



## MEMORANDUM

To: Edward P. de la Parte

From: Kristin Melton

Date: December 4, 2012

**RE: EPA's November 30, 2012 Actions Regarding Florida's Proposed NNC Rules**

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### Overview

On November 30, 2012, the EPA approved DEP's Inland Water rule in its entirety, including all lakes, streams, and estuaries criteria. The EPA determined that DEP's new method of deriving numeric limits for the amount of nutrient pollution allowed in lakes, springs, streams and estuaries is technically and scientifically sound and more effective than the previous narrative approach. However, the EPA did NOT individually approve site specific criteria such as second level WQBEL and TMDLs. The EPA indicated this approval will be part of a separate action, but we do not know what action will happen or when.

However, in order to comply with the existing consent decree, the EPA also proposed additional federal criteria on the basis that the state's rules do not cover some coastal waters, many estuaries and a subset of flowing waters. The EPA is proposing two new rules to address these water bodies.

The first rule (Remanded Inland Waters Rule) serves to clarify some provisions in the rule EPA promulgated in 2010 establishing numeric limits on the amount of nutrient pollution in Florida's inland waters. In normal circumstances, the EPA would be clearly relieved of its obligation to propose numeric criteria for nutrients in streams Florida covered in its newly-approved state water quality standards. However, the proposed DEP criteria do not provide numeric criteria for ALL state waters and there are questions about the impact of Florida Rule 62-302.531, FAC, and a related consent decree and administrative challenge. Rule 62-302.531, FAC, casts some doubt as to whether the newly approved state water quality standards will go into effect if EPA proposes numeric nutrient criteria for streams not covered by the newly-approved State water quality standards. In addition, due to a recent administrative challenge filed in the State of Florida Department of Administrative Hearings, there is uncertainty as to whether DEP will be able to implement its newly approved state water quality standards consistent with DEP's "Implementation of Florida's Numeric Nutrient Standards" (Implementation Document). Thus, EPA approved portions of Florida's new or revised water quality standards subject to the State being able to implement them as provided in its Implementation Document. If, as a result of legal challenge, DEP is unable to implement its Rule as provided in its Implementation Document, EPA would intend to revisit its November

30, 2012 approval of Florida's new or revised water quality standards. EPA has therefore reserved its authority to withdraw or modify that approval.

In light of the above, EPA seeks comment on finalizing a rule that applies EPA's streams criteria to streams meeting EPA's definition of "stream" that are not covered under Florida's numeric interpretation of narrative nutrient criteria at 62-302.531(2)(c), F.A.C. "Stream", as defined at 40 CFR §131.43(b)(12) means a free-flowing, predominantly fresh surface water in a defined channel, and includes rivers, creeks, branches, canals, freshwater sloughs, and other similar water bodies. EPA notes that as defined at 40 CFR § 131.43(b)(8) and consistent with Section 62-302.200, F.A.C., "predominantly fresh waters" means surface waters in which the chloride concentration at the surface is less than 1,500 milligrams per liter (mg/L). The definition of stream in the approved water quality standards for purposes of applying the numeric interpretation of the narrative nutrient criterion to streams is less inclusive than as defined at 40 CFR §131.43(b)(12). Florida's stream definition for purposes of applying the numeric interpretation of the narrative nutrient criterion (see Subsection 62-302.200(36), F.A.C) specifically excludes **non-perennial water segments; tidally influenced segments; and ditches, canals and other conveyances that are manmade or predominantly channelized or physically altered, are used primarily for water management purposes, and have marginal or poor stream habitat components.** Inland flowing waters that meet EPA's definition of stream yet do not meet Florida's definition of stream for purposes of applying the numeric interpretation of the narrative nutrient criterion are designated Class I or Class III waters in Florida water quality standards. If they are not Class I or Class III waters, then this proposed rule would not apply. Additionally, this rule does not apply to wetlands, including non-perennial stream segments that function as wetlands because of fluctuating hydrologic conditions that typically result in the dominance of wetland taxa.

This Remanded Inland Water Rule would serve to fill gaps in coverage if Florida's streams criteria are in effect, or apply to all streams if Florida's streams criteria are not in effect for any reason, including those mentioned above. It is EPA's understanding that DEP's numeric nutrient criteria apply to all Class III flowing waters unless and until DEP makes an affirmative determination that a particular water body meets one of the exclusions under Rule 62-302.200(36), i.e., it is tidally influenced, a non-perennial stream, or an actively maintained conveyance, such as a canal or ditch. For these waters, the DEP proposes the narrative criteria will apply. However, the EPA believes the waters excluded from the stream definition may still be Class I or Class III, which could provide important habitat for a diverse range of natural aquatic plants and animals and may be vulnerable to the effects of nutrient pollution. Therefore, EPA must have federal criteria in place for those Class III flowing waters that may not have numeric criteria until DEP develops site-specific criteria or conducts a use-attainability analysis to correctly classify the excluded waters. For waters that meet the definition of a municipal separate storm sewer system in accordance with 40 CFR 122.26(b)(8), EPA will work closely with DEP to assist in evaluating the appropriate use designations.

Finally, while EPA believes that the provisions addressing downstream protection provide quantitative approaches to ensure the attainment and maintenance of downstream waters consistent with 40 CFR 131.10(b), the provisions themselves, in EPA's opinion, do not consist of numeric values. Because EPA is currently subject to a Consent Decree deadline to sign a rule

proposing numeric downstream protection values (DPVs) for Florida by November 30, 2012, EPA is proposing numeric DPVs to comply with the Consent Decree. However, EPA has amended its January 2009 determination to specify that numeric criteria for downstream protection are not necessary and that quantitative approaches designed to ensure the attainment and maintenance of downstream water quality standards, such as those established by Florida, are sufficient to meet CWA requirements. As such, EPA will ask the court to modify the Consent Decree consistent with the Agency's amended determination, i.e., to not require EPA to promulgate numeric DPVs for Florida. Accordingly, EPA approved the State's downstream protection provisions subject to the district court modifying the Consent Decree to not require EPA to promulgate numeric DPVs for Florida. If the district court agrees to so modify the Consent Decree, EPA will not promulgate numeric DPVs for Florida. However, if the district court declines to so modify the Consent Decree, EPA would intend to promulgate numeric DPVs for Florida and would also expect to revisit its November 30, 2012 approval of the State Rule's downstream protection provisions to modify or withdraw its approval. Therefore, EPA has also reserved its authority to do so in its approval document

The second rule (Coastal Waters rule) proposes numeric limits on the amount of nutrient pollution allowed in Florida's estuaries and coastal waters, as well as "streams" in South Florida, which were not addressed in Florida's rules. The rule does not apply to estuaries or coastal marine waters that were included in the newly approved state water quality standards including: Clearwater harbor/St. Joseph Sound, Tampa Bay, Sarasota Bay, Charlotte Harbor/Estero Bay, Clam Bay, Tidal Cocohatchee River/Ten Thousand Islands, Florida Bay, Florida Keys, and Biscayne Bay. Unlike its prior rules, the EPA is proposing an approach to derive TN and TP criteria expressed as DPVs at the points where inland flowing waters flow into estuaries, or marine waters in south Florida. These proposed DPVs apply to all flowing waters, including south Florida inland flowing waters that discharge directly into estuaries or south Florida marine waters. However, notably, as with the Remanded Inland Waters Rule, EPA is also seeking district court approval of modification to the Consent Decree to not require EPA to promulgate numeric DPVs for Florida. Therefore, if approved by the district court, the south Florida canals would not have numeric criteria because the EPA is not proposing inland protective values and the DPVs will no longer be required. Finally, the EPA is proposing to extend the approach finalized in 40 CFR 131.43(2) to allow development of Site-Specific Alternative Criteria for estuaries, coastal waters, and south Florida inland flowing waters.

The EPA leaves open the opportunity for the state to establish numeric criteria for these waters. The EPA states it is prepared to withdraw, or not move forward with its federal rules for any waters that become covered by state law that meet the requirements of the Clean Water Act. For example, Florida recently adopted nutrient rules for Panhandle estuaries and EPA expects DEP will soon submit the new rules for EPA's formal review and approval under the Clean Water Act.

## **Implementation**

The EPA approval of state rule is final action. Therefore, there will be no additional comment periods on state rule. **However, the DEP rule is not yet in effect because the EPA approval is contingent upon the outcome of consultation under the Endangered Species**

**Act; DEP being able to implement their rule consistent with its Implementation Document and other supporting documents submitted to the EPA by DEP; EPA's proposal to promulgate numeric nutrient criteria for the waters not covered by DEP's rule; and modification of the Consent Decree to not require numeric criteria to protect downstream waters.** Since the DEP rule is not effect, the EPA reserved the right to revisit its approval decision in the future and to modify or withdraw it, as appropriate. **The state rule will not take effect until the aforementioned contingency issues are resolved and EPA abandons its attempt to set numeric nutrient criteria for inland flowing waters not covered by the DEP rule.** At this time, it is not clear when these contingencies will be satisfied and when DEP and EP resolve the missing flowing water issue.

The EPA's final Inland Water Rule was originally scheduled to take effect on March 6, 2012, except for the site-specific alternative criteria provision, which took effect on February 4, 2011. The EPA extended the March 6 effective date to July 6, 2012 and again to January 6, 2013. Since the court found the EPA's stream NNC criteria to be arbitrary and capricious, only the state numeric criteria that have been approved by the EPA are scheduled to take effect as part of the federal Inland Waters Rule. However, given the contingency issues described above, the EPA is **proposing to postpone the applicability of the Inland Water Rule for lakes, springs, some inland flowing waters and certain estuaries, as well as narrative provisions addressing protection of downstream waters (i.e. the state approved water quality standards) until November 15, 2013 in order to allow time to gain clarity on the implementation of Florida's rule.** If the stay is approved, Florida's narrative criteria will remain in effect for these waters until November 15, 2013 or until EPA withdraws the proposed Inland Water Rule, whichever is earlier. If the stay is not approved, the EPA will be required to finalize the inland water rule or be in violation of the court orders and consent decree.

**In the event the EPA one or more of the contingency factors described above is not satisfied, the EPA has reserved the right to either modify or withdraw its approval decision. This could result in the establishing revised federal rules. However, the EPA has expressed a desire to work with the DEP to approve state standards and eliminate the need for separate federal rules.**

The two proposed Federal rules described above will have additional public comment opportunities at public workshops scheduled for January 17 and 18, 2013 in Tampa, Florida and web-based public hearings on January 22-24, 2013. Further, because the court determined the EPA's numeric nutrient criteria for Florida's streams and EPA's DPV for unimpaired lakes were arbitrary and capricious, the EPA is re-proposing numeric criteria for flowing waters and DPVs for unimpaired lakes where Florida has not established its own criteria in accordance with the District Court's February 18, 2012 order as part of the Remanded Inland Water Rule. By court order, **the EPA must finalize the remanded portions of Florida's inland waters rule by August 31, 2013 and the coastal waters rule by September 30, 2013. If these rules are approved, the state rules will still go into effect for any approved state water quality standards, but the additional federal criteria in the Remanded Inland Water Rule and Coastal Rule will also apply.** It is also possible that the EPA could determine the Remanded Inland Water Rule is not necessary but continues with the Coastal Rule. In this case, the state Inland Water Rule would apply as the only applicable regulation for inland waters, but there

could be additional federal rules for the coastal/estuarine waters. In all cases, the EPA's stated goal is to avoid the need for any federal regulation and to implement the clean water act's goals through only state regulations.

Until the rules are officially adopted through the EPA withdrawal of its corresponding federal criteria, the narrative criteria will remain in effect.

### **Other Noteworthy Implications**

- Page 3 of EPA letter approving state rule has national implications by stating it amends its original January determination and now recognizes that quantitative approaches looking at biological indices are sufficient to meet CWA requirements and that numeric criteria are not required in Florida.
- EPA specifically states the way DEP went about proposing criteria for some, but not all waters (i.e. excluding stormwater conveyances) is within state discretion. This rebuts Earthjustice's 1st DCA arguments and will make their case more difficult to win.
- Intermittent streams – EPA agrees with DEP that intermittent streams, that have more wetland like characteristics, do not require numeric criteria.

### **Impact on Pending Appeals**

At this point, there is not a clear answer as to how this affects legal challenges. However, implementation of the DEP rule and withdrawal of the federal rules may moot most of the pending appeals.