



January 6, 2010

Eric Shaw
Environmental Manager
Standards and Assessments Section
Florida Department of Environmental Protection
2600 Blair Stone Road, MS 6511
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**RE: Draft Technical Support Document: Requirements
for Reclassifying the Designated Uses of Florida Surface
Waters and Conducting Use Attainability Analyses**

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Dear Mr. Shaw:

The Conservancy of Southwest Florida, a non-profit conservation organization with over 6,000 members, many of whom use and enjoy the waters of Southwest Florida, respectfully submits the following comments with regard to the revised proposed water use classification changes. We deeply appreciate the Department's efforts to incorporate input from interested stakeholders in preparing the revisions represented in the 12/16/09 Draft of F.A.C. 62-302 revisions. www.conservancy.org

We offer the following comments are in addition to those we have submitted on 12/4/09 and 12/24/09. Therefore, please consider the following in addition to the Conservancy's 12/4/09 letter with regard to the Conservancy's remaining concerns.

Inadequate Time for Public Review and Input

The Draft Technical Support Document ("TSD") represents a major part of the proposed rulemaking for the reclassification of designated uses of Florida waters and should have been provided much earlier in the rule development process. Instead, the forty-one-page draft was provided on Christmas Eve for a workshop to be held the week after the Holidays.¹ There has been insufficient time for the Conservancy and others to perform a detailed review of the draft, particularly given its complexity and its dependence upon voluminous reference literature for the biological assessment protocols that form the basis of the document.² The Conservancy strongly suggests that the Environmental Regulatory Commission consideration of the draft rule and TSD be postponed for at least several months to allow adequate review of the TSD and the opportunity for another public workshop to discuss issues with the TSD.

¹ Fla. Stat. 124.54(2)(a) requires that 'the notice of rule development shall indicate the subject area to be addressed by rule development, provide a short, plain explanation of the purpose and effect of the proposed rule, cite the specific legal authority for the proposed rule, and include the preliminary text of the proposed rules, if available, or a statement of how a person may promptly obtain, without cost, a copy of any preliminary draft, if available.' The original notice of rule development provided for the August 18, 2009, rule development workshop did not provide any text of the proposed rules, including the TSD to be incorporated by reference. The text of the proposed TSD was also not provided for the November 18, 2009, public workshop, although DEP had referred to this document in drafts of the proposed reclassification rule that were circulated.

² The public notice in the Florida Administrative Weekly may have just met the 14-day requirement in Fla. Stat. 124.54(2)(c), but because the notice period was during the Holidays, the 14-day period was insufficient.

Inappropriate Reclassification of Surface Waters to Higher Designated Uses Actually Being Attained

The draft TSD states that the Use Attainability Analysis (UAA) procedures should be used for reclassification of surface waters to higher designated uses actually being attained. These procedures and the scientific criteria in the prescribed UAA are not appropriate for reclassification of waters to higher designated uses, because such reclassification is not discretionary with DEP and does not require a petition by an applicant. U.S. EPA Clean Water Act rules require DEP to perform this reclassification.

40 C.F.R. 131.10(i) states:

Where existing water quality standards specify designated uses less than those which are presently being attained, the State shall revise its standards to reflect the uses actually being attained [emphasis added].

First, the draft TSD is inconsistent with the EPA rule for upgrading uses, because it infers that an applicant must initiate a UAA process (though it says that UAAs are not required in such instances) by provide "detailed scientific assessments" (which this document says will be referred to as UAAs). These external assessments would require an entity external to FDEP to provide FDEP with all the data to justify the upgrade, instead of DEP having the responsibility for identifying those waterbodies where an upgrade is necessary.

Second, the latest version of the proposed rule (12-16-09) contains only vague criteria for upgrading a use that require much more than the EPA rule. It requires "an additional affirmative finding by the Environmental Regulation Commission that the proposed designated use is attainable, upon consideration of environmental, technological, social, economic, and institutional factors." It does not specify what specific factors the ERC is supposed to consider or how the ERC considers them. It also requires the assessment to "address upstream and downstream effects of reclassification," but provides no rationale for why upgrading of a use designation to a use that is presently being attained would have any upstream or downstream impacts on water quality.

The TSD provides very little additional guidance on the criteria for upgrading uses. Section 1.3 requires a demonstration that:

- The proposed reclassification will establish the present and future most beneficial use of the waters;
- The proposed use is clearly in the public interest; and
- The proposed use is attainable.

The "clearly in the public interest" threshold is far beyond the EPA rule requirement.

Section 2.2.1 simply states "[i]nformation must be presented to determine whether the use is a characteristic use of the area, and whether other issues may interfere with upgrading the designated use." It does not explain how to determine whether the use is a characteristic use or what this means. It does not discuss what "other issues" are that may interfere with upgrading the designated use. It further states that "[a]ttainability of the use shall include consideration of

the factors in Subsection 62-302.400(10) F.A.C." without describing how "environmental, technological, social, economic, and institutional factors" should be considered. The TSD then creates a presumption: "[i]f the upgraded use is not feasible because of any of the listed factors, then the upgraded use is likely unattainable." There is no justification provided for this presumption or any guidance on how it is to be determined whether the upgraded use is feasible or not.

Inappropriate Use of SCI, RPS, LVI and Habitat Assessment as Determinants for Downgrading Use Classifications

The proposal to use the Stream Condition Index, Rapid Periphyton Surveys, the Lake Vegetation Index, and habitat assessments as determinants of water quality use classifications is a major new step in water quality standards development for DEP. While such use was proposed with regard to the development of numeric nutrient criteria, it is new to a whole group of stakeholders who have been become involved in DEP's recent use reclassification effort. The draft rule circulated on December 16, 2009, did not signal such a crucial role for these biological assessment or physical habitat assessment tools as is envisioned by the TSD. Much more time is needed for discussion about how these tools would be used in the UAA process and whether these require development of new water quality criteria if they are to be used to determine use classifications.

Current Class III uses in 62-302.400 F.A.C. are "recreation and propagation and maintenance of a healthy, well-balanced population of fish and wildlife." Water quality criteria are "designed to maintain the minimum conditions necessary to assure the suitability of water for the designated use of the classification." Most of the applicable criteria are based on specific concentrations of constituents in the water column or measurable characteristics of the water, such as temperature, except for the criterion for the index of benthic macroinvertebrates and the narrative criterion for nutrients. The biological criterion for the index of macroinvertebrates does not appear to be the same as the SCI now being proposed for use in UAA. The RPS or LVI are not part of the current biological criteria.

In addition to expanded biological criteria for determining use support, DEP appears to be proposing the use of "abiotic components," such as geographic setting, physiography, and geologic influences; land use in the affected area (Landscape Development Intensity Index); morphologic features of the system; hydrologic modifications in the area; and habitat assessment. DEP included a "habitat disturbance scoring" table in the TSD without reference, but it is unclear how this would be used in the proposed UAA methodology. Two of the examples used by DEP include "habitat assessment" numbers in a table, but it is unclear what methodology was used. DEP also mentioned the "Hydrologic Modification Index" as being part of the UAA. Again, these physical habitat criteria are not currently part of water quality criteria.

DEP makes the statement in Section 3.3 of the TSD:

In general, uses are assumed to be protected if criteria are being met. However, this assumption is not always appropriate, because in some cases, criteria are met but non-water quality related factors preclude the use. For example, water quality criteria designed to protect healthy, well-

balanced aquatic communities may be met in a canal, but the canal may have habitat and hydrological limitations that preclude full aquatic life use support, as defined by the ability to pass the Stream Condition Index. In this case, the UAA regulations allow the use to be modified as long as all existing and attainable uses are protected.

This is an astounding departure from the current approach to protecting designated uses and would elevate the SCI to a new Class III water quality criterion.

Furthermore, the examples used by DEP would appear to place the physical habitat assessment results in the same position as the SCI for determining whether uses are being met, so that they would essentially become new water quality criteria. If DEP intends for the physical features of the waterbody to become the determinative factor in use classification, then it should propose this more directly, instead of hinting at an indirect methodology that would seem to accomplish the same result.

EPA'S Criticisms of the Proposed Use of SCI and LVI Remain Unresolved

EPA criticized the proposed use of the SCI and LVI as part of DEP's proposed numeric nutrient criteria in September 2009. These criticisms should also apply to the use of the SCI and LVI as determinants of attainment of designated uses for UAA. Portions of EPA's comments follow:

EPA has concerns regarding Florida's proposed use of indicators of biological health of a waterbody to support the development of SSACs and to make assessment and listing decisions under CWA section 303(d)(1). EPA has asked FDEP for further documentation demonstrating that FDEP's reference sites represent minimally impacted conditions. Specifically, any documentation concerning the possible effect of pesticide use in or near these reference sites, as well as any documentation that historical practices that may have occurred do not continue to affect current conditions, would provide assurance to EPA that the methods for selecting protective thresholds for the SCI and LVI are appropriate.

In addition to these priority comments and the detailed comments in the enclosure, the results of an independent, scientific peer review of the Technical Support Document that presents FDEP's and EPA's numeric nutrient criteria development methodologies were recently submitted to EPA. EPA is providing summarized peer review comments that relate to the enclosed detailed comments wherever appropriate. EPA has not completed its full review of the peer review comments and is still considering how to address the peer review comments in support of its review of FDEP's water quality standards submission and its proposed rule pursuant to the January 14, 2009 determination.

In Florida's proposed rule, biocriteria are currently linked to nutrient criteria as follows: (1) demonstration of use support to allow for Type III SSAC development, (2) "passing" biocriteria scores are used as a step in the benchmark stream selection process, and (3) biological assessments for impairment listing decisions. (See comments on 62-303.450 for

discussion of EPA concerns with Florida's proposed bases for listing waters as impaired). As discussed between FDEP and EPA during the May 6-8 meeting in Atlanta, EPA has concerns regarding the selection of the percentile of reference used as the SCI threshold as significant uncertainty remains whether these reference sites truly represent minimally disturbed conditions. The quality of the reference sites is a critical factor in selecting a threshold.

We request that FDEP provide additional information or further analysis as necessary to document that the reference sites are truly representative of minimally disturbed conditions. For example, EPA needs more information to confirm that human disturbance has been fully accounted for in the human disturbance gradient (HDG) and is not a factor in the reference sites. Information on the extent of historical human disturbance and the past and present use of pesticides and fertilizers at the reference sites should be provided. The Land Use Development Index (LDI), a critical component in developing the HDG and selecting reference sites, provides information on current or recently occurring land use - but not historic. Based on clarifying discussions with FDEP scientists, there is additional documentation and photographic evidence that will soon be publicly available that should address this information request.

Peer reviews of the Technical Support Document indicated that the data support the use of the SCI as an indicator of nutrient enrichment. However, one reviewer questioned whether the index, as well as the LVI (Lake Vegetation Index) and SDI (Stream Diatom Index), were appropriate indicators of nutrient enrichment given that the indices also respond across a gradient of natural factors. Another reviewer noted that while the SCI would likely be a sensitive indicator to chronic nutrient enrichment, the SCI might only be partially successful in detecting effects of nutrient pollution, specifically in instances where acute nutrient loading (e.g., from a rain-driven event) results in short-lived impacts not detected on the time scales of SCI assessments. EPA is interested in understanding FDEP's views on the latter two comments.

Additionally, EPA guidance on listing waters recommends a balanced approach to address the risk for misidentifying impaired waters as unimpaired, or unimpaired waters as impaired (Section III (G) of the 2004 U.S. EPA Integrated Reporting Guidance). Given the selected threshold is at the low edge of the reference site distribution, EPA remains concerned about the risk of missing impaired waters and inadequately protecting aquatic life uses. EPA would like FDEP to take a closer look at the change in variability at or near the selected threshold. EPA recommends that FDEP provide further explanation as to how they will quantify and address the risk, if any, of missing impairments and discuss with both Regional EPA 303c and 303d programs to support a more fully integrated program.

Based on the outcome of the above analyses and information requests, EPA requests that Florida update its current support document so that it fully explains how the threshold Florida selected protects the designated

aquatic life use. The support document needs to articulate how any differences in information (if there are any) have been reconciled.

Biocriteria: Lake Vegetation Index (LVI) In Florida's proposed rule, this index is currently linked to nutrient criteria as follows: (1) demonstration of use support to allow for Type III SSAC development, and (2) biological assessment for impairment listing decisions. As discussed between FDEP and EPA during the May 6-8 meeting in Atlanta, EPA has concerns regarding the selection of the percentile of reference used as the LVI threshold for many of the same reasons as previously discussed for the SCI threshold. However, it appears that for the LVI threshold selected there is an even higher probability of classifying an impaired water as attaining designated uses.

The peer reviewers of the Technical Support Document viewed the LVI as a useful line of evidence in determining numeric nutrient criteria, but stated that additional analyses were warranted to strengthen its validity as an indicator of nutrient enrichment. Two specific comments on the LVI are as follows:

- The presence/absence of individual plant species and/or plant community types has little impact on the whole lake species composition of other fauna.
- Invasive aquatic macrophytes will colonize and overgrow even in pristine waters. While nutrients will exacerbate such a situation, invasive nuisance species often do not require excessive nutrients to proliferate and the index will not reflect nutrient loading.

The Conservancy is aware that DEP has responded to these criticisms, but it does not appear that the FDEP has adequately addressed or resolved EPA's concerns.

Other Comments and Questions on the Draft Technical Support Document

The Conservancy has not had sufficient time to provide other detailed comments on the draft TSD prior to the public workshop tomorrow. However, the following are our initial brief comments and questions about the current draft:

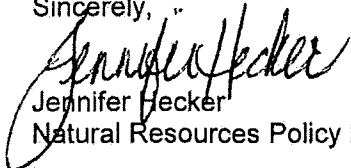
- The definitions of "natural surface waters," "wholly artificial waterbodies," and "altered waterbodies" are vague and will be fraught with tremendous uncertainties in deciding whether a particular waterbody is a candidate for a Class III-L UAA.
- Section 3.1 suggests that a "wasteload allocation" may be used "to estimate the natural water quality by modeling the effect of removing human sources of pollutants and physical changes to the stream system." If this methodology is used for estimating nutrient loadings, for instance, the Conservancy would suggest, as in other contexts, that natural wetlands are not inaccurately considered pollutant sources for nutrients as they have been in the nutrient modeling undertaken by FDEP to date.
- The methodology does not describe how DEP will protect "Tier II" waters (waters that have better water quality than required by the water quality criteria for the designated use) from degradation as required by the EPA antidegradation rule. See 40 CFR §131.12(a).

- How does the procedure for SSAC mesh with the procedure for applying for reclassification of a waterbody to Class III-L?
- Where did the determination of depth of waterbody for whole body recreation come from?
- Is fish consumption considered an aquatic life use or a recreation use? What Class III criteria protect this use and how will UAA determine whether the use has been attained?
- How will DEP determine whether use reclassification is more appropriate than just considering a variance or SSAC (without reclassification)?
- There still needs to be the opportunity to upgrade Class III waters to a more protective use for pristine, high-quality waters. A higher use classification was removed from the proposed rule.
- How does a Type II SSAC assessment mesh with the proposed UAA? Will an applicant for a Type II SSAC have to demonstrate through UAA that the current designated use will be maintained with the proposed alternative criteria?
- Section 3.5 on grouping multiple waterbodies in one UAA would still be subject to abuse, such as where one canal may be fully meeting all Class III water quality criteria, but would be lumped together for UAA with canals that do not meet criteria based on their physical similarities alone.
- The Conservancy supports DEP's idea in Section 4.6 of a longer timeframe for economic analysis.
- There is no support for using information from "similar waters located nearby" to substitute for biological information for the waterbody of interest, as suggested in Section 5.4.3. An applicant should be required to provide waterbody-specific information on the waterbody for which reclassification is sought.

Conclusion

In conclusion, there is not adequate time for public review, evaluation and input for these substantial proposed changes for them to be brought forward for approval by the ERC in the next few months. We respectfully reiterate our request that FDEP suspend its efforts to adopt any policy changes that would affect the designated use classification of surface waters until all of the issues with the proposed rule revisions and technical support document are rectified.

Sincerely, "


Jennifer Hecker
Natural Resources Policy Manager

cc: Jim Giattina, EPA
Stanley Meiburg, EPA
Veronica Fasselt, EPA
Secretary Sole, FDEP
Jerry Brooks, FDEP
Governor Crist, State of Florida