

# ***Legal Permitting Perspectives***

**NNC Implementation Workshop**

**July 2014**

# Overview

- Clean Water Act 101
- Strategy depends on type of water body & programs that already apply to it
- Timing of the rule requirements
- WQBELS v. TBELS
- Discharges to...
  - Flowing surface waters
  - Ground waters (i.e. reuse / recharge systems)
- A quick word on TMDLs

# Clean Water Act 101

- **Water Quality Criteria**
  - Protect “designated uses” of water bodies
  - Translated into discharge permit limits
  - Updated every 3 years
- **TMDL Program (safety net)**
  - Restoration program
  - Point and non-point sources allocated pollutant loads
- **Discharge Permits**
  - Surface Water Discharge: Fed Permit (NPDES)
  - Ground Water Discharge: State Permit

*What Types of Water Bodies Are  
of Concern to My Utility?*

# Different Strokes for Different Folks

- **FDEP Rule Prefers Site-Specific Criteria**
  - Hierarchical approach: TMDLs, Level II WQBELS...
- **Lakes & spring numbers ≈ EPA numbers**
  - Springs: 0.35 mg/L-Nitrate
  - Lakes: Variable based on color, alkalinity
- **EPA stream numbers + “Biological Confirmation”**
  - Streams are more narrowly defined
- **Estuaries**
  - Existing conditions, TMDLs, & reference sites
- **Coastal Waters**
  - Chlorophyll-a
- **Wetlands**
  - Narrative Still Applies
- ***Must follow the drop to its final destination***



# Two Threshold Issues

- **Long before permit renewal, you should...**
  - Understand the watershed & where you fit in
  - Determine what nutrient standards are in place for the various water bodies of concern
    - TMDLs...stand alone numeric criteria...biological criteria?

*If I have a discharge permit, when  
will I be subject to these new rules?*

# FDEP Rules' Effective Date

- After EPA withdraws its rules, then all of the state rules will go into effect
- **Best Guess: 4<sup>th</sup> Quarter 2014**
  - But remember, water quality criteria are not “self implementing”
    - Implemented with EPA oversight via the NPDES & TMDL programs
    - Implemented without EPA oversight in other regulatory programs

# Administrative Orders

- **Administrative Order:**
  - A schedule for achieving compliance. Fla. Stat. § 403.088(2)(e).
  - A capital project or a science project
  - Attached to your permit
    - Possible that the AO will last longer than a permit cycle
  - Community education is important
    - May sound like a penalty

# Numeric Nutrient Criteria

- Am I exposed to lawsuits in the interim?
  - **Safe Harbor:** NPDES permit\* gives you confidence that:
    - The system's discharge complies with the law
    - Will not give rise to an enforcement action, so long as the permit conditions are met.

Fla. Admin. Code R. 62-620.301(2); 33 U.S.C. § 1342(k).



# \*Warning: Rabbit Trail



- Permit to Discharge to Groundwater
  - Should also give you confidence that you are ok
  - But recent 9<sup>th</sup> Circuit cases create new exposure
    - Citizen suits for failure to have an NPDES Permit
    - 9<sup>th</sup> Circuit: discharges to groundwater can also require NPDES permits
    - Waters of the US rulemaking may clarify requirements

*If I discharge into a flowing water body, what should I do?*

# Flowing Waters

- Is the flowing water a “stream” or is it a...
  - Water Management Conveyance
  - South Florida Canal
  - Tidally influenced water segment
  - Intermittent stream exhibiting wetland characteristics
- Tools:
  - FDEP Rule 62-302.200(36), F.A.C.,
  - Guidance document: “Implementation of Numeric Nutrient Standards in Lakes, Springs, and Streams”

# Flowing Waters

- Flowing waters are presumed to be “streams” until demonstrated to be a canal, ditch, etc.
- Streams Criteria Compliance:
  - FDEP rule is primarily concerned with biological health; nutrient levels are arguably secondary
  - Floral Health + [Faunal health or Nutrient Threshold Attainment]



# Flowing Waters

- Permit Strategies
  - Level II WQBEL
    - The burden is on you to develop the criteria
    - Criterion incorporated into your permit
  - TMDL Wasteload Allocation
  - Site specific alternative criterion
    - May also have to reclassify to Class III-Limited
  - If not a stream, surf the narrative
  - *Don't forget about the downstream waters!*

*I already have nutrient limits in my discharge permit based on (Grizzle-Figg, Apricot Act, etc.). Can I be required to further reduce nutrients in my discharge?*

# Technology Based vs. Water Quality Based Effluent Limits

- **Short Answer:**

- Yes

- **TBELS**

- NPDES permits contain technology-based effluent limitations that reflect the pollution reduction achievable based on particular equipment or process changes. 33 U.S.C. §§1314(b), (m), 1316.

- **WQBELS**

- Water quality based effluent limitations ensure the receiving waters achieve and maintain water quality criteria that support designated uses. 33 U.S.C. § 1311(b).

- Imposed when technology-based limits fail to achieve water quality standards.

- **Important:** The water quality based limits are set at levels to ensure discharges do not cause or contribute to violations of water quality criteria. 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. §§ 122.44(d), 122.45(d); Fla. Admin. Code R. 62-650.200(14), 650.400, 650.500.

*If I have a reuse system, what  
should I do?*

# Reuse Systems

- **Impact Depends on Features of System**
  - Irrigation Systems (Operating Permit, 62-610, F.A.C.)
  - Industrial Uses
    - Third Party Discharges
    - What does your contract say?
  - Rapid Infiltration Basins
  - Backup Surface Water Discharges (i.e. NPDES permit)
  - Other Issues
    - Storage Systems Utilizing Storm Water Ponds
    - MS4 Permitting
    - CUP Requirements for Reuse

# Irrigation System Discharges

- When a utility applies to FDEP for a permit to construct or modify a facility that provides reclaimed water for irrigation purposes, the utility must provide FDEP with reasonable assurances that the project will not **“cause or contribute to violations of water quality standards in surface waters.”**  
Rules 62-610.850(1)(a); 610.800(1), F.A.C.
- FDEP rules require that **“[i]f water quality standards cannot be met, additional treatment or disinfection shall be provided or other operational control measures shall be implemented.”** *Id.* at (1)(d).
- Note: these are state permits; not federally delegated permits.

*What impact can we expect to  
Florida's TMDL program?*

# Nutrient TMDLS

- Florida already has over 100 nutrient TMDLS
- FDEP Numeric Nutrient Criteria Rule approved by EPA means even more nutrient TMDLS
- Significant nutrient reductions for storm water
  - Bayou Chico: 30% TN & TP reductions
  - North Escambia Bay: 35% TP reduction
  - Hillsborough River (channelized segment): 50% TN & 60% TP reductions
  - Lake Dora: 67% reduction in TP

# Nutrient TMDLS

- What should I do?
  - Keep you eyes open
    - Stay in touch on new listings, including for downstream waters
    - Attend BMAP Meetings
  - If you are ahead of the curve, brag about it & get others in the community to brag with you
    - Tell your story
    - TMDLs are to be allocated on an equitable basis