

Florida Numeric Nutrient Criteria – Path Forward

On November 30, 2012, the Environmental Protection Agency (EPA) approved State criteria for, streams, lakes, springs and south Florida estuaries and coastal waters. On the same day, the EPA proposed criteria for the remaining estuaries, coastal waters, and south Florida inland flowing waters, and also re-proposed criteria for flowing waters outside of south Florida (applicable to waterways that may meet the definition at 62-302.200(36)(a) or (b) F.A.C.). The following is a joint path forward that, if executed as outlined below, will establish numeric nutrient criteria for the vast majority of Florida waterbodies. Once completed as intended by the parties, EPA anticipates that the combination of these actions and future modification to EPA's 2009 determination should enable the Agency to conclude that finalization of the federal numeric nutrient criteria contained in its November 30, 2012, proposal is unnecessary.

The Florida Department of Environmental Protection (FDEP or Department) will pursue passage of the attached version of the draft legislation and adoption by rule of the attached document, entitled "Implementation of Florida's Numeric Nutrient Standards" dated March 11, 2013. The legislation makes it clear that the effectiveness provisions of 62-302.531(9) F.A.C. will expire once the EPA withdraws federal numeric nutrient criteria and ceases numeric nutrient criteria rulemaking, thus allowing FDEP to fully implement State numeric nutrient criteria.

Marine Waters: FDEP will by rule establish numeric nutrient criteria for 22 estuary and coastal segments by July 1, 2013, or as soon thereafter as possible. The attached draft legislation directs FDEP to complete its rulemaking to establish numeric nutrient criteria for the remaining estuary and coastal segments by December 1, 2014. Until such nutrient criteria are established for the remaining estuary and coastal segments, the draft legislation states that applicable water quality standards are the current unimpaired conditions of those waters and directs the Department to calculate interim numeric values representing those unimpaired conditions and submit them to the Governor and Legislature by August 1, 2013. The interim numeric values, reflecting the current unimpaired conditions, will be values that EPA and FDEP mutually determine are based on the best monitoring and modeling data available at the time and protective of the designated uses. Any disagreement over the interim numeric interpretation for any estuary or coastal segment will be immediately elevated to the Secretary of FDEP and the Regional Administrator of the EPA Region 4 Office for resolution. The EPA will review under Clean Water Act 303(c) the numeric nutrient criteria adopted by the Department for the 22 estuary and coastal segments and the legislatively established narrative standard regarding the current unimpaired conditions of the remaining estuary and coastal segments (taking into account the Department's calculation of the numeric values for total nitrogen, total phosphorus, and chlorophyll *a* conditions for those estuary segments and chlorophyll *a* for coastal segments), all of which will have been submitted to EPA before August 1, 2013. EPA will make final decisions whether to approve those actions and the narrative standard prior to the September 30, 2013, consent decree deadline. The Department's calculated interim numeric values would be used as starting points for implementing appropriate regulatory actions on a site-specific basis, unless final Hierarchy 1 or 2 numeric criteria have been adopted for the waterbody and have become applicable criteria for Clean Water Act purposes by December 1, 2014.

Fresh Waters: Once adopted in rule, FDEP will submit the document, entitled "Implementation of Florida's Numeric Nutrient Standards" dated March 11, 2013, to EPA for review under Section 303(c) of the Clean Water Act. This document clarifies how the numeric nutrient criteria for fresh waterbodies will be applied and implemented, including a new chapter related to the implementation of the definition of stream at 62-302.300(36) F.A.C. The definition excludes conveyances that are man-made or physically altered streams, primarily used for water management, and have marginal or poor habitat

components. The implementation document clarifies FDEP's intent to presumptively apply Florida's stream numeric nutrient criteria to these waterbodies unless the Department has publicly distinguished it as such a conveyance.¹ If available information provided by the public, in response to public notice and request for information, or otherwise known by the Department, demonstrates that the segment is commonly used for navigation, boat access, or other frequent recreational activities such as swimming or boating, then the primary purpose is not water management and the department will apply the nutrient standards in Rule 62-302.531(2) F.A.C. There are also three additional categories of waters that are not subject to numeric nutrient criteria. Other Class III waters not subject to numeric nutrient criteria are: 1) waters influenced by tide (i.e., tidal creeks and tidal segments at river mouths); 2) marine lakes; and 3) South Florida flowing waters. Because of the limited extent of the waters that would not be subject to Florida's numeric nutrient criteria, EPA believes that FDEP should be able to implement their narrative criterion for these waters in an effective and efficient manner.

The Department will also codify, through the legislation noted above, requirements for FDEP to ensure nutrient loads from all managed conveyances and canals, as well as the other waters described above, are controlled so that downstream waterbodies are protected. These actions once implemented and completed, coupled with EPA's prior (November 30, 2012) approval of FDEP's newly adopted Water Quality Standards for lakes and flowing waters, will result in Florida having numeric nutrient standards for all fresh water lakes, springs, estuaries and coastal waters, and the majority of fresh flowing waters in the State.

Based on this extensive coverage of Florida waters by State numeric nutrient criteria (fresh and marine), EPA is prepared to take actions that would make it unnecessary for EPA to finalize federal criteria for these waters. Upon FDEP's incorporating by reference into rule the Implementation Document as modified on March 11, 2013, and EPA's review of that document under Clean Water Act section 303(c), EPA is prepared to amend the 2009 Determination to clarify that numeric nutrient criteria are unnecessary for flowing waters not covered by the stream definition. EPA would then not finalize its rulemaking for inland waters. Upon enactment of the attached version of the legislation and FDEP's submittal to EPA of the numeric values that FDEP is directed to develop in the legislation and those numeric nutrient criteria FDEP adopts by rule, EPA, following review under Clean Water Act section 303(c), is prepared to cease corresponding federal rulemaking for estuaries and coastal waters.

¹ It is important to note that while the limited waters excluded from the stream definition will not be subject to the States NNC, these waters are still Class III waters protected by Florida's existing narrative nutrient standard in accordance with State rules, including 62-303 F.A.C.