

Florida Water Quality Standards in Flux Due to Challenges at Federal and State Level

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UPDATED: Administrative Ruling issued June 7, 2012

The final standards that set numeric limits/criteria regarding the amount of nutrient pollution allowed in Florida's lakes, rivers, streams, and springs are being challenged in federal court. These Water Quality Standards for the State of Florida's Lakes and Flowing Waters were finalized by the U.S. Environmental Protection Agency (EPA), in 2010. The Clean Water Act allows Florida to adapt its own rules imposing nutrient levels to replace the federal rules adopted by the EPA as long as the EPA finds Florida's rules consistent with the Clean Water Act.

The Florida Department of Environmental Protection (FDEP) has proposed rules to replace the EPA standards. The EPA cannot approve Florida's proposed rules until they are adopted by the FDEP, and then either ratified by the Florida legislature or exempted from ratification by the legislature. Environmental groups have filed an administrative rule challenge to the FDEP's proposed rules. As a result of this challenge the FDEP cannot adopt the proposed rules, and the legislature cannot ratify them during the 2012 legislative session. This rulemaking process will significantly affect every business and industry sector that manages and/or discharges water, including power plants, governments, and agricultural and landscaping operations.

DEVELOPMENT OF NUMERIC NUTRIENT CRITERIA FOR FLORIDA'S WATERS

(EPA v. State of Florida)

HISTORY OF THE DISPUTE

On November 14, 2010, EPA Administrator, Lisa P. Jackson, signed "*Water Quality Standards for the State of Florida's Lake and Flowing Waters.*" This document set the final standards for numeric limits and criteria regarding the amount of nutrient pollution allowed in Florida's lakes, rivers, streams, and springs. This final action sought to improve water quality, and protect public health, aquatic life, and the long-term recreational uses of Florida waters, which are critical to Florida's economy. The rule was to take effect on March 6, 2012, but the EPA extended its effective date to July 6, 2012, to allow local governments and businesses, including the State of Florida, time to review the standards and direct strategies to implement them. A second rule related to numeric nutrient criteria in South Florida estuaries, coastal waters, and flowing waters is currently scheduled to be published on May 21, 2012.

The EPA Water Quality Standards for the State of Florida were adopted pursuant to a January 2009 Clean Water Act determination that numeric nutrient criteria were necessary in Florida waters, and a Consent Decree with the Florida Wildlife Federation, which settled a 2008 lawsuit. For the latest information on the status of the consent decree please see this [website](#).

On April 22, 2011, the FDEP petitioned the EPA to withdraw the January 2009 Clean Water Act determination, and repeal the rulemaking completed in November 2010. The rulemaking established criteria for inland lakes and streams. The FDEP also asked the EPA to make control of excess nutrients, including the pursuit of nutrient criteria, a state matter as opposed to a federal one. The petition outlined the state's plans to conduct rulemaking for nutrient criteria for state waters. For the latest information, please see [this website](#).

OVERVIEW OF RULE IMPACT

The original proposal by the EPA sets specific numeric limits on the concentration of nitrogen and phosphorus levels in lakes, rivers, streams, and springs. The stated rationale for the numeric nutrient criteria is that elevated nutrient levels can, and will, cause excessive algal growth in water bodies. This algal growth can reduce the amount of light that reaches the bottom of a water body. This result adversely affects aquatic vegetation and fish habitat. The new criteria strive to help balance the natural growth of plants and wildlife in the State of Florida's lakes and flowing waters, which include rivers, streams, and springs.

This rulemaking process will affect every business and industry sector that manages or discharges water including power plants, municipal operations, governments, and agricultural and landscaping operations. Businesses and industries were concerned that the EPA's original rule proposal would require them to implement potentially cost-prohibitive best management practices (BMP) to prevent nutrients in fertilizer from reaching nearby water bodies. These costs would be passed along to consumers, eliminating the ability of these businesses to compete in the marketplace. While most businesses, industries, and agencies acknowledge that nutrient levels must be controlled in Florida's waters to maintain and improve water quality, they are concerned about implementation costs.

ECONOMIC ANALYSIS

Various groups have reviewed the potential economic impact of the EPA's proposed rules concerning numeric nutrient criteria. Below are links to relevant analyses performed by a consultant and a project of the National Academies.

- [Cardno Entrix Economic Analysis of the Proposed Federal Numeric Nutrient Criteria for Florida](#) Cardno Entrix disputes EPA's estimates of the potential annual cost of implementation (between \$50 million and \$150 million) and depending on the rule requirements and methods, Cardno Entrix estimates that annual costs will be either \$3.1 billion to \$8.4 billion, or \$1 million to \$3.3 billion dollars per year.
- [National Academies, Review of EPA's Economic Analysis of Final Water Quality Standards for Nutrients for Lakes and Flowing Waters in Florida](#) The report drafters concluded that uncertainty is pervasive in estimating the costs of the EPA rule and EPA needed to include all currently impaired water bodies in its cost estimate.

STATUS

On June 13, 2011, the EPA responded to the FDEP's petition. The EPA decided to neither grant nor deny the petition, but allowed the state to proceed with its rulemaking process. The EPA also stated it was prepared to withdraw the federal inland standards if the FDEP adopts, and the EPA approves, its own protective and scientifically sound numeric standards. The EPA also stated it would adjust the timetables for implementing the inland rule and proposing the estuarine and coastal waters rule, if the FDEP's rulemaking efforts progress according to schedule.

After a series of public hearings in Fall 2011, the FDEP published the State's new nutrient criteria draft rules. The EPA reviewed the FDEP's October 24, 2011 draft rules, and preliminarily affirmed them. The EPA has stated that its current evaluation of the FDEP's draft rule and related guidance leads it to the preliminary conclusion that the EPA would be able to approve the draft rule under the Clean Water Act. Should the EPA formally find the FDEP's final numeric criteria consistent with the Clean Water Act, it would initiate rulemaking to withdraw federal numeric nutrient criteria for any waters covered by the new and approved state numeric water quality standards.

On December 8, 2011, the Florida Environmental Regulation Commission approved the FDEP's proposed new rules through Proposed Amendment to Chapters 62-302 and 62-303 Florida Administrative Code, addressing nutrient pollution in Florida waters in an integrated, comprehensive, and consistent manner. The rules, as proposed, estimate that the cost to implement Chapters 62-302 and 62-303 Florida Administrative Code, will be significantly less than the estimated cost to implement the numeric nutrient criteria rules adopted by the EPA. The proposed new rules were forwarded to the Florida House and Senate for ratification. Pursuant to the Federal Clean Water Act, these proposed Amendments must also be approved by the EPA in order to replace the EPA's adopted rules, which were scheduled to take effect March 6, 2012 (now extended to July 20, 2012).

In response to the ERC's action, the Sierra Club and others filed a rule challenge to FDEP's proposed rules, pursuant to Section 120.56, F.A.C. This challenge has prevented the State from completing the certification process for FDEP rules with the Department of State and prevented the legislature from ratifying the rules approved by the ERC during the 2012 legislative session under Chapter 120.541(3) Florida Statutes. Based upon the legal challenge to the proposed FDEP rules and the circumstances associated with the EPA adoption and effective date of the rules, the legislature would need to exempt

the State rules from the ratification requirement in Chapter 120, Florida Statutes, while otherwise approving the rules and directing the Department's submission of the rule to EPA for review.

House Bill 7051 provides for this exemption. The bill cleared the House by a 118-0 vote, passed the Florida Senate, and was signed by Governor Scott on February 16, 2012. The bill waives legislative ratification for the proposed state rules that replace the proposed federal rules. FDEP has asserted that the proposed state rules are more flexible and will cost less to comply with.

UPDATE: Administrative Law Judge Upholds Florida Water Quality Rules.

On, June 7, 2012, Judge Bram Canter of the State of Florida Division of Administrative Hearings entered a final order in the matter of *Florida Wildlife Federation, Inc.; Sierra Club, Inc.; Conservancy of Southwest Florida, Inc.; Environmental Confederation of Southwest Florida, Inc.; and St. John's River Keeper, Inc., Petitioners vs. State of Florida Department of Environmental Protection, Case No: 11 – 6137 RP* ruling that the petitioners failed to prove by a preponderance of evidence that the narrative nutrient criteria adopted by the State of Florida is an invalid exercise of delegated legislative authority and that the FDEP proved by a preponderance of the evidence that the proposed rules are not invalid exercises of delegated legislative authority. The environmental groups had challenged the numeric nutrient criteria, claiming that the rules are weak and unenforceable and would lead to continued toxic algae blooms in Florida waters.

Judge Canter stated in his 58 page order that the groups failed to make their case with the evidence presented. Judge Canter also stated that deference must be given to an agency when it makes a scientific determination on proposed rules. He further commented that it was regrettable that the scientific experts on both sides were so far apart on the potential results of the rules. His order states that the environmental groups failed to show that FDEP lacked authority to propose the rules or that they met the arbitrary and capricious standard.

The FDEP's expert testimony was supported by reports, graphs, and data summaries generated by investigations that involved many scientists focused on the specific objective of developing nutrient criteria. Canter wrote "[i]n contrast, petitioners' position was usually supported only by expert opinions that were based on data collected for different purposes and not presented or made a part of the record."

FDEP officials intend to notify the U.S. EPA of the Judge's opinion during the week of June 11, 2012. The EPA will have 60 days to approve the state's proposed rules or 90 days to disapprove the rules. The EPA has indicated to FDEP that its review clock will begin to run once it receives from FDEP the Final Order entered by Judge Canter.

As of this writing, one of the attorneys for the petitioners has said that his client has not yet decided whether to appeal the decision of Judge Canter to the First District Court of Appeal. The petitioners have 30 days to file their notice of appeal pursuant to Section 120.68, Florida Statutes. Hershel Vinyard, the Secretary of the Florida Department of Environmental Protection, stated in response to the judge's order that the state has spent more than a decade studying and collecting data on the nutrients in Florida waters, and "we have used this science to develop a set of rules for the State of Florida that are the most comprehensive nutrients standards in the nation."

Federal Status

On February 18, 2012, the Federal District Court in Tallahassee invalidated EPA's numeric nutrient criteria rules for Florida streams. The Court, however, upheld EPA's lakes and springs criteria, and upheld the EPA's January 2009 determination that numeric nutrient criteria are necessary for Florida's waters. EPA has until July 20, 2012 for the Administrator to sign for publication a proposed rule setting numeric nutrient criteria for coastal and estuarine waters and flowing waters ("streams") in the South Florida region. The Administrator also has until May 10, 2013 to sign for publication a notice of final rulemaking for these waters. The deadline is extended to November 30, 2012, for the Administrator to sign for publication a proposed rule setting numeric nutrient criteria for streams other than in the South Florida region and setting downstream-protection criteria for unimpaired lakes. The deadline for final rulemaking for these matters is set for August 31, 2013.

This article will be updated as events require.

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