



Phosphorus Water Quality Standards for the Florida Everglades

Summary

EPA has proposed a Federal rule that identifies provisions of Florida's Water Quality Standards for Phosphorus in the Everglades Protection Area (Phosphorus Rule) and Florida's Amended Everglades Forever Act (EFA) that EPA has disapproved, and that, therefore, are not applicable water quality standards for purposes of the Clean Water Act (CWA). The Federal rule will eliminate portions of the EFA and Phosphorus Rule related to a compliance schedule for and variances of water quality standards for phosphorus in the Everglades. Limiting phosphorus pollution in the Everglades is important because phosphorus causes chemical and biological changes that degrade natural systems and crowd out native plants and wildlife. Excess phosphorus is being released into the Everglades as runoff primarily from farms to the north.

Background

EPA issued a CWA determination in 2009 that disapproved these same portions of both the Phosphorus Rule and the EFA, and this rulemaking formalizes these disapprovals in accordance with an order from the U.S. District Court for the Southern District of Florida following lawsuits by the Miccosukee Tribe of Indians and the Friends of the Everglades. Consistent with the Court's April 14, 2010 Order, EPA directed Florida to correct deficiencies in its Phosphorus Rule by January 1, 2011 and the EFA by July 1, 2011. The state did not complete its rulemaking to change the Phosphorus Rule by the deadline, and is unlikely to amend the EFA as the Legislature has adjourned and is not scheduled to reconvene before July. Because the State has not completed its rulemaking on the Rule or made statutory changes to the EFA, EPA is now initiating

rulemaking to promulgate standards pursuant to CWA section 303(c) consistent with the Court's 2010 Order.

Florida's Everglades Forever Act

The Florida Legislature enacted the Everglades Forever Act (EFA) in 1994 to maintain and restore the ecosystem of the Everglades. EPA subsequently reviewed and approved one section of the EFA (section 4(f)) as a new or revised water quality standard in 1999. The Legislature then enacted amendments to the EFA in 2003. EPA reviewed the amendments and issued a decision in 2003 that the amendments were not new or revised water quality standards that required EPA approval/disapproval under section 303(c) of the CWA.

Florida's Phosphorus Rule

In 2005, the Florida Department of Environmental Protection (FDEP) submitted to EPA for review "Water Quality Standards for Phosphorus Within the Everglades Protection Area" (Phosphorus Rule). The Phosphorus Rule established a numeric water quality criterion for phosphorus as well as implementing provisions for the numeric criterion within the Everglades Protection Area. In 2005 and 2006, EPA issued a series of decisions approving certain provisions of the Phosphorus Rule and concluding that other provisions were not new or revised water quality standards and did not require EPA approval/disapproval under CWA section 303(c).

Litigation and Subsequent EPA Actions

In consolidated litigation, plaintiffs challenged (1) EPA's 2003 decision that the EFA amendments were not water quality standards, and (2) EPA's 2005 and 2006 decisions regarding the Phosphorus Rule. In a July 29, 2008 decision stemming from a suit brought by the Miccosukee Tribe of Indians and Friends of

the Everglades against EPA and FDEP, the U.S. District Court for the Southern District of Florida upheld and remanded EPA's decisions. The court upheld EPA's 2005 approval of the Phosphorus Rule's numeric phosphorus criterion and the four-part test for determining attainment of the criterion. The court overturned (1) EPA's decision that certain implementing provisions of the Phosphorus Rule were not new or revised water quality standards, and (2) EPA's approval of other provisions of the Phosphorus Rule finding EPA's approval to be arbitrary and capricious. The court also rejected EPA's determination that the legislative amendments to the EFA did not constitute new or revised water quality standards subject to EPA review. The court instructed to EPA to take further action consistent with the court's decision.

EPA's December 2009 Determination

On December 3, 2009, EPA issued a new Determination in response to the court's remand. Consistent with the court's 2008 decision, EPA disapproved certain amendments to the EFA. It is those disapproved provisions of the EFA that are, in part, the subject of this proposed rulemaking. In addition, EPA reviewed the provisions of the Phosphorus Rule that the court either found were new and revised standards or that the court had held EPA's prior approval invalid. Consistent with the court's decision, EPA disapproved certain provisions of the Phosphorus Rule and those disapproved provisions also are the subject of this proposed rulemaking.

Court's April 10, 2010 Order

The plaintiffs challenged EPA's December 2009 Determination, alleging that EPA failed to specify the changes that Florida must make to the Phosphorus Rule and EFA to bring them into compliance with the CWA and commit to promulgate if the state fails to act. On April 10, 2010, the court remanded EPA's 2009 Determination and ordered EPA to issue an Amended Determination (AD) by September 3, 2010. The court ordered in the AD, "EPA shall require the State of Florida to commence and complete rulemaking for the Phosphorus Rule within 120 days from the date of the AD and shall require amendments to the Amended EFA to be enacted by July 1, 2011." The court

further ordered that "in the event the State of Florida fails to timely act, the EPA shall provide timely notice, and the EPA Administrator shall promulgate such standard[s] pursuant to 33 U.S.C. 1313(c)."

EPA's September 2010 Amended Determination

Consistent with the April 14, 2010 court order, EPA gave directions to the state of Florida for correcting deficiencies in the Phosphorus Rule and Amended EFA. EPA's AD included as attachments, copies of the Phosphorus Rule and EFA with strikeout markings indicating the language that the state needed to correct. EPA's AD stated that if FDEP has not finalized revisions by January 1, 2011 and the legislature has not enacted amendments to the EFA by July 1, 2011, EPA would initiate rulemaking to promulgate standards consistent with the court order. FDEP initiated a rulemaking to adopt the necessary revisions to the Phosphorus Rule consistent with EPA's AD. However, FDEP did not complete that process by January 1, 2011, nor has FDEP completed its rulemaking process since that date. The Florida legislature also did not introduce or enact any amendments to the EFA consistent with EPA's AD. The Florida legislature stands adjourned and is not scheduled to reconvene prior to July 1, 2011. Therefore, EPA is proceeding to initiate the rulemaking process to promulgate federal standards addressing the deficiencies of the Phosphorus Rule and EFA.

Regulatory Impacts

This proposed rule only seeks to implement two orders by the U.S. District Court for the Southern District of Florida. The scope is limited: identifying provisions of Florida's Phosphorus Rule and Everglades Forever Act that EPA has previously disapproved, and that therefore are not applicable water quality standards for purposes of the Clean Water Act. Hence, this proposed rule is not a new regulation. The proposed rule does not involve technical standards, or impose any economic impact burden on any small entity.

For More Information

Contact Mario Sengco at sengco.mario@epa.gov or (202) 566-2676 for more information on this proposed rule.
