WHY SHOULD YOU CARE ABOUT NUMERIC NUTRIENT CRITERIA?
By: Vinette D. Godelia & Mohammad O. Jazil*

Recently, the U.S. District Court for the Northern District of Florida ruled on challenges to the imposition of federal numeric nutrient criteria for Florida’s lakes, springs, and streams;¹ the Florida Legislature passed a bill directing the Florida Department of Environmental Protection (“FDEP”) to submit Florida’s version of the criteria to the U.S. Environmental Protection Agency (“EPA”) for approval under the Clean Water Act;² a panel of the National Research Council issued a report criticizing EPA’s implementation costs for the federal criteria;³ and a state administrative law judge heard arguments in a case where several environmental advocacy groups challenged FDEP’s criteria.⁴ This is only halftime in the contentious battle over stricter water quality standards for Florida’s waters – specifically numeric criteria that set limits on the level of nitrogen and phosphorus in a waterbody. This article briefly explains each of the significant steps taken so far. It also guesses at what might be over the horizon. More importantly, the article begins by explaining why you should care about numeric nutrient criteria.

I. Your pain: curbs on development

Much depends on the proper development of numeric nutrient criteria. Overly restrictive criteria would force discharges that provide essential infrastructure services - like electricity, sewage, and municipal stormwater control - to make costly retrofits. Little money would remain for the expansion of infrastructure necessary to accommodate long-term population growth in Florida, and particularly its urban centers. Also, many waters would unnecessarily be deemed “impaired.” Under the Clean Water Act and Florida law, Florida would then develop total maximum daily loads or “TMDLs” for these waters.⁵ New sources of discharge – which is incidental to urban development – would be precluded from locating near TMDL waters unless they could first offset existing discharges.⁶ Taken together, ill-conceived numeric nutrient criteria would make it difficult to sustain the growth Florida has experienced and come to depend on over the years. Thus, it is imperative that we work together to get this issue right.

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² See HB 7051 (2012).
³ NATIONAL RESEARCH COUNCIL, REVIEW OF THE EPA’S ECONOMIC ANALYSIS OF FINAL WATER QUALITY STANDARDS FOR LAKES & FLOWING WATERS IN FLORIDA (National Academies Press March 6, 2012).
⁴ See Florida Wildlife Fed’n, Inc. v. Dep’t of Environmental Protection, DOAH Case No. 11-6137.
⁶ Id.
II. Federal litigation: inception of the dispute

The dispute over numeric nutrient criteria first rose to prominence in 2008 when several environmental organizations sued EPA for failing to promulgate numeric nutrient criteria in Florida. Relying on guidance documents published in 1998, the environmental organizations alleged that EPA had determined that such criteria were necessary for Florida to comply with the Clean Water Act. As such, the environmental groups concluded that EPA had a mandatory duty under the Act to promulgate criteria in lieu of the State. EPA disagreed.

In January 2009, however, EPA changed its mind. EPA made a formal determination under the Clean Water Act that numeric nutrient criteria were indeed necessary for Florida waters. EPA and the environmental organizations thereafter entered into a consent decree setting a schedule for EPA – unless the State acted first – to promulgate numeric nutrient criteria for all of Florida’s surface waters. Per the schedule, EPA finalized criteria for Florida’s lakes, springs, and streams in December 2010. Lawsuits followed. Specifically, the State of Florida, agricultural interests, local governments, and regulated entities like electric and wastewater utilities, sued EPA arguing that the January 2009 determination and the criteria were legally, scientifically, and factually indefensible. Environmental organizations sued arguing that the criteria were too lax.

In its February 18, 2012 ruling, the U.S. District Court for the Northern District of Florida upheld EPA’s January 2009 determination. The Court also upheld EPA’s lakes and springs criteria, and EPA’s decision to adopt downstream protective values (i.e., values designed to protect downstream lakes from nutrients introduced by upstream waters). But the Court dealt EPA a severe blow by invalidating EPA’s stream criteria – the most contentious and expensive of all the criteria – and some downstream protective values. The Court gave EPA until May 21, 2012 to correct the deficiencies.

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8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
13 See 75 Fed. Reg. 75,762 (Dec. 6, 2010).
15 Id.
16 Id.
17 Id.
18 Id.
19 Id.
20 Id.
III. Bipartisan state action: regaining state primacy

While the federal litigation was ongoing, the State of Florida sought to reassert its primacy over the issue as contemplated by the Clean Water Act. In April 2011, by benchmarking Florida’s efforts to curb nutrients against a recent EPA guidance memorandum, FDEP petitioned EPA to revoke its January 2009 determination and criteria. EPA neither granted nor denied FDEP’s petition. Instead, EPA encouraged FDEP to pursue the development of its own criteria for EPA review. FDEP did just this.

The 2012 Florida Legislature weighed in as well. Indeed, numeric nutrient criteria legislation was the first piece of legislation passed during the session. It received unanimous support in both the Florida House and Senate. The legislation contains three parts. First, it provides legislative approval of FDEP’s numeric nutrient criteria rules. Second, it directs FDEP to submit its criteria to EPA for review under the Clean Water Act. Third, to ensure the integrity of FDEP’s rules, it provides that a majority of FDEP’s rule provisions “shall be effective only if EPA approves these rules in their entirety, concluded rulemaking that removes federal numeric nutrient criteria in response to the approval, and determines . . . that these rules sufficiently address EPA’s January . . . 2009 determination.” Governor Scott signed the legislation into law on February 16, 2012. FDEP submitted its numeric nutrient criteria rule to EPA for review.

A state administrative challenge to FDEP’s rule, however, continues to delay formal EPA review. At the administrative hearing that concluded on March 5, 2012, several environmental organizations asserted that FDEP’s rule was “reactive” and “irrational.” The environmental organizations focused their criticism primarily on the provisions in FDEP’s rule that differ from EPA’s rule. The administrative law judge is expected to rule on validity of FDEP’s numeric nutrient criteria by May 1, 2012.

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22 See Letter from Assistant Administrator Nancy Stoner (EPA) to Secretary Herschel Vinyard (FDEP) (Jun. 13, 2011).
23 Id.
24 See HB 7051 (2012).
25 Id.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id.
32 See Florida Wildlife Fed’n, Inc. v. Dep’t of Environmental Protection, DOAH Case No. 11-6137.
33 Id.
34 Id.
IV. Federal litigation: culmination of the dispute

Assuming the administrative law judge approves FDEP’s numeric nutrient criteria rule, EPA would begin its formal review under the Clean Water Act. Given the Court’s May 21, 2012 deadline to correct errors in EPA’s own rule, and the National Research Council’s criticisms of EPA’s cost estimates for complying with the federal numeric nutrient criteria, one would hope for swift EPA approval of FDEP’s criteria.

Regardless of whether EPA approves or disapproves FDEP’s numeric nutrient criteria rule, more federal litigation is sure to follow. Under the Clean Water Act, EPA’s decision would be reviewable in federal court. The environmental organizations have made clear their desire to challenge any approval of FDEP’s criteria. And it is reasonable to expect the State, local governments, and the regulated community to challenge EPA’s disapproval of FDEP’s numeric nutrient criteria rule.

35 See 33 U.S.C. § 1313(c).
36 Id.