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January 31, 2013

Administrator Lisa P. Jackson
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave, N.W.
Washington, D.C. 20460

Water Docket
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave, N.W.
Washington, D.C. 20460

Attention: Docket ID: EPA-HQ-OW-2009-0596

Re: Water Quality Standards for the State of Florida's Streams and Downstream
Protection Values for Lakes: Remand Provisions

Dear Administrator Jackson:

On behalf of James Sartori, Destin Water Users, Inc., South Walton Utility Co., Inc. Emerald Coast Utilities Authority, Okaloosa County Board of County Commissioners, the City of Panama City, Florida League of Cities, Inc., and the Florida Stormwater Association, Inc., I am submitting to the EPA comments regarding EPA's notice of proposed rules for the State of Florida's waters published in the Federal Register, Volume 77, Number 243, December 18, 2012.

Republication of Standards for Florida's Streams and Downstream Protection Values

EPA is re-noticing the same water quality standards for nitrogen and phosphorus for Florida's streams and lakes. These criteria contain the same values and standards as was contained in the original proposed rule which Judge Hinkle found to be invalid. Judge Hinkle's determination was that the record is absent of any information indicating that the numeric criteria for these waters has a valid scientific basis. Specifically, Judge Hinkle indicated that EPA's statutory authority only extended toward controlling the discharge of pollutants. By definition, EPA's attempt to regulate the discharge of pollutants must be accompanied by a record showing that exceedance of the numeric criteria would be harmful to the receiving waters. No such

evidence was in the record. The record information could actually support the premise that the rule criteria are so low as to deprive these waters of necessary nutrients. This would indicate that if the rule would achieve its presumed purpose; to set a regulatory framework for all waters so as to reduce the ambient levels of TN and TP to those concentrations, could starve aquatic plants and animals of essential life support elements. There is nothing in EPA's published notices, dates, or literature to justify the rationale of the proposed levels of TN and TP. There is no way to determine from all EPA's support documents or published data in this record, whether the ambient concentrations this rule sets, would result in oligotrophic conditions. Thus, the rule is arbitrary and exceeds EPA's statutory authority.

The purported "scientific" support for the republication of these criteria, which appears on pg. 74998 of the December 18, 2012 Federal Register Notice, does not provide a reasonable or even colorable justification for the rule. The analysis first begins with the stream condition index criteria developed by the Florida Department of Environmental Protection. EPA recognizes that this SCI was "not designed to be uniquely responsive to nutrients but nutrients may contribute to adverse impacts." It goes on to further say that where ambient TN or TP concentrations were greater than EPA's proposed criteria, SCI's scores indicated that "on average fauna populations were imbalanced." It goes on to say that a SCI score of 50 has been identified by scientific experts to be associated with the loss of rare native taxa and makes the unsupported statement that "this is the level where there is some negative change in the natural populations of aquatic fauna." Further, the narrative goes on to state that EPA believes "an average SCI of 40 is a level of where there is some negative change in natural populations of aquatic fauna but before profound harmful changes occurred." This purported scientific analysis adds the comment that when nutrient concentrations exceed EPA's proposed numeric streams criteria, the score is, to a certain degree, "more likely to be less than 50. Meaning that it is more likely that there will be some negative change as TN and TP increase above EPA's proposed stream criteria." [Emphasis added] The narrative then goes on and adds more qualifying language to each tenuous conclusion.

The net result of this is that assumptions and "indications" which are less than certain are multiplied by factors which are less supportable. This is a factoring of a list of uncertainties and mere possibilities, which ultimately renders a conclusion that purportedly supports a scientific basis for EPA's numbers. Mathematically, the lack of certainty of all these factors, which are combined to reach a desired conclusion, renders a conclusion that is unsupported. The narrative purportedly supports all five of EPA's different streams criteria for the various regions it has assigned to Florida. This narrative does not support the hypothesis in the rule; it only demonstrates its weakness and lack of scientific value. By stacking a string of uncertainties and possibilities and then applying such a string of assumptions to achieve a result by combining them all, only renders a conclusion which has a low probability of correctness. This purported justification of these criteria only boils down to a re-statement of the obvious – too much nutrients can be harmful; too little can starve biota. There is a void in this record of any reliable and sound justification for the numeric standards EPA has chosen. Thus, EPA exceeds its authority under the CWA. It cannot justify the necessary element of this type of criteria – the

proof that exceedances of these numeric standards will be harmful; is the discharge of a pollutant.

Additionally, EPA's publication of notice of these proposed rules on December 18, 2012, contains no such additional information which would support the re-proposed rule or satisfy Judge Hinkle's basis for invalidation. The proposed rule contains references that alternatives to complying with the rule can occur; such as: variances, site specific alternative criteria and similar processes which do nothing more than excuse compliance with the rule. The fact that a discharger who would otherwise be in violation of the proposed rules may possibly obtain a variance or similar alternative compliance, does not render this rule to be valid or support its validity. The rule itself must be justified; an invalid rule cannot be justified by pointing to means to avoid its application.

The Rule Establishes Standards and Criteria that are Not Technologically Achievable

The rule, thus, exceeds EPA's rulemaking authority, as it attempts to adopt criteria which are disallowed by the Clean Water Act. At various locations of the Act, EPA's authority is described as permitting it to promulgate rules which can require the use and application of best available controlled technologies. However, EPA cannot require compliance with a standard of criteria which the best technology cannot achieve. Simply stated, EPA cannot require compliance with standards that cannot be achieved by existing technology. See 33 U.S.C. § 1314(b)(1)(a).

EPA's Federal Register publication noticing these rules of December 18, 2012 contains an admission that the rule sets criteria which Waste Water Treatment Plants and storm water systems cannot possibly achieve. On page 74969 of that Federal Register publication, the following statement appears:

“EPA considers the costs of known nitrogen and phosphorus treatment options for municipal WWTPs. Nitrogen and phosphorus removal technologies that are available can reliably attain annual average total nitrogen (TN) concentration of approximately 3.0 mg/L or less and annual average total phosphorus (TP) concentration of approximately 0.1 mg/L or less. EPA considered waste water treatment to these concentrations to be the target levels for the purpose of this analysis.”

Those concentrations far exceed the allowable concentrations in the proposed rule. Thus, EPA, by its own publication, has conceded that the rule sets impossible standards. This violates EPA's authority under the Clean Water Act. If, for example, a municipality in the panhandle region of Florida was discharging into a water body that replicated the allowable nitrogen and phosphorus criteria in this rule, that Waste Water Treatment Plant would be in violation of the proposed rule. It would be impossible for the Plant to comply with the rule, as technologies to achieve the required concentrations do not exist. The same holds true for storm water.

EPA must be aware that storm water facilities that have been granted (MS-4) permits, do not subject storm water to the same type of treatment that goes through Waste Water Treatment Plants. Thus, storm water cannot be treated to the degree applied to wastewater and no such technology exists to achieve the levels required by these rules for any storm water discharger in the State of Florida. Again, the rule imposes criteria which are impossible to achieve for storm water, as the technology to purify storm water to such a degree is non-existent.

EPA's Cost Analysis for the Storm Water Facilities and Wastewater Treatment Plants is Fundamentally Flawed

Storm water facilities treat urban storm water runoff through retention and detention facilities. In other words, storm water is cleaned up by routing it through retention ponds and detention facilities, which lengthen residence time so that suspended particles and biologic influences can be attenuated. Storm water treatment systems do not and cannot subject storm water to the same level of treatment as Waste Water Treatment Plants are able to do. Storm water facilities are simply not set up in that fashion and there is not an ability for them to do so. Waste Water Treatment Plants, those that apply the most advanced biologic treatment technologies, as EPA's recognizes on page 74970 of the December 18, 2012 Federal Register, can achieve treatment of biologic waste to have concentrations of 3 mg/L or less for Total Nitrogen and 0.1 mg/L for Total Phosphorus. EPA recognizes that the best treatment facilities cannot reduce these concentrations anywhere close to what these proposed rules require. The suggestion is contained in this publication of notice that all these facilities will have to apply for variances, site specific alternative criteria or some other substitute for compliance.

The estimated costs of achieving this level of treatment is given; however, the estimated costs for complying with the rule criteria is not contained in EPA's notice. EPA only estimated the costs of compliance with the level existing technology can achieve, not the rule criteria. Thus, the notice lacks any credible estimate of what it would cost any facility to comply with these criteria. The assumption that Waste Water Treatment Plants and storm water facilities will be able to obtain variances, site specific alternative criteria or another regulatory mechanism which would excuse compliance is naïve and without foundation. All such alternatives to compliance with this rule would be subject to public notice and challenge by opposition groups. EPA cannot say with any certainty that attempts at achieving approval of such substitutes will be successful.

Thus, EPA's estimate of the cost of compliance with this rule is baseless and greatly understates what the true costs would be. Further, EPA's economic analysis is a clear admission that the rule criteria exceed its statutory authority which delegates rulemaking authority to EPA under the Clean Water Act. EPA has conceded that the rule criteria would impose standards upon storm water facilities and Waste Water Treatment Plants for which technology, which would enable compliance, is not existent.

EPA's notice fails to comply with the Regulatory Flexibility Act (RFA). There are numerous misstatements regarding EPA's decision that the RFA does not apply to its intended

rulemaking. These statements appear on pg. 75003 of the Federal Register publication of this proposed rule, December 18, 2012.

The Notice describes how EPA has acted to negate Florida's rules in this situation because "the administrator determine[d] that a new or revised standard is necessary to meet the requirements of the Act." This is what has been referred to as the "necessity" determination EPA was required to adopt prior to superseding the State of Florida's water quality standards. However, in EPA's determination that it need not comply with the Regulatory Flexibility Act, it has included statements and assumptions which are unfounded and incorrect.

First, EPA assumes that the water quality standards it is imposing will be implemented by the State of Florida through the NPDES permit process. Florida cannot implement EPA's standards, as Florida has already determined the standards are not scientifically valid. In order for the State of Florida to implement EPA's proposed standards, it would have to adopt them, under Florida Law, as a rule, pursuant to procedures in Florida's Administrative Procedure Act, Chapter 120, Florida Statutes. Having officially stated that EPA's proposed rules are scientifically unsupportable, the Florida Department of Environmental Protection could not validly adopt those rules, as they would be subject to challenge. A determination of invalidity would be a certainty after such a challenge because Florida's DEP has officially stated the rules are arbitrary and based on poor science and incorrect assumptions.

Thus, EPA will have to enforce these rules itself. This belies EPA's statements that the requirements of these proposed rules are "not self-implementing." EPA recognizes the rules will require storm water facilities and wastewater treatment facilities and other dischargers to spend significantly large amounts of money, in the hundreds and millions of dollars, to achieve the standards required by these rules. As described earlier, many facilities will be unable, at any cost, to meet these standards because technology to do so is nonexistent. Also, EPA's statement, that Florida "has discretion in developing discharge limits, as needed to meet the standards" is puzzling. Florida cannot modify an EPA rule. For example, if you acknowledge that EPA is imposing these new standards on Florida through its necessity determination, the consent decree and these rules, you must recognize Florida cannot amend or negate the rule criteria. If a small entity is discharging into a water body that has concentrations of TN and TP at the same numeric concentrations which are in the rules, the discharge must meet the concentrations in the rule or seek some variance. Either route is time consuming and very expensive. Either method of compliance is subject to challenge.

It is a false statement, which EPA makes on pg. 75003 of the Federal Register described above, to wit: "This proposed rule does not establish any requirements that are applicable to small entities." In fact, small entities will fall under the requirements of this rule as soon as the standards go into effect. EPA's statement that the rules will have no direct impact on small entities is obviously false. It is akin to say that when a Legislature passes speed limits for its roads and highways that it has no direct impact on drivers because it is the highway patrol that writes the tickets. EPA's logic on this is inexplicable and duplicitous. The rules will require compliance; this is why EPA's administrator found it necessary to adopt these standards, as it

Administrator Lisa P. Jackson

January 31, 2013

Page 6

was determine that Florida's rules weren't stringent enough to protect Florida's waters. The plain truth is that small entity dischargers will be required to expend tremendous resources to comply or to seek alternative methods of obtaining or renewing an NPDES permit. This will all be a result of the direct and immediate effect of these rules.

Yours truly,

A handwritten signature in black ink, appearing to read "Kenneth G. Oertel". The signature is written in a cursive style with a large initial "K".

Kenneth G. Oertel