# FWEA Utility Council

*Protecting Florida's Clean Water Environment*

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February 19, 2013

***Via Electronic Submission***

Elizabeth Southerland, Director
Office of Science and Technology
U. S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
and,
EPA Water Docket
Docket ID No. EPA–HQ–OW–2010–0222
U. S. Environmental Protection Agency
Mail Code: 2822T
1200 Pennsylvania Avenue, N. W.
Washington, D. C. 20460

***Regarding: EPA's Proposed Estuary, Coastal & South Florida Canal Criteria***

Dear Director Southerland,

The Florida Water Environment Association (FWEA) Utility Council appreciates the opportunity to provide the following comments on the U.S. Environmental Protection Agency's (EPA's) proposed estuary, coastal, and South Florida Canal Criteria. For the reasons provided in this letter, the FWEA Utility Council supports EPA's proposal to withdraw its downstream protection value (DPV) requirements for South Florida canals and respectfully requests that EPA also withdraw its proposed criteria for estuaries and coastal waters. The FWEA Utility Council believes that the most protective path forward is to allow the Florida Department of Environmental Protection's (FDEP's) comprehensive nutrient criteria standards program, including FDEP's planned additional estuary rulemakings, to protect Florida's surface waters.

By way of background, the FWEA Utility Council is an association of 51 local government and private utilities in Florida that own and operate domestic wastewater treatment, disposal, reuse, and recycling facilities. FWEA Utility Council members provide essential wastewater treatment infrastructure and services for over 8 million Florida residents. The membership is highly

diverse, both in terms of the communities served and the way utility members serve them, but Utility Council members share a commitment to environmental protection and scientifically sound environmental policies. It is with this shared commitment that the Utility Council offers the following comments.

This comment letter contains three sections. First, the letter addresses EPA's proposal for South Florida canals and supports EPA's proposal to withdraw DPV requirements for South Florida canals. Second, the letter addresses EPA's proposed estuary criteria and requests that EPA withdraw its proposed criteria in light of the State's estuary criteria rulemakings and in light of the existing EPA-approved TMDLs that already set discharge standards for many water bodies. Lastly, the letter addresses EPA's proposed coastal water criteria and requests that EPA withdraw its proposed chlorophyll-a criteria due to the lack of a need or environmental purpose for the criteria.

***The FWEA Utility Council supports EPA's proposal to withdraw all proposed criteria applicable to South Florida flowing waters***

EPA proposes a hierarchal method for setting DPVs based on simulation models, a reference condition approach, "dilution models," or setting total nitrogen (TN) and total phosphorus (TP) criteria of the receiving waters. Importantly, the rule proposal then provides that "EPA does not intend to finalize these DPVs if the district court modifies the Consent Decree consistent with EPA's amended determination that numeric DPVs are not necessary to meet [Clean Water Act] requirements in Florida."[1] EPA explains in the rule proposal and accompanying amended determination that the State of Florida's nutrient regulatory program ensures the maintenance of downstream waters' designated uses. The FWEA Utility Council agrees that the approved State program obviates the need for DPVs in South Florida and in the rest of the state and supports EPA's decision to withdraw its proposed DPVs.

The FWEA Utility Council also supports EPA's preferred approach to not propose instream nutrient criteria for South Florida canals. This approach is consistent with the determinations of the EPA Science Advisory Board (SAB) and FDEP scientists that there is an inadequate scientific basis for deriving instream numeric nutrient criteria for South Florida canals.[2] As the SAB stated,

> For South Florida inland waters, the SAB was not convinced by the available data that nutrient criteria based on instream protection values were meaningful for man-made and managed canals. The canals do provide ecosystem services, but habitat quality and flows—rather than nutrients—have the greatest influence on biological condition in these managed waterways.[3]

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[1] 77 Fed. Reg. at 74960.

[2] SAB, *Review of EPA's draft Approaches for Deriving Numeric Nutrient Criteria for Florida's Estuaries, Coastal Waters, and Southern Inland Flowing Waters* (July 19, 2011); FDEP, *Technical Support Document: Development of Numeric Nutrient Criteria for Florida Lakes, Spring Vents and Streams,* 4-5 *available at* http://www.dep.state.fl.us/water/wqssp/nutrients/docs/tsd-nnc-lakes-springs-streams.pdf.

[3] SAB, *Review of EPA's draft Approaches*, *supra* note 2, at 2.

The FWEA Utility Council supports adherence to the SAB's scientific determination that it is inappropriate to apply instream criteria to South Florida canals.

***The FWEA Utility Council requests that EPA withdraw its proposed Florida estuary criteria***

EPA's rule proposal includes proposed criteria for a handful of Florida estuaries. This proposal is unnecessary, because Florida estuaries are already subject to (1) finalized FDEP numeric criteria that await approval by EPA; (2) finalized FDEP nutrient total maximum daily loads (TMDLs) that have already been approved once by EPA under section 303(d) of the Clean Water Act and now await EPA's reaffirmation under section 303(c); or (3) estuaries that will soon be subject to FDEP nutrient criteria in accordance with a codified state rulemaking schedule. The FWEA Utility Council recommends that EPA withdraw its proposed criteria for these waters.

EPA's proposed criteria for Florida Panhandle estuaries are unwarranted. After an extensive public rule development process, FDEP officially proposed numeric criteria for Perdido Bay, Pensacola Bay (including Escambia Bay),[4] St. Andrews Bay, Choctawhatchee Bay, and Apalachicola Bay on November 30, 2012. These proposed criteria were not challenged at the state level and now await EPA approval. The FWEA Utility Council supports these state-promulgated nutrient standards. The standards are based on detailed scientific evaluations and are set at levels that protect the designated uses of Florida Panhandle estuaries.[5] The FWEA Utility Council requests that EPA promptly approve the FDEP standards and withdraw its corresponding federal numeric criteria proposals.

FDEP has also finalized -- and EPA has approved -- nutrient TMDLs for a number of the estuaries that are subject to EPA's rule proposal. The State of Florida already has EPA-approved nutrient TMDLs for the St. Johns River Estuary,[6] the Indian River Lagoon,[7] the St. Lucie

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[4] FDEP proposed a numeric nutrient TMDL for North Escambia Bay as a site specific interpretation of Florida's narrative nutrient criterion. In accordance with approved Rule 62-302.531(1)(a), Florida Administrative Code, the nutrient TMDL is the state nutrient standard for the Bay. EPA proposed the exact same TMDL and report as a federal TMDL on November 30, 2012. The EPA proposal is available at http://www.epa.gov/region4/water/tmdl/florida/documents/33p_proposed_tmdl_548aa_493b_493a_pensacola_fl_donut_w.pdf.

[5] FDEP developed extensive technical support materials supporting the estuaries' nutrient criteria rules. *See,* FDEP *Site-Specific Information in Support of Establishing Numeric Nutrient Criteria in Apalachicola Bay* (Oct. 2012), at http://www.dep.state.fl.us/water/wqssp/nutrients/docs/meetings/apalachicola_bay_101512.pdf; FDEP, *Site-Specific Information in Support of Establishing Numeric Nutrient Criteria for Choctawhatchee Bay* (Oct. 2012), at http://www.dep.state.fl.us/water/wqssp/nutrients/docs/meetings/choctawhatchee_bay_101512.pdf; FDEP, *Site-Specific Information in Support of Establishing Numeric Nutrient Criteria for Pensacola Bay* (Oct. 2012), at http://www.dep.state.fl.us/water/wqssp/nutrients/docs/meetings/pensacola_bay_101512.pdf; FDEP, *Site-Specific Information in Support of Establishing Numeric Nutrient Criteria for Perdido Bay* (Oct. 2012), at http://www.dep.state.fl.us/water/wqssp/nutrients/docs/meetings/perdido_bay_101512.pdf; FDEP, *Site-Specific Information in Support of Establishing Numeric Nutrient Criteria for St. Andrew Bay* (Oct. 2012), at http://www.dep.state.fl.us/water/wqssp/nutrients/docs/meetings/st_andrew_bay_101512.pdf; FDEP, *Site-Specific Information in Support of Establishing Numeric Nutrient Criteria for St. Joseph Bay* (Oct. 2012), at http://www.dep.state.fl.us/water/wqssp/nutrients/docs/meetings/st_joe_bay_101512.pdf.

[6] 62-304.415(2), F.A.C.

[7] 62-304.520(3)-(11), F.A.C.

Estuary,[8] and the Caloosahatchee River Estuary.[9] These TMDLs are based on extensive and site specific scientific analysis. By approving these numeric nutrient TMDLS, EPA has determined that the numeric targets are protective of the estuaries' designated uses.[10] Also, under the State of Florida's approved nutrient standards rule, these nutrient TMDLs constitute the solely operative numeric nutrient standard for the estuaries.[11] Florida communities, including FWEA Utility Council members, have encumbered significant public monies and are implementing TMDL restoration projects to achieve these water bodies' designated uses.[12] Accordingly, there is no environmental policy objective served by now imposing new generalized nutrient standards for these estuaries that already have site specific TMDL criteria. The EPA proposals are contrary to EPA's decision to approve the nutrient TMDLs as well as EPA's recent approval of the State of Florida's nutrient standards rule. The FWEA Utility Council requests that EPA withdraw its federal numeric nutrient criteria proposals for Florida estuaries that are already subject to EPA-approved TMDLs.

Lastly, the FWEA Utility Council respectfully requests that EPA withdraw its proposed criteria for Florida estuaries that are on schedule to receive State-promulgated numeric nutrient criteria. FDEP Rule 62-302.532(3) requires that "[t]he Department shall establish by rule or final order the estuary specific numeric interpretation of the narrative nutrient criteria for TN and TP for the remaining estuaries by June 30, 2015, subject to the provisions of Chapter 120, F.S." FDEP is developing science-based criteria for these estuaries in accordance with this schedule. The FWEA Utility Council respectfully requests that EPA allow FDEP to develop the scientific information necessary to support state-promulgated criteria and that EPA withdraw its proposed federal nutrient criteria.

***The FWEA Utility Council requests that EPA withdraw its proposed Florida coastal water criteria***

In addition to proposing criteria for some Florida estuaries, EPA also proposed chlorophyll-a criteria for Florida's coastal waters. The environmental objective served by taking this action is unclear. EPA notes that "at most times, Florida coastal waters appear to be supporting balanced natural populations of aquatic flora and fauna."[13] Stated differently, there is no indication that Florida has failed to implement its narrative nutrient criterion in a manner that supports the designated uses of Florida's coastal waters. The most significant phenomenon often incorrectly cited as evidence of anthropogenic nutrient loads to coastal waters – red tide – in fact occurs

[8] 62-304.705(1), (3), F.A.C.
[9] 62-304.800(2), F.A.C.
[10] TMDLs must ensure that waters achieve and maintain their designated uses and applicable water quality criteria. 33 U.S.C. §1313(d); 40 C.F.R. § 130.7(c)(1). Specifically, TMDLs are established at "levels[s] necessary to implement the applicable water quality [criterion]." 33 U.S.C. § 1313(d)(1)(C).
[11] Rule 62-302.531(2)(a)1.a, F.A.C. (stating that "Total Maximum Daily Loads (TMDLs) adopted under Chapter 62-304, F.A.C., that interpret the narrative water quality criterion for nutrients in paragraph 62-302.530(47)(b), F.A.C., for one or more nutrients or nutrient response variables" are the operative numeric nutrient standards for the waters to which they apply)
[12] FWEA Utility Council and FCG EC, Supplemental Memorandum in Support of Summary Judgment, Case 4:08-cv-00324-RH-WCS, Document 277 (June 15, 2011).
[13] 77 Fed. Reg. at 74959.

naturally.[14] Despite the absence of a need, EPA has nevertheless committed via federal consent decree to propose numeric criteria for Florida's coastal waters.

The challenge of developing numeric criteria for Florida's coastal waters was greater than EPA initially expected.[15] Due to the absence of sufficient TN and TP data for Florida's expansive coastal water region, EPA could not develop defensible numeric nutrient criteria. As the SAB observed, "satellite-derived estimates of chlorophyll may be the only feasible approach for this large, poorly sampled region."[16] Accordingly, EPA divided Florida's coastal waters into seventy-one coastal segments, analyzed satellite remote sensing chlorophyll-a data applicable to the various segments, removed the excursions from the data set, averaged the remaining data, and set the criteria at those average levels for each segment.[17]

While EPA may be correct that the resultant chlorophyll-a criteria represent protective levels, EPA fails to address a more important question. That is, what are the prospects that these chlorophyll-a criteria will actually inform appropriate water quality management decisions? After all, while the coastal waters abut the Florida shores or estuarine waters, the waters also abut and are subsumed into the expanses of the Gulf of Mexico, the Florida Straits, and the Atlantic Ocean. The delineation of the coastal zone is based on political (i.e. jurisdictional) considerations, not water resource distinctions. Indeed, EPA provides no information as to how ocean currents, dynamic climate conditions, and other natural factors may dominate the system when compared to onshore activities. EPA makes no demonstration that their dataset reflects the full range of naturally occurring chlorophyll-a conditions. EPA provides no data, research results, or other information indicating that the proposed chlorophyll-a criteria will protect Florida waters better than Florida's existing narrative criterion. EPA also provides no examples of EPA or other States setting chlorophyll-a criteria in States' coastal zones to better protect coastal waters. The absence of this information calls into question the need for this chlorophyll-a rulemaking.

Under the Clean Water Act, the State of Florida has primary authority to develop and implement water quality criteria. So long as the State criteria protect the designated uses of the waters to which they apply, EPA has no authority to unilaterally impose federal criteria on a hunch that the federal criteria would do a better job protecting the State waters than an existing, protective State criteria. EPA itself has stated that "Federal promulgation of State water quality standards should be a course of last resort" and is "symptomatic of something awry with the basic statutory

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[14] After hearing testimony from competing experts on the origin and cause of red tide events, Florida Administrative Law Judge Canter found that "the more persuasive evidence is that red tide blooms are not a reliable indicator of human-caused, excess nutrient loading and may indicate only a temporary imbalance in aquatic flora and fauna." FWF v. FDEP, DOAH Case 11-6137RP, ¶97, 34 F.A.L.R. 3095 (June 2012)

[15] EPA assumed in its January 2009 determination that it would be able to propose coastal waters criteria by 2011, i.e. two years ago. *See* EPA, Letter to Michael Sole Determining that Numeric Nutrient Criteria are Necessary in Florida, (January 14, 2009), at http://water.epa.gov/lawsregs/lawsguidance/cwa/upload/2009_01_16_standards_rules_fl-determination20090114.pdf.

[16] SAB, *Review of EPA's draft Approaches*, *supra* note 2, at 2.

[17] 77 Fed. Reg. at 74958.

scheme" of the Clean Water Act.[18] EPA has provided no evidence that something is "awry" with Florida's use of a narrative nutrient criterion in its coastal waters. Accordingly, the FWEA Utility Council respectfully requests that EPA withdraw its proposed coastal waters criteria.

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The FWEA Utility Council appreciates the opportunity to provide these comments on EPA's proposed South Florida canal, estuary, and coastal water criteria. For the foregoing reasons, the Utility Council requests that EPA withdraw its proposed rulemakings.

Sincerely,

David Richardson, P.E.
FWEA Utility Council President

Enclosures: Cited Reference Materials

[18] EPA, Notice of Final Rule, Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance, 57 Fed. Reg. 60848, at 60858 (Dec. 22, 1992).