

## EPA PROPOSES NUMERIC NUTRIENT CRITERIA FOR FLORIDA'S SURFACE WATERS

On January 15, 2010 the US Environmental Protection Agency (EPA) released its proposed numeric nutrient criteria for lakes and flowing waters in the State of Florida.<sup>1</sup> This proposal represents the first time EPA has exercised its authority under § 303(c)(4)(B) of the Clean Water Act to establish state water quality criteria for nutrients. Many observers believe that EPA's action may establish a precedent for other states and/or for other EPA actions regarding nutrients. Both EPA's proposed criteria and EPA's underlying methodologies are being scrutinized by multiple stakeholders, including for their implications for releases of nitrogen and phosphorus by numerous sources in watersheds throughout the country, including in the Gulf of Mexico, the Mississippi River basin, and the Chesapeake Bay.

EPA's proposed numeric criteria would replace Florida's current narrative criteria for nutrients, which merely state that "in no case shall nutrient concentrations of body of water be altered so as to cause an imbalance in natural populations of flora or fauna."<sup>2</sup> Under Florida's current system, regulators review individual water bodies to assess whether they are meeting the narrative standard. This review has proven costly and time consuming because the relationship between nutrient levels and biological impairment is very complex, and often difficult to separate from other factors. Further, nutrients, unlike toxic contaminants, are necessary for the biological health of streams. At the same time it is widely conceded that at some point excess levels of nutrients can be harmful to the ecosystem of surface water bodies. The factors that render a specific level of nutrients unhealthy for a particular water body are often site-specific, and cannot be readily generalized over an entire state or even an entire region or watershed.

EPA's proposed criteria will have broad-based repercussions throughout Florida. In Florida, approximately 1,000 miles of rivers and streams, 350,000 acres of lakes and 900 square miles of estuaries are impaired for nutrients, according to

### Brussels

+32 (0)2 290 7800

### Denver

+1 303.863.1000

### London

+44 (0)20 7786 6100

### Los Angeles

+1 213.243.4000

### New York

+1 212.715.1000

### Northern Virginia

+1 703.720.7000

### San Francisco

+1 415.356.3000

### Washington, DC

+1 202.942.5000

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<sup>1</sup> Environmental Protection Agency, 40 C.F.R. Part 131, Proposed Rule, Water Quality Standards for the State of Florida's Lakes and Flowing Waters, signed January 14, 2010 (not yet published in the Federal Register) (hereinafter Proposed Rule).

<sup>2</sup> Fla. Admin. Code Ann. R. 62-302.530

EPA.<sup>3</sup> More than 60% of Florida's 823 waters listed as impaired are classified as impaired for nutrients.<sup>4</sup> Many in the regulated community consider EPA's proposed criteria to be unreasonably restrictive. One stakeholder group has characterized the new criteria as so low as to render even many pristine streams and lakes, unaltered by human activity, as impaired; and they have described compliance with the proposed criteria as "technically impossible."<sup>5</sup>

The restrictiveness of the EPA proposed criteria will potentially affect virtually any commercial activity that results in releases of phosphorus or nitrogen, including agriculture, landscaping, silviculture, mining, seaports, urban or community development, small businesses, and even tourist attractions and recreational facilities.<sup>6</sup> Wastewater treatment plants—also nutrient contributors—may need to invest in costly new treatment technologies, passing these costs onto users and dischargers. Municipal utilities would similarly need to invest heavily in new plants and treatment systems, passing these costs onto ratepayers.<sup>7</sup> Estimates for compliance with the proposed regulations run as high as tens of billions of dollars.<sup>8</sup> It is unclear whether or to what extent the proposed rules may implicate known, but less direct contributions of nutrients to surface waters, such as the deposition of nitrogen oxides (NOx) into Florida water bodies.

The EPA proposed rule sets criteria for total nitrogen and total phosphorus for Florida's lakes, streams, springs, and canals. (EPA will propose numeric nutrient criteria for estuarine and coastal waters in a separate rulemaking in 2011.) The proposed rule sets an in-stream protective value (IPV) intended to be protective of that water body, and also establishes a downstream protective value (DPV) to ensure that nutrient load contributed from a stream is

also protective of downstream water bodies. In some instances, the DPV will drive a more restrictive standard than required in-stream at the locus of regulated outfalls or runoff. For some water bodies, such as lakes, EPA derived its criteria from a demonstrable relationship between a specific level of nutrients and a measureable biological impairment. For other water bodies, such as streams, the rule derived criteria based on a statistical distribution of nutrients present in waters judged to be in a healthy biological condition. The latter methodology is the subject of considerable scientific debate as to its validity.

Perhaps in recognition of many of the challenges posed by achieving these restrictive new criteria, the proposed rule contains several provisions intended to provide flexibility and/or phased compliance. For example, the rule allows EPA to approve, at the state's request, site specific alternative criteria where the state can justify criteria for a specific waterway that are different from the proposed criteria.<sup>9</sup> Additionally, EPA's proposal allows Florida to adopt a Restoration Water Quality Standard for waters that cannot meet the criteria, where compliance may be phased in over a period of up to 20 years.<sup>10</sup> The proposed rule also includes provisions for variances, and for the state to alter the designated use of a water body where a use is unattainable.<sup>11</sup> Additionally, the proposed rule seeks comment on a large number of technical and implementation issues and questions, including alternative methodologies and approaches, policy options, the need for more or less stringent criteria, and alternative regulatory strategies.

The rule is being promulgated pursuant to the Court's approval of EPA's settlement in *Florida Wildlife Federation v. Jackson*, 08-0324 (N. D. Fla.), where environmental organizations sued EPA on grounds that it violated a legal obligation by not having set numeric nutrient criteria for Florida. On January 14, 2009, EPA issued a determination that numeric standards for nutrients were necessary

3 Proposed Rule, 27.

4 Letter from Benjamin H. Grumbles, Assistant Administrator, EPA, to Michael Sole, Secretary, Florida Department of Environmental Protection (Jan. 14, 2009) (Necessity Determination), at 6.

5 Don't Tax Florida, Press Release, January 15, 2010, [www.donttaxflorida.com/news10\\_01\\_15.shtml](http://www.donttaxflorida.com/news10_01_15.shtml).

6 Water Quality Regulations, Associated Industries of Florida, at 3.

7 Don't Tax Florida Press Release, January 15, 2010.

8 *Id.*

9 Proposed Rule, 161.

10 *Id.* at 165.

11 *Id.* at 157-161.

for Florida, and established a schedule for promulgating numeric criteria.<sup>12</sup> This schedule was incorporated into a settlement agreement in *Florida Wildlife Federation*.<sup>13</sup> Several Florida regulated entities have filed suit challenging the legal validity of the January 14, 2009 determination,<sup>14</sup> and the final rule itself may also be subject to a litigation challenge.

The proposed rule will be subject to public comment for 60 days from its publication in the federal register,<sup>15</sup> and EPA has scheduled three public hearings in Florida to receive comment on the proposed rule. Additional information on the proposed rule is available at: <http://www.epa.gov/waterscience/standards/rules/florida/>

*We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:*

**Lester Sotsky**

+1 202.942.5170

Lester.Sotsky@aporter.com

**Jeremy Karpatkin**

+1 202.942.5564

Jeremy.Karpatkin@aporter.com

<sup>12</sup> Necessity Determination at 10.

<sup>13</sup> *Florida Wildlife Federation v. Jackson*, 08-00324, Consent Decree at 4-6 (N.D. Fla. Dec. 30, 2009).

<sup>14</sup> These challenges have been consolidated with the *Florida Wildlife Federation* litigation.

<sup>15</sup> As of January 25, 2010, the proposed rule has not yet been published in the Federal Register.