

Numeric nutrient criteria in Florida: The road to cooperative federalism

Mohammad O. Jazil and David W. Childs

Mohammad O. Jazil and David W. Childs practice law with Hopping, Green & Sams in Tallahassee, Florida. They previously authored an [article](#) on numeric nutrient criteria in Florida that appeared in the November/December 2011 issue of Trends.

Since 2008, the U.S. Environmental Protection Agency (EPA), the state of Florida, conservancy groups, and Florida's regulated community have waged a battle over nutrient water quality standards. An opinion issued by the U.S. Court of Appeals for the Eleventh Circuit on July 7, 2015, was its third in this Clean Water Act (CWA) case. Together with prior opinions, it resolves issues regarding EPA's role in the establishment of water quality standards.

Federal supremacy

In 2008, several conservancy groups sued EPA, alleging that a 1998 national guidance document imposed a nondiscretionary duty to promulgate numeric nutrient criteria for Florida's surface waters under CWA section 303(c)(4)(B). EPA disagreed. But, in a January 2009 letter to the Florida Department of Environmental Protection (FDEP), EPA determined that numeric nutrient criteria were indeed necessary. This necessity determination triggered an obligation for EPA to "promptly prepare and publish proposed regulations setting forth" criteria—precisely what the conservancy groups claimed EPA had committed to doing in 1998. 33 U.S.C. § 1313(c)(4). The conservancy groups and EPA thereafter entered into a settlement agreement, which the district court approved as a consent decree. Appeals followed.

On appeal, the regulated community and one of Florida's water management districts argued that the consent decree usurped the state's primacy in establishing water quality standards and interfered with ongoing restoration efforts. In *Florida Wildlife Federation v. South Florida Water Management District*, 647 F.3d 1296 (11th Cir. 2011), the Eleventh Circuit dismissed this appeal for lack of standing, 2–1. The court held that EPA's 2009 necessity determination was the source of alleged harm; the consent decree itself provided only a schedule for EPA to propose and finalize rules setting numeric criteria and thus did not affect the regulated community or district.

On remand, the district court seized on the Eleventh Circuit's statement that the regulated community had "an open door to bring a full challenge" to EPA's necessity determination. *Id.* at 1306. So, despite EPA's arguments to the contrary, the district court held that EPA's determination constituted final agency action under the Administrative Procedure Act (APA), which can be challenged in federal court. Florida and its regulated community did just that.

They also challenged EPA's finalized federal criteria for Florida's inland waters—its lakes, springs, and streams—which EPA had by that time promulgated pursuant to the consent decree. Conservancy groups filed their own challenge to the criteria, arguing that they were not protective enough.

In *Florida Wildlife Federation v. Jackson*, 853 F. Supp. 2d 1138 (N.D. Fla. 2012), the district court upheld EPA's determination and criteria for lakes and springs, but not EPA's streams criteria. Again, appeals followed; again, the Eleventh Circuit dismissed the appeals. This time it held that there was no appellate jurisdiction to review the order because the district court remanded the streams criteria back to EPA. *Fla. Wildlife Fed'n v. EPA*, 737 F.3d 689 (11th Cir. 2013).

State primacy

Meanwhile, the state of Florida reasserted its primacy. FDEP petitioned EPA to revoke the 2009 necessity determination and criteria. Citing a recent EPA guidance document, Florida argued that it was well ahead of the national benchmarks for setting numeric nutrient criteria and so should not have been the first (and only) state where EPA imposed federal criteria. EPA neither granted nor denied the petition. EPA instead encouraged FDEP to develop state criteria.

FDEP heeded EPA's advice, promulgating numeric criteria for many of its surface waters. While FDEP did not promulgate numeric criteria for its streams—given the scientific uncertainty that doomed EPA's criteria—it did establish a holistic method to assess nutrient concentration in streams. Under FDEP's approach, streams would have numeric thresholds—not criteria—that would be further refined based on site-specific water chemistry and biological data. FDEP successfully defended its rule against a challenge under state law.

The 2012 Florida legislature weighed in as well. It unanimously passed a bill that, among other things, stated that FDEP's rules “shall be effective only if EPA approves these rules in their entirety, concluded rulemaking that removes federal numeric nutrient criteria in response to the approval, and determines . . . that these rules sufficiently address EPA's January . . . 2009 determination.” Fla. House Bill 7051 (2012).

Cooperative federalism

FDEP submitted its rules for EPA review and approval. EPA approved Florida's submissions. Because Florida did not promulgate numeric criteria for all of the waters identified in EPA's 2009 necessity determination, EPA also modified its determination to correspondingly limit its scope.

To excuse it from taking final agency action outside the scope of the amended necessity determination, EPA asked the district court to modify the consent decree between it and the conservancy groups. Florida's comprehensive nutrient rules and EPA's amended necessity

determination served as the changes in facts and law necessary to modify a decree.

The district court approved the modification over the conservancy groups' objections. Harkening back to its original order approving the consent decree and the Eleventh Circuit's first opinion, the district court noted that the conservancy groups' opposition incorrectly "rest[ed] on the proposition that the consent decree put the state and industry parties in substantially worse position than they occupied before the decree was entered." *Fla. Wildlife Fed'n v. McCarthy*, 2014 U.S. Dist. LEXIS 1343, *28 (N.D. Fla. Jan. 7, 2014). It would mean that "the consent decree affected the state and industry parties' substantial rights, the consent decree should not have been entered, and the appeal from the decree should not have been dismissed." *Id.* The conservancy groups appealed, arguing that they were entitled to an evidentiary hearing to test EPA's amended necessity determination and approval of Florida's rules—both of which were final agency actions. The Eleventh Circuit disagreed and affirmed the district court's order. *Fla. Wildlife Fed'n v. EPA*, 2015 U.S. App. LEXIS 11635 (11th Cir. 2015).

Guideposts

Necessity determinations under CWA section 303(c)(4)(B) are rare. EPA has said that such determinations are "symptomatic of something awry with the basic statutory scheme." 57 Fed. Reg. 60,848, 60,658 (Dec. 22, 1992). Yet one such determination became the focus of years of litigation over the appropriate role of the federal government. To reassert its state primacy, Florida sued EPA, promulgated its own protective standards, passed a law to keep EPA from cherry-picking from the state's standards, and then argued in court to allow EPA to change the terms of the bargain it struck with conservancy groups. Along the way, Florida and its regulated community established—albeit by sometimes losing in the Eleventh Circuit—that necessity determinations are final agency actions, consent decrees cannot be approved or interpreted in a manner that affects the rights of nonconsenting parties, and final agency actions may not be subjected to an evidentiary hearing simply because the actions serve as the basis to modify a consent decree. Hopefully, Florida's journey provides guideposts for others navigating the sometimes long and always winding road to cooperative federalism.