

Notice of Proposed Rule

DEPARTMENT OF ENVIRONMENTAL PROTECTION

RULE NO: RULE TITLE

[62-302.400](#): Classification of Surface Waters, Usage, Reclassification, Classified Waters

[62-302.530](#): Table: Surface Water Quality Criteria

PURPOSE AND EFFECT: On July 20, 2009, the Department of Environmental Protection (Department) received a petition to initiate rulemaking from the Florida Stormwater Association to establish a more refined surface water classification system. The existing surface water classification system has been in effect for over three decades. The Department initiated rulemaking and conducted four public workshops: August 18, 2009; November 18, 2009; January 7, 2010; and February 22, 2010 to receive comments from the public regarding the revision of the existing surface water classification system. The proposed revisions establish a new sub-classification of Class III waters titled Class III-Limited that is intended to recognize that some artificial or altered waters cannot fully support a Class III use due to human-induced physical or habitat conditions. No waters are reclassified as part of this rulemaking nor are there any changes to water quality criteria.

SUMMARY: The Department is amending Chapter 62-302, F.A.C., to revise the existing surface water classification system by adding a new sub-classification under Class III waters titled Class III-Limited. The new Class III-Limited sub-classification is intended to address some artificial or altered waters that cannot fully support a Class III use due to physical or habitat conditions. Any future reclassification of a waterbody to the new Class III-Limited use will require a Use Attainability Analysis as well as the relevant Site Specific Alternative Criteria appropriate for that waterbody. Reclassification requirements are described in Rule 62-302.400, F.A.C., and the document "Process for Reclassifying the Designated Uses of Florida Surface Waters" (DEP-SAS-001/10), which is incorporated by reference into the rule. Petitioners for a reclassification to Class III-Limited must demonstrate that existing uses of both the reclassified water and downstream water are fully protected, and no classification action or change in designated use shall result in degradation of water quality in Outstanding Florida Waters or Outstanding National Resource Waters.

Chapter 62-302 and Rule 62-302.400, F.A.C., are referenced by a number of other rules. The proposed amendments will have no effect on the following referenced rules, other than to authorize the Department to create a Class III-Limited sub-classification for surface waters to which alternative surface water quality criteria for certain limited parameters may apply in the future: Rules 62-4.242, 62-4.246, 62-25.001, 62-25.025, 62-25.080, 62-29.050, 62-40.120, 62-40.210, 62-113.200, 62-301.100, 62-302.300, 62-302.400, 62-303.100, 62-303.200, 62-303.430, 62-304.310, 62-304.335, 62-304.500, 62-312.050, 62-312.340, 62-312.816, 62-312.819, 62-330.100, 62-330.200, 62-341.486, 62-341.490, 62-341.494, 62-346.051, 62-346.301, 62-528.610, 62-528.630, 62-600.120, 62-600.200, 62-600.300, 62-600.400, 62-600.430, 62-600.440, 62-600.500, 62-600.520, 62-610.200, 62-610.300, 62-610.310, 62-610.650, 62-610.670, 62-610.850, 62-611.110, 62-611.200, 62-611.450, 62-611.500, 62-611.600, 62-611.650, 62-611.700, 62-620.320, 62-620.400, 62-620.620, 62-620.800, 62-624.800, 62-625.300, 62-673.340, 62-673.610, 62-701.200, 62-701.300, 62-709.500, 62-711.540, 62-761.200, 62-762.201, 62-770.200, 62-771.100, 62-777.150, 62-777.170, 62-780.200, 62-782.200, 62-785.200, and 62B-49.012, F.A.C.

Rule 62-302.530, F.A.C., is referenced by a number of other rules. The proposed amendments will have no effect on the following referenced rules other than to authorize the Department to create a Class III-Limited sub-classification for surface waters to which alternative surface water quality criteria for certain limited parameters may apply in the future: Rules 62-302.244, 62-302.200, 62-302.400, 62-302.500, 62-302.530, 62-303.320, 62-303.330, 62-303.370, 62-661.500, 62-611.600, and 62B-49.008, F.A.C.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS: This rule establishes a new sub-classification of waters (Class III-Limited) and describes the requirements for waterbody reclassifications. This rule establishes the classification structure and process for moving a waterbody into a Class III-Limited classification, but it does not actually move any waters from their existing classification. Because no waters are reclassified under this rulemaking, the proposed rule does not have any direct economic effect on small businesses or any other regulated entities. Any subsequent rulemaking to reclassify waters to a lower classification would also not be expected to have any net adverse economic effect on small counties, small businesses, or any regulated entity that applies for a reclassification because reclassifications will only be sought when there would be an economic

advantage to do so. The Department has been advised by industry representatives that any regulated entity, after conducting a cost-benefit analysis, would not seek reclassification unless the short term cost of the reclassification process was offset by the long term economic benefits of the resulting regulatory relief. Reclassifications will also not have any adverse economic impacts on small counties, small businesses, or other entities that use the waters addressed by a reclassification because reclassifications will not be allowed to lower existing water quality or remove existing uses in the reclassified water or downstream waters. The Department prepared a SERC to evaluate the potential future costs associated with future rulemaking triggered by a petition for reclassification (e.g., costs for water quality sampling, hiring a consultant, applying for a Site Specific Alternative Criterion).

Any person who wishes to provide information regarding a statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

SPECIFIC AUTHORITY: [403.061](#), [403.062](#), [403.087](#), [403.088](#), [403.504](#), [403.704](#), [403.804 FS](#).

LAW IMPLEMENTED: [403.021](#), [403.061](#), [403.087](#), [403.088](#), [403.141](#), [403.161](#), [403.182](#), [403.502](#), [403.504](#), [403.702](#), [403.708 FS](#).

A HEARING WILL BE HELD AT THE DATE, TIME AND PLACE SHOWN BELOW:

DATE AND TIME: Thursday, May 20, 2010, 9:00 a.m.

PLACE: Florida Department of Environmental Protection, 3900 Commonwealth Blvd., Conference Room A, Tallahassee, FL

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodations to participate in this workshop/meeting is asked to advise the agency at least 5 days before the workshop/meeting by contacting: Eric Shaw at (850)245-8429. If you are hearing or speech impaired, please contact the agency using the Florida Relay Service, 1(800)955-8771 (TDD) or 1(800)955-8770 (Voice).

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: Eric Shaw, Department of Environmental Protection, Bureau of Assessment and Restoration Support, MS 6511, 2600 Blair Stone Road, Tallahassee, FL 32399-2400, (850)245-8429 or e-mail: eric.shaw@dep.state.fl.us. Copies of the draft rule as well as further information also may be obtained from the Department's internet site at:

<http://www.dep.state.fl.us/secretary/designateduse.htm>. (OGC No. 09-3372)

THE FULL TEXT OF THE PROPOSED RULE IS:

62-302.400 Classification of Surface Waters, Usage, Reclassification, Classified Waters.

(1) All surface waters of the State have been classified according to designated uses as follows:

CLASS I Potable Water Supplies

CLASS II Shellfish Propagation or Harvesting

CLASS III Fish Consumption; Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife

CLASS III-Limited Fish Consumption; Recreation or Limited Recreation; and/or Propagation and Maintenance of a Limited Population of Fish and Wildlife

CLASS IV Agricultural Water Supplies

CLASS V Navigation, Utility and Industrial Use

(2) Classification of a ~~waterbody~~ ~~water body~~ according to a particular designated use or uses does not preclude use of the water for other purposes.

(3) The specific water quality criteria corresponding to each surface water classification are listed in Rules 62-302.500 and 62-302.530, F.A.C.

(4) Water quality classifications are arranged in order of the degree of protection required, with Class I water having generally the most stringent water quality criteria and Class V the least. However, Class I, II, and III surface waters share water quality criteria established to protect fish consumption, recreation and the propagation and maintenance of a healthy, well-balanced population of fish and wildlife.

(5) Class III-Limited surface waters share the same water quality criteria as Class III except for any site specific alternative criteria that have been established for the waterbody under Rule 62-302.800, F.A.C. Class III-Limited waters are restricted to waters with human-induced physical or habitat conditions that prevent attainment of Class III uses and do not include waterbodies that were created for mitigation purposes. Class III-Limited waters are restricted to:

(a) Wholly artificial waterbodies that were constructed consistent with regulatory requirements under Part I or Part IV of Chapter 373 or Part V of Chapter 403, F.S.; or

(b) Altered waterbodies that were dredged or filled prior to November 28, 1975. For purposes of this section, "altered waterbodies" are those portions of natural wetlands and other surface waters that were dredged or filled

prior to November 28, 1975, to such an extent that they exhibit separate and distinct hydrologic and environmental conditions from any waters to which they are connected.

~~(6)(5)~~ No change.

~~(7)(6)~~ Any person regulated by the Department or having a substantial interest in a surface waterbody ~~this Chapter~~ may seek reclassification of waters of the State by filing a petition with the Department in accordance with Rule 28-103.006, F.A.C. Secretary in the form required by Section 120.57, F.S.

~~(8)(7)~~ A petition for reclassification shall reference and be accompanied by the information necessary to support the affirmative findings required in this ~~Section~~, as described in the DEP document titled, "Process for Reclassifying the Designated Uses of Florida Surface Waters" (DEP-SAS-001/10), incorporated by reference herein. Copies of the Process document may be obtained from the Department's internet site at <http://www.dep.state.fl.us/water> or by writing to the Florida Department of Environmental Protection, Standards and Assessment Section, 2600 Blair Stone Road, MS 6511, Tallahassee, FL 32399-2400 ~~to support the proposed reclassification.~~

~~(9)(8)~~ All reclassifications of waters of the State shall be adopted, after public notice (including notification to affected local governments and sovereign American Indian tribes) and public hearing, only upon ~~an~~ affirmative findings by the Environmental Regulation Commission that:

(a) The proposed reclassification will establish the present and future most beneficial use of the waters; ~~and~~

(b) Such a reclassification is clearly in the public interest after considering public input, including special consideration of input submitted by elected city or county governing bodies and sovereign American Indian tribes, who represent the public interest where the waters, and affected upstream and downstream waters, are located;

(c) The proposed reclassification does not allow for the lowering of existing water quality nor result in the nonattainment of water quality standards in downstream waters;

(d) The demonstrations required under subsections (10)-(12) below are met as applicable; and

(e) The requirements contained in Rule 62-302.400, F.A.C., are satisfied.

~~(10)(9)~~ Reclassification of waters of the State which establishes more stringent criteria than presently established by this ~~Chapter~~ shall be adopted, only upon additional affirmative finding by the Environmental Regulation Commission that the proposed designated use is attainable, upon consideration of environmental, technological, social, economic, and institutional factors. The assessment of attainability shall address upstream effects of reclassification.

(11) If rulemaking is initiated for a less stringent classification, the petitioner or the Department shall include in the reclassification documentation appropriate and scientifically defensible water quality, biological, hydrological, and habitat studies and analyses, as well as environmental, technological, social, and economic studies, including costs to small businesses and local governments, as necessary to establish the present and future most beneficial use by demonstrating that:

(a) No existing uses are being removed and the less stringent criteria associated with the designation will not result in the nonattainment of water quality standards in downstream waters;

(b) The designated uses being removed cannot be attained by implementing effluent limits required by sections 301(b) and 306 of the Federal Clean Water Act in conjunction with implementation of cost-effective and reasonable best management requirements for nonpoint source pollution control; and

(c) One or more of the following situations occur:

1. Concentrations of naturally occurring substances prevent the attainment of the use;

2. Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met;

3. Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place;

4. Dams, diversions, or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the waterbody to its original condition or to operate such modification in a way that would result in the attainment of the use;

5. Physical conditions related to the natural features of the waterbody, such as the lack of a proper substrate, cover, flow, depth, pool, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or

6. Controls more stringent than those required by sections 301(b) and 306 of the Federal Clean Water Act would result in substantial and widespread economic and social impact.

(12) The petition for a Class III-Limited classification shall include appropriate Site Specific Alternative Criteria proposals that are protective of the most beneficial use as determined by the demonstration in subsection (9)

above. Site Specific Alternative Criteria established to support the Class III-Limited designated use are restricted to numeric criteria for any or all of the following parameters: nutrients (including nutrient response variables), bacteria, dissolved oxygen, alkalinity, specific conductance, transparency, turbidity, biological integrity, or pH. Site Specific Alternative Criteria for these parameters shall not be set at levels less stringent than water quality conditions at the time of reclassification. Proposed Site Specific Alternative Criteria for other parameters must fully protect Class III uses.

(13) Nothing contained in subsections (8) through (12) above shall be deemed to pre-empt or prohibit the regulatory implementation, adoption, continuation or enforcement of more stringent criteria that are established by a local government through a local pollution control program.

(14)(10) The surface waters of the State of Florida are classified as Class III – Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife, except for certain waters which are described in subsection 62-302.400(16), F.A.C. Rule 62-302.400(12), F.A.C. A waterbody ~~water body~~ may also be designated as an Outstanding Florida Water or an Outstanding National Resource Water ~~in addition to being classified as Class I, Class II, or Class III. Outstanding Florida Waters and Outstanding National Resource Waters are not designated use classifications.~~ A waterbody ~~water body~~ may also have special standards applied to it. However, notwithstanding any provision of this section, no classification action or change in designated use shall result in degradation of water quality in Outstanding Florida Waters or Outstanding National Resource Waters. Outstanding Florida Waters and Outstanding National Resource Waters are listed in Rule 62-302.700, F.A.C.

(15)(11) No change.

(16)(12) Exceptions to Class III:

(a) No change.

(b) The following listed waterbodies ~~water bodies~~ are classified as Class I, Class II, Class III-Limited, or Class V:

1. through 67. No change.

Rulemaking Specific Authority 403.061, 403.062, 403.087, 403.088, 403.504, 403.704, 403.804 FS. Law Implemented 403.021, 403.061, 403.087, 403.088, 403.141, 403.161, 403.182, 403.502, 403.504, 403.702, 403.708 FS. History—Formerly 28-5.06, 17-3.06, Amended and Renumbered 3-1-79, Amended 1-1-83, 2-1-83, Formerly 17-3.081, Amended 4-25-93, Formerly 17-302.400, Amended 12-26-96, 8-24-00, 12-7-06,_____.

62-302.530 Table: Surface Water Quality Criteria.

The following table contains both numeric and narrative surface water quality criteria to be applied except within zones of mixing. The left-hand column of the Table is a list of constituents for which a surface water criterion exists. The headings for the water quality classifications are found at the top of the Table. Applicable criteria lie within the Table. The individual criteria should be read in conjunction with other provisions in water quality standards, including Rule 62-302.500, F.A.C. The criteria contained in Rule 62-302.500, F.A.C., also apply to all waters unless alternative or more stringent criteria are specified in Rule 62-302.530, F.A.C. Unless otherwise stated, all criteria express the maximum not to be exceeded at any time. In some cases, there are separate or additional limits, which apply independently of the maximum not to be exceeded at any time. For example, annual average (denoted as “annual avg.” in the Table) means the maximum concentration at average annual flow conditions (see subsection 62-302.200(2), F.A.C.). In applying the water quality standards, the Department shall take into account the variability occurring in nature and shall recognize the statistical variability inherent in sampling and testing procedures. The Department’s assessment methodology, set forth in Chapter 62-303, F.A.C., accounts for such natural and statistical variability when used to assess ambient waters pursuant to sections 305(b) and 303(d) of the Federal Clean Water Act.

Criteria for Surface Water Quality Classifications							
				Class III and Class III-Limited (see Note 4): Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife			
Parameter	Units	Class I: Potable Water Supply	Class II: Shellfish Propagation or Harvesting	Predominantly Fresh Waters	Predominantly Marine Waters	Class IV: Agricultural Water Supplies	Class V: Navigation, Utility, and Industrial Use
(1) through (70) No change.							

Notes: (1) "ln H" means the natural logarithm of total hardness expressed as milligrams/L of CaCO₃. For metals criteria involving equations with hardness, the hardness shall be set at 25 mg/L if actual hardness is < 25 mg/L and set at 400 mg/L if actual hardness is > 400 mg/L; (2) This criterion is protective of human health not of aquatic life. (3) For application of dissolved metals criteria see paragraph 62-302.500(2)(d), F.A.C. (4) Class III-Limited waters have at least one Site Specific Alternative Criterion as established under Rule 62-302.800, F.A.C. Rulemaking Specific Authority 403.061, 403.062, 403.087, 403.504, 403.704, 403.804 FS. Law Implemented 403.021, 403.061, 403.087, 403.088, 403.141, 403.161, 403.182, 403.502, 403.702, 403.708 FS. History—New 1-28-90, Formerly 17-3.065, Amended 2-13-92, 6-17-92, Formerly 17-302.540, 17-302.550, 17-302.560, 17-302.570, 17-302.580, Amended 4-25-93, Formerly 17-302.530, Amended 1-23-95, 1-15-96, 5-15-02, 7-19-04, 12-7-06,_____.

NAME OF PERSON ORIGINATING PROPOSED RULE: Jerry Brooks

NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: Michael W. Sole

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: April 13, 2010

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAW: July 31, 2009