

November 13, 2020

Mr. Bill Bartnick
Environmental Administrator
Office of Agricultural Water Policy
Submitted Via Bill.Bartnick@FDACS.gov

RE: 5M-1.001, 5M-1.008, and 5M-1.009 Rulemaking

Dear Mr. Bartnick:

Please accept the following comments submitted by Sierra Club, Florida Springs Council, Waterkeepers Florida, and Center for Biological Diversity pertaining to 5M-1.001, 5M-1.008, and 5M-1.009 rulemaking:

1. Draft Nutrient Application Reporting Form (NARF)

The current draft of the NARF provides a Yes/No entry for whether the Producer provided an electronic Excel spreadsheet thereby providing the option for handwritten entries and submissions. Handwritten entries have a great propensity to be illegible and/or submitted in unclear formats. In addition, pdfs and/or handwritten forms will be unsearchable.

Requested change: Require electronic submission, which provides legibility, uniform format, searchable details, and proof of delivery, in order to collect usable data

2. Aggregation

The draft rule appears to have FDACS collect N and P application information, but provides that it is aggregated prior to being given to DEP. This is inconsistent with 403.067 (7)(c) 5 and (d) 3. F.S. and diminishes the data's value.

Aggregated data can be useful, but it can also mask important information only available when it is disaggregated. We note that none of the data collected and reviewed under 5M-1.008 (2) is aggregated. The documentation collected and reviewed by FDACS includes detailed information on specific fertilizer application dates, locations, and total pounds of N and P applied. However, when it comes to the N and P fertilizer application information, the data to be provided to DEP is aggregated both geographically and temporally by 5M-1.008 (3) of the draft rule, the draft Notice of Intent (NOI), and the draft Nutrient Application Report Form (NARF).

The first sentence of 5M-1.008 (3) calls for the collection of records related to N and P fertilizer application, but the draft rule also provides that these records are to be "retained" by FDACS, as opposed to the "review" that all other documentation undergoes. The second sentence then says Producers are to provide the required N and P application records through the NARF. Utilizing a single form is good practice since the idea is to collect data from thousands of producers and to be able to draw meaningful conclusions from an examination of that data. However, instead of having Producers simply transfer the details recorded as required by the BMP Manuals into the

NARF, the draft rule calls for aggregation of the data in paragraphs (3)(d) “Total amount of nitrogen applied in pounds”, (3)(e) “Total amount of phosphorous as P₂O₅ applied in pounds”, and (3)(f) “Total acreage over which nitrogen or phosphorous as P₂O₅ was applied.” The aggregation of data continues in both the draft Notice of Intent form and the draft NARF. The draft NOI clearly allows the aggregation of parcels on which the same BMPs are being implemented (see the third bullet on the first page of the draft NOI form). This aggregation will not serve the goal of collecting usable data (or protecting water resources) when contiguous parcels in the same county that are owned or leased by the same entity with the same kind of operation on each and the same BMPs include some parcels that are on the shores of lakes or rivers, with different topologies, or that perhaps straddle basin boundaries.

Further, the form appears to allow or require the fertilizer applied to a parcel that is in use for only some of the time, to be aggregated with fertilizer applied to parcels in more frequent use. Since rain events are important factors in fertilizer runoff, the dates associated with its application are useful data that should not be lost if water quality protection is the goal.

Requiring Producers to analyze the rule and determine which fertilizer applications should or should not be aggregated is an unnecessary burden and introduces avoidable error into the system. The Department of Environmental Protection should receive the data as recorded by the Producer and make decisions on geographical and temporal aggregation.

Regarding the draft NARF instructions, the underlined language under “Application Period (Month(s) and Year)” allows the aggregation of total application of N and P for periods of up to six months. There are multiple reasons to (1) disallow such aggregation and (2) require full disclosure of nutrient application information:

The Florida Statutes require the information from documentation obtained in the required onsite inspections to be provided to DEP. The Statutes do not say a “summary” or an “aggregation” of the information obtained during the onsite visits.

403.067(7)(c) 5., F.S. states:

5. Subject to subparagraph 6., **the Department of Agriculture and Consumer Services shall provide to the department information obtained pursuant to subparagraph (d)3.**

That subparagraph, 403.067(7) (d) 3. F.S., provides that at least every two years FDACS will perform onsite inspections to verify that BMPs are being implemented properly. The subparagraph further provides: “**Such verification must include a collection and review of the best management practice documentation from the previous 2 years required by rules adopted pursuant to subparagraph (c)2., including, but not limited to, nitrogen and phosphorus fertilizer application records**, which must be collected and retained pursuant to subparagraphs (c)3., 4., and 6. ...”

The statutory mandate is that the information must be collected from the best management practice documentation. It is information about the application of N and P fertilizer. It is not information about the purchase of N or P fertilizer, though purchase records may be a way of proving the record keeping is accurate. The statute also says “collection and review” not “collection and retention” of the BMP documentation.

The reason this is important point is also in statute; 403.067 (7)(c) 4 reads:

4. When water quality problems are demonstrated, despite the appropriate implementation, operation, and maintenance of best management practices and other measures required by rules adopted under this paragraph, the department, a water management district, or the Department of Agriculture and Consumer Services, in consultation with the department, shall institute a reevaluation of the best management practice or other measure. If the reevaluation determines that the best management practice or other measure requires modification, the department, a water management district, or the Department of Agriculture and Consumer Services, as appropriate, shall revise the rule to require implementation of the modified practice within a reasonable time period as specified in the rule.

If properly implemented BMPs prove to be inadequate to achieve the TMDL, a reevaluation of the BMPs is required. A legitimate reevaluation of BMPs cannot be carried out if the details of two years of each Producer's information are lost to mass aggregation, because both diagnosis and prescription for cure require facts, not aggregations of facts, to inform judgment. The same problem occurs if a spike in N or P is discovered in a nearby water body or waterbody segment. Disaggregated data is essential. Since DEP is tasked with the overall structure and operation of BMAPs, they should be the entity that decides whether and how relevant data should be aggregated or disaggregated.

This will not require new recordkeeping and results in less work for the Producer, who would only need to transfer the data already required by existing BMP manuals. Below is what the example record-keeping forms in the appendix of each manual ask for:

- Cow/Calf (2008) - Maintain records of fertilizer application. Records should include soil test analysis, date of application, fertilizer formulation, application rate, location and acreage, and worksheet results.
- Poultry (2016) - Manure/litter analysis; waste pond analysis; records of offsite waste transfers (including N and P); detailed record of onsite land application of nutrients; and soil samples.
- Sod (2008) - Maintain records of all soil and tissue test results and sample locations and maintain records of the amount and type of fertilizer used per application.
- Vegetable (2015) - Soil Sample records, tissue sample records, detailed fertilization records; and rainfall.
- Citrus (2012) - P fertilization rate on soil and/or leaf tissue tests; analysis of leaf tissue test result to determine need for and appropriate rates of supplemental fertilizer; record of irrigation system inspections; detailed fertilization records; and rainfall.
- Specialty Fruit & Nut (2011) - Nutrient applications; soil/tissue testing; and rainfall.

- Dairy (2015) - Nutrient balance calculations; acreage and herd size; waste pond/irrigation source analysis; Soil sample analysis, wastewater application records; nutrient application records for each field per crop or year; and offsite transfers.
- Equine (2011) - Soil samples and nutrient applications.
- Nursery (2014) - Soil and tissue samples; fertilization records; and rainfall

Finally, Producers' trade secrets are protected by subparagraph 6 (below) which provides that the information collected by FDACS and delivered to DEP must be kept confidential by all state agencies to whom it is given.

6. Agricultural records relating to processes or methods of production, costs of production, profits, or other financial information held by the Department of Agriculture and Consumer Services pursuant to subparagraphs 3., 4., and 5. or pursuant to any rule adopted pursuant to subparagraph 2. are confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Upon request, records made confidential and exempt pursuant to this subparagraph shall be released to the department or any water management district provided that the confidentiality specified by this subparagraph for such records is maintained.

Requested change: FDACS must collect and provide to FDEP all fertilizer application data as recorded pursuant to the applicable BMP Manual. If aggregation is allowed or required, it must be at DEP's discretion and must not be at the expense of the collection of disaggregated data.

Specific Amendments:

Amend the second sentence of the third bullet of the NOI by inserting between the words "the same type of operation is conducted on each included parcel," and "and the same BMPs identified on the checklist" the words "their hydrogeology is substantially the same,"

Amend the first sentence of the Instructions for filling out the NARF:

Strike the first sentence starting with "Enter the month(s) and year..." and insert "Enter the date of each application of fertilizer or other nutrient source. (If the exact date is unknown, enter the month and year.)"

Amend the underlined language on the Instructions for filling out the NARF:

Insert between the words "Producers may opt to" and "provide total application amounts" the word "also". This would result in the following: "Producers may opt to also provide total application amounts..."

Amend the last sentence of the underlined language on the Instructions for filling out the NARF: Add at the end of the last underlined sentence the words "and for the Department to use to ensure the NARF is accurately and completely filled out". The last sentence will then read, "Records documenting the monthly application amounts must be available for inspection by OAWP representatives to verify the aggregated application amounts and for the Department to use to ensure the NARF is accurately and completely filled out."

Add a new subsection (4) to 5M-1.008 that reads “All records collected pursuant to paragraph (3) shall be provided, promptly and in unaltered form, to DEP.”

3. Timeline for compliance (and presumption thereof)

In regards to 403.067 (7) (d) *Enforcement and verification of basin management action plans and management strategies.*—

3. At least every 2 years, the Department of Agriculture and Consumer Services shall perform onsite inspections of each agricultural producer that enrolls in a best management practice to ensure that such practice is being properly implemented. Such verification must include a collection and review of the best management practice documentation from the previous 2 years required by rules adopted pursuant to subparagraph (c)2., including, but not limited to, nitrogen and phosphorus fertilizer application records, which must be collected and retained pursuant to subparagraphs (c)3., 4., and 6. The Department of Agriculture and Consumer Services shall initially prioritize the inspection of agricultural producers located in the basin management action plans for Lake Okeechobee, the Indian River Lagoon, the Caloosahatchee River and Estuary, and Silver Springs.

The current draft rule provides for the following:

5M-1.001 (5): The definitions of “Notice of Intent” and “enrolled” make it clear that enrollment is when FDACS representatives identify the Applicable BMPs for a parcel during a site visit.

5M-1.008 (1): Implementation verification (IV) will take place in a site visit “at least every two years,” therefore, the first IV site visit will take place up to two years after enrollment for new enrollees, or within two years of the effective date of either the bill or the rule for Producers who are already enrolled.

5M-1.009 (1)(a): When an IV site visit indicates an Enrolled Producer has not achieved proper implementation of the Applicable BMPs, FDACS works with them to identify “corrective measures” and can give them up to the next IV site visit to take those “corrective measures” and achieve proper implementation (which amounts to a total of up to four years from enrollment or the effective date of the bill or rule.)

5M-1.009 (1)(b): When the next IV site visit occurs, if the corrective measures have not been implemented, FDACS is to identify “remedial measures” to be taken by the Producer. Another two years can be granted for achieving proper implementation (for a total of up to six years from enrollment or the effective date of the bill or this rule).

We strongly oppose the above-referenced timeline for the following reasons:

For two years the Producer could be waiting for a site visit to become enrolled.

For up to two years after the site visit that initiates enrollment, the Producer could be implementing the BMPs improperly but retain the presumption of compliance and would continue to enjoy the presumption of compliance for six years after enrolling in the BMP(s).

Only in the event that a Producer (or Landowner) fails to implement the identified remedial measures do they become subject to subsection (2) of 5M-1.009, which provides that FDACS notifies DEP of their failure to achieve the BMP(s) and the presumption of compliance can be withdrawn and water quality monitoring begun. Six years of failure to implement BMPs properly is unacceptable and absolutely contrary to the protection of water resources.

Moreover, there is no substantive difference between “corrective measures” and “remedial measures” – a quick search in the dictionary reveals each is used to define the other. The draft language provides for the avoidance of any sanctions whatsoever for failing to properly implement BMPs.

Requested changes:

Regarding 5M-1.009: “Best Management Practices Implementation Assistance” should be rendered *before* the presumption of compliance is conferred on the Producer. The Producer should demonstrate competence to properly implement the Applicable BMPs to earn the presumption. Presumption should be provisional; if the Producer or Landowner cannot implement the BMP, they should not get six years of failure before it is withdrawn. Once a Producer or Landowner has demonstrated a sufficient grasp of what is needed to achieve the Applicable BMPs, the presumption of compliance can take effect.

In order to make this practicable, give new BMPs enrollees a six-month window to master what is needed to implement them. At the first IV site visit, if they are not properly implementing the BMPs, go directly to identifying the remedial measures with a one year limit to accomplish them before being subject to 5M-1.009(2) and being reported to DEP as non-compliant.

A weakness of the statute is the lack of a link between the Producer’s enrollment in the BMP program and verification of the Producer’s performance until two years later. Enrollment should require a demonstration that the Producer can implement the Applicable BMPs and then hold them accountable for doing so. Failure to properly implement the Applicable BMPs after having demonstrated the ability to do so implies either some natural disaster (for which an exception should be made), or a willful decision to abandon the implementation which should result in being immediately subject to referral to DEP as non-compliant.

Accurate Choice of Words

At the end of the last sentence of 5M-1.008 (3) on line 48, the text reads “...information pursuant to the Enrolled parcel.” Note that “pursuant” is defined as meaning “as required by” which the Enrolled parcel cannot do.

Requested change: Replace “pursuant to” with “in reference to” or “relating to.”

Finally, we look forward to submitting further comments during the rulemaking process and would appreciate receiving specific quantitative details so that our subsequent comments may be well informed. Please provide the current number of inspectors, properties, and visits per year per inspector, in addition to the projected number of inspectors and projected number of visits per year per inspector with regard to the post-rulemaking time period(s).

Thank you for your prompt attention to this matter. Please respond to this comment submission and list of questions directly to the below-listed signatories.

Respectfully submitted,

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