



# **FWEA Utility Council**

*Protecting Florida's Clean Water Environment*

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[www.fweauc.org](http://www.fweauc.org)

July 18, 2016

Erin Flannery-Keith  
Water Permits Division  
Office of Wastewater Management  
Mail Code 4203M  
Environmental Protection Agency  
1200 Pennsylvania Ave. NW.  
Washington, DC 20460

**Re: NPDES Permitting Rulemaking**  
**Docket ID Nos. EPA-HQ-OW-2016-0145, EPA-HQ-OW-2016-0146**

Dear Ms. Flannery-Keith,

The Florida Water Environment Association (FWEA) Utility Council appreciates the opportunity to provide the enclosed comments on the U.S. Environmental Protection Agency's (EPA's) proposed revisions to National Pollutant Discharge Elimination System (NPDES) regulations.

By way of background, the FWEA Utility Council is the voice of Florida's domestic wastewater treatment community. Our members operate domestic wastewater collection, treatment, disposal, and reuse facilities. Utility Council members provide essential infrastructure services to over 9 million Floridians. Utilities across the State have invested millions of dollars upgrading wastewater treatment systems to remove pollutants in accordance with NPDES permits issued by the Florida Department of Environmental Protection (FDEP).

The FWEA Utility Council appreciates that some aspects of this rulemaking clarify state agencies' authority to implement the NPDES program. For instance, the Utility Council welcomes the proposal to enable permit writers to calculate water quality based effluent limits for domestic wastewater discharges based on effluent flows instead of design flows. Despite these improvements, the Utility Council is concerned about the potential negative impact of other elements of this rulemaking on FDEP's NPDES program. Namely, several aspects of the proposed rule would shift program authority away from the State of Florida and to the federal government. This movement is contrary to the Clean Water Act, which gives the states (and not EPA) primary authority to administer the NPDES program.

Therefore, the FWEA Utility Council respectfully requests that EPA not finalize its proposed amendments to 40 C.F.R. § 123.44(k) or 40 C.F.R. § 122.44(d) as described herein.

### **Proposed 40 C.F.R. § 123.44(k)**

FDEP administers an EPA-approved NPDES permitting program. Under the State program, if an NPDES permit holder has submitted a permit renewal application, but FDEP has not acted before the permit expires, the existing permit is “administratively continued.”<sup>1</sup> This means that the existing permit remains in effect until FDEP takes final action on the application. EPA has acknowledged that the occasional delays are based on the evolving and complex technical and legal issues that may arise in the permitting process.<sup>2</sup> Environmental standards change, and those changes spawn uncertainty and require careful planning. Utility Council members have responsibility to ratepayers to ensure that new regulations are well-understood and carefully planned for and that required capital improvement projects represent a sound investment. Sometimes “getting it right” takes time. Still, permitting delays are the exception and not the rule. In Florida, 99.5% of all NPDES permits are currently up to date, and nationally, the occurrence is rare as well, as over 85% of all permits are current.<sup>3</sup>

Notwithstanding the bona fide reasons for -- and the rarity of -- occasional administrative continuances, EPA proposes a drastic measure to address the issue. The proposed rule would grant EPA the discretion to designate an administratively continued state NPDES permit as a “proposed permit,” which in turn would compel the state to submit the NPDES permit to the EPA Administrator for review and objection. This change would grant the EPA Administrator a new mechanism to initiate discretionary review of FDEP-issued NPDES permits where the State has not reissued an expired, administratively continued permit.<sup>4</sup>

The proposed policy would fundamentally alter the State-Federal balance in the administration of the Clean Water Act. Congress granted the states and not EPA the primary role in NPDES administration as part of its “intent to ‘recognize, preserve and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution.’”<sup>5</sup> Courts thereby recognize that one “should construe the [Clean Water] Act to place maximum responsibility for permitting decisions on the states where the EPA has certified a NPDES permitting program.”<sup>6</sup> This would seem particularly true when a proposed rule appears to lack a strong factual basis for its adoption. Accordingly, the FWEA Utility Council respectfully requests that EPA refrain from adopting its proposal to deem administratively continued permits as “proposed permits.”

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<sup>1</sup> See 40 C.F.R. § 123.44

<sup>2</sup> See Respondent EPA’s Response to Petition for Mandamus, *In re Sierra Club*, Case No. 12-1860 (1st Cir. March 14, 2013).

<sup>3</sup> EPA, NPDES Permit Status Reports, at <https://www.epa.gov/npdes/npdes-permit-status-reports>.

<sup>4</sup> While EPA “expects to exercise its discretion to use this authority only in very limited circumstances,” the draft rule language includes no impediments. The authority, as initially proposed, is unfettered.

<sup>5</sup> *Chesapeake Bay Found., Inc. v. Va. State Water Control Bd.*, 495 F. Supp. 1229, 1232 (E.D. Va. 1980).

<sup>6</sup> *Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 874 (7th Cir. 1989).

**Proposed Amendment to 40 C.F.R. § 122.44(d)**

EPA proposes to revise 40 C.F.R. § 122.44(d) to prescribe requirements associated with the derivation of mixing zones and prepare reasonable potential demonstrations. In both instances, EPA fails to provide examples or a meaningful explanation of the supposed shortcomings of current state agency procedures and then seems to assert both that more data is needed and that the proposed rule will not require additional data collection.<sup>7</sup> These types of scientific demonstrations are inherently site-specific and require state and local level expertise to implement. They should not be subject to overriding federal prescriptive mandates. Accordingly, the FWEA Utility Council respectfully requests that EPA refrain from adopting these proposals.

The FWEA Utility Council appreciates your consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lisa M. Wilson-Davis".

Lisa Wilson-Davis  
FWEA Utility Council President

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<sup>7</sup> See, e.g. 81 Fed. Reg. at 31354 (explaining, after describing the basis for the new mixing zone data requirements, that “[t]his revision would not require the collection of new data and will not impose a new burden; it is intended to ensure that the permitting authority considers existing valid and representative ambient water quality data and to enhance decision-making transparency when permitting authorities consider a dilution allowance.”)