



**35th Annual
Local Government Law in Florida
May 11, 2012**

**Numeric Nutrient Criteria For
Florida**

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A T T O R N E Y S A T L A W

Background



- A number of exhibits are referenced in this presentation but are not attached due to size. These exhibits can be found on our website with this presentation at: <http://www.llw-law.com/practices/Numeric-Nutrient-Criteria/>

Background



- **The Clean Water Act (“CWA”)** requires the waters of Florida to be categorized by designated use (33 U.S.C. 1313 (C)(2)(A))
 - Class I, II, III, IV & V

Background



- **Class I- Potable Water Supplies**
(Fourteen general areas throughout the state including: impoundments and associated tributaries, certain lakes, rivers, or portions of rivers, used as a drinking water supply)

Background



- **Class II- Shellfish Propagation or Harvesting (Generally coastal waters where shellfish harvesting occurs)**

Background



- **Class III- Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife (Default class for all surface waters unless described in Rule 62-302.400, FAC)**

Background



- **Class III Limited-** Fish Consumption; Recreation or Limited Recreation; and/or Propagation and Maintenance of a Limited Population of Fish and Wildlife

Background



- **Class IV- Agricultural Water Supplies (Generally located in agriculture areas around Lake Okeechobee)**

Background



- **Class V- Navigation, Utility and Industrial Use (none exist today)**

Background



- **The Clean Water Act also requires water quality standards to be established for Florida’s waters (33 U.S.C. 1313 (C))**
 - Currently Florida utilizes a narrative water quality standard
 - “In no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural population of flora or fauna.” (62-302.530(47)(b), F.A.C.)

Background



- **The Environmental Protection Agency (“EPA”) announced in 1998 that establishment of numeric water quality standards would be the preferred approach**
 - The Department of Environmental Protection (“DEP”) submitted its Draft Numeric Nutrient Criteria Development Plan to the EPA in May 2002
 - Mutual agreement on July 7, 2004
 - DEP revised the Plan in September 2007; EPA concurred
 - DEP submitted a second revised Plan on March 3, 2009

Then Things Changed



- **July 2008, Earthjustice and several other environmental groups sued the EPA to enforce the setting of numeric nutrient water quality standards**
- **January 14, 2009, the EPA notified DEP that numeric nutrient criteria would be necessary for the State to comply with the CWA**
 - Gave DEP the option to establish numeric criteria for flowing waters by January 14, 2010, and for coastal waters by January 14, 2011, or the EPA would do so
- **EPA pushed for development of numeric nutrient criteria on an expedited schedule**
- **August 2009, the EPA enters into a Consent Decree with the environmental groups settling the lawsuit whereby numeric nutrient criteria had to be:**
 - Proposed by January 14, 2010, and finalized by October 15, 2010, for lakes and flowing waters (extended to November 14, 2010)
 - Proposed by January 14, 2011, and finalized by October 2011, for estuarine and coastal waters (extended to May 21, 2012 and January 7, 2013 – includes South Florida Streams)

DEP/EPA Rule Development



- **January 30, 2009, DEP publishes a Notice of Rulemaking**
 - “PURPOSE AND EFFECT: The Department proposes to establish numeric surface water quality criteria for nutrients and associated standards, such as chlorophyll a. During the rule development process, the Department may decide to amend any or all of the rule sections contained in Chapter 62-302 of the Florida Administrative Code”
- **DEP subsequently abandoned rule development for lakes and flowing waters**
- **January 26, 2010, the EPA published their Proposed Water Quality Standards for the State of Florida’s Lakes and Flowing Waters**
 - Supplemented on August 3, 2010

DEP/EPA Rule Development Cont'd



- **November 14, 2010, the EPA adopts the Final Water Quality Standards for State of Florida's Lakes and Flowing Waters (Noticed December 6, 2010) Exhibit A, <http://www.llw-law.com/practices/Numeric-Nutrient-Criteria/>**
- **EPA extended effective date (originally March 6, 2012) Exhibit B, <http://www.llw-law.com/practices/Numeric-Nutrient-Criteria/>**
 - Takes effect July 6, 2012 except the site-specific alternative criteria took effect February 4, 2011
 - **The extended effective date was intended to give stakeholders “a full opportunity to review the standards and develop flexible strategies for implementation.”**

DEP/EPA Rule Development Cont'd



- Excludes South Florida Waters and Coastal Waters
 - **The EPA is planning to have numeric criteria for these waters proposed by May 21, 2012 and implemented by January 7, 2013**

The Wave of Lawsuits



Consolidated Case No. 04:08-cv-324-RH-WCS

<p>Florida Wildlife Federation v. Jackson, N.D. Fla. Case No. 04:08-cv-324-RH-WCS</p>	<p>The lawsuit that resulted in the NNC</p>
<p>The Florida Water Environmental Association Utility Council, Inc. v. Jackson Case No. 4:09cv428-RH/WCS</p>	<p>Association that represents wastewater facilities challenges the Necessity Determination and Equal Protection claim</p>
<p>The Florida Electric Power Coordinating Group, Inc. v. Jackson, Case No. 4:09cv436-RH/WCS</p>	<p>Organization representing electric utilities challenges the Necessity Determination and Equal Protection claim</p>
<p>Florida Wildlife Federation, Inc., et al. v. USEPA, Case No. 4:10cv511-RH/WCS</p>	<p>Environmentalists challenge the site specific alternative criteria provision of the Final Rule as it applies to watersheds</p>
<p>The Fertilizer Institute et al. v. USEPA, Case No. 4:11cv51-RH/WCS</p>	<p>Organization representing the fertilizer industry and a phosphate company (PCS Phosphate) challenge the Final Rule</p>
<p>The State Of Florida v. Jackson Case No. 04:11cv61-PH/WCS</p>	<p>State of Florida and Florida Commissioner of Dep't of Agriculture challenging necessity determination and Final Rule</p>

The Wave of Lawsuits



Consolidated Case No. 04:11-cv-00061-RH-WCS

The State Of Florida v. Jackson Case No. 04:11cv61-PH/WCS	State of Florida and Florida Commissioner of Dep't of Agriculture
The State Of Florida v. Jackson Case No. 03:10-cv-503-RV-MD	State of Florida and Florida Commissioner of Dep't of Agriculture
The Mosaic Company, Inc., v. Jackson Case No. 03:10-cv-506-RV-EMT	Manufacturer and marketer of phosphate and potash
The Fertilizer Institute v. U.S. EPA Case No. 03:10-cv-507-RS-MD	Association representing the fertilizer industry and a phosphate company
CF Industries, Inc., v. Jackson Case No. 03:10-cv-513-MCR-MD	Fertilizer manufacturer
Destin Water Users, Inc. v. Jackson Case No. 03:10-cv-532-MCR-EMT	Not-for-profit and publicly owned water and wastewater utilities
Florida League of Cities and Florida Stormwater Association Case No. 3:11cv11-MCR/MD	Association representing municipal and county governments and an Association representing organizations that manage stormwater
Florida Pulp and Paper Association Environmental Affairs, Inc., Southeast Milk, Inc., and Florida Fruit and Vegetable Association Case No. 3:11cv47-MCR-EMT	Association representing 8 pulp and paper companies; a Cooperative operating for the benefit of dairy producers; an Agricultural Trade organization representing Florida growers

AND THE COURT RULED



- On February 18, 2012, the presiding judge ruled on the lawsuits
 - Exhibit C, <http://www.llw-law.com/practices/Numeric-Nutrient-Criteria/>
 - Upheld the NNC for lakes and springs
 - Effective date July 6, 2012
 - Upheld the concept of downstream protection values but found how EPA derived these values to be arbitrary and capricious
 - EPA has until May 21, 2012 to justify rule or re-propose rule
 - July 6, 2012 - Effective date for downstream protection values

AND THE COURT RULED



- Found the in-stream values for flowing waters to be arbitrary and capricious
 - Have until May 21, 2012 to justify rule or re-propose rule
 - Potential effective date of July 6, 2012

DEP INITIATIVE



- **DEP Petitions EPA to Rescind its Rule**
 - April 22, 2011, DEP Petitions EPA
 - Seeking to regain State control of water quality standards
- **The Main Differences/Similarities**
 - The numbers are about the same
 - DEP's rule would maintain the narrative criterion but would numerically interpret it
 - DEP's rule does not include downstream protection values
- **Account for biological conditions in addition to numeric thresholds**
 - Hierarchy for site specific interpretations

DEP INITIATIVE



- **Has been Adopted and Transmitted to EPA for Approval**
 - Submitted to Legislature December 9, 2011, Exhibit D, <http://www.llw-law.com/practices/Numeric-Nutrient-Criteria/>
 - Rule challenge filed by Florida Wildlife Federation
 - Legislative approval in 2012 Session originally contemplated but unable to occur because no final rule because of rule challenge
 - HB 7051 approved in 2012 session – exempted ERC approved rule from legislative ratification – Exhibit E, <http://www.llw-law.com/practices/Numeric-Nutrient-Criteria/>
 - February 20, 2012 draft rule submitted to EPA for review - Exhibit F, <http://www.llw-law.com/practices/Numeric-Nutrient-Criteria/>

DEP INITIATIVE



- **Has been Adopted and Transmitted to EPA for Approval**
 - EPA approval after June (expect another extension)
 - EPA is waiting to see what the outcome will be before approving
 - Suspect lawsuits if approved by EPA

DEP INITIATIVE



- **DEP's Rule does not have downstream protection values**
 - Principal tool of implementation will be the TMDL process
 - Essentially:
 - Waterbodies are on a three year evaluation cycle for impairment
 - If a waterbody segment exceeds its established NNC, then DEP would assess its biological conditions to determine if it is in fact impaired for its designated use
 - If declared impaired, then a TMDL is established in conjunction with stakeholders and public participation
 - Once a TMDL is established, the BMAP process starts to determine load allocations
 - Critical to growth as it can be a limiting factor

Rule Development is not Over



- **EPA is still charged with developing NNC for Coastal Waters and South Florida Flowing Waters**
 - EPA has until January 7, 2013, to establish NNC for these waters
 - Must propose rule for these waters by May 21, 2012
 - DEP has established NNC for some estuaries which were submitted for EPA approval
 - DEP has not developed NNC for South Florida Canals
 - Has proposed to retain the narrative standard
 - Suspect more lawsuits to follow with promulgation of these NNC

The Future



- **Bottom Line: NNC is here to stay**
 - **Litigation Outcomes:**
 - 1: The Final Rule is upheld
 - 2: The Final Rule is invalidated entirely
 - **The EPA goes back to the drawing board from scratch**
 - 3: The Final Rule is invalidated in part
 - **The EPA revisits the portions invalidated**
 - 4: Settlement
 - **DEP agreed to establish NNC before the lawsuits and is currently developing NNC**

The Future



- **Things to keep in mind/WHY YOU SHOULD CARE**
 - Will require compliance at local government level
 - Implementation will be a significant undertaking for local governments, requiring proactive budgeting and public financing initiatives
 - Will require local governments to develop innovative approaches to address existing and future infrastructure/development

The Future



- **Things to keep in mind/WHY YOU SHOULD CARE**
 - Will require that local governments put into place the necessary legal and policy frameworks to allow for implementation
 - Third party enforcement mechanisms

The Future



- **Legal Framework**
 - **Comprehensive Planning/FLUM**
 - Proactive resource planning
 - Watershed planning
 - FLUM
 - Infrastructure/Capital Improvements
 - Conservation
 - **Pollution Trading**
 - Best use of land
 - Transfer of development rights/nutrient loading
 - **Legislative Actions**
 - BMPs
 - Nutrient reduction programs
 - **Interlocal Agreements**
 - Shared waterbodies
 - Special districts

The Future



- **Permitting**
 - **National Pollutant Discharge Elimination System/MS-4**
 - Compliance schedules
 - Effluent limits (technology based)
 - **Environmental Resource Permit/Clean Water Act 404 Permits**
 - Permit renewals
 - Future construction
 - **Water Reuse**
 - Where NNC comes into play

The Future



- **Total Maximum Daily Load/Basin Management Action Plans**
 - What they are
 - City and County's role in them
 - Point source
 - Non-point source
 - Relationship with other interested parties
 - Legislative actions
 - Need for early planning

The Future

- **Site Specific Alternative Criteria**
 - What is it?
 - How do you get it?
 - Is it worth it?
- **Data Collection & Monitoring**
 - Will be key now and for the future

The Future

- **Creation of Special Districts**
 - What are they?
 - What is their purpose?
 - How can creation of one benefit NNC reductions?
- **Existing Special districts**
 - Coordination agreements
 - Control water flows
 - BMPs
 - Resource planning

The Future



- **Public Financing**

- Proactive and creative public financing to fund:
 - Monitoring programs
 - Necessary retrofitting of existing facilities and
 - Construction of new facilities
 - Operation and maintenance of NNC reduction initiatives

Questions?



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A copy of this presentation and exhibits may be found at our website:
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