

September 20, 2016

Delivered Via U.S. Mail & Electronic Mail

Hon. Gina McCarthy, Administrator
U.S. Environmental Protection Agency
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Hon. Heather McTeer Toney, Regional Administrator
U.S. Environmental Protection Agency, Region 4
Sam Nunn Atlanta Federal Center
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Re: Florida Human Health Water Quality Criteria

Dear Mses. McCarthy and Toney:

On behalf of the Florida Clean Water Network, Inc. and Conservancy of Southwest Florida, Inc., I am submitting these comments to you on Florida's recent approval of new and revised water quality criteria for the protection of human health. These comments demonstrate that Florida did not follow the procedural requirements of 40 C.F.R. §§ 131.20(b) and 25.5(b) and that EPA must disapprove the criteria if submitted to EPA for approval. 40 C.F.R. § 131.5(b).

Material Facts

On June 30, 2016, the Florida Department of Environmental Protection (FDEP) published public notice of a public hearing on the proposed adoption of new and revised water quality criteria for the protection of human health. 42 Fla. Admin. R. 2873 (June 30, 2016) (available at <https://goo.gl/nXYe45>). The notice did not state that any reports, documents and data relevant to the discussion at the public hearing (e.g., Fla. Dep't of Env'tl. Protection, *Technical Support Document: Derivation of Human Health-Based Criteria and Risk Impact Statement* (June 2016) (available at <https://goo.gl/743y7v>) were available to the public. The public hearing was conducted by the Environmental Regulation Commission (ERC) on July 26, 2016. Following the hearing, the ERC approved the proposed adoption of new and revised water quality criteria for the protection of human health. The new and revised criteria have not been officially "adopted" under State law and adopted criteria have not been submitted to EPA for approval.

Applicable Law

40 C.F.R. § 131.20 provides requirements for State review and revision of water quality standards:

* * *

(b) Public participation. The State shall hold one or more public hearings for the purpose of reviewing water quality standards as well as when revising water quality standards, in accordance with provisions of State law and *EPA's public participation regulation (40 CFR part 25)*. The proposed water quality standards revision and supporting analyses shall be made available to the public prior to the hearing.

(Emphasis added). See U.S. Env'tl. Protection Agency, *Water Quality Standards Handbook*, Section 6.1.2 (Aug. 2014) (available at <https://goo.gl/boZfET>) (“The regulation at 40 CFR Part 25 also describes additional requirements for public involvement.”). 40 C.F.R. Part 25 “sets forth minimum requirements . . . for public participation in activities under the Clean Water Act . . .” 40 C.F.R. § 25.1. Such activities include “State rulemaking under the Clean Water Act . . .” 40 C.F.R. § 25.2(a)(1).

40 C.F.R. § 25.5 provides:

* * *

(b) Notice. A notice of each hearing shall be well publicized, and shall also be mailed to the appropriate portions of the list of interested and affected parties required by §25.4(b)(5). Except as otherwise specifically provided elsewhere in this chapter, these actions must occur **at least 45 days prior to the date of the hearing**. * * * Reports, documents and data relevant to the discussion at the public hearing shall be available to the public **at least 30 days before the hearing**.

(Emphasis added). EPA stated in its final rule on *Water Quality Standards Regulatory Revisions* on August 21, 2015 as follows:

At a minimum, per § 131.20(b), states and authorized tribes are required to follow the provisions of state or tribal law and EPA's public participation regulations at 40 CFR part 25. EPA's public participation regulation, at 40 CFR 25.5, sets

minimum requirements for states and authorized tribes to ***publicize a hearing at least 45 days prior to the date of the hearing; provide to the public reports, documents, and data relevant to the discussion at the public hearing at least 30 days before the hearing***; hold the hearing at times and places that facilitate attendance by the public; schedule witnesses in advance to allow maximum participation and adequate time; and prepare a transcript, recording, or other complete record of the hearing proceedings. See 40 CFR 25.5 for the actual list of federal public hearing requirements.

80 Fed. Reg. 51043 (Aug. 21, 2015) (emphasis added). See e.g., U.S. Env'tl. Protection Agency, *Introduction to Water Quality Standards* (2011) (available at <https://goo.gl/11f6tr>) ("Formal public hearing requires a notice 45 days prior to the hearing") U.S. Env'tl. Protection Agency, *Water Quality Standards Program: How to Develop and Implement Public Involvement Programs and Practices* (June 2011) (available at <https://goo.gl/jPNUdU>) ("Well-publicized advance notification of an activity is required 45 days prior to public hearings and public meetings In addition, background information and technical summaries must be made available to the public at least 30 days prior to the date for both activity types").

40 C.F.R. § 131.5 provides:

(a) Under section 303(c) of the Act, EPA is to review and to approve or disapprove State-adopted water quality standards. The review involves a determination of:

* * *

(6) Whether the State has followed applicable legal procedures for revising or adopting standards;

* * *

(b) If EPA determines that the State's or Tribe's water quality standards are consistent with the factors listed in paragraphs (a)(1) through (8) of this section, EPA approves the standards. ***EPA must disapprove*** the State's or Tribe's water quality standards and promulgate Federal standards under section 303(c)(4), and for Great Lakes States or Great Lakes Tribes under section 118(c)(2)(C) of the Act, if State or Tribal adopted standards are not consistent with the factors listed in paragraphs (a)(1) through (8) of this section. EPA may also promulgate a new or revised standard when necessary to meet the requirements of the Act.

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(Emphasis added). *See Water Quality Standards Handbook*, Section 6.2 (“The EPA determines whether the state or tribe has complied with the procedural requirements contained in 40 CFR 131.20 (e.g., public participation) for conducting WQS reviews.”).

Analysis

The notice of the public hearing before the ERC was published in the *Florida Administrative Register* 26 days before the hearing. This does not comport with the requirement in 40 C.F.R. § 25.5(b) that notice of the hearing shall be published at least 45 days prior to the hearing.

The notice published in the *Florida Administrative Register* did not state that any reports, documents and data relevant to the discussion at the public hearing (e.g., *Technical Support Document: Derivation of Human Health-Based Criteria and Risk Impact Statement*) were available to be provided to the public. Even if the notice had stated that any reports, documents and data relevant to the discussion at the public hearing were available, the notice was published less than 30 days prior to the public hearing. This does not comport with the requirement in 40 C.F.R. § 25.5(b) that any public reports, documents, and data relevant to the discussion at the public hearing be provided to the public at least 30 days before the hearing.

Conclusion

The material facts and applicable law can lead to no determination by EPA other than that Florida has not followed the procedural requirements mandated by 40 C.F.R. §§ 131.20(b) and 25.5(b). Such a determination requires that EPA disapprove the criteria approved by the ERC on July 26, 2016 if the criteria are submitted to EPA for approval. 40 C.F.R. § 131.5(b). Accordingly, we demand that EPA disapprove the criteria approved by the ERC on July 26, 2016 if they are submitted to EPA for approval.

Sincerely,



David A. Ludder
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Conservancy of Southwest Florida, Inc.

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