Will Florida's Wetland Permitting Program Get Any Easier in 2019?

*Silvia Morell Alderman**

The author discusses the changes to wetlands permitting that Florida developers may be faced with in 2019.

The development community is watching closely. Will the wetlands permitting process really be better in 2019? In some cases, yes.

Well, maybe.

In other cases, probably not.

This year, the legislature authorized the State of Florida to assume the dredge and fill permitting program established under Section 404 of the federal Clean Water Act. The particulars are defined in Florida Statutes Section 373.4146. This momentous step has been contemplated for decades. What moved it to the forefront this year? It was no doubt born of a desire to streamline an extremely cumbersome system. But what does it really do?

The Waters

The agencies are presently negotiating and receiving public comment on the implementing rules — Florida Administrative Code ("FAC") Rules 62-330 and 62-331 — and are working on an interagency memorandum of understanding ("MOU") that says who will do what. Unfortunately, the transfer of the Section 404 permit program to Florida will not be complete. This is unfortunate primarily because there will be lingering confusion over who will do what.

The actual areas that will be subject to the jurisdiction of the Florida Department of Environmental Protection ("DEP") will be called "assumed waters." The MOU will define those "assumed waters." The U.S. Army Corps of Engineers will continue to issue permits for waters that are not assumed called "retained waters." What those are is still under discussion. Some would loosely refer to the assumed wetlands as isolated wetlands, though this is not strictly accurate.

Navigable waters jurisdiction is expected to remain with the Corps.

The June 28, 2018 draft of the MOU contained this division of waters:

> III. Waters to be Assumed
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> A. All waters of the United States, as defined at 40 C.F.R. § 232.2, within the State will be assumed by DEP as part of its State 404 Program, with the exception of those waters

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which are presently used, or are susceptible to use in their natural condition or by reasonable improvement, as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, including wetlands adjacent thereto as described in Section III.B., below. For purposes of this agreement, the Corps shall retain permitting authority over those Section 10, Rivers and Harbors Act of 1899 waters, which have been included, as of the effective date of this MOA, on the Jacksonville District Navigable Waters List for the State of Florida and the Supplement to the Jacksonville District Navigable Waters List for the State of Florida (Attachments A and B, respectively [to the agreement]), except those waters included on the list based solely on their historical use. This is consistent with the majority recommendations in the May 2017 Final Report of the Assumable Waters National Advisory Council for Environmental Policy and Technology (NACEPT) Subcommittee.

B. The Corps shall retain permitting authority over wetlands adjacent to retained waters, which is defined as those wetlands that are located within 300 feet of the ordinary high water mark of non-tidally influenced surface waters or the mean high water mark of those tidally influenced surface waters that are subject to the ebb and flow of the tide. This is consistent with the majority recommendations in the May 2017 Final Report of the Assumable Waters NACEPT Subcommittee.

C. In those waters over which DEP does not assume jurisdiction under the State 404 Program, DEP will retain jurisdiction under State law, and both State and federal requirements will continue to apply.

ERPs and Section 404 Permits

Applicants will still need both a state environmental resource permit ("ERP") issued by the water management district with jurisdiction and a Section 404 permit. The difference between that scenario and what we have today is that the Section 404 application for work in assumed waters would be filed with and issued by the state permitting entity instead of the Corps.

Would it be possible to have an ERP and a Section 404 permit coming from the same agency? At this point, unless the U.S. Environmental Protection Agency ("EPA") determines that the water management districts are state agencies, DEP will not be able to delegate the Section 404 program to the water management districts and will have to issue such permits itself.

The Section 404 permit will not be issued until the ERP is issued, unless the activity is exempt.

One piece of good news is that no fees are to be charged for Section 404 permits. Procedurally, the rule creates a much more complex interagency review process than presently exists. Public notice and opportunity for comment are required (as is presently the case with Section 404 permits) and the state entity issuing the Section 404 permit will not be able to issue the permit until the later of 60 days after technical completeness or close of the public comment period.

If the EPA responds with objections within 30 days, the state permitting entity must address those concerns.

If there is a deadlock, the Corps will take action on the contested permit.

This intertwined process is not unlike the delegated NPDES permit process, for those familiar with the EPA's delegation of industrial and domestic wastewater permitting to Florida many years ago. In the beginning there was much confusion but now, decades after its inception, the process flows relatively smoothly, with very little EPA involvement. After a few years of bumps, it is likely that the Section 404 delegation will be equally smoothed out.

The only difference is that there will always be that discussion over what constitutes assumed waters. The development community is hoping that DEP will be able to process the Section 404 permit applications more quickly than the Corps.

Additional Permits

In addition to individual permits, the draft rule contemplates 33 general permits based on Corps Nationwide Permits. They will be five years in duration and will be subject to conditions that include ERP permit conditions. These permits will be for projects with minimal individual or cumulative impacts. Mitigation may be required as well as notice to the agency.

After assumption of the Section 404 program by DEP, the Corps will no longer issue nationwide permits, regional general permits, state programmatic general permits or any other general permits for activities in assumed waters.

Mitigation

Mitigation is expected to follow this hierarchy:

- Mitigation Bank credits;
- Corps in-lieu fee program credits;
- Permittee-responsible mitigation under a watershed approach;
- Permittee-responsible mitigation through on-site and in-kind mitigation; and
- Permittee-responsible mitigation through off-site and/or out-of-kind mitigation.

Conclusion

It should be an interesting few months as this process unfolds while litigation rages elsewhere on precisely what waters are subject to Corps regulation. Stay tuned.