Message

From: Hicks, Matt [Hicks.Matthew@epa.gov]
Sent: 10/22/2018 2:27:47 PM
To: Kupchan, Simma [Kupchan.Simma@epa.gov]
CC: Mcgill, Thomas [Mcgill.Thomas@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]
Subject: RE: More Qs from FDEP

Yes, but like I said, the 10/30 date is somewhat up in the air until there is some resolution on the remaining issues:

Ex. 5 Attorney Client (AC)

From: Kupchan, Simma
Sent: Monday, October 22, 2018 10:25 AM
To: Hicks, Matt <Hicks.Matthew@epa.gov>
Cc: Mcgill, Thomas <Mcgill.Thomas@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>
Subject: RE: More Qs from FDEP

To be clear, 10/30 is the publication date, and then there is a 21 day comment period, right?

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From: Hicks, Matt
Sent: Friday, October 19, 2018 5:12 PM
To: Mcgill, Thomas <Mcgill.Thomas@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>; Purify, Johnnie <Purify.Johnnie@epa.gov>; Ghosh, Mita <Ghosh.Mita@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Hurld, Kathy <Hurld.Kathy@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Parker, Christopher <Parker.Christopher@epa.gov>
Cc: Palmer, Leif <Palmer.Leif@epa.gov>; Zapata, Cesar <Zapata.Cesar@epa.gov>; Allenbach, Becky <Allenbach.Becky@epa.gov>; Walker, Mary <walker.mary@epa.gov>
Subject: RE: More Qs from FDEP

On our call this morning, Heather clarified that the three week timeframe she gave me a few days ago was the time for the public comment process once NOPR occurs. It appears likely now that DEP will go back to OFARR with their revised rule prior to NOPR. Here's the revised rulemaking schedule she gave me, which was before she called with the two new questions below so this may be pushed out based on when we get back to DEP on these two questions (they would like to hear from us no later than mid-week next week):

*Earliest DEP signs revised rule is Tuesday, 10/23.
*Send to OFARR Tuesday, 10/23
*NOPR seven days after OFARR (10/30)

From: Hicks, Matt
Sent: Friday, October 19, 2018 4:56 PM
To: Mcgill, Thomas <Mcgill.Thomas@epa.gov>; Calli, Rosemary <Calli.Rosemary@epa.gov>; Purify, Johnnie <Purify.Johnnie@epa.gov>; Ghosh, Mita <Ghosh.Mita@epa.gov>; Nagrani, Kavita <Nagrani.Kavita@epa.gov>; Hurld, Kathy <Hurld.Kathy@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>;

Parker, Christopher <Parker.Christopher@epa.gov>
Cc: Palmer, Leif <Palmer.Leif@epa.gov>
Subject: More Qs from FDEP

This morning I let DEP know that EPA is okay with the attachment of long-term conceptual plans to state-issued permits as appendices for reference only. I also scheduled a 1:00 call with DEP on Monday to discuss the retained waters/expedited rulemaking issue. DEP has two more stakeholder questions pertaining to the 404 Handbook that it would like EPA to consider asap but hopefully no later than mid-week next week. Apologies for the lengthy email but most of what you see is existing rule language included for context.

1. DEP wants to know whether EPA is okay with the following change:

8.5.1 Mitigation Hierarchy

The following preferential hierarchy shall be followed when compensatory mitigation is required for authorizations and compliance actions~~, with (a) being the most preferred and (e) being the least preferred method, unless the preference is overridden as described in the third paragraph under (a), below~~. However, while there is a preferential hierarchy, it is recognized that flexibility is needed to address watershed needs and allow for the consideration of mitigation projects that are environmentally preferable based on a watershed approach.

(a) Mitigation bank credits. When permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by the purchase of mitigation bank credits.

Mitigation banks are preferred over all other mitigation options, when the appropriate type and number of credits are available, because mitigation banks are approved through a mitigation bank permit or instrument that includes an approved mitigation plan and appropriate real estate and financial assurances. The permit or instrument is required to be in place before the bank's credits can begin to be used to compensate for impacts. This means that use of a mitigation bank can help reduce risk and uncertainty, as well as temporal loss of resource functions and services.

Mitigation bank credits are not released for debiting until specific milestones associated with the mitigation bank site's protection and development are achieved, thus use of mitigation bank credits can also help reduce risk that mitigation will not be fully successful.

Mitigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. Also, development of a mitigation bank requires site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu fee programs. For these reasons, the Agency shall give preference to the use of mitigation bank credits when these considerations are applicable. However, these same considerations may also be used to override this preference, where appropriate, as, for example, where an in-lieu fee program has released credits available from a specific approved in-lieu fee project, or a permittee-responsible project will restore an outstanding resource based on rigorous scientific and technical analysis.

The section goes on to describe in lieu fee programs and permittee responsible mitigation in order of preference. According to DEP, the stakeholders are seeking this change in order to provide DEP with the same flexibility to decide compensatory mitigation that the Corps has under 40 CFR 230.93(a)(1) of the 2008 Mitigation Rule. **Ex. 5 AC/DP**

Ex. 5 AC/DP

2. DEP wants to know whether EPA is okay with the following changes. These changes are based on the 373.4146, F.S., 404 Assumption law that FDEP passed (see attached) which reads in pertinent part at paragraph 5(b):

Ex. 5 AC/DP

Ex. 5 AC/DP

Here are the proposed changes to the 404 Handbook:

2.0 Definitions and Terms

(a) Where the definitions in Chapters 62-330 and 62-345, F.A.C., do not conflict with this section, those definitions shall be used.

(b) The following additional definitions and terms below are used solely for purposes of Chapter 62-331, F.A.C., and this Handbook.

....

21. "Material permit modification" and "material changes in the scope of project" mean, for the purpose of applying Section 373.4146(5), F.S., only those modifications or changes that result in a significant increase in the total project environmental impact, including wildlife impacts, or significant increase in the total project wetland impact.

5.1 General Procedures

The Agencies are required to follow procedural statutes and rules to review and act on applications and notices, and to provide rights to the public to object to Agency decisions. These statutes and rules include: Chapter 120, F.S., (Florida Administrative Procedures Act), Chapters

28-101 through 28-110, F.A.C., (Uniform Rules of Procedure), and each Agency's adopted Exceptions to the Uniform Rules of Procedure.

In acknowledgement that procedures required under Section 404 of the CWA may conflict with the above state procedural statutes and rules, Section 373.4146, F.S., provides the following:

* The Department may adopt any federal requirements, criteria, or regulations necessary to obtain assumption;

* Provisions of state law which conflict with the federal requirements do not apply to state administered section 404 permits;

* The Department must grant or deny an application for a state administered section 404 permit within the time allowed for permit review under 40 CFR Part 233, subparts D and F.

* The Department is specifically exempted from the time limitations provided in Sections 120.60 and 373.4141, F.S., for state administered section 404 permits [default provisions and processing timeframes];

* The decision by the Department to approve the reissuance of any state-administered Section 404 permit is subject to subsections 120.569 and 120.57 only with respect to any material permit modification or material change in the scope of the project as originally permitted.

Additional specific provisions for processing applications and notices under Chapter 62-331, F.A.C., are summarized in the sections below.

5.3.2 Long-Term Conceptual Planning for Projects that will Take More Than Five Years to Complete

State 404 Program permits can only be issued for a duration of five years, although activities identified in a permit may be administratively continued as described in section 5.4.3. For this reason, an application for a permit should only contain activities that can be reasonably expected to be completed within the maximum five-year permit duration. Rule 62-331.051, F.A.C., provides that all activities reasonably related to the project shall be included in the same permit application for the purpose of assessing cumulative impacts. This poses a unique challenge for larger projects that will take longer than five years to complete. Such projects may include, but are not limited to, residential, governmental, or commercial developments, linear transportation, and mining activities.

The following steps shall be taken to facilitate efficient permitting and planning for larger projects that are expected to take more than five years to complete:

....

(c) Permitting

The applicant shall apply for one phase at a time. The most up-to-date version of the long-term planning document from Step 2 shall be included with the application for each phase, with a summary of any changes made to the document since the application for the last phase was submitted. The applicant should apply for the next phase one year before the permit for the previous phase expires or is projected to be completed – whichever is sooner. This will give the agencies time to process the application for the next phase, including putting the project out on public notice and potential federal agency review. Allowing one year for processing will help prevent project delays and will help provide a seamless transition between phases.

Note: The long-term conceptual planning method is intended to provide the applicant and the Agency with information that can assist with successful permitting of a project. Agency review of a long-term conceptual planning document does not constitute pre-approval of subsequent phases of the project. Subject to the reissuance of requirements of 373.4146(5), F.S., ~~T~~there is no guarantee that a permit will be issued for any future phase of the project; each phase must be public noticed and is subject to potential federal agency review.

5.3.3 Continuation of Permits and Review for a New Permit for an Existing Project

State 404 Permits cannot be extended or renewed. Large projects that are expected to take more than five years to complete shall follow the long-term conceptual planning provisions in section 5.3.2. However, occasionally projects will take more than five years to complete because of unexpected project delays. Unexpected project delays can occur for many reasons such as discreet storm events, labor or supply shortages, unanticipated number of inclement weather days, etc. If this occurs, the permittee shall apply for a new permit. If applicable, the permittee may request that the Agency use the original application for a new permit as described in (a), below.

If the permittee applies for a new permit at least 180 days before expiration of the original permit, the original permit may be administratively continued until the new permit is issued (i.e. the permittee may continue work under the original permit until the new permit is issued).

If the permittee does not apply for a new permit at least 180 days before expiration of the original permit, the permittee shall stop work on or before the original expiration date. A new permit must be obtained prior to commencement of work.

(a) An applicant may request that the Agency use the original application form and materials for a new permit when:

1. There have been no material changes to site conditions, including use of the site by listed species, since the original permit was issued other than activities authorized in the original permit;

2. Where the project is in compliance with the original permit; and

3. State 404 Program rules applicable to the project have not changed.

Upon receipt of a request to use the original application for a new permit, the Agency shall conduct a site visit to verify that 1. and 2., above, have been met.

(b) If there are any changes in site condition, State 404 program rules, proposed modifications, or if the project is found not to be in compliance with the permit, the applicant shall submit a new application.

(c) Any application for a new permit for an existing project shall provide the following additional information:

1. A description of work already completed under the original permit;

2. A description of work that has not yet been completed (if requested pursuant to (a), above, the description should be limited to work that was authorized in the original permit);

3. The reason for the unexpected delay;

4. The amount of time needed to finish the project (no more than five years).

Applications for a new permit will be processed as a new individual permit, including all public notice requirements, and if applicable, shall be subject to reissuance requirements of 373.4146(5), F.S.