

March 8, 2010

Water Docket
U.S. Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue, NW.
Washington, DC 20460

Attention: Docket ID No. EPA-HQ-OW-2009-0596

Dear Sir or Madam:

On behalf of *Florida* PEER I would like to take this opportunity to comment on EPA's Proposed Water Quality Standards for the State of Florida's Lakes and Flowing Waters as published on January 26, 2010. I also addressed your panel with regards to this issue on February 16, 2010 at its 7 p.m. hearing in Tallahassee, Florida.

For reasons that will be more fully set forth below, *Florida* PEER supports the concept of adopting nutrient criteria standards for the State of Florida. Past assertions that Florida should move beyond the single use of narrative nutrient criteria have been strenuously fought and ultimately rejected by both industry as well as the very agency that is charged with protecting Florida's environment, the Florida, Department of Environmental Protection (FDEP). We therefore applaud EPA's efforts in this regard. Nevertheless, it is our belief that any standards that are ultimately adopted must be fully protective of Florida's environment. We are concerned that the current, proposed standards do not meet that test.

The Stream Condition Index

As stated on page 4180 of the Federal Register:

3. Nutrient Pollution in Florida

Water quality degradation resulting from excess nitrogen and phosphorus loadings is a documented and significant environmental issue in Florida. According to Florida's 2008 Integrated Report,³² approximately 1,000 miles of rivers and streams, 350,000 acres of lakes, and 900 square miles of estuaries are impaired for nutrients in the State. To put this in context, these values represent approximately 5% of the assessed river and stream miles, 23% of the assessed lake acres, and 24% of the assessed square miles of estuaries that Florida has listed as impaired in the 2008 Integrated Report.³³ Nutrients are ranked as the fourth major source of impairment for rivers and streams in the State (after dissolved oxygen, mercury in fish, and fecal coliforms). For lakes and estuaries, nutrients are ranked first and second, respectively. As discussed above, impairments due to nutrient pollution result in significant impacts to aquatic life and ecosystem health. Nutrient pollution also represents, as mentioned above, an increased human health risk in terms of contaminated drinking water supplies and private wells.

(Footnotes omitted) This statement by EPA underscores the critical nature of adopting a rule that will truly limit the discharge of nutrients into Florida's surface waters.¹

Florida uses a Stream Condition Index (SCI) as the foundation upon which to identify reference sites from which nutrient criteria are established. Simply stated, the allowed nutrient levels in Florida's streams will be too high if the appropriate level for determining whether or not Florida's streams are impaired is not chosen. The standards as proposed largely rely upon the SCI to determine at what score each stream will be considered as impaired. On page 4193 of the Federal Register the EPA stated its approach:

EPA considered two lines of evidence in determining the SCI range of scores that would indicate biologically healthy systems. The first line of evidence was an evaluation of SCI scores in streams considered by FDEP to be least-disturbed streams in Florida. A statistical analysis balanced the probability of a stream being included in this reference set with the probability of a stream not being included in this reference set, and indicated that an SCI score of 40 was an appropriate threshold. SCI scores range from 1 to 100 with higher scores indicating healthier biology.

¹ Actually, we maintain that the figures derived by the FDEP understate the true number of Florida's waters that impaired, particularly given the fact that Florida's Impaired Water Rule, 62-303, F.A.C., has been challenged because of contentions that it is too restrictive in identifying Florida's impaired waters. See, e.g., Sierra Club et. al. vs. Levitt, 488 F.3d 904 (11th Cir. 2007).

Our first issue is whether or not EPA has subjected the SCI and the development of nutrient criteria to its own *Evaluation Guidelines for Ecological Indicators*, approved May 2000, (<http://www.epagov/emap/html/pubs/docs/resdocs/ecoind.html>). If it has followed its own guidance in this matter we are requesting the documentation of these reviews. If not, we submit that EPA's guidance should be used in determining the appropriateness of the SCI and nutrient criteria as developed. This evaluation, we submit, should be done internally by EPA, e.g. by the biocriteria program or the Office of Research and Development, not by an outside contractor. Therefore, we would have some level of confidence that the reference sites chosen are truly representative of only minimally disturbed streams with little to no effect from human influence with known natural variability.

Our second issue is how EPA arrived at a score of 40 (or a 2.5th percentile) as being determinative of the appropriate threshold below which streams would be considered impaired. Simply stated, our concern is that choosing a 2.5th percentile will improperly exclude waterbodies from being labeled as impaired when, in fact, they are. We can well understand Florida's desire that as few of its waterbodies as possible be labeled with an "impaired" designation, but if the science supports such a determination then the public has the right to know as much. After all, nutrient impairment has been shown to be much more than a mere nuisance. It can lead to serious health issues in the human population.

Further, and equally important, is the question of whether the 2.5th percentile of the selected reference sites adequately account for a safety factor that EPA normally uses to establish water quality criteria. From the documentation we have seen we simply do not know whether safety factors have been used, as would normally be the case when trying to identify the level of purity of any state's waterbodies. Given the level of uncertainty as to the allegedly pristine nature of Florida's reference sites and the designation as such we maintain that a safety factor should be used. If they have not been used we maintain that the rule, as promulgated, inadequately protects Florida's waters and the health of its residents.

The Need For Peer Reviews

As I mentioned at the public hearing on the 16th, we believe that it is critical that the development of these nutrient standards, including the use of FDEP's SCI be submitted to internal peer review at EPA, if such has not been accomplished to date. Likewise, any external peer reviews that have been conducted should be identified for the public.

Costs Of The Rule

During the public hearing we heard industry lawyers and other industry representatives complain that adoption of the rule in its present form would impose substantial costs upon them. Some additional costs will occur. But what has yet to be discussed is the long history of inaction by the FDEP with respect to enforcement of even the modest rules that currently govern pollutant discharges in Florida. *Florida* PEER has detailed this lack of enforcement, both in assessments

and collections, for years in reports that are based upon the FDEP's own data. http://www.peer.org/news/news_id.php?row_id=1133 Sadly, actual penalty assessments against violators have declined over the past 20 years when adjusted for inflation.² In addition, even when it does assess civil penalties the FDEP has a poor history of recouping economic benefits derived from violating Florida's NPDES permits.

This is not to say that all industry and agriculture in Florida are bad actors. But the fact remains that many of these facilities have managed to violate the Clean Water Act for years with little or no monetary consequences. We submit, therefore, that little weight should be given to their pleas for relaxing protections for Florida's water bodies when they themselves bear the majority of the blame for the impaired condition of those same water bodies.

Ineffectiveness of Florida's TMDL Program

Industry and agriculture representatives have repeatedly raised the argument at the public hearings that Florida's TMDL Program has been successful at restoring Florida's impaired waters. They urge EPA to allow the program to simply exist as it is, arguing that the TMDL Program will resolve the nutrient impairment issue. This argument is fundamentally flawed on several counts.

Setting nutrient standards will assist in the cleanup of surface waters that are known to be impaired. Nutrients are a serious problem in Florida. Contrary to what the FDEP and other opponents of the rule now maintain, when the issue of dealing with impairment decisions was being litigated in 2001 the FDEP was clear in its stated concern. As an Administrative Law Judge stated in his Final Order on the TMDL Rule, 62-303, F.A.C.:

164. As Mr. Frydenborg testified at the final hearing, nutrients are "probably the most widespread and pervasive cause of environmental disturbance in Florida" and they present "the biggest challenge [that needs to be] overcome in protecting aquatic systems." See also Rule 62-302.300(13), Florida Administrative Code ("The Department finds that excessive nutrients (total nitrogen and total phosphorus) constitute one of the most severe water quality problems facing the State.").

165. As noted above, nutrients are among the parameters for which water quality criteria have been established by the Department in Rule 62-302.530, Florida Administrative Code. The criterion for nutrients set forth in Subsection (48)(b) of the rule (which applies to all "water quality classifications") is a "narrative . . . criterion," as that term is used in Subsection (3)(c) of Section 403.067, Florida Statutes. It is as follows: "In no case shall nutrient

² The entire report may be viewed at http://www.peer.org/docs/fl/08_25_11_fl_rpt_on_historical_enforcement.pdf

concentrations of a body of water be altered as to cause an imbalance of natural populations of aquatic flora or fauna." Paragraphs 164-165, Pages 158-159, Final Order^{3 4}

Yet, while the nutrient problem is critical, the ability to identify such impaired water bodies in Florida is far from simple. In the same Final Order issued at the conclusion of the litigation over the adoption of Florida's TMDL Rule, the Administrative Law Judge made this observation, ironically in support of the use of narrative nutrient criteria.

341. Deciding whether "alternative, site-specific thresholds" should be used and, if so, what they should be, will involve the exercise of the Department's "best professional judgment," as will the determination as to how, in each case the Department is presented with a water placed on the "planning list for nutrient enrichment based on other information indicating an imbalance in flora or fauna," it should go about "verify[ing] the imbalance," as the Department will be required to do by Subsection (2) of proposed Rule 62-303.450, Florida Administrative Code. In some instances, the Department will only need to thoroughly review the "other information" to "verify the imbalance." In other cases, where the "other information" is not sufficiently detailed, new "information" will need to be obtained. How the Department will proceed in a particular case will depend upon the specific circumstances of that case.

Paragraph 341, Page 242, Final Order⁵ In other words, the situation in Florida is now a jumbled mess, it is designed as such so that impairment decisions will take inordinate amounts of time and money with inordinate discretion in the hands of the FDEP. The FDEP, industry and agriculture endorse this process because it helps them. It does not, however, benefit the environment.

Even visual observations of extreme algal growth do not, in Florida, count as evidence of nutrient impairment. In 2001 when Florida DEP first adopted its TMDL Rule, 62-303, F.A.C., a significant area of contention was the effectiveness of the narrative nutrient criteria in identifying whether a water body was impaired. FDEP's representatives testified at the hearing on that rule that red tides could not be considered as evidence of impairment. In other words, even evidence of toxic algae such as phisteria would not, by itself, be evidence of impairment. 62-303.360(4), F.A.C. The ALJ rubber-stamped their position.⁶

When assessing aquatic life-based water quality criteria the TMDL Rule doesn't allow data accumulated as a result of permit violations and/or spills or mixing zones to be considered as evidence of impairment. 62-303.420 (5) F.A.C. Thus, if a facility is continually violating its

³ *Lane et. al. v. FDEP et al.*, Florida, Dept. of Administrative Hearings, Case No.: 01-1332RP, (May 13, 2002)

⁴ Russ Frydenborg is an FDEP employee working in the Bureau of Standards and Special Projects.

⁵ *Lane et. al. v. FDEP et al.*, Florida, Dept. of Administrative Hearings, Case No.: 01-1332RP, (May 13, 2002)

⁶ Paragraph 242, Page 186, Final Order, *Lane et. al. v. FDEP et al.*

permit and this is the source of data showing impairment the water segment will not be listed as impaired. Mixing zones are specifically excluded such that if the FDEP has permitted the mixing zone and it is causing impairment because of the FDEP's decision to allow the mixing zone the affected water body will not be labeled as impaired. 62-303.100 (2), F.A.C.

Three years after adoption of the TMDL Rule, the FDEP issued a report on the status of Florida's water bodies. The report stated that 373 water bodies were impaired because of nutrients, by far the most of any other pollutant.⁷ The report, entitled, *Florida's Total Maximum Daily Load Program: the First 5 Years, A Report to the Legislature and Governor*, acknowledged that Florida's narrative nutrient criteria was causing problems in determining impairment:

The state's criteria for nutrients (nitrogen and phosphorous, for example) are narrative rather than numeric, which on occasion has led to differing interpretations by third parties on DEP's determination as to whether a water body is impaired by excessive nutrients.

Report, Page 7, http://www.dep.state.fl.us/water/tmdl/docs/2005TMDL_Report_final_2-25-05.pdf In light of the problems caused by narrative nutrient criteria the FDEP announced in the Winter of 2008 that it agreed that numeric nutrient criteria were needed for Florida. In fact, it tried to couch the issue as though it had been acting "proactively.

The Need for Criteria - FDEP has long realized the importance of establishing water quality standards for protection against nitrogen and phosphorus pollution (nutrient pollution). Nutrient pollution leads to significant water quality problems such as harmful algal blooms, low-oxygen "dead zones" in water bodies, and declines in wildlife and wildlife habitat. These effects can also disrupt recreational activities and pose threats to public health.

FDEP currently implements the narrative nutrient criterion on a site-specific basis. For example, FDEP will interpret the narrative criterion for permitting purposes or in response to the occurrence harmful and destructive algal blooms. Development of numeric nutrient criteria proactively addresses the discharge of excess nutrients and provides an early warning system for waters threatened by nutrients before it's too late. A plan for the derivation of numeric criteria was developed by DEP several years back and has been revised over time as new information has become available. A Technical Advisory Committee has been meeting on this issue since January 2003 and made considerable progress in addressing this technical complex issue and the natural variation in nutrients that exist throughout Florida.

⁷ See, Report, page 6, http://www.dep.state.fl.us/water/tmdl/docs/2005TMDL_Report_final_2-25-05.pdf

See, FDEP Winter Newsletter, http://www.dep.state.fl.us/WATER/watersheds/docs/watershed-network_v1i4.pdf **If, as industry now contends, the TMDL Rule is working, we would not now be in a situation in which the majority of Florida's waterways that are impaired are in such a condition because of excessive nutrients.**

The groups who argue for allowing TMDLs to supposedly remedy Florida's impaired waters do so for one overriding reason—delay. They know that the very process of setting TMDLs is very time consuming. It is a decision-making process that allows industry to be heavily involved. Then, if industry cannot avoid the setting of a TMDL the same can be litigated for years, thus avoiding cleanup of the water bodies that they polluted. Time is money.

The extended litigation delays also have an advantageous affect for industry because other sections of Florida's TMDL Rule restrict the use of data once it reaches a certain age, e.g. 62-303.450(1), F.A.C., which limits data to five years of age. Thus, the longer such issues can be litigated the less likely it is for the water body to be listed as impaired. By comparison, once nutrient standards are set, the identification of water quality violations becomes clearer and less subject to litigation.

The Need For Nutrient Standards Was Entirely Predictable

Florida's water bodies were not degraded overnight. The degradation did not happen in secret. The fact is that it occurred gradually over time while Florida's state government, through the FDEP, watched and supposedly studied the problem. Careful study is an imperative. But the studies surrounding the issue of nutrients in Florida's have taken well over a decade. Florida's Legislature originally adopted § 403.067, Fla. Stat., in 1999, a statute that was substantially written by industry lawyers and approved by the FDEP. The same approach was taken with respect to the TMDL Rule cited herein. When the rule was challenged by environmental groups because of the obvious flaws contained therein, the FDEP defended the rule with the strong assistance once again of industry lawyers.⁸

The marriage of FDEP and industry/agriculture did not end with the adoption of the TMDL Rule. While FDEP Secretary Sole initially took a position that numeric nutrient standards were needed,⁹ he changed his position when EPA decided that it needed to move forward with adopting those standards.¹⁰ Likewise, two former FDEP Secretaries, Virginia Wetherell¹¹ and Colleen Castille, signed on to an organization called *Don't Tax Florida* when EPA announced its intent to adopt nutrient standards for Florida. This is an organization made up largely of industry

⁸ One of the lawyers who represented FDEP in defending the TMDL Rule in 2001 was Winston K. Borkowski. Mr. Borkowski now works for Hopping Green & Sams, <http://www.hgslaw.com/lawyers/winston-k-borkowski.html>, one of the main firms who represents industry and who is opposing the EPA promulgated rule.

⁹ January 16, 2009, FDEP Press Release, http://www.dep.state.fl.us/secretary/news/2009/01/0116_01.htm

¹⁰ See, report by the Kansas Rural Water Association, October 16, 2009, wherein both Secretary Sole and Florida Agriculture Secretary Charles Bronson derided EPA's efforts. <http://www.krwa.net/newsDB/MainAnnounce2.asp?key=532>

¹¹ Wetherell was the Secretary when the enabling statute, § 403.067, Fla. Stat., was drafted. Her successor, David Struhs, is now working for International Paper, a company that he was supposed to have been regulating while Secretary at FDEP. His successor was Colleen Castille.

and agriculture and dedicated to opposing the setting of nutrient standards that would clean up Florida's water bodies. <http://www.donttaxflorida.com/about1.shtml> Then, at one of the hearings on February 16, 2010, in Tallahassee, industry and FDEP once again teamed up to oppose the setting of standards. Speakers from industry and agriculture repeatedly advised the panel that the FDEP agreed with their position that nutrient standards are not necessary for Florida. They portrayed themselves as innocent victims that are being punished by the EPA. FDEP representatives sat in the audience and said nothing.

The sad fact is that in Florida any improvements to the environment come in spite of, not because of, the work of state government. It is for precisely that reason that Floridians need the EPA to step in and set nutrient standards that will work to clean Florida's surface waters. trust that the final rule will serve to begin that process in a manner consistent with scientific principals and devoid of political influence.

We appreciate the opportunity to present these comments.

Sincerely,

Jerry Phillips
Director
Florida PEER