

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HM 1401 Federal Intrusion into State's Clean Water Program

**SPONSOR(S):** Federal Affairs Subcommittee, Steube

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Federal Affairs Subcommittee	11 Y, 0 N, As CS	Cyphers	Cyphers
2) State Affairs Committee	16 Y, 2 N	Cyphers	Hamby

### SUMMARY ANALYSIS

On December 6, 2010, the United States Environmental Protection Agency (EPA) published final rules establishing numeric nutrient criteria for Florida lakes, streams, rivers, and springs. A portion of the final rule, relating to establishing site-specific alternative criteria, became effective on February 4, 2011. The remainder of the final rule becomes effective on March 6, 2012.

The fiscal impact of the EPA's rule on industrial dischargers, municipal wastewater and urban stormwater facilities, agriculture, and the regulatory agencies is unclear. EPA-generated annualized cost estimates to achieve the numeric criteria (\$130-\$150 million) differ dramatically from estimates provided by the Florida Department of Environmental Protections (DEP) (\$5.7 - \$8.4 billion). One study places the estimates for wastewater utilities alone at between \$24 billion and \$51 billion in capital costs for additional wastewater treatment facilities and annual operating costs between \$4 million and \$1 billion to comply with the federal numeric nutrient criteria.

Several parties, representing environment advocates, state and local governments, water utilities, wastewater, stormwater, agriculture, and fertilizer industries, have challenged the EPA-promulgated numeric nutrient rules in federal court. With the exception of the challenge filed by environmental groups, the complaints share a common theme; that the EPA's actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory authority; or without observance of procedures required by law.

This memorial urges the United States Congress to prevent the EPA from overextending its mandate and to direct the agency not to intrude into Florida's previously approved clean water program.

The House Memorial does not amend, create, or repeal any provisions of the Florida Statutes.

The House Memorial has no fiscal impact on state or local government.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

In recognition of the need to more proactively address impairment of state waters due to nutrients, the Florida Department of Environmental Protection (DEP) implemented a detailed, United States Environmental Protection Agency (EPA) approved plan for the development of numeric nutrient criteria and recently discussed revisions to Chapter 62-302, FAC (Water Quality Standards) and Chapter 62-303, FAC (Impaired Waters Rule) to establish numeric nutrient criteria for lakes and streams. DEP selected the “dose-response” approach (investigating the effects of nutrients on biological communities) as the primary method for the development of scientifically defensible numeric nutrient criteria

This process required extensive methods development, staff training, and quality assurance oversight to ensure the defensibility of the resulting products. The elements of this development and assessment process to date include such components as habitat assessment for streams and lakes, benthic invertebrate indices for streams and lakes, a vegetation index for lakes, and a periphyton index for streams. These activities represent significant investments in staff time and contractual services, with recent and planned funding associated with nutrient criteria development in Florida totaling nearly \$20 million dollars.<sup>1</sup>

In 2002, the DEP submitted to the EPA its initial *DRAFT Numeric Nutrient Criteria Development Plan*. The DEP and the EPA reached mutual agreement on the Plan on July 7, 2004.<sup>2</sup> The DEP revised its Plan in September, 2007, to reflect an evolved strategy and technical approach, and again received agreement from the EPA on September 28, 2007.<sup>3</sup> From 2002 through 2009, the DEP conducted 22 meetings with a group of scientists and experts that formed the Nutrient Technical Advisory Committee (TAC). TAC experts came from a variety of backgrounds, including environmental groups, the EPA, environmental and economic consultants, and representatives from state and local governments.

While the approved plan called for adoption of the criteria by the end of 2010, DEP accelerated its efforts to adopt numeric nutrient criteria in response to the EPA’s January 14, 2009, determination that numeric nutrient water quality criteria are necessary in Florida to implement the Clean Water Act (CWA).

#### The EPA is Sued over Florida’s Narrative Criteria

On July 17, 2008, five environmental groups (the Florida Wildlife Federation, Sierra Club, Conservancy of Southwest Florida, Environmental Confederation of Southwest Florida, and St. Johns Riverkeeper) sued the EPA, alleging failure on the part of the federal agency to comply with the CWA. The EPA initially defended the suit and contested the plaintiffs’ arguments. However, in an EPA internal memorandum from December, 2008, the writer warned that a judicial finding in favor of the plaintiffs could result in the EPA being required to promulgate numeric nutrient rules for the other 49 states. The internal memorandum

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<sup>1</sup> The DEP’s *Florida Numeric Nutrient Criteria History and Status Summary*. This document, and other documentation of nutrient criteria study results, including statistical analyses and interpretation, are found at:

<http://www.dep.state.fl.us/water/wqssp/nutrients/>

<sup>2</sup> The DEP’s *Florida Numeric Nutrient Criteria History and Status Summary*. The DEP’s approach conceptualized establishing ecological sub-regions as a starting point for regionalization efforts it saw as necessary to establish nutrient criteria.

<sup>3</sup> The DEP’s 2007 Plan utilized EPA guidance and proposed the development of regional nutrient criteria for streams based upon the “reference site” approach to determine nutrient characteristics at minimally-disturbed, biologically healthy sites. The EPA’s 2007 letter memorializing the mutual agreement with the DEP may be accessed here:

<http://www.dep.state.fl.us/water/wqssp/nutrients/docs/epa-092807.pdf>

proposes a strategy to avoid this possibility: if the EPA issues a s. 303(c)(4)(B) necessity determination, that may be used as a basis to settle the lawsuit and request a dismissal from the court.<sup>4</sup>

On January 14, 2009, the EPA placed the DEP on formal notice that numerical criteria for nutrients were necessary for compliance with the CWA. This notice triggered a deadline of one year for the EPA to develop numeric nutrient criteria for Florida's surface waters and 24 months to develop numeric criteria for coastal waters, unless the state proposed criteria acceptable to the EPA before final promulgation. On August 19, 2009, the EPA entered into a consent decree to settle the lawsuit filed by the five environmental groups. The EPA committed to propose numeric nutrient standards for inland waters (lakes and flowing waters), as well as for estuarine and coastal waters, by certain dates.<sup>5</sup> The DEP did not formally submit numeric nutrient criteria to the EPA before the deadline.

In drafting the proposed rule, the EPA had the benefit of more than seven years of DEP data and analysis, DEP's nutrient plans, as well as technical support documentation. The DEP maintained contact with the EPA while the EPA formulated the proposed rule.

On January 14, 2010, EPA Administrator Lisa Jackson signed EPA's rule proposing numeric nutrient criteria for Florida's fresh waters. Ten months later, on November 14, 2010, Administrator Jackson signed the final rule adopting numeric nutrient criteria for Florida's fresh waters. On December 6, 2010, the EPA published its final administrative rule. Fifteen months from the publication date, the established numeric water quality standards for nutrients in Florida's inland lakes and flowing waters take effect.

### Comparison of the EPA's Final Rule and the DEP Plan

In general, the quantitative values promulgated by the EPA for lakes and streams are similar to those in the DEP's NNC Plan, and the value reached for springs is identical. In key areas related to implementation, however, there are significant differences in the two approaches. The DEP's multi-tiered approach (numerical criteria with follow-up biological assessment) was not adopted by the EPA. The DEP demonstrated that some water bodies with nutrient thresholds that exceed the value of undisturbed reference waters have healthy biota and do not need restoration. The DEP's intent was to have "biological confirmation" that nutrient concentrations above the numeric standard actually resulted in biological impairment of the water body.

The EPA also rejected the DEP's approach to protect downstream lake values by using the narrative criteria, and instead promulgated an equation to adjust in-stream total phosphorus criteria to protect downstream lakes. This will likely result in more stringent instream values. Additionally, the EPA did not accept Florida's existing nutrient Total Maximum Daily Loads (TMDLs) as meeting CWA Water Quality Standards (WQS) under the new rule, even though the TMDLs have already been approved by the EPA. As a result, the DEP must re-establish to the EPA that water bodies with approved TMDLs comply with provisions of the CWA.

### Cost of Compliance

The fiscal impact of the EPA's rule on industrial dischargers, municipal wastewater and urban stormwater facilities, agriculture, and the regulatory agencies is unclear. EPA-generated annualized cost estimates to achieve the numeric criteria (\$130-\$150 million) differ dramatically from estimates provided by the DEP (\$5.7 - \$8.4 billion). The difference in cost estimates is largely due to the different baselines utilized by the

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<sup>4</sup> Only 15 months earlier, the EPA agreed with Florida's methodology and plan to finalize numeric nutrient rules by the end of 2010. The DEP was not a party to the lawsuit, however, several groups representing utilities, local governments, and agriculture in the state intervened.

<sup>5</sup> The EPA numeric nutrient criteria for Florida's inland waters (except for south Florida) will be effective March 6, 2012. The EPA will propose numeric nutrient criteria for Florida's estuaries, flowing waters in south Florida (including canals), and the downstream protection values for flowing waters into estuaries on or before November 14, 2011. The deadline for promulgating a final rule is August 15, 2012.

two entities: the EPA based its cost estimates on the difference between the EPA criteria and the criteria in the draft DEP Plan.

A study commissioned by the Florida Water Environment Association Utility Council in November, 2010, estimates that wastewater utilities alone will spend between \$24 billion and \$51 billion in capital costs for additional wastewater treatment facilities and incur increases in annual operating costs between \$4 million and \$1 billion to comply with the federal numeric nutrient criteria. According to the commissioned study, the EPA's cost estimate inadequately accounted for existing baseline conditions, failed to address all direct costs, and did not consider all indirect costs to businesses and the public, including the costs of uncertainty.

If the EPA enforces "end-of-pipe" criteria (requiring all discharger effluent levels to be at or below the federally-promulgated standards), the total annual costs could range from \$3.1 to \$8.4 billion (based on the estimated fifth and ninety-fifth percentile of costs). Even if EPA enforces criteria to less strict BMPs and Limit of Technology standards in which effluent is not at or below the federal standard, then the annual costs could range from \$1.0 to \$3.2 billion (based on the estimated fifth and ninety-fifth percentile of costs in this scenario).

Because numeric nutrient criteria are water body-specific, the expected costs for compliance will be largely site-specific and contingent upon the level of impairment. The EPA only recently published guidance documents detailing how the rule is to be implemented and cost estimates have not yet been updated.

### Legal Challenges to the EPA's Final Rule

Several parties, representing environmental advocates, state and local governments, water utilities, wastewater, stormwater, agriculture, and fertilizer industries, have challenged the EPA-promulgated numeric nutrient rules in federal court.<sup>6</sup> With the exception of the challenge filed by environmental groups, the complaints share a common theme; that the EPA's actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory authority; or without observance of procedures required by law.<sup>7</sup> EarthJustice, representing the environmental groups, is challenging the portion of the Final Rule providing a watershed approach to Site Specific Alternative Criteria.

The legal challenges were filed in federal courts located in Tallahassee and in Pensacola, Florida. To date, the Pensacola cases were transferred to Tallahassee and may be consolidated. The EPA has not yet established which documents will comprise the administrative record for the case.

This memorial urges the United States Congress to prevent the EPA from overextending its mandate and to direct the agency not to intrude into Florida's previously approved clean water program.

Copies of the memorial are to be sent to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives and to each member of the Florida delegation to the United States Congress.

The legislation also includes whereas clauses in order to support the memorial. The whereas clauses include:

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<sup>6</sup> The State of Florida v. Jackson, Case No. 03:10-cv-503-RV-MD; The Mosaic Company, Inc., v. Jackson, Case No. 03:10-cv-506-RV-EMT; The Fertilizer Institute v. U.S. EPA, Case No. 03:10-cv-507-RS-MD; CF Industries, Inc., v. Jackson, Case No. 03:10-cv-513-MCR-MD; Destin Water Users, Inc., South Walton Utility Co., Inc., Emerald Coast Utilities Authority, City of Panama City, Okaloosa County Board of County Commissioners v. Jackson, Case No. 03:10-cv-532-MCR-EMT; Florida League of Cities, Inc., and Florida Stormwater Association, Inc., v. Lisa P. Jackson, Case No. 3:11-cv-11; Florida Pulp and Paper Association Environmental Affairs, Inc., Southeast Milk, Inc., and Florida Fruit and Vegetable Association v. Lisa Jackson, Case No. 3:11-cv-47-MCR/EMT; Florida Wildlife Federation v. EPA, Case No. 04:10-cv-511-SPM-WCS (filed prior to promulgation); Florida Wildlife Federation v. Jackson, Case No. 04:08-cv-324-RH-WCS (filed before the issuance of the Determination Letter).

<sup>7</sup> 5 U.S.C. s. 706(2)(A)(C) and (D).

WHEREAS, on December 7, 2010, the State of Florida filed a 8 lawsuit against the United States Environmental Protection Agency over federal intrusion into Florida's clean water program, and

WHEREAS, the lawsuit alleges that the agency's action is inconsistent with the intent of Congress when it based the Clean Water Act on the idea of cooperative federalism whereby the states would be responsible for the control of water quality with oversight by the agency, and

WHEREAS, the control of nutrient loading from predominately nonpoint sources involves traditional states' rights and responsibilities for water and land resource management, which Congress expressly intended to preserve in the Clean Water Act, and

WHEREAS, the lawsuit specifically alleges that the agency's rule and its January 2009 necessity determination for adopting numeric nutrient water quality criteria for Florida's waters were arbitrary, capricious, and an abuse of discretion, and requests the court to enjoin the agency's administrator from implementing the numeric water quality criteria for Florida in the rule, and

WHEREAS, prior to the agency's announcement that it would be implementing new rules for Florida, the state had been diligently working through its Total Maximum Daily Load Program to adopt numeric standards for impaired bodies of water, and

WHEREAS, the agency had already approved Florida's Total Maximum Daily Load Program on the basis that it was sufficient to meet the requirements of the Clean Water Act, as referenced in a letter dated September 28, 2007, and

WHEREAS, as recently as January 2010, the agency praised Florida for implementing "some of the most progressive nutrient management strategies in the nation," and the Total Maximum Daily Load Program had a timetable for implementation through 2011, and

WHEREAS, despite the fact that Florida was working to implement its approved program and was seeing successes, the agency reversed its determinations in 2009 and informed the state that new federal rules and criteria would be developed and implemented by the agency, preempting the approved state program, and

WHEREAS, according to the state's lawsuit, the agency has continued to rely on a methodology that is neither scientifically sound nor cite specific for Florida's waters, and

WHEREAS, in April, the agency's own Science Advisory Board joined the Florida Department of Environmental Protection, the Florida Department of Agriculture and Consumer Services, the University of Florida's Institute of Food and Agricultural Sciences, the Florida Legislature, and others in expressing serious concerns that the agency's methods for developing numeric nutrient water quality criteria are scientifically flawed, and

WHEREAS, the State of Florida has significant concerns with regard to the cost of implementing the new numeric nutrient water quality criteria proposed by the agency...

## B. SECTION DIRECTORY:

### II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable

2. Other:

None

B. RULE-MAKING AUTHORITY:

Not Applicable

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

**Amendment Passed in Federal Affairs Subcommittee on 3/28/2011** – One technical amendment was passed correcting a misspelling. The word “cite” was replaced by “site”, on Line 50.