Nos. 10-10886 & 10-11121 (consolidated)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SOUTH FLORIDA WATER MANAGEMENT DISTRICT
Intervenor/Appellant

FLORIDA WATER ENVIRONMENT ASSOCIATION UTILITY COUNSEL
Intervenor/Appellant

v.

LISA P. JACKSON, Administrator, United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Defendants/Appellees,

FLORIDA WILDLIFE FEDERATION, INC., SIERRA CLUB, INC., ENVIRONMENTAL CONFEDERATION OF SOUTHWEST FLORIDA, INC., ST. JOHNS RIVERKEEPER, INC., CONSERVANCY OF SOUTHWEST
Plaintiffs/Appellees.

On Appeal from the U.S. District Court for the Northern District of Florida, Civil No. 08-324 (Hon. Robert L. Hinkle).

ANSWERING BRIEF FOR THE DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The following is a complete list of persons and entities who, to the best of defendants-appellees' knowledge, have an interest in the outcome of this case, pursuant to Eleventh Circuit Rules 26.1 and 26.1-3, as amended:

Alves, James Steven

American Farm Bureau Federation

Avila, Aaron P.

Baschon, Carol

Borkowski, Winston Kirk

Brannon, Brown, Haley & Bullock, P.A.

Childs, David William

Cole, Terry

Conservancy of Southwest Florida, Inc.

Crowley, Kevin X.

Dreher, Robert G.

Duffey, Amy Christine

Earthjustice – Tallahassee, FL

Environmental Confederation of

Southwest Florida, Inc.

Florida Cattleman's Association

Florida Citrus Mutual, Inc.

Florida Engineering Society

Florida Farm Bureau Federation

Florida Fruit and Vegetable Association

Florida Minerals and Chemistry

Council, Inc.

Florida Pulp and Paper Association Environmental Affairs, Inc.

Florida Stormwater Association

Florida Water Environment Association Utility Council

Florida Wildlife Federation, Inc.

Ford, Peter Z.

Forthman, Carol Ann

Green, Darby Meginniss

Guest, David G.

Hinkle, The Honorable Robert L.

Hopping Green & Sams, P.A.

Jackson, Lisa P.

Jazil, Mohammad Omar

Jones, Lisa E.

Kilbourne, James C.

Mann, Martha Collins

Mitchell, Matthew Calieb

Moreno, Ignacia S.

Northwest Florida Water Management District

Oertel, Fernandez, Cole & Bryant, P.A.

Pennington, Moore, Wilkinson, Bell &

Dunbar, P.A.

Pettit, Christopher L.

Reimer, Monica Kidd

Rizzardi, Keith W.

Samuels, Stephen

St. Johns Riverkeeper, Inc.

Schroer, Lee C.

Shenkman, Ethan

Sierra Club, Inc.

South Florida Water Management District

Southeast Milk, Inc.

Southwest Florida Water Management District

State of Florida Department of Agriculture

Stinson, Robert Del

Suwannee River Water Management District

Toth, Brian C.

U.S. Environmental Protection Agency

STATEMENT REGARDING ORAL ARGUMENT

Defendants-appellees believe that oral argument would be appropriate given the number of intervenors, amici, and other parties who are interested in these appeals and the public importance of water quality standards in general.

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GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
CERCLA	Comprehensive Environmental Response, Compensation, & Liability Act
CWA	Clean Water Act
DE	District Court Docket Entry
DEP	Florida Department of Environmental Protection
EPA	United States Environmental Protection Agency
FDACS	Florida Department of Agriculture and Consumer Services
FRAP	Federal Rules of Appellate Procedure
FRCP	Federal Rules of Civil Procedure
FWEA	Florida Water Environment Association Utility Council
TMDL	Total Maximum Daily Load

JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 33 U.S.C. 1365(a)(2). On December 30, 2009, the district court entered a consent decree between the plaintiffs and EPA. On January 27, 2010, defendant-intervenor Florida Water Environment Association Utility Council ("Council") moved for reconsideration, which was denied on January 29, 2010. DE:161. Defendant-intervenor South Florida Water Management District ("District") filed a notice of appeal on February 26, 2010. DE:162. On March 10, 2010, the Council filed its notice of appeal. DE:169. Both notices were timely under FRAP 4(a)(1)(B) and FRAP 4(a)(4)(A)(iv).

As explained *infra*, this Court lacks jurisdiction because the Council and the District (collectively, "Intervenors") lack standing to appeal. *Diamond v. Charles*, 476 U.S. 54 (1986). If Intervenors had standing, appellate jurisdiction would arise under 28 U.S.C. 1292(a)(1), which allows appeals of interlocutory orders granting injunctions. Consent decrees are considered "injunctions" under that provision. *Birmingham Fire Fighters Ass'n 117 v. Jefferson County*, 290 F.3d 1250, 1253 (11th Cir. 2002).

ISSUES PRESENTED

1. Whether Intervenors have standing to appeal the entry of a consent decree – approved by plaintiff environmental groups and EPA – setting deadlines

for EPA to issue numeric water quality criteria for nutrients (*e.g.*, nitrogen and phosphorous) in Florida waters, unless the State does so first.

2. Whether the district court abused its discretion by entering the consent decree.

3. Whether the district court abused its discretion in declining to conduct an evidentiary hearing prior to approving the consent decree, where Intervenors submitted written evidence and legal memoranda and presented oral argument in opposition to the Decree.

STATEMENT OF THE CASE

1. *Nature of the Case.*

Plaintiffs filed suit in July 2008, alleging that, through various planning documents EPA had issued in 1998, the agency had made a formal determination that numeric water quality standards for nutrients were necessary to meet the requirements of the Clean Water Act. According to plaintiffs, those 1998 documents triggered a nondiscretionary duty under 33 U.S.C. 1313(c)(4)(B), which required EPA to "promptly" propose revised nutrient standards for Florida waters. EPA vigorously disputed that the 1998 documents constituted a determination under Section 1313(c)(4)(B), and the parties cross-moved for summary judgment. About a month before summary judgment briefing began, on January 14, 2009, EPA issued an actual determination under 33 U.S.C. 1313(c)(4)(B) that revised

water quality standards for nutrients are necessary to meet the requirements of the Act for waters in Florida. Because EPA recognized that the January 2009 determination triggered a duty to promulgate revised nutrient criteria for Florida waters, the question whether the 1998 documents also created such a duty was rendered largely academic.

Recognizing that the only remaining dispute between EPA and plaintiffs concerned *when*, not whether, EPA would propose and promulgate revised nutrient criteria, EPA and the plaintiffs negotiated a settlement of the litigation. On August 25, 2009, EPA and plaintiffs jointly moved for entry of a consent decree ("Decree"). DE:90. In response, various defendant-intervenors –including the District, the Council, the Florida Agricultural Department, and others – submitted legal memoranda and written evidence, including declarations, mostly in opposition to the Decree. DE:97, 110, 113, 114, 115, 116; *see also* DE:111, 112, 113-1, 114-1 to 114-24, 115-1 to 115-8. The essence of intervenors' objections was that the Decree's deadlines were not long enough for development of scientifically defensible criteria. Some intervenors attempted to challenge the basis for EPA's determination that numeric criteria were necessary at all.

The court conducted an oral hearing concerning the proposed consent decree on November 16, 2009, (DE:140), allocating equal amounts of argument time – approximately one hour – to each side. DE:136. On December 30, 2009, the

district court granted the joint motion and entered the Decree. DE:152. Two intervenors – the Council and the Florida Agriculture Department – moved for reconsideration. The Council argued that EPA's obligations under the Consent Decree conflicted with those under a prior consent decree concerning the development of total maximum daily loads. The Agriculture Department argued that the statement in the court's order approving the consent decree that algal blooms were occurring in Florida waters lacked support.

The district court denied both motions. DE:160, 161. In denying the Council's motion, the court found that the Council should have raised the argument about conflicts earlier and therefore, reconsideration could be denied on procedural grounds alone. DE:161 at 2. Regardless, the court found no conflict between the two decrees. *Id.* at 3-4. The court also stated that the Council's arguments assumed the outcome of the rulemaking process, which is unknown. *Id.* at 4. Indeed, the court observed, the rulemaking process provides a way the Council might raise objections. *Id*. The court also denied the Agriculture Department's motion. DE:160. In rejecting the Department's assertions about algal blooms, the court cited a report by the Florida Department of Environmental Protection as factual support for the court's statements. *Id.* at 2. These appeals followed.

2. *Legal Background*

a. *Water Quality Standards*. – The Clean Water Act establishes a comprehensive program "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by reducing and eventually eliminating the discharge of pollutants into those waters. 33 U.S.C. 1251(a). As part of this program, the Act sets forth a framework for the establishment and review of state water quality standards. 33 U.S.C. 1313. These standards primarily consist of: (a) designated beneficial uses for waters (*e.g.*, water supply, recreation, fish propagation); (b) water quality criteria, which define the amounts of pollutants a waterway may contain without impairing its designated use; and (c) anti-degradation requirements, which allow the lowering of water quality in certain circumstances. 33 U.S.C. 1313(c)(2)(A); 40 C.F.R. 131.3(i), 131.6, 131.10-12; *see also Sierra Club v. Meiburg*, 296 F.3d 1021, 1025 (11th Cir. 2002). Water quality standards are not self-executing. Instead, permits issued for discharges of pollutants must include limitations to achieve the applicable standard for the receiving waterway. 33 U.S.C. 1311(b)(1)(C), 1342(a)(1).

The Act recognizes the "primary responsibilities and rights" of States to prevent water pollution. 33 U.S.C. 1251(b). Accordingly, the Act gives the States primary authority to set water quality standards. EPA's role is largely one of oversight, in which it reviews a State's revised standards, which States submit to

EPA. 33 U.S.C. 1313(c). States must review their standards and modify them, as appropriate, every three years. 33 U.S.C. 1313(c)(1). States must submit their proposed standards for EPA's review. *See* 33 U.S.C. 1313(c)(3). Upon EPA's approval, the State's standards become effective under the Act. 40 C.F.R. 131.21(c).

EPA may also promulgate standards for a State *sua sponte*. 33 U.S.C. 1313(c)(4)(B); *see Nat'l Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1130 (D.C. Cir. 1997). EPA may only exercise that authority, however, where it has first determined that new or revised standards are necessary to meet the requirements of the Act. 33 U.S.C. 1313(c)(4)(B). Upon making such a determination, EPA must "promptly" publish proposed regulations setting forth a revised water quality standard for the navigable waters involved. *Id.* Within 90 days after the proposed standard is published, EPA must promulgate a final standard, unless the State adopts its own revised standard, approved by EPA, first. *Id.*

b. *TMDLs*. – Where a waterway is not meeting water quality standards, it must be placed on a list of all such water bodies in the State, and the list submitted to EPA every two years. 33 U.S.C. 1313(d)(1); s*ee Sierra Club v. Leavitt*, 488 F.3d 904, 907-08 (11th Cir. 2007). For each impaired waterway, the State must calculate a total maximum daily load ("TMDL"). If EPA disapproves a

TMDL, EPA must develop its own TMDL. Some courts have found that if a State fails to submit TMDLs, EPA must develop them. *See Meiburg*, 296 F.3d at 1026.

TMDLs are developed to establish the maximum amount of a particular pollutant that a waterway[1] may handle while still meeting water quality standards. *See* 40 C.F.R. 130.2(f). This loading capacity includes the sum of all point source discharges – such as those regulated through individual permits – and the sum of all nonpoint source discharges such as agricultural runoff or naturally delivered loads, as well as a margin of safety. *See* 33 U.S.C. 1313(d)(1)(C); *see also* 40 C.F.R. 130.2(g), (h), (i). Where the water quality standard is in narrative form – as under Florida's existing nutrient standard – the standard must first be translated into a numeric target before a loading capacity can be calculated. DE:54-3 at 4.

TMDLs are not self-implementing. *See Meiburg*, 296 F.3d at 1026. Rather, they are used to inform the discharge limits imposed through individual permits. *See id*.; *see also In re City of Moscow, Idaho*, 10 E.A.D. 135, 146-47 (2001) (waste load allocations developed through TMDLs "are not permit limits *per se*; rather they still require translation into permit limits."). As for non-point source discharges, the Act generally leaves TMDL implementation to the states, which must incorporate TMDLs into various plans which are submitted to EPA for

[1] Although this brief uses the term "waterway" for easy reference, TMDLs are prepared only for the segment of the waterway actually impaired. *See* 40 C.F.R. 130.2(j).

approval. *Meiburg*, 296 F.3d at 1026; *see* 33 U.S.C. 1329(a), (b), 1313(e). Once the programs are approved, EPA may approve monetary grants to help States implement their plans. *Id.* (citing 33 U.S.C. 1329(h)).

STATEMENT OF FACTS

1. *Current Florida Water Quality Standard*

Presently, Florida has a narrative water quality standard for nutrients (*e.g.*, phosphorous and nitrogen). The standard provides, in relevant part: "In no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna." Fla. Admin. Code Ann. r. 62-302.530(47)(b). Additionally, Florida has adopted a numeric phosphorus criterion for the Everglades Protection Area. *See* Fla. Admin. Code Ann. r. 62-302.540(4)(a).

2. *January 14, 2009 Determination*

On January 14, 2009, EPA sent a letter to Florida's Department of Environmental Protection in which EPA determined, pursuant to 33 U.S.C. 1313(c)(4)(B), that revised water quality standards for nutrients are necessary to meet the Clean Water Act's requirements of protecting designated beneficial uses for Florida waters. DE:55-6 at 1. The determination explained that nutrient over-enrichment is a significant problem in Florida and that despite the State's best

efforts, many waters remain impaired for nutrients. *See id.* at 6.[2] The determination explained that in setting measurable quantitative goals, numeric criteria will make various regulatory processes – the point source discharge permitting program and the development of TMDLs – more efficient. *See id.* at 4. Currently, in developing permit limits and TMDLs, the State's narrative nutrient standard must be translated into a quantitative target through a resource-intensive, site-specific process. *See id*. Numeric criteria will save time in the permitting process and also allow the state to establish TMDLs more quickly. *See id*.

The January 2009 determination included a timeframe for EPA to propose and promulgate numeric nutrient criteria for Florida. It noted that the State had already made "significant progress" in gathering the necessary data for lakes and streams, and that the State expected to complete gathering and compiling that data by March 2009. *Id.* at 9. Another six months were needed, the determination noted, for EPA to analyze the data, and another four for documenting and assembling the analysis and administrative record for a proposed rule. *Id*. Because Florida was not as far along in compiling or assessing the adequacy of the data for

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[2] When waters have too high a concentration of nutrients, conditions become right for excess algal growth, which can block light and deplete the water of dissolved oxygen needed by aquatic life. *Id.* at 6, 7. That is especially problematic for Florida's coral reefs and natural springs, where inhabiting organisms need light and oxygen. *Id.* at 7. As the determination noted, Florida has documented recurrent algal blooms that continue to pose threats to drinking water and recreation. *Id.* at 6.

coastal waters and estuaries, EPA estimated that 12-24 months would be needed to develop criteria for those waters. *See id*. In conclusion, EPA stated that it expected to propose numeric nutrient criteria within 12 months for lakes and streams, and 24 months for estuaries and coastal waters. *Id*.

3. *The 2009 Consent Decree*

The consent decree contains deadlines for proposing and adopting numeric criteria for Florida waters on two tracks – one for lakes and flowing waters, and a separate set of deadlines for coastal and estuarine waters. First, EPA was required by January 14, 2010, to propose regulations containing numeric water quality criteria for lakes and flowing waters in Florida. DE:153 at 4 (¶4).[3] EPA would have been absolved of that obligation had Florida submitted and EPA approved revised water quality standards. *Id.* (¶5). By October 15, 2010, the agreement requires EPA to sign a final rule addressing the matter, unless EPA has already approved standards submitted by Florida. *Id.* at 4-5 (¶¶6, 7).

The agreement provides a similar set of deadlines concerning Florida's coastal and estuarine waters – *i.e.*, a proposed rule for such waters by January 14, 2011, and a final rule by October 15, 2011. *See id.* at 5-6 (¶¶ 8, 10). As with lakes

[3] EPA's proposed water quality standards were published in late January 2010. 75 Fed. Reg. 4174 (Jan. 26, 2010). Public comments were accepted for 90 days. *See* 75 Fed. Reg. 11079 (March 10, 2010).

and flowing waters, the deadlines for coastal and estuarine waters do not apply if EPA first approves standards submitted by Florida. *See id.* (¶¶ 9, 11).

The district court expressly retains jurisdiction to resolve disputes arising under the Decree. The Decree also specifies procedures for extending deadlines. EPA and the plaintiffs may extend the deadlines by written agreement and upon notice to the court, but without prior court approval. *Id.* at 9 (¶ 22). EPA may also move for an extension over plaintiffs' objection – once for each deadline. The Decree allows automatic extension of the deadlines under certain conditions and upon EPA's request while an opposed extension request is pending before the court. *See id.* at 9-10 (¶¶22(A), (B)).[4] The Decree terminates once EPA's obligations are completed and the plaintiffs' fee claims resolved. *Id.* at 8 (¶ 18).

STANDARD OF REVIEW

1. *Standing*. – Prior to considering the merits, this Court must satisfy itself that appellants have standing. *See Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 807 n.9 (11th Cir. 1993); *see also Church of Scientology Flag Service Org., Inc. v. City of Clearwater*, 777 F.2d 598, 606 (11th

[4] Recently, EPA and the plaintiffs stipulated to an extension until November 14, 2011 for issuing a proposed rule on coastal and estuarine waters. DE:184 at 3. They also stipulated to an extension until August 15, 2012 for issuing a final rule on that same topic, and for a final rule for flowing waters in South Florida, including canals. *Id.* The extensions were necessary to allow peer review by EPA's Science Advisory Board of the methodologies, analyses, and data supporting the rulemakings. *See id.* at 1.

Cir. 1985). Standing is considered *de novo*. *Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1275 (11th Cir. 2000); *see also AT&T Mobility, LLC v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 494 F.3d 1356, 1360 (11th Cir. 2007).

2. *Entry of Consent Decree*. – A district court's decision to approve a consent decree is reviewed for abuse of discretion. *Brooks v. Ga. Bd. of Elections*, 59 F.3d 1114, 1119 (11th Cir. 1995). "District courts should approve consent decrees so long as they are not unconstitutional, unlawful, unreasonable, or contrary to public policy." *Stovall v. City of Cocoa, Fla.*, 117 F.3d 1238, 1240 (11th Cir. 1997) (*citing Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977));[5] *see Howard v. McLucas*, 871 F.2d 1000, 1008 (11th Cir. 1989) (district courts should determine whether consent decree "represent[s] a reasonable factual and legal determination based on the record, and ensure that it [does] not violate federal law").

A district court's approval of a consent decree in a case like this is reviewed with "twofold deference." *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 118 (2d Cir. 1992). First, there is a strong presumption in favor of voluntary settlements. *Fla. Trailer & Equip. Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). Accordingly, deciding if a consent decree is fair is within the sound discretion of

[5] This Court is bound by cases decided by the former Fifth Circuit before October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

district courts and is reversible only upon a clear showing of abuse of that discretion. *Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984).

Additional deference is provided because the Decree was negotiated on behalf of EPA, a federal agency with "substantial expertise in the environmental field." *United States v. Akzo Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991) (citing *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990)). Because EPA administers the Clean Water Act, its assessment that the Decree would further the Act's purpose receives deference. *Cuyahoga*, 980 F.2d at 118. This "doubly required deference" – district court to agency and appellate court to district court – places a "heavy burden" on those challenging consent decrees. *Cannons*, 899 F.2d at 84.

3. *Evidentiary Hearing*. – A district court's decision not to hold an evidentiary hearing before entering a consent decree is reviewed for abuse of discretion. *United States v. Metro. St. Louis Sewer Dist.*, 952 F.2d 1040, 1044 (8th Cir. 1992). *Cf. Loyd v. Ala. Dep't of Corrs.*, 176 F.3d 1336, 1339 (11th Cir. 1999) (reviewing decision not to hold evidentiary hearing before terminating consent decree); *Murchison v. Grand Cypress Hotel Corp.*, 13 F.3d 1483, 1485 (11th Cir. 1994) (same for enforcing settlement agreement). Proponents of an evidentiary hearing bear the burden "to persuade the court that one is desirable and to offer reasons warranting it." *Cannons*, 899 F.2d at 94.

SUMMARY OF ARGUMENT

Intervenors lack standing to appeal. They seek to challenge a consent decree that establishes a schedule under which EPA will promulgate numeric water quality criteria for nutrients in Florida waters (unless the State does so first, with EPA's approval). However, the only alleged injuries about which they complain will not occur, if at all, at least until a final rule is issued, and possibly not until the criteria are actually applied to Intervenors through incorporation into their individual discharge permits. At that time, assuming they have a justiciable claim, Intervenors may bring suit raising the arguments they try to raise here – *e.g.*, whether the criteria conflict with existing TMDLs and whether the criteria for canals in South Florida are scientifically supported. At this time, however, what, if any, effect a future rule might have on Intervenors is entirely speculative. Intervenors fail to demonstrate the injury required for standing.

Intervenors lack standing for other reasons, too. Because the State could issue its own rule that would terminate EPA's duty to finalize the federal criteria, Intervenors cannot show that any future harm they might suffer is necessarily traceable to EPA. Nor have Intervenors demonstrated that their injuries would be redressed by a favorable decision. Absent the consent decree, the Act itself would still require EPA to propose and finalize federal criteria because of the January 2009 determination, which is not the proper subject of these appeals.

Even if Intervenors had standing, their claims fail on the merits. First, the challenged decree does not conflict with EPA's obligations to prepare TMDLs under a 1999 consent decree. Criteria and TMDLs are not equivalent. Criteria are developed for all navigable waters, whereas TMDLs are only developed once a waterway is identified as impaired. Intervenors' arguments would prevent development of criteria meant to protect water quality statewide in favor of waiting until specific waters are formally recognized as violating Florida's existing standards. That makes no sense and is at odds with the Act's purpose of restoring *and maintaining* water quality. Further, the deadlines in the Decree are reasonable. They resemble those that the State had proposed at the time, and they are more generous even than the deadlines available under the Act itself. Further, the Decree permits EPA to seek extensions, which EPA has now done for finalizing criteria for South Florida waters. The Decree already allowed considerable opportunity for public comments. The extension allows even more, plus the opportunity for scientific peer review.

Finally, Intervenors raise various procedural arguments – that they were either entitled to an evidentiary hearing, discovery, or an administrative record for the January 2009 determination. The district court did not abuse its discretion in choosing not to grant those requests. Intervenors all filed written memoranda in response to the proposed Decree, and most filed one or more declarations or

submitted other written evidence. Further, they presented oral argument on the proper procedures for approving the Decree, and also on their substantive challenge to the Decree itself. Finally, the District's argument that it was entitled to an administrative record for the January 2009 determination lacks merit. That determination was not at issue in the approval of the Decree. Nor is it final agency action that can be reviewed at this time under the Administrative Procedure Act ("APA"). Also, the District confuses the appropriate standards of review – the record rule only applies to review of the *merits* of a party's claims, and the District has brought no claim challenging the January 2009 finding. These appeals should be dismissed or, alternatively, the court's orders affirmed.

ARGUMENT

I. INTERVENORS HAVE NOT DEMONSTRATED THAT THEY HAVE STANDING TO APPEAL THE ENTRY OF THE CONSENT DECREE

A. Intervenors Have Not Demonstrated That The Decree Would Cause Them An Actual, Imminent Injury

In this Circuit, a litigant seeking to intervene in the district court need not demonstrate that it has Article III standing. *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). But where, as here, the original parties have settled the claims between them and the intervenors wish to challenge the settlement on appeal, intervenors must show that they have standing. *Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1336 (11th Cir. 2007) (citation omitted); *see also*

Diamond, 476 U.S. at 62. To establish standing, intervenors must demonstrate: (1) that they are "under threat of suffering 'injury in fact' that is concrete and particularized," and that the threat is "actual and imminent, not conjectural or hypothetical;" (2) that the injury is "fairly traceable" to the Decree; and (3) that it is "likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Is. Inst.*, 129 S. Ct. 1142, 1149 (2009) (citation omitted); *accord, Fla. Conference of NAACP v. Browning*, 522 F.3d 1153, 1159 (11th Cir. 2008).

None of those requirements is met here. First, Intervenors have not shown that they are injured by the consent decree. *Cf. Knight v. Ala.*, 14 F.3d 1534, 1556 (11th Cir. 1994) ("Only a litigant who is aggrieved *by the judgment or order* may appeal.") (quotations, citation omitted; emphasis added). The Decree here does not impose any requirements on Intervenors. *Cf. Sierra Club v. Babbitt*, 995 F.2d 571, 575 (5th Cir. 1993) ("On its face, the judgment orders nothing of the appellants."). Rather, it sets deadlines by which EPA will propose and promulgate rules for numeric nutrient water quality criteria in Florida unless the State first submits and obtains EPA approval of its own numeric criteria. The only obligations directly imposed by the Decree, then, fall upon EPA, not Intervenors. As explained below, Intervenors cannot demonstrate the requisite injury.

1. *The Council Has Not Demonstrated That The Decree Threatens Its Members With An Imminent, Concrete Injury*

The crux of the Council's challenge to the Decree is the claim that it allegedly conflicts with a prior decree from 1999 between environmental groups and EPA, which required EPA to establish TMDLs for certain water bodies in Florida by dates certain where the State does not. As a preliminary matter, the Council was not a party to the 1999 decree, so it does not have a protectable interest in enforcing that agreement. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975); *accord*, *Reynolds v. Butts*, 312 F.3d 1247, 1249 (11th Cir. 2002).[6]

Even if the Council were a party to the earlier decree, its alleged injury is speculative. For one, EPA might not issue a final rule at all, because Florida could submit its own numeric criteria to EPA. If that occurs and EPA does in fact approve Florida's proposed criteria, then Florida's criteria become effective. *See* 33 U.S.C. 1313(c)(4).[7] Both the Act and the Decree expressly recognize that EPA's responsibility to propose and finalize revised criteria is terminated if the

[6] Indeed, the 1999 Decree states that "Nothing in this Consent Decree shall be construed to make any other person or entity not executing this Consent Decree a third-party beneficiary to this Consent Decree." DE:36-1 at 20.

[7] Any such approval would be judicially reviewable. *See, e.g., Am. Wildlands v. Browner*, 260 F.3d 1192, 1197-99 (10th Cir. 2001).

State first adopts a revised standard that EPA approves. *Id.*; *see also* DE:153 at 4-6 (¶¶5, 7, 9, 11).

The Council contends that its members, who hold permits governing discharges to Florida waters, will be subject to regulatory uncertainty because they have invested in complying with existing permit limitations, which they fear will become obsolete when final criteria are promulgated. FWEA Br. at 19. But the Council has not identified any particular permits held by its members that will be impacted. *Cf. Summers*, 129 S. Ct. at 1150 (litigants failed to identify any application of the challenged rule "that threatens imminent and concrete harm to the interests of their members"). Nor could it, because as the district court recognized in its order denying the Council's motion for reconsideration, it is uncertain whether the revised criteria will require more stringent limitations on the Council's members than already exist. DE:161 at 3-4. The new criteria might even make exceptions for certain waterways if determined to be appropriate. *See id.* at 4. "Whether that will occur of course cannot be known at this time," but as the court explained, that "uncertainty shows the flaw in the Council's position." *Id.* For such reasons, it is speculative how, if at all, the final rule will impact individual waterways and the permits for discharging into them.

Even if the final rule eventually results in more stringent discharge limits, that might not occur immediately, because individual permits can last up to five

years. 40 C.F.R. 122.46(a). In any event, the Council will be able to seek review of the final rule at a future date. *Cf. Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 734 (1998) (litigant "will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain.").[8] Plus, the Council's members have recourse under state law for challenging any limitations imposed through future permits. *See* Fla. Stat. Ann. 120.569, 120.68; Fla. Admin. Code Ann. r. 62-4.150; *see also District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980) (state courts are proper forums for challenging state discharge permits). For now, though, any potential injury is too speculative to support standing.

Nor may the Council rely upon the theory that it is injured because the Decree implicitly limits EPA's consideration of public comments. FWEA Br. at 24-25. As the Supreme Court recently reiterated, a procedural right by itself cannot be the basis for a litigant's standing. *See Summers*, 129 S. Ct. at 1151. Further, the Council is wrong that the Decree limits the opportunity for public comment. The schedule in the Decree is longer than what ordinarily would be required by the Act itself. The Decree gives EPA nine months from the time it proposes the numeric nutrient water criteria to issue a final rule. *See* DE:153 at 4-6

[8] *Ohio Forestry* concerned ripeness, which is closely related to the requirement for standing that an alleged injury must be "imminent." *See Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006).

(¶¶ 4, 6, 8, 10). It also allows EPA to obtain extensions – either automatically with the plaintiffs' consent or, if plaintiffs object, then with the district court's approval. *See id.* at 9-10. Accordingly, the Decree can and does accommodate a longer public comment period than would ordinarily be required.

Although the Council argues that the Decree unlawfully constrains EPA's discretion by requiring it to finalize a rule (rather than decide to abandon the rulemaking process) (FWEA Br. at 25), that is not an injury that is caused by the Decree. If the Decree had not been entered, the January 2009 determination would still have triggered a requirement that EPA "promptly" publish proposed regulations. 33 U.S.C. 1313(c)(4)(B). And once EPA issues a proposed rule, the agency ordinarily would have a non-discretionary obligation to issue a final rule 90 days later (unless the State acts first). *See* 33 U.S.C. 1313(c)(4).[9] The obligation to take final rulemaking action comes from the statute itself, not just the Decree.

The Council argues that its members will suffer uncertainty because they have invested in complying with existing TMDLs, which they fear may become obsolete when numeric criteria are promulgated. FWEA Br. at 19. Under the Act, however, the Council cannot reasonably expect water quality standards always to

[9] Although the period of time provided in the Decree is longer than the 90 days contemplated by the Act, 33 U.S.C. 1313(c)(4), EPA is not precluded from acting beyond the deadline. *See Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1278 n.3 (5th Cir. 1980).

remain the same. States must review their standards every three years and modify them or adopt new standards "as appropriate." 33 U.S.C. 1313(c)(1). And although the Council's concern could be made about *any* proposed rulemaking, litigants must wait until there is a "direct and immediate" rather than a "distant and speculative" impact on them for their claim of injury to be justiciable. *See Kennecott Utah Copper Corp. v. Dep't of Interior*, 88 F.3d 1191, 1207 (D.C. Cir. 1996); *see also Fla. Power & Light Co. v. EPA*, 145 F.3d 1414, 1420-21 (D.C. Cir. 1998) (finding unripe a challenge to a preamble accompanying a proposed rule). At this juncture, any alleged harm to the Council is too speculative to demonstrate standing.[10]

2. *The District Has Not Demonstrated That The Decree Threatens It With An Imminent, Concrete Injury*

The District's lack of injury is even more apparent, as it *did not even oppose* the entry of the consent decree in the district court. Although the District filed various papers that it termed a "response" to the motion for entry of the Decree,[11] the District stated that it "neither supports nor opposes the proposed Consent

[10] *Northeastern Florida Contractors v. City of Jacksonville*, 508 U.S. 656 (1993), cited by the Council (Br. at xi), is inapposite. The injury at issue there concerned the denial of equal treatment resulting from a local ordinance requiring a percentage of city contracts to be set aside for minorities. *See id.* at 666. No comparable facts are present here.

[11] Unlike the Council, the District captioned its district court papers as a "response," instead of an "opposition" to the consent decree. *Compare* DE:97 *and* DE:114 *with* DE:110.

Decree." DE:114 at 5. *Cf.* Dist. Br. at 41 (stating that the District and other intervenors "filed their documents opposing the Consent Decree"). The District also said that it "cannot determine, at this time, whether the proposed Consent Decree, and its timeframes, are unlawful, unreasonable or inequitable," and that accordingly, it "must take a 'wait and see' posture." DE:114 at 5.[12]

Unlike the Council, the District has expressed support throughout this litigation for the development of numeric criteria. For example, in responding to the motion for entry of the Decree, the District stated that it "appreciates the importance of numeric nutrient criteria, and supports their development *throughout the State of Florida* as consistent with the public interest." DE:97 at 2 (emphasis added). The District repeated its support in a supplemental memorandum, stating that it "stands ready" to share its expertise in developing numeric criteria. DE:114 at 2; *see also* DE:114-1 at 1. The District even submitted a declaration from its Senior Technical Program Specialist, who agreed that EPA "has established an adequate foundation from which numeric nutrient criteria for freshwater lakes and some freshwater flowing waters within the state of Florida can be developed." *Id.* at 7 (¶23). And in its appellate brief, the District says it "supports the development of new criteria, using sound science." Dist. Br. at 8; *see also id.* at 9.

[12] Similarly, three other water management districts, appearing as *amici*, stated that they "neither support nor oppose the entry of the Consent Decree." DE:125 at 2.

The District's only substantive objection to the Decree on appeal is that the Decree's deadlines are too short to allow development of scientifically supportable criteria for canals in South Florida. *See* Dist. Br. at 28-37. But the District cannot show it is injured by the Decree for the same reasons applicable to the Council, discussed *supra*. Additionally, EPA and the plaintiffs have agreed to extend until August 2012 the deadline for finalizing criteria for flowing waters (including canals) in South Florida. DE:184 at 3. The extension will allow EPA to solicit additional public comments on those criteria and to submit the underlying methodologies and data for those criteria for peer review by EPA's Science Advisory Board. *Id.* at 1-2. The District's argument that the Decree does not allow for enough time to develop criteria for South Florida canals falls flat.

The District was highly equivocal on whether it believed the timelines in the Decree could be met. For instance, the District's technical specialist stated only that it was "unclear and debatable" whether the timelines could be achieved, and suggested that the timelines "may prove too ambitious," not that they certainly would. DE:114-1 at 8 (¶26); *see also* Dist. Br. at 41 (arguing that the Decree "may" change the regulatory landscape). That is hardly proof that the consent decree threatens the District with an injury that is "actual and imminent, not conjectural or hypothetical." *Summers*, 129 S. Ct. at 1149.

The District argues that the Decree deprives it of state administrative procedures, which the District argues are more protective than a federal rulemaking. Dist. Br. at 42-43. Even assuming *arguendo* that the District's comparison of state and federal administrative procedures were correct,[13] the Decree does not prevent a state rulemaking. Indeed, the Decree provides, as does Section 1313(c)(4) itself, that the State may still propose and promulgate its own numeric nutrient criteria, which, if approved by EPA before the deadlines, would terminate EPA's obligation to finalize the federal rule.[14] Even after EPA promulgates criteria, the State may still develop substitute criteria, subject to EPA approval. *See* 33 U.S.C. 1313(c)(1), (3). And if EPA approved the State's substitute criteria, EPA would proceed to withdraw the federal rule as no longer necessary.

Although the District protests that the timeframes do not realistically give the Florida Department of Environmental Protection enough time to issue its own rule, the Department did not intervene or object to the Decree. And while the

[13] Unlike a state rule, a federal rule would be reviewable by lifetime-tenured, Article III judges, with all the protections afforded by such a forum.

[14] This Court's decision in *United States v. South Florida Water Management District*, 922 F.2d 704 (11th Cir. 1991) is not to the contrary. There, intervenors' ability to participate in state administrative proceedings was impacted when the United States asked a federal court – rather than an agency – to translate narrative standards into numeric criteria. Here, by contrast, the rulemaking remains in the hands of an expert agency and subject to an open, public process.

Florida Attorney General could represent the State's interests as a whole, he has not entered an appearance, either. *See Thompson v. Wainwright*, 714 F.2d 1495, 1501 (11th Cir. 1983). *Cf. Kirchhoff v. S. Fla. Water Mgmt. Dist.*, 805 So.2d 848 (Fla. App. 2d Dist. 2001) (attorney general representing the District). Consequently, the District cannot base its standing on the interests of the Department or the State more broadly. *See Granite State Outdoor Advertising, Inc. v. City of Clearwater*, 351 F.3d 1112, 1116 (11th Cir. 2003); *see also Warth v. Seldin*, 422 U.S. 490, 499 (1975).

Further, the Decree allows EPA to seek extensions of time. *See* DE:153 at 9-10. Where the plaintiffs agree in writing, the extension is automatic upon notice to the district court. *Id.* EPA has already obtained one such extension, which specifically allows an extra 22 months for EPA to develop criteria for South Florida canals. DE:184 at 3. The Department's ability to issue its own rule has hardly been eliminated.

Finally, the District argues that it would be injured by the court's statement that nothing in the record casts doubt upon EPA's determination that Florida's waters have suffered nutrient pollution. Br. at 44. But even striking that statement would not undermine the court's authority to enter the Decree. Plus, the District admits that statement is true for some waters. *Id.* The statement was made in the context of reviewing the reasonableness of the Decree, not in actually adjudicating

whether all Florida's waters contain nutrient pollution. *Cf.* DE:153 at 11 (noting that the record did not actually resolve whether Florida's nutrient standard was adequate). The court's statement cannot reasonably be understood to apply to all waters throughout the State or to cause any injury to the District.

* * *

Absent a concrete dispute about how a particular permit would be affected by the numeric criteria, Intervenors lack standing, and they must wait at least until EPA issues a final rule – perhaps until their permits are modified – to have the concrete injury necessary to support their claimed injury.

B. Intervenors' Purported Injuries Will Only Result, If At All, From A Final Rule, Not From The Ongoing Rulemaking Process Required by the Consent Decree

Intervenors do not meet the second requirement for standing, because they have not shown that their alleged injuries are fairly traceable to the challenged consent decree. As already explained, Intervenors' alleged injuries stem from their expectation that, eventually, EPA will promulgate one or more final rules concerning numeric nutrient criteria, and that those criteria will eventually be translated into effluent limitations for permits which they or their members hold. But as the district court recognized, that wrongly assumes the outcome of the rulemaking process. DE:152 at 13-14; DE:161 at 4. Those alleged injuries would not occur, if at all, until after a final rule is issued, and possibly not until

Intervenors' permits are actually modified. Also, the State could issue an intervening rule, which would necessarily prevent EPA from being the cause of any injury. *See* DE:153 at 4-6 (¶¶5, 7, 9, 11). Intervenors cannot show that the alleged injury will be caused by the challenged Decree, or by EPA at all.

C. The Alleged Harm About Which Intervenors Complain Would Not Be Redressed By A Favorable Judicial Decision

The harm that the Intervenors allege stems from the Decree would not be redressed by a favorable decision on appeal. EPA's only real obligation under the Decree is to comply with deadlines for proposing and promulgating rules concerning numeric nutrient water quality criteria, unless the State does so first and EPA approves the State's submission. Even if the Decree were set aside, however, EPA would have a statutory duty to perform the same tasks. *See* 33 U.S.C. 1313(c)(4)(B). That responsibility was triggered by EPA's January 2009 determination, which pre-dates the challenged Decree. EPA has now published a proposed rule concerning numeric nutrient criteria for flowing waters in Florida. Even if the schedule in the Decree for promulgating that rule (and proposing and promulgating rules for other waterways) were set aside, EPA's duty to continue its rulemaking, based on the January 2009 determination, would remain.

Although Intervenors try to challenge the January 2009 determination, that issue is not properly before the Court. The District has not filed suit or brought a cross-claim against EPA attempting to challenge the determination. Although the

Council did bring a cross-claim, it is still pending in the district court, as are two other lawsuits – one by the Council and one by an electrical power association – also attempting to challenge the determination.[15] Absent a final order adjudicating these pending claims, the Court should not entertain a challenge to the January 2009 determination. *See Corey Airport Servs., Inc. v. Decosta*, 587 F.3d 1280, 1284 (11th Cir. 2009) (claims still pending in the district court "are not before us on appeal"); *Wascura v. Carver*, 169 F.3d 683, 684 n.1 (11th Cir. 1999) (stating such claims are "not at issue"). And without such a challenge properly before this Court, Intervenors' alleged injuries are not redressible through this appeal. *Cf. KH Outdoor, L.L.C. v. Clay County*, 482 F.3d 1299, 1303-1304 (11th Cir. 2007) (no standing where application denied based on challenged regulation would also be denied based on regulations not challenged in suit).[16]

[15] *See Fla. Elec. Power Coordinating Group, Inc. v. Jackson*, Civ. No. 09-436-RH-WCS (N.D. Fla. filed Nov. 9, 2009); *Fla. Water Envtl. Ass'n Util. Council, Inc. v. Jackson*, Civ. No. 09-428-RH-WCS (N.D. Fla. filed Nov. 4, 2009).

[16] As explained *infra* at Part III.A, the January 2009 determination is not challengeable because it is not "final agency action" under the APA.

II. ASSUMING ARGUENDO THAT INTERVENORS HAVE STANDING, THEIR CHALLENGES TO THE SUBSTANTIVE REASONABLENESS OF THE CONSENT DECREE MUST FAIL

A. The Court Did Not Abuse Its Discretion In Rejecting The Council's Arguments Concerning The 1999 Consent Decree

1. *The District Court Did Not Abuse Its Discretion In Finding That The Council Was Procedurally Barred From Raising Its Argument About the 1999 Decree*

The Council asserts that the Decree conflicts with a consent decree from 1999 in a separate case, to which the Council was not a party. But the Council never made that argument prior to the entry of the Decree. Instead, the argument was presented for the first time in the Council's Rule 59(e) motion for reconsideration. DE:159 at 2-4. The Council is therefore limited to challenging the denial of its reconsideration motion, which is reviewed for abuse of discretion. *Sanderlin v. Seminole Tribe of Fla*., 243 F.3d 1282, 1292 (11th Cir. 2001).

The district court did not abuse its discretion in determining that the Council was procedurally barred from raising an argument about the 1999 Decree because it could have raised it earlier but failed to do so. Reconsideration motions cannot be used to "raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Village of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005). That prohibition includes arguments that were "previously available, but not pressed." *Stone v. Wall*, 135 F.3d 1438, 1442 (11th Cir. 1998).

The Council's memorandum opposing entry of the Decree raised three basic arguments, *i.e.*, that no scientific methodology existed that would allow completion of the rulemaking in the timelines proposed (DE:110 at 2-6); that the Decree foreclosed meaningful public comment (*id.* at 6-8); and that the January 2009 determination was flawed. *Id.* at 9-16. The memorandum barely mentioned TMDLs and nowhere mentioned a possible conflict with the 1999 decree.

The Council cobbles together passages from its intervention papers and other intervenors' memoranda mentioning TMDLs generally and argues, based on those scattered references, that the "2009 decree's impact on Florida's TMDL program" was before the court. *Id.* at 22. Those references, however, are too general to have provided notice that the Council believed the 1999 and 2009 decrees conflicted. Yet the Council had access to the 1999 decree because, as it concedes, the decree was attached to the District's intervention motion. *Id.* at 21 (citing DE:36-1). Because the argument was "previously available, but not pressed," the district court did not abuse its discretion in denying reconsideration. *Stone*, 135 F.3d at 1442.

The Council argues that this Court may consider the effect of the 1999 Decree because it is a "question of law." FWEA Br. at 20. But that is a reason why an appellate court might reach an issue that was otherwise waived *entirely*, not a reason why a district court abuses its discretion in denying a reconsideration

motion.[17] The more appropriate question is not whether "the issue is preserved for appeal," (FWEA Br. at 20), but whether the district court abused its discretion in finding that the Council had not exercised due diligence in bringing the argument to the court's attention before it entered the Decree. *Cf. Am. Home Assur. Co. v. Glenn Estess & Assocs., Inc.*, 763 F.2d 1237, 1239 (11th Cir. 1985) (allowing a litigant to raise new arguments on a Rule 59(e) motion "essentially affords a litigant 'two bites at the apple.'") (citation omitted).

As the district court noted (DN:161 at 2), the Council's case for overlooking the procedural default was particularly weak given that the district court developed a schedule – with input from the Council – for allowing Intervenors to respond to the motion for entry of the Decree, including a significant amount of time to present oral argument. Also, as the court observed (*id.*), the Council knew about the litigation but chose not to intervene until after the Decree was proposed. Those factors demonstrate there was no abuse of discretion. *See Am. Home Assur. Co.*, 763 F.2d at 1238-39.[18]

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[17] Even for the waiver rule, parties must show not only that the question at issue is purely legal, but that failure to consider it "would result in a miscarriage of justice." *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir. 1982). The Council never makes that argument.

[18] In a footnote, the Council mentions that the district court admonished the intervenors to avoid duplicative arguments. FWEA Br. at 21 n.5. But given that none of the other intervenors raised the conflict with the 1999 decree, that argument is unpersuasive. *Cf. O'Neal v. Kennamer*, 958 F.2d 1044, 1047 (11th

2. *The District Court Did Not Abuse Its Discretion In Concluding That The Two Decrees Do Not Conflict*

In any event, the district court reviewed the 1999 decree and concluded there was no conflict with the 2009 Decree. DE:161 at 3. That conclusion was not an abuse of discretion and is an independent basis for rejecting the Council's arguments concerning the two decrees. The 1999 decree requires EPA to establish *TMDLs* for waters on the State's 1998 list of *impaired* waters where the State fails to do so by dates certain. The 2009 decree requires EPA to establish *water quality criteria* for nutrients in *all* of Florida's navigable waters where the State fails to do so by dates certain. Contrary to the Council's argument, EPA's obligations under the two decrees do not conflict.

The Council argues there is a conflict because the 2009 Decree requires EPA to promulgate numeric nutrient criteria for some waterways for which EPA has already approved TMDLs. *See* FWEA Br. at 16-17. But that wrongly equates water quality criteria with TMDLs. The two are not equivalent, even when both are in numeric form. Criteria are one component of the State's water quality standards, which are developed for *all* navigable waters in a State. *See* 33 U.S.C. 1313(c)(2)(A); *see also Meiburg*, 296 F.3d at 1025.

Cir. 1992) (denial of reconsideration is "especially soundly exercised" when litigant fails to provide a reason for not raising its argument at an earlier stage) (quotations, citation omitted).

When criteria are met, water quality "will generally protect the designated use." 40 C.F.R. 131.3(b). Criteria may be established either in numeric or narrative form. *See EDF, Inc. v. Costle*, 657 F.2d 275, 288 (D.C. Cir. 1981). EPA's regulations express a preference for numeric criteria where they are available. *See* 40 C.F.R. 131.11(b)(2) (stating that narrative standards may be developed "where numerical criteria cannot be established or to supplement numerical criteria"). Only where a waterway is not meeting water quality standards must a TMDL be prepared. *See* 33 U.S.C. 1313(d)(1)(A), (C).

The Council's argument that the challenged decree grants relief that is "equivalent" to the 1999 decree thus misapprehends the functional difference between water quality criteria and TMDLs. FWEA Br. at 19. The former are designed to protect the State's waters from becoming impaired, whereas the latter only become relevant once specific water bodies already *are* impaired. The Council's argument would require EPA to wait until waters are impaired before figuring out the numeric target necessary to meet the State standards. Congress passed the Act not only to "restore" the integrity of the nation's waters, but also to "maintain" it. 33 U.S.C. 1251. The Council's argument ignores the latter purpose.

The Council's argument also wrongly implies that having new numeric criteria will immediately affect the permitted discharges by the Council's members. As a preliminary matter, there is no reasonable expectation that water

quality standards will always remain the same, as the Council implies. *See* Br. at 20. The Act contemplates that States will review their standards at least every three years and will modify them or adopt new standards "as appropriate." 33 U.S.C. 1313(c)(1). And the Decree by itself does not immediately withdraw the existing State standards, which remain in place until the final rule is actually issued. *See* 40 C.F.R. 131.21(e).

Second, as the district court observed, the content of the final nutrient rule remains speculative. DE:161 at 4. In some cases, the new criteria may be very close to the same range as those numeric targets that have already been translated from Florida's existing standards. Even where it is not the same, whether the effluent limitation in a particular permit will change may remain uncertain until the permit is revised, which ordinarily occurs every five years. That does not make the two decrees "logically" inconsistent (FWEA Br. at 17), nor does it demonstrate any "immediate conflict." *Id.* at 19.

The Council argues that because the Decree expressly exempts certain water bodies from the need for numeric nutrient criteria, EPA cannot make a similar exemption for waters already having TMDLs. FWEA Br. at 16-17 But as the district court recognized (DE:161 at 4), just because water bodies with TMDLs are not exempted under the 2009 Decree does not mean EPA cannot issue site-specific criteria that are equivalent to the numeric targets already calculated in the TMDLs

for those waters. Indeed, EPA's proposed rule for flowing waters allows for the State to submit to EPA site-specific alternative criteria, which EPA could apply instead of the generally applicable criteria if the alternative criteria show that a site would otherwise be protected. *See* 75 Fed. Reg. at 4217-18, 4226. Thus, the Council's implication that EPA's standards would necessarily be "less precise" than the numeric targets developed through the TMDL process (FWEA Br. at 19) is incorrect.

Even if TMDLs need to be revised after the revised standards are promulgated, the discharge permits do not automatically become invalid. The effluent limitations in permits must be consistent with the "assumptions and requirements" of any EPA-approved, available wasteload allocation for that discharge. 40 C.F.R. 122.44(d)(1)(vii)(B).[19] Because the wasteload allocation is a particular *share* of the loading capacity, it is based upon assumptions about the relative loads that may be fairly apportioned to the different point and nonpoint sources discharging to the waterway. Those assumptions about the *relative* share of the load do not become obsolete just because the *absolute* loading capacity may

[19] "Wasteload allocation" means the portion of the loading capacity attributable to each point source discharging into the waterway. 40 C.F.R. 130.2(h). TMDLs include the sum of all the wasteload allocations associated with the waterway at issue. 40 C.F.R. 130.2(i). TMDLs also include "load allocations" (*i.e.*, the portion of the load capacity attributable to nonpoint source runoff) and account for a margin of safety and seasonal variation. *See id.*; 40 C.F.R. 130.7(c)(1).

change. Even if the criteria become more stringent for a particular waterway, permits, which would need limits as stringent as necessary to meet the new criteria, could still be developed consistent with the "assumptions" and relative "requirements" of the wasteload allocation for existing TMDLs without requiring the TMDLs' immediate revision.

Contrary to the Council's argument (Br. at 19-20), the fact that EPA sought to stay litigation challenging an EPA-approved nutrient TMDL for Lake Okeechobee tributaries is not a tacit acknowledgment that the decrees conflict. Rather, EPA and the plaintiffs in that case recognized that it is possible – but not certain – that numeric criteria would be more stringent than the TMDL's numeric targets (based on interpreting the State's narrative standard) for a given waterway. Litigating the scientific interpretation of a narrative standard is particularly complicated and something that numeric criteria would help avoid. *See* DE:55-6 at 4. The parties therefore reasonably decided to conserve their resources until determining the effect of the final rule.[20] Had the parties believed that there was no potential need to litigate the TMDL, they would have sought dismissal rather than

[20] EPA might seek extensions of deadlines under the 1999 decree in order to use its resources more efficiently in preparing the TMDLs. Indeed, one of the reasons for the January 2009 determination was that establishing numeric criteria would enable TMDLs to be established "in a more timely manner." DE:55-6 at 4.

a stay. In sum, the Council fails to demonstrate that the district court abused its discretion in concluding the two decrees do not conflict.

B. The District Court Did Not Abuse Its Discretion In Concluding That The Timelines In The Consent Decree Were Reasonable

1. *The Decree Does Not Limit EPA's Ability To Meaningfully Consider Public Comments*

Intervenors argue that the Decree limits the opportunity for public comment. FWEA Br. at 24-25; Dist. Br. at 20, 44. They are wrong. Even without any extensions, the schedule in the Decree is *longer* than what would be required by the Act itself. The Decree gave EPA a year after issuing the January 2009 determination to propose criteria for lakes and flowing waters, and a full *two* years after the January 2009 determination to propose criteria for coastal and estuarine waters. DE:153 at 4-5 (¶¶4, 8). While the statute simply requires criteria to be promulgated "promptly," Intervenors cannot reasonably argue that a time period of one or two years is an unreasonable interpretation of that statutory term (which, after all, EPA receives deference in interpreting). 33 U.S.C. 1313(c)(4)(B); *see Am. Petroleum Inst. v. EPA*, 661 F.2d 340, 348 (5th Cir. 1981). As the District conceded at argument before entry of the Decree, "the definition of 'promptly' can be defined by the agency." DE:142 at 72.

The Decree gives EPA nine months from the time it proposes the numeric nutrient water criteria to issue a final rule. *See* DE:153 at 4-6 (¶¶ 4, 6, 8, 10). Had

the Decree not been entered, EPA would have had a non-discretionary obligation to issue a final rule 90 days after proposing the criteria (unless the State acts first). *See* 33 U.S.C. 1313(c)(4). Because the Decree provides more time than the Act, there is an opportunity for a longer public comment period. In fact, EPA allowed 90 days of public comments on the proposed rule for lakes and flowing waters. *See* 75 Fed. Reg. at 11079.

The Decree also allows EPA to obtain extensions – either automatically with the plaintiffs' consent or, if plaintiffs object, then with the district court's approval. DE:153 at 9-10. Indeed, EPA has already obtained one such extension to allow an additional 22 months for finalizing criteria for South Florida flowing waters, and an additional 10 months for proposing and finalizing criteria for coastal and estuarine waters. DE:184 at 3. The extension will allow for EPA to solicit additional public comments and for EPA's Science Advisory Board to conduct peer review of the methodologies and analyses that underlie the criteria. *Id.* at 1-3.

The Council, citing *NRDC v. Whitman*, 2001 WL 1221774 (N.D. Cal. 2001), argues that EPA unlawfully relinquished its discretion by agreeing to finalize a rule by a date certain. FWEA Br. at 25. But *NRDC* does not say that is necessarily true. Also important to the *NRDC* court was the fact that the decree did not bind future administrations. 2001 WL 1221774, at *9. Even with recent extensions, the latest deadlines here are in August 2012, five months before the end of the current

Administration. And regardless, once EPA made the January 2009 determination, its responsibility to propose and finalize a rule (absent the State doing so first) was non-discretionary. The Council's arguments to the contrary lack merit.

2. *The Timelines in the Decree Do Not Preclude Establishment of Defensible Criteria for Canals*

Much of the District's brief is devoted to arguing that the timelines in the Decree are inadequate because they do not allow enough time to develop scientifically defensible criteria for canals in South Florida. Dist. Br. at 28-37. Absent any extensions, the consent decree gives EPA nine months from the time it proposes the numeric nutrient water criteria to issue a final rule. *See* DE:153 at 4-6 (¶¶ 4, 6, 8, 10). Although that timeline is more generous than what would ordinarily be required by the Act, the District nonetheless suggests that is still not enough time to develop numeric criteria for canals.

The District was equivocal in the district court as to whether it actually *opposed* the timelines in the Decree. *See* DE:114 at 5 (taking a "wait and see" approach); DE:114-1 at 8 (¶26). Nor has the District suggested what timelines would be more reasonable than those in the Decree. At oral argument on the parties' summary judgment motions, the District implied that it might require as long as "two decades" to complete such a rule. DE:70 at 61. Yet, the District also acknowledged that the State was close to developing numeric criteria for at least some waters. *See id*. at 61-62 ("[A]t this point we do know that DEP is almost

there and . . . that they were getting to the point where they are going to be able to deal with this, at least the lakes and streams.").

The deadlines in the Decree are reasonably similar to those under which the State was already planning to develop its own criteria. *See* DE:114-5 at 55. In particular, the State anticipated that formal rulemaking for lakes and streams and potentially estuaries would be conducted between January and December 2010, and the rule submitted to the State Environmental Regulatory Commission by early 2011. *Id.* Now, as mentioned *supra*, EPA has obtained an extension of 22 months for the deadline to finalize criteria for South Florida canals to allow for additional public comment and peer review by EPA's Science Advisory Board. The District notes that such an extension was obtained, but it does not argue that it still does not provide enough time. Dist. Br. at 7 n.1. Its arguments about the timing for developing criteria for South Florida canals should be rejected.

C. The Decree Does Not Raise Federalism Concerns

Intervenors argue that the Decree poses federalism concerns because it permits EPA, rather than Florida, to develop water quality standards. FWEA Br. at 28-29; Dist. Br. at 43-44; *see also* FDACS Br. at 18. They are wrong. The Act specifically contemplates that EPA, not the State, may promulgate water quality standards in some circumstances. *See* 33 U.S.C. 1313(c)(4). This is not the first time that EPA has agreed to undertake a task that the Act designates to Florida in

the first instance, when Florida has not itself undertaken the task or has insufficiently done so. Indeed, EPA did so in the 1999 decree when it agreed to establish TMDLs for some Florida waters where the State fails to do so – a process by which the Council abides. *See* FWEA Br. at 19.

EPA's authority to develop federal water quality standards under Section 1313(c)(4)(B) is exercised infrequently, but it is not unprecedented. Indeed, EPA exercised that authority in 1991 to develop numeric criteria for priority toxic pollutants in 14 states, including Florida, where federal criteria for dioxin remain applicable. *See* 56 Fed. Reg. 58420, 58429 (Nov. 19, 1991); *see also* 40 C.F.R. 131.36(d)(6) & (b) (col. D, row 16). Nothing about that process is inconsistent with the Act or the federalism principles it embodies.

Nor is the development of federal criteria inconsistent with federalism principles under the facts of this case. As the Decree acknowledges, the State may still develop and propose to EPA its own numeric nutrient criteria. DE:153 at 4-6 (¶¶5, 7, 9, 11). Should the State do so in sufficient time for EPA to approve the Department's proposed standard before the deadlines in the Decree, then EPA no longer has a responsibility under the Decree to finalize its regulations. *Id.* Also, as explained *supra*, the State may still develop its own substitute criteria, subject to EPA approval, even after EPA promulgates criteria. *See* 33 U.S.C. 1313(c)(1), (3). And if EPA approves the State's substitute criteria, EPA would withdraw the

federal rule. These various options available to the State respect the federal-State balance reflected by Section 1313(c)(4).

D. Intervenors' and Amicus' Remaining Arguments Lack Merit

Intervenors and *Amicus* raise other arguments, all of which lack merit. For example, *Amicus* quotes the district judge's comments during the summary judgment hearing and argues that the judge "may have already made up his mind" concerning the "question of the condition of Florida's waters." FDACS Br. at 11. Neither of the Intervenors makes such a contention. *See Richardson v. Ala. Bd. of Educ.*, 935 F.2d 1240, 1247 (11th Cir. 1991) (refusing to consider arguments by *amicus* that were not argued by appellants on appeal). Regardless, *Amicus* concedes that the issue of Florida's water quality was "clearly put at issue" in the case as early as EPA's answer. FDACS Br. at 9. When it made the quoted statement, the district court had before it the parties' summary judgment filings and the agency's record. *Id.* at 11.

Amicus argues that there is no factual support for the Decree, mostly attacking the court's discussion of nutrient pollution in Florida waters. FDACS Br. at 7-12. *Amicus* admits, however, that the district court had before it evidence of "water quality violations that need to be forcefully addressed." *Id.* at 8. Further, as *Amicus* acknowledges (*id.* at 9 n.15), the court supported its conclusions by citing a State report, which says that algal blooms are "increasing in frequency, duration,

and magnitude," and that abundant algal populations "have been found statewide in numerous lakes and rivers." DE:160 at 2 (citing DE:127-4).

Finally, *Amicus* and the District protest that they were not included in the settlement discussions between plaintiffs and EPA. Dist. Br. at 5-6, 34; FDACS Br. at 6. EPA works cooperatively with the District, which has repeatedly expressed support for the development of numeric nutrient criteria. *See* DE:97 at 2; DE:114 at 2; *see also* Dist. Br. at 8, 9. EPA also depends upon *Amicus* to develop best management practices which aid the State in reducing nonpoint source pollution to meet the goals of the Act. *See* 33 U.S.C. 1329(b). Nonetheless, the District and *Amicus* are wrong to imply that they were required to be part of the settlement between EPA and plaintiffs. *See Local No. 93 v. City of Cleveland*, 478 U.S. 501, 528-29 (1986) (one party may not "preclude other parties from settling their own disputes and thereby withdrawing from litigation.").

III. ASSUMING ARGUENDO THAT INTERVENORS HAVE STANDING, THEIR CHALLENGES TO THE DISTRICT COURT'S PROCEDURAL DECISIONS MUST FAIL

A. The District Court Did Not Abuse Its Discretion In Declining To Conduct An Evidentiary Hearing

Intervenors argue that the district court wrongly deprived them of the opportunity to present live witnesses at the oral argument concerning the Decree. FWEA Br. at 26-29; Dist. Br. at 37-41; *see also* FDACS Br. at 20. As a preliminary matter, it is unclear that an oral hearing of any type was required. A

right to "some kind of prior hearing" is only required for due process "[w]hen protected interests are implicated." *Bd. of Regents v. Roth*, 408 U.S. 564, 569-70 (1972).[21] Here, Intervenors appear to base their interests upon the fact they hold discharge permits. Under Florida regulations, a permit issued by the Department "shall not become a vested property right in the permittee." Fla. Admin. Code 62-4.100(3). Also, the Department may deny a discharge permit if it determines that the applicant has not provided "reasonable assurance" that the permitted installation will operate in accordance with applicable law. *Id.* 62-4.070(2); *see also id.* 62-4.240(4) (permit "*may* be renewed" upon application to the Department) (emphasis added). Thus, a discharge permit is not a protected interest that would trigger due process requirements. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (a benefit "is not a protected entitlement if government officials may grant or deny it in their discretion").

Even if it were a protected interest, the Decree does not deprive Intervenors of their permits, as explained *supra*, Part I. *See Kirby v. Siegelman*, 195 F.3d 1285, 1290 (11th Cir. 1999) (procedural due process challenge requires a deprivation). Assuming *arguendo* that the Decree deprives Intervenors of a protected interest, their arguments fail. First, although parties potentially affected

[21] Notably, this is not a class action, where hearings are sometimes required by rule. *See* FRCP 23(e)(2).

by a proposed settlement must receive adequate notice and a meaningful opportunity to be heard, there is no absolute requirement for a full evidentiary hearing. *See Metro. Sewer Dist.*, 952 F.2d at 1044 (declining to require hearing prior to approving Clean Water Act consent decree) (citation omitted). *Cf. United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc) (approval of proposed settlement "requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of record, *whether established by evidence, affidavit, or stipulation*.") (emphasis added).

An evidentiary hearing "is neither a required, nor even the most effective, method of decisionmaking in all circumstances." *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976). Even in the context of individualized determinations, factual disputes may be resolved on written submissions when their resolution is unlikely to involve credibility determinations. *Califano v. Yamasaki*, 442 U.S. 682, 696 (1979); *see also United States v. Diaz*, 811 F.2d 1412, 1414 (11th Cir. 1987) (denial of evidentiary hearing in bond remission case was not abuse of discretion because the "judge ha[d] all the necessary facts to make a just and equitable determination of the case"). Further, "no court of appeals, to our knowledge, has demanded that district courts invariably conduct a full evidentiary hearing with live testimony and cross-examination before approving a settlement." *Intl. Union, United Auto., Aerospace, & Agric. Implement Workers of Am. v. General Motors*

Corp., 497 F.3d 615, 636 (6th Cir. 2007). Rather, appellate courts have largely deferred to trial courts' discretion how to manage their proceedings for approving consent decrees. *See id.* (collecting cases).

Intervenors received ample process and were fully heard. Collectively, the District, the Council, and other intervenors filed half a dozen memoranda concerning entry of the Decree. DE:97, 110, 113, 114, 115, 116. The District even filed a supplemental response. DE:114. Most submitted written evidence, including declarations and affidavits. DE:111, 112, 113-1, 114-1 to 114-24, 115-1 to 115-8. Plus, they presented oral argument. They participated in a status conference to determine the procedures for filing objections and conducting argument concerning the entry of the Decree. DE:102. And for the actual hearing on the Decree, all intervenors were collectively given an hour of argument time, the same amount collectively given to EPA and plaintiffs. *See* DE:136.

Further, as the district court recognized, its role in approving the Decree was limited – the court was not deciding "as an original matter whether to have narrative standards or numeric standards," in which instance the court stated it "would have some live testimony." DE:142 at 94-95. Rather, the court was only deciding whether the settlement was "fair, adequate, and reasonable." *Cotton*, 559 F.2d at 1330. And because this is a challenge to administrative action, the court

correctly recognized (DE:142 at 95), its proper role is not to review the merits of the settlement *de novo*. *Cannons*, 899 F.2d at 84.

Evidentiary hearings are particularly unnecessary where, as here, an agency's decision is based upon scientific judgments premised on professional experience. *See Matthews*, 424 U.S. at 344-46; *see also* Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1284-85 (noting that, in cases involving "recondite scientific or economic subjects," the main effect of cross-examination is delay). Indeed, the propriety of relief in cases like this is more likely to turn on the deference given EPA's scientific judgments rather than the credibility of witnesses. *See* DN:102 at 20 ("If I were deciding a credibility issue between different experts . . . then having the experts come in and testify live would be more important.").

In several cases concerning civil rights claims against municipalities, this Court (or its predecessor) has reversed district courts for failing to hold an evidentiary hearing before considering whether to approve a consent decree. *See United States v. City of Hialeah*, 140 F.3d 968 (11th Cir. 1998); *Cocoa*, 117 F.3d 1238; *Miami*, 664 F.2d 435. Most of those cases involved Title VII claims that the United States brought against municipalities. When the parties tried to enter consent decrees, they were opposed by employee organizations, which argued that the decrees abridged collective bargaining rights guaranteed under contracts and state law. *See Hialeah*, 140 F.3d at 983; *Miami*, 664 F.2d at 447. As explained

supra, Intervenors do not have any such guaranteed rights, much less any that were abridged by the challenged Decree. Further, civil rights settlements often implicate special concerns because remedies in that context must to be "narrowly tailored" to redress past discrimination. *See Cocoa*, 117 F.3d at 1243-44; *see also Miami*, 664 F.2d at 447. Such concerns are not at issue here.

The District asserts that it was deprived of an opportunity "to have its evidence considered," and that the district court "did not allow any evidence." Br. at 38 n.8, 40 n.9; *see also* FDACS Br. at 9 (intervenors "were not permitted to introduce evidence" concerning algal blooms). Not so. The court permitted the submission of written evidence, including declarations, which most intervenors – including the District – did submit. *See* DE:111, 112, 113-1, 114-1 to 114-24, 115-1 to 115-8. Intervenors were not deprived of meaningful process. *See FDIC v. Morley*, 915 F.2d 1517, 1522 (11th Cir. 1990) ("Procedures providing less than a full evidentiary hearing have often satisfied due process.").

B. The District Court Did Not Abuse Its Discretion In Failing To Require EPA To Produce An Administrative Record

1. *There Is No Administrative Record For The January 2009 Determination Because It Is Not Final Agency Action*

The District argues that the district court erred by not requiring EPA to produce an administrative record for its January 2009 determination prior to entering the Decree. But the January 2009 determination was not the subject of the

Decree, and the District has not brought any claim challenging the January 2009 determination. Even if the District had brought such a claim, an administrative record is not necessary or even appropriate. First, it is not necessary because the court was not "required to open to question and debate every provision of the proposed compromise." *Cotton*, 559 F.2d at 1331.

More importantly, requiring production of an administrative record would be inappropriate because the January 2009 determination is not final agency action. Before any party may obtain review of the January 2009 determination, it must point to a waiver of the federal government's sovereign immunity. The only possible such waiver here is the APA,[22] which limits review of the merits of agency decisions to the "whole record or those parts of it cited by a party." 5 U.S.C. 706. At the same time, the APA only waives sovereign immunity for challenges to "final agency action." 5 U.S.C. 704.

The core question in determining whether a challenged activity is "final agency action" is "whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Mass.*, 505 U.S. 788, 797 (1992). Two conditions must be met for

[22] The Clean Water Act provides a waiver of sovereign immunity for EPA's failure to take an action that is *not* discretionary. *See* 33 U.S.C. 1365(a)(2). That provision does not permit a challenge to the January 2009 determination, a *discretionary* decision. *See Browner*, 127 F.3d at 1131.

agency action to be "final": "First, the action must mark the consummation of the agency's decisionmaking process–it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal quotations, citations omitted). Neither condition is met here.

First, the January 2009 determination was the *initiation*, not the "consummation," of EPA's decisionmaking process. Section 1313(c)(4)(B) requires EPA to propose regulations for a new or revised water quality standard where it determines that such a standard is needed to meet the Act's requirements. 33 U.S.C. 1313(c)(4)(B). EPA must promulgate the standard within 90 days after it is proposed unless the State first adopts a standard that EPA approves. *See id*. The January 2009 determination was merely the first step in a process which will ultimately lead to a revised standard for nutrients in Florida. Because it is "beyond any doubt that further administrative action is forthcoming," nothing that EPA has done (or refused to do) to date can be deemed the "consummation" of its decisionmaking process. *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1238 (11th Cir. 2003).

Second, the January 2009 determination does not have any direct legal effect on Intervenors. *See FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980); *see also*

*Rochester Tel. Corp. v. United States***,** 307 U.S. 125, 130 (1939). Although the Council complains that its members rely upon existing water quality standards, the January 2009 determination did not change those standards. The Florida standard "remains the applicable standard" until EPA approves a change to that standard or promulgates a more stringent standard. 40 C.F.R. 131.21(e).[23] Nor did the January 2009 determination change any discharge permits held by Intervenors or their members.

The District argues that EPA's finding meets the second requirement for finality because the finding has "legal consequences" for *EPA*. Dist. Br. at 20. But the proper inquiry is whether EPA's determination imposes obligations on those seeking to challenge that determination. *Standard Oil*, 449 U.S. at 243 (challenged activity "had no legal force or practical effect upon Socal's daily business other than the disruptions that accompany any major litigation."); *Nat'l Parks*, 324 F.3d at 1237 (nonfinal agency action "'does not itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action'") (quoting *Rochester*, 307 U.S. at 130). As already explained, the determination does not so affect Intervenors.

[23] Although *Amicus* argues that Florida "no longer had an approved water quality standard for nutrients" after the January 2009 determination, Section 131.21(e) demonstrates that the State's narrative standard remains valid.

The Council cites EPA's answer to the amended complaint, in which EPA denied that Florida has "not adopted or proposed numeric nutrient standards," implying that undercuts the January 2009 finding. Br. at 27 (citing DE:24 at ¶48). Not so. EPA denied the allegation because Florida has adopted a numeric phosphorus criterion for the Everglades Protection Area. Fla. Admin. Code Ann. 62-302.540(4)(a).

2. *Regardless, The District's Arguments Confuse The Standard Of Review Of A Consent Decree With That For Final Agency Action*

Even assuming *arguendo* that the January 2009 determination was final agency action, the district court was not required to base its review of the Decree upon an administrative record, as the District contends. When reviewing the *merits* of a challenged final agency action, the District is correct that review is ordinarily limited to the record that was before the agency at the time of its decision. *Cf. Woods v. Fed. Home Loan Bank Bd.*, 826 F.2d 1400, 1408 (5th Cir. 1987) (noting that "the merits of that judicial review [of a plaintiffs' claims] are properly limited to the administrative record"); *see also Barreto-Claro v. U.S. Att'y Gen.*, 275 F.3d 1334, 1338 (11th Cir. 2001) (reviewing the administrative record "[a]s to the merits of [an alien's] claim for asylum"). But the District confuses the APA's limitations on review of the *merits* with the procedures for reviewing the adequacy of a consent decree.

In determining the adequacy of a proposed settlement, the inquiry "should focus upon the terms of the settlement," comparing the relief provided by the decree to what the litigants would have obtained after a successful trial. *Cotton*, 559 F.2d at 1330. Logically, that review only requires examination of the proposed decree, along with the governing statutes and regulations. It does not require review of an administrative record, especially where the party seeking the record is not challenging the purported decision on which the record is based.

The District argues that consent decrees are reviewed under the same procedures and standard as the merits of the underlying complaint. Dist. Br. at 18, 21, 26. That is wrong. Neither the trial court nor this Court in reviewing the approval of a settlement has the right or duty to reach any ultimate conclusion on the issues of fact and law which underlie the merits of the dispute. *See Cotton*, 559 F.2d at 1330 (noting that this point "cannot be overemphasized").[24]

The District cites a Sixth Circuit case, *Akzo Coatings*, for the proposition that courts must base review of an "EPA consent decree" on the administrative record. Dist. Br. at 18-19. Like the Northern District of New York case the District cites for a similar purpose (*id.* at 10, 22), *Akzo* involved a consent decree under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). CERCLA, however, provides that review of EPA's selected

[24] As explained *supra*, the District's reliance on *Miami* and *Hialeah* is misplaced.

response action "shall be limited to the administrative record," and requires the objecting party to demonstrate, "on the administrative record," that the selection was arbitrary and capricious. 42 U.S.C. 9613(j)(1), (2) (quoted in *Akzo*, 949 F.2d at 1423). Because the *Akzo* decree represented EPA's selection of a response action, the court concluded that "*CERCLA's* limitation of judicial review to the administrative record" applied. 949 F.2d at 1424 (emphasis added).

This is not a CERCLA case. The Decree here did not embody a decision that was made reviewable by the underlying substantive statute. By comparison, the *Akzo* consent decree represented the type of decision for which CERCLA expressly limited review to the administrative record. The Clean Water Act contains no comparable language.[25]

The District argues the fact that EPA filed an administrative record for the challenges in plaintiffs' earlier complaints undercuts EPA's representation that there is no administrative record for the January 2009 determination. Dist. Br. at 8; *see also* FDACS Br. at 20. That argument mixes apples and oranges. First, as just

[25] CERCLA consent decrees typically may only be entered after the Attorney General has solicited and considered public comments and filed them with the court. *See* 42 U.S.C. 9622(d)(2)(B). A similar requirement, 28 C.F.R. 50.7(a), was at issue in *United States v. Telluride Company*, 849 F. Supp. 1400 (D. Col. 1994), a case cited by *Amicus*. FDACS Br. at 19. *Amicus* characterizes that case as one where a consent decree was rejected due to the "lack of an adversarial presentation." *Id*. Not so here, where Intervenors opposing the Decree submitted memoranda and declarations, and their counsel participated in oral argument.

discussed, Intervenors confuse the merits of an APA claim with what is at issue here, the propriety of approving a consent decree. Second, the claims in plaintiffs' earlier complaints alleged that EPA had failed to act. DE:1 at 12. Although in failure to act cases agencies produce documents on which courts base their review, such documents are not an "administrative record" in the classic sense. In particular, "there is often no official statement of the agency's justification for its actions or inactions." *S.F. Baykeeper v. Whitman*, 297 F.3d 877, 886 (9th Cir. 2002). Nor is there a final agency decision to mark the end of the record, so courts sometimes consider additional documents beyond what the agency initially provides. *Id.*; *see Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).

That type of "record" is different from what the District seeks. The District does not allege a failure to act, as the plaintiffs did, but rather seeks to challenge a discrete letter which the District attempts to characterize as final agency action. Assuming *arguendo* that the District's characterization were accurate, the record on which such a determination would be based is not the same type of "record" reviewed for a failure to act claim.[26]

[26] *Amicus* cites *Sierra Club v. Peterson*, 185 F.3d 349 (5th Cir. 1999), to argue that courts "may allow an evidentiary hearing where there is no record to review." FDACS Br. at 20. But the Fifth Circuit, sitting *en banc*, later vacated the district court's decision for exceeding the court's jurisdiction by attempting to review

C. The District Court Did Not Abuse Its Discretion In Declining To Allow Discovery

After arguing that EPA should have produced an administrative record, the District argues, alternatively, that the court should have allowed discovery. *Id.* at 9, 37. The District, however, never requested discovery. In fact, counsel for the District told the court that "we won't anticipate much more than filing a declaration with the court and responsive papers, if it was necessary." DE:102 at 9. Even ignoring the District's change in position, their argument lacks merit.

The District argues that it deserves an opportunity to "probe" the evidence on which EPA relies. Br. at 39. But allowing discovery or trial-type testimony of the sort the District seeks is inappropriate. As the Supreme Court has admonished, courts reviewing agency action should not "probe the mental processes" of agency decisionmakers. *United States v. Morgan*, 313 U.S. 409, 422 (1941) (quotation, citation omitted); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (noting that "such inquiry into the mental processes of administrative decisionmakers is usually to be avoided."). And as this Court has recognized, routinely requiring testimony in cases like this risks monopolizing the time of agency officials. *In re United States*, 985 F.2d 510, 512 (11th Cir. 1993).

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conduct that was *not* final agency action. *Sierra Club v. Peterson*, 228 F.3d 559, 561 (5th Cir. 2000).

Allowing discovery also would have likely violated the terms on which the District and the Council were granted intervention. Specifically, the order granting the District intervention was made "subject to the limitation that the case will not be delayed *in any manner* as a result of the intervention." DE:48 at 1 (emphasis added). The Council's intervention was subject to the same condition. DE:133 at 2. Allowing discovery likely would have delayed the entry of the Decree and violated the terms of intervention.

Lastly, the District's desire for discovery conflicts with the APA model they claim applies to review of the Decree. Discovery on the merits is inappropriate in APA cases. *Moretti, Inc. v. Hoffman*, 526 F.2d 1311, 1312 (5th Cir. 1976) (upholding denial of discovery request on the basis "that the action was a challenge, pursuant to the [APA], to a final agency decision which must be reviewed only on the administrative record"); *see also Alabama-Tombigbee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1262 (11th Cir. 2007) (denying discovery where there was not a "strong showing of bad faith or improper behavior" by the agency) (quoting *Overton Park*, 401 U.S. at 420). Even under the APA, the District has not made the necessary showing to obtain discovery.

CONCLUSION

For the foregoing reasons, these appeals should be dismissed. Alternatively, the challenged district court orders should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

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STATUTORY ADDENDUM

5 U.S.C. 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) 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;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

33 U.S.C. 1313. Water quality standards and implementation plans

* * *

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved—

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

* * *

33 U.S.C. 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf--

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

* * *

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2010, the DEFENDANTS-APPELLEES' ANSWERING BRIEF was served by U.S. mail to the following:

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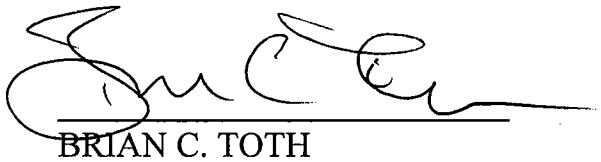

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