

*Via Electronic Mail and
Overnight Delivery*

January 31, 2013

Water Docket
US Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue, NW
Washington, DC 204460

Re: Docket ID No. EPA-HQ-OW-2009-0596
Federal Register 40 CFR Part 131
EPA-HQ-OW-2009-0596
Comments of the Florida Stormwater Association, Incorporated
and the Florida League of Cities, Incorporated

To Whom It May Concern:

On December 18, 2012, the U.S. Environmental Protection Agency (EPA) issued remanded draft numeric nutrient criteria (NNC) water quality standards for limited flowing waters within the State of Florida, as listed in 40 CFR 131.43. This letter presents the comments of the Florida Stormwater Association and the Florida League of Cities concerning the criteria proposed by EPA, and is in addition to those comments submitted on our behalf by Kenneth G. Oertel of Oertel, Fernandez, Bryant & Atkinson, P.A., in Tallahassee, Florida.

The Florida Stormwater Association

The Florida Stormwater Association (FSA) is a voluntary, non-profit Florida corporation organized under subsection 501(c)(4) of the Internal Revenue Service Code.

There are over 280 organizational members of FSA, primarily consisting of municipal and county governments that must obtain and comply with Municipal Separate Storm Sewer System (MS4) permits. FSA's membership also includes various water control districts, Water Management Districts, academic institutions, and consulting and engineering firms. All of the members of FSA have an interest in stormwater management and surface water quality.

Brett Cunningham, PE
President
Jones Edmunds

Jim Hunt, PE
Vice-President
City of Orlando

L. Derrik Owens, PE, DWRE
Secretary-Treasurer
City of Pensacola

Kurt Spitzer
Executive Director

FSA has been actively involved in the development of water quality policy and the implementation of water quality improvement programs in Florida for the past 20 years.

The Florida League of Cities

The Florida League of Cities (FLC) is a voluntary organization whose membership consists of municipalities and other units of local government rendering municipal services in the State of Florida. Its membership presently numbers over 400 municipalities and two charter counties. Under its charter, its purpose is to work for the general improvement of municipal government and its efficient administration, and to represent its members before various legislative, executive, and judicial branches of government on issues pertaining to the welfare of its members

FLC represents the interest of its members in all regulatory and legislative matters. Most of its members operate their own stormwater utility. The issue of water quality is of vital importance to the association as a whole and its individual members.

Background

EPA has approved FDEP's water quality standards providing for NNC for streams and other flowing waters in Florida. In a very small subset of such Florida waters - primarily consisting of urban ditches and stormwater conveyances - Florida's narrative nutrient criteria may continue to apply (in certain circumstances) instead of numeric nutrient criteria. EPA has re-proposed its NNC for those ditches and other stormwater conveyances for which Florida's narrative nutrient criteria may remain in effect.

General Comments about Water Quality Improvement Programs in Florida

1. We gratefully acknowledge and applaud EPA's November 30, 2012 approval of the new water quality standards for Florida as adopted by the Florida Department of Environmental Protection (FDEP). However, we remain very concerned that the rules recently proposed by EPA to supplant the FDEP criteria for certain waters are unnecessary and will serve no significant human or environmental benefit. More significantly, the rules will likely cause MS4 permit-holders to divert scarce resources from waters where water quality improvements are needed (and a relatively high likelihood exists that improvements can be realized) to those "waters" that are merely conveyances for urban stormwater that primarily function as flood control devices. A ditch-by-ditch approach to watershed management removes much-needed flexibility for restoring waters and has the unintended consequence of

mandating a large number of localized solutions in favor of more economical regional solutions.

2. FSA has previously provided EPA with our comments concerning the draft numeric nutrient criteria on April 27, 2010 concerning EPA's NNC as proposed on January 26, 2010, and on August 31, 2010 concerning an additional request for comments that was issued on August 3, 2010.

For the December 18, 2012 proposal, EPA is re-proposing the same numeric nutrient criteria for Total Nitrogen (TN) and Total Phosphorus (TP) that were published in its final rule on December 6, 2010. To the extent that FSA's comments of April 27 and August 3, 2010 concern streams, FSA and FLC are re-submitting those comments, which should be considered to be an integral part of this letter.

3. FSA and FLC believe that it is important to acknowledge the fact that the State of Florida and its local governments have a long history of proactively addressing water quality issues, such as:
 - Florida's water quality statutes and regulatory programs include measures for *implementing* Total Maximum Daily Loads (TMDLs) in a watershed approach through Basin Management Action Plans (BMAPs) as contained in section 403.067, Florida Statutes.
 - FDEP and local governments have spent considerable time and financial resources in collecting water quality data over the past 30 years. In fact, over 33% of all water quality data in the United States is from Florida.
 - There are more stormwater utility financing mechanisms in Florida than in any other state in the nation.
 - As reported to the State of Florida, Florida general and single-purpose local governments spend approximately \$1 billion per year on water quality and flood control improvement programs.
 - Importantly, Florida's NPDES, TMDL and BMAP programs (which are widely regarded as models for other states) will be placed in jeopardy if the new criteria are adopted. As we have mentioned on numerous occasions, Florida law bars FDEP's use of water quality criteria that have not been adopted by the Florida Environmental Regulation Commission (ERC); the proposed EPA criteria may not be simply layered "on top" of Florida's

TMDL and BMAP programs without being first formally approved by the ERC. Our opinion is that the chances of the ERC approving the EPA NNC criteria are rather remote. The resulting complications associated with managing different sets of water quality criteria, regulations and associated administrative procedures in the same watersheds will likely result in Florida's TMDL and BMAP programs becoming unworkable.

The State of Florida, local governments, regulated interests, environmental organizations and numerous state and local elected officials have spent countless hours and millions of dollars on Florida's water quality improvement programs. We believe that filling "gaps" in Florida's model program with scientifically unsound and economically unjustified regulations that attempt to attain what is largely not attainable in urban stormwater conveyances is unwise.

Specific Comments to the Proposed Rule

1. In those stormwater conveyances that will be categorized as being "impaired" under the new EPA regulations, no mixing zone is allowed under Florida law; thus, the NNC would have to be met at the discharge point. In general, there are no surface water dischargers in Florida that would currently achieve the proposed criteria at the point of discharge into a ditch or stormwater conveyance without acquiring and utilizing cost-prohibitive treatment technologies. This is an arbitrary, unattainable and unrealistic standard to expect of permit holders in Florida.
2. *Section II.A* - The document considers nutrients as pollutants but does not acknowledge that there are numerous natural sources of nutrients and that, in some waterbodies, the lack of nutrients is just as much of impairment as is over abundance; in fact, there are many waterbodies in Florida that meet their recreational (fishable) designation with the existing nutrient condition that would be determined to be "impaired" under the NNC as proposed by EPA.

The document references various activities water-related activities (e.g. tourism, fishing, sport fishing, etc.) that Floridians enjoy and are of great benefit to the State's economy as a reason to impose NNC. We know of no such activities that occur in urban ditches or stormwater conveyances.

3. *Section III.B.2* - The Agency states that it could not use the stressor-response approach to establish the numeric criteria and therefore relied upon the reference condition approach, including the use of 90th percentile for most nutrient regions in Florida to set the numeric nutrient criteria for flowing waters. The reference condition approach seeks to identify the

conditions in pristine or nearly-pristine waters, identify those conditions as being indicative of a “healthy” water body, and then use those conditions as criteria for other similar waterbodies.

However, there remains no proven scientific relationship between nutrient loading into a ditch or stormwater conveyance and biological responses. Therefore, the control of nutrient concentrations in such conveyances does not necessarily have an environmental benefit in the water itself. Therefore, all uses of the reference condition approach are cosmetic and falsely imply an environmental benefit that cannot be scientifically demonstrated.

Urban ditches and stormwater conveyances were never intended to function as “streams” or other “flowing waters” in Florida. To the extent that ditches and stormwater conveyances are *by their very nature* waters which are least likely to have conditions similar to the pristine waters as the reference condition approach anticipates, using this approach to set NNC for such conveyances is an arbitrary and unrealistic method to set standards for such waterbodies in Florida.

4. *Section V.C* - The Regulatory Flexibility Act (RFA) requires agencies to assess the impacts of proposed regulations on small business and small governments. The RFA defines “small” governmental jurisdictions as being those with populations of less than 50,000 people.

EPA’s notice fails to comply with the RFA. The Agency states that the proposed rule does not itself establish any requirements that are applicable to small entities; the Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities. Nothing could be further from the truth.

Almost 80% of all city and county governments in Florida have populations of less than 50,000 people. In fact, fully 87% of Florida’s municipal governments are under 50,000 people in population.

It is the local governments in Florida that are responsible for meeting the conditions of their MS4 permit; it is the conditions of the MS4 permit where water quality criteria are implemented. To state that the proposed rule does not “establish any requirements that are applicable to small entities” is grossly incorrect and ignores the requirements of the RFA.

The statement is also inconsistent with EPA’s own actions concerning very similar, recent rulemaking to strengthen the national stormwater program. During that endeavor (“Proposed National Rulemaking to Strengthen the Stormwater Program” initiated in 2010) the Agency

quickly empaneled a Small Entity Advisory Committee pursuant to the RFA to provide input on proposed revisions to national stormwater regulations.

Economic and Fiscal Impacts

On January 18, 2013 EPA issued a Memorandum to Regional Administrators, Regional Water Division Directors and Regional Enforcement Division Directors entitled "*Assessing the Financial Capability for Municipal Clean Water Act Requirements.*" EPA notes in the Memorandum that many state and local governments are facing difficult economic challenges and that it is working with local governments to "...develop and implement new approaches that will achieve water quality goals at lowers costs and in a manner that addresses the most pressing problems first."

Requiring NNC to be applied to urban ditches and stormwater conveyances – especially when the scientific basis of the proposed criteria is questionable and the actual human or environmental benefit of doing so is unproven - is ill-advised. It runs counter to the concept of addressing the "most pressing problems first." Doing so without a comprehensive study that analyzes the true costs and the actual human, environmental and economic benefits of applying NNC to urban ditches and stormwater conveyances is irresponsible.

We note that the Agency's own Science Advisory Board has advised that "[n]umeric nutrient criteria developed and implemented without consideration of system specific conditions can lead to management actions that may have negative social and economic and unintended environmental consequences without additional environmental protection." See: Draft Science Advisory Board (SAB) Ecological Processes and Effects Committee Advisory Report, at page 37, January 8, 2010.

Imposing NNC on urban stormwater conveyances will certainly cause local governments to divert limited fiscal resources from projects where there is a high probability of seeing improvements benefiting the natural environment or human uses, to those "waters" that do nothing more than move urban stormwater or flood waters from one location to another.

Further, the lack of a comprehensive economic analysis leaves the question of the benefit of redirecting significant expenditures of fiscal resources to urban ditches and stormwater conveyances away from other (more valuable) waters, unanswered.

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Recommendation

The Florida League of Cities and the Florida Stormwater Association therefore request that EPA withdraw its NNC rule as proposed on December 18, 2012 and cease further rulemaking concerning flowing waters in Florida.

Sincerely,

A handwritten signature in black ink that reads "Kurt Spitzer". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Kurt Spitzer, Executive Director
Florida Stormwater Association