



Annual Report

No. 1

2015 Edition

May 6, 2015

President's Message

Brian Wheeler
Toho Water Authority

The FWEA Utility Council ("FWEAUC") has continued its strong advocacy mission this past year on behalf of its approximately 51 utility members serving more than 8 million residents. During the past year the FWEAUC has engaged the Florida Department of Environmental Protection ("FDEP") on a number of issues, advocated with the legislature on water policy legislation, and continued its advocacy on behalf of its members in several federal regulatory challenges and litigation.

Historically the FWEAUC has sought to forge a cooperative and collaborative relationship with the FDEP on the development and revision of regulation, policy, and legislation. Those efforts continued to bear fruit this past year. Representatives of the FWEAUC met with FDEP a number of times on issues such as the Bacterial TMDL proposal and the legislatively mandated Reclaimed Water Study and

provided comment to those drafting water policy legislation for the 2015 session.

Over the past several years, the FWEAUC has seen the number and variety of regulatory and legislative issues which affect or have the potential to affect our members continue to grow. Sometimes it appears that as one regulatory issue is resolved another one or two takes its place on our agenda. Concerns arising from a variety of sources about the quality and quantity of the state's water resources will drive expanded involvement by a variety of interests and stakeholders with resulting legislative and regulatory initiatives in response to those concerns. This year's legislative session which included significant water policy legislation is an example, I believe, of what can be expected in future sessions. There is no more crucial time than in the next few years for member utilities to become involved and engaged in the FWEAUC as the council attempts to confront these regulatory and legislative challenges.

During the past year, the FWEAUC continued to work closely with the FSAWWA

Utility Council ("FSAWWAUC") collaborating on several regulatory and legislative issues. Maintaining and strengthening this natural alliance will benefit both organizations and provide a crucial "One Voice" for water issues from the utility community.

The key issues in which the FWEAUC have been involved this year include seeing the federal Numeric Nutrient Criteria ("NNC") issue near closure, involvement in the legislatively mandated reclaimed water study, negotiations with FDEP on a Fecal Bacteria TMDL regulatory policy, Human Health Criteria, federal and state antidegradation lawsuits, federal regulation defining Waters of the United States, septic tank policy, and legislation on a variety of water policy issues. With the NNC issue moving towards closure representatives focused on working with FDEP on developing a rational policy for Fecal Bacteria TMDL issues and insuring that the Reclaimed Water Study builds on the...

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policy and regulatory achievements of the FWEAUC instead of the reverse. Water policy legislation, particularly related to springs protection, has also been a priority of the FWEAUC for its potential to negatively impact a number of the FWEAUC members. There is more detail on each of these issues and the related efforts and accomplishments of the FWEAUC in the following report.

The keynote speaker for our Annual Meeting this year on May 6, 2015 is Mr. Craig Varn, Special Counsel on Water Policy and Legal Affairs for FDEP. In addition to his J.D. from Florida State University College of Law, Mr. Varn has a Civil Engineering degree from the University of Florida. He worked in the engineering field on stormwater management facilities, drainage systems and support structures before spending more than fourteen years as an attorney in the private sector focusing on growth management, environmental and local government issues. Mr. Varn will discuss FDEP water and

wastewater policy and regulatory directions.

This past year has been an active and eventful year for the FWEAUC as you will see from the highlights on the following pages. Water policy issues addressing both quantity and quality will be topics of concern and action for the public, regulatory agencies, and the legislature in the years to come. Developing and maintaining an engaged and unified FWEAUC will be key to making our voices heard in the coming debates. Thank you for your support and involvement for the past year and I ask you to continue that support in the coming year.

Numeric Nutrient Criteria

David Childs
Hopping Green & Sams, P.A.

On October 27, 2014, EPA's withdrawal of its federal numeric nutrient criteria rules became effective. This withdrawal paved the way for FDEP's numeric nutrient criteria standards, which went into effect on the same day.

In order to prepare for the implementation of FDEP's rules, the FWEAUC held a Numeric Nutrient Criteria Implementation Workshop on July 11, 2014. The workshop was designed specifically for wastewater utilities interested in learning more about the implementation of numeric nutrient criteria. Drew Bartlett, Rod Reardon, Russ Frydenborg, and other subject matter experts and industry leaders educated utility representatives on how FDEP's nutrient criteria rule will be implemented and what needs to be done to prepare.

While FWEAUC members prepared to comply with FDEP's new rules, the Florida Wildlife

Federation's appeal of the federal court order amending the consent decree continued to trudge forward. The appeal focuses on whether it was appropriate for the district court in Tallahassee to approve EPA's request to modify the consent decree to allow for FDEP's nutrient criteria rules to supplant the decree's federal rulemaking requirements. The district court ruled that Florida's development, and EPA's approval, of state numeric nutrient criteria justified the requested modification of the consent decree and is consistent with the Clean Water Act mandate that the states retain primary responsibility for setting water quality standards.

Over the past year, the EPA, the Florida Attorney General, the FWEAUC, and the Florida Electric Power Coordinating Group Environmental Committee defended the amendment to the decree. Oral arguments on the appeal took place in January 2015, and we are awaiting a ruling from 11th Circuit Court of Appeals. While we are optimistic that the appellate court will uphold the decision, it is possible that the 11th Circuit will remand the case back to the district court for further proceedings.

NACWA Coordination

Suzanne Goss
JEA

The FWEAUC maintains a relationship with the National Association of Clean Water Agencies ("NACWA"), a group that is involved in all facets of water quality protection and viewed as a key stakeholder in both the federal legislative and regulatory arenas. NACWA has established credible, collaborative relationships with members of Congress, Presidential administrations and the EPA that have benefited such groups as the FWEAUC. Brian L. Wheeler of Toho Water Authority has been serving as the FWEAUC's NACWA liaison.

Recent years have reflected heightened involvement in a broadening array of environmental laws and regulations that include the entire scope of ecosystem issues encompassed under the "umbrella" of watershed management. NACWA continues to pursue every opportunity to develop and implement scientifically-based, technically-sound and cost-effective environmental programs, focusing on several key issue areas, which not only focus on the individual issues, but explore them more broadly in order to find more holistic solutions. Key issues include:

- 1) Water Quality Standards and Criteria - supports that each community must make the decisions that are right for its citizens; that a national, holistic strategy that fairly and equitably takes into account the various sources of contaminants and seeks to find sound and reasonable approaches to deal with them.
- 2) Operations and Wet Weather advocates for responsible policies relating to issues such as sewer

overflows, land application of biosolids, and other activities aimed at protecting wastewater treatment processes and the environment from industrial and commercial pollutants that enable utilities to best serve their community, while continuing to improve the environment.

- 3) Utility and Resource Management - seeks new approaches to assessing affordability and community financial capability limits that incorporates sound economic principles and encourages flexibility and innovation towards meeting the goals of the Clean Water Act in a sustainable manner. Continues to work with Congress and the EPA to ensure they have access to and understand critical utility investment information that cities and communities nationwide need to repair, replace, rehabilitate and build new infrastructure to comply with increasingly complex regulations and to protect public health and safeguard the environment.
- 4) 21st Century Challenges - committed to making sure the array of Water Resources Utility of the Future issues - whether related to energy production, water reuse, green infrastructure, climate impacts or watershed-based approaches - are priorities with Congress, the Administration and other key stakeholders going forward.

Some of the successes this past year included: 1) Water Resources Reform and Development Act, and its invaluable extension of Clean Water State Revolving Fund loan repayment up to 30...

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JEA

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years; 2) the new Farm Bill, which maintained water quality and agricultural nutrient management provisions and established a Regional Conservation Partnership Program; 3) a new Consent Decree Handbook and e-Library offering the most comprehensive collection of municipal wet weather consent decrees and

UIC/ASR

Eric Olsen
Hopping Green & Sams

The potential release of arsenic in underground formations resulting from injected water (although the injected water does not contain arsenic above the drinking water standard) has historically created Underground Injection Control (“UIC”) permitting problems for ASR systems in Florida. Starting in 2011, FDEP began working with EPA to modify the interpretation of the UIC criteria and groundwater quality criteria to employ a non-endangerment approach relying on institutional controls. EPA Region IV officially recognized this approach in 2013 with a letter to FDEP. Beginning in 2013, FDEP has implemented this approach by issuing water quality criteria exemptions for arsenic exceeding the drinking

water quality standard where such exceedance did not endanger any existing or potential use of groundwater as a drinking water source.

FDEP’s application of this new non-endangerment UIC permitting criteria interpretation has facilitated the issuance of a number of UIC permits for ASR systems allowing utilities to implement cost-effective, drought proof, and flexible water storage systems to help provide sustainable water supply sources. Examples of this include the Peace River Manasota River Water Supply Authority (surface water storage), Destin Water Users Group (reclaimed water storage), and City of Tampa. In February 2014, FDEP issued a water quality criteria exemption from the Class G-II ground water standard for total coliform bacteria to the City of West Palm Beach to allow issuance of an UIC permit for

enforcement orders available anywhere; 4) the ‘war on wipes’, which resulted in a ‘Toilets Are Not Trashcans!’ campaign; and 5) the 2nd annual *Water Week 2015*, which included the *National Water Policy Forum, Fly-In, & Expo*.

The FWEAUC receives NACWA’s Clean Water Exchange (and Action Alerts) at no cost. This communication tool, designed to keep members of state and regional clean water organizations informed of critical national issues, provides opportunities for our members to stay engaged and to have their voice heard in Washington, DC.

surface water storage demonstrating an effort to expand this non-endangerment approach to constituents other than arsenic. FDEP has also employed this approach to issue UIC permits for aquifer recharge systems.

The FWEAUC has assisted and supported FDEP in support of this new approach. Continued implementation and expansion of this approach will provide utilities with another cost-effective tool for meeting water supply needs at a time when limitations are being placed on the continued or expanded use of traditional groundwater sources. FDEP staff report that EPA Region IV is developing a second UIC permitting guidance letter for reclaimed water ASR systems. The FWEAUC will continue to monitor the implementation and expansion of this new ASR UIC permitting approach.

Waters of the United States

Chris Pettit

Palm Beach County

On April 24, 2014, the EPA and United States Army Corps of Engineers published a proposed rule that purported to “clarify” the definition of “Waters of the United States” (“WOTUS”) under the Clean Water Act. WOTUS, as defined under the Clean Water Act, dictates those areas over which the EPA and US Army Corps exercise jurisdiction for regulatory processes under the Clean Water Act, including the requirement of National Pollutant Discharge Elimination System (NPDES) Permits under Section 402 and “dredge and fill” permits under Section 404 of the Clean Water Act. EPA claims that the rulemaking is necessary to address ambiguity that has arisen from Supreme Court’s decision in *Rapanos v. U.S.* 547 U.S. 715 (2006), which provided two separate jurisdictional tests under the Clean Water Act as a result of a split plurality decision. EPA and the Corps have stated that the focus of the agencies’ proposed rule is to interpret and apply the “significant nexus” test established in Justice Kennedy’s opinion in *Rapanos*, “based consistently on the law and science.” The public comment period for the proposed rule closed on Nov. 14, 2014 and resulted in over 1 million comments on the proposed rule language.

The text of the proposed rule made several significant changes to the definition of WOTUS, including the utilization of the new terms and definitions of “tributary,” “uplands,” “significant nexus,” “floodplains,” and “neighboring” that arguably expanded the previous extent of jurisdiction under the rule. Stakeholders raised significant concerns regarding the impact of the proposed rule amendments in several areas, including:

- The EPA’s use of the 1986 WOTUS regulations as a regulatory baseline instead of utilization of the guidance documents and legal precedent that had developed since the promulgation of those regulations.
- Confusion over the definition of “tributary,” which could arguably include any

stormwater or roadside ditch that “contributes flow” to a WOTUS.

- Given the relatively flat topography of Florida, the definition of “adjacent waters” as “bordering, contiguous or neighboring”, and allowing for “neighboring” to include waters located in a floodplain or having a subsurface connection to WOTUS could arguably include most of the state.

- That the definition of “significant nexus” created a case-by-case jurisdictional determination that would not “clarify” existing regulations and would instead create a process that would result in unbridled discretion being exercised by EPA staff.

- Although the federal agencies were purportedly “clarifying” the existing regulations, no clarification was being provided regarding well established exemptions for traditional agricultural practices, waste treatment exemptions and features that had not consistently been subjected to regulatory authority, such as manmade tributaries and ditches.

Stakeholders in Florida provided significant comments to the proposed rule, noting that stormwater systems that had been previously permitted under state or federal law and that were not considered “waters of the state” would be considered WOTUS, thereby creating regulatory confusion regarding the applicability of water quality standards and sowing confusion through the regulatory process. Additionally, the FWEAUC and impacted stakeholders raised concerns regarding the impacts of the proposed rule on reclaimed water systems and many of the innovative reuse infrastructure projects being undertaken that benefit Florida’s water resources.

The federal agencies have transmitted the final rule to the Office of Management and Budget for final vetting prior to publication in the Federal...

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Waters of the United States

Chris Pettit
Palm Beach County

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Register. Committee hearings have been held in both the US House of Representatives and the US Senate to vet the rulemaking process, raise concerns with the WOTUS rule and to encourage the federal agencies to provide for the submittal

of additional public comment on additionally proposed changes. Additionally, both chambers have passed resolutions supporting restrictions on the abilities of the federal agencies to complete or implement the WOTUS rule and have initiated legislation to limit the rule's impact and impair the implementation of the rule. FWEAUC members are encouraged to continue to track the rulemaking efforts and to encourage their congressional delegations to support efforts to ensure that the interests of affected stakeholders are protected.

Antidegradation

David Childs
Hopping Green & Sams

It was a busy year for litigation concerning one of the more esoteric features of the Clean Water Act, the "antidegradation policy," which can be generally described as a water quality standard designed to prevent declines in water quality of surface waters. In the Middle District Court of Florida, a lawsuit was filed -- and then settled -- between EPA and the Florida Wildlife Federation that concerned whether and how Florida should be required to consider the antidegradation policy in its impaired water listing determinations. The settlement agreement obligated EPA to complete its decision on review of Florida's most recent "impaired waters list" no later than September 30, 2014. When reviewing this list, EPA was required to "consider all applicable State water quality standards, including antidegradation requirements, and it will consider all existing

and readily available water quality related data and information in assessing the State's Group 5 water bodies, which includes waters within the Clam Bayou Watershed in Pinellas County."

EPA followed through with its settlement commitment, but the Wildlife Federation was dissatisfied with the agency's application of the antidegradation policy. On December 24, 2014, the Wildlife Federation filed another lawsuit in the Middle District of Florida seeking sundry injunctive relief against EPA. According to the Wildlife Federation, FDEP's impaired waters list had myriad legal shortcomings, and EPA failed to correct them. The Wildlife Federation appears to assert that FDEP should list water bodies as impaired that have some decline in water quality (when compared to unspecified baseline levels), even if the water bodies are otherwise supported in their designated uses.

This latest federal lawsuit carries serious implications for

FWEAUC members. The Wildlife Federation seeks a series of judicial findings concerning the supposed inadequacy of Florida's process for identifying waters as impaired. If the Court were to agree with these assertions (or if EPA were to settle the case), then the end result could be more waters identified as impaired in Florida, more total maximum daily loads ("TMDL"s), and more restrictive TMDLs. Further, given the Wildlife Federation's assertions regarding supposed inadequacies in Florida's permitting programs and non-point source pollution controls, it is conceivable that the outcome of this case could result in changes to how FDEP considers antidegradation requirements in other program areas.

In light of these implications, the FWEAUC and other Florida stakeholders have moved to intervene in the case and defend the state program. The State Attorney General has also moved to intervene. The court has not ruled on these motions.

Water Quality Criteria for Fecal Indicator Bacteria

David Childs
Hopping Green & Sams

Over the past year, FDEP has worked to update its bacteriological criteria, the impaired waters listing process, and a proposed streamlined method for implementing bacteriological TMDLs. FWEAUC representatives and FDEP met several times to discuss this rule development. FWEAUC representatives expressed concerns that FDEP's draft proposal included a "guilty until proven innocent" approach to implementing the bacteriological TMDL, whereby a finding of a fecal impairment would trigger mandatory (and potentially resource-intensive) duties for Florida domestic wastewater utilities even without a finding that the utilities were causing or contributing to the impairment. Given the acknowledged scientific limitations of the updated criteria as well as the other potential sources of anthropogenic fecal loadings (e.g. septic tanks, stormwater runoff), the FWEAUC

determined that the FDEP's initial approach could lead to extensive utility efforts that would not improve the environment.

The FWEAUC, however, also recognized that the existing fecal indicator criteria and TMDL implementation methods suffered from significant shortcomings as well. Namely, the existing criteria were based on outdated science and the implementation thereof had forced some utilities to try to prove a negative, i.e., that the utility was not the cause of a particular fecal impairment. These demonstrations proved difficult, and some utilities felt as if they were on a bureaucratic treadmill. FDEP also recognized the scientific and practical shortcomings of its current fecal indicator bacteria criteria and TMDL process. In fact, a goal of the FDEP process was to correct these regulatory shortcomings and facilitate improvements to the water resources. FWEAUC members have expressed their appreciation for FDEP's efforts to try to remedy the existing program and achieve environmental benefits as utilities and FDEP worked together to bridge differences over possible solutions.

After significant discussions with FDEP, the FWEAUC's BAC-TMDL Issue Leaders, Ted McKim and Ed Cordova, worked with legal counsel to develop a position paper. This paper recommends an alternative approach. Rather than obligating Florida's utilities to implement an onerous, one-size-fits-all TMDL implementation plan upon an impairment determination, the FWEAUC recommends an optional "best management practices" rule. In accordance with Section 403.067(7), Florida Statutes, a utility's voluntary implementation of certain recognized best practices would result in "a presumption of compliance with state water quality standards," and additional measures would be unnecessary. This alternative approach is intended to address the shortcomings associated with the existing TMDL process and avoid the significant unintended consequences associated with FDEP's initial proposal. We are hopeful that in the coming year, the FWEAUC and FDEP will implement an approach that will protect Florida surface waters.

Reclaimed Water

Ted McKim

Reedy Creek Improvement District

Last year (2014) the Florida Legislature passed Senate Bill 536, which tasked the FDEP with conducting a study and generating a report to determine the best ways to expand the use of reclaimed water, stormwater and excess surface waters within our state. The study team is comprised of representatives of FDEP, FDOT, DACS and the five water management districts. Mr. Rick Nevulis of SFWMD heads the reclaimed water team.

FDEP has held a series of workshops and teleconferences throughout the state to gain stakeholder input as well as conducted a survey of key stakeholders attempting to identify the impediments to expanding and optimizing the use of reclaimed water. Response to the survey was high. Not

surprisingly, the survey results found that the major impediments to expanding the use of reclaimed water are funding and storage. The former is rather obvious and hopefully this study will lay a foundation for increased funding opportunities provided to suppliers thru FDEP and/or water management district grants and matching contributions. The latter impediment, adequate storage, has many possible solutions but is particularly germane to our state and its unique climate.

Florida's wet and dry seasonal climate cycles are usually out of phase with the demands for reclaimed water. When it rains, we have excess reclaimed water and lowered demands for the product; and when it's dry, we have increased demands for reclaimed water and lower supplies available. The obvious solution is to store the excess water in the wet weather periods and withdraw the stored volume when it's dry. The storage can

take many forms, but the most desirable are usually aquifer storage and recovery systems or large surface water reservoirs. Both have advantages and disadvantages, and can be location specific, dependent on local conditions and circumstances. Because Florida's seasonal rainfall and dry weather patterns can cover over 90 days of duration, the storage volumes needed to match supply and demand can be significant. For medium and large reclaimed water providers, the necessary storage volumes can be in the hundreds of millions to billions of gallons.

The FWEAUC is continuing to follow and participate in this study, and has and will continue to provide insight to the study team. A draft of the study is expected to be available for public comment by the summer of 2015 and the final document is expected to be complete by December 2015.

2015 Legislative Session

David Childs

Hopping Green & Sams, P.A.

The 2015 Legislative Session promised to be the "year of water," as the House and Senate tackled numerous water quality and water policy issues. As of the writing of this summary, however, passage of any substantive water policy appears highly unlikely. The House adjourned three days early and left the Senate with a "take it or leave it" proposition for two potential water bills, HB 7003 and HB 653. The Senate chose the "leave it" option and instead passed their own water bill, SB 918. With that action, it seems highly unlikely that

water policy will be part of the special session that will be convened before July 2015.

Accordingly, several concepts addressed in this year's water legislation will have to wait until next year. These concepts include septic tank remediation plans in springs areas, water management district annual funding plans, new basin management action plan requirements to list and prioritize projects, district work plan requirements, reclassification for potable water supplies, Lake Okeechobee / Northern Everglades restoration, competing consumptive use permit applicants, and MFL/TMDL progress reporting requirements. Also, FDEP's reuse study will complete this year and could include additional legislative recommendations. Stay tuned for 2016.

2015 Annual Meeting Notes

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