



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

**REGION 4
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61 FORSYTH STREET, SW
ATLANTA, GEORGIA 30303-8960**

May 24, 2023

Secretary Emile D. Hamilton
Florida Department of Environmental Protection
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

Dear Secretary Hamilton:

In light of ongoing engagement between our offices concerning the scope of waters subject to Florida's assumed Clean Water Act (CWA) Section 404 program, and in consideration of the significance of this matter, I am writing to follow up on communications described below.

As I communicated to you in a letter dated December 9, 2021, the CWA and its implementing regulations require Florida Department of Environmental Protection (FDEP) to implement its program consistent with the current definition of "waters of the United States." As FDEP proceeds with the issuance of CWA Section 404 permitting decisions, it must ensure that any discharges of pollutants into waters which are not otherwise exempted from permitting requirements (e.g., under Section 404(f)), are authorized by a CWA Section 404 permit.

On April 21, 2020, the EPA and the Department of the Army published the Navigable Waters Protection Rule (NWPR) to define "waters of the United States" in the Federal Register. Nothing in Florida's statute or regulations codifies the NWPR. On August 30, 2021, the U.S. District Court for the District of Arizona vacated and remanded the NWPR in the case of *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*. Considering this order, the agencies halted implementation of the NWPR and returned to interpretation of "waters of the United States" consistent with the pre-2015 regulatory regime.

Thereafter, the EPA issued the "Revised Definition of 'Waters of the United States'" rule that became effective on March 20, 2023 ("2023 Rule"). Florida joined a challenge to the 2023 Rule. On April 12, 2023, a district court judge in North Dakota issued an order preliminarily enjoining this rule in 24 states, including Florida. With the court's injunction, the pre-2015 regulatory regime became effective again in the 24 states challenging the 2023 Rule. In seeking a preliminary injunction of the 2023 Rule, Florida did not dispute that the pre-2015 regulatory regime had been applicable prior to the 2023 Rule and would come back into effect in the challenging states should the challenge be successful. See *West Virginia et al. v. EPA et al.*, case no. 3:23-cv-00032-PDW-ARS, Motion for Preliminary Injunction at 25. The NWPR has not been the legally applicable rule since August 30, 2021.

Despite vacatur of the NWPR over a year and a half ago, FDEP has continued to issue public notices for individual permits and "no permit required" determinations that rely on that rule. This practice is

inconsistent with the requirements of the CWA and Section 404 program regulations. FDEP continued to apply the NWPR to its permitting decisions following the effective date of the March 2023 Rule as well as following the temporary injunction of that Rule in Florida, which restored the pre-2015 regulatory regime. As recently as its May 10, 2023 letter, FDEP reiterated its position. FDEP's continued application of the NWPR has no basis in law.

In a letter to FDEP dated January 31, 2022, the EPA affirmed the applicable definition of "waters of the United States":

"The CWA and the EPA's implementing regulations require that any state administering a Section 404 program regulate the discharge of dredged or fill material into all "waters of the United States" within its jurisdiction, aside from those retained by the Corps. 33 USC § 1344(g); 40 CFR § 233.1(b). The EPA's regulations further provide that a state program shall at all times be conducted in accordance with the CWA. 40 CFR § 233.1(d). Pursuant to these requirements, Florida is required to implement the current applicable definition of "waters of the United States," consistent with the pre-2015 Rule regulatory regime."

The EPA has also expressed its concern with FDEP's use of the NWPR in instances other than the December 9, 2021 and January 31, 2022 letters, including:

- The EPA has objected to FDEP issuing a CWA Section 404 permit for proposed projects 39 times as of April 28, 2023. Of these, 35 objections were based on insufficient information to determine the extent to which FDEP considered discharges into all waters of the United States, including many cases of explicit reliance on the NWPR.
- The EPA identified FDEP's continued use of the vacated NWPR as a concern with FDEP's implementation of its CWA Section 404 program in letters dated May 23, 2022, and April 6, 2023, responding to FDEP's first two draft annual reports. This included identification of concerns that No Permit Required verifications have appeared to be based on the NWPR. This is inconsistent with the CWA and Section 404 program requirements.
- As part of our oversight responsibilities to ensure state program consistency with the requirements of the CWA, the EPA first invoked Section II.B.(3) of the MOA between our two agencies in March 2022, asking that FDEP supply permit applications for projects proposed for individual permits except those for which the applicant has accepted all wetlands and surface waters delineated per 62-340, F.A.C. and regulated under Part IV of Chapter 373, F.S. as waters of the United States. The EPA has now sent seven such letters, covering the timeframe from February 28, 2022, to July 31, 2023, with the information received revealing additional projects involving reliance on the vacated NWPR.

To reiterate, the legally applicable definition of "waters of the United States" in Florida has been and continues to be the pre-2015 Rule regulatory regime until further notice. As FDEP proceeds with the issuance of new CWA Section 404 permits or No Permit Required verifications, it must ensure that any discharges of pollutants into waters protected under the pre-2015 Rule regulatory regime, including discharges into waters outside the scope of the vacated NWPR, which are not otherwise exempted from permitting requirements under that regime (e.g., under Section 404(f)), are authorized by a CWA Section 404 permit. Any discharges of pollutants into waters protected under the pre-2015 Rule regulatory regime which do not have a permit or are not otherwise exempted from permitting

requirements under that regime, violate the Act and are subject to citizen suits as well as state and federal enforcement.

The EPA also reiterates that to base permitting or enforcement decisions on a regulatory regime other than as outlined herein is inconsistent with the CWA. If you have any questions or wish to discuss this matter, please contact me or have a member of your staff contact Ms. Denisse Diaz, Acting Director of the Water Division at Diaz.Denisse@epa.gov or (404) 562-9248.

Sincerely,

Daniel Blackman
Regional Administrator