ENCLOSURE A

DECISION DOCUMENT
Response to March 19, 2004, Petition to Withdraw Florida's National Pollutant Discharge Elimination System (NPDES) Permit Program or to Hold a Hearing Pursuant to Section 402(c)(3) of the Clean Water Act

On March 19, 2004, the Sierra Club, the Natural Resources Defense Council, and Linda Young (Petitioners) filed a Petition to Withdraw Approval of the National Pollutant Discharge Elimination System (NPDES) Program for Florida (petition). After carefully reviewing the issues raised by the Petitioners, the Environmental Protection Agency (EPA) is denying the petition. This document summarizes EPA's review and the bases for the Agency's decision.

BACKGROUND

Under the Clean Water Act (CWA or Act), discharges of pollutants into the nation's waters are, in general, regulated by the NPDES program. 33 U.S.C. § 1342.[1] The CWA gives the EPA Administrator authority to issue and enforce NPDES permits. States may apply for and receive EPA approval to administer the NPDES program governing discharges into waters within their jurisdictions. 33 U.S.C. § 1342(b). In May 1995, EPA approved the application of the Florida Department of Environmental Protection (DEP or Department) to administer the NPDES program in the state of Florida.

EPA may withdraw NPDES program approval where a state program no longer complies with the CWA and its implementing regulations and where the state fails to take corrective action. 33 U.S.C. § 1342(c); 40 C.F.R. § 123.63(a). Pursuant to 40 C.F.R. § 123.63(a), circumstances that may result in program withdrawal:

1) Where the State's legal authority no longer meets the requirements of [40 C.F.R. Part 123], including:

   i) Failure of the State to promulgate or enact new authorities when necessary; or

   ii) Action by a State legislature or court striking down or limiting State authorities.

2) Where operation of the State program fails to comply with the requirements of [40 C.F.R. Part 123], including:

[1] In addition, dischargers of dredge and fill material are, in general, permitted under section 404 of the CWA. 33 U.S.C. § 1344.

i) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits;

ii) Repeated issuance of permits which do not conform to the requirements of this part; or

iii) Failure to comply with the public participation requirements of this part.

3) Where the State's enforcement program fails to comply with the requirements of [40 C.F.R. Part 123], including:

i) Failure to act on violations of permits or other program requirements;

ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or

iii) Failure to inspect and monitor activities subject to regulation.

4) Where the State program fails to comply with the terms of the EPA/State Memorandum of Agreement required under § 123.24 (or in the case of a sewage sludge management program, § 501.14 of this chapter); or

5) Where the State fails to develop an adequate regulatory program for developing water quality-based effluent limits (WQBELs) in NPDES permits.

Petitioners brought this petition asking EPA to withdraw approval of Florida's NPDES program, alleging that the State is not conducting its program in accordance with the requirements of the CWA and its implementing regulations. Pursuant to 40 C.F.R. § 123.64(b)(1), EPA has conducted an informal investigation of the Petitioners' allegations to determine whether there is cause to commence formal withdrawal proceedings. As part of that investigation, EPA requested information from the state and received responses from DEP dated June 14, 2004, and January 12, 2005. After carefully considering the Petitioners' allegations and the information obtained during the informal investigation, EPA has determined that Petitioners have not shown cause to withdraw approval of Florida's NPDES program, pursuant to 40 C.F.R. § 123.63. As set out more fully below, EPA found that Florida's program complies with the CWA and its implementing regulations and, therefore, the petition to withdraw approval of that program is denied. The reasons for EPA's determination with respect to each of the issues raised by Petitioners are set forth below.

ISSUE 1: Whether Florida has failed to issue NPDES permits with limitations required by federal law for dioxin and phosphorus.

A. EPA Determination as to Dioxin: Denied.

Summary: The Petitioners allege that DEP "cannot require an NPDES permittee to comply with water quality-based effluent limits for dioxin because the state of Florida has not *itself* promulgated a water quality standard for dioxin." In other words, Petitioners allege that the state of Florida considers the federally-promulgated dioxin standard, which is applicable to Florida waters pursuant to 40 C.F.R. § 131.36(d)(6), to be irrelevant in state NPDES permitting. Petition at 3. EPA has determined that the state of Florida has adequate legal authority to apply EPA's water quality criterion for dioxin in state-issued NPDES permits, that all existing state-issued NPDES permits include appropriate dioxin discharge limitations, and that DEP has committed to include effluent limitations based on the EPA-promulgated criterion in future NPDES permits as appropriate. The petition on this issue is denied.

Discussion: All state NPDES programs must have legal authority to establish appropriate limitations, standards, and other permit conditions in state-issued NPDES permits, including limitations based on water quality standards established by the states or EPA pursuant to section 303 of the CWA. 33 U.S.C. § 1251 *et seq*; 40 C.F.R. § 123.25(a)(15). Section 303(c)(3) of the CWA provides that EPA is to review and approve or disapprove new or revised state-adopted water quality standards, determining among other things whether the state has adopted criteria that protect the state's designated water uses. In addition, pursuant to CWA section 303(c)(4), EPA may determine that a new or revised standard is necessary to meet the requirements of the Act. Where the Administrator makes such a determination, EPA is to propose, and may promulgate, a new or revised standard for that state when necessary to meet the requirements of the CWA.

Section 303(c)(2)(B) of the CWA requires that states adopt criteria for all toxic pollutants for which EPA has published recommended water quality criteria and for which the discharge or presence of such pollutants in the affected waters could reasonably be expected to interfere with designated uses. In 1992, EPA promulgated a rule establishing water quality criteria for a number of specific toxic pollutants in specific states to implement this requirement. *See* 40 C.F.R. § 131.36. 57 Federal Register (FR) 60848 (December 22, 1992). This rule was called the "National Toxics Rule." The criteria contained in the National Toxics Rule apply to each state specified in the Rule, unless the state adopts criteria which are more stringent than those set out in the Rule. The National Toxics Rule established a human health criterion for dioxin in Florida's waters which applies to all Class I, II, and III waters in the State. *See* 40 C.F.R. § 131.36(d)(6). *See also* column D; row 16 in chart at 131.36(b). This criterion was based on protecting human health at the risk level adopted by Florida. The State adopted a 10^{-6} risk level, meaning that the risk of the ambient concentration of dioxin in the water posed a one in a million chance of producing a cancer effect. Florida has not adopted a human health criterion for dioxin

through state rulemaking. Therefore the criterion contained in the National Toxics Rule is, for CWA purposed, the applicable water quality standard for dioxin in the State.

There has been some confusion over the past years as to what state authority DEP believed to be in place to implement dioxin limitations in state-issued NPDES permits. As stated above, although EPA has promulgated a water quality criterion for dioxin applicable to the state of Florida, DEP staff have, in the past, erroneously stated that the Department cannot put requirements and conditions in a state-issued NPDES permit that do not exist in either DEP rules or in the statutes that govern the permitting program, regardless of whether those requirements and conditions exist in federal regulation. *See* Attachment A, transcript of telephonic hearing, February 13, 2002, in Putnam County Environmental Council, Inc., et al. v. Georgia-Pacific Corporation, DOAH Case No. 01-2442, at 61-62.

If true, DEP's statements would appear to conflict with the CWA requirement that all permits contain limitations based on standards adopted pursuant to section 303 of the Act. During its careful review, however, EPA determined that DEP has appropriate authority to apply federal standards and requirements in state-issued NPDES permits, as discussed below. In addition, DEP has committed to use that authority to include appropriate dioxin limitations in state-issued permits. Finally, EPA has determined that even in instances where DEP staff may have believed state authority was insufficient to require such limits, DEP included appropriate dioxin limitations in all state-issued NPDES permits.[2]

Before EPA approves a state to administer the NPDES program, that state must demonstrate its legal authority to implement NPDES permitting requirements, including those set out at 40 C.F.R. §§ 122.44 and 123.25(a)(15). With its application for approval to implement the NPDES program, DEP provided a detailed description of its legal authority to implement the program. *See* Attachment B, Independent Legal Counsel Statement, FDEP submittal for authorization to administer an NPDES program, February, 1995. Florida's legislature authorized DEP to administer the NPDES program consistent with federal law. Section 403.0885, Florida Statutes (F.S.) DEP then adopted rules to administer the program, set out in Chapter 62 of the Florida Administrative Code (F.A.C.).

F.A.C. Rule 62-620.620(1)(g) requires DEP to issue NPDES permits that include any requirements more stringent than applicable promulgated effluent limits necessary to provide reasonable assurance that a discharge will not cause or contribute to violations of water quality standards set forth in F.A.C. Chapter 62-302. In addition to specific numeric criteria, Florida's Surface Water Quality Standards include "Surface Water Minimum Criteria", also known as "free from" or narrative criteria. Rule 62-302.500, F.A.C. These "free from" or narrative

---

[2] *See* Georgia-Pacific permit, NPDES No. FL0002763, issued 8/6/02; International Paper permit, NPDES No. FL0002526, issued 4/12/05; Buckeye Florida (Buckeye) permit, NPDES No. FL0000876, issued 10/31/05.

criteria provide, among other things, that surface waters of the state shall be free from discharges which pose a threat to the public health, safety or welfare. Rule 62-302.500(1)(a)(5), F.A.C.

During its review in response to the Petition, EPA sought clarification from DEP regarding its authority to implement the applicable water quality criterion for dioxin. In response, the General Counsel for DEP has reiterated that the narrative "free from" criterion cited above provides DEP the authority to apply any EPA-promulgated criterion or effluent limitation. *See* Attachment C, letter from Gregory M. Munson to EPA, dated January 12, 2005, at page 4. DEP's Division of Water Resources has also stated that, based on this authority, it has and will continue to implement the dioxin standard, and any other promulgated EPA standard, in its NPDES permits. *See* Attachment D, letter from Jerry Brooks to EPA, dated January 12, 2005.

With his letter, Mr. Brooks included documents related to what was then a recent DEP NPDES permit action. The permit, issued to Rayonier Performance Fibers on December 1, 2004, includes a daily maximum discharge limitation for 2,3,7,8-tetrachloro-dibenzo-p-dioxin (TCDD or dioxin) of 0.014 parts per quadrillion (ppq or pg/l). An amendment to the permit fact sheet, which documents changes made to the permit from the first draft permit to the second notice of draft permit, includes an explanation of the dioxin limitation. "Regarding dioxin the department uses as its basis for the limit EPA water quality criteria for 2, 3, 7, 8 TCDD of .014 pg/l or ppq (63 FR 68357 (December 10, 1998). This criterion is also used as the basis for effluent limitations in pulp and paper mill NPDES permits and as the basis for clean-up standards when sites are being remediated where dioxin is believed to be present (Georgia-Pacific and Coleman Evans Clean up Site)."

Based on the record, EPA has determined that the state of Florida has acknowledged that it has legal authority to apply EPA's water quality criterion for dioxin in state-issued NPDES permits and that DEP has committed to include effluent limitations based on the EPA-promulgated criterion in future NPDES permits as appropriate. EPA has also determined that all existing state-issued NPDES permits include appropriate dioxin discharge limitations. The petition on this issue is, therefore, denied.

B. <u>EPA Determination as to Phosphorus</u>: <u>Denied</u>.

<u>Summary</u>: The Petitioners allege that DEP cannot set appropriate WQBELs to implement Florida's applicable water quality criterion for phosphorus as required by federal law. In particular, the Petitioners argue the 2003 amendments to the Everglades Forever Act (EFA) prevent DEP from implementing the phosphorus criterion in NPDES permits until 2016. After reviewing these allegations, EPA has found that DEP is properly applying the EPA-approved and applicable CWA water quality standards for phosphorus in state NPDES permits. The petition on this issue is denied.

<u>History</u>: Over the past several years, EPA has issued several determinations concerning the EFA, the EFA Amendments, and Florida's Phosphorus Rule. Some of those determinations are

relevant to the issues raised in the petition regarding Florida's NPDES program and are outlined below.

On September 15, 1999, EPA approved Paragraph 4(f) of the EFA as a compliance schedule for Florida's narrative criterion for nutrients for certain discharges, including discharges of phosphorus into the Everglades Protection Area.[3] On May 20, 2003, and July 1, 2003, Florida enacted amendments to the EFA. EPA determined that the EFA Amendments were not new or revised water quality standards under the CWA.[4] On May 28, 2004, EPA approved the "default" water quality criterion of 10 parts per billion (ppb) total phosphorus [expressed as a long-term geometric mean] established by Subparagraph 4(e)(2) of the EFA as a revision to Florida water quality standards.[5]

On January 12, 2005, DEP submitted a state rule entitled "Water Quality Standards for Phosphorus within the Everglades Protection Area" (the Phosphorus Rule), 62-302.540 F.A.C., for EPA review as a revised water quality standard. On January 24, 2005, EPA approved portions of the Phosphorus Rule that it found to constitute revised water quality standards.[6] Among other provisions, the Phosphorus Rule established a numeric phosphorus criterion for Class III waters in the Everglades Protection Area of a long-term geometric mean of 10 ppb, but not lower than the natural conditions of the Area, taking into account spatial and temporal variability. EPA approved these provisions. EPA disapproved a portion of the Rule which it found to limit the applicability of the numeric criterion in the Loxahatchee National Wildlife Refuge. F.A.C. 62-302.540(4)(c)(1). Florida later removed the disapproved language and EPA approved this deletion on July 27, 2005.[7]

The Phosphorus Rule also established moderating provisions for permits authorizing phosphorus discharges into or within the Everglades Protection Area, if the application of such provisions in a particular permit is itself approved as a new or revised water quality standard by EPA. 62-302.540(6) F.A.C. The Rule authorizes a "net improvement moderating provision," to be available in impacted areas to applicable discharges through December 31, 2016, and a

---

[3] *See* Attachment E, *EPA Determination under CWA Section 303(c)(3), Section 4(f) of the Everglades Forever Act*, September 15, 1999.

[4] *See* Attachment F, *Determination Concerning the Everglades Forever Act*, November 5, 2003.

[5] *See* Attachment G, *Approval of 10 ppb Default Criterion*, May 28, 2004.

[6] *See* Attachment H, *USEPA Determination under Section 303(c) of the Clean Water Act*, January 24, 2005.

[7] *See* Attachment I, *EPA Determination under Section 303(c) of the Clean Water Act Review of FAC 62-302.540 Water Quality Standards for Phosphorus Within the Everglades Protection Area*, July 27, 2005.

"hydropattern restoration provision," applicable to un-impacted areas which does not contain a time limit for application. EPA approved this section of the Rule as a general authorizing provision setting forth a procedure for applying for a variance.[8] EPA found the general authorizing provision to be consistent with the requirements of the CWA, including 40 C.F.R. § 131.10(g). EPA said that it would review and approve or disapprove each application of a permit-specific variance on a case-by-case basis as applied to each individual permittee. *See* Attachment E at 11-15. This approach is consistent with EPA's longstanding approach to reviewing variance provisions. *See* Preamble to final water quality standards rule at 48 FR 51403, col.1 (November 8, 1983).

EPA's decisions related to the Phosphorus Rule are the subject of litigation in Miccosukee Tribe of Indians of Florida et al. v. United States of America et al., No 04-21448-CIV-Gold (S. D. Fla.). Most recently in that case, the Court upheld EPA's approval of the 10 ppb numeric criterion, and the four-part test to implement the criterion.[9] However, the Court found EPA's approval of the moderating provisions and EPA's finding that the EFA amendments were not new or revised water quality standards to be arbitrary and capricious.[10]

Discussion: The Petitioners argue that amendments to the EFA, passed by the Florida Legislature in 2003, inappropriately delay implementation of the phosphorus criterion until 2016 and that "as a result FDEP will be unable to issue NPDES permits with phosphorus WQBELs — as required by the CWA and by federal court order . . .", thus limiting DEP's authority to incorporate WQBELs for phosphorus into NPDES permits.

NPDES permits must contain water quality-based effluent limitations that are derived from and comply with all applicable water quality standards. *See* 40 C.F.R. §§ 122.44(d)(vii)(A) and 123.25(a)(15). A water quality standard adopted by a state and submitted to EPA for review is applicable for CWA purposes only after EPA approves the water quality standard. *See* 40 C.F.R. § 131.21(c).

When EPA approved portions of the Phosphorus Rule as a revision to Florida's water quality standards in 2005 and 2006, those portions of the Rule became applicable water quality standards for phosphorus for the Everglades Protection Area for CWA purposes. As set out above, EPA's approval of the 10 ppb numeric criterion, and the four-part test to implement the criterion, were upheld by the Court in Miccosukee Tribe of Indians of Florida et al. v. United States of America et al. and remain the applicable water quality standard for NPDES permits into or within the Everglades Protection area. The Court also found that EPA should have reviewed the EFA amendments as new or revised water quality standards, and ordered EPA to do so

---

[8] *See* Attachment H at 12.

[9] *See* Miccosukee Tribe of Indians of Florida et al. v. United States of America et al., No 04-21448-CIV-Gold (S.D. Fla. July 9, 2008)(order granting summary judgment; closing case) at 63.

[10] *Id.*

consistent with the Court's Order. Unless and until EPA approves those provisions pursuant to section 303(c) of the Act, however, none of those EFA amendments are in effect for CWA purposes pursuant to 40 C.F.R. § 131.21(c). Therefore, DEP cannot use those provisions in NPDES permits. Similarly, the Court found that EPA's approval of the moderating provisions contained in Section 6 of the Phosphorus Rule as authorizing provisions which allow applications for new or revised water quality standards to be reviewed as variances, on a case-by-case basis, along with the development of a permit, was arbitrary and capricious and, therefore, found EPA's approval of the moderating provisions to be invalid. Those moderating provisions are also not effective for CWA purposes under 40 C.F.R. § 131.21(c) and they cannot be used in NPDES permits.

Should EPA approve provisions in the EFA amendments as new or revised water quality standards in the future, those provisions will become applicable water quality standards for NPDES purposes. Until that time, the Petitioners have presented no evidence that DEP will issue permits that are not consistent with the currently applicable water quality standards. In August, 2005, DEP issued an NPDES permit for a Stormwater Treatment Area, STA 1-E, that contained a WQBEL consistent with the water quality criterion for phosphorus for the Everglades Protection Area. In September 2007, DEP issued three additional Stormwater Treatment Area NPDES permits, for STAs 2, 5, and 6, that contained numeric WQBELs for phosphorus which are consistent with that criterion. In none of these permits did DEP utilize the moderating provisions. The petition on this issue is, therefore, denied.

ISSUE 2: Whether Florida has failed to issue NPDES permits to classes and categories of dischargers which are required to obtain discharge permits by the CWA.

A. EPA Determination as to Concentrated Animal Feeding Operations: Denied.

Summary: The Petitioners allege that Florida has failed to exercise control over Concentrated Animal Feeding Operations (CAFOs) as required by the CWA. The Petitioners cite a state court decision which found that DEP had not established a permit system requiring dairy CAFOs to apply for permits to operate a CAFO or to apply for exemptions from permitting under state law.[11] The Petitioners allege that there are more than 55 dairy CAFOs in Florida that have not obtained NPDES permits. EPA has carefully considered these allegations and has found that Florida is regulating CAFOs in a manner that is consistent with the CWA. Florida did initially regulate CAFOs through a state water permitting program, authorized under 403.088 F.S., rather than through the NPDES program. Since EPA adopted its CAFO rule in 2003, however, Florida has adopted a rule consistent with EPA's rule and, as set out more fully below, has been permitting CAFOs under its approved NPDES program. DEP submitted information to EPA demonstrating the state is now regulating 51 dairy farms under the program. Petitioners have not

[11] The Circuit Court of the Second Judicial Circuit ordered DEP to administer a NPDES permitting program for dairy CAFOs in the state of Florida. *See* Save our Suwannee, Inc. v. State of Florida DEP, Case No. 2001-CA-001266 (March 5, 2004).

identified any specific CAFO which DEP is not appropriately addressing under the state's CAFO rule. The petition on this issue is denied.

Discussion: Animal feeding operations (AFOs) are industrial farms that congregate animals, feed, and waste products into a small area of land. Some AFOs are classified as CAFOs based in part on the number of animals they contain. *See* 62-62.670 F.A.C. EPA promulgated a CAFO regulation, which became effective on April 14, 2003. 68 FR 7176 (Feb. 12, 2003) This rule required that CAFO dairies that discharge pollutants to waters of the United States (U.S.) obtain NPDES permits. 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23. Although the rule was challenged and portions of the rule were remanded, *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2nd Cir. 2005), some states incorporated the CAFO rule into their state NPDES programs. In July 2007, EPA promulgated a final rule extending the permit application deadline for dairy CAFOs that are newly defined under the 2003 CAFO rule, and are not new sources, from July 31, 2007 to February 27, 2009. 72 FR 40245 (July 24, 2007)

Beginning in 1998, Florida issued state permits for CAFOs based on state regulations, 62-62.670 F.A.C., which implemented state water permitting statutes. In January 1999, DEP developed a voluntary partnership program addressing dairy CAFOs in the Suwannee River Basin Partnership (Partnership), which encourages best management practices (BMPs) to control discharges from the CAFOs. DEP developed and implemented the Partnership pursuant to 403.611 F.S., which authorized DEP to explore alternative methods of permitting regulated activities. The Petitioners are correct that a state court found that the Partnership did not satisfy the requirements in EPA's CAFO Rule for NPDES permitting of dairy CAFOs.

However, in December 2003, Florida adopted and incorporated by reference 40 C.F.R. § 122.21(a)(1) (for the purpose of establishing a duty for CAFOs to apply for a permit); 40 C.F.R. § 122.21(i)(1) (permit application requirements for CAFOs); 40 C.F.R. §§ 122.23(a) through (f) (permit coverage requirements, determinations, and definitions for CAFOs); and 40 C.F.R. §§ 122.23(g)(1) through (6) (dates for the submission of CAFO permit applications). *See* 62-620.100(3)(r) through (v) F.A.C. Since adopting and incorporating by reference EPA's CAFO rule in 2003, DEP has regulated dairy CAFOs through the NPDES program.

As of June 2004, Florida had 51 dairy farms which meet the regulatory definition of CAFO. *See* Attachment J, letter from Thomas M. Beason to EPA, dated June 14, 2004. As of May 2007, DEP is regulating 49 dairy CAFOs in Florida through the NPDES permitting program. DEP has entered into consent orders to close two farms, has issued NPDES permits to 48 farms, and has issued a proposed NPDES permit, which is not yet final, to one farm.

The information provided to EPA by DEP demonstrates that discharges from dairy CAFOs in Florida are being appropriately regulated under the NPDES program. The Petitioners have provided no information to the contrary. The petition on this issue is, therefore, denied.

B. EPA Determination as to Hydrologically Connected Surface Waters

In their petition, the Petitioners allege that DEP has refused to issue NPDES permits to facilities that discharge to groundwater that is hydrologically connected to waters of the U.S., in violation of the CWA. The three circumstances cited by the Petitioners are addressed below.

The CWA does not give EPA the authority to regulate groundwater quality through NPDES permits. However, if a discharge of pollutants to groundwater reaches waters of the U.S., it may be a discharge to the surface water (albeit indirectly via a direct hydrological connection, i.e., the groundwater) that needs an NPDES permit. The question of whether groundwaters are hydrologically connected to surface waters ultimately turns on the facts of the particular situation. EPA has considered each situation alleged by Petitioners to require NPDES permits and has determined that DEP's actions as to each situation are appropriate.

1. EPA Determination as to Underground Injection Discharges: Denied.

Summary: The Petitioners argue that DEP has refused to issue NPDES permits to sewage treatment plants and industrial facilities that discharge effluent into underground injection wells and which the Petitioners allege are hydrologically connected to surface waters of the state. Petition at 6-7. The Petitioners have presented no credible evidence that there are existing groundwater discharges with direct hydrologic connection to surface waters associated with Class I underground injection control (UIC) wells in Florida. There is no evidence that DEP has failed to regulate, pursuant to the state's NPDES program, direct hydrologic connections that are conveying pollutants to surface water via ground water. The petition as to this issue is denied.

Discussion: In its June 14, 2004, response to EPA's request for information about issues raised in the petition (Attachment J), DEP stated that it is not aware of any credible evidence of discharges to surface waters via an underground injection well. The deep injection wells referenced in the petition are permitted by DEP as Class I injection wells under the Safe Drinking Water Act Underground Injection Control (UIC) Program, which Florida has been authorized to administer.

Florida requires groundwater monitoring wells at all of the Class I UIC facility sites to detect potential vertical movement of the injectate plume above the confining zone. It is this monitoring that detected the vertical movement at the Miami-Dade sewage treatment facility cited in the petition. However, the horizontal extent of plumes from these deep injection wells is generally unknown and is currently being investigated at the Miami-Dade South District Wastewater Treatment Plant, where monitoring wells have shown impacts to the lowest underground source of drinking water. There is no evidence at this time to indicate movement to surface waters. *See* Relative Risk Assessment, May 5, 2003.

For its argument that injectate from the deep injection wells is contributing to excessive nutrient levels, eutrophication, and associated problems in Florida surface waters, the Petitioners cite Dr. Sydney T. Bacchus. Petition at 6. EPA Region 4 technical experts have reviewed presentations and papers by Dr. Bacchus and have disagreed with her allegations that these surface water problems are connected with deep injection wells. EPA is not aware of any scientific evidence that Class I UIC wells are hydrologically connected to surface waters.

Based on EPA's investigation into Florida efforts to identify discharges subject to regulation under the NPDES program through its groundwater monitoring of Class I wells, together with the lack of credible evidence presented by the Petitioners, EPA concludes that the petition should be denied with respect to the allegations in the petition concerning unpermitted discharges to surface water via a direct groundwater connection in Florida.

2. EPA Determination as to Unpermitted Point Source Discharges to Groundwater and Surface Waters: Denied.

Summary: The Petitioners allege that DEP has failed to issue an NPDES permit for discharges to surface water, via hydrologic connection, from an unlined lagoon at the Smurfit Stone industrial facility in Panama City, Florida. The Smurfit Stone industrial facility does include an unlined wastewater treatment lagoon that discharges to the Bay County Military Point wastewater treatment facility pursuant to a pretreatment permit. Contrary to Petitioners' allegations of unpermitted discharges, however, a review of this case identified no evidence of past or current surface water discharges from the lagoon and, further, demonstrates that the State has required Smurfit Stone to take affirmative actions to prevent any potential, future discharges to surface waters through groundwater. The Petitioners did not submit any information to the contrary. The petition on this issue is denied.

Discussion: Smurfit Stone operates a wastewater treatment lagoon which discharges under a pretreatment permit to the Military Point wastewater treatment facility in Bay County, Florida. In an annual report to DEP, covering the time period from January 1, 2006 through December 31, 2006, Bay County reports no violations of that pretreatment permit by Smurfit Stone.

DEP has also issued Smurfit Stone a state Industrial Wastewater groundwater discharge permit, pursuant to the state's groundwater program, for the wastewater lagoon. The wastewater treatment lagoon is unlined, which could result in groundwater contamination from leachate leaving the lagoon. After monitoring well data indicated some violations of DEP groundwater standards, DEP required the facility to install 33 barrier wells between the lagoon and the shoreline. These wells recover any leachate that leaves the lagoon; that leachate is then pumped back into the lagoon for discharge to the Military Point facility. There are also 16 compliance wells in place to ensure the barrier wells are operating properly.

There is no evidence that leachate from the lagoon is reaching any surface water of the state and, therefore, no evidence that the leachate is subject to regulation under the NPDES program. In fact, the evidence indicates that DEP is taking all appropriate actions to address both past and current environmental issues at this site. The petition on this issue is, therefore, denied.

3. EPA Determination as to Phosphate Mining Discharges. Denied

Summary: The Petitioners allege that DEP has refused to issue NPDES permits for spills, seeps, or other discharges from clay settling ponds or gypsum stack systems used in the phosphate mining industry. The petition alleges that although these sites predictably overflow and have a reasonable likelihood of discharging to surface waters, "the state has issued no permits." Petition at 8. The Petitioners have provided EPA with no information supporting this assertion. EPA has investigated this allegation and is not aware of any failure on DEP's part to issue NPDES permits to phosphate mining facilities where necessary and appropriate. The petition on this issue is denied.

Discussion: DEP routinely issues NPDES permits to discharge activities related to the phosphate mining industry. DEP has issued 40 NPDES permits covering roughly 260 clay settling ponds associated with phosphate mining and 214 related gypsum stack systems. *See* Attachment J at 3. The Temple Terrace Bureau of Mine Reclamation's Phosphate Management Program office of DEP issues and enforces all but two of these permits, which are regulated by DEP's Northeast District Industrial Wastewater Program in Jacksonville. The Temple Terrace Bureau also performs facility inspections. As of June 2004, DEP had 11 active formal enforcement orders, under which facilities are undertaking various corrective actions. *Id.* DEP has an active inspection program and requires NPDES permits where there is evidence or potential for discharges of pollutants to surface waters. Further, DEP requires that information regarding dike and ground stability for new clay settling ponds be provided as part of the NPDES application process. DEP has established safety standards for the construction, operation, maintenance, and inspection of gypsum stacks and reviews the adequacy of existing financial assurances for such operations.

DEP also maintains a website where the general public can submit complaints though an on-line reporting form. Information submitted through this website is sent to the Office of Citizens Services, where it is dispatched to the appropriate program/office. Other complaints are typically referred directly to the appropriate DEP district office. Facilities and citizens may also report wastewater spills or other incidents which may have an immediate threat to the public health or environment through the State Warning Point (SWP) system. The SWP is a toll-free, 24-hour hotline managed by the Florida Department of Community Affairs, which also receives calls on other environmental issues such as environmental crimes, petroleum spills, hazardous waste dumping, etc. Information reported through the SWP system is available to the public through DEP's website. These DEP actions are consistent with the requirement at 40 C.F.R. §

123.26(b)(4) that state programs must maintain a viable system to investigate public complaints of violations.[12]

In response to the information provided by DEP, the Petitioners have asserted that "on information and belief . . . many of these discharges remain unpermitted."[13] The Petitioners have presented no evidence, however, of any phosphate mines that are discharging to surface waters but have not been issued NPDES permits by DEP. Petitioners have also presented no evidence that any of the phosphate settling ponds have a direct hydrologic connection to surface waters and no technical information that shows such a connection. Florida has demonstrated that it has an active program for permitting, inspecting, and enforcing NPDES permits for phosphate mining discharges. The Petitioners' general allegations to the contrary are not an adequate basis for EPA to find Florida's program deficient in this regard. The petition on this issue is, therefore, denied.

ISSUE 3: Whether DEP has issued NPDES permits that do not conform to the CWA and its implementing regulations.

A. Whether DEP has issued NPDES permits that violate the CWA's time limits for permits and compliance schedules.

1. EPA Determination as to whether permit terms and compliance schedules included in state-issued NPDES permits violate the CWA: Denied

Summary: The Petitioners allege that DEP has issued NPDES permits that contain compliance schedules beyond the time frames contemplated by the CWA. In particular, the Petitioners point to a permit issued in 2002 to the Georgia-Pacific Company (Georgia-Pacific) paper mill discharging to Rice Creek. That permit includes a compliance schedule that provides Georgia-Pacific up to eleven years to come into compliance with discharge limitations for specific conductivity, among other parameters. The Petitioners argue that no NPDES permit may include a compliance schedule longer than the five-year term of a permit. The CWA, however, does not provide that compliance schedules cannot extend beyond the term of an NPDES permit. Upon review, EPA has determined that DEP's use of compliance schedules in NPDES permits is consistent with the requirements of the CWA. The petition on this issue is denied.

---

[12] The website for citizen complaints is http://www.dep.state.fl.us/mainpage/programs/cs.htm. The publicly accessible website for information on the SWP is: http://www.dep.state.fl.us/water/wastewater/wce/spills.htm.

[13] Petitioners filed a complaint in the Northern District of Florida on October 4, 2005, alleging that EPA had a mandatory duty to withdraw approval of Florida's NPDES program. That case was dismissed on July 8, 2005. *See* Sierra Club et al. v. EPA, No. 4:04cv401 (N.D. Fla.). *See* paragraph 30 of the initial complaint in that case for Petitioners' additional allegations related to this issue.

Discussion: The CWA defines "schedule of compliance" as a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard, whether technology- or water quality-based. 33 U.S.C. § 1362(17). While the term "compliance schedule" is sometimes used in reference to enforcement orders (*See* CWA section 309(a)(5)), it may also be used in reference to an NPDES permit condition. CWA section 502(11) provides that the term "effluent limitation" means "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological or other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance." Therefore, compliance schedules are a type of an effluent limitation in an NPDES permit. *See also* definition of "schedule of compliance" at 40 C.F.R. § 122.2.

EPA has promulgated regulations regarding the use of compliance schedules in NPDES permits. 40 C.F.R. § 122.47. These regulations provide that, where appropriate, a permit authority may provide a compliance schedule. Among other things, compliance schedules must require compliance "as soon as possible", but no later than any statutory deadline. 40 C.F.R. § 122.47(a)(1). Any NPDES permit establishing a compliance date more than one year from permit issuance shall include interim requirements with dates, at least annual, to achieve those goals and/or report progress. 40 C.F.R. § 122.47(a)(3). These requirements apply to approved state NPDES programs pursuant to 40 C.F.R. § 123.25(a)(18).

The CWA contains a July 1, 1977, compliance date for WQBELs based on water quality standards established prior to that date. 33 U.S.C. § 1311(b)(1)(c). EPA's Administrator interpreted this provision of the CWA in the case of In re Star-Kist Caribe, Inc., 3 E.A.D. 172, 175 (Adm'r 1990), *modification denied*, 4 E.A.D. 33 (EAB 1992). Star-Kist Caribe held that NPDES permits must require immediate compliance with, and therefore cannot contain compliance schedules for, effluent limitations based on water quality standards adopted before July 1, 1977. For "post-1977" standards, that is, water quality standards that are either newly adopted or revised after July 1, 1977, such as Florida's specific conductivity numeric criterion which was adopted on April 26, 1987, Star-Kist Caribe allows states to include compliance schedules in NPDES permits for WQBELs. However, a state's authority to provide for compliance schedules in NPDES permits is limited to those circumstances in which the state's water quality standards or its implementing regulations "can be fairly construed as authorizing a schedule of compliance." Star-Kist Caribe at 34; In re City of Ames, Iowa 6 E.A.D. 374, 380 (EAB 1996). Absent such flexibility under state law, compliance is required immediately upon issuance of the permit. *See* In re J&L Specialty Prods. Corp., 5 E.A.D. 333, 344 (EAB 1994).

DEP has authority under state law to provide for compliance schedules in state-issued NPDES permits. DEP has the authority to provide compliance schedules in any state-issued water permits. *See* 403.088 F. S. The statute which establishes the Florida NPDES program also allows provisions applicable to state-issued water permits, including those contained in 403.088,

to be applied to NPDES permits to the extent those provisions do not conflict with federal requirements. *See* 403.0885(2), F. S. Florida has established by rule specific permit conditions for state-issued NPDES permits. *See* 62-620.620, F.A.C. The rule provides, among other things, that a permit "shall, when appropriate, specify a schedule of compliance . . ." *See* 62.620.620(5), F.A.C. The rule further provides that any such schedule shall require compliance as soon as sound engineering practices allow, but not later than any applicable statute or rule deadline. Compliance schedules longer than one year require interim requirements and dates for their achievement. *Id.* These provisions are consistent with the requirements of the CWA and its implementing regulations, in particular 40 C.F.R. § 122.47.

The Petitioners have alleged that DEP's use of compliance schedules beyond the five-year term of an NPDES permit does not comply with the CWA. However, neither the CWA nor EPA's regulations limit the duration of an otherwise permissible compliance schedule to the five-year permit term.[14] The provision of the CWA that prescribes the permit term, section 402(b)(1)(B), simply requires that any state seeking approval to administer its own NPDES program has legal authority to issue permits for a fixed term, not exceeding five years. EPA's regulations further provide that a permitting authority may include a compliance schedule when appropriate and that, if the permitting authority includes a compliance schedule, the final WQBEL is to be achieved as soon as possible. 40 C.F.R. § 122.47. The five-year permit term required by CWA section 402(b)(1)(B) does not establish a statutory deadline for meeting WQBELs. Rather, it is clear from the statutory structure of the CWA that the statutory deadlines for WQBELs are set forth in section 301 of the Act. There is no limitation in section 301(b)(1)(C) on the term of a compliance schedule to meet effluent limitations derived to implement water quality standards adopted or revised after 1977.

Under appropriate circumstances, a compliance schedule may extend beyond the term of an NPDES permit.[15] The issue is whether a permit that includes a compliance schedule extending beyond its term complies with CWA section 301(b)(1)(C). That section requires that permits include effluent limitations as stringent as necessary to meet water quality standards "and schedules of compliance." Effluent limitations based on the state's water quality standards, including compliance schedule-authorizing provisions, fully comply with CWA section 301(b)(1)(C).

As discussed above, states may adopt provisions authorizing compliance schedules as part of their water quality standards. In Star-Kist Caribe, the Administrator held that compliance schedules are a component of water quality standards under 40 C.F.R. § 131.13:

---

[14] EPA notes, however that for individual control strategies issued pursuant to CWA section 304(l), the CWA establishes a statutory deadline for compliance within three years. 33 U.S.C. § 1314(l).

[15] Even a compliance schedule of five years or less might extend beyond a permit term if it were established as part of a permit modification issued during the five-year term of the existing permit.

> Section 131.13 of the regulations authorizes the states, at their discretion (but subject to EPA approval), to include in their water quality standards 'policies generally affecting their application and implementation, such as mixing zones, low flows and variances.' Logically, schedules of compliance fall within the category of 'policies' listed in this regulation. Moreover, as noted in the text, the Act itself contemplates schedules of compliance being authorized and used by the States. *See* §§ 301(b)(1)(C) and 303(e)(3)(A) and (F).

Star-Kist Caribe, 3 E.A.D.172, 182-183, note 16 (1990).

Effluent limitations in permits that are written in a manner consistent with the state's authorizing provisions would be consistent with CWA section 301(b)(1)(C). That section explicitly provides that compliance schedules are appropriate components of water quality-based effluent limitations. (Effluent limitations are to be established to meet "water quality standards, treatment standards, or schedules of compliance....") Such effluent limitations also would be fully consistent with the CWA's definition of "effluent limitation," which includes "schedules of compliance." CWA section 502(11). Permits written consistent with water quality standards that authorize compliance schedules when implementing those standards, therefore, would be fully consistent with the requirements of CWA section 301(b)(1)(C).

Section 301(b)(1)(C) thus allows the permit authority to take into account applicable water quality criteria, designated uses, and the compliance schedule authorizing provision in developing a WQBEL. Such effluent limitations would also be fully consistent with EPA's permitting regulations at 40 C.F.R. § 122.44(d)(1)(vii)(A), which requires a WQBEL to be "derived from, and compl[y] with" water quality standards, and 40 C.F.R. § 122.44(d)(1), which provides that the permit must include "requirements . . . necessary . . . to [a]chieve water quality standards." Arguing that these provisions preclude allowance of compliance schedules longer than the permit term ignores statutory provisions recognizing that water quality standards adopted by states can include compliance schedules (CWA sections 303(e)(3)(A) and (F)), as well as the longstanding interpretation by the Administrator in the 1990 Star-Kist Caribe case that compliance schedule-authorizing provisions are a component of water quality standards.

The requirement that NPDES permits not exceed five years is included in the CWA so that the permitting authority will revisit authorizations to discharge every five years, thereby providing regular periodic review of permits to ensure that they are up-to-date and contain appropriate conditions. *See* CWA section 402(a)(3). By limiting the permit term to five years, Congress intended that both the permit holder, the public, and the permitting authority review the permit conditions on a regular basis, giving the permit holder and the public a forum and an official opportunity to suggest changes to permit conditions that, in its opinion, are no longer appropriate, and ensuring that the permitting authority considers, on a regular basis, whether new requirements are necessary – for example, new effluent limitations necessary to incorporate

newly-promulgated water quality standards.[16] Nowhere in the CWA or its legislative history is there an indication that Congress intended for section 402(b) to serve as a limitation on the permit writer's authority to adopt appropriate permit conditions in accordance with the substantive requirements of the CWA, which are contained elsewhere in the statute, e.g., CWA section 301(b)(1)(C), not in the solely procedural requirement of CWA section 402(b).

EPA has previously authorized the use of compliance schedules that extend beyond the permit term. In EPA's Water Quality Guidance for the Great Lakes, 40 C.F.R. Part 132, Appendix F, Procedure 9, EPA provides that compliance schedules may be established that go beyond the expiration date of the NPDES permit. This guidance provides that, where a schedule extends beyond the term of the permit, an interim permit limit effective upon the expiration date shall be included in the permit and reflected in the fact sheet/statement of basis, and the administrative record shall reflect the final limit and its compliance date. Great Lakes Initiative Supplemental Information Document at 433; 40 C.F.R. Part 132, Appendix F, Procedure 9.B.2.

Petitioners also allege that EPA's regulations prohibit compliance schedules for permits issued to facilities continuing to discharge at the same location. Petition at 8. Petitioners misinterpret EPA's regulations. The regulation cited by Petitioners, 40 C.F.R. § 122.47(a)(2), places significant constraints on granting compliance schedules to new sources, new dischargers and recommencing dischargers. The term "recommencing dischargers," however, does not mean existing dischargers seeking permit renewal, but instead means dischargers who stopped discharging and then begin operations anew. As discussed in the 1984 preamble to the regulation, these recommencing dischargers are treated in the same manner as new dischargers and new sources because "they are in a better position than existing sources to install and 'start up' their equipment and meet their permit limitations." 9 FR 37998, 38034 (September 26, 1984). This part of the regulation does not apply to existing dischargers who are seeking a new permit.

Petitioners have cited the Georgia-Pacific permit as an example of DEP's inappropriate use of permit compliance schedules. EPA has reviewed that permit and considers that the compliance schedule provided for in the Georgia-Pacific permit is consistent with the CWA. The schedule is "enforceable" as required by the definition of schedule of compliance in the CWA. 33 U.S.C. § 1362(17). In Florida, the Administrative Order accompanying the permit is part of the permit and therefore, the terms of the Administrative Order are enforceable just as are any other permit term. EPA also considers that compliance schedule "appropriate," since it

---

[16] The administrative requirement to revisit the NPDES permit requirements once every five years is not absolute. The permit term provision of the CWA is subject to section 558(c) of the Administrative Procedure Act (APA), which provides for continuance of permits only where the permittee has a permit for an activity "of a continuing nature" and the permittee "has made timely and sufficient application for renewal of a new license." EPA and Florida have issued regulations similar to APA sec. 558(c). *See* EPA permit regulations at 40 C.F.R. § 122.6, and Florida's permit regulations at 62-4.090 F.A.C.

provides for compliance with the terms of the permit "as soon as possible" as required by 40 C.F.R. § 122.47(a)(1).

Several parameters in the Georgia-Pacific permit were affected by new technology-based standards for the pulp and paper industry published by EPA in April 1998. This "Cluster Rule" linked air and water standards into a single set of coordinated regulations. The Cluster Rule established specific deadlines for implementing air emission standards and required that water effluent guidelines be implemented when a given facility's current permit expired and was reissued. The Rule created requirements for the discharge of treated wastewater for pulp and paper manufacturing. Standards to control the discharge of adsorbable organic halides, dioxin, and furans were set based on best available technology to reduce or eliminate these discharges to water. In addition, Georgia-Pacific agreed to install oxygen delignification (OD) on its bleach line, which was not required by the Cluster Rule. OD reduces pollutant loadings and the amount of bleaching chemicals used.

DEP's NPDES permit and accompanying administrative order for the Georgia-Pacific paper mill were developed after the Cluster rule was proposed, but before it was promulgated. Consistent with the final Cluster Rule, the permit and administrative order first allowed time for implementation of air-related process/wastewater improvements, followed by water-related technology improvements and installation of OD. This phased implementation is the basis for the six years allowed Georgia-Pacific to complete the water-related technology-based improvements. The administrative order then provides additional time to meet water quality-based limits, including those for specific conductance. The schedule thus provides for two more years of monitoring and optimization of those treatment improvements to see if they are sufficient to meet the permit's water quality-based requirements. Only if those improvements are not sufficient to meet water quality standards in Rice Creek would a pipeline to the St. Johns River be allowed. In that event, the facility is given a further 27-month schedule to complete a pipeline to the River. An EPA team of pulp and paper experts independently reviewed the schedule and sequence of implementation set out in the administrative order. The team concurred that the sequence and length of the schedule was appropriate.

The Petitioners also cite the International Paper Company (International Paper) permit for a mill in Cantonment, Florida as an example of a compliance schedule that is inconsistent with the requirements of the CWA. As drafted and issued, however, this permit does not contain a compliance schedule. Rather, to address existing permit violations, a schedule for the facility to come into compliance was developed through a concurrent enforcement consent order, which would have become effective concurrently with the NPDES permit. That permit and enforcement consent order, however, were denied after an administrative appeal. DEP issued a new permit and consent order to International Paper in July 2008. That July 2008 permit is currently under administrative appeal.

Upon review, EPA has determined that DEP's use of compliance schedules in NPDES permits is consistent with the requirements of the CWA. The petition on this issue is, therefore, denied.

2. EPA Determination as to whether State-issued NPDES permits have been administratively continued in an inappropriate manner. Denied

Summary: The Petitioners allege that DEP has allowed facilities to operate with an "administratively continued" permit in violation of the CWA. Petitioners allege that DEP inappropriately allowed the administrative continuance provision to authorize dischargers to new waterbodies not authorized in the prior permit or when the applicant was violating water quality standards under its expired permit. Upon review, EPA has determined that DEP allows administratively continued permits in a manner consistent with federal law. The petition on this issue is denied.

Discussion: When EPA is the NPDES permit-issuing authority, the conditions of an expired permit continue in force until the effective date of a new permit if the permittee has submitted a timely application for a renewed permit and, through no fault of the permittee, the Agency does not make a decision regarding the permit application before the expiration date of the previous permit. 40 C.F.R. § 122.6(a). Similarly, states approved to administer the NPDES program may continue permits until the effective date of a new permit if state law allows. 40 C.F.R. § 122.6(d). This provision is often referred to as "administrative continuance" and is intended to protect a permittee from losing its authorization to discharge where the permitting authority has not issued a new permit before the existing permit expires. EPA's regulations are based on a longstanding provision of the APA that provides for continuance of existing licenses if the renewal application is filed in a timely manner. Section 558(c) of the Florida APA provides "When the licensee has made timely and sufficient application for renewal of a license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been fully determined by the agency." With respect to NPDES permits, Florida law provides that "upon timely application for renewal, a permit issued under this section shall not expire until the application has been finally acted upon or until the last day for seeking judicial review of the agency order or a later date fixed by order of the reviewing court." 403.0885(3), F. S.

The Petitioners allege, however, that DEP has used administrative continuance to allow activity beyond the conditions of existing permits, including new discharges to a new water body. The Petitioners allege such continuances are inconsistent with the CWA. Petition at 9. The Petitioners assert that DEP has administratively continued permits for three pulp and paper mill discharges: Georgia-Pacific, International Paper, and Buckeye Florida, L.P. (Buckeye). The Petitioners argue these administratively continued permits are inappropriate because the facilities applied for discharges to new water bodies. Petition at 9. The Petitioners are mistaken about the provisions of the administratively continued permits. While these facilities have applied for

renewal permits that request authorization to discharge to additional waterbodies, only the previously permitted discharges were authorized through administratively continued permits.

All three facilities cited by the Petitioners, Georgia-Pacific, International Paper and Buckeye, applied in a timely manner for re-issuance of their NPDES permits, consistent with Florida law and 40 C.F.R. § 122.6(d). In all three instances, the administratively continued permit only authorized the discharges previously authorized in the expired permit:

Georgia-Pacific: Georgia-Pacific timely applied for a permit renewal in 1995. After resolution of an administrative appeal, DEP reissued the Georgia-Pacific NPDES permit in August 2002. The administrative continuance of the previous permit, before the permit was reissued, allowed only for the existing discharge from the facility to Rice Creek to continue.[17]

International Paper: International Paper timely applied for a permit renewal in 1995. DEP reissued a NPDES permit for International Paper in April 2005, as well as a concurrent consent order, which were appealed, resulting in denial of the permit and order. Following that appeal, DEP issued a new NPDES permit and consent order for International Paper in July 2008. That July 2008 permit is currently under administrative appeal.[18]

Buckeye: Buckeye timely applied for a permit renewal in 1995 and submitted an amended application in 2005. DEP reissued the Buckeye permit in October 2005, with an accompanying administrative order that contained a compliance schedule. That permit and order did not become effective, however, due to a pending administrative appeal. That appeal was recently dismissed due to Florida's development of a new draft permit based on an updated permit application. The previously issued permit has been administratively continued while the renewal permit is being processed. The administratively continued permit allows only for the existing discharge to the Fenholloway River to continue.[19]

---

[17] In fact, the reissued permit and accompanying administrative order also allow only for the existing discharge to Rice Creek while the facility undertakes process/wastewater improvements. Only if those improvements are not sufficient to meet water quality standards in Rice Creek will the discharge be moved to another receiving water (the St. Johns River).

[18] The renewal permit and accompanying consent order allow only for the existing discharge to Eleven Mile Creek for two years. After two years, the permit allows part of the existing discharge to Eleven Mile Creek to continue for one year, along with a partial discharge to receiving wetlands. After three years, the permit allows the full discharge to go to receiving wetlands.

[19] The renewal permit and accompanying administrative order also allow only for the existing discharge to the Fenholloway River while process/wastewater improvements are added and a pipeline to the Fenholloway estuary is constructed. After that construction is completed, the permit allows the discharge to be relocated to the Fenholloway estuary.

The Petitioners also allege that expired permits may not be administratively continued where there is a violation of one of the terms of the administratively continued permit.[20] This allegation is incorrect. While noncompliance with a permit term is a cause for terminating the permit under 40 C.F.R. § 122.64 (applicable to state programs under 40 C.F.R. § 123.25), such termination is not automatic. Any such decision to terminate a permit is discretionary on the part of the regulatory authority.

Since EPA has determined that DEP allows permits to be administratively continued in a manner consistent with federal law, the petition on this issue is, therefore, denied.

---

[20] Plaintiffs have not specified what effluent limitations are being violated in the administratively continued permits. EPA has queried its national Permit Compliance System database for the last three years to determine if there have been significant violations for any of these three administratively continued permits. Georgia-Pacific, NPDES No. FL0002763, has not had any significant noncompliance of its permit limitations. "Significant noncompliance" is defined in 40 C.F.R. § 123.45 as noncompliance with pollutant limits at the same pipe and for the same parameter two or more quarters. This facility has also had three compliance sampling inspections within the last three years. DEP did execute a consent order in May 2005 with a $10,500 penalty to address a clarifier wall breach that resulted in a discharge. DEP also executed a consent order in May 2006 with a $5,250 penalty to address dissolved oxygen (DO) violations.

International Paper Company, NPDES No. FL0002526, has not had any significant noncompliance of its permit limitations within the last three years. The facility has had violations of its permit which were reported, but the facility has not reached the significant noncompliant level. In 1994, DEP did execute a consent order with a $40,000 penalty for biochemical oxygen demand (BOD) and total suspended solids (TSS) violations. However, this occurred prior to Florida receiving approval to implement the NPDES permitting program. In 1999, DEP executed a consent order with a $137,230 penalty for BOD, TSS, and DO violations. In April 2005, as discussed previously, DEP also executed a consent order with no penalty for specific conductivity violations. This facility has also had six compliance sampling inspections within the last three years.

Buckeye, NPDES No. FL0000876, has not had any significant noncompliance of its permit limitations within the last three years. DEP executed a consent order in June 2007 with a penalty based on a February 2007 failure of a secondary containment dike resulting in an un-permitted discharge to the Fenholloway River. Also, this facility has had two compliance sampling inspections and one compliance biomonitoring inspection within the last three years.

ISSUE 4: EPA determination as to whether DEP has issued NPDES permits that fail to meet minimum NPDES requirements.

A. Whether DEP has failed to provide judicial review of permits as required by the CWA and its implementing regulations. Denied.

The Petitioners allege that Florida provides inadequate judicial review of state-issued NPDES permits. The Petitioners' allegation has two parts: (1) Florida interprets its state law as precluding both ALJs and state courts from considering claims that a state-issued NPDES permit violated federal, as opposed to state, law; and (2) Florida interprets standing for judicial review in such as way as to find no injury exists where a proposed NPDES permit would result in a "net environmental benefit."

1. EPA determination as to whether Florida inappropriately restricts judicial review of state-issued NPDES permits by its position that state administrative and judicial proceedings do not have the authority to consider federal claims. Denied.

Summary: EPA-approved state NPDES programs must provide "an opportunity for judicial review that is the same as that available to obtain judicial review in federal court of a federally issued NPDES permit." 40 C.F.R. § 123.30. The Petitioners allege Florida state judicial review is inherently unequal to federal judicial review because Florida interprets its state law to prohibit both administrative and judicial proceedings from considering whether a state-issued NPDES permit violated federal, as opposed to state, law. Petitioners point out Save Our Suwannee v. DEP, Case No. 2001-CA-001266 (March 5, 2004), where DEP argued that state courts may not apply the federal CWA in reviewing appeals regarding NPDES permits but, rather, must apply Florida law. Petitioners' allegation is misplaced. EPA has approved Florida to implement a state NPDES program. In approving Florida's program, EPA determined that applicable state law and regulations were consistent with the CWA and its implementing regulations. Unless EPA determines that such state laws and regulations are no longer consistent with federal requirements and withdraws approval of Florida's program, reliance on state law during judicial review is appropriate. The petition on this issue is denied.

Discussion: Petitioners correctly point out that 40 C.F.R. § 123.30 requires approved state NPDES programs to provide the same opportunity for judicial review of state-issued NPDES permits in a state judicial forum as is available for judicial review of federally-issued NPDES permits in federal court. Petitioners go on to argue that 40 C.F.R. § 123.30 also requires state courts to consider and apply both state and federal law when reviewing state-issued NPDES permits. This argument is contrary to the basic structure of the NPDES program as established by the CWA.

It is well established that, once EPA has approved a state to administer the NPDES program, NPDES permit review of state-issued permits is pursuant to state law in state court.

Alternatively, a person may petition EPA to withdraw approval of the state program. Dist. of Columbia v. Schramm, 631 F.2d 854, 859, 863 (D.C.Cir.1980) (In holding that the district courts lacked jurisdiction to review the Administrator's exercise of discretion in failing to veto a state's issuance of a NPDES permit, and declining to imply a federal cause of action for review of state NPDES decisions, the court said, "congressional silence on federal court review of state permits is consistent with the view that challengers to those permits should be relegated to state law remedies in state courts."); Connecticut Fund for the Environment v. Job Plating Company, 623 F. Supp 207, 216-217 (D. Conn. 985) (Discharger has two different ways to challenge state NPDES permit, "under state law" or challenging EPA's "approval of the state's allegedly invalid NPDES program."); Montgomery County Environmental Coalition v. Costle, 646 F.2d 568, 579 (D.C. Cir. 1990) ("Our decision that transfer of authority to the State of Maryland makes review of the earlier EPA permit issuance inappropriate is reinforced by 'the strong current of federalism in the Clean Water Act,' *See* District of Columbia v. Schramm, 631 F.2d 854 at 863 (D.C.Cir.1980). In that case, we held that the district courts lacked jurisdiction to review the Administrator's exercise of discretion in failing to veto a state's issuance of a NPDES permit, and declined to imply a federal cause of action for review of state NPDES decisions. 'The state courts are the proper forums for resolving questions about state NPDES permits, which are, after all, questions of state law.'" *Id.*); and Mianus River Pres. Ctte. v. EPA, 541 F.2d 899, 906 (2d Cir.1976) (Holding EPA silence on state permitting decisions not reviewable in part because state-issued NPDES permits often would be based upon state law and a federal court would be forced to "review issues involving only a State agency's application and interpretation of purely state law.")

The NPDES permit writers' manual describes further this limited EPA role, once a permit program is approved:

> In general, once a State, Territory, or Tribe is authorized to issue permits, EPA is prohibited from conducting these activities. However, EPA must be provided with an opportunity to review each permit issued by the State, Territory, or Tribe and may formally object to elements that conflict with Federal requirements. If the permitting agency does not address the objection points, EPA will issue the permit directly. Once a permit is issued through a government agency, it is enforceable by the approved State, Territorial, and Federal agencies (including EPA) with legal authority to implement and enforce the permit, and by private citizens (in Federal court).

NPDES Permit Writers' Manual pp. 27-28.

Petitioners cite the decision in Lane v. DEP, Case No. 01-1797, as support for their allegations that Florida inappropriately limits the scope of review in NPDES permit challenges. Lane was not a challenge to an NPDES permit, but was instead a challenge to a state rulemaking,

which challenge was filed with the Florida Division of Administrative Hearings (DOAH).[21] The ALJ found that in hearing such a challenge in a state forum, the appropriate law to apply is state law. Nothing in the Lane decision is inconsistent with the discussion above. The petition on this issue is, therefore, denied.

2. EPA Determination as to whether Florida inappropriately limits standing to seek judicial review of state-issued NPDES permits. Denied.

Summary: The Petitioners allege that a Florida court has inappropriately restricted the definition of standing to seek judicial review of state-issued NPDES permits. The Petitioners argue the court denied standing to appeal an NPDES permit where the discharge would be improved when compared to past discharges and, therefore, would result in a "net environmental benefit," even though the effluent would not meet water quality standards. *See* Petition at 11, citing Young v. Georgia-Pacific et al., No. 1D02-3673 (1st DCA), August 6, 2002.

By statute, Florida provides administrative standing, which determines subsequent judicial standing, to any citizen who meets the standing requirements for judicial review of a case or controversy pursuant to Article III of the United States Constitution. *See* Section 403.412(7), F.S. It is DEP's position that nothing in the Young v. Georgia-Pacific case changes that standing requirement. Furthermore, upon investigation, EPA finds that the Petitioners have misstated the findings of the ALJ and the state court in this case and that the Petitioners' allegations are not supported. The petition on this issue is denied.

Discussion: State NPDES programs must provide an opportunity for judicial review of permitting decisions in state court that is sufficient to provide for, encourage, and assist public participation in the permitting process. A state meets this requirement if the state law allows the same opportunity for judicial review in state court as is available in federal court under section 509 of the CWA, 33 U.S.C. § 1369. *See* 40 C.F.R. § 123.30. *See also* Preamble to EPA's final rule, at 61 FR 20971, 20975 (May 8, 1996).

While Section 509(b) of the Act provides that any "interested person" may seek review in federal court of EPA's permitting decisions, a federal plaintiff must also satisfy the standing requirements of Article III of the U.S. Constitution. This standing requirement incorporates, among other things, the injury-in-fact rule set out in Sierra Club v. Morton, 405 U.S. 727 (1972). See Montgomery Environmental Coalition v. Costle, 646 F.2d 568 (D.C. Cir. 1980) at pages 576-578. To demonstrate an injury-in-fact, a party must show that it has suffered an invasion of

[21] Lane was a challenge to Florida's Impaired Waters Rule, which established how the State identifies waters not meeting applicable water quality standards as required by section 303(d) of the CWA. Petitioners in that case argued that DEP had exceeded its statutory authority in establishing the Rule, based in part on arguments that the Rule violated the federal CWA. The ALJ held, among other things, that state law was the proper law to apply to the questions presented in that case.

a judicially cognizable interest which is (a) concrete and particularized; and (b) actual and imminent. *See* American Forest and Paper Association v. U.S.E.P.A, 154 F.3d 1155 (10th Cir. 1988) at page 1158.

Florida's Environmental Protection Act defines who has standing to enforce state laws and rules for the protection of the air, water, and natural resources of the state. *See* Section 402.412, F. S. Among other things, the Environmental Protection Act provides that a party has standing in cases pertaining to a federally delegated or approved program based on the same injury-in-fact test as is applied in federal courts. Section 403.412(7), F. S. provides that:

> In a matter pertaining to a federally delegated or approved program, a citizen of the state may initiate an administrative proceeding under this subsection if the citizen meets the standing requirements for judicial review of a case or controversy pursuant to Article III of the United States Constitution.

Florida's Administrative Procedure Act further provides when a party may seek judicial review of a final agency action. Section 120.68, F. S. provides that:

> A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

See also Attachment C at page 8, citing Florida judicial decisions applying these statutory provisions: Legal Environmental Assistance Foundation v. Clark, 668 So.2d 982 (Fla. 1996), Florida Chapter of Sierra Club v. Suwannee, 802 So.2d 520 (Fla. 1st DCA 2001).

DEP does not view either the administrative or judicial opinion in Young v. Georgia-Pacific et al. as altering the state's standing requirements for a challenge to state actions in the NPDES program. In a letter to EPA, the General Counsel for DEP stated that the Department recognizes that properly pled allegations of activities consistent with Sierra Club v. Morton are sufficient to demonstrate Article III "injury-in-fact" standing. *See* Attachment C at 9.

The Petitioners allege however, that, in the case of Young v. Georgia-Pacific, a Florida court altered the state's injury-in-fact test so as to make Florida's standing requirements inconsistent with the CWA. In that case, the state court dismissed an appeal of a DEP Final Order adopting the Recommended Order of a DOAH ALJ. Georgia-Pacific, as the permit applicant, moved to dismiss the judicial appeal for lack of standing, arguing that petitioner failed to allege an injury-in-fact. Georgia-Pacific argued that the petitioner in that case lacked standing both because the permit would result in a "net environmental benefit" and because the petitioner had not pled sufficient facts to demonstrate an injury-in-fact under Sierra Club v. Morton. DEP did not join in Georgia-Pacific's motion to dismiss the Linda Young case. The Florida First District Court of Appeals dismissed the appeal without opinion.

The Petitioners allege that "the ALJ and the court determined that the permit would result in a 'net environmental benefit' because the paper mill's discharge would be improved when compared to past discharges." The Petitioners further allege that this standard is contrary to the CWA, as a party "is adversely affected when water quality standards are violated – even if they are violated slightly less than they previously have been." *See* Petition at 11. The Petitioners argue that the state court decision establishes precedent that a permit resulting in a "net environmental benefit," even if the permit does not meet applicable water quality standards, is sufficient to deny standing to a person challenging that permit in state court.

There is no support for Petitioners' assertion that the state court redefined standing in Young v. Georgia-Pacific. In fact, the state court did not issue a substantive opinion in this case at all. Rather, the court issued a one sentence order that the Appellee's motion to dismiss "on grounds that Appellant lacks standing is granted." Linda Young v. Georgia-Pacific Corporation, et.al., Case no. 1D02-3673 (Fla. 1st DCA 2002). As set out above, in its pleadings the permit applicant advanced several arguments against standing for the Petitioners, including the arguments that the Petitioners did not establish an injury-in-fact and that the permit resulted in a "net environmental benefit." There is no basis, however, for stating which argument was accepted by the court in granting the permit applicant's motion to dismiss.

Also contrary to Petitioners' assertions, the ALJ did not create a new standard for standing in the underlying administrative case, but applied the federal (and Florida) "injury-in-fact" test. The Petitioners incorrectly argue that the ALJ found against Linda Young in the administrative permit appeal because he found that the permit had a "net environmental benefit," even though it did not meet water quality standards. The ALJ actually concluded, as a matter of law, that the Petitioners, including Linda Young, lacked standing because "they failed to show they will suffer an injury in fact."[22] See Attachment K, Administrative Law Judge's Recommended Order in DOAH Case No. 01-2442, paragraph 177 at page 63.

Moreover, the ALJ made a finding of fact that the effluent discharge required by the permit would meet water quality standards:

> 151. The project as set forth in the proposed Permit and Administrative Order will be clearly in the public interest because it will result in full achievement of water quality standards and full compliance with the designated use of the receiving water body. The project will result in a substantial reduction in pollutant loading

[22] The ALJ also found that two of the organizations appearing in the Georgia-Pacific case, the Putnam County Environmental Council and the Stewards of the St Johns River, did not prove they were Florida corporations and citizens of the state. Therefore, the ALJ found the organizations did not make the factual showing necessary to gain standing. *See* Attachment K, paragraph 177 at page 63. The Petitioners in this case have not challenged that finding.

> in Rice Creek and the St. Johns River, regardless of whether the discharge will be located in Rice Creek or in the St. Johns River. (Emphasis added)

See Attachment K at 56.

Based on the ALJ's finding of fact that DEP's permit would result in an environmental improvement because the discharge would meet all applicable water quality standards and that plaintiffs failed to show injury-in-fact, the ALJ further concluded that the Petitioners in that case did not demonstrate standing:

> 177. . . .because the proposed agency action will result in environmental improvement, as opposed to harm, and Petitioners have failed to show that they will suffer an injury in fact, all Petitioners lack standing to bring this action . . .

See Attachment K at 63.

There is no basis in the ALJ's decision for the Petitioners' argument that the ALJ would have made the same decision regarding standing if the ALJ had not found that the permit complied with all applicable water quality standards. In addition, there is no evidence that any of Petitioners were prejudiced by the ALJ's decision regarding standing, as each Petitioner was given the right to fully contest the proposed agency action in a full evidentiary hearing. Finally, even assuming arguendo that Petitioners are correct that the facts in this case do not support the ALJ's findings and conclusions regarding "injury-in-fact," there is no basis for arguing that one ALJ decision redefined standing for all future state administrative NPDES challenges. One erroneous application of law in a state administrative proceeding does not constitute grounds for EPA to withdraw a state NPDES program pursuant to 40 C.F.R. § 123.63.

The petition on this point is, therefore, denied.

ISSUE 5 EPA determination as to whether the Impaired Waters Rule prevents DEP from issuing permits that comply with water quality standards as required by the CWA. Denied.

Summary: Petitioners argue that Florida's Impaired Waters Rule (IWR) results in the state issuing NPDES permits that do not adequately protect waters that are not attaining water quality standards. The State uses the IWR, 62-303 F.A.C., to identify waters not meeting applicable water quality standards as required by section 303(d) of the CWA.[23] The Petitioners allege that "while the CWA prohibits an increase in existing discharges or new discharges into . . . impaired waters" the IWR prohibits DEP from "taking any action to restrict dischargers unless the

[23] Under section 303(d) of the CWA, each state is required to establish total maximum daily loads (TMDLs) for waters identified as not meeting applicable water quality standards. These waters are often called "impaired waters."

receiving waters have been designated by Florida as impaired." As set out more fully below, this argument reflects a misunderstanding of the relationship between DEP's total maximum daily load (TMDL) and NPDES programs and a misunderstanding of the IWR. Regardless of whether a discharger is discharging to a water listed as impaired or not, any NPDES permit must contain effluent limitations as stringent as are necessary to meet any applicable water quality standard. 33 U.S.C. § 1311(c)(2)(B). Neither the IWR, nor whether a water is on the section 303(d) list, has an impact on how DEP establishes effluent limitations in NPDES permits or changes the applicable legal requirements for such NPDES permits. The Petitioners have not identified any waters where dischargers have received permit limits that do not contain effluent limitations as stringent as necessary to meet water quality standards based on whether or not they are included on the state's section 303(d) list. The petition on this issue is denied.

Discussion: Section 303(d) of the CWA requires each state to "identify those waters within its boundaries for which the effluent limitations required by [33 U.S.C. § 1311(b)(1)] are not stringent enough to implement any water quality standard applicable to such waters." *See also* 40 C.F.R. § 130.7(b)(6)(i). The identified waters comprise a state's section 303(d) list, or "impaired waters list." Section 303(d) further requires that states submit their impaired waters list to EPA for review. If it disapproves a state's list, EPA must establish a list of impaired waters for the state.

The IWR is the methodology used by DEP to compile its section 303(d) list. The IWR requires DEP to compile two lists of waters, a verified list and a planning list. The verified list contains waters that are verified as not attaining water quality standards and is submitted to EPA as the state Section 303(d) list. Waters on the verified list are scheduled by the State for development of a TMDL. The planning list contains waters DEP determines are potentially not attaining water quality standards and that are scheduled for additional monitoring or data collection to determine if, in fact, the waters are not attaining water quality standards. *See* definitions of "planning list" and "verified list" at 62-303.200 F.A.C.

Petitioners argue that not all waters are properly identified as "impaired" by the State because application of the IWR has resulted in waters being improperly left off the state Section 303(d) list. Petitioners argue that these waters, including waters that are identified as impaired by EPA and added by the Agency to the state section 303(d) list, will not be subject to the alleged CWA "prohibition" on increases in existing dischargers or new discharges to those waters.[24] Nothing in the IWR, however, will have such an effect on the state NPDES program.

---

[24] In addition, Petitioners implicitly are challenging the way DEP identifies impaired waters under CWA section 303(d). Petitioners can challenge (and have challenged) EPA's final agency action approving any particular list in a separate proceeding pursuant to the APA, 5 U.S.C. § 551 et seq. EPA prevailed in a challenge to its action on Florida's 2002 list. *Sierra Club v. Leavitt*, 393 F.Supp.2d 1263 (N.D. Fla. 2003). The case was appealed to the 11th Circuit Court of Appeals, which issued a decision partially affirming and partially reversing the district court.

The Florida statute authorizing DEP to establish the IWR provides that "[t]he list, priority ranking, and schedule cannot be used in the administration or implementation of any regulatory program." *See* 403.067(2)(a), F.S. This requirement is reflected in the IWR provision that "the planning list shall not be used in the administration or implementation of any regulatory program, and shall be submitted to EPA for informational purposes only." *See* 62-303.150(1) F.A.C. The Petitioners allege that this provision will result in NPDES permits that do not implement water quality standards as required by the CWA. Petition at 14-15.

The same statute Petitioners rely on for their argument, however, also clearly provides that the prohibition against use of the list by regulatory programs "does not prohibit any agency from employing the data or other information used to establish the list, priority ranking, or schedule in administering any program." (emphasis supplied) *See* 403.067(2)(a), F. S. The IWR further provides that "[n]othing in this rule is intended to limit any actions by federal, state, or local agencies, affected persons, or citizens pursuant to other rules or regulations." 62-303.100(4), F.A.C.

Nothing in the CWA, its implementing regulations or any provision of Florida law provides that being included on a state's section 303(d) list changes how a water is treated in the NPDES program. While states must ensure that effluent limitations in NPDES permits are consistent with the assumptions and requirements of any established TMDL, 40 C.F.R. § 122.44(d)(1)(vii)(B), there are no additional NPDES requirements for waters that are included on a state's section 303(d) list. Rather, as for any water, an NPDES permit issued for a discharge into such waters must include effluent limitations designed to achieve water quality standards. 40 C.F.R. § 122.44(d)(1). Florida's statutes and regulations provide ample authority for such permit limitations.

Section 403.087(1), F. S. requires that any stationary installation reasonably expected to be a source of air or water pollution obtain a permit. Section 403.088, F. S. specifically addresses the permitting of discharges to Florida waters. Permits issued under Section 403.088 and its implementing rules must, as set forth in Section 403.088(2)(c)(3), "contain such additional conditions, requirements, and restrictions as the department deems necessary to preserve and protect the quality of the receiving water." Section 403.088(d), F. S. further provides that "[n]o operation permit shall be renewed or issued if the department finds that the discharge will not comply with permit conditions or applicable statutes and rules."

Rule 62-620.620(1), F.A.C., sets out the conditions that must be included in a DEP-issued discharge permit, including permits issued under the Department's NPDES permitting authority. Rules 62-620.620(1)(a), (c) and (g) F.A.C. set out the requirements most relevant to this issue, clearly providing that permits must include both applicable promulgated effluent

---

The case has been remanded back to the district court for further proceedings. *Sierra Club v. Leavitt*, No. 05-13959 (11th Cir. 2007).

limitations and any more stringent requirements necessary to provide reasonable assurance that a discharge will not cause or contribute to violations of state water quality standards.

Chapter 62-650, F.A.C., is DEP's rule for establishing WQBELs. As noted at 62-650.300(1)(b), F.A.C., "[t]he effluent limit may be a technology based effluent limit (TBEL), a water quality based effluent limit (WQBEL) determined by the Level I process in accordance with Rule 62-650.400, F.A.C., or where applicable, a WQBEL determined by the Level II process in accordance with Rule 62-650.500, F.A.C." In making its WQBEL determinations, DEP uses all available water quality data, including data used to compile the section 303(d) list. In the event that the State does not include a water on its 303(d) list, and EPA then adds a water to the state section 303(d) list, DEP acknowledges that any information used by EPA to make its listing decision would be relevant to developing a WQBEL for the pollutant for which the water is listed. *See* Attachment C at 13.

EPA has determined that the IWR, or whether a water is on the section 303(d) list, does not have an impact on how DEP establishes effluent limitations in NPDES permits or change the applicable legal requirements for such NPDES permits. The petition on this issue is, therefore, denied.

ISSUE 6 EPA determination as to whether DEP has failed to provide opportunity for public participation in the NPDES permitting process as required by the CWA. Denied.

A. EPA Determination as to FDEP's use of "Notice of Intent to Deny" NPDES permits. Denied.

Summary: The Petitioners allege that DEP avoids public participation in the NPDES permitting process in violation of the CWA. The Petitioners allege that it is DEP's practice to issue a Notice of Intent to Deny a permit and then to issue a draft permit without first withdrawing the Notice of Intent to Deny. The Petitioners further allege that DEP then argues that challenges to such permits are precluded since the challenging party did not petition for a hearing on the draft denial and, therefore, did not preserve its right to administrative review. *See* Petition at 15-16. The Petitioners cite the Anderson-Columbia Corporation (Anderson) NPDES application as a proceeding where DEP allegedly avoided its public participation obligations. However, as set out more fully below, the Anderson proceeding does not demonstrate any improper avoidance of public participation requirements by DEP.

Discussion: State NPDES programs must provide public notice of permit actions, allowing at least a 30-day public comment period. Provisions relating to general permits are found at 40 C.F.R. § 122.28; those applicable to state programs are found at 40 C.F.R. § 123.25(28). The Petitioners' allegations that Florida's program is inconsistent with public participation requirements are based on two examples. One example was a permit issued to Stone Container Corporation in 1998. That permit, however, was not an NPDES permit and is, therefore, not

relevant to this petition. The second example offered by the Petitioners is Anderson's application for coverage under an NPDES general permit.

In 1999, Anderson submitted a notice of intent to seek coverage under Florida's NPDES generic permit for concrete batch plants. Florida's NPDES generic permits are comparable to EPA's use of the term "general permit." *See* 40 C.F.R. §§ 122.2; 122.28. In Florida, generic permits are adopted by rule and the State provides public notice of the proposed permit during the rule development process. The generic permits are subject to challenge as a proposed rule. *Id.* Once adopted as rules, generic permits may also be challenged under the Florida APA as an existing rule. *See* Attachment C at 14-15.

DEP's Northwest District Office required Anderson to publish a notice of application for coverage under the generic permit for concrete batch plants. After that notice was published on August 6, 1999, DEP received additional information from the facility and on August 20, 1999, denied the applicant coverage under the generic permit. *Id.* at 15. The facility then petitioned for an administrative hearing. DEP required Anderson to publish a notice of the proceeding on November 18, 1999, alerting all interested parties that the hearing could lead to DEP changing its position as to the challenged agency action. In fact, one citizen filed, but later withdrew, a request to intervene in the proceeding. *Id.* at 15. There is no evidence that DEP challenged that request to intervene. In February 2000, the challenge was resolved and DEP granted coverage under the generic permit on February 28, 2000. *Id.* at 15-16.

There is no evidence to support Petitioners' allegation that DEP uses notices of intent to deny permits to avoid public participation in the NPDES permitting process. The petition on this issue is, therefore, denied.

B. EPA Determination as to Allegation of Bias by David Struhs. Denied.

Summary: The Petitioners allege that bias on the part of former Secretary of DEP, David Struhs, thwarted public participation. Petitioners question Florida's administrative appeals process whereby an ALJ provides a recommended order to the parties and to DEP, through the Secretary of DEP, who then has 90 days to issue a final order. Petitioners argue that because the DEP Secretary can reject or modify an ALJ decision, the Secretary can "thwart" public participation in the appeals process itself. Petitioners argue this problem is exacerbated where a Secretary has a bias, which they allege was the case with Mr. Struhs. Petitioners are incorrect, however, when they imply that Florida's process is fatally flawed by the Secretary's role in finalizing administrative decisions. Further, the Petitioners have presented no evidence that Mr. Struhs misused his role in that process.

Discussion: Florida's Administrative Procedure Act sets out the process for adjudicating challenges to agency decisions. *See* Chapter 120, F.S. The Act provides that, where an ALJ conducts a hearing involving disputed issues of material fact, the ALJ "shall complete and submit to the agency and all parties a recommended order consisting of findings of fact,

conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order." *See* 120.57(1)(k), F.S. Each party then has 15 days within which to file exceptions to the recommended order. *Id.* The agency may then adopt the recommended order, or may reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. The agency must state with particularity its reasons for rejecting or modifying any conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation is as reasonable, or more reasonable than, that which was rejected or modified. *See* 120.57(1)(l), F.S. DEP may not reject or modify findings of fact unless it is determined, after a review of the entire record, that a finding is not based on competent substantial evidence. *Id. See* 120.57(1)(l), F.S.

Contrary to Petitioners' allegations, Florida's administrative process does not violate the CWA requirements that the State provide meaningful participation in the review of NPDES permits. The department does not have unlimited discretion to modify or reject an ALJ's recommended decision. Rather, that discretion must be exercised within the boundaries established in state statute. Any party believing that the department has overstepped those statutory boundaries may appeal to the Florida District Courts of Appeal. *See* 120.68(1), F.S. The District Court would then be able to consider whether DEP, through the Secretary, properly applied the discretion outlined above.

Petitioners further allege that former Secretary of DEP David Struhs had a particularized bias, which resulted in Mr. Struhs misusing the discretion afforded him by statute. This allegation is based on comments Mr. Struhs made regarding ongoing cases and on Mr. Struhs leaving DEP to accept employment with the International Paper Company.

Florida has a process for parties seeking the disqualification of an agency head. F.S. 120.665 provides:

> (1) Notwithstanding the provisions of s. 112.3143, any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding.

As evidence of Mr. Struh's bias, Petitioners cite several cases where requests that David Struhs recuse himself were denied. The cited cases, however, do not support Petitioners' allegations.

Petitioners first cite the administrative appeal of the Georgia-Pacific permit issued in 2002. The ALJ issued a recommended order July 3, 2002. On August 6, 2002, Secretary Struhs issued a final order which adopted the recommended order in its entirety. The Secretary's final order was appealed to the Florida District Court of Appeals. The question of bias on the part of

Secretary Struhs was one issue raised in that appeal. The District Court ultimately dismissed the entire appeal, including the issue of bias.[25]

Petitioners cite a second instance related to an April 2002 request by Charlotte County that Mr. Struhs recuse himself from a permitting matter involving IMC Phosphates. This case involved a state environmental resource permit necessary for mining and impacts to wetlands, however, not an NPDES permit. On March 8, 2002, the ALJ issued an order recommending that DEP issue the permit to IMC Phosphates. Secretary Struhs was, in fact, disqualified from participating in DEP's final decision in this case. The final order accepting the ALJ's recommended decision was issued by Steven Seibert, as Substitute Agency Head, on November 22, 2002.[26]

Petitioners also allege Mr. Struhs demonstrated bias in the drafting of an NPDES permit for International Paper in Cantonment, Florida. The plan for this permit, first announced in 2000, was for the mill to combine its wastewater with that from a to-be-constructed publicly owned treatment works and for the combined wastewater to discharge first to receiving wetlands and then to enhanced wetlands. Petitioners' allegation of bias is based solely on the fact that Mr. Struhs left DEP in 2004 to accept a position with International Paper. Petitioners have offered no evidence, however, that Mr. Struhs' decisions in 2000 were based on a future offer of employment from International Paper.

Finally, as noted by Petitioners, Mr. Struhs resigned as DEP Secretary on March 1, 2004. The Petition was filed with EPA on March 19, 2004.

Based on all of the above, EPA has determined that there is no evidence that Florida's administrative process violates the CWA. EPA has further determined there is no evidence that former Secretary of DEP David Struhs thwarted public participation in the NPDES permitting process in violation of the CWA. The petition on this issue is, therefore, denied.

ISSUE 7 EPA determination as to whether DEP has failed to adequately enforce NPDES permits. Denied.

Summary: The Petitioners allege that Florida has systematically failed to enforce NPDES permits. Petition at 18-19. The Petitioners cite a 1999 Special Grand Jury report from Escambia County, Florida, which outlined the Grand Jury's concerns about DEP's pollution control programs. As pointed out in the petition, Region 4 was aware of the Grand Jury report, which

---

[25] *See* Final Order, Putnam County Environmental Council, Inc., et al. v. DEP and Georgia-Pacific, Department of Environmental Protection, OGC Case No. 01-0866, DOAH Case No. 01-2442, August 6, 2002.

[26] *See* Final Order, Manasota 88, Inc. et al. v. IMC Phosphates Company and DEP, Department of Environmental Protection, OGC Case Nos. 1080 and 1081, November 22, 2002.

garnered considerable attention in 1999. EPA believes, however, that the State has made significant efforts to address enforcement concerns raised by EPA over the years. Based on its overall enforcement history, EPA has determined that DEP's NPDES enforcement program complies with CWA requirements. The petition on this issue is denied.

Discussion: Based on 40 C.F.R. § 123.63(a)(3), EPA may consider whether to withdraw a state NPDES program:

> Where the state's enforcement program fails to comply with the requirements of this part, including:
>
> (i) Failure to act on violations of permits or other program requirements;
> (ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed; or
> (iii) Failure to inspect and monitor activities subject to regulation.

EPA has conducted numerous reviews of DEP's NPDES enforcement program since the 1999 Special Grand Jury report. As noted by Petitioners, EPA did express concerns in its 2001 and 2002 mid-year enforcement program reviews regarding DEP's significant noncompliance (SNC) rate and the lack of enforcement of municipal storm water permits. However, more recent program reviews demonstrate that DEP has addressed those concerns.

In its 2003 mid-year enforcement program review, EPA commended DEP for the reduction in its active exceptions rate and for addressing SNC facilities at a rate that was closer to achieving the national goal. "Active Exceptions" are facilities that have been in noncompliance with pollutant guidelines in 40 C.F.R. § 123.45 at the same pipe and for the same parameter two or more quarters without a formal enforcement action. In its 2004 mid-year enforcement program review, EPA commended DEP for keeping both the SNC rate and the active exceptions rate "significantly low" during the first quarter of fiscal year 2004. Also, EPA did not note storm water enforcement as a concern in either the 2003 or 2004 mid-year enforcement program review. In addition, in its 2003 end-of-year enforcement review, EPA included an updated Major/Minor/Storm Water Compliance and Enforcement Strategy provided by DEP. EPA did not cite any specific concerns with DEP's enforcement activities. Finally, in its 2005 end-of-year enforcement program review, EPA stated:

> "...the FDEP Storm Water Program has done an excellent job of tracking compliance and enforcement of its MS4 permits. Annual reports for all Phase I MS4 facilities are reviewed each year and inspections are conducted at all Phase I MS4s. FDEP has also developed an Annual Report Form for all MS4 facilities to streamline the annual reports submitted and to aid in the review of the reports. Over the past two years, two Consent Orders have been issued to Phase I MS4 facilities for failure to adequately implement parts of the program contained in its NPDES permit. FDEP took enforcement on three Phase II MS4s for failure to

> apply for permit coverage under the FDEP general MS4 permit. FDEP has an aggressive MS4 Storm Water program that incorporates permitting, inspections, and enforcement of Phase I & II facilities."

Based on its reviews, EPA is satisfied that DEP routinely enforces NDPES permits in Florida and seeks penalties against violators. DEP reasonably exercises its enforcement discretion to not take formal actions in individual cases. On occasion, the DEP Tallahassee office or EPA has encouraged DEP District offices to be more aggressive in specific cases, but this is not a frequent occurrence. On the infrequent occasions where EPA has raised concerns that DEP has not taken appropriate action, DEP has subsequently initiated an appropriate enforcement action.

In summary, DEP has systematically addressed the concerns identified by EPA in its enforcement program. The petition on this point is, therefore, denied.