

# Clean Water Act Section 404 Program: U.S. Environmental Protection Agency Approves Florida's Delegation Request



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On Tuesday, December 22, 2020, the United States Environmental Protection Agency ("EPA") published a notice in the Federal Register that the State of Florida "has the necessary authority to operate a CWA Section 404 program in accordance with the requirements found in CWA section 404(g-1)" and, therefore, "EPA has taken final action to approve Florida's assumption of the program." 85 Fed. Reg. 83,553 (Dec. 22, 2020).

Florida's assumption of the Section 404 Program took effect the same day.

## **Background**

The Clean Water Act prohibits the discharge of any pollutants by any person into waters of the United States without authorization. 33 U.S.C. § 1311(a). The prohibition extends to and includes the discharge of dredged or fill material into waters of the United States. Section 404 of the Clean Water Act authorizes the U.S. Army Corps of Engineers to issue permits for the discharge of dredged or fill material. 33 U.S.C. § 1344. The Corps' permitting program is commonly referred to as Section 404 or the 404 Program.

Section 404(g)(1) provides states and tribes the opportunity to submit to EPA a request to assume administration of the Section 404 program in certain waters within state or tribal jurisdiction. The regulations establishing the requirements for state or tribal assumption of the 404 Program are codified at 40 CFR Parts 232 and 233.

A state application to assume and administer the Section 404 program must include:

- a letter from the Governor of the state requesting approval;
- a complete program description as outlined in 40 CFR 233.11;
- an Attorney General's statement that the laws and regulations of the State provide adequate authority to carry out the program and meet all applicable requirements;
- a Memorandum of Agreement with the EPA Regional Administrator;
- a Memorandum of Agreement with the Secretary of the Army; and
- copies of all applicable state statutes and regulations to implement the program, including applicable state administrative procedures.

## **Florida's Assumption Request**

On August 20, 2020, EPA received from the Governor of the State of Florida a complete program submission. On September 16, 2020, EPA published in the Federal Register a notice of its receipt of a

complete program assumption request, opened a public comment period, and scheduled public hearings. See 85 Fed. Reg. 57,853 (Sept. 16, 2020).

In addition to public review and comment on the assumption request materials, EPA also consulted with the U.S. Fish & Wildlife Service pursuant to Section 7 of the Endangered Species Act, and consulted with the Advisory Council on Historic Preservation and the Florida State Historic Preservation Officer pursuant to Section 106 of the National Historic Preservation Act. EPA received over 3,000 public comments during the public comment period.

#### **Florida State 404 Program**

Florida's 404 Program includes provisions for the issuance of general permits and individual permits. The State adopted 38 general permits. See 85 Fed. Reg. at 57,855.

In its public notice of Florida's application, EPA highlighted relevant portions of the Florida laws designed to implement the Section 404 Program and noted, among other items, specific requirements that:

- “no dredge or fill activity shall be permitted if there is a practicable alternative to the proposed activity which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences” and
- an individual permit cannot be issued if it “[c]auses or contributes to violations of any applicable State water quality standard, except when temporarily within a mixing zone proposed by the applicant and approved . . .” by the State.

*Id.* EPA also referenced Florida's existing state-only permit program, “which regulates the disposal of dredged or fill materials into waters of the State under State Law.” *Id.*

Pursuant to its Memorandum with the Secretary of the Army all “existing Section 404 permits already issued by the Corps as of the effective date of State assumption [e.g., December 22, 2020] will remain with the Corps” during the lifespan of the permit. *Id.* Notably, EPA also clearly stated that it “maintains oversight of State-issued permits pursuant to 40 CFR 233.50. *Id.*

With its December 22, 2020 approval in hand, Florida joins Michigan and New Jersey as the only state assumed Section 404 Programs in the country.

A copy of EPA's Notice of Florida's September request to assume program authority can be found [HERE](#).

A copy of EPA's Notice of Approval of Florida's request to assume program authority can be found [HERE](#).