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# The Ripple Effect: How a Lawsuit Seeking Cleaner Water May be Backfiring

Sara Gonzalez-Rothi Kronenthal\*

## INTRODUCTION

Success in litigation requires more than a favorable order. For parties to achieve a desired outcome, forces outside the courtroom must not interfere with the legal victory. In 2009, conservation groups succeeded in negotiating a settlement that, on its face, seemed to promise cleaner water in Florida. However, a ripple of social and political opposition to the regulations that followed threatened to undermine the environmental benefits sought in the first instance. While the case poses interesting federalism questions,<sup>1</sup> the discussion that follows focuses on the likely practical outcome of *Florida Wildlife Federation v. Jackson*.<sup>2</sup>

Part I of this Article provides an overview of the environmental and legal history preceding *Florida Wildlife*. This section discusses the historical, economic, and environmental stakes of nutrient pollution in Florida. Part II examines the legal premise underlying the case. Specifically, the Clean Water Act vests in states significant authority for setting water quality standards, but reserves certain legal tools for the federal government to ensure the protection of the Nation's water resources. Central to *Florida Wildlife* is the scope of federal authority and discretion to determine that water quality criteria are insufficient. In Part III, the Article describes the complex legal, administrative, and legislative backlash to federal regulations prompted by *Florida Wildlife* and the resulting consent decree. This section reflects on the response

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1. See Bonnie A. Malloy, *Testing Cooperative Federalism: Water Quality Standards Under the Clean Water Act*, 6 ENVTL. & ENERGY L. & POL'Y J. 63 (2011) (arguing *Florida Wildlife* is an example of cooperative federalism at work). See also Adam Weiss, Note, *Federal Numeric Nutrient Criteria in Florida: When Cooperative Federalism Goes Rogue*, 30 PACE ENVTL. L. REV. 299 (2012) (characterizing EPA's role in Florida Wildlife as eroding the cooperation with states required by the Clean Water Act).

2. Fla. Wildlife Fed'n, Inc. v. Jackson, 853 F. Supp. 2d 1138 (N.D. Fla. 2012).

by state and federal legislatures and administrative agencies to the settlement. Significantly, the backlash resulted in nutrient limits that are arguably less protective of water quality than those predating the lawsuit. Part IV addresses regulations promulgated by the State of Florida in an attempt to circumvent the federal action. Part V analyzes how public and political support for stricter pollution limits eroded, even in a state with a typically pro-environment electorate, and what the future holds for similar cases. This Article concludes that *Florida Wildlife* may fundamentally change the way the Environmental Protection Agency (EPA) and potential plaintiffs seek to address nutrient pollution.

## I. FLORIDA, NUTRIENT POLLUTION, AND THE CLEAN WATER ACT

### A. *Why Florida?*

While the term “nutrient” sounds benign, overabundance of nitrogen and phosphorous can wreak havoc on natural systems.<sup>3</sup> This is especially true in Florida.<sup>4</sup> The State’s economy relies on a healthy environment—from fishing to tourism.<sup>5</sup> The roughly 18 million people who call Florida home host several million more national and international visitors, all of whom increase demands on the State’s water supply. The chemistry, biology, and geology of the State are particularly sensitive to nutrient pollution.<sup>6</sup>

Florida’s world-class beach towns, citrus groves, theme parks, freshwater springs, football stadiums, cattle ranches, and golf courses all sit atop karst topography where water continuously dissolves the bedrock. The interchange between ground and surface water is virtually constant.<sup>7</sup> The chalky limestone substrate of the State is spongy and porous. As a result, activities that occur on land are highly likely to impact water.

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3. Malloy, *supra* note 1, at 66.

4. *Id.* at 67.

5. Tom Allen et al., *Sportfishing in America: An Economic Force For Conservation*, AM. SPORTFISHING ASSOC. (JAN. 2012), [http://asafishing.org/uploads/Sportfishing\\_in\\_America\\_January\\_2013.pdf](http://asafishing.org/uploads/Sportfishing_in_America_January_2013.pdf), archived at <http://perma.cc/6CC3-VRBD>.

6. Weiss, *supra* note 1, at 303.

7. See James Phillips, *Karst*, SOUTHWEST FLA. WATER MGMT. DIST., <http://www.swfwmd.state.fl.us/education/watersheds/alafia/karst-topography>, archived at <http://perma.cc/M6RX-ASYM> (last visited Oct. 26, 2014).

### B. Nutrient Pollution

When concentrations of nitrogen and phosphorous exceed an appropriate level for a given water body, the results can include harmful algae blooms (HABs), fish kills, and hypoxic dead zones devoid of living organisms.<sup>8</sup> The impact to humans from HABs is substantial, including direct consequences to human health.<sup>9</sup> A prominent Republican United States Senator, who also happened to serve as the ranking member on the Environment and Public Works Committee, infamously grew ill after swimming in an Oklahoma lake suffering an algae bloom.<sup>10</sup> While Senator Inhofe's experience was inconvenient, exposure to algae-tainted water at high levels or in people with compromised immune systems can cause liver toxicity, neurotoxicity, increased tumor growth, and can be fatal.<sup>11</sup>

The economic toll of nutrient pollution is also significant.<sup>12</sup> Hypoxic zones, fish kills, and algae blooms are bad for business. Some rivers in Florida are closed almost annually due to an algal outbreak. Water-dependent industries are not the only businesses that suffer. These events are visually unappealing, and the smell is overpowering. This can negatively impact tourism and the value of real estate in affected communities.<sup>13</sup>

In Florida, where the economic stakes are high and the environmental tolerance for elevated nitrogen and phosphorous is

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8. MINDY SELMAN ET AL., EUTROPHICATION AND HYPOXIA IN COASTAL AREAS: A GLOBAL ASSESSMENT OF THE STATE OF KNOWLEDGE 2–3 (2008), available at [http://www.wri.org/sites/default/files/pdf/eutrophication\\_and\\_hypoxia\\_in\\_coastal\\_areas.pdf](http://www.wri.org/sites/default/files/pdf/eutrophication_and_hypoxia_in_coastal_areas.pdf), archived at <http://perma.cc/manage/vest/8FD4-ZCH5>.

9. See NAT'L RES. COUNCIL COMM. ON THE MISSISSIPPI RIVER & THE CLEAN WATER ACT, MISSISSIPPI RIVER WATER QUALITY AND THE CLEAN WATER ACT: PROGRESS, CHALLENGES AND OPPORTUNITIES 45 (2008), available at <http://biotech.law.lsu.edu/climate/docs/mississippi-pollution.pdf>, archived at <http://perma.cc/WW2N-X96M>.

10. Keith White, *Inhofe blames illness on lake algae*, THE HILL (July 2, 2011, 11:25 AM), <http://thehill.com/blogs/blog-briefing-room/news/169511-inhofe-blames-illness-on-oklahoma-lake-algae>, archived at <http://perma.cc/7FJN-LZCZ>.

11. See *Nutrient Pollution: Human Health Effects*, ENVTL. PROT. AGENCY, <http://www2.epa.gov/nutrientpollution/effects-human-health>, archived at <http://perma.cc/68XG-PRKD> (last updated Aug. 26, 2014).

12. Weiss, *supra* note 1, at 302.

13. See *Nutrient Pollution: Economic Effects*, ENVTL. PROT. AGENCY, <http://www2.epa.gov/nutrientpollution/effects-economy>, archived at <http://perma.cc/J2AL-5NGM> (last updated Mar. 16, 2014).

low, the Department of Environmental Protection (FDEP) has decades of water quality data.<sup>14</sup>

Twenty-five years ago, litigation to reduce nutrient pollution in America's iconic Everglades began with *United States v. South Florida Water Management District*.<sup>15</sup> Five years ago, the Florida Wildlife Federation filed a lawsuit attempting to settle the issue statewide for all Florida surface waters.<sup>16</sup> Presumably, the *Florida Wildlife* plaintiffs filed suit because they sought to bring about positive environmental change.<sup>17</sup> Unfortunately, state-promulgated regulations spurred solely by the 2008 lawsuit are unlikely to result in cleaner water. While the case resulted in a version of the literal relief sought in *Florida Wildlife* (rulemaking to establish numeric limits on nutrient pollution), the manner in which the regulations will be implemented is arguably less stringent than the standards that pre-existed the lawsuit.

## II. LITIGATION BACKGROUND

### A. Clean Water Act Requirements

The Clean Water Act vests in states the primary authority to develop water quality standards.<sup>18</sup> The Act also establishes a process for the EPA to then review and approve state-promulgated standards.<sup>19</sup> This state-federal interplay is often referred to as the

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14. State water quality data is entered into a publically accessible database. As of March 22, 2013, over 25 million records were available in STORET. "STORET—an acronym for STORAge and RETrieval database—is the database currently used by FDEP to capture, store, and report chemical, physical, and biological water quality 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 Action Plans (BMAPs), to name just a few." *STORET*, FLA. DEP'T. OF ENVTL. PROT., <http://www.dep.state.fl.us/water/storet/>, archived <http://perma.cc/MWU9-F66N> (last visited Oct. 12, 2014).

15. *United States v. S. Fla. Water Mgmt. Dist.*, 922 F.2d 704 (11th Cir. 1991).

16. *Fla. Wildlife Fed'n, Inc. v. Jackson*, No. 4:08cv324-RH/WCS, 2009 U.S. Dist. LEXIS 123651, at \*8–9 (N.D. Fla. Dec. 30, 2009).

17. Some scholars view the mere setting of water quality standards is a substantive step towards water quality protection and improvement. *See Malloy, supra* note 1, at 64. However, Malloy's analysis in support of the efficacy of the cooperative federalism of the Clean Water Act in protecting water quality pre-dates the legal, legislative, and regulatory backlash to *Florida Wildlife*. This Article provides a retrospective reconsideration of state and federal roles in light of the events following *Florida Wildlife*.

18. 40 C.F.R. § 131.4 (2013).

19. 33 U.S.C. § 1313 (2012). 40 C.F.R. § 131.5.

“cooperative federalism” of the Clean Water Act.<sup>20</sup> Per EPA regulation, the purpose of state-developed water quality standards is “to protect public health and welfare, enhance the quality of water and serve the purposes of the Clean Water Act . . . . [W]ater quality standards should, wherever attainable, provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation in and on the water.”<sup>21</sup>

A water quality standard has three components. For each surface water body, a state must establish a “designated use.”<sup>22</sup> The state must also develop water quality criteria necessary to attain or maintain the designated use.<sup>23</sup> Water quality criteria may be expressed “as constituent concentrations, levels, or narrative statements.”<sup>24</sup> Finally, a water quality standard must contain an anti-degradation policy and an implementation method.<sup>25</sup>

States are required to review water quality standards at least every three years.<sup>26</sup> Within 30 days of completion of the review, the state must either modify its standards or report back to the EPA.<sup>27</sup> The EPA may approve the state’s new or revised water quality standard within 60 days.<sup>28</sup> The EPA also has the authority to determine that a new or revised water quality standard is necessary under Clean Water Act Section 303(c)(4)(B).<sup>29</sup> This determination provision establishes a powerful check on state flexibility and vests in the EPA the ultimate authority to ensure protection of the Nation’s waters. In the event that the EPA makes such a determination, the EPA is required to promulgate new or revised standards “promptly” and adopt them within 90 days unless a State promulgates adequate standards in the interim.<sup>30</sup>

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20. Indeed, some critics argue that the EPA’s actions following settlement of *Florida Wildlife* indicate an erosion of the cooperative federalism of the Clean Water Act and overreach by EPA. See Weiss, *supra* note 1, at 301.

21. 40 C.F.R. § 131.2.

22. Designated uses include fishable/swimmable, potable water supply, agricultural use, navigation, industrial, and related categories. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.3(f), 131.10.

23. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.3(b), 131.11.

24. 40 C.F.R. § 131.3(b) (2013).

25. 40 C.F.R. § 131.12(a)(2); *Am. Wildlands v. Browner*, 260 F.3d 1192, 1194 (10th Cir. 2001).

26. 33 U.S.C. §§ 1313(c)(1), (2)(A).

27. 40 C.F.R. § 131.20.

28. 33 U.S.C. § 1313(c)(3) (2012); 40 C.F.R. § 131.21(a)(1).

29. 33 U.S.C. §§ 1313 (c)(3), (4)(A); 40 C.F.R. §§ 131.21-131.22.

30. *Id.*

*B. Water Quality Criteria: Numeric v. Narrative*

To express water quality criteria as a narrative statement for a water body, a state could essentially use language based on the purpose outlined in the EPA regulations. Prior to establishment of numeric criteria, Florida's nutrient standard required that "in no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural flora or fauna."<sup>31</sup> This narrative standard was relatively simple to promulgate because it did not require scientific inquiry into the exact levels that would trigger an imbalance for each water body. However, without a clear metric, violation of the standard was difficult to ascertain until after an imbalance existed.<sup>32</sup> For example, for an algae bloom to grow, there must be not only an abundance of nutrients, but also warm temperature and sunlight. Thus, under the narrative criteria, a water body may have a nutrient imbalance, but it would be virtually undetectable without other conditions.<sup>33</sup>

The EPA recognized the difficulty presented by narrative nutrient criteria, and in June 1998, it released a National Strategy recommending that all states translate narrative criteria to numeric for nutrients.<sup>34</sup> "States should have adopted nutrient criteria that support state-designated uses *by the end of 2003*."<sup>35</sup> The vast majority of states did not do so.<sup>36</sup> In Florida, the FDEP began the process, expanding its nutrient monitoring of Florida surface waters. While numeric criteria in the form of total maximum daily loads were established for certain impaired waters<sup>37</sup> and a numeric

31. FLA. ADMIN. CODE ANN. r. 62-302.530 (2014).

32. See Oliver A. Houck, *Cooperative Federalism, Nutrients, and the Clean Water Act: Three Cases Revisited*, 44 ELR 10426, 14031 (2014).

33. In making this point, plaintiffs characterize narrative criteria as "reactive rather [than] preventative." Fla. Wildlife Fed'n v. Dep't of Env'tl. Prot. No. 11-6137RP, at \*18 (Fla. Div. Adm. Hear. June 7, 2012), available at <http://www.dep.state.fl.us/secretary/news/2012/06/11006137.pdf>, archived at <http://perma.cc/SL3Y-2YV3>.

34. ENVTL. PROT. AGENCY, NATIONAL STRATEGY FOR THE DEVELOPMENT OF REGIONAL NUTRIENT CRITERIA (1998) [hereinafter, NATIONAL STRATEGY], available at <http://permanent.access.gpo.gov/lps50399/20003NOU.pdf>, archived at <http://perma.cc/C8K6-QVEZ>.

35. *Id.* at iv (emphasis added).

36. *State Adoption of Numeric Nutrient Standards*, ENVTL. PROT. AGENCY (2008), [http://www2.epa.gov/sites/production/files/documents/nutrient\\_report1998-2008.pdf](http://www2.epa.gov/sites/production/files/documents/nutrient_report1998-2008.pdf), archived at <http://perma.cc/UQL9-8EWZ>.

37. "The Department, in conjunction with the state's Water Management Districts, conducted detailed studies, held meetings, and promulgated 79 specific total maximum daily loads ("TDMLs") for various nutrients in specific bodies of water." FLA. ADMIN. CODE ANN. r. 62-304.300 to 810 (adopted 2005-2010). Fla.

limit was established for the Everglades watershed via consent decree, by 2008, Florida had not yet translated the narrative criteria into numeric criteria as outlined in the National Strategy.<sup>38</sup>

### C. Florida Wildlife Federation v. Jackson

In July 2008, the Florida Wildlife Federation, St. Johns Riverkeeper, Conservancy of Southwest Florida, Sierra Club, and Earthjustice brought suit against the EPA and the Administrator.<sup>39</sup> The plaintiffs presented a novel argument that the EPA had a non-delegable duty to determine per § 303(c)(4)(B)<sup>40</sup> that new or revised water quality standards were required under the Clean Water Act based on the National Strategy provision recommending numeric criteria by 2003.<sup>41</sup> Presumably, the plaintiffs believed that upon adoption of numeric criteria, more water bodies would be listed as impaired sooner, thus triggering stricter permit limits and resulting in cleaner water.

The EPA under the Bush Administration initially disputed that the National Strategy documents alone acted as a § 303(c)(4)(B) determination and moved for summary judgment on this point.<sup>42</sup> “Contrary to Plaintiffs’ claims, the EPA Administrator did not make a determination in 1998 that revised water quality standards were necessary to meet the requirements of the Clean Water Act with regard to nutrients in the State of Florida.”<sup>43</sup> The Clinton-Gore era National Strategy itself contained the following in a ‘Note to the Reader:’ this document “*cannot impose legally binding requirements* on EPA, States, Tribes, or the regulated community and may not apply to some particular situations.”<sup>44</sup>

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Wildlife Fed’n, Inc. v. S. Fla. Water Mgmt. Dist., 647 F.3d 1296, 1300 (11th Cir. 2011).

38. In part, the process to establish numeric criteria is technical and time-consuming. See Weiss, *supra* note 1, at 305.

39. Fla. Wildlife Fed’n, Inc. v. Jackson, 853 F. Supp. 2d 1138 (N.D. Fla. 2012).

40. 33 U.S.C. § 1313(c)(4)(B) (2012).

41. “The target date for adoption of nutrient criteria as part of water quality standards is within three years of completion of the guidance (i.e., by the end of the calendar year 2003). EPA will step in and promulgate nutrient water quality criteria for a State or Tribe if EPA determines that federal action is necessary.” See NATIONAL STRATEGY, *supra* note 34, at 6.

42. Motion for Summary Judgment and Incorporated Memorandum of Law, Fla. Wildlife Fed’n, Inc. v. Jackson (N.D. Fla. 2009) (No. 4:08-cv-00324-RH-WCS), 2009 WL 1248302.

43. *Id.*

44. NATIONAL STRATEGY, *supra* note 34, at vi (emphasis added).



Yet the question of whether the National Strategy created a legal duty to revise water quality standards was soon moot. On January 14, 2009, the outgoing Administrator for Water, Ben Grumbles, sent a formal determination letter to the Crist-appointed FDEP Secretary, Michael Sole, setting a timeline by which the EPA would promulgate numeric criteria for nitrogen and phosphorous in Florida surface waters.<sup>45</sup> This statewide determination was unprecedented in the history of the Clean Water Act.<sup>46</sup> In the § 303(c)(4)(B) process, if a state promulgates adequate standards after a determination but before the EPA, the EPA is no longer obligated to promulgate federal standards. The FDEP was initially cooperative with the timeline.<sup>47</sup> Regarding the determination, FDEP Secretary Mike Sole explained, “The State of Florida recognizes that more needs to be done to address nutrient pollution in our rivers, streams, lakes and estuaries, and these actions will help our State and all of our stakeholders prevent and better manage sources of nitrogen and phosphorus from entering our waters.”<sup>48</sup>

### III. RESPONSE TO CONSENT DECREE

#### *A. Preliminary FDEP Rulemaking and Settlement*

FDEP released draft regulations for inland waters (lakes, streams, and springs) in the early summer 2009.<sup>49</sup> On August 25, 2009, the EPA and the *Florida Wildlife* plaintiffs signed a consent decree encompassing the same timelines included in the January 14<sup>th</sup> EPA determination letter. Subsequently, the EPA provided

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45. Letter from Benjamin Grumbles, Adm’r, Env’tl. Prot. Agency, to Michael Sole, Sec’y, Fla. Dep’t of Env’tl. Prot. (Jan. 14, 2009), *available at* [http://www.dep.state.fl.us/water/wqssp/nutrients/docs/benjamin\\_grumbles\\_epa\\_01142009.pdf](http://www.dep.state.fl.us/water/wqssp/nutrients/docs/benjamin_grumbles_epa_01142009.pdf), archived at <http://perma.cc/NPF9-79P9>.

46. Stakeholders and some legal scholars felt the determination shut the state out of the process, straining the cooperative federalism of the Clean Water Act. *See Weiss, supra* note 1, at 308.

47. News Release, Env’tl. Prot. Agency, EPA and Florida DEP Work Together to Restore Florida’s Surface Waters (Jan. 16, 2009), *available at* <http://yosemite.epa.gov/OPA/ADMPRESS.NSF/d0cf6618525a9efb85257359003fb69d/112863fab6eeb9cc852575400058fb33!OpenDocument>, archived at <http://perma.cc/4S4K-6LP8>.

48. *Id.*

49. *State of Florida Numeric Nutrient Criteria Development Plan*, FLA. DEP’T OF ENVTL. PROT. (2009), <http://www.dep.state.fl.us/water/wqssp/nutrients/docs/fl-nutrient-plan-v030309.pdf>, archived at <http://perma.cc/P3LF-T4G9>.

comment on the draft state rule.<sup>50</sup> The September 16<sup>th</sup> letter posed several questions to the state. Coming only three weeks after the consent decree, the letter prompted concern within FDEP that the EPA intended to promulgate a federal rule rather than approve the State criteria.<sup>51</sup>

FDEP rescinded the draft and halted all regulatory action.<sup>52</sup> Industry opposed the settlement.<sup>53</sup> The South Florida Water Management District (SFWMD) also challenged the consent decree in the Northern District of Florida.<sup>54</sup> The arguments questioned both the legal necessity of numeric standards and the feasibility of developing scientifically defensible criteria within the timelines. After considering written evidence, briefs, and oral arguments, Judge Robert Hinkle approved the consent decree on December 30, 2009.<sup>55</sup> The SFWMD appealed in early spring 2010 to the Eleventh Circuit. The attempts to intervene failed when the Eleventh Circuit dismissed the appeal.<sup>56</sup> Given the statewide implications of federally-promulgated water quality standards for an almost ubiquitous pollutant, politicians became involved in the run-up to the 2010 gubernatorial and congressional races.

### *B. Legislative Backlash to EPA Inland Waters Rule*

The Florida congressional delegation sent a bipartisan letter requesting delay in the promulgation of the EPA draft inland

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50. Letter from Denise Keehner, Dir., Standards & Health Prot. Div. to Jerry Brooks, Dir., Env'tl. Assessment & Restoration, Fla. Dep't of Env'tl. Prot. (Sept. 16, 2009), available at [https://web.archive.org/web/20130511222319/http://www.dep.state.fl.us/water/wqssp/nutrients/docs/epa\\_comments\\_091609.pdf](https://web.archive.org/web/20130511222319/http://www.dep.state.fl.us/water/wqssp/nutrients/docs/epa_comments_091609.pdf), archived at, <http://perma.cc/R8ZJ-V54U>.

51. See *DEP Responses to EPA's 9/16 Comment Letter* (Oct. 9, 2009), [https://web.archive.org/web/20130511225535/http://www.dep.state.fl.us/water/wqssp/nutrients/docs/dep\\_responses\\_100909.pdf](https://web.archive.org/web/20130511225535/http://www.dep.state.fl.us/water/wqssp/nutrients/docs/dep_responses_100909.pdf), archived at <http://perma.cc/S5Q8-PFR8> (from the Fla. Dep't of Env'tl. Prot.).

52. Electronic versions of the draft initially posted on the FDEP website are no longer available.

53. See Memorandum of Law in Opposition to Motion for Entry of Consent Decree, *Fla. Wildlife Fed'n, Inc. v. Jackson*, (N.D. Fla. 2009) (No. 4:08-cv-00324-RH-WCS), 2009 WL 5128286.

54. Intervenor South Florida Water Management District's Supplemental Response to Motion to Approve Consent Decree, *Fla. Wildlife Fed'n v. Jackson*, (N.D. Fla. 2009) (No. 4:08-cv-00324-RH-WCS), 2009 WL 5128285.

55. Order Approving the Consent Decree, *Fla. Wildlife Fed'n v. Jackson*, (N.D. Fla. 2009 (no. 4:08-cv-00324-RH-WCS)).

56. *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1307 (11th Cir. 2011).

waters rule. The draft rule was published on January 26, 2010.<sup>57</sup> The rule contained explicit numeric limits for springs, rivers and streams, and lakes, but the draft allowed for site-specific alternative criteria upon approval by the EPA if certain conditions were met.<sup>58</sup> Interestingly, the actual concentrations in the draft rule were almost identical to those included in the rescinded draft state rule for inland waters.

The rule also included a provision for “downstream protective values” (DPVs) that would lower the allowable limits if a downstream water body requires more stringent nutrient controls.<sup>59</sup> This portion of the draft rule proved controversial. Several coastal and estuarine waters in Florida face significant nutrient pollution problems, but the criteria for coastal and estuarine waters were not scheduled for promulgation for another year. This created uncertainty for regulated entities discharging into upstream waters. The State estimated that less than half of Florida streams would attain the instream limit for Total Nitrogen (TN) and less than one-third would attain the DPV in the EPA’s draft rule.<sup>60</sup>

The applicability of the criteria to certain water-bodies was also controversial. A high proportion of Florida’s flowing waters have been altered in some way, either through channelization, construction of pump-stations, or flood control structures, and the draft EPA inland waters rule seemed to apply even to altered structures.<sup>61</sup>

The Florida congressional delegation requested a National Academy of Sciences review of the cost assessment the EPA included in the draft rule and asked pointed questions about the scientific validity of the DPV regulations.<sup>62</sup> Several members joined with industry and municipalities in calling for peer review

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57. Water Quality Standards for the State of Florida’s Lakes and Flowing Waters, 75 Fed. Reg. 4174 (proposed January 26, 2010) (to be codified at 40 C.F.R. § 131).

58. *Id.* at 4217.

59. *Id.* at 4176.

60. See *Evaluation of Florida’s Status Network Data Relative to EPA’s Proposed Numeric Nutrient Criteria*, FLA. DEP’T OF ENVTL. PROT. (Feb. 16, 2010), <http://www.dep.state.fl.us/water/wqssp/nutrients/docs/federal/ipv-dpv-inferences-0210.pdf>, archived at <http://perma.cc/89PA-3HYR>.

61. See Water Quality Standards for the State of Florida’s Lakes and Flowing Waters, 75 Fed. Reg. 4174.

62. See NAT’L RESEARCH COUNCIL, REVIEW OF THE EPA’S ECONOMIC ANALYSIS OF FINAL WATER QUALITY STANDARDS FOR NUTRIENTS AND FLOWING WATERS IN FLORIDA (2012), available at <http://dels.nas.edu/resources/static-assets/materials-based-on-reports/reports-in-brief/EPA-Econ-Analysis-Florida-Final.pdf>, archived at <http://perma.cc/E4QU-CP4N>.

of the rule.<sup>63</sup> The inland waters rule was scheduled to become final on October 15, 2010. One senator requested a delay.<sup>64</sup> Another filed an unsuccessful appropriations rider to bar the EPA from using fiscal year 2011 funds to continue the rulemaking.<sup>65</sup> In response to concerns about the scientific validity, the EPA submitted the DPV methodology to the Science Advisory Board for review.<sup>66</sup>

### *C. EPA Responds to Opposition*

The EPA finalized the inland waters rule on December 6, 2010, just after the election of Rick Scott as Florida's newest governor and Marco Rubio as its newest Senator.<sup>67</sup> Anti-regulatory sentiment had reached a fevered pitch nationally, and the Florida numeric nutrient criteria issue became a common example.

In part due to public and political comments on the draft rule, and in part because of lingering scientific concerns, the EPA removed the DPV for flowing waters upstream of coastal and estuarine waters from the inland rule, but maintained DPV for lakes.<sup>68</sup> These provisions would instead be addressed in the second phase of rulemaking. "This will allow EPA time to hold a public peer review by EPA's Scientific Advisory Board (SAB) of the scientific methodologies for estuarine and coastal criteria, flowing waters in south Florida, and downstream protection values for

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63. Letter from Rep. Adam Putnam et al., to Lisa Jackson, Adm'r, Env'tl. Prot. Agency (Aug. 2, 2010), *available at* <http://capitalsoup.com/2010/08/02/putnam-leads-call-for-scientific-review-of-florida-water-rules/>, archived at <http://perma.cc/48MF-NFGH>.

64. Letter from Bill Nelson, U.S. Senator, to Lisa Jackson, Adm'r, Env'tl. Prot. Agency (Sept. 16, 2010), *available at* <http://www.docstoc.com/docs/55661283/Bill-Nelson-Letter-to-Lisa-Jackson>, archived at <http://perma.cc/C2JK-T974>.

65. Continuing Appropriations Act of 2011, H.R.3081, 111th Cong. (2011).

66. DEBORAH L. SWACKHAMER & JUDITH L. MEYER, REVIEW OF EPA'S DRAFT APPROACHES FOR DERIVING NUMERIC NUTRIENT CRITERIA FOR FLORIDA'S ESTUARIES, COASTAL WATERS, AND SOUTHERN INLAND FLOWING WATERS (2011), *available at* [http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/DCC3488B67473BDA852578D20058F3C9/\\$FILE/EPA-SAB-11-010-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/02ad90b136fc21ef85256eba00436459/DCC3488B67473BDA852578D20058F3C9/$FILE/EPA-SAB-11-010-unsigned.pdf), archived at <http://perma.cc/H9BA-RJFU>.

67. See Water Quality Standards for the State of Florida's Lakes and Flowing Waters, 75 Fed. Reg. 4174 (proposed January 26, 2010) (to be codified at 40 C.F.R. pt. 131).

68. Letter from Peter Silva, Asst. Adm'r, Env'tl. Prot. Agency, to Michael Sole, Sec'y, Fla. Dep't. of Environmental Protection (Mar. 17, 2010), *available at* <http://www.dep.state.fl.us/water/wqssp/nutrients/docs/federal/silva-letter.pdf>, archived at <http://perma.cc/FB2T-F57V>.

estuaries and coastal waters.”<sup>69</sup> In addition, the EPA made the decision to allow Florida to petition for all existing total maximum daily loads to presumptively suffice as site-specific alternative criteria, at least for the first five years.<sup>70</sup> These modifications to the inland rule did not temper the opposition.

#### *D. Efforts to Circumvent EPA Inland Waters Rule*

Recognizing that the EPA was going to continue progress to revise water quality standards for Florida surface waters pursuant to the consent decree, the Scott Administration began negotiations. Governor Scott directed FDEP to resume efforts to create its own state rule.<sup>71</sup>

With the failure of the appropriations rider, a renewed legislative effort began to get traction. John Mica, the Chair of the Transportation and Infrastructure Committee and a Florida Congressman, introduced the Clean Water Cooperative Federalism Act.<sup>72</sup> This bill purportedly aimed to “preserve the authority of each State to make determinations relating to the State’s water quality standards.”<sup>73</sup> Under the Clean Water Act, if the EPA determines under § 303(c)(4)(B) that new or revised water quality standards are necessary, the EPA must promptly promulgate standards.<sup>74</sup> The Clean Water Cooperative Federalism Act would have required a State’s consent for the EPA to begin that process. This legislation was a clear response to the EPA’s numeric nutrient criteria rulemaking for Florida waters. In relevant part, the House Report explained:

Recently . . . EPA has abandoned its proper role of approving state programs and ensuring that the standards that states adopt meet the minimum requirements of the CWA. Instead, EPA has decided to get involved in . . . second-guessing EPA’s own prior determinations that a state standard meets the minimum requirements of the CWA . . . . For example, in November 2010, EPA decided to federally promulgate water quality standards for

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69. Water Quality Standards for the State of Florida’s Lakes and Flowing Waters, 75 Fed. Reg. 75762, 75772 (Dec. 6, 2010) (to be codified at 40 C.F.R. pt. 131).

70. *Id.* at 75787.

71. FLA. ADMIN. CODE ANN. r. 62-302.530(47)(b) (2014).

72. Clean Water Cooperative Federalism Act of 2011, H.R. 2018, 112th Cong. (2011) (passed by the House on July 13, 2011; never passed by Senate).

73. *Id.*

74. *Id.*

nutrients in Florida, even though the state was well underway in developing its own, scientifically defensible nutrient standards for the state, and even though EPA had earlier approved Florida's nutrient criteria development plans.<sup>75</sup>

#### *E. Florida Administrative Reclassification*

When it became apparent that Florida would have numeric limits for nutrients in surface waters, whether promulgated by the State or by the EPA, Florida began a process to create a new designated use classification and to reclassify existing designated uses.<sup>76</sup> Because criteria reflect the designated use intended to be maintained, reclassifying certain waters may lead to less stringent limits. Prior to 2009, the Florida Administrative Code contained five classes and corresponding designated uses for surface waters. Class III waters were designated for fish consumption; recreation; and propagation and maintenance of a healthy, well-balanced population of fish and wildlife.<sup>77</sup> In August 2009, the same month the *Florida Wildlife* plaintiffs and the EPA signed the consent decree memorializing the timeline to set numeric criteria for nutrients, FDEP began the process to creating a new class.<sup>78</sup> Purportedly this new class was created because “affected parties” raised concerns about existing designated uses and their attainability in artificial or altered waters. In relevant part:

Despite the wide variety of state surface waters, ranging from naturally flowing rivers, spring runs, and open-water lakes, to concrete drainage ditches, upland cut canals, and other man-made or altered features, they are almost all designated Class III . . . . As such . . . there is only one level of protection afforded to aquatic life, with the same

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75. H.R. REP. NO. 112-139, at 4 (2011).

76. See *Process for Reclassifying the Designated Uses of Florida Surface Waters*, FLA. DEP'T OF ENVTL. PROT. 4–6 (June 2010), [http://www.dep.state.fl.us/water/wqssp/docs/reclass/process\\_document\\_080510.pdf](http://www.dep.state.fl.us/water/wqssp/docs/reclass/process_document_080510.pdf), archived at <http://perma.cc/JC68-BQHY>.

77. *Designated Uses Policy Advisory Comm., Recommendations of the Designated Uses Policy Advisory Committee for the Refinement of Florida's Surface Water Classification System*, FLA. DEP'T OF ENVTL. PROT. 3 (Aug. 2009), <http://www.dep.state.fl.us/water/wqssp/docs/DUCR/dupac-rpt-draft.pdf>, archived at <http://perma.cc/AR47-DF7T>.

78. *Id.* at 9–11.

expectation of a healthy aquatic life assemblage in a pristine stream as in a man-made, concrete-lined ditch.<sup>79</sup>

Class III-Limited waters are those that are either artificial or those that were altered prior to 1975.<sup>80</sup> These waters support the designated uses of fish consumption, recreation or *limited* recreation, and propagation and maintenance of a *limited population* of fish and wildlife.<sup>81</sup> Because of Florida's topography and climate, several surface waters were altered prior to 1975. The entire southern portion of the state was re-plumbed by the Army Corps of Engineers as part of the Central and Southern Florida Flood Control Project authorized in 1948 following a wave of devastating hurricanes.<sup>82</sup> Also, early settlers considered all of Florida to be an uninhabitable swamp and modified its waters for agriculture.<sup>83</sup> In practice, the "limited" classification may actually be quite expansive.

#### *F. Florida Administrative Procedure Act*

In spring 2010, the Florida Legislature considered and unanimously passed a bill that significantly modified the State's Administrative Procedure Act.<sup>84</sup> House Bill 1565 would require the legislature to "ratify" any rules with an impact of more than a \$1 million within five years of adoption before the rule could take effect.<sup>85</sup> In a letter providing his veto of House Bill 1565, Governor Crist explained, "instead of addressing regulatory costs, this bill encroaches on the principle of separation of powers."<sup>86</sup>

Governor Scott was elected the following November, just prior to finalization of the EPA inland waters rule. In one of his first activities as governor, Rick Scott joined other newly elected state

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79. *Id.* at 1.

80. FLA. ADMIN. CODE ANN. r. 62-302.400(5) (2014).

81. *Id.* (emphasis added).

82. NAT'L ACADEMIES PRESS, *PROGRESS TOWARD RESTORING THE EVERGLADES: THE FIRST BIENNIAL REVIEW 25* (2007), available at [http://nap.edu/openbook.php?record\\_id=117548page=25](http://nap.edu/openbook.php?record_id=117548page=25), archived at <http://perma.cc/YJ5X-TZ6M>

83. News Release, S. Fla. Water Mgmt. Dist., 1949-1960: The Early Years as a Flood Control District (March 12, 2009), available at [http://www.sfwmd.gov/portal/page/portal/xrepository/sfwmd\\_repository\\_pdf/nr\\_2009\\_0312\\_60anniversary\\_1949.pdf](http://www.sfwmd.gov/portal/page/portal/xrepository/sfwmd_repository_pdf/nr_2009_0312_60anniversary_1949.pdf), archived at <http://perma.cc/3QZE-TS82>.

84. H.B. 1565, 2010 Reg. Sess. (Fla. 2010).

85. *Id.*

86. Letter from Charlie Crist, Governor, State of Fla., to Dawn Roberts, Interim Sec'y, Fla. Dep't of State (May 28, 2010), available at <http://capitalsoup.com/wp-content/uploads/2010/05/1565.pdf>, archived at <http://perma.cc/8GTN-2PYW>.

officials in a letter to the EPA requesting a delay of the inland waters rule on November 12, 2010.<sup>87</sup>

Four days later, in a special session on November 16, 2010, the Florida legislature voted to override the Crist veto.<sup>88</sup> The modification to the Florida Administrative Procedure Act became law. As a result, should FDEP reinstate state rulemaking to establish numeric nutrient criteria, the new standards will have to be presented to the Legislature for ratification during a regular session before taking effect.<sup>89</sup>

### G. Legal Backlash

As delay proposals and legislation to limit the EPA's authority made their way through the Congress and the administrative process, industry, state agencies, and the environmental plaintiffs made their way into court. There were several legal challenges to the final inland waters rule that was published December 6, 2010. The *Florida Wildlife* plaintiffs challenged some of the more flexible portions of the rule—for example, the option to petition for site-specific alternative criteria where a petitioner can show legitimate justification for a given water body segment.<sup>90</sup>

Other parties challenged the stream criteria. For lakes and springs, the EPA was able to establish a scientific cause-and-effect relationship using a method called “stressor-response.”<sup>91</sup> However, in the case of streams, this method was inapplicable.<sup>92</sup> The EPA instead analyzed a subset of the most pristine streams, determined the levels of nutrients present, and set the criteria at the 90<sup>th</sup> percentile of the average of those values.<sup>93</sup> The court found that because there was not a scientific basis that showed any change in flora and fauna is harmful, setting the criteria in this manner was arbitrary and capricious.<sup>94</sup> “The Administrator had apparently only

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87. Letter from Rick Scott, Governor, State of Fla., to Lisa Jackson, Adm’r, Env’tl. Prot. Agency (Nov. 12, 2010), *available at* <http://www.tampabay.com/blogs/the-buzz-florida-politics/content/rick-scott-joins-fight-against-epa-water-standards>, archived at <http://perma.cc/7F5H-ZB2W>.

88. See FLA. STAT. § 120.541 (West Supp. 2014).

89. Regular sessions of the Florida Legislature begin in March and generally end in May. See *Session*, THE FLA. SENATE, <http://www.flsenate.gov/session>, archived at <http://perma.cc/9YUC-WQ4M> (last visited Oct. 26, 2014).

90. Fla. Wildlife Fed’n, Inc. v. Jackson, 853 F. Supp. 2d 1138 (N.D. Fla. 2012).

91. *Id.* at 1167.

92. *Id.* at 1169.

93. *Id.* at 1168–69.

94. *Id.* at 1169.



concluded that an increase above this level ordinarily causes a change in flora and fauna—not that it causes a *harmful* change.”<sup>95</sup>

The challengers also addressed the DPV provision included in the final inland waters rule.<sup>96</sup> While the EPA specifically pulled the DPVs for certain streams from the inland waters rule, the rule retained DPVs for waters upstream of lakes.<sup>97</sup> The EPA’s methodology to establish the DPVs for streams flowing into lakes assumed that any change in flora or fauna of the receiving lake constituted a negative impact.<sup>98</sup> The court referenced its conclusion about the stream criteria in holding that the methods used for lake DPVs were equally arbitrary and capricious.<sup>99</sup> “Here, as with the stream criteria, the Administrator shot at the wrong target, seeking to identify not just a harmful effect on downstream waters, but any change in nutrients at all.”<sup>100</sup> The stream criteria and DPVs for waters upstream of lakes were remanded to the EPA.<sup>101</sup> Industry called the remand a victory and described it in the media as an indication that the rule was fatally flawed.

#### IV. STATE REGULATIONS COUNTER EPA RULE

##### *A. FDEP Regulations*

When the EPA finalized the inland waters rule in December 2010, it stayed the rule’s effectiveness for 15 months.<sup>102</sup> In March 2012, the EPA delayed the effective date further to July 6, 2012.<sup>103</sup> Meanwhile, FDEP was in the process of reinitiating its own rule, and the EPA recognized the benefit of having the State lead the way. FDEP held several public meetings throughout 2011 and presented a rule establishing numeric nutrient criteria for inland waters and some estuarine waters to the State Environmental

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95. *Id.* at 1143.

96. Fla. Wildlife Fed’n, Inc. 853 F. Supp. 2d at 1161.

97. *Id.* at 1168.

98. *Id.* at 1168–69.

99. *Id.* at 1171.

100. *Id.* at 1170–71.

101. *Id.* at 1176–77.

102. See Water Quality Standards for the State of Florida’s Lakes and Flowing Waters, 75 Fed. Reg. 4174 (proposed January 26, 2010) (to be codified at 40 C.F.R. pt. 131).

103. *Proposed Extension of Effective Date for Water Quality Standards for Florida’s Lakes and Flowing Waters*, ENVTL. PROT. AGENCY (Dec. 2011), [http://water.epa.gov/scitech/swguidance/standards/upload/florida\\_flow\\_factsheet.pdf](http://water.epa.gov/scitech/swguidance/standards/upload/florida_flow_factsheet.pdf), archived at <http://perma.cc/85SE-M2X9>.

Regulations Commission (ERC) on December 8, 2011.<sup>104</sup> The ERC amended the rule and FDEP intended to submit the approved criteria to the Legislature for ratification in accordance with the APA.<sup>105</sup>

The FDEP regulations contained provisions that concerned the environmental plaintiffs, but the EPA was inclined to approve them.<sup>106</sup> Though the actual numeric values are similar to those established by the EPA, the rule establishes a different process for implementing the criteria. The FDEP rule specifically allows for “mixing zones” and exempts canals.<sup>107</sup> In addition, the FDEP rule maintains the narrative criteria as well as establishing a numeric expression of the nutrient limits.<sup>108</sup> The EPA rule suggests that if the ambient nutrient values in a water-body segment exceed the criteria and there is not a variance, that water may begin the impairment listing process. The FDEP rule requires verification of a biological response.<sup>109</sup> This provision essentially brings a narrative aspect back into the equation.

In a Technical Support Document, FDEP explains that, for waters exceeding the numeric criteria prior to impairment listing:

[A]n additional variable that responds to nutrient enrichment would have to be exceeded (*i.e.*, chlorophyll *a*, biological health criteria, Dissolved Oxygen, or “free form” criteria) to verify that biological impairment is occurring and, if so, to definitively establish that nutrients are a reasonable cause of designated use impairment. In the absence of such confirmatory data, DEP will first place these waters on the Planning List . . . targeted for follow-up monitoring and analysis.<sup>110</sup>

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104. See *Archive of Public Meeting Announcements, Agendas*, FLA. DEP’T OF ENVTL. PROT., <http://www.dep.state.fl.us/water/wqssp/nutrients/meeting-arch.htm>, archived at <http://perma.cc/M5F6-BS4N> (last updated Sept. 4, 2012).

105. Letter from Herschel Vinyard, Sec’y, Fla. Dep’t of Env’tl. Prot., to Mike Haridopolos, President, Fla. Senate & Dean Cannon, Speaker, Fla. House of Representatives (Dec. 9, 2011).

106. Letter from Nancy Stoner, Acting Assistant Adm’r, Env’tl. Prot. Agency, to Herschel Vinyard, Sec’y, Fla. Dep’t of Environmental Protection (Apr. 17, 2013), *available at* <http://www.epa.gov/region4/water/wqs/documents/nancy-stoner-letter-to-fdep-nnc-rule.pdf>, archived at <http://perma.cc/RAW5-HZJF>.

107. FLA. ADMIN. CODE ANN. r.62-302.200(44) (2014).

108. See FLA. ADMIN. CODE ANN. r.62-303.350(1).

109. FLA. ADMIN. CODE ANN. r. 62-303.330.

110. *Technical Support Document: Development of Numeric Nutrient Criteria for Florida Lakes, Spring Vents, and Streams*, FLA. DEP’T OF ENVTL. PROT. 128 (2012), <http://dep.state.fl.us/water/wqssp/nutrients/docs/tsd-nnc-lakes-springs-streams.pdf>, archived at <http://perma.cc/4FZ5-FC54>.

The environmental plaintiffs fiercely opposed these provisions in the FDEP rule, and filed an administrative petition.<sup>111</sup> Pursuant to Florida administrative procedure, the FDEP could not finalize the rule until the challenge was resolved.

### *B. EPA Considers State Rule*

The EPA had several outstanding questions for FDEP before it was prepared to approve the rule in lieu of federal criteria. Specifically, the EPA had not yet promulgated criteria for coastal and estuarine waters.<sup>112</sup> The FDEP rule contained limits for four estuaries, but the EPA was being asked to approve the rule as sufficient to discharge the EPA of its requirement to proceed with criteria for *all* Florida surface waters. In conjunction, the FDEP set forth a rulemaking schedule for the remaining coastal and estuarine waters not covered by the rule.<sup>113</sup> In addition, the EPA requested more information on how FDEP intended to implement its newly adopted criteria, including which waters would not be subject to the rule and how FDEP will ensure that nutrient levels in altered features, like canals, do not harm downstream waters.<sup>114</sup>

As the EPA considered whether to approve the FDEP rule, the political pressure mounted once again. Elected officials sent the EPA letters urging expedient review and approval.<sup>115</sup> Several Florida House and Senate members introduced a new legislative proposal that would prevent the EPA from proposing or finalizing any numeric nutrient criteria in Florida until the Administrator makes a final determination about whether to approve the State-proposed rule.<sup>116</sup>

111. Fla. Wildlife Fed'n, Inc. v. Dep't of Env't Prot., No. 11-6137 (Fla. Div. Admin. Hrgs. 2012).

112. Numeric criteria for these waters were developed in 2012 and 2013. FLA. ADMIN. CODE ANN. r. 62-303.353 (2014).

113. See *Florida Numeric Nutrient Criteria-Path Forward*, FLA. DEP'T OF ENVTL. PROT. 1-2 (Nov. 30, 2012), [http://www.dep.state.fl.us/secretary/news/2013/03/Florida\\_Numeric\\_Nutrient\\_Criteria\\_EPA\\_FDEP\\_PathForward\\_31413.pdf](http://www.dep.state.fl.us/secretary/news/2013/03/Florida_Numeric_Nutrient_Criteria_EPA_FDEP_PathForward_31413.pdf), archived at <http://perma.cc/Q2D9-XULS>.

114. Letter from Nancy Stoner, Acting Asst. Adm'r., Env'tl. Prot. Agency, to Herschel Vinyard, Sec'y, Fla. Dep't of Environmental Protection (Nov. 30, 2012), available at <http://water.epa.gov/lawsregs/rulesregs/upload/determination2012-2.pdf>, archived at <http://perma.cc/TB79-XDZH>.

115. Letter from Bill Nelson, U.S. Senator, to Lisa Jackson, Adm'r, Env'tl. Prot. Agency (Feb. 15, 2012), available at <http://www.sunshinestateneWS.com/sites/default/files/BillNelsonLetter.pdf>, archived at <http://perma.cc/KKJ8-W4MR>.

116. State Waters Partnership Act of 2012, H.R. 3856, S. 2115, 112th Cong. § 5 (2012).

Ultimately the EPA approved the State criteria in November 2012.<sup>117</sup> At the same time, the EPA promulgated draft federal regulations to cover the remanded stream criteria, DPVs, and remaining coastal and estuarine waters not covered by the FDEP rule. This approval was not without caveats—the EPA would retain the 303(c)(4)(B) determination and the federal standards would remain unless and until FDEP adequately completed certain rulemaking.<sup>118</sup> The specific steps required of FDEP in the interim, including successful enactment of State legislation, were outlined in a “Path Forward” document in March 2013.<sup>119</sup>

FDEP promulgated a final rule for estuaries and coastal waters in 2013.<sup>120</sup> In addition, to answer the EPA’s questions related to implementation, FDEP developed several technical support documents.<sup>121</sup> FDEP has continued to promulgate criteria for coastal and estuarine waters in accordance with the Path Forward. The EPA approved the last estuary-specific numeric expressions of the narrative criteria in September 2013.<sup>122</sup> The EPA also requested a modification of the *Florida Wildlife* consent decree to explicitly allow the FDEP rule to suffice as revised water quality criteria.<sup>123</sup> Over the opposition of the environmental plaintiffs, Judge Hinkle approved the modification on January 7, 2014.<sup>124</sup>

## V. ANALYSIS

Even though numeric criteria for almost all Florida surface waters are now in place, the environmental plaintiffs continue to criticize the State rule, arguing that it created “loopholes” that make it more difficult to list certain waters as impaired than under

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117. Letter from James Giattina, Dir., Water Protection Div., Env'tl. Prot. Agency, to Herschel Vinyard, Sec'y, Fla. Dep't of Env'tl. Prot. (Nov. 30, 2012), available at [http://www.dep.state.fl.us/water/wqssp/nutrients/docs/estuaries/epa\\_approval\\_letter\\_113012.pdf](http://www.dep.state.fl.us/water/wqssp/nutrients/docs/estuaries/epa_approval_letter_113012.pdf), archived at <http://perma.cc/VQL7-Z8HG>.

118. *Id.*

119. See *Florida Numeric Nutrient Criteria-Path Forward*, supra note 113.

120. FLA. ADMIN. CODE ANN. r.62-302.532 (2014).

121. See, e.g., Memorandum of Technical Support Document: Remotely Sensed Chlorophyll *a* Criteria for Selected Florida Coastal Waters (July 2012).

122. See Letter from James Giattina, Dir., Water Protection Div., Env'tl. Prot. Agency, to Tom Frick, Dir., Div. of Env'tl. Assessment & Restoration, Fla. Dep't of Env'tl. Prot. (Sept. 26, 2013), available at [http://www.dep.state.fl.us/secretary/news/2013/09/Estuaries\\_Decision\\_Document.pdf](http://www.dep.state.fl.us/secretary/news/2013/09/Estuaries_Decision_Document.pdf), archived at <http://perma.cc/DAG7-M9DH>.

123. Fla. Wildlife Fed'n, Inc. v. McCarthy, 2014 WL 51360, at \*4 (N.D. Fla. 2014).

124. *Id.*

the pre-existing narrative standard alone.<sup>125</sup> Regarding Judge Hinkle's decision to allow modification of the consent decree, one of the attorneys explained his dismay:

Florida's clean water regulations just aren't working, and we need EPA to step in and do the job. We have so much sewage, fertilizer, and manure contamination that we have toxic slime outbreaks happening all over the state. Hundreds of dead manatees, dolphins, fish and birds have been washing up on shores in South Florida. The Clean Water Act is supposed to prevent things like this.<sup>126</sup>

In a similar vein, the plaintiffs have suggested they may appeal the ruling. In sum, this outcome is not likely what they had in mind when filing the lawsuit in the first instance.<sup>127</sup>

In practice, a positive judgment is worth as much as the paper it is written on. Victory on legal grounds alone does not ensure success in the practical implementation of a remedy.

In this case, the plaintiffs sought enforceable limits on nutrient pollution and believed that numeric criteria would provide those limits.<sup>128</sup> There is an important distinction here: the enforceability of a water quality standard as against a state or the EPA is very different than the enforceability of actual permit limits against a point source.

Judge Hinkle addressed the distinction and its legal significance in upholding the authority of the EPA to issue a determination that new or revised standards were necessary in the first place:

[The contention that] numeric nutrient criteria are not necessary because FDEP has already established a total maximum daily load ("TMDL") for many water bodies . . . misconceives the structure put in place by the Clean Water Act. Criteria are set in advance for all waters, impaired and

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125. See Response for Plaintiff, Fla. Wildlife Fed'n, Inc. v. Jackson (N.D. 2009) (No. 4:08-cv-00324-RH-WCS), 2009 WL 5128290 at \*5.

126. Gary Fineout, *Federal Judge Signs Off on Water Pollution Limits*, ASSOCIATED PRESS (Jan. 8, 2014), <http://staugustine.com/news/state/2014-01-08/federal-judge-signs-water-pollution-limits#.VDsjvildUh0>, archived at <http://perma.cc/H4Z8-FXVH>.

127. *Id.*

128. See Complaint, Fla. Wildlife Fed'n v. Johnson (N.D. 2009) (No. 4:08-cv-00324-RH-WCS), 2009 WL 5108601.

unimpaired . . . . A TMDL, on the other hand, is established for an impaired water body *after* it becomes impaired.<sup>129</sup>

In seeking and successfully exacting numeric water quality criteria, the remedy provides a water quality benchmark prior to impairment. But it does not provide enforceable limits on nutrient load sources. The regulation still allows waters to exceed criteria levels without triggering the impairment process if other biological metrics do not indicate harm.

Administrative Law Judge Bram Canter also alluded to this point in denying the plaintiffs' petition challenging FDEP decision to promulgate numeric criteria as an expression of the intact narrative rule.<sup>130</sup> In relevant part he explains:

Proving that nutrient pollution has not been prevented is not the same thing as proving that the narrative criterion is the cause . . . . There is more support in the record for the proposition that nutrient pollution in Florida is caused by a fragmented and uncoordinated regulatory system than for Petitioners' proposition that nutrient pollution is due to the Department's narrative criterion. Petitioners did not show that numeric criteria, alone, can prevent nutrient pollution in Florida.<sup>131</sup>

Furthermore, establishment of numeric criteria does nothing to address the regulatory patchwork described by Judge Canter. Even if enforceable numeric permit limits on nitrogen and phosphorous were included in every point-source discharge permit in Florida, non-point source loading would still significantly impact surface waters. While numeric criteria can serve as the trigger to develop best management practices for unregulated activities, the impairment process remains burdensome, time-consuming, and costly.

In practice, if a judgment is likely to impact the financial bottom line of well-financed industry, success in the courtroom may be met with even greater losses in the legislative arena. In this instance, the *Florida Wildlife* plaintiffs faced several challenges.

First, because the Clean Water Act and its nuances are complex, the general public does not understand the distinction between a water quality standard and a permit limit. While some communities in Florida were familiar with the total maximum

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129. Fla. Wildlife Fed'n, Inc. v. Jackson, 853 F. Supp. 2d 1138, 1160 (N.D. Fla. 2012).

130. Fla. Wildlife Fed'n, Inc. v. Dep't of Env'tl. Prot., No. 11-6137, at \*19–20 (Fla. Div. Admin. Hrgs. 2012).

131. *Id.*

daily load process for end of pipe loading into impaired waters, the notion of numeric ambient water quality criteria was foreign. Affected entities took advantage of this confusion. For example, one Florida utility company sent mailers to all of its customers saying the cost of water bills would increase by \$700 per household as a result of the consent decree. Bush appointee Ben Grumbles made the § 303(c)(4)(B) determination, and yet the issue was framed as “Obama’s Water Quality Mandate.”<sup>132</sup> When planning to bring a lawsuit with broad public implications on a complex area of law, plaintiffs should consider an education and public relations campaign to counter intentional confusion by the opposition.

The plaintiffs also faced difficult political dynamics. The Clean Water Act, even given its expansive view of federal jurisdiction over waters of the United States, vests significant authority in the states. With the 2010 gubernatorial and congressional races in Florida (an important swing state) the political interplay between state and federal power was in the spotlight. Following enactment of the Affordable Care Act and the rise of the Tea Party, this dynamic was even more salient. Florida candidates were successful in recruiting assistance from legislators in other states by framing the consent decree and ensuing regulation as government overreach. Affected stakeholders warned that federal numeric nutrient criteria were “coming to a state near you.”<sup>133</sup> A legal scholar commented that EPA rulemaking “set a dangerous precedent for the Agency,”<sup>134</sup> and was “just the tip of the iceberg.”<sup>135</sup> Given the Clean Water Act 303(c)(4)(B) requirements, it was difficult for the EPA to categorically refute the argument.

However, in a similar ongoing case, the EPA seems to be taking a different approach than it did in Florida.<sup>136</sup> In 2008, conservation groups led by Gulf Restoration Network filed a petition for the EPA to promulgate numeric nutrient criteria in the

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132. Jim Turner & Nancy Smith, *Bill Nelson, Democrats Support Florida, Oppose Obama’s Water-Quality Mandate*, SUNSHINE STATE NEWS (Feb. 17, 2012, 12:40 PM), <http://www.sunshinestateneews.com/story/bill-nelson-democrats-support-florida-oppose-barack-obamas-water-quality-mandate>, archived at <http://perma.cc/M636-FREZ>.

133. See *Numeric Nutrient Criteria: Coming to a State Near You*, APPLIED TECH. & MGMT, [http://www.nsrp.org/6-Presentations/Env/110910\\_Numeric\\_Nutrient\\_Criteria.pdf](http://www.nsrp.org/6-Presentations/Env/110910_Numeric_Nutrient_Criteria.pdf), archived at <http://perma.cc/W9QY-W32R> (last visited Oct. 26, 2014).

134. Weiss, *supra* note 1, at 321.

135. *Id.* at 322.

136. *Gulf Restoration Network v. Jackson*, No. 12-677, 2013 WL 5328547 (E.D. La. 2013).

Gulf of Mexico and the Mississippi River Basin.<sup>137</sup> Nutrient loadings in the Mississippi River Basin have contributed to a hypoxic dead zone in the northern Gulf of Mexico.<sup>138</sup> For the *Gulf Restoration* plaintiffs, the outcome of the Florida case should serve as a cautionary tale.

Three years passed without a response to the request for rulemaking.<sup>139</sup> In July 2011, the EPA denied the petition, referencing the desirability of states setting water quality standards and the administrative burden involved with federal promulgation.<sup>140</sup> The plaintiffs brought suit in federal court, alleging that the denial letter did not provide information constituting the requisite “determination” under Clean Water Act § 303(c)(4)(B).<sup>141</sup> On September 20, 2013, citing *Massachusetts v. EPA*<sup>142</sup> and granting summary judgment, in part, the court remanded to the EPA and asked the agency to respond to the rulemaking petition within 180 days:

[P]erhaps the most important aspect of *Massachusetts v. EPA* for the case at bar is the Court’s implicit conclusion that EPA lacks the discretion to simply decline to make the threshold determination in response to a rulemaking petition even where the statutory text does not explicitly require it to do so.<sup>143</sup>

Rather than proceed with a § 303(c)(4)(B) determination, on November 18, 2013, the EPA filed an appeal.<sup>144</sup> It is difficult to imagine that reactive state rulemaking in Florida did not influence the EPA’s consideration of the *Gulf Restoration* petition.

The industries that coalesced to challenge federal criteria in Florida are also likely to be engaged in the outcome of *Gulf Restoration Network*. *Gulf Restoration* plaintiffs should consider whether the social and political climate is likely to cause similar backlash in deciding how to proceed. It appears that the EPA is keenly aware of the potential opposition. Confusion about the structure and function of the Clean Water Act persists. Anti-regulatory sentiment continues. In addition, the *Gulf Restoration*

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137. *Id.* at \*1.

138. *Id.* at \*2.

139. *Id.*

140. *Id.*

141. *Gulf Restoration Network*, 2013 WL 5328547 at \*2.

142. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

143. *See Gulf Restoration Network*, 2013 WL 5328547 at \*6.

144. Notice of Appeal, *Gulf Restoration Network v. McCarthy*, (E.D. La. 2013) (No. 12-677).



*Network* case presents interstate pollution questions that further complicate the federal and state roles.

### CONCLUSION

Like a stone in water, a lawsuit can have an unanticipated ripple effect. Thus far, this has proven to be the case in *Florida Wildlife*. While the law (§ 303(c)(4)(B)) and the facts support numeric limits for nitrogen and phosphorous in Florida (and potentially in the Mississippi River Basin), the socio-political climate must allow a legal victory on those grounds to stand. Too often, legal action is met with a swift and severe legislative reaction. The resulting diluted stringency of numeric nutrient criteria in Florida is a prime example. Plaintiffs must weigh the potential for backfire with the relative merits of the claim, and in some instances, pursue a different strategy to achieve a pro-environmental end goal.