stormwater; agriculture; septic systems; and local governments.³² Of particular importance to Utility Council members and their ratepayers, the NRC specifically disagreed with EPA's assumption that no domestic wastewater treatment utility would be required to meet EPA's nutrient criteria rules at the point of discharge. This incorrect assumption caused EPA to wrongly conclude that no utility would be driven beyond advanced wastewater treatment standards to attain EPA's nutrient criteria rules. The result was an EPA cost projection that was lower than can be reasonably expected for Floridians to comply with the new federal standards.

Rather than updating its initial economic analysis based on the NRC's criticisms, EPA has provided no new economic analysis for its gap-filling numeric nutrient criteria rules. The FWEA Utility Council respectfully requests that EPA prepare a revised economic analysis that incorporates the recommendations of the NRC report and informs the public of the costs of implementing and achieving EPA's proposed rules.

EPA should acknowledge that the State of Florida's nutrient criteria rule sufficiently addresses EPA's January 2009 determination letter and withdraw its proposed "gap-filling" nutrient criteria rule

As it currently stands, the State of Florida has promulgated a numeric nutrient criteria rule that applies to 100% of Florida's Lakes, 100% of Florida's Springs, 100% of Florida's Perennial Freshwater Rivers and Streams, and around 72% of Florida Estuaries (with a schedule to cover 100% by 2015). The State nutrient criteria rule is based on exhaustive research and policy judgments of FDEP scientific experts and an extensive public participation process.³³ Notwithstanding EPA's unconditional approval of Florida's comprehensive rule, EPA has decided to ignore the scientific judgments underlying the state rule and propose additional criteria on urban storm water conveyances, concrete and rip-rap lined ditches, tidally influenced stream segments, agricultural canals, some non-perennial streams, and (by separate rulemaking) the estuary and coastal waters not yet covered by State of Florida rules. EPA has provided no technical or policy basis for overriding the State's prerogative in this manner, nor has EPA informed the public of the expected costs or purported environmental benefits of extending its (already once-invalidated) nutrient criteria rules to ditches and canals. EPA's decision-making

³² NRC, *Review of the EPA's Economic Analysis of Final Water Quality Standards for Lakes and Flowing Waters in Florida*, Table 2-8 (2012).

³³ FDEP's rules were upheld by a Florida administrative law judge. *FWF v. FDEP*, DOAH Case 11-6137RP, 34 F.A.L.R. 3095 (June 2012).

appears to be rooted not in a determination that numeric nutrient criteria will ensure the protection of the designated uses of this limited subset of surface waters; instead, the overriding basis for EPA's decision seems to be a concern that the consent decree obligates EPA to engage in this rulemaking, notwithstanding the scientific and policy considerations that indicate otherwise.

A consent decree, however, cannot direct EPA to promulgate invalid criteria.³⁴ To that end, the consent decree entered in this case expressly retains EPA's discretion under the Clean Water Act and the APA.³⁵ Prior to approving the consent decree, Judge Hinkle of the United States Northern District Court of Florida carefully questioned EPA legal counsel as to whether the consent decree's rulemaking schedule might obligate EPA to finalize invalid criteria. In response, EPA's legal counsel stated that EPA "is not forced to promulgate something that is not a good rule just because there is a deadline in the consent decree."³⁶ EPA's legal counsel also acknowledged EPA's discretion to revisit -- and even revoke -- EPA's determination that numeric criteria are necessary for Florida.³⁷

Accordingly, EPA has the discretion to conclude that FDEP's nutrient rule satisfies EPA's original January 2009 determination and seek the termination of the consent decree. The FWEA Utility Council respectfully requests that EPA follow the parameters outlined by the court and legal counsel for taking these necessary steps. EPA should withdraw its proposed "gap-filling" nutrient criteria rules and instead allow Florida's newly approved nutrient rules to be implemented.

Sincerely,



David Richardson, P.E.
FWEA Utility Council President

Enclosures: Cited Reference Materials

³⁴ See, e.g. *Wash. v. Penwell*, 700 F.2d 570, 573 (9th Cir. 1983); *Dunn v. Carey*, 808 F.2d 555, 559-560 (7th Cir. 1986).

³⁵ Paragraph 24 states: "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 the subject of this decree." *FWF v. EPA*, Consent Decree, ¶ 24 (Dec. 30, 2009), available at <http://water.epa.gov/lawsregs/rulesregs/upload/Consent-Decree-re-numeric-water-quality-criteria-for-nutrients-for-the-state-of-Florida.pdf>

³⁶ *FWF v. EPA*, Official Transcript of Motion Hearing Before Honorable Robert L. Hinkle, United States District Judge, page 79 (Nov. 16, 2009).

³⁷ In an exchange with Judge Hinkle, EPA's legal counsel stated, "I think that if EPA were to conclude that numeric nutrient criteria were not necessary in the state of Florida, we would have to come back to you and seek a termination of the consent decree, because we would still be obligated under the terms. ... *FWF v. EPA*, Official Transcript of Motion Hearing Before Honorable Robert L. Hinkle, United States District Judge, at 81.