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October __, 2021

Via email: Kevin.Odonnell@FloridaDEP.gov

Florida Department of Environmental Protection
Attn: Kevin O'Donnell
Watershed Assessment Section
Division of Environmental Assessment and Restoration
2600 Blair Stone Road MS# 3560
Tallahassee, FL 32399-3000
Kevin.Odonnell@FloridaDEP.gov

RE: Application of State Water Quality Standards in Permitted Municipal Separate Storm Sewer System and Permitted Surface Water Management System

Dear Mr. O'Donnell:

This correspondence is submitted to object to the application of Florida surface water quality standards to WBID 3252C1 and WBID 3252F1 that are regulated under a municipal separate storm sewer system (MS4) permit issued by FDEP and as part of a surface water management system permitted by the South Florida Water Management District (SFWMD). The conveyances assessed as WBIDs 3252C1 and 3252F1 are not waters of the state, nor waters of the U.S., and are not subject to the application of surface water quality standards or the application of the Department's federally mandated TMDL program.

The Village of Wellington operates its MS4 under FDEP-issued MS4 permit FLS000018-004. The Department's issuance of the MS4 permit to the Village of Wellington was a determination that the Village stormwater collection and conveyance system was part of the MS4 and not waters of the state.

MS4s Discharge to Waters

By definition, an MS4 discharges to waters of the U.S. or state and cannot be considered jurisdictional waters. FDEP Rules 62-624.200(8) and (9), F.A.C., state:

Municipal separate storm sewer or MS4 means a conveyance or system of conveyances like roads with stormwater systems, municipal streets, catch basins, curbs, gutters, ditches, constructed channels, or storm drains:

- (a) Owned or operated by a State, city, town, county, special district, association, or other public body (created by or pursuant to State Law) having jurisdiction over management and discharge of stormwater and which discharges to surface waters of the state;
- (b) Designed or used for collecting or conveying stormwater;
- (c) Which is not a combined sewer; and
- (d) Which is not part of a Publicly Owned Treatment Works (POTW). POTW means any device or system used in the treatment of municipal sewage or industrial wastes

of a liquid nature which is owned by a “State” or “municipality.” This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

(Emphasis added).

- (9) Outfall means a point source at the location where a municipal separate storm sewer discharges to water of the state and does not include open conveyances connecting two municipal separate storm sewers, or pipes, tunnels or other conveyances which connect segments of the same stream or other waters of the state and are used to convey waters of the state. Point source is defined as any discernible, confined, and discrete conveyance, such as any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, or landfill leachate collection system from which pollutants are or may be discharged.

(Emphasis added).

These State definitions are virtually identical to EPA’s definitions as set out in federal regulations and must be read in context with 40 C.F.R. § 131.10(a), the last line of which states: “In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.” This regulation is often cited as the basis for rule of thumb that “waters cannot be treatment and treatment cannot be waters.”

The Village of Wellington MS4 collects stormwater and provides treatment as described in Surface Water Management System Permit 50-00548-S and subsequent modifications. As a collection and treatment system, the conveyances are not jurisdiction waters.

Surface Water Standards Not Applicable to Stormwater Management Systems

Additionally, the system is also subject to Section 373.4142, Florida Statutes, which states:

State surface water quality standards applicable to waters of the state, as defined in s. 403.031(13), shall not apply within a stormwater management system which is designed, constructed, operated, and maintained for stormwater treatment in accordance with a valid permit or noticed exemption issued pursuant to chapter 62-25, Florida Administrative Code; a valid permit or exemption under s. 373.4145 within the Northwest Florida Water Management District; a valid permit issued on or subsequent to April 1, 1986, within the Suwannee River Water Management District or the St. Johns River Water Management District pursuant to this part; a valid permit issued on or subsequent to March 1, 1988, within the Southwest Florida Water Management District pursuant to this part; or a valid permit issued on or subsequent to January 6, 1982, within the South Florida Water Management District pursuant to this part. Such inapplicability of state water quality standards shall be limited to that part of the stormwater management system located upstream of a manmade water control structure permitted, or approved under a noticed exemption, to retain or detain stormwater runoff in order to provide treatment of the stormwater. The additional use of such a stormwater management system for flood attenuation or irrigation shall not divest the system of the benefits of this exemption. This section shall not affect the authority of the department and water management districts to require reasonable assurance that the water quality within such stormwater management systems will not adversely impact public health, fish and wildlife, or adjacent waters.

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In sum, an MS4 is the point source that discharges to waters and therefore cannot be waters subject to Clean Water Act jurisdiction and, where the MS4 is also subject to a state water management district permit, there is clear statutory authority that water quality standards do not apply within the stormwater system.

The Proposed Listings are Arbitrary and Capricious

Additionally, any attempt to apply surface water quality standards to an MS4 or surface water management system creates a regulatory morass. If the stormwater collection and treatment system must now meet water quality standards, the permitted party would have to build another treatment system to treat water before it enters the MS4 or surface water management system. But then the operator risks having the new treatment system suddenly declared jurisdictional forcing the permittee to create yet another treatment system and so on.

Applying surface water quality standards to a portion of an MS4 or surface water management system subject to Section 373.4142, Fla. Stat., violates state and federal law at multiple levels. By listing a portion of the MS4 as if jurisdictional waters, the Department is revoking the applicable MS4 permit with no notice or due process. At the same time, and also without notice or due process, the Department is revoking portions of Permit 50-00548-S, and subsequent modifications, as issued by the South Florida Water Management District (e.g., application numbers 050322-5 and 070330-35).

The regulatory status of the stormwater conveyances at issue was determined by FDEP and SFWMD by issuance of the applicable and current permits and the Village has relied upon those determinations. The fact that members of the public may attempt to fish in or otherwise use the stormwater conveyance system as if recreational waters does not eliminate the regulatory status of the system as a permitted MS4 or permitted surface water management system. To suddenly declare that FDEP will now assess MS4s and surface water systems as if subject to federally mandated surface water quality standards is arbitrary and capricious and not supported by law.

Additionally, by illicitly designating permitted stormwater conveyances as waters of the state, the Department is essentially creating a new classification of waters without allowing affected parties to contest the illicit redesignation through formal rulemaking. By trying to regulate stormwater conveyances and treatment systems as Class III waters, the Department is creating a new classification of surface waters of which waste treatment is an inherent component. As noted, by federal regulation, waste treatment and assimilation cannot be adopted by the states as designated uses.

Conclusion

State and federal law draws clear legal lines between jurisdictional waters and stormwater conveyances and treatment systems. The Department has crossed those lines in attempting to assess portions of the Village of Wellington's permitted MS4 and permitted surface water management system as if waters of the state.

Accordingly, this correspondence is submitted to contest the assessment of, an application of surface water quality standards in, any portion of the permitted MS4 and permitted surface water management system as owned or operated by the Village. Copies of the applicable permits and relevant support documents are attached to this email.

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The Village would like to resolve this matter early and amicably and avoid the potential of having to contest this matter at the state or federal level. The Department's prompt and careful consideration of this matter would be appreciated.

Please copy:

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