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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 28 2013

OFFICE OF WATER

Herschel T. Vinyard
Secretary
Florida Department of Environmental Protection
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

Dear Secretary Vinyard:

The U.S. Environmental Protection Agency (EPA) made a determination on January 14, 2009, that new or revised water quality standards (WQS) for nutrients in the form of numeric nutrient criteria are necessary in the state of Florida to meet the requirements of the Clean Water Act (CWA). In response to the EPA's determination, the Florida Department of Environmental Protection (FDEP) has devoted significant time and resources—both independently and in collaboration with the EPA—to developing protective nutrient criteria across the state. Due to the immense progress that the FDEP has made in establishing numeric nutrient criteria for the majority of Florida's waters and the vast body of knowledge gained over the past five years with respect to translating Florida's narrative nutrient criterion, the EPA hereby amends, in part, its January 2009 determination by concluding that numeric nutrient criteria are not necessary for a limited number of waters in the state of Florida. This is the second amendment of the January 14, 2009 determination; the EPA previously amended that determination on November 30, 2012, when the Agency concluded that numeric downstream protection values are not necessary in Florida.

Statutory and Regulatory Background

Section 303(c) of the CWA directs states to adopt WQS for their navigable waters. CWA section 303(c)(2)(A) and the EPA's implementing regulations at 40 CFR part 131 require, among other things, that state WQS include the designated use(s) and criteria that protect those uses, and that states submit new or revised WQS to the EPA for review and approval or disapproval. The EPA regulations at 40 CFR § 131.11(a)(1) provide that states shall "adopt those water quality criteria that protect the designated use" and that such criteria "must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." The EPA regulations at 40 CFR § 131.10(b) further provide that "[i]n designating uses of a water body and the appropriate criteria for those uses, the state shall take into consideration the water quality standards of downstream waters and ensure that its water quality standards provide for the attainment and maintenance of the water quality standards of downstream waters."

CWA section 303(c)(4)(B) authorizes the Administrator to determine, even in the absence of a state submission, that a new or revised standard is needed to meet CWA requirements. The CWA does not specify particular information or factors that the EPA must consider when deciding whether to exercise its discretion under section 303(c)(4)(B), and the EPA therefore considers each situation based on its particular facts and circumstances. The authority to make a determination under CWA section

303(c)(4)(B) is discretionary and resides exclusively with the Administrator, or the Administrator's duly authorized delegate. For purposes of this determination, the Administrator has delegated this authority to me, Nancy K. Stoner, Acting Assistant Administrator for Water.

EPA's 2009 Determination and Consent Decree

On January 14, 2009, the EPA determined—pursuant to CWA section 303(c)(4)(B)—that new or revised WQS in the form of numeric water quality criteria for nutrient pollution were necessary to meet the requirements of the CWA in the state of Florida.[1] The determination noted that despite Florida's intensive efforts to diagnose and manage nutrient pollution, its reliance on a narrative nutrient criterion[2] alone resulted in a time-consuming, site-specific and resource-intensive implementation process that was insufficient to protect applicable designated uses.

Subsequently, the EPA entered into a Consent Decree with Florida Wildlife Federation, Sierra Club, Conservancy of Southwest Florida, Environmental Confederation of Southwest Florida, and St. Johns Riverkeeper, which became effective on December 30, 2009.[3] This Consent Decree established a schedule for the EPA to propose and promulgate numeric nutrient criteria for Florida's lakes, springs, flowing waters, estuaries, and coastal waters. The Consent Decree also provided that if Florida submitted and the EPA approved numeric nutrient criteria for any relevant waterbodies before the dates set forth in the schedule, the EPA would no longer be obligated to propose or promulgate, as appropriate, criteria for those waterbodies.

Florida's 2012 New and Revised Water Quality Standards

On June 13, 2012, the FDEP submitted new and revised WQS to the EPA for review and approval or disapproval pursuant to CWA section 303(c).[4] These WQS included numeric nutrient criteria for a number of Florida's fresh and marine waters, as well as a quantitative approach for protecting downstream waters. On November 30, 2012, the EPA approved these new or revised WQS, resulting in the first major step toward the EPA and the FDEP's mutual goal of state-adopted numeric nutrient criteria for Florida's waters.[5]

With regard to fresh waters, the FDEP established numeric nutrient criteria for all freshwater lakes and springs, as well as many flowing waters subject to the EPA's January 14, 2009 determination and the Consent Decree. For the remaining flowing waters, the FDEP did not adopt numeric nutrient criteria, meaning that only the state's existing narrative nutrient criterion would continue to apply to those waters. These remaining flowing waters include tidally-influenced water segments and conveyances primarily used for water management purposes with marginal or poor stream habitat components.[6,7] The

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[1] Letter from Benjamin H. Grumbles, Assistant Administrator, EPA Office of Water, to Michael Sole, Secretary, FDEP (January 14, 2009).

[2] Florida's narrative nutrient provision at Subsection 62-302.530(47)(b), Florida Administrative Code (F.A.C.) provides as follows: "[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."

[3] N.D. Fla. Case No. 4:08-cv-00324-RH-WCS (December 30, 2009).

[4] Rules 62-302 [Surface Water Quality Standards] and 62-303 [Identification of Impaired Surface Waters], F.A.C.

[5] Letter from James D. Giattina, Director, Water Management Division, to Herschel T. Vinyard, Secretary, FDEP (November 30, 2012).

[6] Subsection 62-302.200(36), F.A.C., July 3, 2012.

[7] Subsection 62-302.531(2)(c), F.A.C., July 3, 2012.

FDEP also did not adopt numeric nutrient criteria for flowing waters in the South Florida Region,[8] meaning that only the narrative nutrient criterion would apply to those waters (except for the approved Total Phosphorus criterion that applies in the Everglades Protection Area).[9]

For marine waters, the FDEP established numeric nutrient criteria for estuaries and coastal waters along the South and Southwest coasts of Florida, including Tampa Bay, Clearwater Harbor, Sarasota Bay, Charlotte Harbor, Clam Bay, and marine waters offshore of the South Florida Region.[10] The FDEP's definition of "lake" applies only to freshwater lakes, but there are a small number of lakes in the state that are comprised of marine water instead of fresh water. This means that no numeric nutrient criteria would apply and only the state's existing narrative nutrient criterion would apply to those marine lakes.[11]

Finally, the FDEP adopted an approach for protecting downstream waters that consists of a narrative statement[12] and a quantitative approach involving analysis of water quality trends[13,14] and watershed modeling.[15] The narrative statement and quantitative approach apply to all waters in Florida.

EPA's 2012 Amended Determination

On November 30, 2012, the EPA amended its January 14, 2009 determination to state that numeric nutrient criteria for protection of downstream waters are not necessary in Florida. The EPA concluded that while the approach presented in Florida's 2012 revised WQS for protecting downstream waters does not itself consist of numeric values, it will result in quantitative outcomes that achieve timely and effective protection of downstream waters, consistent with the EPA's implementing regulations at 40 CFR 131.10(b).[16]

2013 EPA and FDEP Agreement in Principle and Path Forward

On March 15, 2013, the EPA and the FDEP reached an agreement in principle and announced a path forward toward state adoption of numeric nutrient criteria that, if approved by the EPA could eliminate the need for the EPA to promulgate federal numeric nutrient criteria.[17,18] This agreement and path forward describe, among other things: the FDEP's commitment to adopting numeric nutrient criteria for

[8] The EPA has defined the South Florida Region as those areas south of Lake Okeechobee and the Caloosahatchee River watershed to the west of Lake Okeechobee and the St. Lucie watershed to the east of Lake Okeechobee.
[9] Subsection 62-302.531(2)(c), F.A.C., July 3, 2012.
[10] Subsection 62-302.532, F.A.C., July 3, 2012.
[11] Subsection 62-302.200(16), F.A.C. provides, in part: ""Lake" shall mean, for purposes of interpreting the narrative nutrient criterion in paragraph 62-302.530(47)(b), F.A.C., a lentic fresh waterbody with a relatively long water residence time and an open water area that is free from emergent vegetation under typical hydrologic and climatic conditions."
[12] Subsection 62-302.531(4), F.A.C. provides as follows: "The loading of nutrients from a waterbody shall be limited as necessary to provide for the attainment and maintenance of water quality standards in downstream waters."
[13] Subsection 62-303.390(2)(a), F.A.C., July 2, 2012.
[14] Subsection 62-303.450(4), F.A.C., July 2, 2012.
[15] FDEP. 2012. *Implementation of Florida's Numeric Nutrient Standards.* Document Submitted to the EPA in Support of the Department of Environmental Protection's Adopted Nutrient Standards for Streams, Spring Vents, Lakes, and Selected Estuaries. Florida Department of Environmental Protection. p.29.
[16] Letter from Nancy K. Stoner, Acting Assistant Administrator, EPA Office of Water, to Herschel T. Vinyard, Secretary, FDEP (November 30, 2012).
[17] *Agreement in Principle*, Florida Department of Environmental Protection and the U.S. Environmental Protection Agency, March 15, 2013.
[18] *Florida Numeric Nutrient Criteria – Path Forward*, Florida Department of Environmental Protection and the U.S. Environmental Protection Agency, March 15, 2013.

the remaining estuaries and coastal waters in the state before the Consent Decree deadline of September 30, 2013 for the EPA to sign final federal criteria for the remaining estuaries and coastal waters; the FDEP's intention to adopt its Implementation Document into rule which will clarify which types of flowing waters may be excluded from coverage by numeric nutrient criteria; and the EPA's follow-up commitment to amend the scope of the EPA's 2009 determination.

Waters Without State-Derived Numeric Nutrient Criteria

The FDEP has adopted numeric nutrient criteria for many waters in the state and is working to establish numeric criteria for the remaining estuaries and coastal waters that were not included in Florida's 2012 WQS. This will result in the state's establishment of numeric nutrient criteria for all of Florida's Class I, II, and III estuaries, coastal waters, freshwater lakes, and springs.[19] However, as discussed above, there are a relatively small number of waters that the FDEP has decided at this time are best addressed by application of Florida's existing narrative nutrient criterion on a site-specific basis. As mentioned above, these waters are marine lakes, flowing waters in the South Florida Region, flowing waters influenced by tide, and conveyances primarily used for water management purposes with marginal or poor stream habitat components.

On April 23, 2013, the FDEP adopted into rule its document entitled "Implementation of Florida's Numeric Nutrient Standards" (dated March 11, 2013), which provides additional clarification as to which flowing waters will be covered by the state's narrative nutrient criterion only (i.e., not subject to the state's numeric nutrient criteria). That document states that Florida's numeric nutrient criteria for streams will apply to all Class I or III streams unless the FDEP identifies a specific stream as meeting one of the exclusions mentioned above and in Florida's 2012 WQS, in which case only the narrative nutrient criterion will be the applicable nutrient criterion for that stream.[20] In deciding whether a particular waterbody is excluded, the FDEP will provide public notice and request information relevant to the application of numeric nutrient criteria to the affected waterbody.[21] Regarding conveyances, if a waterbody is commonly used for navigation, boat access, or other frequent recreational activities such as swimming or boating, the FDEP's Implementation document clarifies that waterbody will not meet the FDEP's exclusion for "conveyances primarily used for water management purposes with marginal or poor stream habitat components" and therefore the FDEP's numeric nutrient criteria for streams will apply to the waterbody.[22] In addition, the Implementation Document provides operational procedures for "identifying marginal or poor stream habitat components," which include reference to a standard operating procedure for identifying poor substrate diversity and availability and artificial channelization to ensure appropriate limitation of the conveyance exemption.[23]

With these clarifications, the EPA understands that the FDEP's numeric nutrient criteria for streams would presumptively apply to 90% of Florida's Class I and III fresh flowing waters (29,462 linear

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[19] Subsection 62-302.400(1), F.A.C. provides as follows:

All surface waters of the state have been classified according to designated uses as follows:

CLASS I	Potable Water Supplies
CLASS II	Shellfish Propagation or Harvesting
CLASS III	Fish Consumption; Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife

[20] *Implementation of Florida's Numeric Nutrient Standards,* p. 49 (March 11, 2013).

[21] Id.

[22] Id. at p. 56.

[23] Id. at pp. 56-57.

miles). Of these, up to 11,497 linear miles (35% of fresh flowing waters) are waters that the FDEP could potentially determine meet the FDEP's water management conveyance exclusion from stream criteria described above. In practice, the EPA believes that this exclusion will likely apply to less than 35% of fresh flowing waters because (1) it is likely that stakeholders will only be interested in pursuing the exclusion for a subset of potential water management conveyances, (2) the FDEP's public participation process may reveal information about frequent recreational activities, and (3) physical habitat assessment may reveal better conditions than specified in the FDEP's rules for establishing an exclusion. In addition to any excluded water management conveyances, the remaining 10% of fresh flowing waters (3,403 linear miles in the South Florida Region[24]), as well as 5,903 linear miles of non-wetland tidally-influenced flowing waters would be covered only by Florida's existing narrative nutrient criterion. The EPA notes that there are also a small number of marine lakes in Florida which would be covered only by Florida's narrative nutrient criterion, comprising an estimated 4.2 square miles (compared to over 2,500 square miles of freshwater lakes, which are all covered by numeric nutrient criteria).

Determination

In the January 14, 2009 determination, the EPA concluded that given Florida's unique physical features and aquatic ecosystems, the FDEP's process of site-specific application of Florida's narrative nutrient criterion was resource intensive, time-consuming, and less than effective in implementing programs to protect water quality and prevent impairments. When the EPA made this determination, there were no numeric nutrient criteria for the vast majority of Florida's waters and only limited knowledge of how to interpret the state's narrative nutrient criterion into numeric targets for implementation purposes. Given the scope of Florida's EPA-approved numeric nutrient criteria and the numeric nutrient criteria that are to be established for the remaining estuaries and coastal waters by September 30, 2013, as well as the large body of knowledge that has been gained over the last five years in connection with developing nutrient criteria for Florida's waters, the EPA believes that it is appropriate to revisit our determination regarding the necessary scope of numeric nutrient criteria coverage in the state.

As discussed above, the FDEP has decided not to adopt numeric nutrient criteria for a limited subset of waters. The FDEP has concluded that it is best to address nutrient pollution in those waters through implementation of the state's narrative nutrient criterion. The FDEP's decision is within the FDEP's discretion if their resulting suite of criteria for all their waters will result in criteria that meet the requirements of the CWA (CWA section 303(c)(2)(A) and 40 CFR 131.11(a)(1)). In its 2009 determination, the EPA determined that numeric nutrient criteria would enable the state to implement nutrient controls more broadly, effectively, and expeditiously to protect applicable designated uses. As such, adoption of numeric nutrient criteria was deemed necessary to ensure the state had criteria that protect the state's designated uses. In light of the FDEP's rulemakings to adopt numeric nutrient criteria for the vast majority of Florida's waters, and the FDEP's approach to protect the remaining waters in the state, it is appropriate for the EPA to reconsider whether the FDEP's resulting combination of numeric and narrative nutrient criteria protect the state's designated uses.

One factor in the EPA's reconsideration is whether the FDEP will be able to implement its narrative criterion for the waterbodies for which there are no numeric nutrient criteria in a manner that ensures the narrative criterion will protect the designated uses of those waterbodies. The EPA's conclusion is that the state's implementation of its narrative nutrient criterion for these waters, while still site-specific, will be less time-consuming and resource-intensive because of the progress that has been made and

[24] The vast majority of South Florida flowing waters (8,281 linear miles) are Class IV waters not subject to the EPA's January 14, 2009 determination.

knowledge gained in interpreting the state's narrative nutrient criterion over the last five years.

For example, tidally-influenced flowing waters already or will soon have downstream estuary and coastal numeric nutrient criteria and upstream freshwater stream numeric nutrient criteria (including Florida's established procedures for evaluating floral community attributes) as reference points for use in interpreting the state's narrative criterion for the adjacent tidally-influenced waters. In addition, the EPA's proposed *Water Quality Standards for the State of Florida's Estuaries, Coastal Waters, and South Florida Inland Flowing Waters* (77 FR 74923) identifies three options for establishing numeric nutrient criteria for tidal creeks that the FDEP could use to interpret the narrative criterion for tidal creeks. As another example, to interpret the narrative nutrient criterion for water management conveyances, the FDEP will have the benefit of presumptive application of the stream criteria. If the FDEP subsequently determines that a conveyance should be excluded, the FDEP could consider the numeric nutrient criteria in upstream and downstream waters adjacent to such conveyance to interpret the narrative criterion for that conveyance. Finally, the FDEP could use the freshwater lake criteria to inform assessment decisions and set permit limits for any discharges in marine lakes. The EPA has shared information with the FDEP that suggests the freshwater lake criteria are protective for marine lakes.

A second factor in the EPA's reconsideration is the limited extent of Florida waters that will not be covered by numeric nutrient criteria. In addition to the data and information that have been generated over the past few years, the EPA has concluded that the FDEP should be able to implement Florida's existing narrative nutrient criterion for those limited waters in an effective and efficient manner. The state's establishment of numeric nutrient criteria for the large majority of Florida's waters will vastly improve and accelerate the FDEP's ability to identify impaired waters, establish total maximum daily loads (TMDLs) and derive water quality-based effluent limits (WQBELs) in National Pollutant Discharge Elimination System (NPDES) permits. As a result, the FDEP should have sufficient time and resources at their disposal, including the data and information gathered over the past several years, to interpret the narrative nutrient criterion on a case-by-case basis for waters covered only by the narrative nutrient criterion.

For these reasons, the EPA hereby amends its January 14, 2009, CWA section 303(c)(4)(B) determination and now determines that new or revised numeric nutrient criteria are not necessary for flowing waters in the South Florida Region (including the Everglades Agricultural Area and the Everglades Protection Area, the latter currently subject to an EPA-approved numeric total phosphorus criterion), marine lakes, tidally-influenced flowing waters, and conveyances primarily used for water management purposes with marginal or poor stream habitat components in Florida. The EPA recognizes that the state may continue to pursue development of numeric nutrient criteria for some or all of these categories of waters to gain greater certainty and efficiency, and the Agency remains supportive of those efforts.

In addition, the EPA stated in its 2012 amended determination that Florida's approach to downstream protection, in combination with numeric nutrient criteria for the upstream and downstream waterbodies, achieves timely and effective protection of downstream waters. Although the EPA cited existence of numeric nutrient criteria in both upstream and downstream waters, it is the numeric nutrient criteria in nutrient-sensitive downstream waters that are the relevant factors for downstream protection, and Florida either has covered or will soon cover all downstream freshwater lakes and estuaries with numeric nutrient criteria. While the EPA is now further amending its 2009 determination to state that numeric nutrient criteria are not necessary for a limited scope of flowing waters and marine lakes, the

EPA believes that Florida's approach to downstream protection will still function effectively because it will still be applied in combination with numeric nutrient criteria for the majority of Florida's waters, and all nutrient-sensitive downstream waters, to ensure attainment and maintenance of downstream WQS as required by the EPA's implementing regulations at 40 CFR 131.10(b). Therefore, the EPA continues to support its conclusions in the 2012 amended determination.

Sincerely,

Nancy K. Stoner
Acting Assistant Administrator