

**IN THE UNITED STATES DISTRICT COURT
OF THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

FLORIDA WILDLIFE FEDERATION
and CINDY DAVIS,

Plaintiffs,

Case No.

v.

GINA McCARTHY, Administrator of the
United States Environmental Protection Agency;
HEATHER McTEER TONEY, Regional
Administrator of the United States Environmental
Protection Agency Region IV; UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Defendants.

_____ /

**COMPLAINT FOR DECLARATORY AND
PROSPECTIVE INJUNCTIVE RELIEF**
(Related to Pending Case No. 8:13-cv-2084-SDM-EAJ)

Plaintiffs, Florida Wildlife Federation and Mrs. Cindy Davis bring this five (5) count complaint seeking declaratory judgment and prospective injunctive relief against Defendant, Gina McCarthy, EPA Administrator; Defendant, Heather McTeer Toney, the Regional Administrator for U.S. EPA Region IV; and Defendant, U.S. Environmental Protection Agency.

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Abbreviations used in this Complaint

Plaintiff, Florida Wildlife FederationFWF

Plaintiff, Mrs. Cindy Davis.....Mrs. Davis

Defendants, Gina McCarthy, Heather McTeer Toney, and
 the U. S. Environmental Protection Agency.....EPA

Federal Administrative Procedures Act (5 U.S.C. §701-708).....APA

Clean Water Act (33 U.S.C. § 1251 et seq.)	CWA
Water Quality Standards.....	WQSs
Water Quality Limited Segments.....	WQLSs
Florida Department of Environmental Protection.....	FDEP
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Technology Based Effluent Limitations.....	TBELs
Water Quality Based Effluent Limits.....	WQBELs
Load Allocations.....	LAs
Waste Load Allocations.....	WLAs
Total Maximum Daily Loads.....	TMDLs
Outstanding Florida Waters.....	OFW
EPA’s 2014 Decision Document Basin Group 5 Update.....	EPA’s 2014 Dec. Doc.
The Administrative Record for EPA’s 2014 Decision Document.....	AR
Everglades Agricultural Area.....	EAA

INTRODUCTION

1. This complaint is a five (5) count complaint seeking declaratory and prospective injunctive relief to enforce and implement the CWA and FDEP’s antidegradation WQSs, and the APA procedures.

JURISDICTION

2. This Court has jurisdiction over counts I-V pursuant the APA, 28 U.S.C. §1331 (federal question), 28 U.S.C. §1361 (action to compel an officer of United States to perform duty), and 28 U.S.C. §2201(a) (declaratory judgment).

VENUE

3. Venue is proper in the Tampa Division of the Middle District of Florida pursuant to 28 U.S.C. Section 1391(e). A substantial number of FWF members reside in the Middle District of Florida, and the FWF has two offices in the Middle of District of Florida. Mrs. Davis resides in Pinellas County which is located in the Tampa Division of the Middle District of Florida.

THE PARTIES

The FWF

4. FWF is duly incorporated under the laws of the State of Florida as a not for profit corporation. The FWF has its office headquarters in Tallahassee, Florida, and two regional offices in the Middle District of Florida, these being in Naples and St. Augustine, Florida.

5. The FWF has over 14,000 members and approximately 60,000 supporters. The members of FWF use and enjoy the surface waters of the State of Florida for recreational and aesthetic purposes, including fishing, boating, canoeing, kayaking, swimming, wading, research, photography, observation, and as well as spiritual purposes.

6. The corporate purposes of the FWF include the protection of the environment, protecting and conserving fish and wildlife resources, and the protection of the air and water quality of the State of Florida and the nation. For decades the FWF has been advocating and litigating for the protection and improvement of surface water quality in the State of Florida.

7. The subject EPA 2014 Dec. Doc. adversely affects the substantial interests and rights of FWF members to use and enjoy Florida's surface waters protected by FDEP's antidegradation WQSs. The FWF members have procedural and substantive rights which EPA's 2014 Dec. Doc. adversely affects. FWF members are currently suffering injuries, and will in the future suffer injuries, traceable to EPA's 2014 Dec. Doc. These injuries are likely to be redressed by a decision favorable to the FWF.

Mrs. Davis

8. Mrs. Davis resides at 2790 45th Street South, Gulfport, Florida 33711, which is waterfront property on the Clam Bayou estuary in south Pinellas County which FDEP has designated as an OFW. Mrs. Davis has used and enjoyed, and in the future will use and enjoy, the waters protected by FDEP's antidegradation WQSs, including using waters designated as

OFWs.

9. Mrs. Davis has suffered, and in the future will suffer, concrete and particularized actual injuries in fact which are traceable to EPA's 2014 Dec. Doc. These injuries are within the zone of protection of the CWA and APA. These future injuries are likely to be redressed by a decision favorable to Mrs. Davis in this action.

Defendant, Gina McCarthy

10. Defendant, Gina McCarthy, is the EPA Administrator. She is charged with the supervision and management of the CWA, including the mandatory and non-discretionary duties of the CWA. She is sued in this action in her official capacity as EPA Administrator. Her official address is Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

Defendant, Heather McTeer Toney

11. Defendant, Heather McTeer Toney is the Regional Administrator for EPA Region IV, the region which includes the State of Florida. She is charged with implementing the CWA in the State of Florida, including reviewing and approving or disapproving Florida's Section 303(d) impaired waters documents and lists and Florida's WQSs. She is sued in this action in her official capacity as Regional Administrator of EPA Region IV. Her official address is U.S. EPA, Sam Nunn Atlanta Federal Center, 61 Forsyth St., S.W., Atlanta, GA 30303-3104.

Defendant, Environmental Protection Agency

12. Defendant, Environmental Protection Agency (EPA) is an agency of the federal government which has the primary statutory responsibility under the CWA to protect and restore the surface waters of the United States from pollution. EPA's headquarters are located at Ariel Rios Building, 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460.

THE INTRICATE CWA SYSTEM

The CWA goals and concepts

13. In 1972 Congress enacted the CWA, thereby revising and substantially strengthening earlier federal water pollution laws that had proven ineffective.

14. The 1972 CWA is a comprehensive water quality statute designed “to restore, and maintain the chemical, physical, and biological integrity of the nation’s waters.” CWA §101(a).

15. The 1972 CWA primarily sought to prevent the causes of pollution by protecting and maintaining high quality waters, and the establishment of mechanisms to control both point and nonpoint sources of pollution in order to maintain and restore waterbodies to applicable WQSs.

The CWA carrot-and-stick approach

16. The 1972 CWA used distinctly different methods to control pollution released from point sources and pollution traceable to nonpoint sources. The CWA directly mandates controls of pollution from point sources, and uses the carrot of federal grants to the states to entice states to regulate and control pollution from nonpoint sources.

17. CWA §101(a)(7) states “it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.”

A. The CWA §303(a)-(b) state WQSs requirements

18. CWA §303, entitled “Water quality standards and implementation plans,” is the core of CWA carrot-and-stick approach to attain the CWA water quality goal without direct federal regulation of nonpoint sources of pollution.

19. CWA §303(a)-(b) require each state to enact WQSs consisting of three elements: designated uses, water quality criteria, and antidegradation requirements.

20. State WQSs must establish water quality goals for each specific waterbody, and these state WQSs provide the basis for water quality based treatment controls and strategies for state pollution control actions for point sources and non-point sources.

21. CWA §303(a)-(b) require states to set WQSs for all waters within their boundaries regardless of the sources of the pollution entering the waters, broad apply the state WQSs to all activities which affect water quality regardless of whether an enforcement procedure is in place for the activity that affects water quality.

22. EPA's Water Quality Standards Handbook, Chapter 4: Antidegradation, §4.6 provides that state WQSs must apply to

“any activity that affects water quality...and are not limited to evaluation of effects caused by discharge of pollutants from point sources. States should have in place methods by which the State can determine whether or not their standards have been achieved (including uses, criteria, and implementation of antidegradation policy). Evaluating attainment of standards is basic to successful application of a State's water quality standards program. In the broad application of standards, these evaluations are not limited to those activities which are directly controlled through a mandatory process. Rather, these evaluations are an important component of a State's water quality program regardless of whether or not an enforcement procedure is in place for the activity under review.

“Water quality standards are implemented through State or EPA-issued water quality-based permits and through State nonpoint source control programs....Application of water quality standards in the overall context of a water quality management program, however, is not limited to activities for which there are enforceable implementation mechanisms.

“ In simple terms, application and enforceability are two distinct separate functions in the water quality standards program...Water quality standards are applicable to all waters and in all situations, regardless of the activity or source of degradation.

“It is acceptable for a State to specify particular classes of activities for which no control requirements have been established in State law. It is not acceptable, however, to specify that standards apply to classes of activities (i.e. for purposes of monitoring and assessment). To do so would abrogate one of the primary functions of water quality standards.” (e.s.).

23. No court, nor any EPA national guidance, has held that a state can enact WQSs which exempt any pollution source from state antidegradation WQSs without first establishing the baseline antidegradation water quality assimilative capacity of waterbodies.

25. Courts have held that state antidegradation WQSs which do not contain a de minimis cumulative cap on the degradation of the antidegradation assimilative capacity baseline are in violation of the CWA.

B. The CWA §303(c) EPA review of state WQSs

26. CWA §303(c) places upon EPA the non-discretionary duty to review new or revised state WQSs to determine if the state WQSs are consistent with the CWA. See, CWA §1251(b) and §303(c).

27. Section 303(c) of the CWA provides two distinct mechanisms by which EPA oversees state WQSs. First, states must submit all new or revised standards to EPA for approval or disapproval based upon state WQSs are consistency with the requirements of the CWA. In the Eleventh Circuit, EPA has a duty to review new or revised water quality standards even if a state does not submit them for review. See, Miccosukee Tribe of Indians of Fla. v. United States, 105 F.3d 599, 602-03 (11th Cir. 1997). Second, CWA §303(c)(4)(B) authorizes EPA to review state WQSs even in the absence of the state enacting new or revised WQSs to determine whether a new or revised state WQSs is “necessary to meet the requirements of the Act.” If EPA determines a new or revised state WQSs is necessary, CWA §303(c)(4)(B) grants EPA the authority to publish revised WQSs for a state to meet the requirements of the Act.” This allows EPA to assess the sufficiency of previously approved WQSs in light of changed circumstances or new data to ensure that state waters will continue to meet the goals of the CWA even if a state

fails to submit new or revised WQSs to EPA.

28. Neither FDEP nor EPA may effectively rewrite or amend an existing FDEP antidegradation WQSs by means of a non-rule interpretation of FDEP's antidegradation WQSs unless the interpretation has been reviewed and approved by EPA pursuant to CWA §303(c) for consistency with the requirements of the CWA.

29. The Eleventh Circuit Court of Appeals has held that

“under the Clean Water Act, the state's water quality standards may only be revised if the change complies with the anti-degradation policy which EPA regulations mandate each state to adopt. 33 U.S.C. § 1313(d)(4)(B); *see* 40 C.F.R. § 131.12. Thus, any change must, at the very least, maintain the existing quality of each waterbody, preventing any further "degradation" of the waterbody's integrity.” FPIRG v. EPA, 386. F.3d 1070, 1073 (11th Cir. 2004).

C. The CWA §303(d) informational tools

30. CWA §303(d)(1) directs states to identify those waters for which effluent limitations required by CWA §301(b)(1)(A)-(B) of the CWA are not stringent enough to implement any applicable water quality standard, and to establish a priority ranking for such waters taking into account the severity of the pollution and the uses to be made of the waters.

31. EPA's regulations at 40 C.F.R. §130.7(b)(1) which implement CWA §303(d)(1) provide that:

“Each State shall identify those water quality-limited segments still requiring TMDLs within its boundaries for which: (i) Technology-based effluent limitations required by sections 301(b), 306, 307, or other sections of the Act; (ii) More stringent effluent limitations (including prohibitions) required by either State or local authority preserved by section 510 of the Act, or Federal authority (law, regulation, or treaty) and (iii) Other pollution control requirements (e.g., best management practices) required by local, State, or Federal authority are not stringent enough to implement any water quality standards applicable to such waters.” (e.s.).

States must identify WQLS where any federal or state effluent limitation or pollution control

requirements (including best management practices) are not stringent enough to implement any WQS applicable to state surface waters.

32. The CWA §303(d) assessment is a comprehensive approach which identifies all water pollution problems regardless of the sources of pollution, and regardless of whether permitting decisions had been made and issued regarding the sources of pollution. The CWA §303(d)(1)(A) assessment must be a complete listing of key water pollutants, the sources of the pollutants, and information on the amount of the pollutants that need to be reduced to attain applicable state WQSs, including state antidegradation WQSs.

33. EPA's regulations expressly provide that "[f]or purposes of listing waters under 40 C.F.R. §130.7(b), the term 'water quality standard applicable to such waters' and 'applicable water quality standards' refer to those water quality standards established under section 303 of the Act, including numeric criteria, narrative criteria, waterbody uses and antidegradation requirements." (e.s.). 40 C.F.R. §130.7(b)(3).

34. CWA §303(d) is the interface between the CWA's NPDES permits of point source pollution and the state's regulation of nonpoint source pollution. CWA §303(d) utilizes a water-quality based approach to identify WQLSs and insure that appropriate pollution limits for both point source and nonpoint sources of water pollution are implemented.

35. The interface between the CWA §303(d) process and nonpoint source pollution is explained by the GAO report which explains that CWA §303(d)

"provides a comprehensive approach to identifying and resolving water pollution problems regardless of the sources of pollution. If implemented, the TMDL process can provide EPA and the states with complete listing of key water pollutants, the sources of the pollutants, information on the amount of the pollutants that need to be reduced, options between point and/or nonpoint approaches, costs to clean up, and situations where it may not be feasible to meet water quality standards." (e.s.). See, Alaska Center for the Environ., 762 F.Supp.

at 1424 (fn 2)(W.D. Wash. 1991).

1. Identification of WQLSs

36. The CWA §303(d)(1)(A) and 40 C.F.R. §130.7(b)(1) process requires states and the EPA to assess and evaluate all point and nonpoint sources of pollution regardless of whether the pollution source is permitted or is exempted from permitting by the state.

37. The CWA §303(d) process must identify all of the pollutants “causing or expected to cause violations of the applicable [WQSs].” See, 40 C.F.R. §130.7(b)(4).

38. The CWA §303(d) process must identify not just segments of waterbodies that currently are not meeting applicable state WQSs, the process must also identify segments of waterbodies that are not expected to meet applicable WQSs in the future.

39. The CWA §303(d) impaired waters identification process applies not only to waters polluted by point sources, it also applies to waters such as the Garcia River in California which failed to attain applicable state WQSs due solely to nonpoint sources of pollution. See, Pronsolino v. Nasri, 291 F.3d 1123 (9th Cir. 2002). EPA’s regulations at 40 C.F.R. §130.2(j) define “water quality limited segment[s]” as “[a]ny segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards.....,” meaning segments failing to meet WQSs solely to nonpoint sources of pollution must be listed as CWA §303(d) WQLSs.

2. Existing and available water quality data

40. When developing CWA §303(d) lists of WQLSs, states must assemble and evaluate all existing and readily available water quality-related data and information to develop the WQLSs list. States may not place a time limit in the age of water data, nor may states shirk the CWA antidegradation requirements by throwing out water quality-related data. See, Sierra Club,

Inc. v. Leavitt, 488 F.3d 906, 913 (11th Cir. 2007)(states and EPA each must evaluate all existing and readily available data and information, there cannot be an age cutoff); 40 C.F.R. 130.7(b)(5).

3. Development of TMDLs and individual effluent limitations

41. CWA §303(d)(1)(C) requires each state to establish TMDLs for the identified WQLSs by estimating the total pollution from all pollution sources, including nonpoint sources. CWA §303(d) TMDLs must be the sum total of individual WLAs for point sources and LAs for nonpoint sources and natural background.

42. CWA §303(d)(4)(A) requires that effluent limitations for WQLSs may be revised only if the “cumulative effect” of all such effluent limitations assure the waters will be restored to applicable WQSs, including antidegradation WQSs.

43. CWA §303(d)(4)(B) applies to waters identified by the §303(d)(1) process to have water quality which equals or exceeds applicable WQSs, and requires that any effluent limitation or WLA, or any WQS established under CWA §303, or any other permitting standard, may be revised only if the revision is subject to and consistent with the antidegradation policy established under the CWA. Effluent limitations and all permit requirements for point sources and nonpoint sources in waters attaining WQSs must be subject to and consistent with the antidegradation policy of the CWA.

44. The CWA §303(d)(4) TMDL development requirement is another example of the entire CWA §303(d) process being an information tool for planning and implementing state water pollution control programs. As the Ninth Circuit noted in Pronsolino v. Nasri, 291 F.3d 1123, 1126 (9th Cir. 2002),

“TMDLs are primarily informational tools that allow the states to proceed from

the identification of waters requiring additional planning to the required plans....As such, TMDLs serve as a link in the implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint sources pollution reduction, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals for the nation's waters." (e.s.). Pronsolino, 291 F.3d at 1129.

4. State submission for EPA approval

45. CWA §303(d)(2) and 40 C.F.R. §130.7(2)(d) require states to submit their lists of WQLSs and estimated TMDLs to EPA for review. EPA shall review and determine whether the WQLSs lists and the TMDLs loads meet the requirements "necessary to implement the water quality standards applicable to such waters." See, CWA §303(d)(2).

46. EPA measures the adequacy of submitted state lists against EPA approved state WQSs, CWA §303(d), and EPA's listing regulations. EPA "shall approve a list developed under §130.7(b)...only if it meets the requirements of §130.7(b)." See, 40 C.F.R. §130.7(2)(d).

D. The CWA §303(e) state continuing planning process

47. CWA §303(e) requires states include the state estimated CWA §303(d)(1)(C) TMDLs in the state continuing planning process, including "adequate implementation [and] schedules of compliance."

48. States must implement §303(d) TMDLs by means of effluent limitations of NPDES point source permits, and by means of state pollution control programs implementing LAs on nonpoint sources if a state desires to receive federal grant money.

E. The CWA §319 nonpoint source grant process

49. CWA §319 establishes a national program to control nonpoint source pollution. CWA §319 (a)(1)(A) provides that each state must prepare a state assessment report that "identifies

those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this chapter.” In order to achieve this goal, states must include assessment of state antidegradation WQSs in the CWA §303(d) process.

50. The CWA §319 assessment report by a state must identify and describe the state and local programs needed to achieve and maintain state WQSs by properly controlling pollution from nonpoint sources.

FDEP’S STATUTORY POWERS AND DUTIES

51. FDEP’s statutory powers and duties at set forth in Section 403.061, Fla. Stat. and Section 373.026(7), Fla. Stat.

52. Section 403.061, Fla. Stat. grants FDEP in pertinent part the powers and duties to:

“(7) Adopt rules pursuant to ss. 120.536(1) and 120.54 [Fla. Stat.] to implement to implement the Act [Chapter 403, Fla. Stat.]....

* * *

“(11) Establish ambient...water quality standards for the state as a whole, or for any part thereof....

* * *

“(14) Establish a permit system whereby a permit is required for the operation, construction, or expansion of any installation that may be a source of ...water pollution....

* * *

“(27) Establish rules which provide for the special category of water bodies within the state, to be referred to as ‘Outstanding Florida Waters,’ which water bodies shall be worthy of special protection because of their natural attributes....

* * *

“(28) Perform any other act necessary to control and prohibitwater pollution...”.

53. Section 403.061(14), Fla. Stat. imposes upon FDEP the duty to establish a permit system for “any installation” (i.e., any structure, equipment, facility or activity) which may emit contaminants (i.e., substances which are harmful to plants, animal or human life) in quantities or

at levels which “may be” a source of water pollution. See, Sections 403.031(1) & (4), Fla. Stat. for definitions of “contaminant” and “installation.”

54. Section 403.161(1)(a)-(b), Fla. Stat. provide that it is a violation of Chapter 403, Fla. Stat. for any person to cause pollution without an FDEP permit, which Fla.Admin.Code R. 62-4.020(11) defines as any FDEP legal authorization of any activity reasonably expected to be a source of pollution. See, paragraph 58 below.

55. Section 403.031(7), Fla. Stat. defines “pollution” as any substance, contaminant, or man-made or man induced impairment of the waters of the state.

56. Section 373.026, Fla. Stat. provides that FDEP is responsible for the administration at the state level of Chapter 373, Fla. Stat. (the Water Resources Act), including surface water management and consumptive use of surface and ground waters.

57. Section 373.026(7), Fla. Stat. declares that FDEP “may exercise any power herein authorized to be exercised by a water management district.” This includes the power to permit consumptive uses of water, surface water management, and nonpoint sources of pollution.

FDEP’S DEFINITION OF “PERMITS”

58. Fla.Admin.Code R. 62-4.020(11) defines as follows.

“(11) ‘Permit’ is the legal authorization to engage in or conduct any construction, operation, modification, or expansion of any installation, structure, equipment, facility, or appurtenances thereto, operation, or activity which will reasonably be expected to be a source of pollution.”

59. With regard to water pollution and FDEP’s WQSs, a permit is any FDEP action or any statute which is legal authorization for a activity that is reasonably expected to be a pollution source, including point and nonpoint discharges. Florida actions which constitute permits include: individual permits with TBELs and/or WQBELs, general permits, generic permits,

statutory and rule based exemptions, rule-based best management practices, and rule-based stormwater treatment facility design and performance standards, consumptive use permits, septic tank permits, and state inaction to establish best management practices for sources reasonably expected to be sources pollution.

60. An FDEP effluent limitation is any restriction established by FDEP on the quantities, rates of concentration of constituents of a nonpoint or point source discharge into the surface waters of the state. See, Section 403.031(3), Fla. Stat.

FDEP'S DEFINITION OF WATER QUALITY STANDARDS

61. Fla.Admin.Code R. 62-302.200(42) defines WQSs as follows.

“(42) “Water quality standards” shall mean standards composed of designated present and future most beneficial uses (classification of waters), the numerical and narrative criteria, including Site Specific Alternative Criteria, applied to the specific water uses or classification, the Florida antidegradation policy, and the moderating provisions, such as variances, mixing zones, rule revisions, or exceptions.” (e.s.).

62. FDEP's Water Resource Implementation Rules are set forth in Fla.Admin.Code Chapter 62-40, with Fla.Admin.Code R. 62-40.430(1)(a) providing that FDEP's WQSs shall be enforced "to protect waters of the State from point and nonpoint sources of pollution."

FLORIDA'S ANTIDegradation WQSs

63. Florida's antidegradation policy is derived from the CWA antidegradation policy set forth in 40 C.F.R. §131.12.

64. FDEP first enacted Florida's antidegradation policy on March 1, 1979 as part of FDEP's WQS in then Fla.Admin.Code R. 17-3.04(1)-(9), which read as follows.

"(6) The quality of waters which exceeds the minimum quality necessary to support the designated use of those waters shall be protected and enhanced."

* * *

"(8) The highest protection shall be afforded to Outstanding Florida Waters."

65. FDEP's current antidegradation policy is set forth in Florida's WQSs in Fla.Admin.Code Chapter 62-302 which is entitled "Surface Water Quality Standards." Specifically, Florida's antidegradation policy is currently set forth as part of FDEP's WQSs in Fla.Admin.Code R. 62-302.200(12), 62-302.300(12),(14), (17)-(18); 62-302.700, and 62-4.242.

66. FDEP's antidegradation policy currently consists of four tiers: Tier 1.0, Tier 2.0, Tier 2.5, and Tier 3.0.

Tier 1.0

67. FDEP's current Tier 1.0 antidegradation WQS is in Fla.Admin.Code R. 62-302.300(14) which provides that

"[e]xisting uses and the level of water quality necessary to protect the existing uses shall be fully maintained and protected. Such uses may be different or more extensive than the designated use." (e.s.).

68. The phrase "existing use" is defined by Fla.Admin.Code R. 62-302.200(14) as "any actual beneficial use of the waterbody on or after November 28, 1975." An "actual beneficial use of the waterbody on or before November 28, 1975" includes recreation uses (i.e., fishing, shellfish harvesting, swimming or boating), and aquatic life/wildlife uses (i.e., aquatic communities of invertebrates or plants, resident species of fish, resident species of shellfish (oysters, clams, and mussels), and resident communities of scallops, shrimp, and crabs. The Tier 1.0 existing use does not need to be a use designated by FDEP's water classification system.

69. To be "fully maintained and protected" as required FDEP's Tier 1.0 antidegradation WQS means no significant impairment of growth or reproduction of resident species that existed on November 28, 1975. See, EPA's Water Quality Handbook §4.4.2.

70. FDEP's Tier 1.0 antidegradation WQS of "fully protected and maintained" applies to any and all reasonably expected pollution sources, and FDEP's Tier WQS does not allow for any

degradation of the water quality necessary to protect the "existing uses."

71. The CWA §303(d)(1) process must assess and evaluate whether state and federal effluent limitations, and state pollution control requirements are stringent enough to fully maintain and protect the water quality necessary the Tier 1.0 existing uses of surface waters. Water segments which do not fully maintain and protect the water quality necessary for the existing uses must be listed as not attaining FDEP's Tier 1.0 antidegradation WQSs.

Tier 2.0

72. FDEP's current Tier 2.0 antidegradation WQSs are located in Fla.Admin.Code R. 62-302.300(12), (17) & (18). There are two different types of FDEP Tier 2.0 antidegradation WQSs: (1) the Tier 2.0 technology-based antidegradation WQSs set forth in Rule 62-302.300(12), and (2) the necessity-based antidegradation WQS set forth in Rule 62-302.300(17)-(18) which prohibit degradation unless the degradation is "necessary or desirable under federal standards and is clearly in the public interest."

A. Tier 2.0 technology-based antidegradation WQS

73. FDEP's Tier 2.0 technology-based antidegradation WQS was first enacted in 1989 as Fla.Admin.Code R. 62-302.300(12), and provides in pertinent part that:

"(12) The Department shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources, and all cost-effective and reasonable best management practices for nonpoint source control."

74. This subsection 62-302.300(12) language is FDEP's verbatim adoption of the last sentence of EPA's CWA regulation 40 C.F.R. §131.12(a)(2) for Tier 2.0 waters. All point sources and nonpoint sources of pollutants are subject to this FDEP Tier 2.0 technology-based antidegradation WQS requirement.

75. This Tier 2.0 antidegradation technology-based antidegradation WQS requires FDEP assure that FDEP achieves the utilization of the "highest statutory and regulatory requirements" for point sources with regard to maintaining and protecting the baseline assimilative capacity of Tier 2 waters.

76. Because FDEP has the statutory authority pursuant to Section 403.061(28), Fla. Stat. to "[p]erform any act necessary to control and prohibit water pollution," FDEP is required by its Tier 2.0 technology-based antidegradation WQS to impose the highest technology to point sources to control or prevent water pollution from point sources which partially or completely degrade the assimilative capacity of Florida's Tier 2.0 waters. This includes highest technology for point source water transfers between WBIDs, and point source water withdrawals.

77. Fla.Admin.Code R. 62-302.300(12) requires FDEP use "all cost-effective and reasonable best management practices" on nonpoint sources regardless of whether the best management practice has been adopted by FDEP rules. Cost-effective best management practices which FDEP must assure are achieved include:

A. FDEP site specific and waterbody specific criteria for nonpoint source septic tank pollution such as authorized by the Florida First District Court of Appeal in Cape Cave Corp. v. Dept. of Envir. Reg., 498 So.2d 1309 (Fla. 1st DCA 1986) (appellate court affirmed FDEP's permit which contained conditions which restricted the installation and operation of septic tanks).

B. FDEP developing agriculture practices for the application of sulfur and sulfate in the Everglades Agricultural Area (EAA).

C. Ground water withdrawals which degrade surface water quality by reducing groundwater inflows to surface waters.

D. Water management system flows and discharges which either directly or indirectly cause salinity shock to aquatic flora and fauna (i.e., watershed management).

B. Tier 2.0 necessity-based antidegradation WQS

78. Fla.Admin.Code R. 62-302.300(17) & (18)(b), enacted in 1989, read in pertinent part as follows.

is "(17) If the Department finds a proposed new discharge or expansion of an existing discharge will not reduce the quality of the receiving waters below the classification established for them, it shall permit the discharge if the degradation necessary and desirable under federal standards and under circumstances which are clearly in the public interest.....

* * *

for "(18) (a) Except as provided in subsections (b) and (c) of this paragraph, an applicant for either a general or generic permit or renewal of an existing permit which no expansion of discharge is proposed is not required to show that any degradation from the discharge is necessary or desirable under federal standards and in circumstances which are clearly in the public interest.

"(b) If the Department determines that the applicant has caused degradation of water quality over and above that allowed through previous permits issued to the applicant, then the applicant shall demonstrate that this lowering is necessary or desirable under federal standards and under circumstances which are clearly in the public interest..."

"(c) If the new or expanded discharge was initially permitted by the Department on or before October 4, 1989, and the Department determines that an antidegradation analysis was not conducted, then the applicant seeking renewal of the existing permit shall demonstrate that degradation from the discharge is necessary or desirable under federal standards and under circumstances which are clearly in the public interest." (e.s.).

79. The state must provide full public participation in the Tier 2.0 antidegradation review process which ensures that all feasible alternatives to allowing degradation have been adequately assessed and evaluated. The evaluation must include establishing the baseline assimilative capacity of the applicable waterbody in the FDEP permitting process.

80. FDEP's antidegradation review process and analyses must: (1) initially quantify the

amount of degradation (lowering of water quality) being proposed; (2) compare the amount of the applicants proposed degradation with other degrees of degradation of alternatives to the applicant's proposed activity or discharge; (3) determine whether a certain amount, if any, of degradation is consistent with FDEP's antidegradation requirements; (4) announce to the public the amount of degradation involved and provide for public participation and comment; and (5) under Rule 62-302.300(18)(b) evaluate whether the actual lowering (degradation) of perviously issued permits has occurred or is occurring.

81. Without establishment of the baseline assimilative capacity it is not only impossible to determine whether degradation is occurring as a result of specific discharges. It is also impossible: (1) to determine the cumulative amount of degradation due to exempt pollution sources; (2) to determine if inadequacy of design and performance standards presumptions exist, (3) to determine whether any inadequacy of best management practices exist; (4) to determine whether best management practices are needed for other pollution sources; and (5) to determine to impacts of pollution sources which obtained general or generic permits.

82. EPA guidance document interpretations provide that degradation related to point and non-point source discharges are not necessary or appropriate if degradation it could be partially or completely prevented through state implementation of its highest regulatory pollution requirements for point sources or controls of nonpoint sources of pollution.

Tier 2.5 (OFW)

83. Section 403.061(27), Fla. Stat. defines OFW as a "special category of water bodies...which shall be worthy of special protection because of their natural attributes."

84. By rule FDEP has designated 309 water bodies in Florida as OFWs. See, Fla.Admin.Code R. 62-302.700(9).

85. FDEP's WQSs for OFWs are FDEP's Tier 2.5 antidegradation WQSs which are located in Fla.Admin.Code R. 62-302.700 and by reference in Fla.Admin.Code R. 62-4.242(2).

86. Fla.Admin.Code R. 62-302.700(1) reads in pertinent part as follows.

"62-302.700 Special Protection, Outstanding Florida Waters, Outstanding National Resource Waters.

"(1) It shall be the Department policy to afford the highest protection to Outstanding Florida Waters and Outstanding National Resource Waters. No degradation of water quality, other than that allowed in subsections 62-4.242(2) and (3), F.A.C., is to be permitted in Outstanding Florida Waters and Outstanding National Resource Waters, respectively, notwithstanding any other Department rules that allow water quality lowering." (e.s.).

87. Fla.Admin.Code R. 62-302.700(7) provides that "[t]he policy of this section [62-302.700] shall be implemented through the permitting process pursuant to Rule 4-4.242, F.A.C."

88. Fla.Admin.Code R. 62-4.242 implements FDEP's Tier 2.5 OFW antidegradation WQS in Rule 62-302.700 by means of Rule 62-4.242(2) entitled "Standards Applying to Outstanding Florida Waters."

89. Fla.Admin.Code R. 62-4.242(2)(a) provides that:

"No permit or water quality certification shall be issued for any proposed activity or discharge within an Outstanding Florida Waters, or which significantly degrades, either alone or in combination with any other stationary installations, unless the applicant affirmatively demonstrates that:

* * *

(2) The proposed activity or discharge is clearly in the public interest, and

* * *

(b) The existing ambient water quality within Outstanding Florida Waters will not be lowered as a result of the proposed activity or discharge...."

90. Fla.Admin.Code R. 62-4.242(2)(a) provides that

"[n]o permit or water quality certification shall be issued for any proposed activity or discharge within Outstanding Florida Waters, or which significantly degrades, either alone or in combination with other sources or activities, any Outstanding Florida Waters, unless the applicant affirmatively demonstrates that: the proposed activity or discharge is clearly in the public interest, and the

existing ambient water quality within Outstanding Florida Waters will not be lowered as a result of the proposed activity or discharge..." (e.s.).

91. Fla.Admin.Code R. 62-302.700(8) defines the baseline year for determining "existing ambient water quality" of an OFW as follows.

"(8) For each Outstanding Florida Water listed under subsection 62-302.700(9), F.A.C., the last day of the baseline year for defining the existing ambient water quality (paragraph 62-4.242(2)(c), F.A.C.) is March 1, 1979, unless otherwise indicated. Where applicable, Outstanding Florida Water boundary expansions are indicated by date(s) following "as mod." under subsection 62-302.700(9), F.A.C. For each Outstanding Florida Water boundary which expanded subsequent to the original date of designation, the baseline year for the entire Outstanding Florida Water, including the expansion, remains March 1, 1979, unless otherwise indicated."

92. Fla.Admin.Code R. 62-4.242(2)(c) defines the term "existing ambient water quality" of an OFW as follows.

"(c) For purpose of this section the term 'existing ambient water quality' shall mean (based upon the best scientific information available) the better of either (1) that which could reasonable be expected to have existed for the baseline year of an Outstanding Florida Water designation or (2) that which existed during the year prior to the date of a permit application. It shall include daily, seasonal, and other cyclic fluctuations, taking into consideration the effects of actual allowable discharges for which Department permits were issued or applications for such permits were filed and complete on the effective date of the designation.

93. Two Florida appellate courts in separate district have rendered decisions which interpreted Fla.Admin.Code R. 62-4.242(2). In DeCarion v. Dept. Environmental Regulation, 445 So.2d 619, 621 (Fla. 1st DCA 1984) Florida's First District Court of Appeal interpreted Fla.Admin.Code R. 17-4.242(2) (renumbered now to Fla.Admin.Code R. 62-4.242(2)) to "prohibit any degradation of water quality below ambient conditions for projects located within outstanding Florida waters, and prevents any significant degradation of such waters by projects located outside the outstanding Florida water." (e.s.).

94. In Save Anna Maria, Inc. v. Department of Transp., 700 So.2d 113, 117-118 (Fla. 2nd

DCA 1997), Florida's Second District Court of Appeal interpreted Fla.Admin.Code R. 62-4.242(2) to require applicants for any FDEP approval under Rule 62-4.242(b) establish the OFW existing ambient water quality and prove their proposed activity within the OFW would not degrade the baseline existing ambient water quality of the OFW. In the *Save Anna Maria* case the permit applicant, the Florida Department of transportation, failed to carry its "burden of convincing the hearing officer by a preponderance of the evidence that the proposed project would not degrade the ambient water quality of Sarasota Pass [OFW] in contravention of rule 62-4.242(2)." *Save Anna Maria*, 700 So.2d at 117.

95. These two Florida appellate court decisions are binding upon both the FDEP and EPA pursuant to Florida's stare decisis doctrine because these two decisions are harmonious and there is no conflict with a decision of another Florida district court of appeal, or a contrary precedent by the Florida Supreme Court.

96. FDEP's rules do not define "significant degradation" as the phrase is used in Fla.Admin.Code R. 4-4.242(2)(a) regarding degradation by activities or discharges outside OFWs. However, FDEP by means of a final order has held that "significant degradation" of an OFW is a "noticeable adverse change or important significant lowering of the outstanding recreational or ecological significance which allows the water to be designated as an OFW in the first place." See, *ECOSWF v. Cape Cave Corp.*, 8 FALR 317, 379 (DER Final Order 1985). A "noticeable adverse change" includes any noticeable degradation of water quality, including the lowering of the diversity or extent of the flora or fauna in the OFW.

97. FDEP's final order definition of "significant degradation" in the *ECOSWF v. Cape Cave Corp* is binding upon FDEP under Florida law because FDEP's prior final orders are the officially stated FDEP policy or prior agency practice which Florida law prohibits FDEP from

acting inconsistent with unless the deviation is officially explained by FDEP. See, Section 120.68(7)(e)(3), Fla. Stat. FDEP has not publicly issued any such officially explained deviation from the definition of "significant deviation" in FDEP's final order in ECOSWF v. Cape Cave Corp.

98. Activities outside OFWs are prohibited from causing and contributing, “either alone or in combination with other stationary installations,” to the significant degradation of OFW baseline existing ambient water quality. The phrase “either alone or in combination with other stationary installations” means the WQS is cumulative, and a stationary installation is any non-mobile point or non-point discharge.

99. Nowhere in Fla.Admin.Code R. 62-302.700 or Fla.Admin.Code R. 62-4.242(2) are any activities or discharges exempted from the WQSs and permitting requirements of Fla.Admin. Code R. 62-302.700 or Fla.Admin.Code R. 62-4.242(2). Any and all point and nonpoint sources of pollution within OFWs and upstream of OFWS must obtain a FDEP Rule 62-4.242(2) permit and/or authorization which requires the pollution source to have establish compliance with the baseline existing ambient water quality for the applicable OFWs.

Tier 3.0

100. Florida’s Tier 3.0 Outstanding National Resource Waters (ONRW) requirements are located in Fla.Admin.Code R. 62-302.700 and Fla.Admin.Code R. 62-4.242(3). Fla.Admin.Code R. 62-4.242(3) prohibits discharges or activities subject to FDEP permitting from causing degradation of water quality of listed ONRW. FDEP has has identified waters for consideration by the Florida Legislature as Tier 3.0 waters, but the Florida Legislature has not designated any waters as ONRWs.

FDEP’S 2012 BASIN GROUP 5 UPDATE

101. On May 23, 2012, FDEP submitted its 2012 CWA §303(d) list of WQLSs for Florida Basin Group 5, Cycle 2 Update, a list of WQLSs developed by FDEP pursuant to the methodology and authority of FDEP's IWR (Fla.Admin.Code Chapter 62-303).

102. FDEP's Basin Group 5 consists of: the Springs Coast (Boca Ciega Bay to Withaloochee River); the Everglades (including the Everglades National Park, the EAA, drainage canals in the EAA); the Florida Keys; the Upper East Coast/Indian River Lagoon; and the Perdido basin in northwest Florida.

103. Numerous designated OFWs exist in FDEP's Basin Group 5 waters.

A. In the Spring Coast of the Group 5 waters the OFWs include: the Crystal River (Kings Bay); the Homosassa River System; the Chassahowitzka River System; the Chassahowitzka National Wildlife Refuge; the Weekiwachee Riverine and Spring System; and Clam Bayou in Pinellas County.

B. The Everglades basin in the Group 5 water includes the Everglades National Park (ENP) OFW, including the portion of the ENP in Florida Bay, and the publicly purchased East Everglades.

C. The Florida Keys basin of Group 5 waters is almost entirely designated as the Florida Keys OFW, extending from the ENP southern boundary to the western point of Key West.

D. The OFWs in the Upper EastCoast/Indian River Lagoon basin of Group 5 waters include: the Indian River OFW; the Spruce Creek OFW; the Tomoka River OFW; the Pellicer Creek OFW; and the Gauno River OFW.

E. The Clam Bayou OFW in south Pinellas County is part of FDEP's Basin Group 5 waters.

104. FDEP's 2012 Basin Group 5 Update submittal to EPA:

A. Did not assess the available water quality data and information to determine whether Florida's waters are attaining compliance with FDEP's antidegradation WQSs as required by CWA §303(d)(1)(A) and 40 C.F.R. §130.7(b)(5);

B. Did not contain the existing available water data and information for calculating and establishing the baseline assimilative capacity of high quality Tier 2.0 waters in Florida's Basin Group 5;

C. Did not establish and evaluate the baseline assimilative capacity of the high quality Tier 2 non-OFW waters in Florida's Basin Group 5;

D. Did not contain any baseline existing ambient water quality of any of the OFWs in the Basin Group 5, evidence that FDEP did not obtain this essential information prior to issuing any Rule 62-4.242(2) permit for activities within or upstream of OFWs as mandated by the FDEP's OFW WQSs and the binding appellate interpretations of Rule 62-4.242(2); and

E. Did not submit any official explanation for deviation from FDEP's final order definition in the Cape Cave Corp case of significant degradation of an OFW by activities upstream of an OFW.

105. Without the baseline assimilative capacity of high quality non-OFW Tier 2.0 waters in Florida's Basin Group 5 it is not possible for either FDEP or EPA to determine whether degradation of the high quality Tier 2.0 non-OFW waters in Florida's Basin Group 5 waters has occurred, and if so how much degradation.

106. Without the baseline assimilative capacity of high quality Tier 2.0 non-OFW waters in Florida's Basin Group 5 it is also not possible for FDEP and EPA to consider the options which exist to stop and/or restore such degradation, nor is it possible for anyone to assess and

determine whether degradation of the assimilative capacity of Tier 2.0 waters could be partially or completely prevented by the following available FDEP water pollution control powers.

A. Application of FDEP's highest existing statutory and regulatory requirements to point source discharges.

B. Limitation of the duration or volume of discharges.

C. Requiring all new and existing stormwater management systems discharging to non-OFW waters to achieve at least 95% reduction of the average annual load of pollutant(s) as currently required by Fla.Admin.Code R. 62-25.025(9) for direct stormwater discharges to OFWs.

D. Limiting water withdrawals from significantly degrading the baseline antidegradation assimilative capacity of surface waters.

E. Requiring redeveloped sites to retrofit stormwater systems.

F. Requiring septic tank inspection and retrofitting when necessary.

G. Tighten up best management practices on non-point sources in Tier 2.0 waters, including requiring best management practices for agricultural application of sulfur in the EAA.

107. The absence of the submission by FDEP of OFW existing ambient water quality data is conclusive evidence that FDEP has never issued a Fla.Admin.Code R. 62-4.242(2) permit for activities within OFWs, or upgradient of OFWs, which lawfully authorized any degradation of the baseline existing ambient water quality of an OFW.

108. Without the baseline assimilative capacity of high quality non-OFW Tier 2.0 waters in Florida's Basin Group 5 it is not possible for either FDEP or EPA to determine whether degradation of the high quality Tier 2.0 non-OFW waters in Florida's Basin Group 5 waters has occurred, and if so, how much degradation has been allowed by which pollution sources.

INFORMATION SUBMITTED BY FWF AND MRS. DAVIS TO EPA

109. Between October 8, 2012 and September 30, 2014, the FWF and Mrs. Davis provided EPA with information regarding FDEP's failure to implement FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 OFW antidegradation WQSS.

110. The FWF and Mrs. Davis provided EPA with information that FDEP had never established either the baseline Tier 2.0 assimilative capacity of high quality waters non-OFWs, nor had FDEP ever established the Tier 2.5 baseline OFW existing ambient water quality for OFWs. Specifically, FWF and Mrs. Davis advised EPA the following.

A. On October 2, 2012, in response to a written Florida Public Records Act (Chapter 119, Fla. Stat.) request to Ms. Julie Espy, Chief of FDEP's Watershed Assessment Program to inspect and/or copy FDEP documents regarding the Tier 2.0 baseline assimilative capacity of Florida's high quality waters, and the baseline Tier 2.5 OFW existing ambient water quality, Ms. Espy advised the FWF and Mrs. Davis that "[t]here were no documents uncovered" by her search for such requested public record documents.

B. That on November 15, 2012, at FDEP's triennial review public meeting in the Conference Room on the sixth floor of FDEP's office at 2600 Blair Stone Rd. in Tallahassee, Florida, FDEP management level representatives were formally asked on the public record whether FDEP had ever established either the baseline assimilative capacity of Tier 2.0 waters in Florida or the Tier 2.5 existing ambient water quality of OFW waters in Florida. In response to this question, Mr. Daryll Joyner, Chief of FDEP's Standards and Assessment Program, and Mr. Russel Frydenborg, then the Administrator of FDEP's Standards and Assessment Program, each publicly admitted on the record that FDEP had not established the baseline assimilative capacity of high quality Tier 2.0 waters and the Tier 2.5 baseline OFW existing ambient water quality.

Two EPA Region IV staff members were present at this FDEP public meeting, and both heard the FDEP public admissions. The FWF and Mrs. Davis also relayed this information to EPA for it to be made a part of EPA's A.R. review of FDEP's 2012 Basin Group 5 update submittal.

111. On July 25, 2014, the FWF and Mrs. Davis wrote to EPA regarding the two Florida appellate court interpretations of OFW antidegradation WQS Rule 62-4.242(2). The letter explained the appellate court opinions in DeCarion, 445 So.2d at 621 and Save Anna Maria, Inc., 700 So.2d at 117-118. The letter advised EPA of Florida's stare decisis doctrine which makes these appellate court opinions binding upon both FDEP and EPA.

112. The FWF and Mrs. Davis also provided EPA with water quality data and information regarding the Clam Bayou OFW, including the following.

A. The March 2009 study of the Clam Bayou OFW performed by the Environmental Protection Commission of Hillsborough County, Florida at the request of the Tampa Bay Estuary Program. This study documented the increasing rate of the accumulation of four polycyclic aromatic hydrocarbons (PAHs) in the Clam Bayou OFW. The carcinogenic PAHs which were accreting at an increasing rate in Clam Bayou were Benzo(a)pyrene, Benzo(b)fluoranthene, Dibenzo(a)anthracene, Indeno(1,2,3-cd)pyrene.

B. A summary of the September 29, 2011 the Florida Fish and Wildlife Conservation Commission (FWCC) fish tissue sample study in the Clam Bayou OFW at a location where the public frequently fishes. This data was generated over three years prior to EPA's 2014 Dec. Doc. From this fish tissue data FDEP had calculated a target fish concentration (TFC) level in fish tissue that would be equivalent to the associated water column criterion, with FDEP concluding that:

i. The TFC level for chlordane was exceeded in the fish tissue data of both

the Common snook and the Striped mullet caught by the FWCC in the Clam Bayou OFW, and that based upon this data the Florida Department of Health (DOH) recommends a fish consumption advisory of one eight ounce meal per month of Common snook and Striped mullet caught in the Clam Bayou OFW.

ii. The TFC level for total PAHs was exceeded in the fish tissue data of the Sheephead, the Common snook, and the Striped mullet caught in the Clam Bayou OFW by the FWCC, and based upon this data, the Florida DOH recommends a fish consumption advisory of one eight ounce meal per month of the Sheephead, the Common snook, and the Striped mullet caught in the Clam Bayou OFW.

113. In 2011, FDEP collected data and information in the Clam Bayou OFW for determining a historic trend analysis. The data established that four PAHs and two metals were accumulating in Clam Bayou at an increasing rate. This FDEP data and information was generated by FDEP more than 3 years prior to EPA acting upon FDEP's Basin Group 5 Update, and prior to FDEP submitting a final full update to EPA.

EPA's 2014 DECISION DOCUMENT

114. Pursuant to the July 23, 2014 Settlement Agreement in Florida Wildlife Federation and Cindy Davis v. McCarthy, et. al, Case No. 8:13-cv-2084-SDM (M.D. Fla.), on September 30, 2014, EPA issued its 2014 Dec. Doc. regarding FDEP's 2012 Basin Group 5 Update.

115. As set forth in counts I-IV below, the FWF and Mrs. Davis contend EPA's 2014 Dec. Doc. is: (1) arbitrary, capricious, an abuse of discretion and in not in accordance with law; (2) is in excess of EPA's legal authority; (3) that EPA unlawfully withheld or unreasonably delayed making a CWA §303(c) review for consistency with the requirements of the CWA; and (4) unlawfully withheld or unreasonably delayed making a CWA §303(c)(4)(B) necessity

determination. As set forth in count V below, Mrs Davis contends EPA has unlawfully withheld or unreasonably delayed acting upon her petition to EPA to initiate rulemaking to revise FDEP's antidegradation WQSs to comply with the requirements of the CWA.

COUNT I
EPA's 2014 Decision Document approval
of FDEP's 2012 Basin Group 5 Update was
arbitrary, capricious, or not in accordance with law
(APA Section 706(2)(A))

116. Count I is a citizen suit pursuant to §706(2)(A) of the APA by the FWF and Mrs. Davis against EPA, seeking declaratory judgment and prospective injunctive relief.

JURISDICTION

117. This Court has jurisdiction over count I pursuant to APA §706 (2)(A), 28 U.S.C. §1331 (federal question), 28 U.S.C. §1361 (action to compel an officer of United States to perform duty), and 28 U.S.C. §2201(a) (declaratory judgment).

118. Count I is ripe for adjudication because EPA has taken final agency action which is causing irreparable harm to the high quality waters of Florida for the following reasons.

A. By EPA accepting FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs, EPA has approved FDEP's revision and modification of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQS without subjecting the revisions to EPA review pursuant to CWA §303(c) for consistency with the CWA's.

B. EPA is using this FDEP interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs in other currently pending EPA reviews of FDEP's CWA §303(d) Updates for Florida Basin Group 1-4 waters.

C. FDEP's interpretation of FDEP's Tier 2.0 and Teir 2.5 WQSs which EPA's 2014 Dec. Doc. approved weakens FDEP's Tier 2.0 and Tier 2.5 antiegradation WQSs such that

FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs do not meet the requirements of the antidegradation policy of the CWA.

D. EPA's 2014 Dec. Doc. is an EPA precedent which is resulting in further degradation of high quality surface waters in Florida and across the nation.

E. EPA's 2014 Dec. Doc. failed to assess and list the Clam Bayou OFW as failing to attain FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 WQSs due to the levels of chlordane and total PAH in fish tissue levels in Sheepheads, Striped mullet and Common snook exceeding the levels for unlimited fish consumption, thereby risking and endangering human health by failing to notify the public of the fish tissue contamination.

119. Declaratory judgment jurisdiction exists because a substantial, real and immediate case or controversy currently exists between the parties who have adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment, and the Court otherwise has jurisdiction over the parties pursuant to the APA. The FWF and Mrs. Davis are: (1) currently each suffering injuries in fact, (2) a causal connection exists between these injuries of degraded Florida surface waters and EPA's failure to properly review FDEP's CWA §303(d) 2012 Basin Group 5 Update, and (3) it is likely these injuries will be redressed by a favorable declaratory judgment.

THE PARTIES

120. The plaintiffs in count I are the FWF and Mrs. Davis.

121. The defendants in count I are Gina McCarthy in her capacity as the Administrator of EPA, Heather McTeer Toney in her capacity as the Regional Administrator of EPA, and the U.S. Environmental Protection Agency.

THE STANDING OF THE FWF AND MRS. DAVIS

122. EPA's 2014 Dec. Doc. that is being challenged in count I is final EPA agency action which is adversely affecting both the procedural and substantive rights of FWF members and Mrs. Davis. The FWF and Mrs. Davis have the procedural right to have EPA act in accordance with the law. The FWF and Mrs. Davis have the substantive right to use and enjoy Florida's high quality surface waters that are fully protected by FDEP's antidegradation WQSSs.

123. The FWF and Mrs. Davis are each currently suffering injuries in fact, and will in the future suffer injuries in fact, by the subject challenged agency action of EPA failing to properly implement CWA §303 and its implementing regulations. These injuries are fairly traceable to EPA's 2014 Dec. Doc., and these injuries are likely to be redressed by a decision favorable to the FWF and Mrs. Davis.

APA SECTION 706(2)(A)

124. APA Section 706(2)(A) provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

FACTS

125. The FWF and Mrs. Davis reallege paragraphs 51-113 above.

126. On December 20, 2010, in Davis v. Jackson, M.D. Fla. Case No. 8:09-cv-1070-EAK, Mrs. Davis and EPA signed a settlement agreement which held in pertinent part under the heading of "EPA Actions" that

list "EPA expects Florida to submit its next Section 303(d) list update for Group 5 waters in 2012. EPA agrees that when reviewing Florida's next Section 303(d) for Group 5, it will consider all State water quality standards, including antidegradation requirements, and it will consider all existing and readily available water quality related data and information in assessing the State's Group 5 water bodies, which includes waters within the Clam Bayou Watershed in Pinellas County. As part of this review, EPA will consider Florida's water quality

standards regulations. At this time, those regulations are: Florida Administrative Code Sections 62-4.242, 62-302.500, 62-302.200, 62-302.300, and 62-302.700." (e.s.). (Doc. 54.1, pg. 3).

127. On August 13, 2013, the FWF and Mrs. Davis filed suit against EPA in part because EPA had not yet taken action to approve or disapprove FDEP's 2012 Basin Group 5, Cycle 2 Section 303(d) list update.

128. On July 21, 2014, the FWF, Mrs. Davis, and EPA signed a settlement agreement which held in pertinent part under the heading of "EPA Actions" that

303(d) "The State of Florida submitted its Group 5, Cycle 2 Section 303(d) list in 2012, and its revised Group 5, Cycle 2 Section 303(d) list on February 20, 2014. EPA agrees to issue its decision on review of Florida's Group 5, Cycle 2 Section 303(d) list no later than September 30, 2014. EPA agrees that when reviewing Florida's Section 303(d) list for Group 5, Cycle 2, it will consider all applicable State water quality standards, including antidegradation requirements, and it will consider all existing and readily available water quality related data and information in assessing the State's Group 5 water bodies, which includes waters within the Clam Bayou Watershed in Pinellas County. As part of this review, EPA will consider the following Florida water quality standards regulations: Florida Administrative Code Sections 62-4.242, 62-302.500, 62-302.200, 62-302.300, and 62-302.700."

129. On September 30, 2014, EPA issued its 2014 Dec. Doc. which approved FDEP's Section 303(d) list updates for Basin Group 5 which FDEP had submitted to the EPA for review. EPA's 2014 Dec. Doc. found that on May 23, 2012 FDEP submitted the Basin Group 5 update to EPA, and that between May 23, 2012 and April 2014 that FDEP made several amendments to FDEP's May 23, 2012 submittal, including a revision to the Basin Group 5 Section 303(d) list based upon a FDEP Secretarial Order on January 26, 2014. Thus, EPA must consider and review available and readily available water quality data and information in assessing FDEP's Group 5 water bodies up to and including April, 2014.

130. Pursuant to CWA §303(d)(2) and 40 C.F.R. §130.7(d)(2), EPA must approve or

disapprove FDEP's submittal within 30 days after the date of FDEP's submission. In the instant situation, EPA delayed acting upon FDEP Group 5 submittal because FDEP continued to submit revisions and amendments which EPA deemed prevent the FDEP submittal from being complete. Nevertheless, EPA unreasonably delayed more than 30 days beyond April, 2014 when FDEP last revised FDEP's submittal to EPA.

131. EPA's 2014 Dec. Doc. found and concluded on pages 3-4 that the CWA §303(d) listing of impaired waters applies to waters impaired by point and nonpoint pollution sources, and quoting from 40 C.F.R. §130.7(b)(1) concluded and declared that states must identify WQLSs still requiring TMDLs due to "pollution control requirements (e.g., best management practices) required by local, State or Federal authority are not stringent enough to implement water quality standards applicable to such waters."

132. EPA's 2014 Dec. Doc. made the following findings and conclusions in Subsection III(A)(1)(c) entitled "Florida's Antidegradation Requirements."

"Florida regulations include a statewide antidegradation policy at sections 62-302.300 and 62-302.700, F.A.C. Florida's antidegradation policy includes requirements for protecting existing uses (Tier 1); deciding whether or not to authorize the lowering of water quality where existing water quality exceeds levels needed to support propagation of fish, shellfish, and wildlife and recreation in and on the water (Tier 2); and protecting ONRWs (Tier 3). Florida also provides additional protection for Outstanding Florida Waters (OFWs). The EPA considers these waters to be a subset of Tier 2 waters, referred to as "Tier 2.5" waters, which are provided more stringent protection than Tier 2 waters and less stringent protection than Tier 3 waters. Florida has also promulgated regulations to implement the State antidegradation policy through the State's permitting program at section 62-4.242, F.A.C.

Subsection 62-302.300(14), F.A.C. requires protection of Tier 1 waters, recognizing that the existing use for a particular waterbody may be different from, or more extensive than, the designated use.

Subsections 62-302.300(17) and 62-302.300(18), F.A.C. establish a public interest test for Tier 2 waters, which must be applied during the permitting

process for any new or expanded discharge that will reduce the quality of a receiving Tier 2 waterbody to determine if the degradation is necessary or desirable. If the public interest test is not applied at initial permit issuance, then it must be applied at permit renewal.

Subsection 62-302.300(12), F.A.C., further requires that all new and existing point sources achieve the highest statutory and regulatory requirements and that non-point sources achieve all cost-effective and reasonable best management practices for non-point source control.

Section 62-302.700, F.A.C. establishes progressively more stringent requirements for allowing degradation in higher quality OFWs and highest quality ONRWs. Subsection 62-302.700(10), F.A.C. provides that ONRWs will be protected as Tier 3 waters, but further provides that ONRW designations will not be effective until the Florida Legislature enacts legislation specifically authorizing this Tier 3 protection for specific waterbodies. To date, Florida has not enacted such legislation.

Section 62-4.242, F.A.C., establishes specific antidegradation permitting requirements that must be met to ensure that permits issued are “consistent with the antidegradation policy set forth in Rule section 62-302.300, F.A.C., and if applicable, Rule section 62-302.700, F.A.C.” Subsection 62-4.242(1), F.A.C., establishes antidegradation permitting requirements applicable to all permits, while subsections 62-4.242(2) and 62-4.242(3), F.A.C., establish additional requirements applicable to new or expanded discharges to OFWs and ONRWs, respectively. Doc. 1.2, pg. 9

133. EPA's 2014 Dec. Doc. made the following findings and conclusions in Subsection III(B)(7) entitled "Antidegradation Assessment."

"On October 23, 1991 and May 15, 1995, the EPA approved Florida's antidegradation policy. Florida regulations include a statewide antidegradation policy at sections 62-302.300 and 62-302.700, F.A.C. Florida's antidegradation policy includes requirements for protecting existing uses (Tier 1); deciding whether or not to authorize the lowering of water quality where existing water quality exceeds levels needed to support propagation of fish, shellfish, and wildlife and recreation in and on the water (Tier 2); and protecting outstanding National resource waters (ONRWs) (Tier 3). Florida also provides additional protection for Outstanding Florida Waters (OFWs). The EPA considers these waters to be a subset of Tier 2 waters, referred to as "Tier 2.5" waters, which are provided more stringent protection than Tier 2 waters and less stringent protection than Tier 3 waters. Florida has also promulgated regulations to implement the state antidegradation policy through the State's permitting program at section 62-4.242, F.A.C.

"Florida's EPA-approved water quality standards are the applicable water quality standards for CWA purposes in the State, including for purposes of identifying impaired waters under section 303(d) of the Act. 40 C.F.R. 131.21(c) and (d). When applying the applicable water quality standards, the EPA applies the State's reasonable interpretation of those standards.

a. Tier 1 Assessment

"Florida conducted a thorough review of historical information and a public solicitation for additional information regarding the protection of existing uses. Florida reviewed SEAS shellfish harvesting classifications, as the State believed that this was the most relevant information to review to determine whether any waters had lost an existing use. During this analysis, the State identified several Class III marine waterbodies with current water quality-based SEAS classifications that are less than fully approved and therefore, should be included on the section 303(d) list for impaired shellfish harvesting consistent with the Grubbs memo. Although these waterbodies were identified during an antidegradation analysis, the EPA proposes to add these waters to the section 303(d) list for not supporting their designated use as set out above.

b. Tier 2 Assessment

process
Decision
determine
conducted
permitting
to be

"Florida's antidegradation policy, as approved by EPA, establishes a public interest test for Tier 2 waters, which must be applied during the permitting for any new or expanded discharge that will reduce Florida §303(d) List Document September 24, 2014 the quality of receiving Tier 2 waters to if the degradation is necessary or desirable. This analysis is to be during initial permit issuance or at permit renewal if the analysis was not conducted during initial permit issuance. Florida's antidegradation requirements, at subsection 62-4.242(1), F.A.C., describe how this test is implemented. The test requires a balancing of the importance and benefits of the project against adverse impacts caused by the discharge, as well as an options review to demonstrate whether certain alternatives that would minimize lowering of water quality are technologically or economically feasible. Subsection 62-4.242(2), F.A.C., identifies additional permitting requirements which must be met to allow lowering of water quality in OFWs.

"A permitted discharge may lower water quality where an antidegradation review was conducted during the permitting process, as prescribed by the state antidegradation policy and FDEP authorized the lowering following the antidegradation review. Such an authorized lowering of water quality associated with a permitted discharge is not in violation of the state antidegradation water quality standard.

OFWs. Department's rather than storm

"Florida's antidegradation review procedures apply to all permits, including NPDES (National Pollutant Discharge Elimination System) and ERP (Environmental Resource) permits. NPDES permits include Municipal Separate Storm Sewer System (MS4) permits and permits issued for discharges into

As to MS4 permits, prior to September 15, 2010, FDEP did not conduct antidegradation analyses of its MS4 permits. This is because the position was that MS4 permits did not cause degradation of waters but such permits reduced the degradation that would result from unregulated water discharges to State waters. Since September 15, 2010, however, all new or expanded MS4 permits have been subject to antidegradation analysis, including MS4 permits in Basin Group 5. As to permitted discharges into OFWs, Florida provides greater protections as set out in 62-242(2), F.A.C. These protections are more stringent than permitting requirements imposed on discharges into general Tier 2 waters (see 62-242(1), F.A.C.).

"To assess whether Basin Group 5 waterbodies are attaining FDEP's Tier 2 antidegradation policy and procedures, FDEP reviewed existing and readily available information to determine whether permits issued by the Department since state antidegradation rules became effective in 1989 were subject to antidegradation reviews consistent with the antidegradation permitting requirements of sections 62-302.300, 62-302.700 and 62-4.242, F.A.C. FDEP provided assurance to the EPA that no permits have been identified that were not subject to antidegradation review.

standards, associated with waters, confirming that antidegradation

"As set out above, FDEP interprets its Tier 2 antidegradation policy as applying only in the permitting context. The EPA finds that FDEP's interpretation is a reasonable reading of Florida's applicable antidegradation water quality as approved by the EPA. Therefore, any lowering of water quality permits that was authorized in accordance with the State's required antidegradation process does not require section 303(d) listing. For Tier 2 including OFWs, the EPA finds that the State has successfully assessed its waterbodies for attainment of the state antidegradation policy, by the state permitting program appropriately implemented Florida's policy."

EPA'S ACTION WAS UNLAWFUL UNDER APA §706(2)(A)

134. The FWF and Mrs. Davis contend EPA's 2014 Dec. Doc. is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," and therefore in violation of APA §706(2)(A) for each of the following reasons.

EPA'S VIOLATIONS IN GENERAL

40 C.F.R. §130.7(d)(2)

135. FDEP's failure to submit to EPA the baseline assimilative capacity and baseline OFW existing ambient water quality, and failure to estimate the total pollution from all pollution sources, including nonpoint sources, is a failure by FDEP's CWA §303(d) submittal to EPA to meet the requirements of 40 C.F.R. §130.7(b). As a matter of law EPA does not have the authority to approve FDEP's incomplete CWA §303(d) submittal and list which does meet the requirements of 40 C.F.R. §130.7(b). See, 40 C.F.R. §130.7(d)(2).

EPA failed to rationally explain how EPA can approve FDEP's CWA §303(d) submittal which was based upon FDEP's IWR which does not contain antidegradation methodology to identify CWA §303(d) impaired waters

136. EPA failed to rationally explain how EPA can approve FDEP's Basin Group 5 list of impaired update which FDEP implemented by means of the methodology set for in FDEP's Impaired Waters Rule (IWR) which does not contain any antidegradation methodology for review evaluation of the CWA §303(d)(1) issue of whether Florida's surface waters are attaining FDEP antidegradation WQSs.

Failure to rationally explain whether FDEP's interpretations of FDEP's antidegradation WQSs are consistent with the requirements of the CWA

137. When applying FDEP's antidegradation WQSs, EPA is authorized to accept FDEP's interpretations of FDEP's antidegradation WQSs only if they are consistent with the requirements of the CWA and its implementing regulations. EPA failed to rationally explain whether FDEP's antidegradation WQSs as interpreted by FDEP was consistent with the antidegradation requirements of the CWA.

Failure to rationally explain whether FDEP's interpretation of FDEP's antidegradation WQSs revised or modified FDEP's antidegradation WQSs

138. In the Eleventh Circuit, EPA cannot unquestionably accept FDEP's assertion that its interpretations do not revise FDEP's Tier 2 and Tier 2.5 antidegradation WQSs. EPA must independently determine if FDEP's interpretations of FDEP's antidegradation WQSs modify or revise FDEP's antidegradation WQSs. EPA failed to rationally explain whether FDEP's interpretation revised or modified FDEP's antidegradation WQSs.

Failure to make CWA §303(c)(4)(B) necessity determination.

139. EPA failed to state why EPA did not make a CWA §303(C)(4)(B) determination whether a new or revised standard is necessitated for FDEP's interpretations of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs not meeting the requirements of the CWA.

Failure to rationally explain whether FDEP had the legal authority for FDEP's non-rule of FDEP's antidegradation WQSs and permit regulations

140. EPA failed to explain whether FDEP has the legal authority under Florida law for FDEP's to make non-rule interpretations of FDEP's antidegradarion WQSs and permit regulations. EPA's regulation at 40 C.F.R. §131.5(3) prohibits EPA from reviewing FDEP revisions to FDEP's WQSs unless FDEP had "followed its legal procedures for revising or adopting standards." EPA failed to rationally explain whether FDEP met the requirements of 40 C.F.R. §131.5(3).

Failure to rationally explain what constitutes FDEP's permitting process and what pollution sources were subjected by FDEP to antidegradation WQS review

141. EPA failed to rationally explain what constitutes FDEP's permitting process and what pollution sources are subjected by FDEP regulations to antidegradation WQS review. The FWF and Mrs. Davis contend the point and non-point pollution sources listed in (A)-(I) have not been subjected to FDEP antidegradation review of compliance with FDEP's Tier 1.0, Tier 2.0

and Tier 2.5 antidegradation WQs.

A. Many Fla.Admin.Code R. 62-4.242 permits and CWA water quality certifications are issued by state water management districts, rather than FDEP, and are not subjected to antidegradation review.

B. FDEP Rule 62-302.300(18)(a) exempts FDEP general permits and generic permits from antidegradation review procedures in violation of the CWA.

C. The permit exemptions in Fla.Admin.Code R. 62-346.051 have not been subjected to antidegradation review procedures.

D. FDEP's rule based rebuttable presumed approval of stormwater design and performance based standards in Fla.Admin.Code R. 62-40.432(2)(a) and Fla.Admin.Code R. 62-25.025(9) have not been subjected to FDEP's antidegradation review procedures.

E. FDEP's approved best management practices, as well as, FDEP's decisions not to require best management practices for agricultural application of sulfur in the EAA, have not been subjected to FDEP's antidegradation review procedures.

F. FDEP's rule approved standard for issuing or denying Individual MS4 permits in Fla.Admin.Code R. 62-624.500(2) exempts Individual MS4 permits from FDEP's antidegradation review procedures.

G. MS4 permits issued by FDEP prior to September 15, 2010 were not subjected to FDEP's Tier 2.0 and Tier 2.5 OFW antidegradation WQS analysis. Thus, the waters to which these MS4 systems discharged were not permitted by FDEP with authorization to degrade the receiving waters.

H. FDEP's authorization by Fla.Admin.Code R. 62-25.042 to use wetlands for

stormwater treatment without reference to, or compliance with, FDEP's antidegradation WQSS has not been subjected to FDEP antidegradation review pursuant to FDEP's Tier 1.0, Tier 2.0 or Tier 2.5 antidegradation WQSSs.

J. Nonpoint source septic tank pollution has not been subjected to FDEP's antidegradation review and permitting pursuant to FDEP's Tier 1.0, Tier 2.0 or Tier 2.5 antidegradation WQSSs.

K. Permits for water consumption have not been to FDEP's antidegradation review and permitting pursuant to FDEP's Tier 1.0, Tier 2.0 or Tier 2.5 antidegradation WQSSs.

L. FDEP has exempted water transfers from the Class III EAA canals to the Class I waters of Lake Okeechobee, and water transfers from Lake Okeechobee to the St. Lucie River and the Caloosahatchee River, from FDEP permitting and from antidegradation review. The waters of the EAA, Lake Okeechobee, the St. Lucie River, and the Caloosahatchee River are ecologically distinct surface waters from each other, each have ecologically distinct levels of surface water quality, and each have ecologically distinct flora and fauna from each other. Water transfers between these WBIDs have degraded the waters of the receiving WBIDs without FDEP antidegradation WQSSs review.

Failure to rationally explain the lack of an independent EPA §303(d) assessment of all existing and available water quality data and information

142. EPA failed to provide a rationale explanation for EPA's decision not to independently review all existing and available water quality data and information to determine whether the ambient water quality of FDEP's Basin Group 5 waters are attaining FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 antidegradation WQSSs.

Failure to rationally explain why the EAA and the downstream

Everglades waters were not subjected to review and assessment for attaining FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 antidegradation WQSs

143. EPA failed to explain why the EAA canals and the downstream Everglades OFWs were not reviewed for attainment of FDEP's Tier 1.0, Tier 2.0 or Tier 2.5 antidegradation WQSs. The A.R. water quality data and information establish that the water in the EAA canals is a loathsome concoction of chemical contaminants including nitrogen, phosphorous, un-ionized ammonia, herbicides, pesticides, sulfate, sulfide, and methylmercury. Specifically, EPA made the following failures to assess and evaluate whether these levels of pollutants in the EAA canals attained FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 antidegradation WQSs.

A. EPA failed to rationally explain why EPA did not review the waters of the EAA canals and the Everglades for attainment of FDEP's Tier 1.0 antidegradation WQS which require existing fishing and aquatic life uses of the EAA canals and the downstream Everglades be "fully maintained and protected" at all times since November 28, 1975.

B. EPA failed to rationally explain why EPA did not review the waters of the EAA canals and the downstream Everglades for attainment of FDEP's Tier 2.0 technology-based WQSs which require FDEP assure the achievement of the use of the highest statutory and regulatory requirements for point sources, and the "all cost-effective and reasonable best management practices for nonpoint source control" in any and all waters.

C. EPA failed to rationally explain why EPA did not review the waters the Everglades OFWs for attainment of FDEP's Tier 2.5 OFW existing ambient water quality which mandates the protection of Everglades OFWs existing ambient water quality, including fish tissue and aquatic health, from significant degradation by activities upgradient of the Everglades OFW, including pollution discharges into the EAA canals which follow downstream into the

Eveglades OFWs.

Failure to rationally explain why the Clam Bayou OFW fish tissue data was not subjected to Tier 1.0, Tier 2.0 and Tier 2.5 antidegradation review

144. EPA failed to rationally explain why EPA did not review the 2011 Clam Bayou OFW fish tissue data and information which established that the levels of chlordane and PAHs in Sheepshead, Common snook, and the Striped mullet did not attain FDEP's Class III WQSs, and FDEP's Tier 1.0, Tier 2.0, or Tier 2.5 antidegradation WQSs.

A. EPA's fish consumption assessment in Section III(B)(5) on page 24 of EPA's 2014 Dec. Doc. failed to rationally explain EPA's failure assess the 2011 fish tissue data of fish caught in the Clam Bayou OFW for attainment of Class III WQSs.

B. FDEP's Tier 1.0 antidegradation WQS requires existing uses such as fishing and aquatic life use of waters be "fully maintained and protected." At all times since November 28, 1978, Sheepshead, Common snook, and the Striped mullet have used the waters of the Clam Bayou OFW as habitat. At all times since November 28, 1975 the public has fished in the Clam Bayou OFW for Sheepshead, Common snook, and the Striped mullet. FDEP's Tier 1 antidegradation WQS does not authorize the issuance of permits to allow the increase in the levels of of chlordane and PAHs in the fish tissue of fish caught in the Clam Bayou OFW.

C. EPA failed to rationally explain why EPA did not perform a Tier 2.0 technology-based antidegradation WQSs review of the the Clam Bayou OFW fish tissue data.

D. EPA failed to rationally explain why EPA did not perform a Tier 2.0 necessity-based antidegradation WQSs review for the fish tissue in Clam Bayou.

E. EPA did not rationally explain why EPA did not perform a Tier 2.5 OFW existing ambient water quality assessment of the fish tissue with the Clam Bayou OFW.

EPA'S VIOLATIONS RELATED TO TIER 1.0

EPA's inaccurate listing of non-attainment of existing shellfishing harvesting use

145. EPA's proposal to add the shellfish harvesting Tier 1.0 existing use WQS violation as a Class III WQS violation is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." EPA has the duty to accurately list these impaired shellfish harvesting waters as violating FDEP's Tier 1.0 antidegradation WQS. Without accurate listing of the WQS being violated, the CWA §303(d) ranking and TMDL are being unlawfully manipulated.

Fish tissue pollution in Clam Bayou

146. EPA failed to discuss and explain whether data and information which shows that the levels of chlordane and PAHs in the tissue of fish in the Clam Bayou OFW, and in the water column and sediment of the Clam Bayou OFW, is a violation of FDEP's Tier 1.0 antidegradation WQS (i.e., the existing uses by recreational fishes (existing aquatic use) and the existing uses by recreational fisherman) because those existing uses has not been "fully maintained and protected" since November 28, 1975.

Failure to assess Tier 1.0 existing scallop and crab harvesting

147. EPA failed to discuss and explain why EPA approved FDEP's CWA §303(d) submittal which failed to assess and evaluate whether Tier 1.0 existing uses of scallop harvesting and crabbing since November 28, 1975 had been "fully maintained and protected" as required by FDEP Tier 1.0 WQS at Rule 62-302.300(14).

Failure to existing uses in St. Johns County

148. EPA failed to discuss and explain why EPA had not identified and listed mapped existing uses in St. Johns County (FDEP's Group 5 Upper East Coast) which are now mapped by

SEAS as "Conditionally Prohibited" or "Prohibited" which is non-attainment of FDEP's Tier 1.0 antidegradation WQS. The current SEAS mapping of these waters as "Conditionally Prohibited" or "Prohibited" indicates the shellfish harvesting existing uses in these waters have not been "fully maintained and protected" as required by FDEP's Tier 1.0 antidegradation WQS.

Failure to explain Tier 1.0 WQSs and the sulfate levels in EAAs and Everglades

149. EPA failed to discuss and explain why the sulfate levels in the EAA canals and the Everglades south of the EAA are not in violation of FDEP's Tier 1.0 antidegradation WQSs because November 28, 1975 existing uses in the EAA canals had not been fully maintained and protected. Sulfate contamination of the Everglades basin of the Basin Group 5 is one of the most significant water quality problems in the Everglades. Roughly sixty percent (60%) of the remnant Everglades has surface water sulfate levels which significantly exceed sulfate water quality levels of the unenriched Everglades area, and above the sulfate level where the sulfate enhances the production of methylmercury and mobilizes nutrients. The presence of these levels of sulfate is not only impairing the existing use of fishing, it is also impairing the use of these waters by aquatic organisms and aquatic plant communities. Identification of this sulfate pollution violation of FDEP's Tier 1.0 WQSs is fundamental to the establishment of TMDLs and effluent limitations to attain compliance with Tier 1.0 existing use WQS as it relates to sulfate pollution, and is required by the CWA.

EPA'S VIOLATIONS RELATED TO TIER 2.0 WQSs

No finding whether FDEP achieved the technology-based Rule 62-302.300(12) WQS

150. EPA failed to make findings and conclusions whether FDEP has achieved FDEP's Tier 2 technology-based antidegradation WQSs of Fla.Admin.Code R. 62-302.300(12) that

prohibits FDEP from allowing the degradation of the baseline assimilative capacity of Tier 2.0 high quality waters by failing to assure and achieve the "highest statutory and regulatory requirements for all new and existing point sources, and all cost-effective and reasonable best management practices for non-point source pollution."

Failure to assess Tier 2.0 technology-based antidegradation WQSs

151. EPA's finding regarding EPA's understanding of FDEP's interpretation of FDEP's Tier 2.0 antidegradation WQSs failed to either reference, explain, or assess FDEP's Tier 2.0 technology-based antidegradation WQS at Fla.Admin.Code R. 62-302.300(12). This EPA failure is an EPA admission that FDEP did not apply Fla.Admin.Code R. 62-302.300(12) as part of FDEP's Tier 2 antidegradation WQSs.

No FDEP antidegradation review of Tier 2.0 waters between March 1, 1979, not 1989 as asserted by EPA

152. FDEP first adopted its Tier 2.0 antidegradation WQSs on March 1, 1979, making the Tier 2.0 baseline assimilative capacity for assessment of FDEP's Tier 2.0 antidegradation WQSs March 1, 1979, not 1989 as asserted by EPA. FDEP did not conduct antidegradation review for permits between March 1, 1979 and October 4, 1989, and EPA cannot find and conclude that the Rule 62.4-242 permits issued by FDEP between March 1, 1979 and October 4, 1989 allow any degradation the baseline assimilative capacity of Tier 2.0 waters.

EPA'S VIOLATIONS RELATED TO TIER 2.5 OFW WQSs

Binding Florida appellate court interpretations of Rule 62-4.242(2)

153. EPA's finding and conclusion that "[w]hen applying the applicable water quality standards, the EPA applies the State's reasonable interpretation of those standards" is not in accordance with law. EPA has no legal authority to apply FDEP's interpretation of

Fla.Admin.Code R. 62-4.242(2) for two reasons. First, Florida's stare decisis doctrine binds both FDEP and EPA to interpretation of Fla.Admin.Code R. 62-4.242(2) by two Florida appellate courts. Second, it is not reasonable for EPA to approve a FDEP interpretation which does not meet the requirements of the CWA.

Rules 62-302.700(1) and 62-4.242(2) are unambiguous

154. FDEP Rules 62-302.700(1) and 62-4.242(2) are unambiguous and it is unreasonable for EPA to approve FDEP's strained reading and interpretation of these unambiguous OFW WQSs in an impermissible FDEP and EPA attempt to amend these FDEP OFW WQSs.

**FDEP has not "appropriately implemented"
FDEP's Tier 2.5 OFW antidegradation WQSs**

155. EPA's finding and conclusion that FDEP has "appropriately implemented" FDEP's Tier 2.5 OFW antidegradation WQS is not supported by the A.R. because the existing ambient WQS of OFWs has not been established by either permit applicants or FDEP, and have not been submitted to EPA by FDEP as part of FDEP's update submittal. It is impossible and unreasonable for EPA to determine FDEP had properly assessed Florida Basin Group 5 waters for attainment of the state antidegradation policy when FDEP did not submit any Tier 2.5 baseline OFW existing ambient water quality data to compare against the existing ambient water quality of Tier 2.5 OFWs. Without such baseline data, neither FDEP nor EPA can make an informed analysis or conclusion whether FDEP's 2.5 OFW antidegradation WQSs are being attained as required by CWA §303(d) and 40 C.F.R. §130.7(b). See, Save Anna Maria, 700 So.2d at 118.

NO ADEQUATE REMEDY AT LAW

156. The FWF and Mrs. Davis have no adequate remedy at law for EPA's count I

violations of the CWA and the APA.

INJUNCTIVE RELIEF IN THE PUBLIC INTEREST

157. Issuance of the requested count I declaratory judgment and remedial injunction order is in the public interest because it cures the identified violations of the CWA and the APA. Monetary compensation without declaratory and injunctive relief to the FWF and Mrs. Davis would circumvent environmental laws, and is contrary to the interests of the FWF, Mrs. Davis, and the public.

WHEREFORE, the FWF and Mrs. Davis respectfully request the Court grant the following relief.

A. Find and declare that FDEP's CWA §303(d) submittal to EPA failed to meet the requirements of 40 C.F.R. §130.7(b), thus, pursuant to 40 C.F.R. §130.7(d)(2) EPA had no legal authority to approve FDEP's Basin Group 5 update submittal.

B. Find and declare that EPA failed to rationally explain how EPA can approve FDEP's Basin Group 5 list of impaired waters which FDEP implemented by means of the methodology set for in FDEP's IWR which does not contain any antidegradation methodology regarding the CWA §303(d)(1) issue of whether Florida's surface waters are attaining FDEP antidegradation WQSs.

C. Find and declare that EPA failed to rationally explain whether FDEP's interpretations of FDEP's antidegradation WQSs were consistent with the requirements of the CWA.

D. Find and declare that EPA failed to rationally explain whether FDEP's interpretations of FDEP's antidegradation WQSs revised or modified FDEP's antidegradation WQSs.

E. Find and declare that FDEP's interpretations of FDEP's antidegradation WQSs

triggered and obligated EPA to make a CWA §303(c)(4)(B) determination where FDEP's antidegradation WQSs as interpreted by FDEP meet the requirements of the CWA.

F. Find and declare that EPA failed to make a CWA §303(c)(4)(B) necessity determination regarding whether FDEP's interpretations of FDEP's antidegradation WQSs necessitated new or revised FDEP antidegradation WQSs in order to meet the requirements of the CWA.

G. Find and declare that EPA failed to rationally explain whether FDEP had state legal authority for the subject non-rule interpretation of FDEP's antidegradation WQSs.

H. Find and declare that EPA failed to rationally explain what constitutes FDEP's permitting process and what pollution sources were subjected by FDEP to FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 antidegradation WQSs review.

I. Find and declare that EPA failed to rationally explain why EPA failed to independently EPA §303(d) assess all existing and available water quality data and information regarding the CWA §303(d) requirement that all pollution sources be identified when determining whether FDEP's WQSs are being attained.

J. Find and declare that EPA failed to rationally explain why the EAA discharges into EAA canals and the downstream Everglades waters were not subjected to review and assessment to determine whether FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 antidegradation WQSs are being attained in the EAA canals and the Everglades.

K. Find and declare that EPA failed to rationally explain why the Clam Bayou OFW fish tissue data was not subjected to review when determining whether FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 antidegradation WQSs are being attained in the Clam Bayou OFW.

L. Find and declare that EPA inaccurately and unlawfully listed non-attainment of existing shellfishing harvesting uses as non-attainment of FDEP's Class III WQSs rather than non-attainment of FDEP's Tier 1.0 antidegradation WQS.

M. Find and declare that EPA failed to discuss and explain whether the water quality data and information which show that the levels of chlordane and PAHs in the tissue of fish in the Clam Bayou OFW, and in the water column and sediment of the Clam Bayou OFW, constitute a violation of FDEP's Tier 1.0 antidegradation WQS.

N. Find and declare that EPA failed to discuss and explain why EPA had not identified and listed mapped existing uses in St. Johns County (FDEP's Group 5 Upper East Coast) which are now mapped by SEAS as "Conditionally Prohibited" or "Prohibited" as waters which fail to attain FDEP's Tier 1.0 antidegradation WQS of fully maintaining and protecting existing uses.

O. Find and declare that EPA failed to discuss and explain why the sulfate levels in the EAA canals and the Everglades south of the EAA are not violations of FDEP's Tier 1.0 antidegradation WQSs of fully maintaining and protecting existing uses.

P. Find and declare that EPA failed to make findings and conclusions whether FDEP has achieved the application of FDEP's Tier 2 technology-based antidegradation WQSs of Fla.Admin.Code R. 62-302.300(12) for point and nonpoint sources.

Q. Find and declare that EPA's finding regarding FDEP's interpretation of FDEP's Tier 2.0 antidegradation WQSs failed to either reference or assess FDEP's Tier 2.0 technology-based antidegradation WQS at Fla.Admin.Code R. 62-302.300(12).

R. Find and declare that FDEP did not conduct antidegradation review of permits issued between March 1, 1979 and October 4, 1989, thus, EPA cannot find and conclude that the Rule

62.4-242 permits issued by FDEP between March 1, 1979 and October 4, 1989 allow any degradation of the baseline assimilative capacity of Tier 2.0 waters.

S. Find and declare that EPA has no legal authority to apply FDEP's interpretation of Fla.Admin.Code R. 62-4.242(2) because Florida's stare decisis doctrine binds both FDEP and EPA to the interpretation of Fla.Admin.Code R. 62-4.242(2) made by Florida's First and Second District Courts of Appeal.

T. Find and declare that FDEP's OFW antidegradation WQSs at Fla.Admin.Code R. 62-302.700(1) and 62-4.242(2) are unambiguous, and it was unreasonable for EPA to approve FDEP's stated interpretation of these unambiguous OFW WQSs in an impermissible attempt to amend Fla.Admin.Code R. 62-302.700(1) and 62-4.242(2).

U. Find and declare that FDEP has not "appropriately implemented" FDEP's Tier 2.5 OFW antidegradation WQSs, and EPA must perform an independent assessment and evaluation of all existing and available OFW water quality data and information.

V. Find and declare that EPA unlawfully failed to perform the CWA §303(d) informational assessment and evaluation process as it relates to FDEP's Tier 2.5 OFW antidegradation WQS.

W. Find and declare that without establishment of the baseline assimilative capacity of Tier 2.0 waters it is impossible for either FDEP or EPA to determine whether any degradation is occurring as a result of: (1) specific permitted discharges; (2) any degradation related to exempt pollution sources; (3) any inadequacy of FDEP's design and performance standards for stormwater facilities; (4) any inadequacy of best management practice assumptions, (5) any non-point source septic tank pollution, (6) any water withdrawal authorization, (7) any water

transfer; and (8) pollution sources which obtained general or generic permits which were not subjected to FDEP antidegradation review.

X. Find and declare that degradation of the baseline assimilative capacity of Tier 2.0 waters is not necessary or appropriate under the CWA antidegradation requirements and FDEP's Tier 2.0 performance-based antidegradation WQS if the degradation could be partially or completely prevented through FDEP implementing its highest regulatory pollution requirements for point sources or controls of nonpoint sources of pollution.

Y. Issue a prospective remedial injunction which reverses and remands EPA's 2014 Decision Document to EPA with instructions for EPA to review FDEP's 2012 Basin Group 5 Update consistent with the Court's findings and declarations.

Z. Award the FWF and Mrs. Davis their costs and reasonable attorney fees; and

AA. Grant any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

COUNT II

EPA's acceptance of FDEP's non-rule interpretation of FDEP's antidegradation WQSs was in excess of EPA's legal authority

158. Count II is a citizen suit pursuant to §706(2)(C) of the APA by the FWF and Mrs. Davis against EPA, seeking declaratory judgment and prospective injunctive relief.

JURISDICTION

159. This Court has jurisdiction over count II pursuant to: APA §706(2)(C); 28 U.S.C. §1331 (federal question); 28 U.S.C. §1361 (action to compel an officer of United States to perform duty); and 28 U.S.C. §2201(a) (declaratory judgment).

160. Count II is ripe for adjudication because EPA has taken final agency action which

is causing irreparable harm to the high quality waters of Florida for the following reasons.

A. By EPA accepting FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs EPA has approved FDEP's revision and modification of FDEP's Tier 2 and Tier 2.5 antidegradation WQS without subjecting these revisions to EPA §303(c) review for consistency with the CWA's.

B. EPA is using this acceptance of FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs in other currently pending EPA reviews FDEP's CWA §303(d) Updates for Florida Basin Group 1-4 waters.

C. FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 WQSs which EPA's 2014 Decision Document approved weakens FDEP's Tier 2.0 and Tier 2.5 antidegradation WQS such that FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs do not meet the requirements of the antidegradation policy of the CWA.

D. EPA's 2014 Dec. Doc. determination that FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs as interpreted by FDEP are not subject to the CWA §303(d) informational process is an EPA precedent which resulting in further degradation of high quality Florida waters. Neither FDEP nor EPA are establishing the Tier 2.0 baseline assimilative capacity of Florida high quality non-OFW waters, or the Tier 2.5 OFW existing ambient water quality, an EPA precedent which adversely affects high quality waters across the nation.

E. EPA's 2014 Dec. Doc. failed to assess and list the Clam Bayou OFW as failing to attain FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 WQSs due to the levels of chlordane and total PAH in fish tissue levels in Sheepheads, Striped mullet and Common snook exceeding the levels for unlimited fish consumption, thereby risking and endangering human health by failing

to notify the public of the fish tissue contamination health issue.

161. Declaratory judgment jurisdiction exists because a substantial, real and immediate case or controversy currently exists between the parties who have adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. The FWF and Mrs. Davis are each currently suffering injuries in fact, a causal connection exists between these injuries of degraded Florida surface waters and the EPA's failure to properly review FDEP's CWA §303(d) 2012 Basin Group 5 Update, and it is likely these injuries will be redressed by a favorable declaratory judgment.

THE PARTIES

162. The plaintiffs in count II are the FWF and Mrs. Davis.

163. The defendants in count II are Gina McCarthy in her capacity as the Administrator of EPA, Heather McTeer Toney in her capacity as the Regional Administrator of EPA, and the U.S. Environmental Protection Agency.

THE STANDING OF THE FWF AND MRS. DAVIS

164. EPA's 2014 Dec. Doc. that is being challenged in count II is final EPA agency action which is adversely affecting both the procedural and substantive rights of FWF members and Mrs. Davis. The FWF and Mrs. Davis have the procedural right to have EPA act in accordance with the law. The FWF and Mrs. Davis have the substantive right to use and enjoy Florida's high quality surface waters that are fully protected by FDEP's antidegradation WQSs.

165. The FWF and Mrs. Davis are each currently suffering injuries in fact, and will in the future suffer injuries in fact, by the subject challenged agency action of EPA failing to properly implement CWA §303 and its implementing regulations. These injuries are fairly traceable to

EPA's challenged 2014 Decision Document, and these injuries are likely to be redressed by a decision favorable to the FWF and Mrs. Davis in this count II.

APA SECTION 706(2)(C)

166. APA Section 706(2)(C) provides that the reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”

FACTS

167. The FWF and Mrs. Davis reaver paragraphs 125-133 in Count I above.

168. EPA's acceptance of FDEP's non-rule interpretation of FDEP's antidegradation WQSs without EPA conducting a CWA §303(c) review of FDEP's interpretation for consistency with the CWA antidegradation policy was in “excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” and this unlawful EPA action is causing irreparable harm and degradation to the high quality surface waters of the State of Florida.

169. FDEP's Basin Group 5 submittal to EPA failed to meet the requirements of 40 C.F.R. §130.7(b). Thus, pursuant to 40 C.F.R. §130.7(d)(2) EPA has the non-discretionary duty to disapprove FDEP's Basin Group 5 update submittal. EPA's approval of FDEP's Basin Group 5 submittal that failed to meet the requirements of 40 C.F.R. §130.7(b) was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

170. EPA's approval of FDEP's Basin Group 5 list of impaired waters update which FDEP implemented by means of the methodology set forth in FDEP's IWR which does not contain any antidegradation methodology was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

171. EPA's approval of FDEP's non-rule interpretation of FDEP's antidegradation WQSs and permit regulations was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right because FDEP did not follow Florida's legal procedures for revising or adopting antidegradation WQSs as required by 40 C.F.R. §131.5(3).

172. EPA's approval of FDEP's Basin Group 5 list of impaired waters which did not review or assess the EAA discharges into the EAA canals and the downstream Everglades waters for attaining FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 antidegradation WQSs was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

173. EPA's approval of FDEP's Basin Group 5 list of impaired waters which did review or assess the Clam Bayou OFW fish tissue data for attainment of FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 antidegradation WQSs was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

174. EPA's approval of FDEP's Basin group 5 list of impaired waters which did not review or assess the levels of chlordane and PAHs in the water column and sediment of the Clam Bayou OFW for attainment of FDEP's Teir 1.0, Tier 2.0 and Tier 2.5 antidegradation WQSs was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

175. EPA's approval of FDEP's Basin Group 5 list of impaired waters which did not review or assess the sulfate levels in the EAA canals and the Everglades south of the EAA for attainment of FDEP's Tier 1.0 antidegradation WQSs was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

176. EPA's approval of FDEP's Basin Group 5 list of impaired waters which did not review or assess attainment of FDEP's Tier 2 technology-based antidegradation WQSs of

Fla.Admin.Code R. 62-302.300(12) was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

177. EPA's approval of FDEP's Basin Group 5 list of impaired waters which was based upon FDEP's interpretation of Fla.Admin.Code R. 62-4.242(2) that conflicted with the interpretation of Fla.Admin.Code R. 62-4.242(2) made by the Florida First and Second District Courts of Appeal was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

178. EPA's approval of FDEP's Basin Group 5 list of impaired waters without EPA performing an independent assessment and evaluation of all existing and available OFW water quality data and information was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

179. EPA's approval of FDEP's Basin group 5 list of impaired waters without either FDEP or EPA establishing the baseline assimilative capacity of Tier 2.0 waters was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right because without such as baseline assimilative capacity it is impossible for either FDEP or EPA to determine the quantity of the degradation and the source of the degradation. A baseline assimilative capacity is necessary to establish the quantity of degradation from various pollution sources, including specific permitted discharges, exempt pollution sources, stormwater facilities subject to FDEP's rule for the design and performance standards for stormwater facilities, the inadequacy or absence of necessary best management practices, and discharges which obtained general or generic permits which were not subjected to FDEP antidegradation review.

NO ADEQUATE REMEDY AT LAW

180. The FWF and Mrs. Davis have no adequate remedy at law for EPA's count II violations of the CWA and the APA.

INJUNCTIVE RELIEF IN THE PUBLIC INTEREST

181. Issuance of the requested count II declaratory judgment and remedial injunction relief order is in the public interest because it cures the identified violations of the CWA and the APA. Monetary compensation to the FWF and Mrs. Davis without declaratory and injunctive relief would circumvent environmental laws, and is contrary to the interests of the FWF, Mrs. Davis, and the public.

WHEREFORE, the FWF and Mrs. Davis respectfully request the Court grant the following relief.

A. Find and declare that FDEP's Basin Group 5 submittal to EPA failed to meet the requirements of 40 C.F.R. §130.7(b).

B. Find and declare that EPA's approval of FDEP's Basin Group 5 submittal that failed to meet the requirements of 40 C.F.R. §130.7(b) was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

C. Find and declare that EPA's approval of FDEP's Basin Group 5 list of impaired waters update which FDEP implemented by means of the methodology in FDEP's Impaired Waters Rule (IWR) which does not contain antidegradation methodology was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

D. Find and declare that EPA's approval of FDEP's non-rule interpretation of FDEP's antidegradation WQSs and permit regulations was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right because FDEP did not follow Florida's legal

procedures for revising or adopting antidegradation WQSs as required by 40 C.F.R. §131.5(3).

E. Find and declare that EPA's approval of FDEP's Basin Group 5 list of impaired waters which did not review or assess the EAA canals and the downstream Everglades waters to determine whether the EAA canals and the Everglades waters are attaining FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 antidegradation WQSs was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

F. Find and declare that EPA's approval of FDEP's Basin Group 5 list of impaired waters which did review or assess the Clam Bayou OFW fish tissue data for attainment of FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 antidegradation WQSs was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

G. Find and declare that EPA's approval of FDEP's Basin group 5 list of impaired waters which did not review or assess the levels of chlordane and PAHs in the water column and sediment of the Clam Bayou OFW, for attainment of FDEP's Tier 1.0, Tier 2.0 and Tier 2.5 antidegradation WQSs was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

H. Find and declare that EPA's approval of FDEP's Basin Group 5 list of impaired waters which did not review or assess the sulfate levels in the EAA canals and the Everglades waters south of the EAA for attainment of FDEP's Tier 1.0 antidegradation WQSs was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

I. Find and declare that EPA's approval of FDEP's Basin Group 5 list of impaired waters which did not review or assess attainment of FDEP's Tier 2 technology-based antidegradation WQSs of Fla.Admin.Code R. 62-302.300(12) was in excess of EPA's statutory jurisdiction,

authority, or limitations, or short of statutory right.

J. Find and declare that EPA's approval of FDEP's Basin Group 5 list of impaired waters which was based upon FDEP's interpretation of Fla.Admin.Code R. 62-4.242(2) that conflicted with the interpretation of Fla.Admin.Code R. 62-4.242(2) made by the Florida First and Second District Courts of Appeal was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

K. Find and declare that EPA's approval of FDEP's Basin Group 5 list of impaired waters without EPA performing an independent assessment and evaluation of all existing and available OFW water quality data and information was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

L. Find and declare that EPA's approval of FDEP's Basin group 5 list of impaired waters without either FDEP or EPA establishing the baseline assimilative capacity of Tier 2.0 waters was in excess of EPA's statutory jurisdiction, authority, or limitations, or short of statutory right.

M. Issue a prospective remedial injunction which reverses and remands EPA's 2014 Dec. Doc. to EPA with instructions for EPA to review FDEP's 2012 Basin Group 5 Update consistent with the Court's findings and declarations.

N. Award the FWF and Mrs. Davis their costs and reasonable attorney fees; and

O. Grant any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

COUNT III

EPA has unlawfully withheld or unreasonably delayed making a CWA §303(c) review of FDEP's Tier 2.0 and 2.5 antidegradation WQSs as interpreted by FDEP for consistency with the requirements of the CWA

182. Count III is a citizen suit pursuant to §706(1) of the APA by the FWF and Mrs. Davis against EPA, seeking declaratory judgment and prospective injunctive relief.

JURISDICTION

183. This Court has jurisdiction over count III pursuant to: APA §706(1); 28 U.S.C. §1331 (federal question); 28 U.S.C. §1361 (action to compel an officer of United States to perform duty); and 28 U.S.C. §2201(a) (declaratory judgment).

184. Count III is ripe for adjudication because EPA inaction is causing irreparable harm to the high quality waters of Florida for the following reasons.

A. By EPA accepting FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs, EPA has approved FDEP's revision and modification of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQS without subjecting these revisions to EPA §303(c) review for consistency with the CWA's.

B. EPA is using this acceptance of FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs in other currently pending EPA reviews FDEP's CWA §303(d) Updates for Florida Basin Group 1-4 waters.

C. FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 WQSs which EPA's 2014 Dec. Doc. weakens FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs to the point they do not meet the requirements of the antidegradation policy of the CWA.

D. EPA's 2014 Dec. Doc. determination that FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs as interpreted by FDEP are not subject to the CWA §303(d) process is an EPA precedent which resulting in further degradation of high quality Florida waters. Neither

FDEP nor EPA are establishing the Tier 2.0 baseline assimilative capacity of Florida high quality non-OFW waters, or the Tier 2.5 OFW existing ambient water quality.

185. Declaratory judgment jurisdiction exists because a substantial, real and immediate case or controversy currently exists between the parties who have adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. The FWF and Mrs. Davis each are currently suffering injuries in fact, a causal connection exists between these injuries of degraded Florida surface waters and the EPA's failure to properly review FDEP's CWA §303(d) 2012 Basin Group 5 Update, and it is likely these injuries will be redressed by a favorable declaratory judgment.

THE PARTIES

186. The plaintiffs in count III are the FWF and Mrs. Davis.

187. The defendants in count III are Gina McCarthy in her capacity as the Administrator of EPA, Heather McTeer Toney in her capacity as the Regional Administrator of EPA, and the U.S. Environmental Protection Agency.

THE STANDING OF THE FWF AND MRS. DAVIS

188. EPA's 2014 Dec. Doc. that is being challenged in count III is final EPA agency action which is adversely affecting both the procedural and substantive rights of FWF members and Mrs. Davis. The FWF and Mrs. Davis have the procedural right to have EPA act in accordance with the law. The FWF and Mrs. Davis have the substantive right to use and enjoy Florida's high quality surface waters that are fully protected by FDEP's antidegradation WQSs.

189. The FWF and Mrs. Davis are each currently suffering injuries in fact, and will in the future each suffer injuries in fact by the subject challenged agency action of EPA failing to

properly implement CWA §303 and its implementing regulations. These injuries are fairly traceable to EPA's 2014 Dec. Doc., and these injuries are likely to be redressed by a decision favorable to the FWF and Mrs. Davis.

APA SECTION 706(1)

190. APA Section 706(1) provides that "The reviewing court shall— (1) compel agency action unlawfully withheld or unreasonably delayed."

FACTS

191. The FWF and Mrs. Davis reaver paragraphs 51-66, 73-99, 101-113, and 126-133 above.

192. CWA §303(c) requires states to submit all new or revised standards to EPA for approval or disapproval based upon state WQSs are consistency with the requirements of the CWA. In the Eleventh Circuit, EPA has a duty to review new or revised water quality standards even if a state does not submit them for review. FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs are new or revised FDEP WQSs because FDEP's interpretation modifies and revises the level of protection provided by FDEP's Tier 2.0 and Tier 2.5 WQSs. antidegradation WQSs.

193. Without rational explanation, EPA is unlawfully withholding or unreasonably delaying making a CWA §303(c) consistency review of FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs in order to determine if FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs as interpreted by FDEP meet the antidegradation WQSs requirements of the CWA.

NO ADEQUATE REMEDY AT LAW

194. The FWF and Mrs. Davis have no adequate remedy at law for EPA's count III violations of the CWA and the APA.

INJUNCTIVE RELIEF IN THE PUBLIC INTEREST

195. Issuance of the requested count III declaratory judgment and remedial injunction order is in the public interest because it cures the identified violations of the CWA and the APA. Monetary compensation without declaratory and injunctive relief to the FWF and Mrs. Davis would circumvent environmental laws, and is contrary to the interests of the FWF, Mrs. Davis, and the public.

WHEREFORE, the FWF and Mrs. Davis respectfully request the Court grant the following relief.

A. Find and declare that FDEP's interpretations of FDEP's antidegradation WQSs obligated EPA to make a CWA §303(c) determination whether FDEP's antidegradation WQSs as interpreted by FDEP meet the requirements of the CWA.

B. Find and declare that FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 OFW antidegradation WQSs required EPA to a CWA §303(c) determination whether new or revised FDEP state WQSs are necessary to meet the requirements of the CWA.

C. Find and declare that EPA's 2014 Dec. Doc. did not rationally explain why EPA was withholding making a CWA §303(c) determination whether new or revised FDEP state WQSs are necessary to meet the requirements of the CWA.

D. Find and declare that EPA is unlawfully EPA is unlawfully withholding or unreasonably delaying making a CWA §303(c) consistency review of FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs in order to determine if FDEP's Tier 2.0 and

Tier 2.5 antidegradation WQSs as interpreted by FDEP meet the antidegradation WQSs requirements of the CWA.

E. Issue a prospective remedial injunction which directs EPA within 90 days of this Court's order to make a CWA §303(c) determination whether FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs as interpreted by FDEP meet the requirements of the CWA.

F. Award the FWF and Mrs. Davis their costs and reasonable attorney fees; and

G. Grant any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

COUNT IV

EPA has unlawfully withheld or unreasonably delayed making a CWA §303(c)(4)(B) determination of necessity for revision of FDEP's antidegradation WQSs for Florida due to FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs

196. Count IV is a citizen suit pursuant to §706(1) of the APA by the FWF and Mrs. Davis against EPA, seeking declaratory judgment and prospective injunctive relief.

JURISDICTION

197. This Court has jurisdiction over count IV pursuant to: APA §706(1); 28 U.S.C. §1331 (federal question); 28 U.S.C. §1361 (action to compel an officer of United States to perform duty); and 28 U.S.C. §2201(a) (declaratory judgment).

198. Count IV is ripe for adjudication because EPA inaction is causing irreparable harm to the high quality waters of Florida for the following reasons.

A. By EPA accepting FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs, EPA has approved FDEP's revision and modification of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQS without subjecting these revisions to EPA §303(c) review for

consistency with the CWA's.

B. EPA is using this acceptance of FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs in other currently pending EPA reviews FDEP's CWA §303(d) Updates for Florida Basin Group 1-4 waters.

C. FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 WQSs which EPA's 2014 Decision Document weakens FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs to the point they do not meet the requirements of the antidegradation policy of the CWA.

D. EPA's 2014 Dec. Doc. determination that FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs as interpreted by FDEP are not subject to the CWA §303(d) process is an EPA precedent which is resulting in further degradation of high quality Florida waters. Neither FDEP nor EPA are establishing the Tier 2.0 baseline assimilative capacity of Florida high quality non-OFW waters, or the Tier 2.5 OFW existing ambient water quality.

199. Declaratory judgment jurisdiction exists because a substantial, real and immediate case or controversy currently exists between the parties who have adverse legal interests of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. The FWF and Mrs. Davis are each currently suffering injuries in fact, a causal connection exists between these injuries of degraded Florida surface waters and the EPA's failure to properly review FDEP's CWA §303(d) 2012 Basin Group 5 Update, and it is likely these injuries will be redressed by a favorable declaratory judgment.

THE PARTIES

200. The plaintiffs in count IV are the FWF and Mrs. Davis.

201. The defendants in count IV are Gina McCarthy in her capacity as the Administrator

of EPA, Heather McTeer Toney in her capacity as the Regional Administrator of EPA, and the U.S. Environmental Protection Agency.

THE STANDING OF THE FWF AND MRS. DAVIS

202. EPA's 2014 Dec. Doc. that is being challenged in count IV is final EPA agency action which is adversely affecting both the procedural and substantive rights of FWF members and Mrs. Davis. The FWF and Mrs. Davis have the procedural right to have EPA act in accordance with the law. The FWF and Mrs. Davis have the substantive right to use and enjoy Florida's high quality surface waters that are fully protected by FDEP's antidegradation WQSs.

203. The FWF and Mrs. Davis are each currently suffering injuries in fact, and will in the future suffer injuries in fact, by the subject challenged agency action of EPA failing to properly implement CWA §303 and its implementing regulations. These injuries are fairly traceable to EPA's 2014 Dec. Doc., and these injuries are likely to be redressed by a decision favorable to the FWF and Mrs. Davis.

APA SECTION 706(1)

204. APA Section 706(1) provides that "The reviewing court shall— (1) compel agency action unlawfully withheld or unreasonably delayed."

FACTS

205. The FWF and Mrs. Davis reaver paragraphs 51-66, 73-99, 101-113, and 126-133 above.

206. EPA has unlawfully withheld or unreasonably delayed making a CWA §303 (c)(4)(B) determination of necessity for revision of FDEP's antidegradation WQSs for Florida due to FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs.

NO ADEQUATE REMEDY AT LAW

207. The FWF and Mrs. Davis have no adequate remedy at law for EPA's count IV violations of the CWA and the APA.

INJUNCTIVE RELIEF IN THE PUBLIC INTEREST

208. Issuance of the requested count IV declaratory judgment and remedial injunction order is in the public interest because it cures the identified violations of the CWA and the APA. Monetary compensation without declaratory and injunctive relief to the FWF and Mrs. Davis would circumvent environmental laws, and is contrary to the interests of the FWF, Mrs. Davis, and the public.

WHEREFORE, the FWF and Mrs. Davis respectfully request the Court grant the following count IV relief.

A. Find and declare that FDEP's interpretations of FDEP's antidegradation WQSs triggered and obligated EPA to make a CWA §303(c)(4)(B) determination whether FDEP's antidegradation WQSs as interpreted by FDEP meet the requirements of the CWA.

B. Find and declare that after EPA's 2014 Dec. Doc. acceptance of FDEP's interpretation of FDEP's Tier 2.0 and Tier 2.5 OFW antidegradation WQSs, EPA has withheld or unreasonably delayed making a CWA §303(c)(4)(B) determination whether new or revised FDEP state WQSs are necessary to meet the requirements of the CWA.

C. Issue a prospective remedial injunction which directs EPA to make a CWA §303 (c)(4)(B) necessity determination regarding FDEP's Tier 2.0 and Tier 2.5 antidegradation WQSs as interpreted by FDEP, within 90 days of this Court's order.

D. Award the FWF and Mrs. Davis their costs and reasonable attorney fees; and

E. Grant any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

COUNT V

EPA is unlawfully withholding or unreasonably delaying action on Mrs. Davis' petition to EPA to initiate rulemaking to promulgate needed amendments to FDEP's antidegradation WQSs in order to met the requirements of the CWA

209. Count V is a citizen suit pursuant to §706(1) of the APA by Mrs. Davis seeking declaratory judgment and prospective injunctive relief.

THE PARTIES

210. The plaintiff in count V is Mrs. Davis.

211. The defendants in count V are Gina McCarthy in her capacity as the Administrator of EPA, and the U.S. Environmental Protection Agency.

THE STANDING OF MRS. DAVIS

212. Mrs. Davis has the procedural right to have EPA act in accordance with the law, and the substantive right to use and enjoy Florida's high quality surface waters that are fully protected by FDEP's antidegradation WQSs.

213. Mrs. Davis is currently suffering injuries in fact, and will in the future suffer injuries in fact, by the subject challenged agency action of EPA failing to properly implement the CWA antidegradation policy in Florida. These injuries are fairly traceable to EPA's unlawful or unreasonable delay in acting upon her petition to initiate rulemaking, and these injuries are likely to be redressed by a decision favorable to Mrs. Davis.

APA SECTION 706(1)

214. APA Section 706(1) provides that "The reviewing court shall— (1) compel agency action unlawfully withheld or unreasonably delayed."

FACTS

215. Mrs Davis reavers paragraphs 51-113, and 126-133 above.

216. On October 2, 2014, Mrs. Davis petitioned EPA to initiate rulemaking to revise FDEP's antidegradation WQSs to meet the requirements of the CWA.

217. Mrs. Davis' petition to EPA is very similar to the July 10, 2012 petition to initiate rulemaking filed by the FWF over 2 1/2 years ago. EPA has not yet acted upon either the 2012 FWF petition or Mrs. Davis' 2014 petition.

218. Mrs. Davis' petition alleged that the revision of FDEP's current antidegradation WQSs was clearly necessary in order for FDEP's antidegradation WQSs and implementation methodology to meet the requirements of the CWA. Mrs. Davis specifically noted the following reasons the proposed revisions to Florida's WQSs are necessary to meet the requirements of the CWA.

A. FDEP's current antidegradation WQSs and implementation methodology do not achieve the CWA's goal of restoring and maintaining the integrity of the nation's waters. See, 33 U.S.C. § 1251(a).

B. As interpreted by FDEP, FDEP's current antidegradation WQSs exempt numerous pollution sources from FDEP's antidegradation WQSs, including exempting non-point sources, general permits, generic permits, the exemptions from permitting set forth in Fla.Admin.Code. R. 62-346.051, and various sources subject to BMPs.

C. As interpreted by FDEP, FDEP's current antidegradation WQSs do not require the establishment of the antidegradation WQSs assimilative capacity baseline, the absence of which is a violation of the CWA.

D. As interpreted by FDEP, FDEP's current antidegradation WQSs do not require the establishment a de minimus cumulative cap on the degradation of the antidegradation WQSs assimilative capacity baseline, the absence of which is a violation of the CWA.

E. FDEP's existing antidegradation WQSs do not effectively and explicitly identify the alternative analysis for the protection and maintenance of high quality waters as is necessary to meet the requirements of the CWA.

F. FDEP's current antidegradation WQSs do not identify the overall holistic Tier 2 assessment factors, such as, "existing aquatic life uses including aquatic assemblages, hydrology, geomorphic processes, and landscape conditions; existing recreational uses and recreational significances; and overall value and significance of the water body upon an ecological and public use perspective." Federal Register, September 4,2013, pg. 54527, 3rd column.

G. FDEP's current antidegradation WQSs do not require the explicit documentation of all antidegradation decisions which affect the assimilative capacities of Tier 2 waters and 2.5 OFW waters, the absence of which violates the public participation requirements of the CWA.

219. EPA is currently unlawfully withholding or unreasonably delaying action on Mrs. Davis' petition to EPA to promulgate the necessary clarity and implementation criteria in Florida antidegradation WQSs in order to met the requirements of the CWA.

220. Mrs Davis has the right to petition EPA to initiate pursuant to APA §553(e) provides that "Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." See, First Amendment of the Federal Constitution (right to

petition the government).

221. APA § 555(b) requires EPA to "proceed to conclude a matter presented to it" and that it do so "within a reasonable time." APA §706(1) provides that a reviewing court "shall compel agency action unlawfully withheld or unreasonably delayed." APA §706(a) coupled with APA §555(b) indicates congressional intent that agencies should act within reasonable time frames and that courts may compel agency action that has been improperly withheld or unreasonably delayed.

222. EPA has been unlawfully withholding or unreasonably delaying action upon Mrs. Davis' petition to EPA. EPA's inaction is unreasonable in light of the following.

A. EPA's 2014 Dec. Doc. not performing a CWA §303(c) review to determine whether FDEP's interpretation of FDEP's antidegradation WQSs meet the requirements of the CWA.

B. EPA's 2014 Dec. Doc. not making a CWA §303(c)(4)(B) necessity determination to determine whether after FDEP's interpretation of FDEP's antidegradation WQSs revisions to FDEP's antidegradation WQSs were necessary to meet the requirements of the CWA.

C. EPA withholding or unreasonably delaying acting upon FWF's July 10, 2012 petition to EPA to initiate rulemaking petition to revise FDEP's antidegradation WQSs, an ongoing delay of 2 1/2 years.

D. EPA withholding and unreasonably delaying acting upon Mrs. Davis' October 2, 2014 petition to EPA.

223. EPA's inaction on Mrs. Davis' petition is causing significant ongoing degradation

and harm to the surface waters of Florida in light of the FDEP's ongoing CWA§ 303(d) impaired waters assessments, EPA's ongoing reviews of such FDEP CWA §303(d) impaired waters assessments, and the use of these CWA §303(d) actions for the establishment of TMDLs and effluent limitations throughout Florida.

224. This Court should direct EPA to make a determination within 60 days of this Court's order of the need to initiate rulemaking to revise FDEP's antidegradation WQSs in order to meet the requirements of the CWA.

WHEREFORE, Mrs. Davis respectfully requests the Court grant the following relief.

A. Find and declare that EPA has unlawfully withheld or unreasonably delayed action on her petition to EPA to initiate rulemaking.

B. Issue a prospective remedial injunction which orders EPA to take action, within 60 days of the order, on the petition to initiate rulemaking filed by Mrs. Davis.

C. Award Mrs. Davis her costs and reasonable attorney fees.

D. Grant any other relief this Court deems necessary and just to effectuate a complete resolution of the legal disputes between the parties.

Respectfully submitted,

/S/ Thomas W. Reese

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Certificate of Service

I hereby certify that on December 23, 2014, I e-mailed this complaint to Martha C. Mann, United States Department of Justice, Environmental Defense Section via email address of martha.mann@usdoj.gov.

/S/ Thomas W. Reese
Thomas W. Reese