

STATE ASSUMPTION OF THE CLEAN WATER ACT SECTION 404 PERMITTING PROGRAM: PART I, AN OVERVIEW

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Section 404 of the Clean Water Act (CWA), Title 33 of the U.S. Code (U.S.C.) §1251, *et seq.*, governs discharges of dredge or fill materials into waters of the United States.^[1] In Florida and 47 other states, a permit must be obtained from the U.S. Army Corps of Engineers (corps) under §404 of the Clean Water Act, for activities that discharge dredge and fill materials into a water of the United States. Additionally, in Florida, works and activities that alter the surface of land must have an environmental resource permit (ERP) from the Florida Department of Environmental Protection (DEP) or one of the state's five water management districts under Part IV of F.S. Ch. 373 and Rule 62-330 of the Florida Administrative Code.^[2] DEP estimates the federal 404 permit and state ERP overlap 85% of the time.^[3] This means many applicants must process two sets of permits that often regulate the same activity, incurring additional costs and potential delays.

Section 404(g)(1) allows states and Native American tribes with “treatment as a state” status to apply to the U.S. Environmental Protection Agency (EPA) to assume permitting under the §404. Relying upon the authorization in §404(g), in 2018 the Florida Legislature enacted F.S. §373.4146, allowing DEP to apply to the EPA to assume §404 permitting. This statute also authorized DEP to enact necessary rules to implement the program and federal requirements necessary for assumption (state 404 permit program).

The goal of state assumption is to provide a streamlined permitting procedure addressing both federal and state requirements, while maintaining at least the same level of environmental protection as the federal program. DEP states that assumption “would provide greater certainty to the regulated community, conserve resources of both applicant and regulator, and would afford the state greater control over its natural resources while complying with federal law.”^[4]

The Assumption Process^[5]

As part of the assumption process, DEP spent many hours working with the EPA, the corps, and other agencies on memorandums of agreement (MOAs) and memorandums of understanding (MOUs), discussed below. DEP also adopted F.A.C.R. 62-331, with an incorporated State 404 Program Applicant's Handbook, setting forth the rules for the assumed program, including provisions to meet federal requirements.

DEP published a notice of rule development for Rule 62-331 on May 11, 2018. The first public workshops were held in May and June 2018, and on February 19, 2020, proposed F.A.C.R. 62-331 was published. Hearings were held in April 2020. Two notices of change were published in June 2020.

On August 20, 2020, DEP applied to EPA for assumption of the CWA 404 program.^[6] On September 16, 2020, EPA published notice in the Federal Register that DEP submitted a complete application for assumption.^[7] At the time of the writing of this article, the EPA has scheduled public hearings for October 21 and 27, 2020, and is in the process of consulting with Native American tribes. The deadline for public comments regarding Florida's §404 assumption application was November 2, 2020. EPA has 120 days from receipt of the complete application to approve or disapprove the application. This means EPA must act on Florida's request no later than December 17, 2020. If EPA approves the request, Florida will be the third state to assume the 404 CWA permitting program and the first in decades.^[8]

If assumption is approved by the EPA, F.A.C.R. 62-331 and the memorandums of agreement and understanding discussed below will be effective upon publication of the approval decision, and 404 permits will be issued pursuant to state law and must be challenged pursuant to F.S. Ch. 120.

DEP has been training staff to implement the state 404 permit program upon approval and coordinating with water management districts to make the program run smoothly.^[9]

Coordination with Federal and State Agencies

DEP's assumption application required memorandums of agreement or understanding with the EPA, the corps, and the U.S. Fish and Wildlife Service (USFWS). The MOA between DEP and EPA Region IV defines the federal and state roles in carrying out the policies, regulations, and procedures necessary for Florida to administer the state 404 permit program.^[10] Pursuant to §404(k) of the CWA and 40 C.F.R. §233.51, EPA waives the requirements of §404(j) and the regulations adopted thereunder regarding federal review of DEP permit applications, with specific permit category exceptions set forth in the MOA.^[11]

The MOA between DEP and the corps addresses authority to be retained, coordination procedures, procedures for existing permits and pending applications, review of state programmatic permits, and coordination on mitigation banking and enforcement.^[12]

The MOU between the USFWS and the Florida Fish and Wildlife Conservation Commission (FWC) sets forth a coordination framework wherein DEP or FWC may engage with the USFWS for threatened and endangered species coordination reviews in the state 404 permit program.^[13] A technical team, roles and responsibilities will be established in the MOU among DEP, FWC, and the USFWS^[14] to address the federal requirements for the protection of threatened and endangered species.^[15] “Compliance shall be required, as applicable with any requirements resulting from consultation with or technical assistance by, the [FWC], the [USFWS] and the National Marine Fisheries Services for permits reviewed under the state 404 program.”^[16] If EPA objects or provides a permit condition and DEP does not satisfy EPA’s objection or address the requirement for the permit condition, then the corps shall process the application.^[17]

Lastly, the operating agreement between the Florida Division of Historical Resources — State Historic Preservation Officer (SHPO) and DEP sets forth a consultation process, called the “historic properties review,” for assessing the potential effects a state 404 program permit application may have on historic properties and for avoiding, minimizing, or mitigating any adverse effects on historic properties. The operating agreement is intended to mirror the §106 process from the National Historic Preservation Act to ensure the potential impact to cultural and historic resources are properly evaluated and addressed. The historic properties review includes consultation with Native American tribes, local governments, applicants, and the public. It is designed to complement established procedures and timelines for permit processing and public notice under the state 404 program.^[18]

What Waters Will Be Retained by the Corps?

Not all waters can be assumed by a state. The corps will maintain jurisdiction of the list of retained waters set forth in Appendix A of the State 404 Program Applicant’s Handbook.^[19] The corps will retain permitting authority for waters that are presently used or susceptible to use in their natural condition or by reasonable improvement for interstate transport of foreign commerce shoreward to the ordinary high water mark.^[20] This includes waters subject to the ebb and flow of the tide shoreward to the mean high water mark, including adjacent wetlands within the “administrative boundary” line. The administrative boundary is a 300-foot guideline established from the ordinary high watermark or mean high tide line of the retained water. The administrative boundary demarcates the adjacent wetlands over which jurisdiction is retained by the corps. If a project involves discharges of dredged or fill material both waterward and landward of the 300-foot guideline, the corps will retain jurisdiction to the landward boundary of the project.^[21] DEP included three diagrams in §4.1 of the State 404 Program Applicant’s Handbook to assist applicants in determining the administrative boundary. The corps will provide retained waters GIS layers to DEP to also assist in the determinations.

The retention of jurisdiction does not end with the retained waters list. The corps will also retain jurisdiction within “Indian country.”^[22] DEP does not exercise jurisdiction over “Indian country,” as that term is defined in 18 U.S.C. §1151 and does not seek such authority through the MOAs with EPA or the corps. Whenever DEP receives an application for a permit that has a reasonable potential to impact the waters within “Indian country,” DEP will transmit a copy of the public notice to the potentially federally recognized tribe^[23] and to EPA. This same process will apply if a permit has a reasonable potential to impact Alabama or Georgia waters.

The MOA between DEP and the corps also provides that “[m]itigation banking instruments and in-lieu fee program instruments shall be processed by the corps in accordance with 33 C.F.R. Part 332.”^[24] DEP may approve the use of credits from a corps-approved mitigation bank or in-lieu fee program to provide compensatory mitigation for permits issued under the state 404 program, as long as the use of credits is consistent with the approved mitigation banking instrument or in-lieu fee instrument.

Also, in accordance with §14 of the Rivers and Harbors Act, the corps must review requests for modification of federal projects by non-federal interests prior to project commencement.^[25] Certain projects that would require a permit under the federal Rivers and Harbors Act will also be retained by the corps.^[26]

Two Permits Will Continue to be Required

After assumption, applicants will be able to use a joint application form to apply for an ERP and a §404 permit.^[27] This will be familiar in Florida as, until recently discontinued by the corps, DEP, the water management districts, and the corps used a joint application form. Though applicants will use one application form, two permits will still be required in most cases — an ERP from DEP or a water management district and a state 404 permit from DEP. DEP and the water management districts will continue to share permitting authority under Part IV of Ch. 373 as established by individual operating agreements incorporated by reference into F.A.C.R. 62-330. Therefore, in many cases, applicants will continue to get permits from two agencies. However, due to DEP’s intense coordination efforts with the water management districts, the process is expected to be streamlined and expedited.

At some point in the future, DEP may delegate authority to the water management districts to issue state 404 permits. The legislature included this option for DEP in the enabling statutory language,^[28] and provisions in the 404 handbook also speak to the potential delegation.^[29] Section 1.0, State 404 Program Applicant’s Handbook states, “In the event (DEP) seeks and receives approval from EPA pursuant to 40 C.F.R §233.16 to modify the program to delegate implementation of the State 404 Program to Florida’s five Water Management Districts, the [d]istricts may then implement the program with (DEP) oversight.”^[30]

The New State 404 Permit Rule

F.A.C.R. 62-331 sets forth the requirements of federal law not already addressed in the ERP rules set forth in Rule 62-330. F.A.C.R. 62-331 references existing ERP Rule 62-330 whenever possible. The new rule sets forth the review sequence and public notice procedures for the state 404 permit program. DEP also promulgated and is adopting the State 404 Program Applicant’s Handbook, which will be incorporated by reference in Rule 62-331.010(5). DEP is making minor changes to F.A.C.R. 62-330 in order to be consistent with new Rule 62-331.

There are several elements of the federal program that differ from the state program. For example, under the ERP rules, the applicant must demonstrate that it has reduced or eliminated impacts to wetlands and other surface waters. State regulators do not have the authority to require an applicant to consider alternative sites. By contrast, the federal rules require an applicant to demonstrate avoidance and minimization of impacts. This analysis requires applicants to also consider alternative sites and justify the use of the project site. Appendix C of the State 404 Applicants Handbook provides guidance for

conducting an alternatives analysis. Appendix C is nearly identical to the Corps Jacksonville District's "information for Preparing an Alternatives Analysis Under Section 404," dated June 2014, minus two rebuttable presumptions.^[31]

Federal and state rules differ on the mitigation hierarchy. State rules do not set forth a mitigation hierarchy. Under ERP rules, on-site or off-site mitigation within the same drainage basin that offsets the impacts is permitted and not disfavored by state regulators. By contrast, the federal rules set forth a preference for mitigation banks. Aesthetics and economics cannot be considered by the state in reviewing an ERP application. These items are considered in the federal review.

Exemptions available in ERP rules do not apply to the state 404 program. However, there are other exemptions currently set forth in federal law that are set forth in Appendix B of the State 404 Applicant's Handbook. Any activity set forth in Appendix B will not require a state 404 permit under Rule 62-331. Rule 62-331, which sets forth 38% general permits modeled after the existing corps' nationwide permits.

Any elements of state law that conflict with federal law will not apply to the state 404 permit program. For example, the permitting timelines set forth in F.S. Chs. 120 and 373, will not apply to the state 404 permit program. State rules provide for a default permit if the agencies fail to act within statutory timeframes. Federal law does not allow for default permits. DEP will encourage applicants to voluntarily waive ERP timeframes to ensure consistency between ERP and state 404 permits. This will prevent later potential modifications to the ERP to be consistent with a later issued state 404 permit.^[32]

^[1] Permits for Dredged or Fill Material, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended 33 U.S.C. §1344 (2020)); see also EPA, *Section 404 of the Clean Water Act, Permit Program under CWA Section 404 Overview*, <https://www.epa.gov/cwa-404/permit-program-under-cwa-section-404>.

^[2] Under Fla. Stat. Ch. Part IV, any project, construction, or alteration of the surface of land requires an environmental resource permit. See Fla. Stat. §373.4131 (2020). F.A.C. Ch. 62-330.010(2) states that the "ERP program governs the following: construction, alteration, operation, maintenance, repair, abandonment and removal of stormwater management systems, dams, impoundments, reservoirs, appurtenant works, and works (including docks, piers, structures, dredging, and filling located in, on or over wetlands or other surface waters, as defined and delineated in chapter 62-340, F.A.C.)...." F.A.C.R. 62-330.010(2) (2020).

^[3] Fla. Dep't of Environmental Protection (DEP), *Description of the Scope and Structure of the State's Program 5* (Aug. 20, 2020), available at ftp://ftp.dep.state.fl.us/pub/outgoing/404%20Assumption%20Application/B_Program%20Description/a/; see also Fla. DEP, *State 404 Program Rule Adoption Hearing, PowerPoint 6* (Apr. 2, 2020), available at https://floridadep.gov/sites/default/files/State404ProgramHearing_04022020.pdf.

^[4] *Id.* at 5.

^[5] For additional information on the assumption process, see Adam F. Blalock, *State Assumption of the Federal Dredge and Fill Permitting Program — the Search for the "Holy Grail,"* 92 Fla. Bar J. 46 (2008), available at <https://www.floridabar.org/the-florida-bar-journal/state-assumption-of-the-federal-dredge-and-fill-permitting-program-the-search-for-the-holy-grail/>.

[6] As required by 40 C.F.R. §233.10, the assumption package included, a letter from the governor, program description, attorney general statement of legal authority, the new F.A.C.R. 62-331, which will be the implementing rule, and two executed memorandums of agreement (MOA), one between DEP and the EPA and the second between DEP and the corps. Although not required by §404(g), the package also included a memorandum of understanding (MOU) between DEP, the Florida Fish and Wildlife Conservation Commission (FWCC), and the U.S. Fish and Wildlife Service (USFWS) pertaining to endangered species review, and an operating agreement between DEP and the Division of Historical Resources-State Historic Preservation Office (SHPO) pertaining to cultural and historic resources. The rule, MOAs and MOUs will become effective when EPA publishes a decision of approval in the Federal Register. 40 C.F.R. §233.1(d) (2020).

[7] Florida's Request to Assume Administration of a Clean Water Act §404 Program, 85 Fed. Reg. 57853 (Sept. 16, 2020).

[8] The two states that have assumed 404 permitting are Michigan and New Jersey. Michigan's state 404 program became effective in 1984. Michigan Department of Natural Resources Section 404 Permit Program Approval, 49 Fed. Reg. 38947 (Oct. 2, 1984) (codified as 40 C.F.R. §233.70). New Jersey's program became effective in 1994. New Jersey Department of Environmental Protection and Energy Section 404 Permit Program Approval, 59 Fed. Reg. 993 (Mar. 2, 1994) (codified as 40 C.F.R. §233.71).

[9] DEP and each of the water management districts have an operating agreement that sets forth which agency will issue ERPs. See Fla. DEP, *Delegation of Authority and Responsibility to NFWFMD, SRWMD, SJRWMD, SWFWMD and CSFWMD* (1977). The water management districts issue the majority of ERPs. See generally Fla. Stat. §373.4131 (2020). This designation of responsibility will not change with 404 assumption.

[10] Fla. DEP & EPA, *Memorandum of Agreement Between the Florida Department of Environmental Protection and the United States Environmental Protection Agency* (Jul. 31, 2020), available at ftp://ftp.dep.state.fl.us/pub/outgoing/404%20Assumption%20Application/D_EPA%20MOA/.

[11] EPA retains significant oversight authority and is required to review permits that fall into any of the following categories: draft general permits; projects with reasonable potential to impact waters of another state or tribe; projects with reasonable potential to affect threatened and endangered species; projects within 1,000 feet of a public water supply intake; projects where dredged or fill materials may contain toxins; projects impacting compensatory mitigation sites; projects impacting or requested by federal entities; and projects within critical areas established under state or federal law; projects where DEP fails to accept the recommendation of an affected state or tribe received during the public comment period. *Id.* at 5.

[12] Fla. DEP & U.S. Army Corps of Eng., *Memorandum of Agreement Between the Florida Department of Environmental Protection and the Department of the Army* (Aug. 5, 2020), available at ftp://ftp.dep.state.fl.us/pub/outgoing/404%20Assumption%20Application/E_USACE%20MOA/.

[13] Section 404(b)(1) guidelines state that no permit may be issued that would jeopardize the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of destruction or adverse modification of critical habitat. 40 C.F.R.

§230.10(b)(3) (2020).

[14] Fla. DEP, FWC, & U.S. Fish & Wildlife Conservation Comm'n, *Memorandum of Understanding Between the Florida Fish and Wildlife Conservation Commission, the United States Fish and Wildlife Service, and the Florida Department of Environmental Protection* (Aug. 5, 2020), available at ftp://ftp.dep.state.fl.us/pub/outgoing/404%20Assumption%20Application/B_Program%20Description/j_other/.

[15] In the event that a programmatic biological opinion and incidental take statement are issued by the USFWS, and that biological opinion's conclusion or reasonable and prudent alternatives or measures relies on the establishment of a technical assistance process with DEP, the memorandum provides that FDEP or FWC will engage in a technical assistance process with the USFWS for state 404 permits. *Id.* at 5.

[16] See Fla. DEP, *State 404 Program Applicant's Handbook* 6, 44-47 (proposed official draft, 2020) (providing a list of rivers, creeks, and lakes that will be retained by the corps for 404 permitting.)

[17] Fla. DEP & U.S. Army Corps of Eng., *Memorandum of Agreement Between the Florida Department of Environmental Protection and the Department of the Army* at 6.

[18] *Id.* at 4.

[19] The corps will retain responsibility for the discharge of dredged or fill material in those waters identified in the retained waters list (appendix A), as well as all waters subject to the ebb and flow of the tide shoreward to their mean high water mark that are not specifically listed in the retained waters list, including wetlands adjacent thereto landward to the administrative boundary. Fla. DEP & U.S. Army Corps of Eng., *Memorandum of Agreement Between the Florida Department of Environmental Protection and the Department of the Army* at 2.

[20] *Id.*

[21] See Fla. DEP, *State 404 Program Applicant's Handbook* at 10.

[22] "Indian country" is defined in 18 U.S.C. §1151 to mean: "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. §1151 (2020).

[23] Federally recognized tribes are set forth on the list published annually by the secretary of the interior. See Federally Recognized Indian Tribe List Act of 1994 Pub. L. No. 103-454, §104, 108 Stat. 4791, 4792 (1994) (current version at 25 U.S.C. §5131 (2020)).

[24] Fla. DEP & U.S. Army Corps of Eng., *Memorandum of Agreement Between the Florida Department of Environmental Protection and the Department of the Army* at 7.

[25] 33 U.S.C. §408 (2020).

[26] According to the state's 404 handbook: "In accordance with Section 10 of the Rivers and Harbors Act (RHA), the Corps has regulatory jurisdiction over all obstructions and alterations of navigable waters of the United States, the construction of any structures in or over navigable waters of the United States, and any work affecting the course, location, condition, or capacity of navigable waters of the United States, as defined in 33 C.F.R. Part 329. This includes permit authority under Section 10 of the RHA for those waters based solely on historic use (Section 10 historic waters). While the Corps retains authority over Section 10 historic waters, upon the effective date of the State 404 Program, the State assumes authority over Section 404 permitting within Section 10 historic waters. Therefore, discharges of dredged or fill material in Section 10 historic waters may require a separate Section 10 permit from the Corps in addition to the State 404 permit." See Fla. DEP, *State 404 Program Applicant's Handbook* at 6.

[27] See F.A.C.R. 62-330.060 (2020).

[28] Fla. Stat. §373.4146(5)(c) (2020).

[29] See Fla. DEP, *State 404 Program Applicant's Handbook* at 4.

[30] *Id.*

[31] Fla. Stat. §373.4146(3) (2020).

[32] See Fla. DEP, *State 404 Program Applicant's Handbook* at 20.



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This column is submitted on behalf of the Environmental and Land Use Law Section, Rachael Bruce Santana, chair, and Felicia Kitzmiller, editor.