



LEWIS, LONGMAN & WALKER, P.A.
ATTORNEYS AT LAW

Reply To: West Palm Beach

July 2, 2009

Mr. Eric Shaw
Florida Department of Environmental Protection
Standards and Assessment Section
2600 Blainstone Road, Mail Stop 6511
Tallahassee, Florida 32399-2400

Dear Mr. Shaw:

On behalf of the Florida Association of Special Districts (“FASD”) and its membership, Lewis, Longman & Walker, P.A., provides the following comments concerning the proposed rule amendments to Sections 62-302, 62-303, and 62-800, F.A.C. FASD has represented the interests of the independent and dependent special districts in the state since 1976. Special districts are limited purpose governmental units administratively separated from county, municipal, or state government. Special districts provide the permanent administrative structure for financing, and maintain services or infrastructure traditionally provided by local government when the local government is unable or unwilling to provide the necessary service or capital improvements.

There are approximately 60¹ special districts that have the legislatively expressed purpose of managing water resources within the South Florida Coastal Plain Ecoregion (basically, everything south of Lake Okeechobee). The services provided by these water control special districts are invaluable to the sustainability of South Florida, including but not limited to the protection of public safety and welfare. These water control districts operate and maintain the extensive canal systems that dominate the hydrology of South Florida and prevent flooding throughout South Florida.

Department of Environmental Protection’s (“DEP”) proposed rules will have significant, potentially negative impacts on all of FASD’s member districts that manage water resources. The

¹ This estimate is based on the Florida Department of Community Affairs Official List of Special Districts that provide drainage and water control functions.

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following are FASD's initial comments related to the proposed rules. As more information becomes available, FASD will supplement these comments to assist DEP in its rulemaking efforts.

I. Schedule for Rulemaking to Establish Numeric Nutrient Criteria

Currently, DEP is scheduled to have numeric nutrient criteria established for all of Florida's lakes and flowing waters, including canals by January 2010. Numeric criteria for estuaries are scheduled to be established by January 2011. The additional year for establishing criteria for estuaries was precipitated by both DEP and the United States Environmental Protection Agency (EPA) recognizing the complexities associated with setting numeric nutrient criteria for estuaries. During the rule development process it has become abundantly clear that there also exists several complexities in establishing numeric nutrient criteria for canals. Simply stated, canals do not function similar to naturally flowing streams, and it is therefore not scientifically defensible to base numeric criteria for canals on nutrient concentrations within natural streams. The complexities associated with canals is evident by the fact the proposed rules are silent on the numeric criteria for flowing waters within South Florida. Similar to the approach for estuaries, it is essential, that DEP and the EPA acknowledge the complexities associated with South Florida canals and extend the deadline for establishing numeric nutrient criteria for canals within the South Florida Coastal Plain Ecoregion to January 2011 for all the same reasons 2011 was designated the timeframe for estuaries.

The additional year will afford DEP the needed time to develop reasonable and functional numeric criteria for canals. It will also afford the regulated public the opportunity to provide DEP with sufficient data and assessments necessary to develop feasible numeric standards for canals. Currently, the expedited timeframe for establishing numeric standards for canals creates an impossibility of informed decision-making and impossibility in developing meaningful and scientifically appropriate criteria.

II. Canals Are Not Naturally Flowing Streams

We have participated in several of the Technical Advisory Committee ("TAC") workshops concerning the establishment of numeric nutrient criteria. What is clear from the TAC discussions is that canals function and respond differently from natural streams. Canals do not respond to nutrients in the same manner as naturally flowing streams, and canals have an entirely different purpose than naturally flowing streams. Canals within the South Florida Coastal Plain Ecoregion were generally constructed for the express purpose of conveying water (for flood control, irrigation, mosquito control, etc). Their primary purpose is water management to protect property.

FASD is alarmed that proposed rules define “stream” to include canals, which means, for purposes of establishing numeric criteria, canals and natural streams are treated the same. This is not scientifically based and is contrary to comments raised by several TAC members who were selected to participate on the TAC based on their recognized expertise in the subject area. Such an approach will result in criteria that will be impossible to meet and would not account for the biological realities of canals.

It is therefore recommended that DEP recognize that canals should be treated as a distinct type of waterbody deserving a focused biological assessment index and criteria based on the unique characteristics of canals. It is also recommended that DEP initiate parallel rulemaking to develop a subclass of Class III waters that appropriately categorize canals and their intended uses.

Having canals lumped into Class III waters with naturally flowing streams will also create complexities for the regulated community during the site specific alternative criteria petitioning process. Having canals designated under the current Class III definition effectively ignores their true intended use/purpose and imposes a false “designated use” of recreation and propagation of fish and wildlife. Properly recognizing and designating the true “uses” of canals (flood control and water supply) is essential to establishing appropriate numeric criteria for canals.

III. Lack of Numeric Standards for the South Florida Coastal Plain Ecoregion

FASD is also concerned that the proposed rules are devoid of any criteria for flowing waters within the South Florida Coastal Plain Ecoregion. It is impossible to comment on an unknown number and an unknown biological assessment index. What is further troubling is that it is our understanding that DEP will have numeric criteria proposed for the South Florida Coastal Plain Ecoregion sometime in October; however, the rule adoption schedule has not been enlarged to account for the delay in establishing the criteria.

Essentially, DEP will effectively eliminate any possibility of meaningful public comment on the South Florida criteria. This current schedule will create a situation whereby a rule challenge will be the only means of meaningful “public participation” in the rule development process. This is contrary to the intent of public rulemaking and makes a mockery of the public participation process.

Based on discussions at the TAC meeting, it appears the numeric criteria for phosphorus within the South Florida Coastal Plain Ecoregion will likely be between 10 and 40 parts per billion. This range of total phosphorus would be lower than anywhere else in the state. In addition, the range that is being discussed as potential criteria is not based on the biological response realities of canals

to nutrients. As discussed at the TAC meetings, data exist that demonstrates canals are biological sustainable with nutrient levels well in excess of 200 parts per billion.

Further, the range under discussion is not practicable because it will impose reductions that are either impossible or not feasible given costs and current technology. Forcing the water control districts to become water treatment facilities will require additional infrastructure, in many cases financially and practically impossible, in order to attempt compliance with the numeric criteria. These special districts have limited assessment authority, and that authority is based only on what is needed to carry out their primary, legislatively-mandated function.

IV. Economic Considerations

As stated above, the imposition of numeric nutrient criteria for canals based on natural stream indices will impose unnecessary and excessive expenditures of monies and resources. It is alarming that DEP has not provided an estimate of economic impacts that will be incurred by imposition of these standards. Failure to develop cost estimates translates to a failure to adequately consider the economic impacts of the criteria proposed. It is critical for DEP to account for the impacts on the regulated community, including the economic sustainability of the communities served by the special districts. Failure to consider the economic impacts at this stage of rule development will only result in criteria that will unnecessarily impose economic hardships on the special districts and their constituents.

V. Permitting Considerations

The imposition of numeric criteria for canals within the South Florida Coastal Plain Ecoregion will result in having a majority of the South Florida canals non-compliant with regulatory standards and will have significant adverse implications on the ability to operate and maintain water control facilities. As a condition of issuance of any Environmental Resource Permit or Army Corps of Engineers permit, the applicant must demonstrate compliance with state water quality standards. Considering that a majority of the South Florida canals will not comply with the numeric criteria, a majority of the special districts will not be able to obtain the necessary state and federal authorizations to construct improvements necessary to continue the operation of the special districts. Essentially, the proposed numeric criteria run the risk of shutting down water control districts and putting their service areas in jeopardy.

VI. Downstream Conditions

The proposed rule provides that “[i]n no case shall the loading of nitrogen or phosphorus from a Class I or III fresh water stream cause or contribute to an exceedance of water quality standards in a downstream waterbody.” Again, water control districts have the primary purpose of managing water resources within their jurisdictional boundaries, which necessarily requires the conveyance of water to alleviate flooding. This is particularly true in urban areas and other areas inhabited by people. Precluding the transfer of water from one waterbody to another based on the possibility of contributing to the downstream water quality standards will prohibit the key operating function of water control districts, which is to convey and manage surface waters for a variety of urban and agricultural purposes. Such a prohibition will increase the likelihood of flooding and put public safety and welfare at a severe risk.

VII. Water Control Districts North of the South Florida Coastal Plain Ecoregion

Although the vast majority of the water control districts that are FASD members are located within the South Florida Coastal Plain Ecoregion, FASD has water control district members north of this Ecoregion where DEP has proposed criteria for phosphorus and nitrogen. For many of the same reasons stated above, FASD is concerned the criteria being proposed for the rest of the State will have severe impacts to its membership and to the management of the State’s water resources to the detriment of public safety and welfare.

As stated earlier, canals function and respond differently from naturally flowing streams. The sensitivity to nutrients is different for canals than natural flowing waters; therefore, canals can be biologically healthy and productive at higher nutrient levels. However, the proposed criteria for the ecoregions north of the South Florida Coastal Plain Ecoregion do not account for the unique, biological characteristics of canals. This oversight is evident by the definition of “Stream,” which lumps canals in with naturally flowing waters. Such an approach is not based on sound science and totally ignores the biological and practical realities of canal systems.

In addition, it is highly unlikely that the water control districts will be able to comply with the criteria being proposed. Even if the criteria proposed could theoretically be obtained, compliance is not a practical reality. The reductions that would be required to satisfy the proposed criteria would compel the water control districts to operate as water treatment facilities. For all the same reasons stated earlier, this would require significant expenditures of money, land, and resources that the water control districts do not have and that are not reasonably feasible. The water control districts have limited assessment authority and have limited land available, all of which are necessary for

their primary purpose of drainage and flood control. Forcing the water control districts to divert resources to treat water will only result in diminishing their primary mission at the expense of the citizens they serve and at the expense of public safety and welfare. Also, imposing unattainable criteria would preclude the water control districts from obtaining the necessary State and Federal authorizations to construct new, or upgrade existing, facilities/infrastructure because the districts will not be able to demonstrate compliance with State water quality standards. Such a result is a practical reality that the proposed criteria will limit or preclude effective longevity of the water control districts and their operations. The development of numeric nutrient criteria must be formulated in conjunction with consideration of the impacts resulting from implementation.

Finally, FASD is concerned that the proposed rules will limit the ability to transfer water downstream when such transfers could contribute to an exceedance of downstream water quality. As stated above, this limitation ignores the necessary, and legislatively mandated, functions of the water control districts, which is drainage and flood control. Prohibiting downstream transfers of water would put both people and property at risk. Such considerations must be taken into account with regard to downstream water transfers.

VIII. Conclusion

For all the foregoing reasons, the proposed rules will significantly impact the day to day operations of the water control districts' operating man-made canals within the State of Florida, particularly within the South Florida Coastal Plain Ecoregion. The accelerated rulemaking schedule does not account for the complexities of canals systems. Therefore, it is necessary for the development of numeric criteria for canals to be extended to January 2011. This will give sufficient time for the regulated community to provide DEP with the necessary data and assessment to establish scientifically feasible criteria.

It is also important that the numeric nutrient criteria acknowledge the unique characteristics of canals. Canals do not function or respond in the same manner as natural streams and, therefore, should not have criteria based on natural stream indices. Failure to acknowledge canals as a distinct class of waters will result in criteria that will be impossible for a vast majority of canals to meet. Canal-specific criteria are therefore necessary.

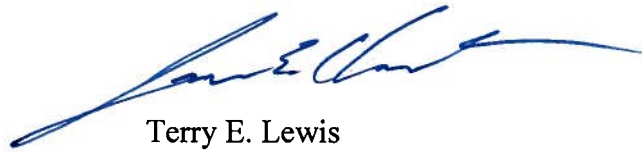
Finally, the proposed rules were developed without consideration of the economic impacts to the regulated community, including the special districts and their constituents. Economic feasibility and economic impacts of the numeric criteria must be evaluated and considered in conjunction with the development of the water quality standards. In addition, potential impacts to future

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infrastructure needs and associated permitting must be considered or the proposed rules run the risk of shutting down the special water control districts and shutting down management of water resources within the State, especially within South Florida. Consideration of operations should also factor in the primary purpose of the water control districts, which is to convey water. Any rule language that would limit the ability to convey water adversely impacts public safety and welfare.

Thank you for the opportunity to provide comments. If you have any questions or comments regarding the foregoing please do not hesitate to contact one of us.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Terry E. Lewis", with a long, sweeping horizontal line extending to the right.

Terry E. Lewis
James E. Charles

c: Clete J. Saunier, P.E.
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