



Florida Department of Environmental Protection

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MEMORANDUM

Date: September 1, 2010

Subject: Department Comments on the Environmental Protection Agency's (EPA) Notice of Data Availability on Numeric Nutrient Criteria for Florida's Lakes and Flowing Waters, August 3, 2010

To: Docket ID No. EPA-HQ-OW-2009-0596

From: Jerry Brooks, Director
Division of Environmental Assessment and Restoration

The Florida Department of Environmental Protection (Department) respectfully submits our comments on the August 3, 2010 Environmental Protection Agency (EPA) Notice of Data Availability (NODA) regarding numeric nutrient water quality criteria for the State of Florida's Lakes and Flowing Waters. A comment document will be submitted to the docket in addition to this letter to document the Department's review of the EPA NODA.

The Department appreciates EPA's consideration of criteria derived based on data from minimally disturbed streams (benchmark distribution approach). We are confident that it is the best method available that accounts for natural contributions of phosphorus from geological formations and organic nitrogen from wetlands. However, the Department reiterates that EPA should not disqualify minimally disturbed streams as legitimate candidates simply because they experience low dissolved oxygen conditions. This is a natural phenomenon in the State of Florida related to the subtropical climate, and influence of wetlands and ground water. The Department also reiterates the need to couple reference-based approaches with appropriate implementation procedures (like biological confirmation) to account for the method's lack of a cause and effect relationship. The Department submitted comments supporting these positions during the previous comment period.

The Department has three major comments in response to the NODA issued by EPA. Other comments are provided in the Department's comment document submitted to the docket.

1. The Department attempted to review many provisions contained in EPA's Proposed Rule and its NODA, but has been significantly hindered by the absence of data, studies, and methodologies used by EPA for supporting certain core components of the Rule. Our comment document outlines areas of the rulemaking process where data and information were not available regarding provisions for 1) the establishment and application of lake downstream protection values (DPVs); 2) the averaging periods and allowable exceedance frequencies of criteria; 3) the Nutrient Watershed Regions for Total Nitrogen; and 4) the option of applying lake criteria to streams in the absence of a working water quality model. Not disclosing these data, methods, or analyses, and not providing clear explanations of criteria provisions prevents meaningful review.
2. The Department would like to reiterate that downstream protection values established for the protection of Lakes is neither legally nor scientifically necessary, and presents an undue burden on the Department and EPA. Standards adopted for the protection of each waterbody type meets the intent of EPA regulations. The adoption of In-Stream Protection Values (IPVs) derived using minimally disturbed sites provides inherent protection of downstream waterbodies. If Streams attain the IPVs derived this way, then the nutrient delivery to the downstream lakes should be considered protective of any lake's minimally disturbed condition.
3. The Nutrient Watershed Regions for total nitrogen should not be the same as the Regions for total phosphorus. There was no information in the docket to explain EPA's proposal, but the Department has provided information to inform a more scientifically accurate delineation of Nutrient Watershed Regions for total nitrogen. Using the same Nutrient Watershed Regions that were used for Total Phosphorus is not a proper application of the reference stream approach and can lead to either under- or over-protection of stream water quality.

The Department would also like reiterate our immediate concern regarding the criteria effective date. While the Department had earlier requested a one year effective date delay, it has become very evident that more time is needed. Assuming the promulgated criteria address the concerns expressed in our comments, only then can Florida take necessary steps to begin implementation. The Department will need to, at a minimum, adopt rule revisions for permitting and assessment (Impaired Waters Rule) because State law does not allow the Department to implement policies or procedures that are not contained in the Florida Administrative Code. The decision on any rulemaking activities associated with the Criteria will not likely occur until the new Governor and administration has taken office in 2011. Once a decision is made, it could take two additional years to complete any rulemaking and potential rule challenges, given the administrative process for adopting rule changes.

Until Department rules can be adopted, the Department will have to depend upon the Region to implement the promulgated criteria in relevant Clean Water Act (CWA) programs. Of immediate concern is ambient water quality assessments associated with compiling the CWA 303(d) list. The Department will launch our public process in May, 2011, for the 613 waterbodies located in the Group 5 Basins. There are more than 650,000 nutrient related ambient analyses associated with those waterbodies that will have to be reviewed against the criteria. It is almost certain that the Department will not have rules in place by that time to conduct those assessments. Therefore, that burden would fall to the Region if the criteria are in effect.

Given all these circumstances, the Department has now concluded that it would be most prudent to set the effective date of the freshwater criteria to coincide with the effective date of the estuarine and coastal water criteria. This would allow simultaneous application of all nutrient related criteria, facilitate a single State rulemaking effort necessary for implementation, and reduce complications regarding the application of existing freshwater criteria (IPVs and DPVs) and the potential future DPVs to the same waterbodies. These complications could include permit renewals that would drive treatment upgrades during the interim period that may not be viable if more stringent DPVs for estuaries are later established.

Lastly, the Department asks that EPA develop an outreach strategy to address public inquiry once the criteria are established. We ask that EPA plan events in the State so that interested stakeholders can ask questions to more clearly understand their responsibilities with respect to criteria implementation. The Department will continue to be available to address public inquiry, but it would be very helpful for EPA to join us in that endeavor.

As you know, the effort to derive and establish numeric nutrient criteria for Florida's fresh waterbodies is challenging and contentious. The State has invested significant resources to ensure that EPA has the best science available to successfully accomplish this task. It was important to the Department to provide EPA with the supporting data and information so that informed and defensible decisions can be made regarding the final criteria. Once EPA has promulgated the criteria, the Department will immediately begin our process of review so that necessary Department follow-up can be initiated as soon as possible.

cc: Ephraim King