Message

From: Calli, Rosemary [Calli.Rosemary@epa.gov]
Sent: 10/23/2018 7:46:42 PM
To: Laycock, Kelly [Laycock.Kelly@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]
Subject: FW: Comments (so far) on pre-review draft of rule
Attachments: 404_Handbook_Draft_Working_Draft_9-14-18 - EPA_internal_markup.docx; State_404_Program_62-331_Working Draft_9-14-18 - EPA_internal_markup.docx

Round 1 of our comments on pre-review rule

From: Calli, Rosemary
Sent: Thursday, September 20, 2018 5:42 PM
To: 'Mason, Heather' <Heather.Mason@dep.state.fl.us>; 'Simmons, Kristen B.' <Kristen.B.Simmons@dep.state.fl.us>
Cc: Thomas Mcgill (Mcgill.Thomas@epa.gov) <Mcgill.Thomas@epa.gov>; Hicks, Matt <Hicks.Matthew@epa.gov>; Philip Mancusi-Ungaro <Mancusi-Ungaro.Philip@epa.gov>; Hurld, Kathy <Hurld.Kathy@epa.gov>; Parker, Christopher <Parker.Christopher@epa.gov>
Subject: Comments (so far) on pre-review draft of rule

Hello, Heather, Kristen -

The EPA appreciates the opportunity to provide informal feedback on the information shared by FDEP staff between Sep 14 and 17 regarding their draft rule package (i.e., draft rule language, 404 Handbook, regulatory crosswalk). While we did not have time to review the entire package, we reviewed as much as we could in order to provide you with some feedback by COB today as you requested. Below and attached are some comments for your consideration and we're happy to discuss any issues or questions that you may have.

Conceptual plans/5-year permitting

- The rule only references "conceptual" in the application form, and this at 62-331.051(2): "All activities which the applicant plans to undertake which are reasonably related to the same project shall be included in the same permit application."
    - Recommend that it would be helpful for the Rule to reference the Handbook at this point for details, and to ensure this requirement is recognized.
- Handbook 5.3.2 describes need for long-term conceptual planning, including, "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."
    - 62-331.051 doesn't actually say that last clause explicitly ("for the purpose of assessing cumulative impacts" ...)
    - The point that this helps assess cumulative impacts is an important one, we just suggest separating it from the reference to 62-331.051.

404(b)(1) Subpart B (Restrictions on discharge...)

62-331.053(3)(a) – Recommend including when it causes or contributes to violations of WQS of another state. ("State" in previous sentence is capitalized as though referencing Florida only.)

Crosswalk points to 62-331.053(3)(a)5., F.A.C. for significant degradation, but paragraph 5 doesn't actually exist. Should probably point to paragraph 7.

62-331.053(3)(a)7. – Recommend also including significant degradation in retained waters and state-regulated waters beyond assumed waters.

Significant degradation: The 404(b)(1) Guidelines (at 230.10(c)) expand on how to assess this with reference to 40 CFR Part 230 Subparts C through F, and also point to requirements under the rest of Subpart B (factual determinations, findings of compliance/non) and Subpart G (evaluation of dredged or fill material). How are these connections made? Suggest that at least references to other parts of Rule or Handbook be incorporated.

** Overarching comment – 404(b)(1) Guidelines elements are largely couched as applicable to individual permits, especially in 62-331.053. However, § 230.7 "General permits" describes requirements for issuance of general permits, including consistency with elements of the 404(b)(1) Guidelines' restrictions on discharge. We recommend that this be captured in the rule for general permits specifically.

Public notice elements

62-331.060 – Lacks recognition of long-term conceptual planning and phasing. Recommend that the long-term planning document be published with the PN. Also recommend that the summary of changes be published with PN for any subsequent phases.

62-331.060(1) references "emergency field authorization" but the definition does seem to not appear in the Handbook – recommend adding definition.

62-331.200 "Policy and Purpose of General Permits" includes the language below re: public noticing GPs; recommend language (e.g., "and for general permits as described in…") and reference to this section within 62-331.060 "Public Notice."

> (3) If required, notice of intent to use the general permit shall be given pursuant to subsection 62-330.402(1), F.A.C., and section 4.3 of the 404 Handbook, and acted upon in accordance with subsection 62-330.402(4), F.A.C., section 5.0 of the 404 Handbook, and this section. Submittal of a notice of intent to the Agency is required if:
> (a) Indicated in the general permit;
> (b) The activity requires a notification or authorization under Chapter 62-330, F.A.C.;
> …
> (i) The Miccosukee Tribe of Indians …

Jurisdictional waters, terminology, incl. description of Retained Waters List

62-331.010(3) says, "The State wetland delineation methodology in Chapter 62-340, F.A.C., shall be used to determine the boundary of state-assumed waters."

- Doesn't the methodology actually delineate all *state-**regulated*** waters? Recommend changing to "state-regulated" if so.

62-331.052 – Suggest incorporating recognition of element from implementation strategy recognizing that inconsistencies/discrepancies in delineations could add processing time.

Definitions - all

- Carrier of contaminant - There doesn't appear to be a definition of "carrier of contaminant." May not be necessary, but the program description could help make this connection to demonstrate if the discharge contains one of the contaminants at 40 CFR 230.3. Important because one of the non-waived categories references permits involving contaminants.

- Contaminant - There doesn't appear to be a definition for "contaminant", just a reference to the definition of "pollutant" (which includes dredged or fill material). Contaminants are called out in the federal regulations because if a discharge has contaminants the permit review is slightly different. If no definition is included, an explanation as to why not would help make the distinction here.

Mitigation, incl. re: mining, DOT projects

62-31.130 additionally points to section 10.3 of Volume I (ERP Applicant's Handbook), and section 8.5 of the 404 Handbook.

- Volume I section 10.3 points back to 10.2.1 through 10.2.1.3, which really speaks to minimization in terms of design modifications. Avoidance should be clear first step of mitigation sequencing.

- Section 8.5 of the 404 Handbook speaks to compensatory mitigation hierarchy (banks…)

- (b) speaks to *Corps* authorized ILF programs. What about other ILF programs, including possible future programs proposed in state-regulated waters?

** The first element of mitigation sequencing, avoidance, seems to be missing/lacking from this description of mitigation. The language (in ERP Volume I) largely speaks to minimizing and design alternatives, but it is unclear that alternatives that avoid impacts altogether should be the first consideration. This section of the rule (62-331.130) really focuses on compensatory mitigation after the opening sentence with references, and the incorporated references do not start with avoidance. Perhaps point to section 62-331.053 and re-emphasize avoidance with the first sentence.

GPs

We continue to have questions about the magnitude of impacts provided for under the general permit at 62-331.248, *General Permit for Florida Department of Transportation and Florida's Turnpike Enterprise*. General permits are for activities that would cause only minimal individual and cumulative environmental impacts. This proposed general permit would allow for impacts of up to 5.0 acres of state-assumed waters (wetlands and surface waters) for any 1-mile segment of roadway length, up to a maximum loss of 50 acres of state-assumed waters per project.

62-331.080 "Modification, Suspension, or Revocation of Permits"

Once decided, we suggest incorporating the approach re: modifications of Corps permits here, as providing beneficial clarity for applicants.

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