

Numeric Nutrient Criteria Set for Florida

In what will certainly be a precedent-setting action for the rest of the nation, the US Environmental Protection Agency has issued numeric nutrient criteria for waters in the State of Florida. Numeric criteria have been common for other types of pollutants but narrative criteria have always been used to determine the health of a waterbody in Florida. The switch to numeric criteria will have far-reaching impacts on the State, its local governments and the private sector.

Background

The Florida Department of Environmental Protection (FDEP) had been in the process of developing numeric criteria for several years. But given the state's great diversity in types of soils and surface and ground waters, the task proved to be more challenging than originally thought.

In late 2008, several environmental organizations filed suit in federal court arguing that the development of such criteria was a mandatory duty of EPA; that neither the State of Florida nor EPA had developed such criteria for Florida; and, that EPA must develop the criteria for Florida in order to further the objectives of the Clean Water Act.

Initially, EPA argued that the development of such criteria was not a mandatory duty. The Florida Stormwater Association and other parties were granted the right to intervene on EPA's behalf.

However, in early 2009 EPA sent a letter to FDEP stating that while they believed the development of numeric nutrient criteria was not a mandatory duty, they nonetheless had determined that the development of such criteria was necessary in Florida.

Although FDEP was initially given a few months to complete its initiative, EPA and the environmental organizations entered into a Consent Decree which provided that EPA will set the criteria for Florida. The Court upheld the Consent Decree this past November.

However, a procedural challenge is still alive as to whether proper procedures were followed when a determination was made by EPA that it was necessary to develop numeric nutrient criteria for Florida. The Court should rule on that question within the next several weeks

The Proposed Rules

The proposed rules have now been published in the Federal Register and also on EPA's website at <http://www.epa.gov/waterscience/standards/rules/florida/>. Final adoption is set for October of 2010. Three hearings are scheduled for different locations in Florida and a 60-day period to receive written comments will extend into March 2010. After adoption in October, the rules may be challenged but only based on the record developed through the 60-day comment period.

Many local governments, point sources and other entities are concerned with the draft criteria, questioning the scientific basis of their development and ability to comply with the new numbers. Unless an appropriate and workable compliance schedule or site specific alternative criteria are adopted, the majority of discharges will be in non-compliance with the new criteria. For example:

- Florida local governments have invested billions of dollars in upgrading wastewater facilities to Advanced Wastewater Treatment (AWT). But even those facilities will not meet the new criteria.
- FDEP notes that 80% of the waters they use as “reference sites” in the development of their own numeric nutrient criteria *will not attain the EPA downstream protection values for Total Nitrogen (TN)*.
- The proposed rules may be not only overprotective but in some cases harmful to the natural environment: Scientists note that the proposed nutrient levels for Apalachicola Bay would actually be harmful to the oyster population.
- And speaking of the Apalachicola Bay, under the new regulations, waters flowing into Florida from Alabama and Georgia will be required to meet the numeric nutrient criteria for Florida.

What’s Next?

Interested parties in Florida and other states should closely monitor the developments in Florida. Lawsuits have already been filed in other states, although outside of Region IV. Nonetheless, its clear that numeric nutrient criteria will be the norm in the future. We should strive to be certain that the science used in developing the criteria is valid, and that the economic and financial impacts of the criteria on permittees is considered.