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June 16, 2011

Update on the EPA Numeric Nutrients Standards

This Dean Mead e-Alert provides news that is important to you about the EPA's response to the Florida Department of Environmental Regulation's petition for the withdrawal of the EPA numeric nutrient standards.

Attached to this e-Newsletter you will find a letter dated June 13, 2011, from the Acting Assistant Administrator of the U.S. Environmental Protection Agency ("EPA"), in response to a petition from the Florida Department of Environmental Protection ("FDEP") regarding the EPA numeric nutrients standards approved last year and set to be implemented in early 2012.

The numeric nutrient rules have been the subject of much controversy in Florida, including federal lawsuits by groups like the Florida League of Cities and the Florida Cattlemen's Association, and the petition from FDEP to EPA which is referenced in the letter. In the letter, EPA recognizes that states have the "primary role" in establishing and enforcing water quality standards in their states. It acknowledges and recognizes that FDEP is involved in its own rulemaking process, and agrees to hold its response to the FDEP petition in abeyance until it has seen the results of that rulemaking. The letter is more conciliatory in tone than much of the EPA's public discussion of the subject has been, and provides that EPA may be willing to extend implementation of its own standards if the FDEP rulemaking is satisfactory. But it is also clear that EPA is taking a wait-and-see attitude toward Florida's rulemaking.

Given Governor Rick Scott's suspension of rule making activity in Florida (Executive Order 11-01), it is unclear how rapidly FDEP will be able to move through its rule making process, even with EPA's deadline looming.

The attorneys of Dean Mead will continue to monitor developments relating to the numeric nutrient standards. If you have questions, please contact Dennis G. Corrick of our Fort Pierce office at (772) 464-7700 or by email at dcorrick@deanmead.com.

If you would like to learn more about the Dean Mead Agribusiness Industry Team, please visit our Website at <http://www.deanmead.com/CM/Industries/Agribusiness.asp> .



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 13 2011

OFFICE OF
WATER

Herschel T. Vinyard Jr., Secretary
Florida Department of Environmental Protection
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, FL 32399-3000

Dear Secretary Vinyard:

Thank you for your letter and petition of April 22, 2011, to Administrator Jackson requesting that the U.S. Environmental Protection Agency (EPA) (1) withdraw its January 2009 determination that numeric nutrient criteria are necessary in Florida, (2) repeal Federal rulemaking completed in November 2010 to establish such criteria for inland lakes and streams, and (3) refrain from proposing or promulgating any further numeric nutrient criteria. This letter constitutes EPA's initial response to FDEP's petition; we are not issuing a final response to the petition at this time.

Your petition outlines plans and a rulemaking schedule by which the Florida Department of Environmental Protection (FDEP) will adopt nutrient criteria. The projected rulemaking schedule calls for a Notice of Rule Development in May 2011, a rule development and public outreach process through the summer and early fall of 2011, and adoption of a final rule in January 2012, to be followed by a legislative ratification process under Florida law.

EPA supports FDEP's continued focus on reducing nitrogen and phosphorus pollution and commends the State's commitment to recommence its rulemaking efforts for both inland and estuarine waters. EPA agrees with FDEP that the Clean Water Act (CWA) envisions that states have the primary role in establishing and implementing water quality standards for their waters. The State was authorized by the CWA to adopt numeric nutrient water quality criteria before EPA's January 2009 determination, and has remained so authorized. FDEP affirmed its support for the promulgation of numeric nutrient criteria for the State in its initial commitment to develop numeric nutrient criteria in 2002, and reaffirmed this position in a subsequent commitment to develop numeric nutrient criteria in 2007. In the determination, EPA affirmed its preference for State-adopted numeric nutrient criteria over EPA promulgation. FDEP also continues to have authority for the implementation of the range of activities and tools highlighted in the petition to assure more effective nutrient loadings reductions.

EPA looks forward to working with FDEP as it proceeds with its rulemaking effort. If FDEP adopts and EPA approves protective nutrient criteria that are sufficient to address the concerns underlying our determination and rule, and if such criteria enter into legal force and effect in Florida, EPA will promptly initiate rulemaking to repeal the corresponding federally

promulgated numeric nutrient criteria. If FDEP adopts and EPA approves criteria for any waters for which EPA has not yet proposed or promulgated federal criteria, and if these criteria are legally effective under Florida law, EPA will not propose or promulgate (as appropriate) corresponding federal criteria.

As you know, we included a 15-month extension of the effective date for the criteria in our November 2010 rule to provide time for Florida to prepare for implementation and to allow State officials to consider further actions that would achieve the purposes of the rule. If the March 2012 effective date is approaching and Florida has adopted a protective and approvable final rule but further steps are needed for that rule to take effect, such as ratification by the Legislature, we will propose, through rulemaking, an additional extension of the effective date to enable Florida to complete such steps. In addition, if Florida continues to move ahead on schedule toward adoption of approvable standards for coastal and estuarine waters, EPA will seek an extension to the deadlines in the consent decree for EPA's proposed rule for coastal and estuarine waters, now scheduled for November of this year, so that Florida can continue to focus on completing its own rulemaking. Again, EPA looks forward to working with FDEP during the State's rulemaking process, and will make available our policy and technical staff to provide assistance on a priority basis.

Although we are not taking action on your petition at this time and will continue to consider it as we move forward, we continue to believe that numeric nutrient criteria are necessary to meet the requirements of the CWA in the State of Florida, whether those criteria are promulgated by FDEP or by EPA. The extensive data and technical analysis supporting the need for numeric nutrient criteria are included in the January 2009 determination, the preambles to our proposed and final rules, and the administrative record for the final rule. As a basis for reconsidering our January 2009 determination, your petition referenced EPA's March 16, 2011, memorandum entitled "Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions" (Framework Memo). While an important statement of Agency policy, the Framework Memo does not constitute a set of decision-making criteria to be applied by the Agency when evaluating whether to determine, pursuant to CWA section 303(c) (4) (B), that new or revised water quality standards, such as numeric nutrient criteria, are necessary in a particular state in order to meet the requirements of the CWA.

Thank you again for your letter and petition. For the reasons discussed above, EPA is not granting or denying your petition at this time. Rather, EPA is providing its initial response and will hold your petition in abeyance pending the results of FDEP's intended rulemaking at which

time EPA will provide a final response to your petition. If you would like to discuss your concerns further, please feel free to contact me at (202) 564-5700 or Bob Sussman, the Administrator's Senior Policy Counsel, at (202) 564-7397.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nancy K. Stoner', with a stylized flourish at the end.

Nancy K. Stoner
Acting Assistant Administrator

cc: Gwendolyn Keyes Fleming
Regional Administrator, Region 4