

Waters of the United States: U.S. Environmental Protection Agency Letter Addressing Florida's Regulatory Position



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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Region 4 of the United States Environmental Protection Agency ("EPA") sent a January 31st letter to the Florida Department of Environmental Protection ("FDEP") responding to its correspondence regarding the Clean Water Act definition of waters of the United States ("WOTUS").

The letter was transmitted from Jeaneanne Gettle, EPA Region 4 Director, Water Division to FDEP Deputy Secretary John Truitt.

Florida recently obtained delegation of the Clean Water Act Section 404 program. The state transmitted a December 17, 2021, letter to EPA regarding the definition of WOTUS. EPA's January 31st letter indicates that FDEP suggested that:

... there is "confusion" and a "complex and unusual legal situation" regarding the governing definition of "waters of the United States."

The FDEP letter presumably addressed the Biden Administration's decision to apply the pre-2015 definition of WOTUS. EPA assumes that delegated states will in turn apply this interpretation.

To the extent Florida is arguing that the WOTUS issue is unsettled, EPA states in part:

... in this matter we disagree; the applicable standard is straightforward. As we stated in our letter of December 9, 2021, to Secretary Hamilton, two district courts have vacated the most recent regulation defining "waters of the United States," the Navigable Waters Protection Rule. *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*, No. 20-00266 (D. Ariz. Aug. 30, 2021) and *Navajo Nation v. Regan*, No. 2:20-cv-00602 (D.N.M. Sept. 27, 2021). Based on those court decisions and the vacatur, the EPA and the U.S. Army Corps of Engineers (Corps) have been clear that the definition of "waters of the United States" currently in effect nationwide is the pre-2015 Rule regulatory regime. See EPA, Current Implementation of Waters of the United States, <https://www.epa.gov/wotus/currentimplementation-waters-united-states>.

EPA Region 4 further argues that despite FDEP's status of a delegated state it is required to implement the current applicable definition of WOTUS consistent with the pre-2015 "regulatory regime."

FDEP also apparently noted 40 C.F.R. 233.16(b) which allows states a certain amount of time to implement changes to federal regulations when the change "requires revision" of state law. EPA deems this regulation inapplicable because it views the relevant Florida definitions (such as WOTUS) as consistent with the pre-2015 rule.

A copy of the EPA Region 4 letter can be downloaded [here](#).