



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4

ATLANTA FEDERAL CENTER
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ATLANTA, GEORGIA 30303-3104

January 31, 2022

Deputy Secretary John Truitt
Florida Department of Environmental Protection
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399

Dear Deputy Secretary Truitt:

Thank you for your letter of December 17, 2021, seeking to better understand the Environmental Protection Agency's position that the current definition of "waters of the United States," applicable nationwide, is the regulatory interpretation in place prior to promulgation of the 2015 Clean Water Rule ("pre-2015 Rule regulatory regime") and that this definition currently applies to Florida's Clean Water Act (CWA) Section 404 program.

Your letter affirms Florida's commitment to administering the assumed CWA Section 404 program consistent with the requirements of the statute, and the EPA appreciates this commitment. However, you also suggest that there is "confusion" and a "complex and unusual legal situation" regarding the governing definition of "waters of the United States." 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>.

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.

Florida's statute and regulation governing its administration of the Section 404 program are consistent with these federal requirements, as they simply codify the term "waters of the United States." Florida's

statute authorizing assumption of the CWA Section 404 permitting program defines “state assumed waters” to mean “waters of the United States that the state assumes permitting authority over pursuant to s. 404 of the Clean Water Act...and rules promulgated thereunder, for the purposes of permitting the discharge of dredge or fill material.” Fl. Stat. 373.4146. Florida’s implementing regulations, in turn, provide that “[t]he State 404 Program governs all dredging and filling in waters of the United States regulated by the State under Section 373.4146.” 62 Fla. Admin. Code Ann. 62-331.010. The EPA has not identified, and your letter did not reference, any Florida statute or regulation that would impede Florida’s implementation of the currently applicable federal definition of “waters of the United States.”

Your letter also refers to the EPA’s regulation at 40 CFR 233.16(b), which allows states a period of time to implement certain changes to federal regulations when the federal change “requires revision” of state law. That regulation is inapplicable for the reasons discussed above.

Your letter includes other questions about, among other things, any deliberations the EPA or the Department of Justice may have had regarding the applicability of the vacatur of the Navigable Waters Protection Rule, the EPA’s past experience in overseeing state adoption of federal standards, and the EPA’s schedule for rulemaking to redefine the scope of “waters of the United States.” None of these questions are relevant to Florida’s obligation, outlined above and in our letter of December 9, 2021, to implement the pre-2015 Rule regulatory regime defining “waters of the United States.” We also recognize that the Supreme Court has recently granted certiorari in a case implicating the definition of “waters of the United States,” *Sackett v. EPA* (21-454), but the Supreme Court’s pending review of this case does not affect Florida’s current obligations. We would be glad to discuss these issues or other questions you may have, other than internal federal government deliberations, by phone or video conference at your convenience.

The EPA appreciates the productive working relationship that our agencies have shared related to Florida’s administration of the CWA Section 404 program. Please feel free to reach out to me if you would like to discuss this matter or have a member of your staff contact Ms. Rosemary Calli, Section Chief, Wetlands & Streams Regulatory Section, at Calli.Rosemary@epa.gov or 404-562-9846.

Sincerely,

JEANEANNE
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Jeananne Gettle
Director, Water Division
US EPA Region 4