



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

December 9, 2021

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

Dear Secretary Hamilton:

As the new Regional Administrator for the Environmental Protection Agency, Region 4, I look forward to working with you and your office to continue the important work of ensuring the protection of human health and environment in Florida. My staff has briefed me on recent communications between our offices regarding the scope of waters subject to the Clean Water Act Section 404 program that Florida has assumed. In consideration of the significance of this matter, I am writing this letter as a follow up to those discussions.

I would like to confirm that the EPA and the U.S. Army Corps of Engineers (the agencies) interpret the current definition of “waters of the United States” subject to the Section 404 program to be the regulatory interpretation in place prior to promulgation of the 2015 Clean Water Rule. Florida’s Section 404 permitting program must therefore regulate discharges of dredged or fill material into “waters of the United States” consistent with the pre-2015 Rule regulatory regime.

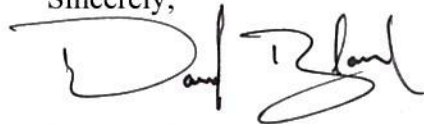
As background, the Clean Water Act generally prohibits the discharge of pollutants into “waters of the United States” unless authorized by a permit, including a permit issued pursuant to Section 404 of the Act. 33 USC §§ 1311(a); 502(7), (12). The Clean Water Act and the EPA’s implementing regulations 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 Act. 40 CFR § 233.1(d). Florida’s statute and regulations are consistent with this mandate. *See* Fl. Stat. 373.4146 (defining state-assumed waters as “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”); 62 Fla. Admin. Code Ann. 62-331.010 (providing that the “State 404 Program governs all dredging and filling in waters of the United States regulated by the State under Section 373.4146”).

When 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 (NWPR). On August 30, 2021, the U.S. District Court for the District of Arizona vacated and remanded the NWPR. *Pascua Yaqui Tribe v. U.S. Environmental Protection Agency*, No. 20-00266 (D. Ariz. Aug. 30, 2021). On September 27, 2021, the U.S. District Court for the District of New Mexico also issued an order vacating and remanding the NWPR. *Navajo Nation v. Regan*, No. 2:20-cv-00602 (D.N.M. Sept. 27, 2021). Pursuant to these cases, the agencies interpret "waters of the United States" under the statute and implementing regulations to mean the pre-2015 regulatory regime.

The Clean Water Act and its implementing regulations, as well as Florida's statute and regulations, require Florida to implement its program consistent with the definition of "waters of the United States," which since August 30, 2021, has effectively been the pre-2015 Rule regulatory regime. Accordingly, 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 do not have a permit or are not otherwise exempted from permitting requirements under that regime (e.g., under section 404(f)), violate the Act and are subject to citizen suits as well as state and federal enforcement.

If you have any questions or wish to discuss this matter, please contact me, or have a member of your staff contact Ms. Jeaneanne Gettle, Director of the Water Division at gettle.jeaneanne@epa.gov or 404-562-8979.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel Blackman". The signature is stylized and cursive.

Daniel Blackman
Regional Administrator