IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

FLORIDA LEAGUE OF CITIES, INC., and FLORIDA STORMWATER ASSOCIATION, INC.,

Plaintiffs,

Case No.

v.

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

Defendants.
_____/

COMPLAINT

FLORIDA LEAGUE OF CITIES, INC., and FLORIDA STORMWATER ASSOCIATION, INC., sue the U.S. ENVIRONMENTAL PROTECTION AGENCY (EPA) and its Administrator, LISA JACKSON, acting in her official capacity, and assert:

JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief brought pursuant to the federal Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (Federal question jurisdiction) and 5 U.S.C. § 702 (judicial review of final agency action). The claims arise under the Administrative Procedure Act, 5 U.S.C. § 706, and the Clean Water Act (CWA). This court can grant declaratory and injunctive relief under 28 U.S.C. § 2201 (declaratory judgment), 28 U.S.C. § 2202 (injunctive relief) and 5 U.S.C. §§ 701-706 for violations of the CWA.

2. Venue is proper in the Pensacola Division of the Northern District of Florida under 28 U.S.C. 1391(e) because the Plaintiffs are residents within the Northern District of

Florida, the Defendants are an agency and officer of the United States, and because the Rule will have substantial impacts in the Northern Division of Florida.

THE PARTIES

3. Plaintiffs are not-for-profit Associations which represent the interests of municipal and county governments and other entities located throughout the State of Florida.

4. Defendant EPA is the principal federal agency responsible for implementing the CWA. EPA has oversight authority as to the Florida National Pollutant Discharge Elimination System (NPDES) Permit Program, Water Quality Standards Program, and TMDL Program.

5. Defendant Lisa Jackson is the current Administrator of the EPA. Administrator Jackson is named in this action in her official capacity only.

6. The Florida Stormwater Association, Inc. (FSA) is a not-for-profit Florida corporation, headquartered in Tallahassee, Florida. It is a 300-member association consisting of city and county governments, consulting and engineering firms, academic institutions, and various special districts, that have an interest in stormwater management and finance in Florida. In particular, FSA's city and county members discharge stormwater to surface waters in the State of Florida. FSA's city and county members are regulated by the Florida Department of Environmental Protection (FDEP) and indirectly, by the EPA. The FSA, through and on behalf of its members, will be directly affected by EPA's final action in adopting the Rule in question. Many of its members are "small entities" as defined by the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and the Small Business Act, 15 U.S.C. 632. A significant number of members of the FSA are domiciled in the Pensacola District.

7. The Florida League of Cities, Inc. (the League), is a voluntary organization whose membership consists of municipalities and other units of local government rendering municipal

services in the State of Florida. Under its charter, its purpose is to work for the general improvement of municipal government and its efficient administration, and to represent its members before the various legislative, executive, and judicial branches of government on issues pertaining to the welfare of its members. Its members own and operate water and sewer systems and stormwater management facilities. A significant number of members of the League are domiciled in the Pensacola District. Many of its members are "small entities" as defined by the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and the Small Business Act, 15 U.S.C. 632.

EPA'S RULE

8. On November 14, 2010, EPA gave notice of the adoption of rules which apply new Water Quality Standards for nutrients in the State of Florida's Lakes and Flowing Waters. This action was characterized as a "Final Rule." This Rule is to take effect fifteen (15) months after official publication in the Federal Register. The Rule was so published in the Federal Register on December 6, 2010. The rules set numeric criteria for "nitrogen and phosphorus for the purpose of protecting aquatic life in lakes, flowing waters, and springs within the State of Florida." A copy of the Rule is attached as Exhibit "A" to this Complaint. The Rule sets a variety of water quality criteria for different geographic areas of Florida.

COUNT I

BASIS OF CHALLENGE

9. Plaintiffs contest EPA's Numeric Nutrient Criteria Rule for Florida as final agency action as provided by the federal Administrative Procedure Act, 5 U.S.C., §§ 701 – 706 and specifically § 706(2)(A) which allows this Court to set aside final agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

10. Section 706 of the Administrative Procedure Act, addressing the scope of judicial

review of final agency action, states in relevant part that "the reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory authority; or without observance of procedures required by law." 5 U.S.C. § 706(2)(A)(C) and (D). Plaintiffs contend the Final Rule is unlawful for all the above reasons.

11. The Science Advisory Board, appointed by EPA to advise it as to the appropriate methodologies for deriving numeric nutrient criteria for surface waters, has concluded that the methodologies recommended and employed by EPA fail to establish a cause and effect relationship between nutrients and meaningful response variables and therefore should not be used to derive numeric nutrient criteria related to the applicable designated use. See Exhibit "B" attached to this Complaint. Plaintiffs contend this conclusion is correct. A copy of EPA's own Science Advisory Boards critique of EPA's methodology applied to derive this Rule is attached to this Complaint as Exhibit "B."

12. Among other things, EPA's own Science Advisory Board commented on this proposed Rule that "the final document should clearly state that statistical associations may not be biologically relevant and do not prove cause and effect." See page 2 of Exhibit "B."

13. The State of Florida has an existing, narrative standard for nutrients. It is contained in rules adopted by the Florida Department of Environmental Protection (FDEP). FDEP has attempted to formulate scientifically defensible, numeric criteria for nutrients and has expended substantial resources toward that effort, in excess of tens of millions of dollars. However, at all times material to this Complaint, FDEP has lacked adequate data for the adoption of numeric nutrient criteria that would (a) be based on sound scientific rationale, and

(b) protect the designated uses of water bodies within the state of Florida.

14. At all material times, FDEP has worked diligently to develop a scientifically defensible set of numeric criteria for nutrients. FDEP's Water Resource Division published a document titled Numeric Nutrient Criteria Development Plan (September 2007) (the "2007 Development Plan" document, attached hereto as Exhibit "C").

15. Florida's general approach, as stated in the 2007 Development Plan, was to develop more specific sub regions based upon localized conditions and specific water body designated uses. According to the 2007 Development Plan, FDEP planned first to address criteria for lakes and streams, next to develop criteria for estuaries, and finally to develop criteria for wetlands. The FDEP was also to determine an appropriate means of defining "bioregions" for regulation during this process. The FDEP projected that it would undertake rule development for numeric criteria, with consideration of rule language between January 2010 and January 2011. The FDEP approach, however, was always intending to confirm or corroborate impairment by also evaluating biological indices.

16. By letter dated September 28, 2007 (attached hereto as Exhibit "D"), EPA responded to Florida's 2007 Development Plan. EPA expressed agreement with the approach and the target dates stated in the 2007 Development Plan. As stated in that letter:

> EPA recognizes that this Plan represents considerable effort undertaken by the State to address the issue of nutrient over-enrichment. We especially appreciate the close cooperation of your staff with EPA Region 4 in development of Florida's Plan, and your continued support of their participation in our Regional Technical Advisory Group (RTAG). The achievement of mutual agreement on your revised Plan reflects the success of that process.
>
> Based upon our review, we believe this Plan describes a reasonable process by which the State of Florida (State) can develop appropriate protective numeric nutrient criteria for adoption into Florida water quality standard; and that completion of this process by the target dates indicated should provide increased protection from the effects of nutrients over-enrichment.

17. At the time of the Rule announcement EPA observed that Florida was continuing to compile and assess the adequacy of data available to develop numeric nutrient criteria for estuaries and coastal waters. EPA noted "technical uncertainties" and "additional evaluation" that would be necessary to determine cause and affect relationships between nutrients and biological response parameters. In sum, by EPA's own admission, existing data and analysis were insufficient to assess cause and effect relationships between nutrients and an adverse biological response.

18. At all material times, neither EPA nor FDEP have been able to create a scientifically valid method to set numeric limits for nutrients which would protect designated uses for water bodies, or classes of water bodies, within the State of Florida. EPA's decision to commit to adopt this Rule based on scientifically supportable conclusions was an aspiration it hoped to accomplish within an arbitrary deadline. While EPA did adopt the Rule, it did not settle upon a Rule which is scientifically valid. At all material times, analysis available to EPA has indicated that data have been insufficient to create scientifically defensible numeric nutrient criteria.

19. In the methodology utilized to formulate this Rule, EPA has failed to consider a crucial aspect of the challenge in setting numeric nutrient criteria, specifically, the absence of a cause-and-effect relationship between impairment and nutrient concentrations, particularly, in streams. In addition, EPA has failed to consider the extreme variability in nutrient responses for other water bodies in the State of Florida.

20. Further, the Final Rule is not based on sound science or reason. It is based on faulty assumptions, guesswork, and an absence of logic. As an example of this, the Rule states its purpose is to "protect aquatic life in lakes, flowing waters, and springs within the State of

Florida." Yet, the determination of what is required to achieve this goal is based on a review of limited data from streams which were determined to have "good biology" and low background levels of TN and TP. After a review of this very limited data, EPA concluded that such existing levels could not be exceeded in any lakes, flowing streams, or springs without causing harm. This assumption was the cornerstone of the Rule, yet it amounts to untested assumptions.

21. Data from lakes, rivers, and springs was used by EPA to set the water quality limits contained in the Rule. Water which is low in nutrients may actually inhibit the proliferation and diversity of aquatic life, as it may contain insufficient nutrients to sustain a wider and more diverse aquatic biota. For such waters an increase in nutrients would be an ecological benefit, not a cause of harm or water quality degradation. EPA's assumption that such waters cannot assimilate greater amounts of TN and TP without becoming degraded is an unsupportable premise. It is also a conclusion which lacks any valid scientific basis. Yet, this assumption is the basis for the criteria set in the Rule in question. The purpose of the Rule is to control the excessive discharge of nutrients into freshwaters. Yet, the methodology used by EPA to arrive at the numeric criteria in this Rule made no scientific effort to make this determination. The facts in the record before EPA clearly indicate that a significant number of water bodies in Florida with greater levels of TN and TP than allowed in this Rule exhibit very healthy conditions.

22. EPA's method of using reference sites to set criteria in this Rule has resulted in criteria which make pristine and very biologically healthy water bodies considered to be impaired. This is an unsupportable conclusion. The Rule unquestionably has put very healthy water bodies into the category of being impaired. This is not scientifically supportable.

IMPOSSIBILITY

Waste Water Treatment

23. It is arbitrary, capricious, an abuse of discretion, and not in accordance with law for EPA to adopt water quality criteria which are impossible to achieve. EPA has done so in this Final Rule.

24. The Plaintiff, League, represents and has many members of public, governmental entities which operate wastewater treatment facilities. These facilities receive raw, untreated wastewater and process the wastewater stream to a high degree of treatment and purity. All of these facilities must find a means of discharging their treated wastewater after it is finished being processed. Simply put, the wastewater stream continuously comes into each treatment facility, gets treated, and after treatment must be discharged.

25. Under the adopted EPA rules subject to this challenge, none of the League's members would be able to comply with the criteria in question, as even their highly treated wastewater exceeds the limits set in the rules in question. Each will have to install additional and extremely expensive wastewater treatment facilities to further process their already treated wastewater. The only technology presently available that is capable of achieving the level of treatment which will be necessary is reverse osmosis, which is also known as membrane treatment.

26. Reverse osmosis is a process which purifies water by forcing it, under high pressure, through a series of membranes. This process is expensive to construct, operate, and uses a tremendous amount of electricity to achieve the pressures required. However, reverse osmosis only produces purified water on one side of the membranes; the other side of the membranes will contain more concentrated wastewater. This concentrated wastewater ("reject

water"), under the rules in question, will also not be allowed to be discharged to surface waters.

27. EPA's Final Rule will make facilities which operated by members of the League obsolete and nonconforming should they discharge into waters which the Rule deems to be impaired. No such treatment system is known to exist which will satisfy these rules in such cases. As described above, membrane technology may produce water which will be allowable to be discharged to surface waters under this Rule, but it also produces wastewater which will not. Thus, the Rule will soon make many existing wastewater treatment systems in Florida nonconforming. Unfortunately they will remain in that circumstance as there is no available way they can comply with the Final Rule.

Stormwater Treatment

28. Stormwater treatment systems capture and treat stormwater before discharging it. Treatment of stormwater involves directing rainwater runoff to retention ponds and other systems and devices which are effective in reducing the constituents of stormwater, including nutrients. Stormwater which is directed to such systems and devices is eventually discharged.

29. The criteria in EPA's Rule also apply to all stormwater which is discharged to lakes, streams, or springs. Such stormwater discharges are regulated under the National Pollutant Discharge Elimination System (NPDES) program through Municipal Separate Storm Sewer Systems (MS4) permits. Recent guidance from EPA indicates that even MS4s will be expected to meet numeric limits in their permits for discharges to impaired waters. All stormwater systems in Florida will have great difficulty in treating stormwater to the level of perfection required by the Rule. To do so will impose a burden which will be very difficult, if not impossible, for stormwater systems to attain.

30. Florida prohibits the treatment of stormwater through wastewater treatment

plants. In order for the municipal and county governments which operate stormwater systems to comply with this Rule, it will be necessary for them to construct additional treatment water facilities at the end point of existing stormwater systems. This will involve enormous expense. Unfortunately, even if collected and diverted to central treatment facilities, as with wastewater systems, no treatment technology presently exists which can purify stormwater to the level contained in EPA's Rule.

COUNT II

31. Plaintiffs re-allege the allegations in paragraphs 1-30.

32. The Rule is in violation of and in conflict with the CWA. That statute in 33 U.S.C. 1342(P)(3)(B) sets limits on EPA's powers. That section allows EPA to set specific measurable performance standards sufficient to ensure the implementation of controls to reduce the discharge of stormwater pollutants to "the maximum extent practicable," but not to an extent which is impossible to attain. Further, 33. U.S.C. 1281(b) declares the intent of Congress. It states: "Waste treatment management plans and practices shall provide for the application of the best practicable waste treatment technology before any discharge into receiving waters. . ." This section of the CWA allows EPA to set a high standard, but not one which cannot be achieved.

33. It is not in accordance with the CWA for EPA to implement a rule, such as this, which exceeds the statute and creates a criteria which cannot be achieved. The limit of EPA's regulatory authority allows it to impose strict, but not impossible, criteria to limit discharges of pollutants. In this case, by this Rule, EPA has crossed the line of and exceeded the extent of powers delegated to it by Congress through the CWA.

COUNT III– EPA'S RESPONSE TO COMMENTS

34. The Plaintiffs re-allege the allegations in paragraphs 1-33.

35. On a review under the Administrative Procedure Act, the Court must review the record to determine whether the agency examined the relevant data and articulated a satisfactory explanation for its decision, including a rational connection between the facts found and the decision made. On such a review, the Court must determine whether the agency considered all relevant factors and whether there has been a clear error of judgment. Colorado Wild v. U.S. Forest Service, 435 F.3d 1204, 1213 (10th Cir. 2006).

36. Agency action will be set aside if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The grounds upon which the agency acted must be clearly disclosed in, and sustained by, the record. The agency must make plain its course of inquiry, its analysis and its reasoning. Id.

37. The agency is also obligated to provide a response to significant comments, in order to assure that it has considered all relevant factors in its decision. Under the "arbitrary and capricious" standard of review, an agency is thus required to respond to significant comments that cast doubt on the reasonableness of the rule the agency adopts. Hussion v. Madigan, 950 F.2d 1546, 1554 (11th Cir. 1992); Baltimore Gas and Elec. Co. v. U.S., 817 F.2d 108, 116 (D.C. Cir. 1987); Home Box Office, Inc. v. F.C.C., 567 F.2d 9, 36 (D.C. Cir. 1977).

38. In the Rule as initially proposed, EPA announced its decision to base key components of the Rule on a "reference" method. Significantly, instream protection values for rivers and streams were to be based on an upper percentile in a distribution of nitrogen concentrations of unimpaired "reference streams." The instream protection values for rivers and

streams are not based upon any evidence that the resulting standard would prevent nutrient impairment. The resulting criteria are based, instead, on the faulty presumption that nutrient concentrations in certain rivers and streams, under near pristine conditions, are appropriate limits on a regional basis. As described in paragraph 16, infra, EPA has stated numeric nutrient criteria are appropriate for "the issue of nutrient over-enrichment." Yet, its decision in the Rule in question constitutes a decision which is based on the premise that nutrients, at almost any level, are harmful. This is a faulty and unsound premise. A Rule based on faulty premise cannot be valid.

39. EPA received extensive comments demonstrating shortcomings to its approach. Interested parties frequently noted the lack of scientific support for EPA's reliance on the reference method. Based upon the record and comments received, there was no rational basis for EPA to continue its reliance upon the reference approach and other methods announced in its proposed Rule.

40. Notwithstanding public comments, EPA continued its reliance on its reference approach in its Final Rule. EPA failed to articulate a reasonable basis for it to continue its reliance on its reference approach.

41. EPA's decision and approach was based, in large part, on its efforts to resolve ongoing litigation with private environmental groups, a factor that bears no relationship to EPA's role in its statutory responsibilities to review and adopt water quality standards under the Clean Water Act.

42. EPA's justification of the Final Rule was ostensibly based on an effort to prevent future impairment of waters within the State of Florida in waters where no impairment had yet occurred, and to simplify the process of decisions under the Total Maximum Daily Load

Program. The Final Rule is not reasonably related to those goals, and EPA ignored reasonable alternatives to the achievement of those goals.

43. The central purpose of water quality criteria is to protect designated uses. In certain cases, high levels of nitrogen and phosphorus concentrations may lead to nutrient impairment, as well as the impairment of designated uses of waters within the State of Florida. However, nutrient impairment is the result of a number of independent variables, other than nitrogen and phosphorus concentrations. In certain circumstances, the anthropogenic addition of nitrogen and phosphorus may increase productivity and enhance designated uses.

44. In promulgating its responses to comments regarding its proposed numeric nutrient standard for the State of Florida, EPA could not assign a cause and effect relationship between nutrient concentrations and nutrient impairment. It is assumed that pre-development conditions, no matter how such reference water bodies were low in nutrients, were a suitable reference point for regulatory controls on a regional basis. It apparently could not respond to comments regarding confounding variables that would affect nutrient response, so it ignored them. When its science was challenged, its response referred to its guidance documents; however, its action was not consistent with those guidance documents. It's response on the proposition that if the standards were wrong, was that an interested party could ask EPA to modify the standard on a site-specific basis. This is not a response, it is a tacit statement that the standards may be incorrect but it could be possible to obtain relief from them. Such a statement does not support the correctness of the Rule.

45. For example, in its response to the massive outcry of the host of comments it received regarding the lack of a demonstrated cause and effect relationship between the criteria it selected for nutrients and sound water policy, EPA basically ignored the comments it had

received. On this issue, EPA stated:

> EPA received a variety of comments arguing that no cause and effect relationship between nutrients and biological responses had been established and, therefore, that criteria for nutrients will not protect designated uses nor will the reduction of nutrients result in predictable environmental improvements. EPA considered these and other comments. There is a well established, sizeable body of scientific knowledge including both experimental and observational studies, including in Florida, that has unequivocally established a cause and effect relationship between nutrients and biological responses in fresh water lotic ecosystems, including an effect on the balance of natural aquatic flora and fauna. . . [references omitted]. EPA has concluded from this body of scientific knowledge that a cause and effect relationship between nutrient enrichment and detrimental biological responses exists and that nutrient reduction will result in environmental improvement.

46. EPA's response to these comments is totally superficial and misses or purposefully evades the comments. It is widely accepted that excessive nutrients can foul water bodies and insufficient nutrients can starve aquatic biota. The point is to find the correct "dosage." EPA's response ignores the massive critique it received that its numbers were scientifically unjustified. Its response only states the obvious; that nutrients can create a water quality problem. This does not address or even attempt to justify the actual numeric criteria it has selected in this Rule. The last part of this response that "nutrient reduction will result in environmental improvement" is, as a generality, totally false and not supported by any data in this record. Thus, EPA has failed to satisfy 5 U.S.C. 706(2)(a)(c) and (d). Further, EPA's characterization of the comments it has received, quoted above, are misleading. EPA did not, as it contends, receive comments which disputed there is a relationship between excessive nutrients and adverse biological responses; that is accepted as true. The overwhelming comments EPA received disputed whether the criteria for nutrients EPA proposed were appropriate and whether its methodology was sound. EPA did not respond to those voluminous comments. It merely misstated the gist of those comments and then gave a superficial response to its own straw-man

this distortion created.

47. EPA's general approach, through the inflexible regulation of nitrogen and phosphorus alone, completely fails to account for other independent variables that may cause or inhibit nutrient impairment. As a result, EPA's promulgated Rule is not rationally related to the prevention of nutrient impairment or the protection of designated uses. Instead, the resulting Rule results in a regulation that will reflect nitrogen and phosphorus concentrations in certain water bodies selected as "examples of the natural biological integrity of a region." See Technical Support Document for U.S. EPA's Final Rule for Numeric Criteria for Nitrogen/Phosphorus Pollution in Florida's Inland Surface Fresh Waters at 18. The Rule then makes the heroic assumption that any increase in those numbers will be detrimental to water quality. This faulty assumption is the keystone of this Rule.

48. In public comments, interested parties provided EPA with comments that would support reasonable alternatives to the prevention of nutrient impairment and the protection of designated uses. Among other things, commenting parties suggested that the State of Florida should continue its review of water bodies, on a site-specific basis, under its existing TMDL program.

49. EPA failed, in the promulgated Rule and in its response to comments, to offer a reasonable defense of the reference approach in the determination of numeric nutrient standards.

50. EPA failed, in its promulgated Rule and in its response to public comments, to make a rational connection between the facts found and its ultimate decision.

51. EPA failed in it its promulgated Rule to provide a reasoned response to alternative regulatory approaches.

52. EPA committed a clear error of judgment in the adoption of its Final Rule.

COUNT IV - VIOLATION OF THE REGULATORY FLEXIBILITY ACT, 5 U.S.C. § 601, ET. SEQ.

53. The Plaintiffs re-allege the allegations in paragraphs 1-52.

54. Many of the members of the Florida League of Cities and the Florida Stormwater Association meet the definition of "small entities" under the Regulatory Flexibility Act (RFA). In Florida, there are a large number of small entities which will be greatly impacted by this Rule. Under the RFA, EPA had the responsibility of evaluating the impact of the Rule on small entities.

55. The RFA, 5 U.S.C. § 601, et. seq., requires agencies to consider the impact of their regulatory proposals on small entities, analyze alternatives to minimize that impact, and make the analyses available for public comment. The only exception to this requirement is where the regulation will not have a substantial impact on a significant number of small entities.

56. The RFA allows for the agency to avoid making an analysis of the economic impact of its regulatory proposals if "the head of the agency certifies that the Rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). In its response, the EPA did indeed certify that the EPA Final Rule will not have a significant economic impact on a substantial number of small entities.

57. Despite the fact that the Rule in question will actually have an enormous economic impact on these Plaintiffs and other small entities, EPA declined to comply with the RFA. It explained its failure to do so with the following statement: "This final Rule . . . does not itself establish any requirements that are applicable to the small entities." See attachment/Exhibit "E". This statement is patently incorrect. The Rule will apply to all not-for-profit utilities, of which there are many in Florida, small farmers, small businesses, and a host of municipalities and counties which operate wastewater and stormwater facilities, and a variety of

other activities.

58. The Plaintiffs contend that EPA's certification is not supported by substantial evidence for the following reasons:

a. Plaintiffs' members are "small entities" as defined in the statute;

b. Plaintiffs submitted comments to EPA outlining the significant economic impacts the Final Rule will have on the Plaintiffs;

c. The EPA erroneously ignored the Plaintiffs' comments on the significant economic impacts of the Final Rule on the Plaintiffs; and

d. The Rule will, in fact, require these Plaintiffs to expend enormous sums to comply.

59. The RFA authorizes a reviewing court to remand the Rule to the agency, and to stay the enforcement of the Rule against small entities if it finds non-compliance with the RFA.

COUNT V– DECLARATORY JUDGMENT

This is an action for a declaratory judgment under 28 U.S.C. 2201.

60. The Plaintiffs re-allege the allegations in paragraphs 1-59.

61. The Final Rule has created confusion among the Plaintiffs as to the extent, scope, and applicability of the Rule. For example, in EPA's discussion regarding the application of this Rule to wastewater treatment plants, it is stated that the Rule does not apply to plants which generate reuse water. A copy of EPA's statement is attached as Exhibit "F." Reuse water does not meet the published criteria. It is puzzling how or why EPA would state that plants which generate re-use water are exempt. Such a conclusion is not apparent from the Rule. If wastewater treatment plants which generate reuse water are truly not covered by the Rule, these operators would save huge costs and expenses which will otherwise be required to be undertaken

under the Rule.

62. If the Plaintiffs are correct that no treatment technology presently exists which can achieve the nutrient levels required by this Rule for treatment of wastewater, and/or stormwater, the Plaintiffs need this court to require EPA to definitively state how it would be possible for them to comply. Cities and counties cannot stop their treatment of stormwater and wastewater; such could cause a violation of numerous laws, rules, existing permits, and create a health and environmental disaster. Nor can they reasonably be expected to stop the generation of stormwater or wastewater discharges. They are not "for profit" entities that have the option of closing operations and moving to new locations. EPA, in its rationale for this Rule published November 14, 2010, stated it did not believe reverse osmosis was necessary or practical to meet this Rule and that it would not be required. See Exhibit "F." This creates an egregious source of confusion, as it makes it appear that even EPA does not know how these Plaintiffs and others similarly situated can comply.

63. In the process of EPA evaluating the comments submitted to it by these Plaintiffs and other similarly situated wastewater treatment operators, EPA had determined there exists currently available waste water technology which can achieve compliance with the Final Rule. Recently, through statements of its administrators, EPA conceded that its earlier opinion was erroneous, but it did not modify the Rule. EPA now concedes that the Plaintiffs are correct in their allegations that current wastewater technology cannot meet the new EPA criteria. Plaintiffs are thus at a loss as to determine how they will be able to comply with the Rule and are in desperate need of judicial guidance as to how to proceed so as not to be in violation of a Rule which has set criteria which are unattainable.

64. EPA's Final Rule, by setting water quality criteria which are technologically

impossible to attain, has adopted a criteria which is arbitrary, capricious, an abuse of discretion, and in violation of existing law. EPA's criteria do not set limits which are necessary to protect waters in Florida; they set impossibly stringent criteria which will automatically put cities and counties in violation of the Rule, with no known way to be in compliance. The Plaintiffs need this court to issue a declaratory judgment which determines a fair and appropriate method or process to resolve this dilemma.

65. The entities which produce treated wastewater which is then re-used for industrial uses or irrigation applications will continue to do so. As described supra, this treated wastewater cannot meet the stringent tolerances stated in the Rule in question. Should this re-use water be later discharged into a lake, stream, or spring it is unclear who will be committing the violation, the treatment facility, the end user, or both. The Rule is silent on this question.

66. It is unclear as to whether the Rule, when it goes into effect, will immediately apply to facilities which are operating under currently issued NPDES permits before those permits expire. This question has enormous implications to such permit holders as it determines the deadline for compliance.

67. For those entities which operate and maintain stormwater treatment systems it is unclear what level of treatment will really be required to comply with the Rule. The Rule appears to be unambiguous; the criteria are not flexible. Yet EPA has made numerous statements regarding the Rule's requirements for stormwater which cannot be reconciled with the wording of the Rule. For example in recent "webinars" regarding the published Rule, EPA has publicly stated stormwater treatment systems need only provide the "maximum extent practicable" (MEP) to comply. This is not apparent in the Rule or in EPA's published comments and the question needs to be resolved. While the CWA speaks to MEP as the applicable criteria,

EPA has indicated numeric standards will now be applied to stormwater discharge permits. The question of which of these two alternatives will be effective is not clearly determined.

68. As alleged in Count II, the Plaintiffs contend the EPA has adopted criteria in this Rule which go beyond the capacity of present technology to practically or even theoretically achieve. Plaintiffs need a declaratory judgment as to the correctness of their contention and whether EPA has adopted criteria which are stricter than allowed by the Clean Water Act.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, pray for the following relief:

A. Declare EPA's Numeric Nutrient Criteria Rule arbitrary, capricious, an abuse of discretion and not otherwise in accordance with law, and in excess of EPA's authority under the Clean Water Act.

B. Vacate EPA's Numeric Nutrient Criteria Rule and remand the Rule to EPA for proceedings consistent with the Clean Water Act and its implementing regulations.

C. Award Plaintiffs their reasonable attorney's fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d);

D. Grant a declaratory judgment to the Plaintiffs which resolves the uncertainties and ambiguities of EPA's final action and determines whether and how the Plaintiffs can comply with the rules at issue;

E. Remand the Final Rule to the EPA with instructions to comply with the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601, et. seq.; and

G. Award any other relief the Court deems just and proper.

Dated this 10th day of January, 2011.

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