



September 1, 2021

Via Email shawn.hamilton@floridadep.gov

Shawn Hamilton, Interim Secretary
Florida Department of Environmental Protection
3900 Commonwealth Boulevard M.S. 49
Tallahassee, FL 32399

Re: Impact of Court Ruling Vacating WOTUS Rule on Florida 404 Program

Dear Secretary Hamilton:

As you know, we are challenging EPA's approval of Florida's 404 Program as unlawful under federal law. We write to ensure you are also aware of the recent ruling in Pasqua Yaqui Tribe, et al. v. United States Env't Prot. Agency, et al., No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. Aug. 30, 2021), vacating "The Navigable Waters Protection Rule: Definition of 'Waters of the United States'" (Apr. 1, 2020) ("NWPR") on which Florida's Section 404 program is based. Enclosed please find a copy of that decision for your convenience.

Florida assumed jurisdiction over the dredging and filling of "waters of the United States" under Section 404 of the Clean Water Act on or about December 22, 2020. Since that time, the state has proceeded under the 2020 NWPR definition of "waters of the United States" to determine the scope of its jurisdiction. The Court's vacatur of the NWPR as unlawful requires that DEP immediately re-assess the scope of waterways in Florida covered by Section 404.

As the Court observed, the NWPR substantially reduced the number of waterways, including wetlands, protected under the Clean Water Act as compared to prior rules and practices. Pasqua Yaqui Tribe, 2021 WL 3855977, at *5. Vacatur of the rule restores broader coverage of waterways under the Clean Water Act as existed in years past. This will have considerable impacts in Florida and on the state's duties under federal law. It is therefore critical that DEP act immediately to ensure protection of all waterways covered by the Clean Water Act.

Among other things, DEP must immediately: (1) ensure that the regulated community is notified of the Court's action; (2) ensure against the unlawful (unpermitted) dredging and filling of additional covered waterways; (3) re-visit its "no permit required" and other jurisdictional determinations made while the unlawful NWPR was in effect; (4) defer issuance of any permit to re-assess the scope of the state's jurisdiction and obligations relative to the permit application; and (5) ensure adequate staffing and training to make correct jurisdictional determinations.

Sincerely,

Tania Galloni
Managing Attorney

Bonnie Malloy
Senior Attorney

Christina Reichert
Associate Attorney

Enc.

cc w/enc.: Justin George Wolfe, General Counsel
Florida Department of Environmental Protection
justin.g.wolfe@dep.state.fl.us