

# EPA Approves Florida Nutrient Rule and Proposes Rules for Additional Waters

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**The authors discuss recent actions taken by the Environmental Protection Agency that have far-reaching implications for the regulation of nutrient discharges in Florida, and potentially throughout the country.**

The Environmental Protection Agency (“EPA”) recently took a series of actions with far-reaching implications for the regulation of nutrient discharges in Florida, and potentially throughout the country. EPA’s actions are significant for all industries and sectors of the economy whose operations lead to nutrient discharges, including electric utilities, municipal wastewater treatment facilities, pulp and paper manufacturers, agricultural users of fertilizer, fertilizer manufacturers and many others.

EPA simultaneously approved the State of Florida’s rule establishing revised nutrient water quality standards (the “State rule”)<sup>1</sup> and proposed two sets of rules establishing federal criteria for nutrients.<sup>2</sup> The first proposed rule addressed criteria for streams and the protection of unimpaired lakes, while the second addressed setting numeric criteria for estuaries, coastal waters and South Florida waters.<sup>3</sup> EPA has stated that the criteria proposed in these rules would either—depending on other circumstances—“backfill” gaps in the State rule or apply to all Florida waters if the State rule does not go

into effect. EPA has also suggested that these rules might not be finalized, if the State and EPA reach further understandings regarding State regulation of nutrient discharges for waters not currently covered by the State rule. EPA also announced it was amending its 2009 “Necessity Determination” to no longer require the establishment of numeric end points for criteria established to protect downstream water bodies, such as lakes and estuaries (downstream protection values, or “DPVs”).<sup>4</sup>

## The Necessity Determination

EPA’s actions come as the latest move in a lengthy rulemaking and litigation controversy involving numeric nutrient criteria in Florida. Waters in the State of Florida are currently subject to the State’s narrative criterion: “In 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.”<sup>5</sup> While the Clean Water Act allows states to adopt numeric or narrative criteria, in July 2008, five environmental organizations (“ENGOS”) sued EPA to force

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the Agency to use its Clean Water Act authority to establish numeric nutrient criteria for the State.<sup>6</sup> In 2009, EPA made a determination under Section 303(c)(4) of the Act to exercise its independent authority to set numeric nutrient criteria for Florida (the “Necessity Determination”).<sup>7</sup> After making the Necessity Determination, the Agency entered into a Consent Decree settling the ENGO suit and committing the Agency to meet a strict schedule for development of numeric nutrient criteria for Florida. In compliance with that schedule, EPA proposed regulations for lakes and flowing waters outside of South Florida in January 2010<sup>8</sup> and finalized the rule in December 2010.<sup>9</sup>

### Court Challenge

This final rule was promptly challenged in U.S. District Court by the State of Florida, industry groups, local government and—for different reasons—ENGOS. The State, industry groups and local governments challenged EPA’s determination that the rule was necessary under the Clean Water Act, and challenged the criteria as being arbitrary and capricious. The ENGOS asserted that the criteria were insufficiently protective. On February 18, 2012, Judge Hinkle struck down key elements of the final rule.<sup>10</sup> After a “searching and careful review,” the court invalidated EPA’s criteria for streams because the Agency had failed to demonstrate that its criteria were based on the level of nutrients that cause biological harm to a receiving waterbody. The court upheld other elements of the rule, including the criteria for lakes and springs, and EPA’s 2009 Necessity Determination. The court also rejected all of the claims of the ENGOS.

Independent of the federal rulemaking and litigation, the Florida Department of Environ-

mental Protection developed its own nutrient regulation, and, after successfully overcoming an administrative challenge by ENGOS, formally submitted the State rule to EPA for approval in June 2012.<sup>11</sup> The State nutrient rule is similar to the EPA rule in the regulation of lakes and springs, but uses the criteria established in the federal rule as only one component of a broader framework for the regulation of streams. Under the State rule, stream criteria would be established in the first instance by a site-specific determination of nutrient values—through a Total Maximum Daily Load (“TMDL”), a Water Quality Based Effluent Limit (“WQBEL”), or some other state mechanism—and would use the EPA criteria as threshold values only in combination with indicators of impaired flora and fauna. A stream with nutrient levels above the federal limits would only be considered to be “verified” as impaired for nutrients if additional biological evidence showed unhealthy flora and fauna attributable to high nutrient levels.

EPA’s dual actions of approving the State rule and proposing its own new rules create a bit of confusion and considerable uncertainty. While it is EPA’s stated intention that its new proposed rules will only impact those waters not covered by the State rule (and may not ever be finalized if EPA becomes satisfied that the State will timely and adequately address those waters), in the short run EPA has proposed rules that, on their face, propose a different approach to nutrient regulation than the State rule which EPA has just approved. Additionally, EPA has stated that its action to remove the requirement for numeric DPVs requires the Court to amend the 2009 Consent Decree. ENGOS could oppose revision of the Consent Decree, as well as challenge EPA approval of the State rule. Accordingly, since there is uncertainty as to what the Court will do and

whether the State rule will go into effect, EPA has reserved the right to apply its nutrient rules to all waters of the State of Florida.

The complex patchwork status of nutrient rulemaking in Florida aside, some may view EPA's actions in Florida as positive steps in this continuing saga. By approving the State rule, EPA is indicating that an approach different from and more flexible than the highly prescriptive EPA rule still satisfies the requirements of the Clean Water Act. Also, EPA's decision to no longer require strict numerical criteria for DPVs similarly signals renewed flexibility in approving state nutrient regulations that do not impose a "one size fits all" approach to reducing nutrient discharges. EPA's apparent flexibility in accepting alternative approaches to addressing nutrient issues may be of particular interest to states in the Mississippi River watershed, where EPA is currently facing another ENGO lawsuit. The ENGOs are asserting that EPA is required under the Clean Water Act to issue a Necessity Determination and set numeric nutrient criteria for the waters in an unspecified number of states within the broad watershed of the Mississippi River.

### Conclusion

More broadly, EPA's actions in Florida may signal a return to a spirit of cooperative federalism as embodied in the Clean Water

Act, wherein Congress declared that states have primary responsibility for setting water quality standards, subject to EPA approval, with EPA direct intervention only upon clear necessity. While the immediate next steps in Florida remain unclear, EPA's recent actions may be a reaffirmation of those principles.

### NOTES:

<sup>1</sup>A November 30, 2012, letter from EPA Region Four to the Florida Department of Environmental Protection approving the State rule is *available at* <http://www.epa.gov/aboutepa/states/approval-letter.pdf>.

<sup>2</sup>These proposed rules are *available at* [http://water.epa.gov/lawsregs/rulesregs/florida\\_index.cfm](http://water.epa.gov/lawsregs/rulesregs/florida_index.cfm).

<sup>3</sup>These actions are summarized in an EPA Decision Document, *available at* <http://www.epa.gov/aboutepa/states/epa-decision-document-11-30-12-final.pdf>.

<sup>4</sup>A November 30, 2012, letter from EPA to the Florida Department of Environmental Protection announcing the amendment is *available at* <http://water.epa.gov/lawsregs/rulesregs/upload/determination2012-2.pdf>.

<sup>5</sup>Fla. Admin. Code Ann. R. 62-302.530(47)(b).

<sup>6</sup>*Florida Wildlife Fed'n Inc. v. Jackson*, No. 4:08cv324. The five organizations are The Florida Wildlife Federation; Sierra Club, Inc.; Conservancy of Southwest Florida, Inc.; Environmental Confederation of Southwest Florida, Inc.; and St. Johns Riverkeeper, Inc.

<sup>7</sup>The Necessity Determination is *available at* [http://www.dep.state.fl.us/water/wqssp/nutrients/docs/benjamin\\_grumbles\\_epa\\_01142009.pdf](http://www.dep.state.fl.us/water/wqssp/nutrients/docs/benjamin_grumbles_epa_01142009.pdf).

<sup>8</sup>75 Fed. Reg. 4,174 (Jan. 26, 2010).

<sup>9</sup>75 Fed. Reg. 75, 805 (Dec. 6, 2010).

<sup>10</sup>*Florida Wildlife Fed'n Inc. v. Jackson*, 853 F.Supp.2d 1138 (N.D. Fla. 2012).

<sup>11</sup>See <http://www.dep.state.fl.us/water/wqssp/nutrients/nnc-hl.htm>.