



August 17, 2009

Florida Landowners and Developers Advised to Follow a Proposed New Statewide Storm Water Treatment Rule in the Making

The state says the new rule represents a significant step toward controlling nutrient loading from storm water discharges.

This issue of Capitol Report alerts affected landowners and developers to participate in the rule development process to ensure their positions are considered. Plus, read the latest on the Federal Clean Water Restoration Act.



By H. Ray Allen
Carlton Fields Shareholder

The Florida Dept. of Environmental Protection (FDEP) is addressing the increased nutrient enrichment of Florida's surface and ground waters. The agency has therefore initiated a process to adopt a new statewide Storm Water Treatment Rule to increase the level of nutrient removal required for storm



water treatment systems serving both new development and urban redevelopment. The proposed rule is being developed with specific design parameters and criteria that are subject to change prior to the July 1, 2010, effective date set by the FDEP. The present schedule has the final rule being adopted in May 2010, with workshops set between October 2009 and February 2010.

New Performance Standard

In March, the FDEP and the state's five water management districts established a new performance standard relating to the level of water treatment. The standard is reflected in the proposed rule as *the lesser of at least 85 percent average annual nutrient load reduction (95 percent for discharges to outstanding Florida water bodies), or a post development nutrient load not exceeding pre-development nutrient load levels (where pre-*

development is the native vegetative community condition). The agency's position is that this represents a significant step forward in its attempt to control nutrient loadings from storm water discharges.

Tech Advisory Committee Created

A technical advisory committee (TAC) is making recommendations to the FDEP in relation to the proposed rule. The TAC comprises parties across the state, including:

- Audubon Society
- 1000 Friends of Florida
- Southwest Florida Conservancy
- The Florida Homebuilders Association
- Florida Engineering Society
- Florida Chamber of Commerce
- The Florida League of Cities
- Florida Association of Counties
- Local Environmental Resource Agencies
- Florida Storm water Association
- Florida Dept. of Transportation
- Florida Dept. of Agriculture and Consumer Services

The TAC is presently addressing a number of issues that could result in changes to the rule, as presently proposed, in a series of meetings through September 2009. It has also created a revised draft *Applicant's Handbook*, along with several technical memos that will be the focus of discussions at its remaining meetings.

The handbook summarizes design requirements for storm water quality treatment systems. Based on input at the TAC meetings, the *Applicant's Handbook* could be revised before the beginning of the rule workshops, set for the fall of 2009.¹

¹ See:

www.dep.state.fl.us/water/wetlands/erp/rules/storm_water/index.htm for a schedule of TAC meetings, the proposed handbook and other current information on the proposed Statewide Storm Water Treatment Rule.

What Is Different Under The Proposed Rule?

Four of the five water management districts – Northwest Florida being the exception – have set their own criteria for water quality standards. Under the proposed rule, the water quality standards and design criteria will be applied consistently throughout Florida.

Emphasis will be given to nutrient loading and storm water runoffs specifically targeting the removal rates of phosphorus and nitrates.

Storm water systems designed under the proposed rule will need to demonstrate how they will meet a requirement to efficiently remove these pollutants from the storm water stream prior to discharge into surface and/or groundwater waters. This should create a level playing field throughout Florida in relation to nutrient loading.

Some of the best management practice treatments being looked at under the revised *Applicant's Handbook* are low impact design concepts. These include the Florida Friendly Landscaping Green Industry BMP Program; pervious concrete, green roof, cistern and irrigation systems; and the promotion of natural vegetation onsite to reduce compaction of urban soils/loss of infiltration capacity.

Also included, would be advanced storm water treatment components, such as dry ponds, bio-filtration systems, ex-filtration trench systems, wet ponds, wetland storm water management systems, vegetated natural buffers, and storm water re-use systems.

Under the new design criteria, post development nutrient loading shall not exceed the predevelopment nutrient loading levels.

Because runoffs from undeveloped areas contain ambient levels of nitrates and phosphorus, and developed lands typically generate higher concentrations of nutrient run-

offs, storm water treatment devices would be required to have sufficient nutrient removal capabilities to achieve the pre-versus-post development equality. The proposed handbook provides tables for calculating pre-and post-development nutrient loads.

One of the major issues facing the TAC is the definition of "pre-development." The handbook indicates that "pre-development condition" will be defined as the *undeveloped native landscape*, not the current land-use of the developed conditions. The application of native landscape for pre-development condition of developed sites would generally increase the amount of water quality treatment necessary to achieve the required removal efficiencies. This has the potential to make redevelopment of urban sites cost prohibitive to landowners and developers.

Reducing incentives to redevelop urbanized areas will not be in the best interest of protecting natural environments in the state.

Summary

The proposed rule will also apply the same storm water design standards throughout Florida in relation to nutrient loading, specifically phosphorus and nitrates. As well, the proposed rule will have an impact on the design of storm water systems, and thus, the cost of developing land in Florida.

In conclusion, landowners and developers should carefully follow and participate in the FDEP rule development process to ensure their positions are considered. ■

Update on the Federal Clean Water Restoration Act

The Clean Water Restoration Act (CRA) was introduced during the 110th Congress and reintroduced this year in the 111th Congress. This bill is in reaction to two US Supreme Court decisions, *Solid Waste Agency of*

Northern Cook County v United States Army COE of Engineers (531 US 159, 2000), and *Rapanos v United States* (547 US 715, 2006).

The Court rulings, and subsequent guidance issued by the prior Bush Administration, have been seen as weakening the Federal Clean Water Act and causing confusion, permitting delays, increased costs, and litigation.

The CRA would replace the term "navigable" waters with the term "Waters of the United States," thus expanding the scope of protection under the Clean Water Act to include the nation's surface waters, which comprise state waters, wetlands, tributaries, territorial seas, intrastate lakes, rivers, streams (including intermittent streams), mud flats, sand flats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, and natural ponds.

In June, the US Senate Environmental and Public Works Committee approved the current draft of the CRA by a 12-6 vote. The bill now goes to a full vote on the US Senate floor, with its fate in the House of Representatives unknown at this time. ■

H. Ray Allen is a shareholder in Carlton Fields' Tampa Office, and is a member of the firm's Government Law & Consulting; Real Estate & Finance; and Real Property Litigation Practice Groups. Ray co-chairs the firm's subgroup on Environmental Regulation and Natural Resources.



Ray also chairs the Land-Use and Zoning Committee of the Real Property, Trust and Estate Law Section of the American Bar Association.

As well, he has experience in judicial and administrative litigation, appellate practice, land-use law, and environmental and water permitting. Ray was previously the managing attorney of the Land-Use Dept. of the Hillsborough County Attorney's Office.

Contact Ray at 813.229.4270 or rallen@carltonfields.com