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EPAExecSec <EPAExecSec@epa.gov>
FW: Notice of Legal Violation re: EPA Approval of 404 Program
To: "CMS.OEX" <cms.oex@epa.gov>

From: Ana Correa <acorrea@earthjustice.org>
Sent: Tuesday, December 22, 2020 5:01 PM
To: Wheeler, Andrew <wheeler.andrew@epa.gov>
Cc: Fotouhi, David <Fotouhi.David@epa.gov>; oliver.potts@nara.gov; scott.a.spellmon.mil@mail.mil; andrew.d.kelly@usace.army.mil; Noah Valenstein <noah.valenstein@dep.state.fl.us>; justin.g.wolfe@dep.state.fl.us
Subject: Notice of Legal Violation re: EPA Approval of 404 Program
Importance: High

Please see attached.

Ana C. Correa

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December 22, 2020

Andrew Wheeler, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
wheeler.andrew@epa.gov

Re: EPA Approval of Florida's Application to Assume Administration of a Clean Water Act Program (Docket # EPA-HQ-OW-2018-0640-0001; EPA-HQ-OW-2018-0640); Effective Date, Failure to Codify

Dear Administrator Wheeler:

On December 17, 2020, you announced EPA's approval of Florida's request for authorization to assume jurisdiction over permitting under Section 404(a) of the Clean Water Act of 1972 ("CWA"), 33 U.S.C. § 1344, in waters of the United States. On December 22, 2020, EPA's approval of the program was published in the Federal Register, stating that "Florida's program assumption will be applicable December 22, 2020." 85 Fed. Reg. 83,553 (Dec. 22, 2020).

To the extent EPA intended to convey an immediate effective date for the transfer of 404 authority to the state, we write to advise you that an immediate effective date is in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553(d). Section 553(d) provides that "[t]he required publication or service of a substantive rule shall be made not less than 30 days before its effective date." Id. The only exceptions to the 30-day period between publication and effective date occur when the rule is: (1) a substantive rule that "grants or recognizes an exemption or relieves a restriction;" (2) an interpretive rule or statement of policy; or (3) "the agency otherwise provides for good cause found and published with the rule." Id. § 553(d)(1)–(3). None of those exceptions apply here.

EPA regulations require that notice of a state program approval be published in the Federal Register, and provide that transfer of an approved 404 program to the state "shall not be considered effective until such notice appears in the Federal Register" and that the U.S. Army Corps of Engineers "shall suspend issuance" of 404 permits in state-assumed waters "on such effective date." 40 C.F.R. § 233.15(h). The regulations do not authorize an immediate effective date. To comply with the APA, the transfer of 404 authority to a state is not effective until thirty days following publication of EPA's approval in the Federal Register.

Moreover, EPA's December 22, 2020, approval notice fails to codify the state program in the Code of Federal Regulations, 40 C.F.R. Subpart H – Approved State Programs. See 85 Fed. Reg. 57,853 (Sept. 16, 2020) ("If EPA approves this program, EPA will also codify the approved program in 40 CFR 233 subpart H."). Codification is required for all documents of an agency "having general applicability and legal effect ... and ... relied upon by the agency as authority." 44 U.S.C. § 1510(a); 1 C.F.R. § 21.1.

The state program therefore does not have the force of law, and the authority to administer Section 404 of the Clean Water Act in Florida remains with the U.S. Army Corps of Engineers.

Sincerely,

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