Florida's Exploration of Clean Water Act §404 Assumption

ISSUE:

The Florida Department of Environmental Protection has notified EPA staff that it is exploring assumption of the CWA §404 program, with a tentative goal of assuming the program by the end of 2018. EPA staff are engaging FDEP staff and are committed to provide any needed assistance and support to FDEP.

BACKGROUND:

CWA §404(g) authorizes States, with the approval from the EPA, to assume the authority to administer the Section 404 permit and enforcement program in some, but not all, navigable waters and adjacent wetlands.

In order to receive EPA approval to assume the program, a State program must:

- Be consistent with and no less stringent than Section 404 and implementing regulations;
- Have equivalent scope of jurisdiction;
- Regulate at least the same activities;
- Provide for sufficient public notice and allow public participation;
- Ensure compliance with CWA Section 404(b)(1) Guidelines;
- Ensure adequate enforcement authority;
- Submit certification from their Attorney General that the State laws provide adequate authority to carry out the described program.
- Have a Memorandum of Agreement (MOA) in place with the Corps of Engineers, which among other things describes which waters are assumable;
- Have a MOA in place with the EPA that among other things describes EPA's oversight.

The approval decision for assumption is made by the RA, with concurrence from the Office of Water, the Office of Enforcement and Compliance and the Office of General Counsel.

- EPA's action requires Endangered Species Act, Section 7 consultation.

During the early- to mid-1990s, FDEP had seriously considered assumption.

- An action taken by the State legislature regarding the scope of jurisdiction of wetlands prevented the State from having a package that could be approved by the EPA.

The Assumable Waters Subcommittee, comprised of 22 states and the Corps of Engineers and convened under the [HYPERLINK "https://www.epa.gov/faca/nacept"]and issued a report in May 2017.

- Report included recommendations by the majority (except the Corps) that EPA clarify, through rulemaking or guidance, which waters a state assumes permitting responsibility for under an approved [HYPERLINK "https://www.epa.gov/cwa-404/section-404-permit-program"].
- The EPA has not yet acted upon these recommendations.

To date, New Jersey and Michigan are the only States that have assumed the 404 program.

- Typically, the exploration of assumption by a State takes several years.

- Many states use a State Programmatic General Permit in lieu of assumption.

STATUS:

FDEP has informally engaged EPA regarding its interest in assumption including during the June 2017 EPA-State Commissioners meeting, a meeting with Ken Wagener on 7/13/2017 and in a teleconference with Region 4 and Office of Water staff on 8/3/2017.

- FDEP has not yet announced to the public that it is seeking assumption.
- FDEP stated that their goal is to assume the program by the end of Governor Scott's term (i.e., by the end of 2018).
- FDEP relayed that Ken Wagener offered that EPA could use a "SWAT Team" to assist with their efforts.
- EPA staff answered questions and offered to provide any needed assistance during the 8/3/2017 teleconference. EPA also shared a regulatory cross-walk for FDEP to use as a tool for identifying which state statutes may require changes to meet assumption requirements.
- Region 4 staff remain prepared to provide any assistance needed by FDEP.

Staff with the Jacksonville District of the Corps of Engineers have shared with Region 4 staff the status of their discussions with FDEP.

- Colonel Kirk has directed staff to work with FDEP regarding what the State will need to develop an assumption package.
- The Corps is in the process of delineating waters that it believes are not assumable (e.g., waters subject to Section 10 of the Rivers and Harbors Act, other Traditional Navigable Waters). This process is not expected to be complete until sometime during 2018.

NEXT STEPS:

Office of Water staff are scheduling a briefing for senior management with OW, OGC and OECA, targeted for mid- to late August to describe the 404 assumption process and requirements. Region 4 staff will participate in the briefing and welcome any input, including any specific direction regarding how to use a "SWAT Team" approach to assisting Florida.

Region staff remain prepared to provide any needed help or assistance to FDEP.

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