



FLORIDA DEPARTMENT OF Environmental Protection

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3900 Commonwealth Boulevard
Tallahassee, FL 32399

Ron DeSantis
Governor

Jeanette Nuñez
Lt. Governor

Shawn Hamilton
Secretary

December 17, 2021

Director Jeaneanne Gettle
United State Environmental Protection Agency, Region 4
61 Forsyth Street, Atlanta Federal Center
Atlanta, Ga 30303-8960

Dear Director Gettle:

Thank you for Regional Administrator Blackman's December 9, 2021, letter to Secretary Hamilton regarding Florida's 404 program. Secretary Hamilton asked that I respond on behalf of the Florida Department of Environmental Protection (DEP). We appreciate Region 4 opening a dialogue concerning the assortment of new developments noted in your letter related to the definition of "waters of the United States" ("WOTUS").

Even as actions at the federal level continue to create confusion as to the WOTUS definition, DEP remains committed to administering Florida's Section 404 program consistent with applicable law and to maintaining its cooperative partnership with EPA to ensure maximum protection of Florida's water resources. DEP is equally committed to administering its longstanding State Environmental Resource Permit (ERP) program, which is separate from Florida's 404 program and, in fact, regulates the "waters of the State" beyond the extent of any past or current definition of WOTUS.

DEP is closely evaluating this complex and unusual legal situation to chart a lawful course forward. While your letter states that the pre-2015 WOTUS definitional regime immediately applies to Florida's program, the letter overlooks a variety of crucial legal questions that DEP is continuing to evaluate to determine when modifications to our own program should occur. To that end, DEP would be assisted by gaining a better understanding of EPA's current position on the critical legal issues surrounding the U.S. District Court cases cited in your letter and EPA's pending rulemaking to reinstitute the pre-2015 definition. In particular, it would aid DEP to better understand EPA's position on the following:

- Please explain EPA's position that the Arizona and New Mexico vacatur orders are directly applicable to Florida's Section 404 program, and how the vacatur orders effectuate a change in federal regulation that is automatically applicable nationwide with regard to all federal *and state* programs. Within this question, please address whether EPA took into account the directives, principles, and considerations

found in the U.S. Department of Justice's *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* when deciding whether to apply the Arizona and New Mexico vacatur orders on a nationwide basis (and to Florida, specifically), and whether EPA, as a party to the litigation opposed to vacatur of the WOTUS definitional rule, has sought to appeal the Arizona or New Mexico vacatur orders or otherwise sought to obtain clarification directly from the district courts as to the scope of the courts' vacatur orders.

- Please provide EPA's rationale for re-imposing a pre-2015 regulatory regime *before* taking public notice and comment on its proposed rule and promulgating a final rule.
- Please provide EPA's position concerning whether 40 CFR 233.16(b), which provides a one-year and/or two-year period for states to update state 404 programs to reflect changes in federal law, is applicable to Florida's program in this context. Within this question, please explain EPA's position concerning whether the Arizona and New Mexico vacatur orders constitute a "modification . . . to [an] applicable Federal statute or regulation" within the meaning of 40 CFR 233.16(b).
- Please identify any federal regulation, other than 40 CFR 233.16, which governs the timeframe for states to update state Section 404 programs in response to changes in federal law, including changes purportedly arising from court orders.
- Please provide prior instances, if any, where EPA responded to a court vacatur order by instructing states with federally approved programs (whether via delegation, assumption, or otherwise) to immediately modify their respective state program without regard to timeframes expressly provided by regulations analogous to 40 CFR 233.16 or as otherwise provided by law.
- As you point out in your letter, "[w]hen EPA approved Florida's request to assume the Section 404 program, the term 'waters of the United States' was defined by the 2020 Navigable Waters Protection Rule." Please explain how Florida can unilaterally apply a new definition of Waters of the United States without giving the public the right to comment via the state rulemaking process and the federal process for states to update state Section 404 programs.
- Please provide additional information concerning the timing of a final rule adopting the pre-2015 definitional regime (as set forth in the proposed rule). Likewise, please provide additional information concerning the timing and content of the "second rulemaking" that EPA has stated it anticipates issuing "in the future" to "build upon the foundation of [the] proposed rule."

DEP looks forward to EPA's response and to continued discussions on these matters. Beyond the questions noted above, DEP welcomes any other input or perspectives that EPA may wish to provide at this time. If EPA has questions or concerns about DEP actions with regard to specific projects or applicants under the Florida Section 404 program, DEP trusts that both agencies will continue to follow the cooperative processes set forth in the Memorandum of Agreement between our agencies to address those issues wherever warranted. We stand ready to work alongside your office to protect Florida's water resources in full compliance with applicable law.

Thank you for your kind attention to this matter.

Respectfully,

A handwritten signature in blue ink, appearing to read 'John Truitt', with a stylized flourish at the end.

John Truitt
Deputy Secretary

CC: Shawn Hamilton, DEP Secretary
Justin Wolfe, DEP General Counsel
Leif Palmer, EPA Regional Counsel
Daniel Blackman, EPA Regional Administrator