

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA**

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

Plaintiffs,

Case No. 2008 - _____

v.

STEPHEN L. JOHNSON, Administrator of the
United States Environmental Protection Agency;
and THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Defendants.

_____ /

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

Plaintiffs—Florida Wildlife Federation, Inc.; Sierra Club, Inc.; Conservancy of Southwest Florida, Inc.; Environmental Confederation of Southwest Florida, Inc, and St. Johns Riverkeeper, Inc.—bring the following complaint against Stephen L. Johnson and the United States Environmental Protection Agency (“EPA”) for failing to comply with their non-discretionary duty to promptly set numeric nutrient criteria for the state of Florida as directed by section 303(c)(4)(B) of the Clean Water Act. This complaint seeks a declaratory judgment and injunctive relief.

NATURE OF THE CASE

1. This citizen’s suit is brought pursuant to section 505(a)(2) of the Federal Water Pollution Control Act (“Clean Water Act” or “CWA”), 33 U.S.C § 1365(a)(2), and under the Administrative Procedures Act (“APA”), 5 U.S.C. §§ 701 *et. seq.*, to compel the United States Environmental Protection Agency (“EPA”) to perform its non-discretionary duty mandated by section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), of the CWA. That provision requires EPA to “promptly” propose a new or revised water quality standard for a state once it has made a determination that the standard is necessary to meet the requirements of the CWA.

2. In 1998, EPA determined that prompt development of numeric standards for the nutrients phosphorus and nitrogen by the state of Florida was necessary to meet the requirements of the CWA. EPA action is required here in order to achieve sufficient protection of Florida’s waters because the State of Florida has failed to develop these standards.

3. The United States Environmental Protection Agency’s duty under the CWA is to protect public health and the environment. Both the letter and the spirit of its mandate require that it promptly develop numeric nutrient standards to protect the waters—and the people—of the State of Florida.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this claim by virtue of 33 U.S.C. § 1365(a) (“Citizen suits” provision of the Clean Water Act) because this complaint alleges a failure of the Administrator to perform a duty which is non-discretionary under the act. Additionally, jurisdiction exists under 5 U.S.C. § 701-706 (Administrative Procedure Act); 28 U.S.C § 1331 (“Federal question”); 28 U.S.C § 1361 (“Action to compel an officer of the United States to perform his duty”); and 28 U.S.C. §§ 2201-2202 (“Creation of remedy” and “Further

relief” provisions establishing power to issue declaratory judgments in cases of actual controversy).

5. Venue is proper in this judicial district and in this court under 28 U.S.C § 1391(e) because no real property is involved in this action and first named plaintiff, Florida Wildlife Federation, resides or maintains its principal place of business in Tallahassee, Florida which is located in the Northern District of Florida.

6. Plaintiffs have provided Defendants with at least sixty days written notice of the violations of law alleged herein in the form and manner required by the CWA (33 U.S.C. § 1365(b)(2)). A copy of the notice is attached as exhibit “A.”

THE PARTIES

7. Plaintiff Florida Wildlife Federation (“Federation”) is a Florida statewide non-profit conservation and education organization with its principal place of business in Tallahassee, Florida. It is a membership-based organization with approximately 13,000 members throughout Florida. The organization’s mission includes the preservation, management, and improvement of Florida’s water resources and its fish and wildlife habitat. The Federation represents its members in state and federal litigation brought to preserve and protect Florida’s river, lakes, and estuaries.

8. Plaintiff Sierra Club, Inc. (“Sierra Club”) is a non-profit public benefit corporation with its principal place of business in San Francisco, California. Sierra Club consists of members living throughout the state and around the nation. There are approximately 30,000 members living in the State of Florida. The Sierra Club represents the interests of its members in state and federal litigation, public policy advocacy, administrative proceedings, and before state, local, and federal lawmakers. The Sierra Club is very involved in advocacy regarding issues

related to preserving wetlands, improving water quality, and stopping factory farm runoff. All of these activities support Sierra Club's mission to explore, enjoy, and protect the wild places of the earth and educate and enlist humanity to protect and restore the quality of the natural and human environment.

9. Plaintiff Conservancy of Southwest Florida, Inc. ("CSF") is a Florida non-profit corporation with its primary place of business in Naples, Florida. There are approximately 6,000 CSF members residing throughout Florida. CSF is a grassroots organization devoted to protecting the land, water and wildlife of Southwest Florida. CSF works to protect both the quality and quantity of southwest Florida's water resources through education, monitoring, litigation, and preservation.

10. Plaintiff Environmental Confederation of Southwest Florida ("ECOSWF") is a Florida non-profit corporation with its primary place of business in Sarasota, Florida. ECOSWF has approximately 50 members consisting of business entities, governmental agencies and other organizations and individuals living in Southwest Florida. ECOSWF is a regional coalition which focuses its efforts on protecting the conservation interests of Southwest Florida, including Charlotte, Collier, DeSoto, Lee, Manatee, and Sarasota Counties. ECOSWF accomplishes its goals through active stewardship of Southwest Florida's wildlife, water, soil and air, through citizen participation and education, through legal challenges aimed at preserving Florida's waters, and by its support of preservation and conservation.

11. Plaintiff St. Johns Riverkeeper, Inc. ("Riverkeeper") is a Florida non-profit membership-based corporation with its primary place of business in Jacksonville, Florida. Riverkeeper is dedicated to the protection, preservation, and restoration of the ecological integrity of the St. Johns River watershed for current users and future generations. Riverkeeper

monitors the environmental quality in the St. Johns River and its tributaries. It has over 1000 members who use and enjoy the waters of the St. Johns River for boating, fishing, and observing birds and other wildlife in the St. Johns River watershed. Riverkeeper organizes regular boat trips for its members and citizens to learn more about the river and how they can participate in its management.

12. Each of the Plaintiffs files this action on its own behalf and on behalf of its members in an effort to protect their health, economic, recreational, aesthetic, scientific and conservation interests in the waters of Florida.

13. Defendant Johnson is the Administrator of the United States Environmental Protection Agency. He is charged with the supervision and management of the CWA, including mandates under 33 U.S.C. § 1313(c)(4)(B) which are at issue here. Mr. Johnson is sued in his official capacity only.

14. Defendant United States Environmental Protection Agency (“EPA”) is an agency of the federal government, which has the primary statutory responsibility under the CWA to protect the waters of the United States from pollution.

15. Defendants’ headquarters are at Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C., 20460.

STANDING

16. Members of the Federation, Sierra Club, CSF, ECOSWF, and Riverkeeper use and enjoy waters throughout the state for a variety of purposes, including, but not limited to, wading, walking, swimming, canoeing, sailing, sport boating, wildlife observation, photography, personal and commercial research, sport and commercial fishing, and collecting aquatic life for personal and commercial consumption.

17. Their ability to use Florida waters for these purposes is being harmed because failure to adopt numeric nutrient standards in Florida has resulted in excessive levels of nitrogen and phosphorus in Florida water bodies – which EPA admits is a direct cause of toxic blue-green algae blooms.

18. Blue-green algae (also known as cyanobacteria) produce “dermatotoxins” that can create severe dermatitis and are known tumor promoters; “neurotoxins” which interfere with nerve cell function; and “hepatotoxins” which attack the liver. Exposure to blue-green algae toxins through ingestion, dermal contact or inhalation can cause rashes, skin and eye irritation, allergic reactions, gastrointestinal upset, serious illness, and even death.

19. Blue-green algae toxins can contaminate drinking water supplies, endanger public health, and result in the shut down of drinking plants that rely on surface waterbodies as their drinking water source.

20. The frequency of toxic blue-green algae blooms is increasing in lakes, rivers, streams, reservoirs, and estuaries throughout Florida.

21. From mid-July to mid-October 2005, major portions of the St. Johns River suffered a toxic blue-green algae bloom which was dubbed “The Green Monster” for the fluorescent green slime created on the surface of the water. Toxin levels were recorded at 50 – 140 times above the World Health Organization’s suggested recreational limits and many people reported respiratory problems, raw throats, and irritated eyes. Photographs of this bloom are attached as exhibits “B1,” and “B2.”

22. From mid-August to mid-October 2005, almost the entirety of the Caloosahatchee River in Southwest Florida suffered a massive blue-green algae bloom following excessive

releases of nutrient laden water from Lake Okeechobee. Attached as exhibit “C1” is a photograph of this algae bloom.

23. Beginning in mid-June 2008, a toxic blue-green algae bloom occurred north of the Franklin Lock on the Caloosahatchee River. The Olga Water Treatment Plant, which obtains its source water from the Caloosahatchee and which provides drinking water for 30,000 people, was forced to shut down as a result of this bloom. Photographs of this bloom are attached as exhibits “D1 and “D2.” Exhibit “D2” shows the Olga Treatment plant beside the pea-green soup river.

24. In August to September 2005, the St. Lucie River and estuary suffered a massive toxic algae bloom also caused by releases of nutrient polluted water from Lake Okeechobee. Toxin levels in the St. Lucie River and estuary during this bloom were three hundred times above suggested drinking water limits and sixty times above suggested recreational limits. Attached as exhibits “E1 and “E2” are photographs of the St. Lucie algae bloom.

25. In addition, Florida’s estuaries and coastal oceans have been plagued with harmful algae blooms associated with nutrient over-enrichment including macroalgae (seaweed) blooms, which displace seagrass and overgrow coral reef ecosystems, and novel and toxic dinoflagellate (red tide) blooms. Attached as exhibit “F” is a photograph of a face-guarded lifeguard on a deserted Volusia County beach during a toxic red tide event in October 2007. This bloom moved from the Southwest Florida coast, around the tip of Florida, and up the Atlantic Coast to Flagler, Volusia, and Brevard Counties. It lingered for several months, causing massive fish kills and angering tourists and residents who were unable to enjoy the beach.

26. Plaintiffs and their respective members who use and enjoy these water bodies and coastal areas, and other rivers, lakes, and coastal waters around the state which are being similarly affected, have been, are being, and—unless the relief prayed for herein is granted—will

continue to be adversely affected and irreparably injured by Defendants' unlawful failure to perform its non-discretionary duty under 33 U.S.C. § 1313(c)(4)(B).

BACKGROUND AND FACTS

27. The Clean Water Act was enacted by Congress in 1972 to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” 33 U.S.C § 1251(a). The CWA further declared that “it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.” 33 U.S.C. § 1251(a)(1).

28. In order to meet this end, 33 U.S.C. § 1313 requires the states to establish water quality standards and provides a schedule to effectuate this process. It directs that the standards “shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of the [the Clean Water Act].” 33 U.S.C § 1313(c)(2).

29. The CWA, as one means of maintaining or achieving those standards, mandates that EPA “promptly prepare and publish” revised or new water quality standards for navigable waters “in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of [the Clean Water Act].” 33 U.S.C § 1313(c)(4)(B).

30. The vast majority of water quality standards are expressed in numeric terms. For example, Florida’s water quality standard for mercury is expressed as 0.012 micrograms per liter of water.

31. However, Florida has a “narrative” water quality standard for nutrients:
“Nutrients: 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 and fauna.” Rule 62-302.530(47)(b), Fla. Admin. Code.

32. The result of having a narrative rather than a numeric standard is that there is no measurable, objective, water quality baseline against which to measure progress in decreasing nutrient pollution, nor is there any measurable, objective means of determining whether a water quality violation has occurred.

33. In 1998, Defendant EPA reported¹ that:

[N]utrient pollution is the leading cause of impairment in lakes and coastal waters and the second leading cause of impairment of rivers and streams. Nutrient enrichment has also been strongly linked to the large hypoxic zone in the Gulf of Mexico and to recent outbreaks of the toxic microorganism *Pfiesteria* along the Gulf and Mid-Atlantic coasts.

34. EPA determined that “adding nutrient criteria to State water quality standards is essential for Federal, State, and local agencies, and the public, to better understand, identify, and manage nutrient overenrichment problems in surface waters.” The consequence of not having numeric standards was that “nutrient overenrichment problems are underestimated and the response authorities of the Clean Water Act and other laws are not fully engaged.”

35. EPA then required all states to develop numeric nutrient standards that were protective of a water body’s “designated uses”² by 2003, or EPA would develop standards for them.³

¹ See USEPA, National Strategy for the Development of Regional Nutrient Criteria, June 1998 (noticed in the Federal Register on June 25, 1998 at 63 Fed. Reg. 34648).

² The Clean Water Act requires states to designate the uses to be made of every navigable water body. 33 U.S.C. §1313(c)(2)(A). Florida has five classes of designated uses. The designated uses of less stringently regulated classifications are included within the designated uses of more stringently regulated classifications.

Class I - Potable Water Supplies

Fourteen general areas throughout the state including: impoundments and associated tributaries, certain lakes, rivers, or portions of rivers, used as a drinking water supply.

Class II - Shellfish Propagation or Harvesting

Generally coastal waters where shellfish harvesting occurs.

Class III - Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife

The surface waters of the state are Class III unless described in rule 62-302.400 F.A.C.

Class IV - Agricultural Water Supplies

36. For example, Florida has designated the section of the Caloosahatchee River where the Olga Water Treatment Plant is located (and where the algae bloom photographs attached as exhibits D1 and D2 were taken) for use as “Potable Water Supplies.” It is readily apparent that the Florida’s narrative nutrient standards have not been protective of the river’s use as a drinking water source given that the plant had to be closed due to an algae bloom fueled by excessive nutrients. The purpose of EPA’s requirement that states must set numeric standards was to prevent exactly such an event from occurring.

37. In May 2006, Florida’s Integrated Water Assessment (a report which by law is submitted to EPA) found that fifty percent of Florida’s river and stream miles, sixty percent of Florida’s lakes (excluding the 730 square miles of Lake Okeechobee which is itself impaired due to nutrient pollution), and sixty percent of the square miles of Florida’s estuaries had poor water quality. Nutrient pollution was the major source of concern.

38. The Assessment’s list of major water quality concerns included: 1) documentation of increasing levels of nutrients in Florida’s surface waters since the 1970s, 2) water quality declines in springs associated with increases in nitrate levels (nitrate is also a nutrient); 3) freshwater harmful algal blooms which were increasing in frequency, duration, and magnitude which posed a significant threat to surface drinking water resources and recreational areas; 4) abundant populations of blue green algae (cyanobacteria) capable of producing health threatening toxins in rivers and lakes; and 5) the finding of levels of these cyanotoxins above suggested guidelines in finished drinking water from some drinking water facilities.

Generally located in agriculture areas around Lake Okeechobee.

Class V - Navigation, Utility and Industrial Use.

Currently, there are not any designated Class V bodies of water. The Fenholloway River was reclassified as Class III in 1998

³ This date was subsequently changed to 2004 because EPA was delayed in getting out its guidance documents.

39. On May 25, 2007, EPA's Office of Water issued a bleak report on the states' efforts to develop numeric nutrient criteria over the preceding nine years.⁴ As of that date, virtually no progress had been made. The majority of states were still at the level of collecting data and many were only beginning the criteria process.

40. In the section of the memo titled "Why Action is Needed," EPA explained that:

High nitrogen and phosphorus loading, or nutrient pollution, results in harmful algal blooms, reduced spawning grounds and nursery habitats, fish kills, oxygen-starved hypoxic or 'dead' zones, and public health concerns related to impaired drinking water sources and increased exposure to toxic microbes such as cyanobacteria. Nutrient problems can exhibit themselves locally or much further downstream leading to degraded estuaries, lakes and reservoirs, and to hypoxic zones where fish and wildlife can no longer survive.

41. The memo further explained that numeric nutrient criteria were needed to address this "major source of environmental degradation" because "[a]s any environmental professional understands, we can't effectively manage what we can't measure."

42. As of today, Florida has failed to develop numeric nutrient criteria for phosphorus and nitrogen.

43. Moreover, Defendants have failed to take action by promptly setting numeric nutrient criteria for the state of Florida as mandated by the CWA.

COUNT I

CLAIM FOR DECLARATORY RELIEF

44. Plaintiffs hereby incorporate all preceding paragraphs of this complaint and all allegations contained within them.

⁴ Memo from Benjamin Grumbles, USEPA Assistant Administrator re: Nutrient Pollution and Water Quality Standards (May 25, 2007).

45. Defendants determined that numeric nutrient criteria were necessary to meet the requirements of the CWA in 1998 and required that states either adopt such standards by 2003 or have EPA set the standards for them.

46. Since that time, Florida has neither adopted nor proposed numeric nutrient standards and EPA has set no numeric standards for nutrients in Florida.

47. Defendants' failure to promptly promulgate its own numeric nutrient criteria for Florida is a failure to perform their non-discretionary duty under section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), of the CWA.

48. Based on the foregoing facts, Plaintiffs request a declaration of Defendants' failure to perform their non-discretionary duty under section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), of the CWA.

COUNT II

CLAIM FOR INJUNCTIVE RELIEF

49. Plaintiffs hereby incorporate all preceding paragraphs of this complaint and all allegations contained within them.

50. Plaintiffs have no adequate remedy at law for these violations.

51. Each day on which EPA violates its duty to protect the water of Florida causes severe and irreparable environmental degradation and heightened public health risks because of the continuing pollution in violation of water quality standards.

52. Therefore, Plaintiffs are entitled to injunctive relief set forth in the prayer to prevent injury to themselves and the public.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs Florida Wildlife Federation, Inc., Sierra Club, Inc., and Conservancy of Southwest Florida, Inc. respectfully request this Honorable Court to enter the following relief:

- (1) a declaratory judgment against Stephen L. Johnson, as Administrator, and the United States Environmental Protection Agency that their failure to promptly set numeric nutrient standards for the state of Florida stands in violation of their non-discretionary duty mandated by section 303(c)(4)(B), 33 U.S.C. § 1313(c)(4)(B), of the Clean Water Act;
- (2) an injunction against Defendants, requiring them to promptly set numeric nutrient standards for the state of Florida;
- (3) an award of litigation costs, including reasonable attorney and expert witness fees, as authorized in section 505(d) of the Clean Water Act, 33 U.S.C. § 1365(d); and
- (4) any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between Plaintiffs and Defendants.

Respectfully submitted on this 17th day of July, 2008.

/s/Monica K. Reimer
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EARTHJUSTICE

BOZEMAN, MONTANA DENVER, COLORADO HONOLULU, HAWAII
INTERNATIONAL JUNEAU, ALASKA NEW YORK, NEW YORK OAKLAND, CALIFORNIA
SEATTLE, WASHINGTON TALLAHASSEE, FLORIDA WASHINGTON, D.C.

April 29, 2008

VIA CERTIFIED MAIL
7099-3400-0009-9824-9870

Stephen L. Johnson, Administrator
United States Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Intent to Sue the Administrator of EPA for Failure to Perform Its Mandatory Duty to Promulgate Numeric Nutrient Criteria for the State of Florida As Required by Section 303(c)(4)(B) of the Clean Water Act

Dear Mr. Johnson,

Florida's 2006 Integrated Water Assessment¹ found that 50% of Florida's river and stream miles, 60% of Florida's lakes (excluding the 730 square miles of Lake Okeechobee), and 60% of the square miles of Florida's estuaries had poor water quality. Nutrient pollution was the major concern for both surface and groundwater. Specifically listed major water quality concerns included: 1) documentation of increasing levels of nutrients in Florida's surface waters since the 1970s, 2) water quality declines in springs associated with increases in nitrate levels (nitrate is a nutrient); 3) freshwater harmful algal blooms which were increasing in frequency, duration, and magnitude which posed a significant threat to surface drinking water resources and recreational areas; 4) abundant populations of blue green algae (cyanobacteria) capable of producing health threatening toxins in rivers and lakes; and 5) the finding of levels of these cyanotoxins above suggested guidelines in finished drinking water from some drinking water facilities.

As the Assessment explained, blooms of cyanobacteria are due, in most part, to high nutrient loads, slow moving waters, and hot, humid, and stagnant conditions, all of which are typically found in Florida. Potentially toxigenic cyanobacteria have been found statewide, including river and stream systems such as the St. Johns River in the Northeast Region, the Caloosahatchee River in the Southwest Region, and the Peace and Kissimmee Rivers in the Central Region. In the Southeast Region, toxin levels in the St. Lucie River and estuary during an algae bloom in 2005 were three hundred times above suggested drinking water limits and sixty times above suggested recreational limits. Warning signs had to be posted by local health authorities warning visitors and residents not to come into contact with the water. Lake Okeechobee, which is categorized under state regulations as a drinking water source, is now subject to almost year round blue-green algae blooms as a result of nutrient pollution.

¹ Florida Department of Environmental Protection, "Integrated Water Quality Assessment for Florida: 2006 305(b) Report and 303(d) List Update," May 2, 2006. Found at http://www.dep.state.fl.us/water/tmdl/docs/2006_Integrated_Report.pdf

Exhibit

A

Florida's estuaries and coastal ocean have likewise been plagued with harmful algal blooms associated with nutrient over-enrichment, including macroalgae (seaweed) blooms which displace seagrass and overgrow coral reef ecosystems and novel and toxic dinoflagellate (red tide) blooms. Specifically, blooms of the red tide organism, *Karenia brevis*, have become increasingly more frequent, more intense, and of longer duration along the southwest coast of Florida. The evidence suggests that these red tide blooms are associated with the eutrophication of the West Florida Shelf (WFS) that has resulted from escalating nutrient loads from unmitigated land-based sources of nutrient pollution. The linkage of these type of coastal harmful algal bloom phenomena with increasing land-based nutrient pollution has been critically reviewed by the National Academy of Sciences "Clean Coastal Waters: Understanding the effects of nutrient pollution (2000)" study.²

EPA understands the threat of toxic algae blooms having recently declared portions of the Klamath River in California impaired by toxic blue-green algae.³ Scientists have also found that the toxins produced by these Klamath River blooms bioaccumulate in the muscle tissue of fish creating yet another significant health threat resulting from algae impaired waters.⁴

The primary reason nutrient pollution has continued to increase is that many states, including Florida, adopted *narrative* nutrient criteria rather than set measurable numeric levels as is done with all other pollutants. In Florida, that standard is as follows:

*Nutrients: 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 and fauna.*⁵

Whether this narrative standard was being violated was the subject of the lawsuit brought by the United States against the South Florida Water Management District and the Florida Department of Environmental Protection in 1988. The lawsuit alleged that the natural flora and fauna of the Loxahatchee National Wildlife Refuge were being destroyed by discharges of high levels of phosphorus into the Refuge. The remedy the United States sought was that a numeric nutrient standard for phosphorus be set to replace the narrative standards.⁶ The consent decree in that case required that a numeric standard be set. The reason was obvious – without a numeric standard it would have been impossible to tell whether the goals of the consent decree were being met. In compliance with the consent decree, Florida developed a numeric standard of 10 parts per billion phosphorus for waters in the Refuge and other parts of the Everglades. This lawsuit over nutrient pollution generated the multi-billion dollar Everglades Restoration Project.

² Found at http://www.nap.edu/catalog.php?record_id=9812#toc

³ Klamath Riverkeeper, "Klamath Dam Removal Advocates Win Major Victory In Dams Toxics Case," March 20, 2008. Found at <http://www.klamathriver.org/Press-Release-032008>

⁴ Dan Bacher, "Algae Toxins Found in Yellow Perch on Klamath River Reservoirs," April, 10, 2008. Found at <http://www.indybay.org/newsitems/2008/04/10/18491952.php>

⁵ Rule 62-302.530(47)(b), Florida Administrative Code. Found at <https://www.flrules.org/gateway/readFile.asp?sid=0&type=1&tid=3295010&file=62-302.530.doc>

⁶ U.S. v. South Florida Water Management Dist., 922 F.2d 704, 707-08 (11th Cir.1991).

In 1998, the United States Environmental Protection Agency determined that prompt development of numeric nutrient standards by all states was necessary to meet the requirements of the Clean Water Act given that: 1) nutrient pollution had recently been reported to be the leading cause of impairment in lakes and coastal waters and the second leading cause of impairment in rivers and streams; 2) nutrient pollution had been linked to the dead zone in the Gulf of Mexico; and 3) nutrient pollution had been linked to outbreaks of toxic organisms along the Mid-Atlantic Coast.⁷ According to EPA's plan to deal with this major source of pollution, all states were required to develop numeric nutrient standards that supported designated uses by 2003, or EPA would step into the breach and develop standards for them.

On May 25, 2007, EPA's Office of Water issued a bleak report on the states' efforts.⁸ As of that date, the majority of states were still at the level of collecting data and many were "just starting the criteria process." The reason for the delay was not because EPA had changed its mind that numeric criteria were necessary to meet the requirements of the Act. As the Office of Water wrote:

High nitrogen and phosphorus loading, or nutrient pollution, results in harmful algal blooms, reduced spawning grounds and nursery habitats, fish kills, oxygen-starved hypoxic or "dead" zones, and public health concerns related to impaired drinking water sources and increased exposure to toxic microbes such as cyanobacteria. Nutrient problems can exhibit themselves locally or much further downstream leading to degraded estuaries, lakes and reservoirs, and to hypoxic zones where fish and aquatic life can no longer survive.

* * * *

Virtually every State and Territory is impacted by nutrient-related degradation of our waterways. All but one State and two Territories have Clean Water Act Section 303(d) listed impairments for nutrient pollution. States have listed over 10,000 nutrient and nutrient-related impairments. Fifteen states have more than 200 nutrient-related listings each.

The Office of Water also explained that numeric nutrient criteria were needed to address this "major source of environmental degradation" because "[a]s any environmental professional understands, we can't effectively manage what we can't measure." Adoption of numeric criteria would allow for:

- Easier and faster development of TMDLs
- Quantitative targets to support trading programs
- Easier to write protective NPDES permits
- Increased effectiveness in evaluating success of nutrient runoff minimization programs
- Measurable, objective, water quality baselines against which to measure environmental progress.

⁷ United States Environmental Protection Agency, "National Strategy for the Development of Regional Nutrient Criteria," June 1998. Found at <http://www.epa.gov/waterscience/criteria/nutrient/strategy/nutstra3.pdf>

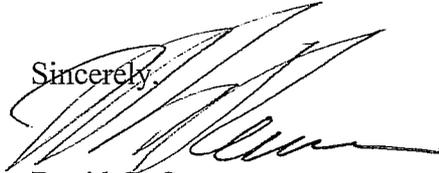
⁸ Benjamin H. Grumbles, Memo on "Nutrient Pollution and Numeric Water Quality Standards," May 25, 2007. Found at <http://www.epa.gov/waterscience/criteria/nutrient/files/policy20070525.pdf>

April 29, 2008

Having determined that numeric standards were necessary to meet the requirements of the Act in 1998, the Administrator fell under a mandatory duty to promptly promulgate numeric standards for the states as required by section 303(c)(4)(B) of the Clean Water Act. Florida has failed to develop narrative nutrient criteria. However, not only has EPA failed to take action, it has consistently permitted Florida to postpone its adoption of numeric standards to the point where EPA recently approved a plan that would have numeric standards, at best, being "proposed" by 2012.⁹

The Florida Wildlife Federation, the Sierra Club, and the Conservancy of Southwest Florida hereby notify the Administrator of their intent to sue under section 505(a)(2) of the Clean Water Act over the Administrator's failure to comply with its mandatory duty under section 303(c)(4)(B) of the Act to promptly set numeric nutrient criteria for the state of Florida, it having determined that the standards were necessary to meet the requirements of the Clean Water Act in 1998.

Sincerely,



David G. Guest

Monica K. Reimer

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CONSERVANCY OF SOUTHWEST FLORIDA

1450 Merrihue Drive

Naples, Florida 34102

Telephone: (239) 262-0304

cc: Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

⁹ Florida Department of Environmental Protection, "State of Florida: Numeric Nutrient Criteria Development Plan," September 2007. The plan is not posted on the FDEP website nor is EPA's approval letter.



Microcystis Bloom - Goodby's Creek at the St. Johns River, Jacksonville, FL - 09.14.05 - 6:39pm

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Exhibit
B1



**Arlington Boat Ramp off of University Blvd. in Jacksonville during 2005 St. Johns River Bloom Event
(Photograph courtesy of Neil Armingeon, St. Johns Riverkeeper).**



***Microcystis* Bloom in Caloosahatchee River at Olga, Florida approximately a mile and a half west of the Franklin Lock, south side of the river, October 14, 2005
(Photo Courtesy of Richard Solveson).**

Exhibit

C1



***Anabaena* Algae Bloom in Caloosahatchee River at Franklin Lock, June 17, 2008
(Photo Courtesy of John Cassani).**

Exhibit

D1



***Anabaena* Algae Bloom in Caloosahatchee River at Franklin Lock showing Olga Water Treatment Plant, June 17, 2008.
(Photo Courtesy of John Cassani).**



**An aerial view of the algae bloom on St. Lucie River,
photograph by Jason Nuttle, August 8, 2005.**

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without the written approval of Scripps Treasure Coast Newspapers).**

Exhibit

E1



Algae on seawall off Palm City Road, Palm City Florida, during St. Lucie River *Microcystis* algae bloom event, photograph by Jason Nuttle, August 10, 2005.

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**Red Tide Warning at Volusia County beach during red tide event, October, 2007
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Exhibit

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