

PERMITTING PROBLEMS: ENVIRONMENTAL JUSTICE AND THE MICCOSUKEE INDIAN TRIBE

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ABSTRACT

The Miccosukee Tribe of Indians is a federally recognized tribe that works and resides in the Everglades region of the State of Florida. The Miccosukee have been battling lax water quality standards through lawsuits since the 1990's. Recent rulings in federal court held that the State of Florida has failed to comply with the Clean Water Act and ordered the Environmental Protection Agency to set nutrient criteria for the water bodies in the state of Florida until the Florida Department of Environmental Protection complies with the Clean Water Act.

This article uses the principles of environmental justice to analyze ways in which the Environmental Protection Agency can lift the undue burden that the Miccosukee Indian Tribe is bearing due to the nutrient pollution occurring in the Everglades. Environmental Justice is a jurisprudence that is used when low-income or minority populations bear a disproportionately high burden of adverse human health or environmental effects. The Environmental Protection Agency has created a new, comprehensive environmental justice plan called Plan EJ 2014. This plan acts as a roadmap to better integrate environmental justice into the program's activities and policies. The author addresses the environmental justice that is burdening the Miccosukee Indian Tribe, and suggests using environmental justice principles to set nutrient criteria in Florida, particularly the water bodies found within the land of the Miccosukee Tribe of Indians.

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INTRODUCTION

Imagine that the Federal Government is pumping polluted water into your backyard from an affluent community that is located near your home. Now imagine that the polluted water is causing damage to the land and water bodies located behind your home, and the wildlife that inhabited that ecosystem. Imagine that Federal and State Laws are being violated, but the Government does not, and will not take action.¹ What would you think if you found out that the Federal Government knew about this situation in 1994 and did not contemplate compliance of the Federal Law until 2016?² Would you think of this as an injustice? What if you were to informed that, at this very moment, that exact factual pattern is taking place in the Everglades region of Florida. Polluted water is being pumped from an urban, agricultural and residential development into the tribal waters of the Miccosukee Indian tribe.³

This paper will raise awareness of the environmental justice issue that is causing the small, indigenous community of the Miccosukee Indian Tribe to bear an environmental burden that is disproportionate to the community from which the pollution is being pumped. Part II of this paper will explain environmental justice, and what legal actions can be utilized to bring an environmental justice claim. Part III of the article will briefly review the Miccosukee Indian Tribe, the initial litigation that the Miccosukee Indian tribe initiated against the Environmental Protection Agency (hereinafter “EPA”), and the following litigation against the Florida Department of Environmental Protection (hereinafter

¹. “The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” 33 U.S.C. § 1251(a) (2006); *see also* FLA. ADMIN. CODE ANN. r.62-302.540(4)(a) (West 2012). “The numeric phosphorous criterion for Class III waters in the Everglades Protection Area shall be a long-term geometric mean of 10 ppb, but shall not be lower than the natural conditions of the Everglades Protection Area, and shall take into account spatial and temporal variability.” *see also Miccosukee Tribe of Indians of Florida v. United States*, 706 F. Supp.2d 1296, 1299 (S.D. Fla. 2004). “In federal Clean Water Act terms, the 10ppb standard is referred to as a water quality based effluent limitation (“WQBEL”).”

². *See Miccosukee Tribe of Indians of Florida*, 706 F. Supp. 2d at 1299-300.

³. *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 98-100 (2004).

“FDEP”). This article will then discuss the recent pollutant criteria set forth by the FDEP and evaluate whether it complies with the criteria that is currently set forth by the EPA, and whether those criteria are enough to halt the pollution that remains in these waters. Part IV will discuss exactly what nitrogen and phosphorous pollution is, and the adverse effects that nitrogen and phosphorous pollution may cause to humans, wildlife, fish and other aquatic life.⁴ Part V of this article will encase an environmental justice argument suggesting that the pollution is being specifically targeted at a minority community, particularly the Miccosukee Indian Tribe. Part VI of the article will analyze the previous sections and contain arguments as to which regulation would be most apt in addressing the environmental justice issues raised. Part VII will then conclude this article with an argument that the FDEP criteria should comply with the standards set forth by the EPA.

I. ENVIRONMENTAL JUSTICE

A. WHAT IS ENVIRONMENTAL JUSTICE?

An environmental injustice occurs when there is a disproportionately high burden and adverse human health or environmental effect on minority and low-income populations.⁵ While environmental justice is a growing jurisprudence, it has been in existence for some time, blooming in the 1980's.⁶ The birthplace of environmental justice was in Warren County, North Carolina.⁷ In 1982, a new hazardous waste landfill was constructed near the small, predominately African-American community of Afton.⁸ Contaminated soil that contained polychlorinated biphenyl was to be placed in this

⁴ FLA. STAT. § 403.021(1).

⁵ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994), *reprinted as amended in* 42 U.S.C. § 4321 (2006).

⁶ Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, Natural Resources Defense Council, (Oct. 12, 2006), *available at* <http://www.nrdc.org/ej/history/hej.asp> (last visited Apr. 10, 2012).

⁷ *Id.*

⁸ *Id.*; *see also*, *Environmental Justice Legacy*, U.S. Fish and Wildlife Service, *available at* <http://www.fws.gov/dpps/envirojustice.html> (last visited Apr. 10, 2012).

landfill.⁹ Concerned that the chemicals from the contaminated soil would leach into their drinking water, the citizens of this small community took it upon themselves to peacefully protest by meeting the trucks and lying in the road that led to the landfill.¹⁰ The protests lasted for six weeks, and although the contaminated soil was eventually placed in the landfill, the uprising by this small community sparked the movement that is now known as Environmental Justice.¹¹

Following the events of Warren County, the General Accounting Office studied the location of four hazardous-waste landfills and the results demonstrated the high environmental burden minority communities are faced with. Only one of the landfills was located in a community where below fifty percent of the population were minorities.¹² In 1987, the United Church of Christ conducted a study called, "Toxic Wastes and Race in the United States." The study found that communities predominantly of color are at a disproportionate risk from commercial toxic waste.¹³ The report found that race, not income, was the number one predictor in where a commercial waste facility would be located.¹⁴ The United Church of Christ then conducted a study on Environmental Justice twenty years after releasing "Toxic Wastes and Race in the United States," and subsequently found that race continues to play a crucial role in the location of commercial hazardous waste facility locations.¹⁵

⁹. *Id.*

¹⁰. *Id.*

¹¹. *Id.*

¹². JULIAN AGYEMAN, SUSTAINABLE COMMUNITIES AND THE CHALLENGE OF ENVIRONMENTAL JUSTICE 15 (New York University Press 2005). The study found that, "the four facilities were found to be in communities in which minorities made up 38 percent, 52 percent, 66 percent, and 90 percent of the population." *Id.*

¹³. *Id.*

¹⁴. Robert D. Bullard, Ph.D., et al., Toxic Wastes and Race at Twenty: A Report Prepared for the United Church of Christ Justice & Witness Ministries, X (Mar. 2007), available at <http://www.ejrc.cau.edu/TWART-light.pdf> (last visited Apr. 10, 2012).

¹⁵. *Id.* at 56.

A pioneer of the Environmental Justice movement, Cesar Chavez, was a Mexican American Farm worker as well as the founder of the United Farm Workers.¹⁶ In 1988, Chavez went on thirty-nine day water only fast in order to boycott the use of toxic pesticides on grapes.¹⁷ Not only did he fast, but he also organized a movement for Latino farmworkers to be protected from harmful pesticides that were being utilized in the grape fields of California.¹⁸ Cesar Chavez was posthumously awarded the Presidential Medal of Freedom, the highest civilian honor, by President William Clinton in 1994.¹⁹

Not only did the Environmental Justice movement see the recognition of one of its pioneers with a Presidential Medal of Freedom in 1994, but soon after witnessed President William Clinton signing Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.²⁰ Executive Order 12898 forced federal agencies to make environmental justice part of their mission by identifying and addressing policies and programs that will have a disproportionately high and adverse health and environmental effects on minority and low-income populations.²¹ While this executive order can be seen as a step in the right direction, the order is not as effective as legislation and therefore only forces agencies to make achieving environmental justice part of their missions, and does not carry any penalties to deter agencies from implementing programs that may be seen as going against the goals of the order.

¹⁶. Cesar E. Chavez, California Department of Education, <http://chavez.cde.ca.gov/ResearchCenter/DocumentDisplayRC.aspx?rpg=/chdocuments/documentdisplay.jsp&doc=6212dd%3Aead754e3ce%3A-7f24&searchhit=yes> (last visited Apr. 10, 2012).

¹⁷. Kathleen Sutcliffe, *On Cesar Chavez Day, Farmworker & Health Advocates Petition U.S. EPA to Cancel Carcinogenic Pesticide*, Earthjustice.org, (Mar. 31, 2010) available at <http://earthjustice.org/news/press/2010/on-cesar-chavez-day-farmworker-health-advocates-petition-u-s-epa-to-cancel-carcinogenic-pesticide> (last visited Apr. 10, 2012).

¹⁸. Skelton, *supra* note 6.

¹⁹. AGYEMAN, *supra* note 12, at 15.

²⁰. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994), *reprinted as amended in* 42 U.S.C. § 4321 (2006).

²¹. *Id.*

In celebration of the twentieth anniversary of President Clinton signing his executive order directing federal agencies to address environmental justice issues, the EPA has created a new comprehensive environmental justice plan called *Plan EJ 2014*.²² This new comprehensive plan acts as a roadmap to better integrate environmental justice into the EPA's programs, activities and policies.²³ According to the EPA, the goals of this plan are to: protect health in communities overburdened by pollution, empower communities to take action to improve their health and environment, and to establish partnerships with local, state, tribal, and federal organizations to achieve healthy and sustainable communities.²⁴ Plan EJ 2014, however, is only a strategy, not a rule or regulation, and will only achieve the goals of environmental justice if the EPA take initiative and fully integrates the plan and polices itself to make sure the goals of the plan are being met.

B. LEGAL ENVIRONMENTAL JUSTICE ACTIONS

When a minority or low-income community is faced with an environmental injustice, the community will want the adverse human health and environmental effect lifted from their community. While the community can go to the polluter and ask them to stop, the polluter will most likely ignore the requests from the community. The community will seek to have the burden lifted and will pursue an environmental justice claim. Environmental justice claims can be litigated under: civil rights law, civil tort law, federal environmental law, and State and local law.²⁵ These courses of action have their own unique benefits and burdens. Civil rights have been used in past environmental justice actions but now the plaintiff has to show discriminatory intent which is a very high burden that is rarely met. Environmental justice communities

²² *Plan EJ 2014*, United States Environmental Protection Agency, available at <http://epa.gov/environmentaljustice/resources/policy/plan-ej-2014-09.pdf> at A message from EPA Administrator Lisa P. Jackson (last visited Oct. 2, 2012).

²³ *Id.* at Executive Summary i.

²⁴ *Id.*

²⁵ Jean Marie Zokovitch Paben, *Approaches To Environmental Justice: A Case Study Of One Community's Victory*, 20 S. CAL. REV. L. & SOC. JUST. 235, 241-52 (2011).

often utilize civil tort law, often successfully, but this type of litigation is very expensive and the litigation can lead to a battle of the experts. Federal, State and local law is useful because through statutes, the environmental justice communities have access to the courts when Federal, State, or local agencies are not in compliance with the statutes. Problems arise, however, when the Federal Agencies relegate their powers to the States or the States relegate their powers to the local governments.

The Equal Protection Clause of the Fourteenth Amendment²⁶ was utilized in early environmental justice claims.²⁷ Under the Fourteenth Amendment, however, a Plaintiff had to prove discriminatory intent, which is often nearly impossible to show.²⁸ Title VI of the Civil Rights Act of 1964 was also utilized in environmental justice claims.²⁹ Title VI, section 601 was utilized as a way to circumvent the requirement of showing discriminatory intent. Title VI, section 601, only requires a showing of disparate impacts.³⁰ Moreover, section 602 of Title VI proved to be another hurdle. In the case of *Alexander v. Sandoval*, the Supreme Court held that there was no intent to create a private right of action under section 602.³¹ While the door has not been closed on bringing an environmental justice action using Civil Rights Law, it is almost impossible to utilize this form of litigation due to the very high

²⁶. U.S. CONST. amend. XIV, § 1. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

²⁷. Brian Crossman, *Resurrecting Environmental Justice: Enforcement Of EPA'S Disparate-Impact Regulations Through Clean Air Act Citizen Suits*, 32 B.C. ENVTL. AFF. L. REV. 599, 603 (2005).

²⁸. *Id.*

²⁹. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-602, 78 Stat. 241, 252 (codified as amended at 42 U.S.C. §§ 2000d-2000d-1 (2000)).

³⁰. Crossman, *supra* note 27, at 603.

³¹. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that, “Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce a freestanding private right of action to enforce regulations promulgated under § 602. We therefore hold that no such right of action exists.”).

burden of proving discriminatory intent by an agency.³² It is very unlikely, after the recent rulings of the Court that an environmental justice claim will be brought under the umbrella of Civil Rights laws.³³

However, Environmental Justice claims may be brought as torts. There are several routes one could take: nuisance, trespass, negligence theories (such as personal injury or wrongful death, and strict liability).³⁴ While often successful in environmental justice claims, civil actions under tort law are very expensive. Considering the majority of communities with environmental justice issues are low-income, it is often difficult to locate attorneys who will take these cases.³⁵ Furthermore, the environmental issues that are raised are very scientific in nature and require expert witnesses.³⁶ This can lead to a battle of the experts, which uses more resources.³⁷ The remedy in civil actions are predominately monetary and although monetary redress may be welcomed by some plaintiffs, many would rather have the environmental burden lifted from their community, or at the very least an apology or explanation.³⁸ Another problem with monetary compensation is that the communities have to divide the compensation among their population. To the public, there may appear to be a very high amount of compensation for the burdens an environmental justice community has faced, but in most instances there is a very low amount of redress for the disparate environmental effects these communities have had to bear.

Moreover, federal law has been utilized in many environmental justice lawsuits.³⁹ A problem arises when Federal Agencies delegate the power to set substantive requirements for polluting to the States, and

³². Crossman, *supra* note 27, at 603.

³³. *See generally, Sandoval*, 532 U.S. at 293.

³⁴. Paben, *supra* note 25, at 250.

³⁵. *Id.*

³⁶. *Id.*

³⁷. *See* JONATHAN HARR, *A CIVIL ACTION* (Random House 1995).

³⁸. *Id.*

³⁹. *Id.* at 242.

then the States do not abide by requirements set forth by Federal Statutes. An example of this is the issuance of permits under the National Pollutant Discharge Elimination System, which is found in Section 402 of the Clean Water Act.⁴⁰ Under this section, the Environmental Protection Agency allows the states to set the substantive requirements for polluting.⁴¹ However, as the next section will explore, things can go awry. The FDEP has been issuing National Pollutant Discharge Elimination System permits (hereinafter “NPDES permits”) for the State of Florida, and the amount of nutrients in the waters of the Miccosukee Indian Tribe have risen to a level that is well beyond the criteria found to be acceptable under the Clean Water Act.⁴² This presents as the main issue in the *Miccosukee* cases.⁴³

II. THE CLEAN WATER ACT AND THE *MICCOSUKEE* CASES

A. THE MICCOSUKEE INDIAN TRIBE

The Miccosukee Tribe of Indians is a Federally recognized Tribe that works and resides in the Everglades region of the State of Florida.⁴⁴

⁴⁰. 33 U.S.C. § 1324 (2006).

⁴¹. *Id.* at § 402; *see also*, PABEN, *supra* note 25, at 47.

⁴². *Id.*; *see also*, “The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the nation’s waters.” 33 U.S.C. § 1251(a); *see also* FLA. Admin. Code Ann. R. 62-302.540(4)(a) (West 2012). “The numeric phosphorous criterion for Class III waters in the Everglades Protection Area shall be a long-term geometric mean of 10 ppb, but shall not be lower than the natural conditions of the Everglades Protection Area, and shall take into account spatial and temporal variability.” *see also Miccosukee Tribe of Indians of Florida v. United States*, 706 F. Supp.2d 1296, 1299 (S.D. Fla. 2004). “In federal Clean Water Act terms, the 10ppb standard is referred to as a water quality based effluent limitation (“WQBEL”).”

⁴³. *Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 98-6056-CIV, 1, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999) *aff’d in part, vacated in part*, 280 F.3d 1364 (11th Cir. 2002) *vacated sub nom.*; *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537, 158 L. Ed. 2d 264 (2004); *see also, Id.* at 1368-69; *see also, Miccosukee Tribe of Indians of Florida v. United States*, 706 F. Supp. 2d 1296 (S.D. Fla. 2010) *modified in part*, 04-21448-CIV, 2011 WL 1624977 (S.D. Fla. Apr. 26, 2011).

⁴⁴. *Id.* at 1.

The Tribe's heritage revolves around the Everglades ecosystem for their religious, cultural, economic and historic identity.⁴⁵ The Everglades, therefore, must be preserved in its natural state, including the quantity and quality of the waters found in the Everglades.⁴⁶ The Miccosukee Indians have land interest lying within the Everglades, and within these land interests are special hunting and fishing privileges.⁴⁷ These privileges, however, can only be considered privileges if the Tribe are able to hunt and fish. Water quality and quantity within the Everglades, therefore, are of great concern to the Tribe because if the Everglades become polluted, the Tribe cannot use the habitat as a source of food and income.⁴⁸ In recent years, the Tribe has been unable to make a living by hunting and fishing, with one of the main problems being blamed on the waters within the Everglades.⁴⁹

B. THE CLEAN WATER ACT

The main objective of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.⁵⁰ The Clean Water Act comes from earlier statutes regulating

⁴⁵. *Id.*

⁴⁶. *Id.*

⁴⁷. *Id.* "The Tribe has land interests lying within the Everglades, including a perpetual lease to most of Water Conservation Area 3 A."; *see also* 16 U.S.C.A. § 698 (West 2010). "[n]otwithstanding this section or any other provision of sections 698f to 698m-4 of this titles, members of the Miccosukee Tribe of Indians of Florida and members of the Seminole Tribe of Florida shall be permitted, subject to reasonable regulations established by the Secretary, to continue their usual and customary use and occupancy of Federal or federally acquired lands and waters within the preserve and the addition, including hunting, fishing, and trapping on a subsistence basis and traditional tribal ceremonials."

⁴⁸. *Miccosukee Indians*, South Florida Information Access, *available at* <http://sofia.usgs.gov/publications/reports/rali/miccosukee.html> (last visited Apr. 10, 2012).

⁴⁹. *Id.*

⁵⁰. 33 U.S.C.A. § 1251(a) (West 2010).

navigation and water pollution.⁵¹ The modern Clean Water Act was implemented in 1972 and had the goal of the total elimination of pollution from the nations waterways.⁵² The policy of Congress in this act was to give authority of each State to allocate the quantities of water within each States' jurisdiction.⁵³ This policy clearly sets out that the Clean Water Act was not to supersede the States right to their water.

However, the Act also states that, “[f]ederal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.”⁵⁴ Simply put, the Federal agencies should work with state agencies to reach the goal of the act, to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.⁵⁵ In the State of Florida, the EPA has not worked with the FDEP in the enforcement of the Clean Water Act, and as a result, the Miccosukee Indian Tribe have had to bear a disproportionate environmental impact by the nutrient rich runoff water that is being pumped into their waters from a urban, agricultural and residential area that is home to 136,000 people.⁵⁶ This has occurred due to the FDEP’s issuance of NPDES permits and the lack of the FDEP to establish or comply with a nutrient criteria standard that is in line with the Clean Water Act.

C. THE MICCOSUKEE TRIBE OF INDIANS CASES

The Miccosukee Indian Tribe has been battling both the federal and state government over pollutants in their waters. The issue being

⁵¹. Ray Vaughan, *Water Pollution: Proof of Water Quality Under the Clean Water Act*, 26 Am. Jur. Proof of Facts 3d 395 (Originally published in 1994).

⁵². *Id.*

⁵³. 33 U.S.C.A. § at 1251(g).

⁵⁴. *Id.*

⁵⁵. *Id.* at 1251(a).

⁵⁶. *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 100 (2004).

contested is the addition of pollutants, caused by backpumping-contaminated water, into the Everglades.⁵⁷

In the case of *South Florida Water Management District v. Miccosukee Tribe of Indians*, the Supreme Court discussed the five concrete elements of the project.⁵⁸ The first element is a canal called C-11.⁵⁹ The C-11 canal collects water and rainwater from a 104-square mile area in south central Broward County.⁶⁰ The area drained by C-11 includes urban, agricultural, and residential development and is home to 136,000 people.⁶¹ The second element of the project is a large pump station called S-9.⁶² S-9 begins pumping water out of the canal when the water in C-11 reaches a certain level.⁶³ The third element of the project is when the pump station empties the water into a large undeveloped wetland area called WCA-3.⁶⁴ WCA-3 is the largest of several water conservation areas that are remnants of the original South Florida Everglades.⁶⁵ The fourth and fifth elements are levees L-33 and L-37.⁶⁶ These levees separate S-9 and WCA-3, which, left to nature, would be a single wetland covered in an undifferentiated body of surface and ground water flowing slowly southward.⁶⁷

⁵⁷. *Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 98-6056-CIV, 1, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999) *aff'd in part, vacated in part*, 280 F.3d 1364 (11th Cir. 2002) *vacated sub nom.*; *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537, 158 L. Ed. 2d 264 (2004).

⁵⁸. *See S. Florida Water Mgmt. Dist.*, 541 U.S. at 100.

⁵⁹. *Id.*

⁶⁰. *Id.*

⁶¹. *Id.*

⁶². *Id.*

⁶³. *Id.*

⁶⁴. *Id.*

⁶⁵. *Id.*

⁶⁶. *Id.*

⁶⁷. *Id.*

In the line of Miccosukee cases, “[t]he Tribe alleges that S 9, the cause of the pollutants, has been backpumping contaminated water which contains nutrients, such as phosphorous, into the Everglades specifically [sic] into WCA-3, a jurisdictional water of the United States, without the required National Pollutant Discharge Elimination System (“NPDES”) permit.”⁶⁸ The district court found that according to the Clean Water Act, an NPDES permit is required for the discharge of pollutants from a point source to navigable waters in the United States.⁶⁹ The district court held that, an addition of pollutants exists because undisputedly water-containing pollutants is being discharged through S-9 from C-11 waters into the Everglades, the latter being a separate body of United States water with a different level of water quality.⁷⁰

D. NARRATIVE NUTRIENT CRITERION V. NUMERIC NUTRIENT CRITERIA

It will be beneficial in the next few sections to understand the difference between the Florida’s Narrative Nutrient Criterion and the EPA’s Numeric Nutrient Criteria. In his 2012 Order, Judge Hinkle gave a very useful approach to understanding the differences between the two.

Under Florida’s Administrative code revised, the criterion for nutrients is narrative: “[i]n 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.”⁷¹

⁶⁸. *Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 98-6056-CIV, 1, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999) *aff’d in part, vacated in part*, 280 F.3d 1364 (11th Cir. 2002) *vacated sub nom.*; *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537, 158 L. Ed. 2d 264 (2004).

⁶⁹. *Id.* at 6.; *see also Miccosukee Tribe of Indians of Florida v. South Florida Water Management District*, 280 F.3d 1364, 1368-69 (2002) (Holding that, “[w]hen a point source changes the natural flow of a body of water which contains pollutants and causes that water to flow into another distinct body of navigable water into which it would not have otherwise flowed, that point source is the cause-in-fact of the discharge of pollutants. And, because the pollutants would not have entered the second body of water *but for* the change in flow caused by the point source, an addition of pollutants from a point source occurs.”).

⁷⁰. *Id.*

⁷¹. Fla. Admin. Code R. 62-302.530(47)(b) (West 2012).

Under the EPA's numeric nutrient criteria, there is a fixed numeric amount of nutrients that can be found in the water, and this, at the least, must comply with the numeric criteria of the Clean Water Act's "10ppb"⁷² criteria.

In his order, Judge Hinkle uses an analogy set forth by some of the parties in the case: "a state could adopt a numeric speed limit-70 miles per hour- or a narrative standard-don't drive too fast."⁷³ This visualization is helpful throughout the next few sections to understand the differences between the Florida Department of Environmental Protection's narrative standard and the EPA's numeric nutrient criteria.

E. THE BATTLE BETWEEN THE FDEP AND EPA IN THE MICCOSUKEE CASES

Judge Gold, in the case of the *Miccosukee Tribe of Indians of Florida v. United States*, is very critical of both the EPA and the FDEP's efforts, or lack thereof, to issue and enforce criteria for the amount of pollutants in the waters of the Everglades protection Area.⁷⁴ This case dealt with a failure of the EPA to comply with a Summary Judgment Order to require the state of Florida to comport with water quality standards established by the Clean Water Act.⁷⁵ It was established that the Everglades is a national and state treasure, and within the Everglades protection Area there continues to be pollution.⁷⁶ To protect the environmental integrity of the Everglades, the discharges that flow into

⁷². *Miccosukee Tribe of Indians of Florida v. United States*, 706 F. Supp. 2d 1296, 1298 (S.D. Fla. 2010) *modified in part*, 04-21448-CIV, 2011 WL 1624977 (S.D. Fla. Apr. 26, 2011). 10 ppb was found to be an acceptable level of nutrient concentration under the Clean Water Act.

⁷³. *Florida Wildlife Fed'n, Inc. v. Jackson*, 4:08CV324-RH/WCS, 2012 WL 537529, 5 (N.D. Fla. Feb. 18, 2012).

⁷⁴. See *Miccosukee Tribe of Indians of Florida v. United States*, 706 F. Supp.2d 1296 (S.D. Fla. 2004).

⁷⁵. *Id.*

⁷⁶. *Id.*

the Everglades must be regulated in the amount of phosphorous and nitrogen they contain.⁷⁷

In the ruling for the Tribe on their Motion for Summary Judgment, it was ordered that in order to comply with the Clean Water Act, the EPA must force the State of Florida to set criteria that was acceptable within the limits of the Clean Water Act.⁷⁸ Even if this order for summary judgment was not granted, the Clean Water Act requires that the EPA look over standards that states are setting, and if the standards do not comply with the Clean Water Act, it is the duty of the EPA to contact the states and counsel them on how to make changes that meet the criteria of the Clean Water Act.⁷⁹ It was found that the current state law in Florida was not above the standards set forth in the federal Clean Water Act.⁸⁰ Subsequently, since Florida's criteria did not comport with the criteria set forth by the Clean Water Act, the State law was ruled invalid.⁸¹

Judge Gold uses a very visual example of the Clean Water Act, stating that,

“[s]imply put, the Clean Water Act provides a federal floor, not a ceiling on environmental protection. If a state seeks to provide a standard that is less stringent than the federal Clean Water Act's floor, or seeks to apply a standard in a way that is otherwise invalid under federal law, then federal agencies and federal courts are

⁷⁷. *Id.* at 1298-99. “To protect the Everglades from further significant environmental degradation, it is essential that discharges into, and within, the Everglades Protection Area not exceed more than 10 parts per billion of phosphorous (“ppb”).” “In federal Clean Water Act terms, the 10ppb standard is referred to as a water quality based effluent limitation (“WQBEL”).”

⁷⁸. *Id.*

⁷⁹. *Id.* (Holding that, the Clean Water Act places primary reliance for developing water quality standards on the states, the states remain accountable for ensuring compliance, and the Act requires EPA to step in when states fail to fulfill their duties under the Act.)

⁸⁰. *Id.* at 1319.

⁸¹. *Id.* at 1318. “The short answer is that Florida law does not trump the federal Clean Water Act.”

obligated to resolve the application of the federal Clean Water Act in any case that properly comes before it.”⁸²

Using this language, it is very clear that if the FDEP wants to create nutrient criteria that are less stringent than the Clean Water Act requires, the EPA must step in and enforce the Clean Water Act and its 10 ppb criteria.⁸³

The State of Florida argued that they have been in compliance with the Clean Water Act by using short term-variances.⁸⁴ The State, through the FDEP, continued to push back the date of compliance with the Clean Water Act.⁸⁵ Initially, the nutrient criteria were to be submitted by the FDEP on December 31, 2006, but, with the graces of the EPA, the date had been extended ten years to December 31, 2016.⁸⁶ The court did not accept the argument that using short-term variances complied with the Clean Water Act. The court was tired of excuses and made a good point: time is of the essence and something needs to be done immediately.⁸⁷

The Court held that the EPA should have control over any issuance of NPDES permits, to ensure the FDEP complies with the Clean Water Act.⁸⁸ Issuance of NPDES permits will become the responsibility of the State of Florida once they are within full compliance of the Clean Water

⁸². *Id.* at 1303.

⁸³. *Id.*

⁸⁴. *Id.* at 1306-07.

⁸⁵. *Id.*

⁸⁶. *Id.*

⁸⁷. *Id.* “arguing that ‘something is better than nothing’ ignores the undeniable scientific fact that we are falling further behind, and that time is running out.”

⁸⁸. *Id.* at 1313. “because the State of Florida has violated the Summary Judgment Order and evinced a constant disregard for the requirements of the CWA in the Everglades Protection Area, it is essential that responsibility for CWA compliance through the issuance of NPDES permits be returned to the EPA until such time as the State of Florida is in full compliance with the CWA (as shall be determined by the EPA and this Court following further evidentiary hearing.”

Act.⁸⁹ The NPDES permits will act as a carrot, and once the FDEP is within full compliance of the Clean Water Act, the State of Florida will have a legal right to issue permits, but until they are in compliance, the permitting process will lie in the hands of the EPA.

The Court found that both the FDEP and EPA were in violation of the Summary Judgment Order.⁹⁰ For two decades the EPA and the State of Florida had failed to comply with the Clean Water Act.⁹¹ Now, the EPA must force the State of Florida to complete the rule making for the Phosphorous Rule and the amendments were to be enacted by July 1, 2011.⁹²

The EPA administrator was ordered to notify the State of Florida that the nutrient standards were out of compliance and was to send Florida an Amended Determination.⁹³ The Amended Determination needed to provide instructions on how best to achieve a level of nutrients that would comport with the CWA.⁹⁴

F. THE FDEP PROPOSAL AND THE EPA'S RECOMMENDATIONS

Subsequent to the ruling by Judge Gold,⁹⁵ the EPA sent a memorandum on March 16, 2011, through Acting Assistant Administrator Nancy K. Stoner, to the Regional Administrators, Regions 1-10, with the subject heading *Working in Partnership with*

⁸⁹. *Id.*

⁹⁰. *Id.* at 1313.

⁹¹. *Id.* at 1323.

⁹². *Id.*

⁹³. *Id.*

⁹⁴. *Id.* “The Amended Determination shall provide clear, specific and comprehensive instructions to the State of Florida on the manner and method to obtain enforceable WQBELS within a time certain, consistent with the Clean Water Act and its implementing regulations, the Summary Judgment Order and this Order.”

⁹⁵. *Id.*

*States to Address Phosphorous and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions.*⁹⁶

The memorandum noted that nitrogen and phosphorous pollution has the potential to become one of the costliest and the most challenging environmental problems we face.⁹⁷ The EPA recognized that states need room to create standards for their own local waters, and a one-size-fits-all policy to regulate nitrogen and phosphorous pollution is not desirable.⁹⁸ It is the EPA's conclusion that numeric nutrient criteria targeted at different categories of water bodies and informed by scientific understanding of the relationship between nutrient loadings and water quality impairment is ultimately necessary for effective state programs.⁹⁹ The memorandum concluded that the EPA would support states that follow this particular framework but, at the same time, must retain all its authorities under the Clean Water Act.¹⁰⁰

Under the *Recommended Elements of a State Framework for Managing Nitrogen and Phosphorous Pollution*, the EPA demanded that the work plan and schedule should contain certain criterion including interim milestones of data collection and analysis and criteria adoption consistent with the Clean Water Act.¹⁰¹

On April 22, 2011, the FDEP through its secretary, Herschel T. Vinyard Jr., submitted a petition from the Florida Department of Environmental Protection requesting that the U.S. Environmental

⁹⁶. Letter from Herschel T. Vinyard Jr., Secretary, Florida Department of Environmental Protection, to Lisa P. Jackson, Administrator, United States Environmental Protection Agency, *available at* http://water.epa.gov/lawsregs/rulesregs/upload/fdep_petition_withdrawal_determination.pdf at cover letter from EPA attachment 1 (last visited Apr. 10, 2012).

⁹⁷. *Id.*

⁹⁸. *Id.* at 2.

⁹⁹. *Id.* at 2-3.

¹⁰⁰. *Id.* at 3.

¹⁰¹. *Id.* at 2.; *see also Miccosukee Tribe of Indians of Florida v. United States*, 706 F. Supp.2d 1296, 1299 (S.D. Fla. 2004). "In federal Clean Water Act terms, the 10ppb standard is referred to as a water quality based effluent limitation ("WQBEL")."

Protection Agency (EPA) withdraw its January 2009, determination that numeric nutrient criteria are necessary in Florida.¹⁰²

The state of Florida was adamant that the EPA should be involved in establishing numeric criteria for Florida waters and through the Florida Department of Environmental Protection petitioned the EPA to withdraw its January 2009 determination that numeric nutrient criteria are necessary in Florida.¹⁰³ Furthermore, the State requested the EPA initiate repeal of 40 C.F.R. § 131.43, and discontinuing proposing or promulgating further numeric nutrient criteria in Florida.¹⁰⁴ The petition claimed that Florida is one of the few states that have in place a comprehensive framework of accountability that provides the enforceable authority to address nutrient reductions in impaired waters based upon the establishment of site-specific total maximum daily loads.¹⁰⁵

The FDEP took a stance that the nutrient criteria were only being targeted at the State of Florida.¹⁰⁶ The FDEP stated that despite Florida's status as a national leader in nutrient reduction, the EPA issued a Section 303(c)(4)(B) determination that numeric nutrient criteria were necessary in the State of Florida, but in no other State.¹⁰⁷ This may be seen as a challenge to the EPA to regulate uniformity between all states and not just single out Florida.

In their petition, FDEP continued to ask for the EPA to withdraw its determination so that Florida can address nitrogen and phosphorous pollution through State and local programs.¹⁰⁸ The FDEP recognizes that if the EPA were to withdraw its determination they would not relinquish authority to Florida, and that this significant step would once again allow Florida to regain its primary responsibility for standard

¹⁰². *Id.* at cover letter from the FDEP.

¹⁰³. *Id.* at petition 1.

¹⁰⁴. *Id.*

¹⁰⁵. *Id.* at 2.

¹⁰⁶. *Id.* at 4.

¹⁰⁷. *Id.*

¹⁰⁸. *Id.* at 5.

setting, which Congress unambiguously envisioned in the Clean Water Act.¹⁰⁹

The FDEP took a strong stance against the determination when it concluded that EPA's purported willingness to give flexibility to States, like Florida, that have in place the framework for achieving nutrient reductions, is not consistent with EPA's 2009 necessity determination for Florida. Measured against EPA's March 16, 2011, memo, the State of Florida has in place a framework for achieving nitrogen and phosphorous reductions and control that is among the best in the nation. Therefore, it is reasonable to conclude that EPA's 2009 necessity determination should not have singled out Florida. To rectify this discrepancy, EPA must withdraw its necessity determination and has good reason to do so."¹¹⁰

On November 2, 2011 Nancy K. Stoner, Acting Assistant Administrator for the EPA, sent a letter to Herschel T. Vinyard Jr., secretary of the FDEP, addressing Florida's draft rules.¹¹¹ In her letter, Nancy Stoner explained that a final decision to approve or disapprove any nutrient criteria rule set forth by the FDEP would be put under a formal review under section 303(c) of the Clean Water Act.¹¹² Acting Assistant Administrator Stoner the gave hope to the State of Florida by informing the State that the current, but not formal review of the October 24, 2011 draft rule lead to the preliminary conclusion that the EPA would be able to approve the draft rule because that rule would comport with the Clean Water Act.¹¹³ The EPA's analysis of the draft rule and its consistency with the Clean Water Act could change, however, if there were modifications during the legislative process or if

¹⁰⁹. *Id.* at 30.

¹¹⁰. *Id.*

¹¹¹. Letter from Nancy K. Stoner, Acting Assistant Administrator, United States Environmental Protection Agency, to Herschel T. Vinyard Jr., Secretary, Florida Department of Environmental Protection (Nov. 2, 2011) *available at* <http://www.dep.state.fl.us/secretary/files/stoner.pdf> (last visited Apr. 10, 2012).

¹¹². *Id.* at 1.

¹¹³. *Id.*

technical information or public comments identifies why the final rule does not comport with the Clean Water Act.¹¹⁴

The letter concluded that if the EPA should formally approve FDEP's final nutrient criteria as consistent with the CWA, the EPA would initiate rulemaking to withdraw federal nutrient criteria for any waters covered by the new and approved state quality standards.¹¹⁵

On February 18, 2012, Judge Hinkle upheld the EPA's determination that in order to meet the Clean Water Act requirements, it is necessary that numeric nutrient criteria be set for Florida waters.¹¹⁶ Judge Hinkle ordered that the Administrator's rule setting numeric nutrient criteria was valid in all respects except the stream criteria and the default-downstream protection criteria for unimpaired lakes.¹¹⁷ The valid provisions of the rules took effect on March 6, 2012.¹¹⁸ Under Judge Hinkle's ruling, Florida's longstanding narrative nutrient criterion has been done away with, and now the EPA will administer numeric nutrient criteria in the State of Florida until the FDEP can enact legislation that comports with the CWA.¹¹⁹

On February 16, 2012, Governor Rick Scott of Florida signed into law Senate Bill 2060/ House Bill 7051 allowing the FDEP to propose nutrient limits on springs and lakes; such limits would have to be approved by the EPA.¹²⁰ More, U.S. Representative Steve Southerland

¹¹⁴. *Id.*

¹¹⁵. *Id.*

¹¹⁶. *Florida Wildlife Fed'n, Inc. v. Jackson*, 4:08CV324-RH/WCS, 2012 WL 537529 (N.D. Fla. Feb. 18, 2012).

¹¹⁷. *Id.* at 26. *see generally* Thomas J. Fumero, Esq., Thomas F. Mullin Esq., *Numeric Nutrient Criteria In Florida-An Overview*, available at, <http://www.jdsupra.com/post/documentViewer.aspx?fid=54f218ba-e773-4c7a-9036-54974a9a51ef.pdf> (last visited Apr. 10, 2012).

¹¹⁸. *Id.*

¹¹⁹. *Id.*

¹²⁰. John Rehill, *Both EPA and DEP are Bidding for Florida Water*, THE BRADENTON TIMES, http://www.thebradentontimes.com/news/2012/02/25/environment/both_epa_and_dep_are_bidding_for_florida_water/ (last visited Apr. 10, 2012); *see also*, *HB 7051- Rules Establishing Numeric Nutrient Criteria*, Florida House of Representatives,

has sponsored a Bill titled the, “State Waters Partnership Act of 2012” that will limit the authority of the Administrator in numeric nutrient criteria.¹²¹

In the line of cases and the current proposals, it is very clear that in order to comport with the Clean Water Act, the FDEP must establish numeric criteria that meets the requirements set forth in the Clean Water Act, and if the FDEP fails to do so, the EPA must step in and take measures to meet the requirements of the Clean Water Act.

III. NITROGEN AND PHOSPHOROUS POLLUTION AND THE EFFECTS ON WATERS AND ECOSYSTEMS

Nitrogen and phosphorous is not always problematic when found in water. According to the EPA, nitrogen and phosphorus are a part of a natural, healthy aquatic ecosystem.¹²² Nitrogen and phosphorous support the growth of underwater plants, and these underwater plants produce oxygen and habitat that supports growth and reproduction of aquatic organisms.¹²³ Nitrogen and phosphorous also support the growth of algae, which is a natural part of aquatic ecosystems.¹²⁴ Algae are found in shallow waters and are a food source for some fish and shellfish.¹²⁵ Therefore, nitrogen and phosphorous ultimately need to be

<http://flhouse.gov/Sections/Bills/billsdetail.aspx?BillId=48936> (last visited Apr. 10, 2012).

¹²¹. See *id.*; see also *H.R. 3856: State Waters Partnership Act 2012*, Govtrack.us, <http://www.govtrack.us/congress/bill.xpd?bill=h112-3856> (last visited Apr. 10, 2012) (“To limit the authority of the Administrator of the Environmental Protection Agency with respect to certain numeric nutrient criteria, and for other purposes.”).

¹²². *Water Criteria, Nutrients, The Problem*, United States Environmental Protection Agency, available at <http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/problem.cfm> (last visited Apr. 10, 2012).

¹²³. *Id.*

¹²⁴. *Id.*

¹²⁵. *Id.*

in any body of water to produce a healthy and sustainable ecosystem to maintain the health of the organisms that live there.¹²⁶

When nitrogen and phosphorous levels become too high, however, it can create problems.¹²⁷ These high levels can cause the ecosystem to become unbalanced.¹²⁸ When this occurs, algae grow to an unhealthy level and can create eutrophication.¹²⁹ According to Merriam-Webster, eutrophication is defined as, “the process by which a body of water becomes enriched in dissolved nutrients (as phosphates) that stimulate the growth of aquatic plant life usually resulting in the depletion of dissolved oxygen.”¹³⁰

When eutrophication occurs, the algae grow rapidly producing an algae bloom.¹³¹ Algae blooms can be harmful to underwater plants, animals and humans.¹³² Harmful algae blooms can cause human problems when there is recreational contact, such as swimming or water-skiing, or when humans consume contaminated fish and shellfish.¹³³ In addition, drinking water when the nutrient levels reach above the 10mg/L maximum contaminant level will have adverse effects on human health.¹³⁴

Examples of adverse effects are blue baby syndrome, hexatotoxin, dermatoxin, and neurotoxin. Blue baby syndrome, or methemoglobinemia, is an illness that arises when an infant’s blood is

¹²⁶. *Id.*

¹²⁷. *Id.*

¹²⁸. *Id.*

¹²⁹. *Id.*

¹³⁰. Merriam-Webster Dictionary, *available at* <http://www.merriam-webster.com/dictionary/eutrophication> (last visited Dec. 10, 2011).

¹³¹. *Water Criteria, Nutrients, The Problem*, United States Environmental Protection Agency, *available at* <http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/problem.cfm> (last visited Apr. 10, 2012).

¹³². *Id.*

¹³³. *Id.*

¹³⁴. *Id.*

unable to carry enough oxygen to body cells and tissue.¹³⁵ When this occurs, the nitrites react with the hemoglobin in the blood, and forms high amounts of methemoglobin, which cannot carry oxygen.¹³⁶ If too much methemoglobin is found in the blood, an infant's tissue or organs may be deprived of oxygen.¹³⁷ When this occurs, the infant develops a bluish color and the infant will have long-term digestive and respiratory problems.¹³⁸ Furthermore, another type of algae bloom, from the blue-green algae, also poses three types of serious health risks due to cyanobacteria.¹³⁹ They include hepatotoxin, which can damage the liver and other organs,¹⁴⁰ dermatotoxin, which can damage the skin and the GI tract,¹⁴¹ and neurotoxin, which can damage the nerve synapse and nerve axons.¹⁴²

Algae blooms, however, may be controlled, according to the authors of *The Distribution of Toxic Cyanobacteria in Florida*. The authors suggest that, "[t]he ideal long-term strategy for dealing with toxic algae is to prevent or reduce the occurrence of blooms."¹⁴³ Fundamentally, the easiest way to prevent or reduce the occurrence of blooms is to reduce the amount of nutrients that bolster the growth of

¹³⁵. *Baby Blue Syndrome*, BHIA.org, available at <http://www.bhia.org/articles/childrens-health/bluebabysyndrome.html> (last visited Apr. 10, 2012).

¹³⁶. *Id.*

¹³⁷. *Id.*

¹³⁸. *Id.*

¹³⁹. Edward J. Philips, et. al., *The Distribution of Potentially Toxic Cyanobacteria in Florida*, available at http://www.myfloridaeh.com/medicine/aquatic/pdfs/Cyanobacteria_200208_Pgs006-036.pdf at 22 (last visited Apr. 10, 2012).

¹⁴⁰. *Id.* Table 1 at 30.

¹⁴¹. *Id.*

¹⁴². *Id.*

¹⁴³. *Id.* at 26.

algae.¹⁴⁴ The most fundamental way of addressing this challenge is to reduce the availability of nutrients that support the growth of algae.¹⁴⁵

As previously mentioned, nitrogen and phosphorous are needed in a healthy ecosystem to support the health of the organisms that live there.¹⁴⁶ However, too much of these nutrients can cause algae blooms and have an adverse effect on the water and aquatic life.¹⁴⁷ The Everglades is an oligotrophic¹⁴⁸ wetlands system, which is phosphorous limited and sensitive.¹⁴⁹ When phosphorous is found above natural levels, it causes detrimental growth.¹⁵⁰ Therefore, in order to maintain the pristine beauty of the Everglades and its waters, the FDEP or EPA criteria need to be targeted to reduce the availability of nutrients that support the growth of algae.¹⁵¹ Keeping the goal of maintaining the pristine beauty of the Everglades in mind with Judge Hinkle's ruling, the EPA must enforce numeric nutrient criteria and must force the FDEP to form criterion that will comport with the Clean Water Act.

¹⁴⁴. *Id.*

¹⁴⁵. *Id.*

¹⁴⁶. *Water Criteria, Nutrients, The Problem*, United States Environmental Protection Agency, available at <http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/problem.cfm> (last visited Apr. 10, 2012).

¹⁴⁷. *Id.*

¹⁴⁸. An oligotrophic wetlands system is an environment that offers little to sustain life.

¹⁴⁹. *Micosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 98-6056-CIV, 1, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999) *aff'd in part, vacated in part*, 280 F.3d 1364 (11th Cir. 2002) *vacated sub nom.*; *S. Florida Water Mgmt. Dist. v. Micosukee Tribe of Indians*, 541 U.S. 95, 124 S. Ct. 1537, 158 L. Ed. 2d 264 (2004).

¹⁵⁰. *Id.*

¹⁵¹. Philips, *supra* note 135, at 26.

IV. THE MICCOSUKEE INDIAN TRIBE AND ENVIRONMENTAL JUSTICE

Some scholars have argued that environmental justice is not a good fit for Native American tribes.¹⁵² Those skeptical of the application of environmental justice to a tribal context base their skepticism primarily on their beliefs that environmental justice fails to take tribal economic needs into account. Another reason scholars are skeptical of environmental justice to a tribal context is because most tribes are of a sovereign nature and environmental justice fails to take that into account.¹⁵³ However, to counter the tribal sovereignty argument, it has been argued that although sovereignty allows the Tribes to control the land that has been deemed tribal land, it does not provide any power to fight harmful land uses near their land.¹⁵⁴ An example of this that has been given is a situation where water pollution is carried away to downstream communities.¹⁵⁵ By analogy, the Miccosukee have control of their land, but the pollution that is being pumped into their waters from S-9 is located near their land, not on it.¹⁵⁶ Therefore, tribal sovereignty will not protect the Miccosukee Tribe from the nutrient pollution, as the nutrient pollution is not being controlled by the Miccosukee Tribe, but being pumped in from a source that is not located on their land.¹⁵⁷

In an article written by David J. Galalis, there is mention of environmental justice and the permitting processes.¹⁵⁸ It is Galalis's

¹⁵². Kristen Marttila Gast, *Environmental Justice and Indigenous Peoples In The United States: An International Human Rights Analysis*, 14 *TRANSNAT'L L. & CONTEMP. PROBS.* 253, 265 (2004).

¹⁵³. *Id.* at 267.

¹⁵⁴. *Id.*

¹⁵⁵. *Id.*

¹⁵⁶. *South Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 100 (2004).

¹⁵⁷. Gast, *supra* note 155, at 270.

¹⁵⁸. David J. Galalis, *Environmental Justice And Title VI In The Wake Of Alexander V. Sandoval: Disparate-Impact Regulations Still Valid Under Chevron*, 31 *B.C. ENVTL. AFF. L. REV.* 61, 101 (2004).

belief that, “[t]he unequal distribution of environmental harm often occurs through government sanctioned permitting processes.”¹⁵⁹ He further wrote that, “[r]ather, it is an economically, politically, and socially entrenched reality that these “blind” decision making processes, left to themselves, will subject poor, minority communities to a disparate share of environmental harm as compared to surrounding affluent, Caucasian neighborhoods.”¹⁶⁰

This is also analogous to the Miccosukee cases as the NPDES permits were being issued by the FDEP.¹⁶¹ In the most recent *Miccosukee* case, the FDEP was violating the Summary Judgment Order and the Judge instructed the EPA only to issue NPDES permits when the State of Florida was in compliance with the Clean Water Act.¹⁶²

V. ANALYSIS AND SUMMARY

When the issuance of NPDES permits by the FDEP caused nutrient pollution to affect the WCA-3 water basin of the South Florida Water Management District, the pollution constituted an act of environmental injustice. The Miccosukee Indian Tribe is a minority of the population of Florida.¹⁶³ The Tribe is bearing a disparate amount of harm to their lands by the nutrient pollution that is being pumped by the ground water and rainwater from an area that includes urban, agricultural and residential developments.¹⁶⁴ This is a concrete example of environmental injustice. The courts that heard the *Miccosukee* cases had

¹⁵⁹. *Id.*

¹⁶⁰. *Id.*

¹⁶¹. *Miccosukee Tribe of Indians of Florida v. United States*, 706 F. Supp. 2d 1296, 1313 (S.D. Fla. 2010) *modified in part*, 04-21448-CIV, 2011 WL 1624977 (S.D. Fla. Apr. 26, 2011).

¹⁶². *Id.*

¹⁶³. U.S. Census Bureau, *available at* <http://quickfacts.census.gov/qfd/states/12000.html> (last visited Apr. 10, 2012). According to the U.S. Census in 2010, American Indians only made up 0.4% of the Florida’s population. *Id.*

¹⁶⁴. *See South Florida Water Mgmt. Dist.*, 541 U.S. at 100.

an opportunity to address the underlying Environmental Justice problems, but did not. One need not examine these cases closely to determine that this is an environmental justice issue. The issues jump out like a pop-up book: pollution being pumped from an urban, agricultural and residential community into a small community of Native Americans; the government, both State and Federal, sits idle. Today, we stand at a crossroad. The State of Florida wants the authority to issue NPDES permits, but does not want to create numeric criteria that comport with the Clean Water Act.

The Clean Water Act requires that the nutrient criteria be no less than 10ppb.¹⁶⁵ Judge Gold was very passionate when he eloquently stated that, “[s]imply put, the Clean Water Act provides a federal floor, not a ceiling on environmental protection.”¹⁶⁶ Therefore, it is not necessary for the FDEP or the EPA to point fingers and try to abandon responsibility, but it is their duty to make sure that the waters in WCA-3 comport to the Clean Water Act.

The State of Florida, however, has vehemently argued that it should be able to set its own nutrient standards. The State feels like the EPA has specifically targeted it pointing out that it is the only state that has had nutrient criteria limitations imposed on its waters.¹⁶⁷ The State argues that it is better suited to establish nutrient criteria.

Since 1994, the State through the FDEP, and with the EPA’s allowance, has been continuing to delay the establishment of nutrient criteria and allow the pollution in the Everglades to continue. Before Judge Gold allowed the injunction on his Order for Summary Judgment, the EPA had granted the FDEP an extension of its criteria until the year

¹⁶⁵. See *Micosukee*, 706 F.Supp. 2d 1296 at 1299. “In federal Clean Water Act terms, the 10ppb standard is referred to as a water quality based effluent limitation (“WQBEL”).”

¹⁶⁶. *Id.* at 1303.

¹⁶⁷. Letter from Herscel T. Vineyard Jr., Secretary, Florida Department of Environmental Protection, to Lisa P. Jackson, Administrator, United States Environmental Protection Agency, available at http://water.epa.gov/lawsregs/rulesregs/upload/fdep_petition_withdrawal_determination.pdf at cover letter from EPA attachment 1 (last visited Apr. 10, 2012).

2016. The court decided that enough was enough and forced the EPA to set numeric nutrient criteria for the State of Florida.¹⁶⁸

Not only is the pollution harming the hunting and fishing rights granted to the Miccosukee Indian Tribe, but it is also harming the cultural identity of the Tribe as land in the tribal context is integral to tribal identity, cultural practices, and religious beliefs.¹⁶⁹ This is causing a huge burden on that community. Not only are human health and environmental rights being infringed upon, but so too are the rights of their cultural practice and religious beliefs.

At the time this article is being written, Justice Hinkle's ruling in February of 2012 is viewed as a victory for environmental justice movement and the Miccosukee Indian Tribe. After 18 years, the Everglades Forever Act of 1994, which required nutrient criteria to adhere to the CWA, has been fulfilled. The Act has been fulfilled because the court has stepped in and is forcing the EPA to set numeric nutrient criteria for Florida's waters. Some may argue that because, at this time, no monetary remedy has been given to the tribe, it is hard to see this as a victory. However, the whole purpose of litigation in the *Miccosukee* cases has not been monetary redress for the pollution that is being pumped into their waters. The aim of the litigation was to have the pollution that was being pumped into their tribal lands, by the S-9 pump pumping polluted water into WC3-A, halted. It may be argued that because the EPA is setting numeric nutrient criteria, the pollution will never be completely stopped, and therefore the goal of prevention all together is not being fulfilled. That argument is not well founded, however, because under the new EPA numeric nutrient criteria, the water that flows through the tribal lands must comport to the 10ppb as set forth in the CWA. Therefore the EPA will control the NPDES permits to the S-9 pump if the water being pumped into the WCA-3 does not comport to the EPA's numeric nutrient criteria. Although the pollution will not automatically go away at the time of the ruling, the EPA's numeric criteria will allow the pollution to be controlled and eventually brought within the bounds of the CWA, preserving the tribes

¹⁶⁸. *Florida Wildlife Fed'n, Inc. v. Jackson*, 4:08CV324-RH/WCS, 2012 WL 537529, 5 (N.D. Fla. Feb. 18, 2012).

¹⁶⁹. Kristen Carden, *Case Comment: U.S. Supreme Court Environmental Case, October 2003 Term, South Florida Water Management District v. Miccosukee Tribe of Indians*, 28 HARV. ENVTL. L. REV. 549, 556 (2004).

hunting and fishing rights and not compromising their land that is central to their tribal identity, cultural practices, and religious beliefs.¹⁷⁰

The EPA stands at a point where it can directly implement a focus of environmental justice into state permitting processes. Executive Order 12898 only forced federal agencies to look at environmental justice in their policies and programs, that Executive Order had no bearing on any state agencies or their policies and programs.¹⁷¹ With *Plan EJ 2014* as its blueprint, the EPA could force the State of Florida to implement a focus on environmental justice before the EPA hands back the rights of permitting to the FDEP. One of the strategies in implementing *Plan EJ 2014* is to allow overburdened communities to participate fully and meaningfully in the permitting process.¹⁷² This strategy is an excellent fit for the Tribe because it allows the Miccosukee Indians, who have the best knowledge of their waters and how much pollution is tolerable, to participate in the permitting process. *Plan EJ 2014* also uses a strategy to help states develop environmental justice for their environmental justice strategies for their permitting processes.¹⁷³ To show their commitment to helping states develop environmental justice strategies for their permitting processes, the EPA should help FDEP come up with an environmental strategy in the issuance of NPDES permits before the EPA approves FDEP's nutrient criteria.

CONCLUSION

Until the pollution in the Everglades has been remedied, and the waters in WCA-3 meet the minimum numeric nutrient criteria of 10 ppb, the environmental injustice against the Miccosukee Indian Tribe will continue. In order to offset this environmental injustice, the EPA must enforce the requirements set forth by the CWA.

¹⁷⁰. *Id.*

¹⁷¹. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994), *reprinted as amended in* 42 U.S.C. § 4321 (2006).

¹⁷². *Plan EJ 2014*, United States Environmental Protection Agency, *available at* <http://epa.gov/environmentaljustice/resources/policy/plan-ej-2014-09.pdf> at 45 (last visited Oct. 2, 2012).

¹⁷³. *Id.*

The nutrient criteria of Florida's waters set by the FDEP must meet the federal floor of the CWA. If the FDEP is willing to comply with that federal floor, the EPA is in the clear to allow the FDEP to establish that criteria. However, the EPA is not free to allow the FDEP to set criteria that is below the floor of the CWA, and the EPA must continue to monitor the states water and the waters in WCA-3 to make sure that they comport to the 10 ppb as set forth by the CWA. Following the February 2012 ruling, the EPA will most likely be in charge of granting NPDES permits and making sure the nutrients that are being pumped from S-9 will comport to the numeric nutrient criteria they have set out. Since the EPA has a strategy for environmental justice and part of this plan is to use environmental justice in the permitting process, they should force the FDEP to develop environmental justice strategies for the NPDES permitting decisions before they approve FDEP's nutrient criteria. If the numeric nutrient criteria does not comport to the CWA, the tribe will still have outlets to remedy the harm they are being burdened with, mainly through Federal Court system.