



Natural Resources & Public Lands Subcommittee

January 17, 2018
12:30 PM – 3:30 PM
12 HOB

Meeting Packet

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Natural Resources & Public Lands Subcommittee

Start Date and Time: Wednesday, January 17, 2018 12:30 pm
End Date and Time: Wednesday, January 17, 2018 03:30 pm
Location: 12 HOB
Duration: 3.00 hrs

Consideration of the following proposed committee bill(s):



PCB NRPL 18-02 -- State assumption of federal section 404 dredge and fill permitting authority

Update on the South Florida Water Management District status report on implementation of Chapter 2017-10, Laws of Florida (CS/SB 10), relating to water resources

NOTICE FINALIZED on 01/12/2018 4:04PM by Herndon.Angela

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB NRPL 18-02 State assumption of federal section 404 dredge and fill permitting authority
SPONSOR(S): Natural Resources & Public Lands Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:** SB 1402

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Natural Resources & Public Lands Subcommittee		Gregory 	Shugar 

SUMMARY ANALYSIS

Section 404 of the Clean Water Act (CWA) provides the principle federal protection for wetlands. Under the CWA, no person may discharge dredge or fill materials into navigable waters without a permit. The United States Army Corps of Engineers (Corps) administers the section 404 dredge and fill permitting program (program), while the United States Environmental Protection Agency (EPA) provides oversight.

Part IV of chapter 373, F.S., establishes Florida's wetland regulatory program. The Environmental Resource Permit (ERP) program administers permits for dredging and filling in all wetlands and other surface waters, including state waters not subject to federal jurisdiction. The ERP program also regulates activities that affect the flow of water across the surface of the land, such as stormwater.

States may assume administration of the program from the federal government. Assumption allows states to process permit applications, issue permits, and monitor permitted activities on behalf of the federal government. A state's permitting criteria must be at least as stringent as federal criteria and must follow federal permitting procedures. The ERP program requirements are substantially similar to the federal requirements and could be used to administer the program.

The PCB:

- Authorizes DEP to assume administration of the program. State assumption would streamline, but not merge, the current state and federal permitting processes;
- Grants DEP rulemaking authority to adopt necessary rules to satisfy federal requirements to administer the program. The PCB specifically authorizes DEP to adopt the EPA's guidance for section 404 dredge and fill permits and the Corps' public interest criteria for evaluating permits. DEP cannot assume administration of the program until EPA approves Florida's application for assumption;
- Clarifies that when state law conflicts with federal requirements, the federal requirements would apply to the state administered section 404 permits;
- Incorporates by reference the exemptions from federal permitting requirements found in the CWA and rules for the state administered section 404 permits;
- Exempts state administered section 404 permits from state permitting decision deadlines;
- Limits state administered section 404 permits to a period of no more than five years, as required by federal law.
- Provides that upon timely, complete application for reissuance, a state administered section 404 permit would not expire until DEP acts on the application. The PCB requires DEP to adopt rules for an expedited permit review process for the reissuance of state administered section 404 permits under certain conditions; and
- Authorizes DEP to delegate administration of the state administered program to water management districts or other governmental entities seeking such authority. The PCB authorizes DEP to review, modify, revoke, or rescind any state administered section 404 permit issued by a delegated entity to ensure consistency with federal law.

The PCB will likely have a fiscal impact on DEP; however, DEP has indicated that the agency is able to absorb the impact within existing resources.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: pcb02.NRPL.DOCX

DATE: 1/12/2018

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Federal Wetland Regulations

Jurisdiction

Section 404 of the Clean Water Act (CWA) provides the principle federal protection for wetlands.¹ The United States Environmental Protection Agency (EPA) and the United States Army Corps of Engineers (Corps) jointly implement the section 404 dredge and fill permitting program (program).² Under the law, no person may discharge dredge or fill materials into navigable waters without a permit.³ Navigable waters are waters of the United States, including the territorial seas.⁴ "Waters of the United States" include waters traditionally covered by federal jurisdiction such as interstate waters, waters used for interstate and foreign commerce, the territorial seas, and navigable waters. However, federal courts have agreed the CWA's geographic jurisdiction extends beyond those waters to tributaries, adjacent wetlands,⁵ and waters that have a relatively permanent connection to downstream traditional navigable waters.⁶

The Corps adopted technical guidelines and procedures in 1987 to delineate the extent of wetlands and adopted specific guidance in 2010 for wetlands in the Atlantic and Gulf Coastal Plain Region.⁷ The Corps identifies wetlands based on a three-factor approach involving indicators of hydrophilic vegetation, hydric soil, and wetland hydrology.⁸

Permitting Standard

The EPA and the Corps develop regulations for the program.⁹ The Corps serves as the key regulatory agency that issues section 404 dredge and fill permits (section 404 permits). To receive a section 404 permit, an applicant must demonstrate:

- There is no practicable alternative to the proposed activity that would have less impact on the aquatic ecosystem;
- The proposed activity will not violate other state or federal laws that protect environmental resources;
- The proposed activity will not cause or contribute to significant degradation of waters of the United States; and
- The applicant took appropriate and practicable steps to avoid and minimize potential adverse impacts.¹⁰

¹ 33 U.S.C. § 1344.

² 33 U.S.C. § 1344(a) and (b).

³ 33 U.S.C. § 1344(a).

⁴ 33 U.S.C. § 1362(7).

⁵ *United States v. Riverside Bayview Homes*, 474 U.S. 121, 139 (1985).

⁶ *Rapanos v. United States*, 547 U.S. 715, 733 (2006).

⁷ Corps, *Corps of Engineers Wetlands Delineation Manual* (1987), available at:

<http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/Wetlands/1987WetlandDelineation.pdf> (last visited January 2, 2018); Corps, *Regional Supplement to the Corps of Engineers Wetlands Delineation Manual: Atlantic and Gulf Coastal Plain Region (Version 2.0)* (2010), available at

http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/Wetlands/AGCP_regsupV2.pdf (last visited January 2, 2018).

⁸ *Regional Supplement to the Corps of Engineers Wetlands Delineation Manual: Atlantic and Gulf Coastal Plain Region* p. 1.

⁹ 33 U.S.C. § 1344(b).

¹⁰ 40 C.F.R. § 230.10.

As part of its alternative analysis, the Corps must evaluate alternatives that accomplish the overall project purpose and are reasonable and practicable.¹¹ The Corps cannot issue a section 404 permit if a practicable alternative exists that would have less adverse impact on the aquatic ecosystem, provided that the alternative does not have other significant adverse environmental impacts.¹²

When the Corps evaluates whether the activity will violate other state and federal laws, it considers whether the proposed activity:

- Violates state water quality standards;
- Violates applicable toxic effluent standards of the CWA;
- Jeopardizes the continued existence of endangered or threatened species listed under the Endangered Species Act (ESA) or would result in destruction or adverse modification of critical habitat for endangered or threatened species; and
- Violates any regulation to protect any marine sanctuary designated under the Marine Protection, Research, and Sanctuaries Act.¹³

When the Corps evaluates whether the activity will cause or contribute to significant degradation of waters of the United States, it bases its determinations on factual determinations, evaluations, and tests outlined in the EPA's rules.¹⁴

When the Corps evaluates whether the applicant took appropriate and practicable steps to avoid and minimize potential adverse impacts, it considers limitations of the dredge material itself, dispersion of the dredge material, actions to avoid impacts to wildlife, and actions to avoid impacts to human use.¹⁵

Whenever a federal agency authorizes, funds, or undertakes an activity, it must evaluate the effects of each proposed action on any federally listed threatened or endangered species or its designated critical habitat.¹⁶ These evaluations often require coordination with the United States Fish and Wildlife Service (FWS) and/or National Oceanic and Atmospheric Administration (NOAA) Marine Fisheries Service.

Applicants may propose mitigation to offset environmental losses caused by the unavoidable adverse impacts of the proposed activity.¹⁷ Applicants must first avoid and minimize impacts before proposing mitigation.¹⁸ Applicants may also purchase mitigation credits from a mitigation bank or use an in-lieu fee program credit.¹⁹ Compensatory mitigation is the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources.²⁰

As part of the permitting process, the Corps must conduct a public interest review. The Corps bases its decision on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest. The Corps will grant a permit unless it determines the proposed activity is contrary to the public interest. The Corps must consider all factors that may be relevant to the proposal including the cumulative effects thereof, including conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs,

¹¹ 40 C.F.R. § 230.10(a); *See also* Corps, *Information for Preparing an Alternatives Analysis Under Section 404* (June 2014), available at: http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/Alternatives/20140624-Preparing_Alternatives_%20Analysis.pdf (last visited October 30, 2017).

¹² *Id.*; *See National Wildlife Federation v. Whistler*, 27 F.3d 1341, 1344 (8th Cir. 1994).

¹³ 40 C.F.R. § 230.10(b).

¹⁴ 40 C.F.R. Part 230 subparts B, C, F, and G.

¹⁵ 40 C.F.R. Part 230 subpart H.

¹⁶ 16 U.S.C. § 1536(a)(2).

¹⁷ 40 C.F.R. § 230.93(a).

¹⁸ 40 C.F.R. § 230.91(c).

¹⁹ 40 C.F.R. § 230.93(b).

²⁰ 40 C.F.R. § 230.92.

considerations of property ownership and, in general, the needs and welfare of the people. For activities involving 404 discharges, the Corps will deny a permit if the discharge would not comply with the EPA's guidelines described above.²¹

The Corps considers the following general criteria in the evaluation of every application:

- The relative extent of the public and private need for the proposed structure or work;
- Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and
- The extent and permanence of the beneficial and/or detrimental effects that the proposed structure or work is likely to have on the public and private uses to which the area is suited.²²

The Corps determines the specific weight of each factor by its importance and relevance to the particular proposed activity. Accordingly, the importance of a particular factor and how much consideration it deserves will vary with each proposal.²³

Permitting Process

Once the Corps receives an application, it evaluates the material to determine if the application is complete. If the application is incomplete, the Corps will request additional information within 15 days.²⁴ When the Corps deems the application complete, it will publish a public notice within 15 days to receive comments from interested parties on the proposed project.²⁵ Comment periods are no more than 30 days and no less than 15 days.²⁶ The Corps evaluates each comment, furnishes the applicant the comments, and determines if a public hearing is necessary.²⁷

After the comment period and possible public hearing, the Corps will determine whether the section 404 permit should be issued based on the record and applicable law.²⁸ The Corps will decide on all applications within 60 days unless precluded by law or procedures required by other laws, such as the CWA.²⁹ The Corps will add special conditions to a section 404 permit when such conditions are necessary to satisfy legal requirements or to satisfy the public interest requirement.³⁰

Section 404 permits issued by the Corps for permanent structures will have an indefinite duration, while section 404 permits for temporary structures or restorations of waterways will have a definite end date.³¹ The Corps will specify time limits for completing the work or activity for construction, discharge of dredged or fill material, or other activity and any construction period for a structure with a section 404 permit.³² Permit holders may request extensions of time.³³

The section 404 permit holder may request permit modification or the Corps may unilaterally modify the section 404 permit, if it determines that the public interest requires a modification of the terms or

²¹ 33 C.F.R. § 320.4(a)(1).

²² 33 C.F.R. § 320.4(a)(2).

²³ 33 C.F.R. § 320.4(a)(3).

²⁴ 33 C.F.R. § 325.2(a)(1).

²⁵ 33 C.F.R. § 325.2(a)(2).

²⁶ 33 C.F.R. § 325.2(d)(2).

²⁷ 33 C.F.R. § 325.2(a)(3).

²⁸ 33 C.F.R. § 325.2(a)(6).

²⁹ 33 C.F.R. § 325.2(d)(3). Processing time for individual permits is usually 60 to 120 days from the receipt of a complete application in non-controversial projects. Controversial or larger projects may take longer. Corps, *Sourcebook*, <http://www.saj.usace.army.mil/Missions/Regulatory/Source-Book/> (last visited January 4, 2018).

³⁰ 33 C.F.R. § 325.4(a).

³¹ 33 C.F.R. § 325.6(b).

³² 33 C.F.R. § 325.6(e).

³³ 33 C.F.R. § 325.6(d).

conditions of the permit based on a reevaluation of the circumstances and conditions of a permit.³⁴ If the permittee does not agree to the modification, the Corps may take enforcement actions that may include suspension or revocation of the section 404 permit.³⁵

Exemptions

The CWA specifically exempts six activities from section 404 permitting.³⁶ However, any exempt activity intended to bring an area into a use that the area was not previously subject to, that impairs flow or circulation of navigable waters or reduces the reach of such waters, must obtain a section 404 permit.³⁷

Alternative Permitting

The CWA authorizes, and the Corps developed, numerous alternative permitting procedures to reduce regulatory burdens. A "general permit" is a Corps authorization issued on a nationwide or regional basis for a category of activities that are substantially similar in nature and cause only minimal individual and cumulative impacts.³⁸ After the Corps issues a general permit, individual activities falling within the categories authorized by the general permits do not need to seek further authorization by the Corps.³⁹ The Corps currently implements 17 general permits specifically for Florida and 44 nationally. These activities include maintenance dredging, transmission lines, residential docks, and other minor structures.⁴⁰

A state desiring to administer a general permit may submit to the Corps a description of the program the state proposes to establish and administer under state law.⁴¹ If the Corps approves the state's program, the state takes over issuing the general permits.⁴² Programmatic general permits are a type of general permit founded on an existing state, local, or federal agency program designed to avoid duplication with that program. The Corps has issued 12 programmatic general permits for Florida.⁴³

Letters of permission (LOP) are a type of permit issued by the Corps with abbreviated procedures.⁴⁴ The Corps evaluates the following as LOPs: mosquito control activities; erosion control activities not to exceed .2 acres; minor modifications not to exceed ten percent of the original authorization or 10 acres; backfill to eliminate existing, unvegetated boat basins and boat ramps not to exceed 0.2 acre; and restoration efforts by DEP.⁴⁵

Enforcement

For unauthorized activities, the Corps may formulate recommendations on the appropriate administrative course or legal action it will take.⁴⁶ The Corps may administratively order such remedial measures and make a decision on whether legal action is necessary.⁴⁷

³⁴ 33 C.F.R. § 325.7(b).

³⁵ 33 C.F.R. § 325.7(b), (c), and (d).

³⁶ 33 U.S.C. § 1344(f)(1); *See also* 33 C.F.R. § 323.4 and 40 C.F.R. § 232.3.

³⁷ 33 U.S.C. § 1344(f)(2).

³⁸ 33 U.S.C. § 1344(e)(1).

³⁹ 33 C.F.R. § 325.2(e)(2).

⁴⁰ Corps, *Sourcebook*, <http://www.saj.usace.army.mil/Missions/Regulatory/Source-Book/> (last visited January 4, 2018).

⁴¹ 33 U.S.C. §1344(g)(1).

⁴² 33 U.S.C. §1344(h).

⁴³ Corps, *Sourcebook*, <http://www.saj.usace.army.mil/Missions/Regulatory/Source-Book/> (last visited January 4, 2018).

⁴⁴ 33 C.F.R. 325.2 (e)(1).

⁴⁵ Corps, *Public Notice of LOP Categories of Work, May 21, 1996*, available at

http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/permitting/letter_of_permission/lop21may96.pdf (last visited January 4, 2018).

⁴⁶ 33 C.F.R. 326.3.

⁴⁷ *Id.*; Corps, *Sourcebook*, <http://www.saj.usace.army.mil/Missions/Regulatory/Source-Book/> (last visited November 1, 2017).

Permit Challenges

Once a section 404 permit is approved or denied, third parties may challenge the issuance or the applicant may challenge the denial. The applicant bears the burden of proof to demonstrate they are entitled to the section 404 permit.⁴⁸ The appeal of a 404 permit denial is limited to the information contained in the administrative record by the date of the notice of appeals process for the application, the proceedings of the appeal conference, and any relevant information gathered by the review officer. Neither the appellant nor the Corps may present new information not already contained in the administrative record, but both parties may interpret, clarify or explain issues and information contained in the record.⁴⁹

Florida Wetland Regulations: Environmental Resource Permit (ERP)

Jurisdiction

Part IV of chapter 373, F.S., regulates the construction, alteration, operation, maintenance, abandonment and removal of stormwater management systems, dams, impoundments, reservoirs, works and appurtenant works. Such projects include dredging and filling in wetlands and other surface waters.⁵⁰

“Water” or “waters in the state” are any and all water on or beneath the surface of the ground or in the atmosphere, including natural or artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground, as well as all coastal waters within the jurisdiction of the state.⁵¹ “Surface water” is water upon the surface of the earth, whether contained in bounds created naturally or artificially or diffused.⁵² The definition of water and the permitting thresholds for Florida’s regulations are broader and capture more activities than the federal regulations. Florida adopted a method to delineate the extent of wetlands in 1994.⁵³

DEP, the five water management districts (WMDs), and certain local governments delegated by DEP⁵⁴ jointly implement Florida’s ERP program. The agencies’ responsibilities are divided according to the Operating and Delegation Agreement⁵⁵ and the geographic regions of the WMDs.⁵⁶

Permitting Standard

To receive an ERP, an applicant must demonstrate the proposed activity will not be harmful to the water resources and will not be inconsistent with the overall objectives of the WMD. The applicant must provide reasonable assurance the activity will not violate the applicable water quality standard and the activity is not contrary to the public interest. For activities in Outstanding Florida Waters, the applicant must provide reasonable assurance that the proposed activity will be clearly in the public interest.⁵⁷ It is

⁴⁸ 5 U.S.C. § 556(d); *U.S. Steel Corp. v. Train et al.*, 556 F.2d 822, 834 (7th Cir. 1977).

⁴⁹ 33 C.F.R. § 331.7(f).

⁵⁰ Section 373.413(1), F.S.; DEP, *Environmental Resource Permit Applicant’s Handbook, Volume 1*, AH 1.0, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 4, 2018); s. 373.403(13), F.S., defines dredging as excavation, by any means, in surface waters or wetlands. It also means the excavation, or creation, of a water body that is, or will be, connected to surface waters or wetlands, directly or via an excavated water body or series of water bodies.; s. 373.403(14), F.S., defines filling as the deposition, by any means, of materials in surface waters or wetlands

⁵¹ Section 373.019(22), F.S.

⁵² Section 373.019(21), F.S.

⁵³ Section 373.4211, F.S.; chapter 62-340, F.A.C.

⁵⁴ Section 373.441, F.S.

⁵⁵ Incorporated by reference in chapter 62-113, F.A.C., accessible at: <https://floridadep.gov/ogc/ogc/content/operating-agreements>, (last visited January 4, 2018).

⁵⁶ DEP, *Environmental Resource Permit Applicant’s Handbook, Volume 1*, AH 1.0, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 4, 2018).

⁵⁷ Section 373.414(1), F.S.

the intent of DEP and the WMDs that they will implement these criteria in a manner that achieves a programmatic goal, and a project-permitting goal, of no net loss in wetlands or other surface water functions.⁵⁸

To determine whether an activity is not contrary to the public interest or is clearly in the public interest, the WMD or DEP must consider and balance the following criteria:

- Whether the activity will adversely affect the public health, safety, or welfare or the property of others;
- Whether the activity will adversely affect the conservation of fish and wildlife, including endangered or threatened species, or their habitats;
- Whether the activity will adversely affect navigation or the flow of water or cause harmful erosion or shoaling;
- Whether the activity will adversely affect the fishing or recreational values or marine productivity in the vicinity of the activity;
- Whether the activity will be of a temporary or permanent nature;
- Whether the activity will adversely affect or will enhance significant historical and archaeological resources; and
- The current condition and relative value of functions being performed by areas affected by the proposed activity.⁵⁹

DEP and the WMDs require applicants to consider design modifications to reduce or eliminate adverse impacts before proposing mitigation to offset adverse impacts.⁶⁰ An applicant must provide reasonable assurances that a regulated activity will not impact the values of wetland and other surface water functions that would cause adverse impacts to the abundance and diversity of fish, wildlife, listed species, and the bald eagle and the habitat of fish, wildlife, and listed species.⁶¹ After the applicant has made practicable design modifications, an applicant may propose mitigation, or DEP or the WMD may suggest mitigation, to offset the adverse impacts caused by the proposed activity.⁶²

DEP and the WMDs will provide a copy of all notices of ERP applications that propose regulated activities in, on, or over wetlands or other surface waters to the Florida Fish and Wildlife Conservation Commission (FWC) for review and comment. In addition, DEP and the WMDs may solicit comments from FWC regarding other applications to assist in the assessment of potential impacts to fish and wildlife and their habitats, particularly with regard to listed species.⁶³ If the proposed activity will likely take⁶⁴ an endangered or threatened species, the applicant may be required to obtain an incidental take permit from either FWS or NOAA in a process separate and apart from the ERP process.⁶⁵

⁵⁸ DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 10.1, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 4, 2018).

⁵⁹ Section 373.414(1)(a), F.S.; r. 62-330.301(1), F.A.C.; DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 10.1.1, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 4, 2018).

⁶⁰ DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 10.2.1, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 4, 2018).

⁶¹ *Id.* at AH 10.2.2; "Listed Species" are those species that are endangered or threatened species by the federal government or species of special concern listed by FWC. *Id.* at AH 2.0 56.

⁶² Section 373.414(1)(b), F.S.; DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 10.3, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 4, 2018).

⁶³ *Id.* at AH 10.2.2.

⁶⁴ "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19). "Harm," is "an act which actually kills or injures wildlife" that may include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. The "take" prohibition in 16 U.S.C. § 1538(a)(1)(B) applies to both "endangered" and "threatened" species. 50 C.F.R. § 17.31(a).

⁶⁵ 16 U.S.C. § 1538(a)(1)(B).

Applicants may seek variances from the ERP standards found in both statute and rule.⁶⁶

Permitting Process

Once DEP or the WMD receives an application, it evaluates the material to determine if the application is complete.⁶⁷ If the application is incomplete, DEP or the WMD will request additional information within 30 days.⁶⁸ The applicant must respond to such requests within 90 days.⁶⁹ Within 30 days after receipt of such additional information, DEP or the WMD must review the submittal.⁷⁰ Unlike other state permits, DEP or the WMD must decide whether it should issue or deny an ERP within 60 days of the original application, the last item of timely requested additional material, or the applicant's written request to begin processing the permit application.⁷¹ Any application that DEP or the WMD do not approve or deny within 60 days is considered approved by default.⁷²

DEP and WMDs authorize the construction phase of an ERP typically for five years, but may authorize ERPs for a longer duration if certain criteria are met.⁷³ The construction phase of an ERP expires on the date indicated in the permit, unless DEP or the WMD receives an application for an extension of the construction phase prior to expiration of the permit, certain conditions are met, and DEP grants the extension.⁷⁴ The operation and maintenance phase of all ERPs is in perpetuity.⁷⁵

The permit holder may request a modification to an existing, currently valid ERP.⁷⁶ DEP and the WMDs must process any application for modification as a major modification, if that application does not qualify for a minor modification. An application for a major modification of an ERP must be submitted, reviewed, and processed in the same manner as a new ERP application.⁷⁷

Exemptions

Current law exempts 34 activities from the requirement to obtain an ERP.⁷⁸ These activities include activities permitted by other agencies, certain agricultural activities, maintenance activities on already impacted areas, maintenance of deepwater ports, and other minor structures.

DEP and WMDs may establish by rule activities that they determine will have only minimal or insignificant individual or cumulative adverse impacts on the water resources of the district.⁷⁹ DEP has identified 60 activities that are exempt from ERP requirements.⁸⁰ Further, DEP and the WMDs may determine, on a case-by-case basis, whether a specific activity only minimally or insignificantly has an

⁶⁶ Section 373.414(17), F.S.

⁶⁷ DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 5.5.3, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 4, 2018).

⁶⁸ Section 373.414(1), F.S.

⁶⁹ DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 5.5.3.5, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 4, 2018).

⁷⁰ Section 373.414(1), F.S.

⁷¹ Section 373.414(2), F.S.; Most state permit decisions in Florida must be made within 90 days. s. 120.60(1), F.S.

⁷² Section 120.60(1), F.S.

⁷³ Rules 62-330.320(2), 62-330.315(2)(a), and 62-330.320(2), F.A.C.

⁷⁴ DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 6.1.2.2, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 4, 2018).

⁷⁵ Rule 62-330.320(3), F.A.C.; DEP, *Environmental Resource Permit Applicant's Handbook, Volume 1*, AH 6.1.4, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 4, 2018).

⁷⁶ Rule 62-330.315(2), F.A.C.; Types of requests considered are listed in the rule.

⁷⁷ Rule 62-330.315(3), F.A.C.

⁷⁸ See Sections 373.406 and 403.813(1), F.S.

⁷⁹ Section 373.406(6), F.S.

⁸⁰ Rule 62-330.051, F.A.C.

individual or cumulative adverse impact on the water resources.⁸¹ These are known as *de minimis* exemptions.⁸²

Alternative Permitting

DEP and the WMDs may adopt rules to establish general permits for projects, or categories of projects, that have, either singly or cumulatively, a minimal adverse impact on the water resources of the district. These rules must specify design or performance criteria that, if applied, would result in compliance with the conditions for issuance of permits described above.⁸³ General permits authorize activities by rule rather than by individual review of applications.⁸⁴ Some of the activities authorized by general permit include dredging navigation channels, installing riprap, mosquito control, certain Department of Transportation activities, and other minor structures.

Enforcement

Any person who willfully causes pollution commits a felony of the third degree punishable by a fine of not more than \$50,000 or by imprisonment for five years, or by both, for each offense. Each day during any portion of which such violation occurs constitutes a separate offense.⁸⁵ Any person who causes pollution due to reckless indifference or gross careless disregard commits a misdemeanor of the second degree, punishable by a fine of not more than \$5,000 or 60 days in jail, or by both, for each offense.⁸⁶ Any person who willfully fails to obtain an ERP or knowingly makes any false statement, representation, or certification commits a misdemeanor of the first degree, punishable by a fine of not more than \$10,000 or by 6 months in jail, or by both, for each offense.⁸⁷

Whenever a WMD believes a violation of any ERP regulation, permit, or order has occurred, is occurring, or is about to occur, the WMD may serve a written complaint on the alleged violator or violators and also order necessary corrective action the violator must take within a reasonable time.⁸⁸

DEP and WMDs may seek civil and administrative remedies for dredge and fill or stormwater violations. For judicial remedies, DEP and WMDs may seek penalties of \$10,000 per offense.⁸⁹ For administrative remedies, DEP and WMDs may not impose penalties in excess of \$10,000 per notice of violation.⁹⁰

Permit Challenges

Once an ERP is approved or denied, third parties may challenge the issuance or the applicant may challenge the denial. Unlike federal permit challenges, if a third party petitioner challenges approval of an ERP, it has the burden of ultimate persuasion and has the burden of going forward to prove the case in opposition to the ERP.⁹¹ Also, unlike federal administrative appeals, the hearing officer is free to consider relevant evidence external to the application.⁹²

⁸¹ Section 373.406(6), F.S.

⁸² DEP, *Environmental Resource Permit Applicant's Handbook*, Volume 1, AH 3.2.7, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 4, 2018).

⁸³ Sections 373.118(1), 373.406(5), 373.4131(1)(a)4., and 373.4145(1)(b) and (2)(d) and (e), F.S.

⁸⁴ DEP, *Environmental Resource Permit Applicant's Handbook*, Volume 1, AH 5.3.1, incorporated by reference in r. 62-330.010(4), F.A.C. (October 1, 2013) available at: <https://www.flrules.org/gateway/reference.asp?No=Ref-03174> (last visited January 4, 2018).

⁸⁵ Section 373.430(3), F.S.

⁸⁶ Section 373.430(4), F.S.

⁸⁷ Section 373.430(5), F.S.

⁸⁸ Section 373.119(1), F.S.

⁸⁹ Sections 373.129(5) and (7) and 403.121(1), F.S.

⁹⁰ Sections 373.129(7) and 403.121(2), F.S.

⁹¹ Section 120.569(2)(p), F.S.

⁹² Section 120.57(1)(k), F.S.; McDonald v. Dept. of Banking Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977); See 33 CFR §§ 331.7(e)(6) and 331.7(f).

Section 404 Assumption

Jurisdiction

A state or tribe may seek assumption of the program in certain waters.⁹³ The Corps retains jurisdiction in tidal waters and their adjacent wetlands and waters used as a means to transport interstate or foreign commerce and their adjacent wetlands.⁹⁴ For those waters, an applicant will need to continue to seek authorizations from both the Corps and the state or tribe permitting agency. The state or tribe program must regulate all discharges of dredged or fill material into state assumed waters. EPA will not approve partial state programs.⁹⁵ The state or tribe must implement its assumed program in accordance to the CWA and its regulations. A state's permitting criteria may be more stringent and encompass a greater scope than required by federal law.⁹⁶

When the state or tribe assumes administration of the program, they assumes responsibility for the program, determines the regulated areas and activities, processes individual permits for specific proposed activities, and carries out enforcement activities.⁹⁷

Standard for Assumption Approval

To authorize assumption of the program, EPA must determine whether a state or tribe possesses the following authority:

- To issue permits that:
 - Apply, and assure compliance with any applicable requirements of the CWA, including, but not limited to, the guidelines established by EPA;⁹⁸
 - Are for fixed terms not exceeding five years; and
 - Can be terminated or modified for cause including, but not limited to, the following: violation of any condition of the permit; obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts; or change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;
- To issue state administered section 404 permits that apply, and assure compliance with, all applicable requirements of the CWA to inspect, monitor, enter, and require reports from permit holders;
- To assure that the public, and any other state whose water may be affected, receive notice of each state administered 404 permit application and to provide an opportunity for a public hearing before a ruling on each application;
- To assure that EPA receives notice of each state administered 404 permit application;
- To assure that any state (other than the permitting state), whose waters may be affected by the issuance of a state administered section 404 permit may submit written recommendations to the permitting state (and EPA) with respect to any state administered section 404 permit application and, if any part of such written recommendations are not accepted by the permitting state, that the permitting state will notify the affected state (and EPA) in writing of its failure to accept the recommendations together with its reasons for so doing;
- To assure that no state administered section 404 permit will be issued if anchorage and navigation of any of the navigable waters would be substantially impaired thereby;
- To abate violations of the state administered section 404 permit or the permit program, including civil and criminal penalties and other ways and means of enforcement; and

⁹³ 33 U.S.C. § 1344(g).

⁹⁴ 33 U.S.C. § 1344(g)(1).

⁹⁵ 40 C.F.R. § 233.1(b).

⁹⁶ 40 C.F.R. § 233.1(c).

⁹⁷ EPA, *State or Tribal Assumption of the Section 404 Permit Program*, <https://www.epa.gov/cwa-404/state-or-tribal-assumption-section-404-permit-program> (last visited January 4, 2018).

⁹⁸ The section 404 guidelines are in 40 C.F.R. Part 230.

- To assure continued coordination with federal and federal-state water-related planning and review processes.⁹⁹

If EPA approves the state's application, it must notify the state and the Corps of the decision and publish the notice in the Federal Register. Transfer of the program to the state becomes effective when the notice appears in the Federal Register. The Corps must suspend the issuance of section 404 permits in state regulated waters on the effective date.¹⁰⁰ The Corps must transfer to the state all pending applications for dredge and fill activities.¹⁰¹ If the state chooses to implement the Corps' general permits, the Corps must suspend the administration and enforcement of such general permits.¹⁰² Lastly, once a state or tribe assumes section 404 permitting, it must revise its dredge and fill regulations within one year of revision of any applicable section 404 regulation or statute.¹⁰³

Permitting Process

Once a state assumes section 404 permitting, it may not issue a state administered section 404 permit when:

- The permit does not comply with the requirements of the CWA or its regulations;
- The EPA has objected to issuance of the permit and the objection has not been resolved (discussed in more detail below);
- The proposed discharges would be in an area EPA has prohibited, withdrawn, or denied as a disposal site, or when the discharge would fail to comply with a restriction imposed thereunder; and
- The Corps determines, after consultation with the Coast Guard, that anchorage and navigation of any of the navigable waters would be substantially impaired.¹⁰⁴

Permits issued under a state or tribal section 404 program are state permits issued under state law. For this reason, the provisions of other federal laws that apply to federal permit actions, such as section 7 of the ESA, are not applicable.¹⁰⁵ While other applicable laws may address endangered and threatened species concerns, the applicants may not have the benefit of federal review and the ability to receive a biological opinion. Thus, applicants may be required to obtain an incidental take permit if their activity takes endangered or threatened species. New Jersey addressed this permit processing issue with an agreement with FWS and EPA to involve FWS in the review of state administered section 404 permits.¹⁰⁶

A state or tribe must provide public notice of state administered section 404 permit applications and provide a reasonable period, normally 30 days, for interested parties to provide comment.¹⁰⁷ Interested parties may request a public hearing on a state administered section 404 permit application. A state or tribe must hold a public hearing when it determines there is a significant degree of public interest in a state administered section 404 permit application or a draft general permit. A state or tribe may also hold a hearing, at its discretion, whenever it determines a hearing may be useful to a decision on the state administered section 404 permit application.¹⁰⁸

⁹⁹ 33 U.S.C. § 1344(h)(1).

¹⁰⁰ 33 U.S.C. § 1344(h)(2); 40 C.F.R. § 233.15(h).

¹⁰¹ 33 U.S.C. § 1344(h)(4).

¹⁰² 33 U.S.C. § 1344(h)(5).

¹⁰³ 40 C.F.R. § 233.16(b).

¹⁰⁴ 40 C.F.R. § 233.20.

¹⁰⁵ The Association of State Wetland Managers, Inc. and The Environmental Council of States, *Clean Water Act Section 404 Program Assumption: A Handbook for States and Tribes*, p. 25 (August 2011), available at:

https://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf (last visited January 4, 2018).

¹⁰⁶ Susan Lockwood, *Assumption, New Jersey Style*, https://www.aswm.org/pdf_lib/assumption_nj_style.pdf (last visited January 4, 2018).

¹⁰⁷ 40 C.F.R. § 233.32(b).

¹⁰⁸ 40 C.F.R. § 233.33.

If the EPA does not comment on a state administered section 404 permit application, the state or tribe must make its final permit decision at the close of the public comment period.¹⁰⁹ If the EPA comments on the state administered section 404 permit application, the state must follow a specific procedure.¹¹⁰

In the event that the state neither satisfies EPA's objections or requirement for a permit condition nor denies the state administered section 404 permit, the Corps must process the permit application.¹¹¹ Out of the tens of thousands of permits issued by states that have assumed the program, the Corps has only taken over permitting nine times from 1984 to 2011.¹¹²

The EPA may waive review of any category of discharge regulated by the states except: draft general permits; discharges with reasonable potential for affecting endangered or threatened species as determined by FWS; discharges with reasonable potential for adverse impacts on waters of another state; discharges known or suspected to contain toxic pollutants in toxic amounts or hazardous substances in reportable quantities; discharges located in proximity of a public water supply intake; and discharges within critical areas established under state or federal law, including but not limited to national and state parks, fish and wildlife sanctuaries and refuges, national and historical monuments, wilderness areas and preserves, sites identified or proposed under the National Historic Preservation Act, and components of the National Wild and Scenic Rivers System.¹¹³ The EPA has waived all review of state administered section 404 permits except the discharges described above, and certain other major discharges, in both states that have assumed the program.¹¹⁴

Section 404 permits issued by the state must include conditions prescribed by the EPA.¹¹⁵ This includes that state administered section 404 permits may not exceed five years,¹¹⁶ unlike section 404 permits issued by the Corps and Florida's ERPs that have longer or indefinite durations. Applicants may seek to extend the duration of their state administered section 404 permits, but the extension may not last beyond five years from the original effective date.¹¹⁷ A state may continue Corps or state administered section 404 permits until the effective date of the new permits, if state law allows.¹¹⁸

State administered section 404 permits may be modified at the permit holder's request or if the state determines:

- There is significant noncompliance;
- The permit holder failed to fully disclose all relevant facts;
- Activities authorized by a general permit are having more than minimal individual or cumulative adverse effect on the environment, or that the permitted activities are more appropriately regulated by individual permits;
- Circumstances relating to the authorized activity have changed since the permit was issued and justify changed permit conditions or temporary or permanent cessation of any discharge controlled by the permit;
- Significant information relating to the authorized activity was not available at the time the permit was issued and would have justified the imposition of different permit conditions or denial at the time of issuance; or

¹⁰⁹ 40 C.F.R. § 233.35(b).

¹¹⁰ 40 C.F.R. § 233.35(a).

¹¹¹ 33 U.S.C. § 1344(j); 40 C.F.R. § 233.50(j).

¹¹² The Association of State Wetland Managers, Inc. and The Environmental Council of States, Clean Water Act Section 404 Program Assumption: A Handbook for States and Tribes, p. 9 (August 2011), available at: https://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf (last visited January 4, 2018).

¹¹³ 33 U.S.C. § 1344(k); 40 C.F.R. § 233.51.

¹¹⁴ Memorandum of Agreement Between the Michigan Department of Environmental Quality and the United States Environmental Protection Agency, Region 5, p. 3 (dated October 17, 2011); Memorandum of Agreement Between the New Jersey Department of Environmental Protection and the United States Environmental Protection Agency, p. 4 (dated March 4, 1997).

¹¹⁵ 40 C.F.R. § 233.23.

¹¹⁶ 33 U.S.C. § 1344(h)(1)(A)(ii); 40 C.F.R. § 233.23(b).

¹¹⁷ 40 C.F.R. § 233.36(c)(2)(v).

¹¹⁸ 40 C.F.R. § 233.38.

- Revisions to applicable statutory or regulatory authority, including toxic effluent standards or prohibitions or water quality standards.¹¹⁹

Exemptions and Alternative Permitting

When a state or tribe assumes the program, it cannot exempt activities from a state administered section 404 permit that are not also exempt under federal regulations.¹²⁰ A state or tribe that assumes the program may administer and enforce general permits previously issued by the Corps.¹²¹ Further, a state or tribe may issue a general permit for categories of similar activities if it determines the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. Any general permit issued by a state or tribe must comply with EPA's CWA guidance.¹²²

Enforcement

A state that assumes the program must possess enforcement authority to:

- Restrain immediately and effectively any person from engaging in any unauthorized activity;
- Sue to enjoin any threatened or continuing violation of any program requirement;
- Assess or sue to recover civil penalties and to seek criminal remedies, as identified in the EPA's rules.¹²³

A state must assess the approved maximum civil penalty or criminal fine for each violation and, if the violation is continuous, must assess the maximum amount for each day of violation.¹²⁴

The burden of proof and degree of knowledge or intent required under state law for establishing violations must not be greater than the burden of proof or degree of knowledge or intent the EPA must bear when it brings an action under the CWA.¹²⁵

The EPA may approve a state program where the state lacks authority to recover penalties at the levels described above only if it determines, after evaluating a record of at least one year for an alternative enforcement program, that the state has an alternate, demonstrably effective method of ensuring compliance which has both punitive and deterrence effects.¹²⁶ Any state that administers a section 404 permitting program must allow public participation in the state enforcement process.¹²⁷

Withdrawal of 404 Permitting Authority

If the EPA determines, after a public hearing, that a state is not administering a section 404 permitting program in accordance with the CWA and its regulations, the EPA must notify the state. If the state does not take appropriate corrective action within a reasonable time, not to exceed 90 days after the date of the receipt of notice, the EPA must:

- Withdraw approval of the section 404 permitting program until the EPA determines the state has taken corrective action; and

¹¹⁹ 40 C.F.R. § 233.36(a).

¹²⁰ The Association of State Wetland Managers, Inc. and The Environmental Council of States, Clean Water Act Section 404 Program Assumption: A Handbook for States and Tribes, p. 6, 16 (August 2011), available at: https://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf (last visited January 4, 2018).

¹²¹ 40 C.F.R. § 233.21(a).

¹²² 40 C.F.R. § 233.21(b).

¹²³ 40 C.F.R. § 233.41(a).

¹²⁴ 40 C.F.R. § 233.41(b)(1).

¹²⁵ 40 C.F.R. § 233.41(b)(2).

¹²⁶ 40 C.F.R. § 233.41(d)(1).

¹²⁷ 40 C.F.R. § 233.41(e).

- Notify the Corps to resume the section 404 permitting program for activities until the state takes corrective actions.¹²⁸

Notable Differences Between ERP and 404	ERP	State Issued 404
Jurisdiction	Waters of the State	Waters of the United States (WOTUS)
Time Extensions	Up to 5 years	Ok so long as within original 5 years
Application Review	30 days to request additional information 60 days to approve or deny from complete application	15 days to request additional information Minimum 30 days public comment then must decide OR If EPA reviews, minimum 90 days
Exemptions	60	6
Standard of Review Permitting Criteria	Eliminate and reduce, then mitigate ERP public interest criteria May seek variance	Avoid and minimize, then mitigate Corps public interest criteria Must do alternative analysis May not seek variance
General Permits	46	17 – Jacksonville District (Florida) 54 – Nationwide DEP may choose which ones it implements
Wetland Delineation	DEP says it is functionally the same as the Corps' method	Includes certain upland species DEP does not use
Modification	Permits not subject to changes in law or rules after application received	May modify permit if: Noncompliance Failure to disclose relevant facts If general permit has more than minimal adverse impact Circumstances change New information Revision of statutes or regulations
3 rd Party Challenges	Challenger must carry burden of proof	Applicant must carry the burden of proof

Effect of the Proposed Changes

The PCB creates s. 373.4146, F.S., to authorize DEP to assume section 404 of the CWA to regulate the discharge of dredged or fill material into navigable waters. If the EPA approves the state's assumption application, DEP would regulate all discharges of dredged or fill material into state assumed waters where authorized.¹²⁹ The Corps would suspend the issuance of 404 permits in state regulated waters on the effective date of the assumption.¹³⁰ The Corps would transfer to Florida all pending applications for dredge and fill activities in state assumed waters.¹³¹ If Florida chooses to implement the Corps' general permits, the Corps must suspend the administration and enforcement of such general permits.¹³² DEP has indicated that it will issue separate ERP and state administered section 404 permits.

¹²⁸ 33 U.S.C. § 1344(i).

¹²⁹ 40 C.F.R. § 233.1(b).

¹³⁰ 33 U.S.C. § 1344(h)(2); 40 C.F.R. § 233.15(h).

¹³¹ 33 U.S.C. § 1344(h)(4).

¹³² 33 U.S.C. § 1344(h)(5).

Jurisdiction

The PCB defines "state assumed waters" to mean waters of the United States that the state assumes permitting authority over pursuant to the CWA, and the rules promulgated thereunder, for the purposes of permitting the discharge of dredge or fill material. Florida may only assume administration of the program in certain waters. The Corps retains jurisdiction in tidal waters and their adjacent wetlands and waters used as a means to transport interstate or foreign commerce and their adjacent wetlands.¹³³ For those waters, an applicant will need to continue to seek authorization from both the Corps and the state or tribe permitting agency. For any waters that are not "state assumed waters" and not under the Corps' jurisdiction, the current ERP program will continue to apply.

DEP and the Corps are currently working together to delineate those waters where DEP may assume section 404 jurisdiction. DEP has indicated that it intends to use the Majority Recommendation of the EPA's Assumable Waters Subcommittee (Subcommittee) adopted in May of 2017 to identify state assumed waters.¹³⁴ Under this methodology, the Corps would retain jurisdiction of waters it identifies as regulated under section 10 of the Rivers and Harbors Act with two modifications. Section 10 waters include waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.¹³⁵ Each Corps district maintains a list of section 10 waters.¹³⁶ The Corps and DEP would use this list as the basis for the list of waters the Corps retains. The Subcommittee recommended excluding any waters that are on the Section 10 lists based solely on historic use (e.g. based solely on historic fur trading) and waters that are assumable by a tribe may also be retained by the Corps when a state assumes the program.¹³⁷ Further, the Corps would retain jurisdiction over all wetlands adjacent to retained navigable waters landward to an administrative boundary agreed upon by DEP and the Corps. DEP and the Corps would use the CWA regulatory definition of "adjacent" to identify adjacent wetlands, and the Corps would retain administrative authority only over adjacent wetlands within the agreed-upon administrative boundary. DEP and the Corps may negotiate an administrative boundary to take into account existing state regulations or natural features that would increase practicability or public understanding. Alternatively, if DEP and the Corps do not negotiate a boundary, a 300-foot national administrative default line could be used.¹³⁸

Rulemaking

The PCB authorizes DEP to assume the program in accordance with the procedures described above. The PCB authorizes DEP to adopt any federal requirement, criteria, or regulation necessary to assume the program, including but not limited to, EPA's section 404 guidelines¹³⁹ and the Corp's public interest review criteria.¹⁴⁰ This will allow DEP to require state administered section 404 permit applicants to perform an alternative analysis when making a permit application. This will also authorize DEP to consider factors as part of its public interest analysis that it currently does not consider. This includes the consideration of economic and land use factors.¹⁴¹

¹³³ 33 U.S.C. § 1344(g)(1).

¹³⁴ The Final Report is available at: EPA, *Final Report of the Assumable Waters Subcommittee*, https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteeefinalreprot_05-2017_tag508_05312017_508.pdf (lasts visited January 4, 2018).

¹³⁵ 33 C.F.R. § 329.4.

¹³⁶ The Jacksonville District's section 10 water list is available at: Corps, *Jacksonville District Navigable Waters List*, http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/other_permitting_factors/Jacksonville%20District%20Section%2010%20Waters.pdf (last visited January 4, 2018).

¹³⁷ EPA, *Final Report of the Assumable Waters Subcommittee*, https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteeefinalreprot_05-2017_tag508_05312017_508.pdf, p. 14 – 15, 17 – 21 (lasts visited January 4, 2018).

¹³⁸ *Id.* at p. 17 – 21, 27 – 33.

¹³⁹ 40 C.F.R. Part 230.

¹⁴⁰ 33 C.F.R. § 320.4(a).

¹⁴¹ Economic injury is not the type of injury that the permitting proceeding under chapter 373 was designed to protect. *Village of Key Biscayne v. DEP*, 206 So. 3d 788, 791 (Fla. 3d DCA 2016) citing *Mid-Chattahoochee River Users v. DEP*, 948 So.2d 794, 797 (Fla.

The PCB restricts any rule, standard, or other requirement adopted by DEP to obtain assumption from becoming effective until EPA approves Florida's assumption application. The bill indicates that the legislature intends this grant of rulemaking authority to be sufficient to enable DEP to assume and implement the federal section 404 dredge and fill permitting program in conjunction with the ERP program.

If the federal government amends any applicable statute or rule related to section 404 dredge and fill permitting, Florida will be required to revise its regulations within one year of the promulgation of the federal regulation. If Florida must enact or amend a statute in order to make the revision, then the revision must take place within two years.¹⁴²

Differences Between Federal and State Regulations of Dredge and Fill Permitting

The PCB authorizes DEP to implement state laws that regulate discharges in state assumed waters when they do not conflict with federal law. The PCB prohibits DEP from applying state laws that conflict with the federal requirements to state administered section 404 permits. Florida must implement its assumed 404 permitting program in accordance to the CWA and its regulations. Florida's permitting criteria may be more stringent and encompass a greater scope than required by federal law.¹⁴³

This may lead to some different permitting and processing procedures between ERPs, state administered section 404 permits, and federally administered section 404 permits, including:

- State administered section 404 permits may be reviewed by EPA, unless review is waived by EPA;¹⁴⁴
- The application requirements for an ERP and a state administered section 404 permit may be slightly different;
- State administered section 404 permits are issued under state law and not eligible for section 7 consultation under the ESA like federally administered section 404 permits.¹⁴⁵ Thus, applicants may be required to obtain an incidental take permit if their activity takes endangered or threatened species. DEP has indicated it is working with EPA and FWS to address this issue through a memorandum of agreement;
- The Corps and DEP use different methods to determine the extent of wetlands. DEP has indicated the procedures are substantially similar. However, if DEP's procedures must be updated, the rulemaking would require legislative ratification;¹⁴⁶
- Mitigation for state administered section 404 permits may be handled slightly differently to account for different requirements established by the Corps and EPA;¹⁴⁷
- ERP applicants may seek variances from ERP criteria,¹⁴⁸ while applicants for section 404 permits may not seek variances;¹⁴⁹
- When issuing state administered section 404 permits, DEP will not be able to use state created general permits. DEP may use federally created general permits for state administered section

1st DCA 2006); Unless authorized by statute, DEP may not consider local comprehensive plan requirements and local land use regulations as part of the permitting criteria. 206 So. 3d 791 *citing Council of Lower Keys v. Charley Toppino & Sons*, 429 So.2d 67, 68 (Fla. 3rd DCA 1983).

¹⁴² 40 C.F.R. § 233.16(b).

¹⁴³ 40 C.F.R. § 233.1(c).

¹⁴⁴ 33 U.S.C. § 1344(k); 40 C.F.R. § 233.51.

¹⁴⁵ The Association of State Wetland Managers, Inc. and The Environmental Council of States, Clean Water Act Section 404 Program Assumption: A Handbook for States and Tribes, p. 25 (August 2011), available at:

https://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf (last visited November 6, 2017).

¹⁴⁶ Section 373.421(1), F.S.

¹⁴⁷ See 40 C.F.R. § 230.93(b) mitigation hierarchy; 40 C.F.R. § 230.98 establishment of mitigation banks.

¹⁴⁸ Section 373.414(17), F.S.

¹⁴⁹ *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 387 (Cl. Ct. 1988).

404 permits if it chooses to do so.¹⁵⁰ DEP has indicated it plans to utilize all the available federal general permits;

- State administered section 404 permits may be unilaterally modified when:
 - There is significant noncompliance;
 - The permit holder failed to fully disclose all relevant facts;
 - Activities authorized by a general permit are having more than minimal individual or cumulative adverse effect on the environment, or that the permitted activities are more appropriately regulated by individual permits;
 - Circumstances relating to the authorized activity have changed since the permit was issued and justify changed permit conditions or temporary or permanent cessation of any discharge controlled by the permit;
 - Significant information relating to the authorized activity was not available at the time the permit was issued and would have justified the imposition of different permit conditions or denial at the time of issuance; or
 - Revisions to applicable statutory or regulatory authority, including toxic effluent standards or prohibitions or water quality standards; and¹⁵¹
- Unlike federal administered section 404 permit applications, applicants for state administered section 404 permits will not bear the burden of ultimate persuasion and will not have the burden of going forward to prove the case when their permit application is challenged by a third party.¹⁵²

State administered section 404 permit applicants will continue to be required to meet the same environmental regulatory criteria whether the state assumes the program or the Corps processes the permit. ERP criteria will also remain the same for applicants.

Exemptions

The PCB exempts applicants from seeking a state administered section 404 permit if they are exempt from seeking a federal issued section 404 permit by federal statutes and rules. The exemptions from ERPs will continue to apply as applicable to ERPs. However, the exemptions to ERPs will not apply to state administered section 404 permits. Thus, some activities in state assumed water may require both an ERP and a state administered section 404 permit, just an ERP, just a state administered section 404 permits, or neither.

Time Limitations and Permitting Procedures

The PCB exempts DEP from meeting the permit processing and decision deadlines used for ERPs when issuing state administered section 404 permits. Thus, DEP will not be required to review application information and additional information received in response to a request for additional information for state administered section 404 permit applications within 30 days of receipt. Further, DEP will not be required to issue or deny a state administered section 404 permit within 60 days after receipt of the original application, the last item of timely requested additional material, or the applicant's written request to begin processing the permit application. Unlike ERPs, state administered section 404 permit applicants will not be able to receive a permit by default if DEP does not act within 60 days.¹⁵³ Rather, DEP must grant or deny a permit application for a state administered section 404 permit within the time allowed by the EPA's rule, described above. The PCB authorizes applicants to apply for an order from a circuit court to require DEP to render a decision within a specified time if DEP fails to render a permitting decision within the time required by federal law, or a memorandum of agreement

¹⁵⁰ 40 C.F.R. § 233.21(a).

¹⁵¹ 40 C.F.R. § 233.36(a).

¹⁵² See 120.569(2)(p), F.S.

¹⁵³ See s. 120.60(1), F.S.

executed by DEP and EPA, whichever is shorter. This is similar to the authority granted to applicants in other federally delegated programs.¹⁵⁴

The PCB limits state administered section 404 permits to a period of no more than five years, as required by federal law.¹⁵⁵ Unlike ERPs, the state administered section 404 permits may not be issued or extended for a longer period.¹⁵⁶

The PCB allows state administered section 404 permits to continue past their expiration date, if the applicant submits a timely application for reissuance. These permits may continue until DEP takes final action upon the application or until the last day for seeking judicial review of the agency order or a later date fixed by order of the reviewing court.¹⁵⁷

The PCB requires DEP to adopt by rule an expedited permit review process that is consistent with federal law for the reissuance of all state administered section 404 permits. The rule must allow expedited review for reissuance of the original permit when there have been no material changes in the scope of the project as originally permitted, site and surrounding environmental conditions have not changed, and the applicant does not have a history of noncompliance with the existing permit. The bill limits the issues that may be administratively challenged for a reissued permit to any material permit modification or material changes in the scope of the project as originally permitted.

Delegation

The PCB authorizes DEP to delegate administration of the state administered program if delegation is in accordance with federal law. DEP must retain the authority to review, modify, revoke, or rescind a state administered section 404 permit issued by any delegated entity to ensure consistency with federal law. This will allow DEP to delegate administration of the program in the same manner DEP delegates the ERP program.¹⁵⁸

B. SECTION DIRECTORY:

Section 1. Creates s. 373.4146 relating to state assumption of federal Clean Water Act, section 404 dredge and fill permitting program.

Section 2. Provides the act will take effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The PCB may have a positive fiscal impact on DEP if the department collects application fees for the processing of section 404 dredge and fill permits where authorized by the EPA and the Corps.

2. Expenditures:

The PCB may have a negative fiscal impact on DEP because DEP will need to revise its rules to adopt federal requirements, criteria, or regulations necessary to obtain assumption of the program and adopt by rule an expedited permit review process that is consistent with federal law for the reissuance of all state administered section 404 permits. The PCB may have a negative fiscal

¹⁵⁴ See Section 403.0885(3), F.S.

¹⁵⁵ 33 U.S.C. § 1344(h)(1) 40 C.F.R. § 233.23(b).

¹⁵⁶ See 40 C.F.R. § 233.36(c)(v); Rules 62-330.320(2) and (6), F.A.C.

¹⁵⁷ This is allowed by federal rule. 40 C.F.R. § 233.38.

¹⁵⁸ Sections 373.103(8), 373.441, F.S.

impact on DEP because the department will assume the processing of section 404 dredge and fill permits where authorized by the EPA and the Corps. DEP has indicated that the agency can absorb the additional workload within existing resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The PCB may have a positive fiscal impact on local governments who choose to accept delegation from DEP to assume processing of section 404 dredge and fill permits where authorized by the EPA and the Corps because the local governments may collect application fees.

2. Expenditures:

The PCB may have a negative fiscal impact on local governments who choose to accept delegation from DEP to process state assumed section 404 permits and do not collect additional fees if processing an ERP.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Applicants seeking both an ERP and a state administered section 404 permit may experience some positive fiscal impacts from increased efficiency, consistency, and streamlined procedures from seeking the two permits from one agency, instead of two agencies.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This PCB does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The PCB grants DEP the authority to adopt any federal requirements, criteria, or regulations necessary to obtain assumption of the program. The PCB also requires DEP to adopt by rule an expedited permit review process that is consistent with federal law for the reissuance of all state administered section 404 permits.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

Not applicable.

1 A bill to be entitled
 2 An act relating to state assumption of federal section
 3 404 dredge and fill permitting authority; creating s.
 4 373.4146, F.S.; defining the term "state assumed
 5 waters"; providing the Department of Environmental
 6 Protection with the power and authority to adopt rules
 7 to assume and implement the section 404 dredge and
 8 fill permitting program pursuant to the federal Clean
 9 Water Act; specifying that certain rules, standards,
 10 or other requirements are not effective or enforceable
 11 until such assumption is approved; providing
 12 legislative intent; providing applicability of other
 13 state law regulating discharges; specifying the
 14 applicability of certain exemptions; specifying
 15 department authority upon assumption of the section
 16 404 dredge and fill permitting program; specifying
 17 certain procedures for permit applications; exempting
 18 the department from certain permitting timeframe
 19 limitations upon such assumption; specifying the
 20 maximum dredge and fill permit period for activities
 21 in state assumed waters; specifying certain procedures
 22 for permit reissuance; requiring the department to
 23 adopt rules to create an expedited permit review
 24 process; specifying applicability of certain
 25 administrative procedures; authorizing the department

26 to delegate certain activities; specifying that the
 27 department must retain the authority to review,
 28 modify, revoke, or rescind any permit authorizing
 29 activities in state assumed waters which is issued by
 30 a delegated entity; providing an effective date.

31

32 Be It Enacted by the Legislature of the State of Florida:

33

34 Section 1. Section 373.4146, Florida Statutes, is created
 35 to read:

36 373.4146 State assumption of the federal Clean Water Act,
 37 section 404 dredge and fill permitting program.-

38 (1) As used in this section, the term "state assumed
 39 waters" means waters of the United States that the state assumes
 40 permitting authority over pursuant to s. 404 of the Clean Water
 41 Act, Pub. L. No. 92-500, as amended, 33 U.S.C. ss. 1251 et seq.,
 42 and rules promulgated thereunder, for the purposes of permitting
 43 the discharge of dredge or fill material.

44 (2) The department has the power and authority to assume,
 45 in accordance with 40 C.F.R. part 233, the dredge and fill
 46 permitting program established in s. 404 of the Clean Water Act,
 47 Pub. L. No. 92-500, as amended, 33 U.S.C. ss. 1251 et seq., and
 48 rules promulgated thereunder. The department may adopt any
 49 federal requirements, criteria, or regulations necessary to
 50 obtain assumption, including, but not limited to, the guidelines

51 specified in 40 C.F.R. part 230 and the public interest review
52 criteria in 33 C.F.R. s. 320.4(a). Any rule, standard, or other
53 requirement adopted pursuant to the authority granted in this
54 subsection for purposes of obtaining assumption may not become
55 effective or otherwise enforceable until the United States
56 Environmental Protection Agency has approved the state's
57 assumption application. This legislative authority is intended
58 to be sufficient to enable the department to assume and
59 implement the federal section 404 dredge and fill permitting
60 program in conjunction with the environmental resource
61 permitting program established in this chapter.

62 (3) To the extent that state law applies and does not
63 conflict with the federal requirements identified in subsection
64 (2), the application of such state law to further regulate
65 discharges in state assumed waters is not prohibited. Provisions
66 of state law which conflict with the federal requirements
67 identified in subsection (2) do not apply to state administered
68 section 404 permits.

69 (4) A state administered section 404 permit is not
70 required for activities as specified in 33 U.S.C. s. 1344(f), 40
71 C.F.R. s. 232.3, or 33 C.F.R. s. 323.4. The exemptions
72 established in ss. 373.406, 373.4145, and 403.813 still apply to
73 environmental resource permits. However, the exemptions
74 identified in ss. 373.406, 373.4145, and 403.813 may not be
75 applied to state administered section 404 permits.

76 (5) Upon state assumption of the section 404 dredge and
 77 fill permitting program pursuant to subsection (2):

78 (a) The department must grant or deny an application for a
 79 state administered section 404 permit within the time allowed
 80 for permit review under 40 C.F.R. part 233, subparts D and F.
 81 The department is specifically exempted from the time
 82 limitations provided in ss. 120.60 and 373.4141 for state
 83 administered section 404 permits.

84 (b) All state administered section 404 permits issued
 85 under this section must be for a period of no more than 5 years.
 86 Upon an applicant's submittal of a timely application for
 87 reissuance, a state administered section 404 permit does not
 88 expire until the department takes final action upon the
 89 application or until the last day for seeking judicial review of
 90 the agency order or a later date fixed by order of the reviewing
 91 court. If the department fails to render a permitting decision
 92 within the time allowed by s. 404 of the Clean Water Act, Pub.
 93 L. No. 92-500, as amended, 33 U.S.C. ss. 1251 et seq., 40 C.F.R.
 94 part 233, subparts D and F, or a memorandum of agreement
 95 executed by the department and the United States Environmental
 96 Protection Agency, whichever is shorter, the applicant may apply
 97 for an order from the circuit court requiring the department to
 98 render a decision within a specified time. The department must
 99 adopt by rule an expedited permit review process that is
 100 consistent with federal law for the reissuance of state

101 administered section 404 permits where there have been no
 102 material changes in the scope of the project as originally
 103 permitted, site and surrounding environmental conditions have
 104 not changed, and the applicant does not have a history of
 105 noncompliance with the existing permit. The decision by the
 106 department to approve the reissuance of any state administered
 107 section 404 permit issued pursuant to this section is subject to
 108 ss. 120.569 and 120.57 only with respect to any material permit
 109 modification or material changes in the scope of the project as
 110 originally permitted.

111 (c) The department may delegate administration of the
 112 state administered section 404 permitting program if such
 113 delegation is in accordance with federal law. The department
 114 must retain the authority to review, modify, revoke, or rescind
 115 a state administered section 404 permit issued by any delegated
 116 entity to ensure consistency with federal law.

117 Section 2. This act shall take effect upon becoming a law.

Progress Report on SFWMD Implementation of Senate Bill 10 (Section 373.4598 Florida Statutes)



INTRODUCTION

Senate Bill 10, approved by the Florida Legislature and signed into law by Governor Rick Scott in 2017, provided funding and direction to the South Florida Water Management District (SFWMD) to expedite planning, design and construction of the Everglades Agricultural Area (EAA) Storage Reservoir, an original component of the Comprehensive Everglades Restoration Plan (CERP) as approved by the U.S. Congress in 2000.

The goals of the EAA Storage Reservoir project are to significantly reduce the volume of damaging discharges from Lake Okeechobee to the northern estuaries and provide additional water storage, treatment and conveyance south to the Everglades.

SFWMD is dedicated to planning, designing and constructing the EAA Storage Reservoir project. To date, SFWMD has developed alternatives that will reduce the number of discharge events from Lake Okeechobee to the northern estuaries, in conjunction with authorized projects, by almost 60% while accomplishing

the goals and objectives defined in CERP, achieving state water quality standards and complying with state and federal laws. The alternatives are built on a foundation of sound scientific principles, data and modeling – such as those implemented successfully in Gov. Scott's Restoration Strategies plan – while making the best use of Florida taxpayer dollars on lands identified by the Legislature.



SFWMD has made real progress in advancing this important project and remains on track to deliver this study to the U.S. Army Corps of Engineers by March 30, 2018. Delivery would provide six months for review and submission to the U.S. Congress by the Office of the Assistant Secretary of the Army for Civil Works. Therefore, SFWMD does not believe an extension of time is necessary. This summary document reflects the hard work completed to date and fulfills the reporting requirements set by the Legislature in 2017.

Letter from Dan O'Keefe, Chairman South Florida Water Management District



Dear Legislators:

As water managers, we recognize 2017 as a pivotal year for environmental progress in South Florida. Yet, it is not the triumphs that many remember, but instead, it is the image of blue-green algae damaging our northern estuaries from the prior year. The coverage was intense; the public outcry even more so. The call to craft an action plan to protect the St. Lucie and Caloosahatchee estuaries for future generations was loud and clear.

On May 9, 2017, Governor Rick Scott signed into law Senate Bill 10. As Florida legislators, your hard work in Tallahassee paid off and set forth bold direction for the professional engineers and scientists at the South Florida Water Management District (SFWMD) to make the Everglades Agricultural Area (EAA) Storage Reservoir a reality.

Since its passage, SFWMD's staff of professional engineers, scientists, modelers and restoration experts have worked tirelessly to meet the intent and letter of the law. Working with input from the public, they have developed alternatives to implement the EAA Storage Reservoir project on lands identified by the Legislature. Together with authorized projects including components of the Central Everglades Planning Project (CEPP), the reservoir will significantly reduce harmful Lake Okeechobee discharges, improve flow to the Everglades and achieve state water quality standards. Implementation of any selected alternative will provide much needed relief to the estuaries and foster resilience in the ecology of the entire region.

These alternatives presented to you today are built on a foundation of sound science, benefitting from an extensive and robust public outreach process. Each of these alternative plans will achieve state water quality standards. The work presented here is consistent with our broad portfolio of successful restoration activities such as Restoration Strategies, which when implemented has shown real-world results.

On behalf of our dedicated SFWMD workforce, I am proud to submit this report detailing progress on Senate Bill 10 that includes restoration components years in the making. After reading, I know that you will agree that this is a tremendous undertaking that identifies several options for helping our northern estuaries, while delivering additional fresh water south to the Greater Everglades. SFWMD is poised to move forward on delivering the much needed relief to the northern estuaries, resulting from our staff's monumental planning efforts for this project.

Sincerely,

A handwritten signature in blue ink that reads "Dan O'Keefe". The signature is fluid and cursive.

Dan O'Keefe

Governing Board Chairman

South Florida Water Management District

Central Everglades Planning Project as the Starting Point

SFWMD is seeking federal approval and cost sharing of the project as a change to the congressionally approved Central Everglades Planning Project (CEPP).

CEPP, authorized by the U.S. Congress in the Water Infrastructure Improvements for the Nation (WIIN) Act of 2016, included the first increment of Everglades Agricultural Area (EAA) storage described in the Comprehensive Everglades Restoration Plan (CERP).

SFWMD initiated the planning process for a Post Authorization Change Report (PACR) for CEPP in August 2017. Alternatives under consideration will benefit the ecology of the northern and southern Everglades by providing the final increment of EAA storage to:

- Aid in reducing harmful discharges to the northern estuaries.
- Achieve the CERP goal of increasing flow to the central portion of the Everglades by approximately 98 billion gallons (300,000 acre-feet) on an average annual basis.

Building on the first increment of CEPP, this PACR provides the final increments of the following components of CERP:

- EAA Storage Reservoirs (CERP Component G)
- Flow to Northwest and Central Water Conservation Area 3A (CERP Component II)
- Environmental Water Supply Deliveries to the St. Lucie Estuary (CERP Component C)
- Environmental Water Supply Deliveries to the Caloosahatchee Estuary (CERP Component E)



EAA Storage Reservoir Feasibility Study

Leading the collaboration in the public scoping process and with the guidance provided by state law, SFWMD identified the goals and objectives of the project.

The Everglades Agricultural Area (EAA) Storage Reservoir project has been formulated to address the following problems and opportunities:

- High-volume damaging freshwater discharges from Lake Okeechobee to the northern estuaries.
- Need for additional freshwater flow to the Everglades system.
- Identify the next increment of storage, treatment and conveyance south of Lake Okeechobee to reduce ongoing ecological damage to the northern estuaries and Everglades system.

With the overarching goal of formulating the next set of features that will enhance the ecology of the natural system, economic values and social wellbeing, the problems and opportunities identified above were paired with the restoration goals identified in the Comprehensive Everglades Restoration Plan (CERP). Among other important considerations, the benefits to the northern estuaries and the Everglades system identified in CERP included an 80% reduction in harmful discharges to the estuaries and an annual average increase of approximately 98 billion gallons (300,000 acre-feet) to the Everglades system, as compared to the existing conditions. In short, SFWMD started this project with the goals of CERP.

Through that lens, SFWMD's technical team developed models, formulated alternative plans and evaluated the effects of these plans. The additional acres of stormwater treatment areas needed to meet state water quality standards for the additional flow south to the Everglades are incorporated into all of the alternatives. At this step, where the effects of the alternative plans are under review and consideration, the results of the technical work show several alternatives are technically feasible and financially viable and have not indicated additional lands above and beyond those identified by the Legislature are needed. The best performing alternative plans will be compared and optimized in the coming weeks to continue to develop a cost-effective plan that meets the goals and objectives of the EAA Storage Reservoir project.



Ecological Benefits to the Northern Estuaries

All alternatives help restore the resiliency of the northern estuaries by reducing the number, duration and frequency of harmful discharges from Lake Okeechobee.

High-flow discharges to the St. Lucie Estuary of more than 2,000 cubic feet per second (cfs) are harmful to oysters and submerged aquatic vegetation due to salinities outside the healthy envelope. In comparison, the damaging flows to the Caloosahatchee Estuary are considered at or above 2,800 cfs at the S-79 structure. Evaluation of the alternatives showed significant reductions in the number, duration and frequency of harmful discharges to the estuaries, including:

- ✓ 33% reduction in high-flow discharge events lasting more than 60 days to the Caloosahatchee Estuary for all alternatives, in addition to the benefits provided by the Central Everglades Planning Project (CEPP).
- ✓ 55% reduction in high-flow discharge events lasting more than 42 days to the St. Lucie Estuary for all alternatives, in addition to the benefits provided by CEPP.
- ✓ 50-54% reduction in discharge volumes from Lake Okeechobee to the northern estuaries, in conjunction with authorized projects.
- ✓ 56-61% reduction in the number of discharge events from Lake Okeechobee to the northern estuaries, in conjunction with authorized projects.



Caloosahatchee Estuary

The alternatives provide an additional 30% to 45% reduction in harmful discharge events.



St. Lucie Estuary

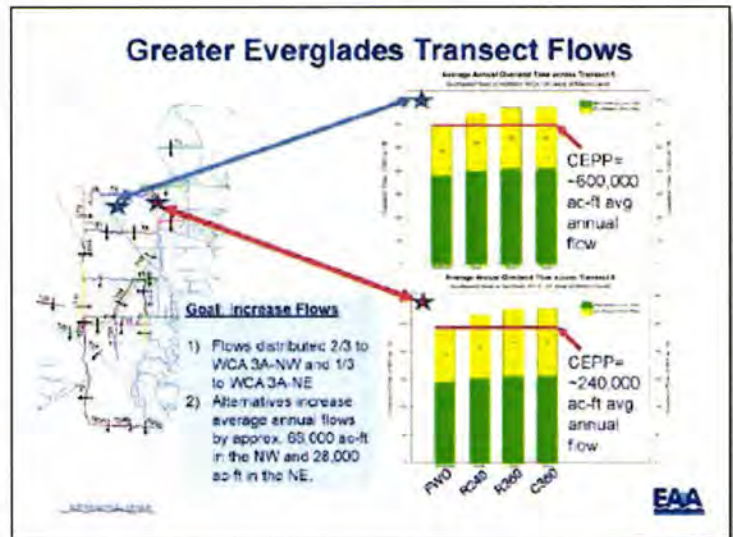
The alternatives provide an additional 33% to 42% reduction in harmful discharge events.

Ecological Benefits to the Greater Everglades

All alternatives achieve the Comprehensive Everglades Restoration Plan (CERP) goal of delivering an annual average of approximately 98 billion gallons (300,000 acre-feet) of clean water south to the Greater Everglades. Further optimization of high-performing alternatives will improve this performance.

The Central Everglades Planning Project (CEPP), the starting point for the Everglades Agricultural Area (EAA) Storage Reservoir Feasibility Study, redistributed existing treated water in a more natural sheetflow pattern and provided an average of approximately 210,000 acre-feet per year of additional clean fresh water flowing into the Everglades. This increase in freshwater flow to the Everglades was approximately two-thirds of the additional flow estimated to be provided by CERP.

All of the alternatives evaluated for the EAA Storage Reservoir project build upon the benefits of CEPP and achieve the next increment of freshwater flows to the Everglades, providing the remaining one-third of additional flow called for by CERP. This additional flow will have the following ecological benefits:



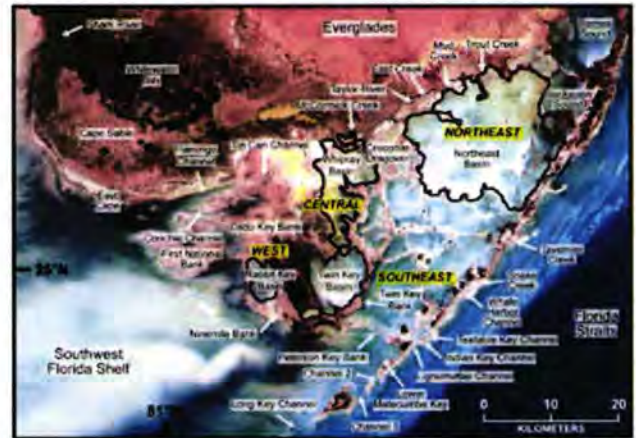
- ✓ Additional water flowing into northern Water Conservation Area 3A (WCA-3A) and Everglades National Park (ENP) will help restore vegetative communities and habitat for fish and wildlife – above and beyond the benefits provided by CEPP.
- ✓ In Northwest WCA-3A, all alternatives provide improved slough vegetation depths, reducing the time the water ponding depth in the sloughs falls below zero (less dry outs).
- ✓ In Northwest WCA-3A, all alternatives provide for longer durations where the CERP target ponding depths are achieved, which in turn improve slough vegetation suitability.
- ✓ In Northeast WCA-3A, all alternatives provide for improved slough vegetation by increasing the duration of beneficial water ponding depths.
- ✓ Overland flows across Tamiami Trail and into the northern portions of ENP are increased by an annual average of 74,000 acre-feet.
- ✓ Additional freshwater overland flow is also provided to Central Shark River Slough and Taylor Slough in all alternatives, which continues to build on the progress made by CEPP in improving the timing, distribution and continuity of sheet flow across the Everglades ridge and slough landscape. The benefits to Taylor Slough and the direct flows to Florida Bay are in part a result of improved operations of the C-111 South Dade and Florida Bay projects. The benefits of additional overland flow to Central Shark River Slough are a continuum of the additional flows across Tamiami Trail in the natural system.

Ecological Benefits to Florida Bay

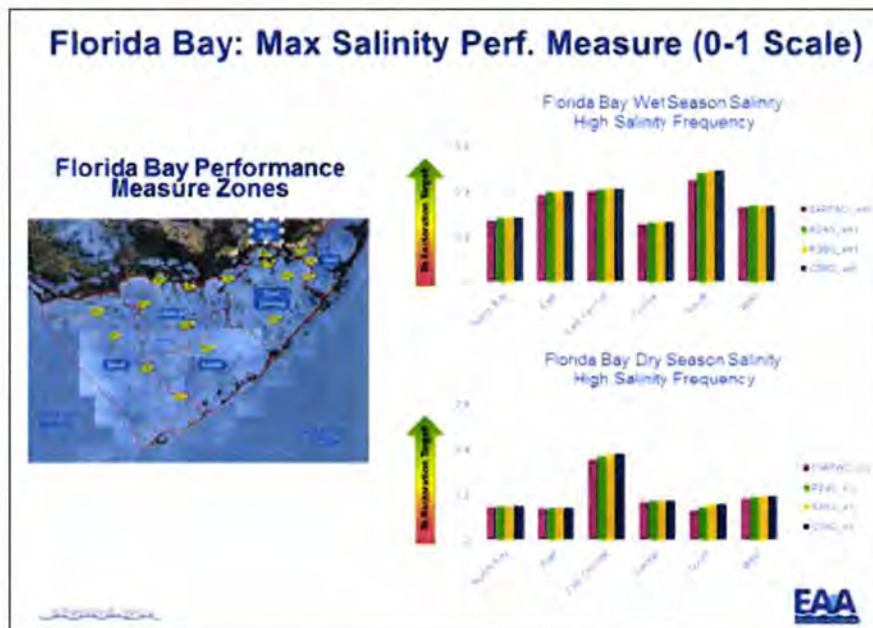
Alternatives, when used in conjunction with the other authorized and constructed restoration projects – particularly the C-111 South Dade and Florida Bay projects – show a small increase in surface water flows at Taylor Slough and a modest improvement in salinity across the Florida Bay performance measure zones.

As part of the federal planning process, habitat units are used to provide a standardized measure for benefit comparison in the cost effectiveness determination. In the Central Everglades Planning Process (CEPP), Florida Bay habitat units were calculated utilizing the habitat unit model and supporting regression model developed and applied by Everglades National Park. The changes in predicted Florida Bay salinity were calculated utilizing the regression relationship of water level stages in Taylor Slough, C-111 and Shark River Slough and 17 monitoring stations in Florida Bay.

In order to calculate the comparable incremental change in habitat units, the same tools were utilized for the alternatives. Although it is recognized that these tools are imperfect in estimating actual ecological improvements in Florida Bay, the tools do allow for the necessary comparison called for in the federal planning process. Modeling results show that all of the alternatives provide a modest improvement (around 0.5 salinity units) to the bay. SFWMD scientists look at ecosystem responses to explain habitat improvement, however; habitat units only allow for the comparison of alternatives. The interior of Florida Bay is dominated by a complex array of small islands and mud embankments.



Florida Bay is dominated by a complex array of small islands and mud embankments.

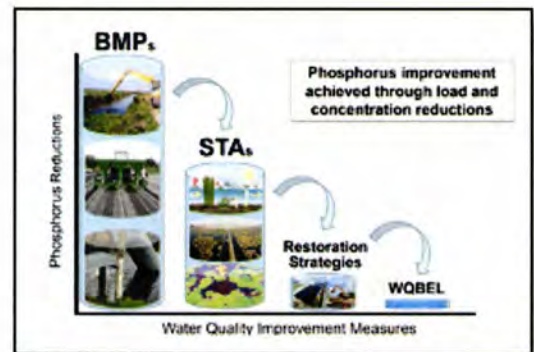


Circulation patterns in the bay have a strong influence on salinity, as exchanges of water between the basins are restricted by the mud embankments and the prevailing winds. The effect of small increases in surface water flow in Taylor Slough would have an influence in the nearshore area of northern Florida Bay.

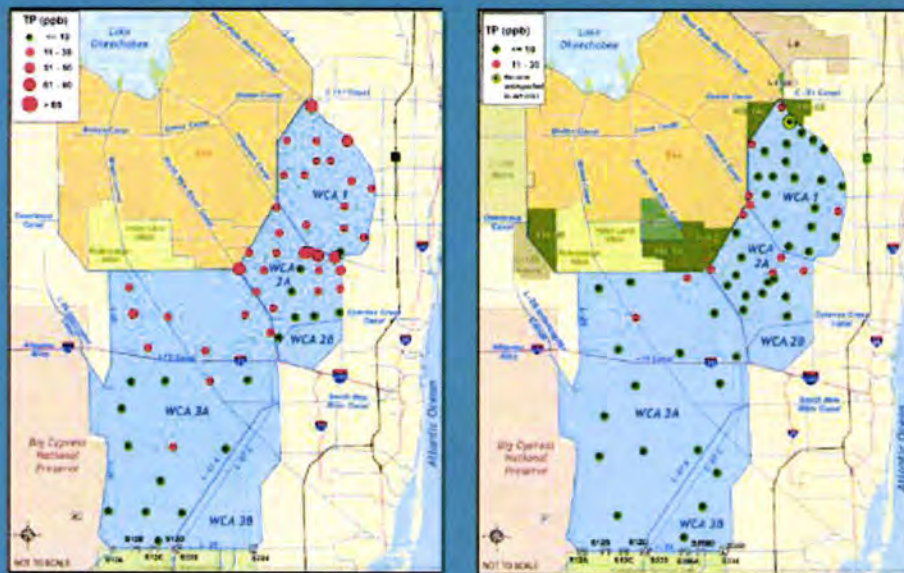
Building on the Successful Improvement of Water Quality in Greater Everglades

Florida has made tremendous investments to achieve water quality standards in the Everglades over the past two decades. Those real-world results have a foundation of science, modeling, engineering and regulatory oversight developed for activities such as Restoration Strategies – which compose the framework for the development of the Everglades Agricultural Area (EAA) Storage Reservoir project. All of the alternatives developed for the EAA Storage Reservoir project will achieve state water quality standards.

The state water quality criterion of 10 parts per billion of phosphorus is currently being achieved for more than 90% of the Everglades due to Governor Rick Scott's Restoration Strategies plan and many prior water quality investments. Completed components of Restoration Strategies have produced real-world water quality improvements. The tools, methods and regulatory oversight are the same currently being applied to the EAA Storage Reservoir project. All of the alternatives put forward by SFWMD are designed to achieve state water quality standards by including additional stormwater treatment areas that will work in conjunction with SFWMD's existing facilities to meet Comprehensive Everglades Restoration Project (CERP) flows south to the Everglades.



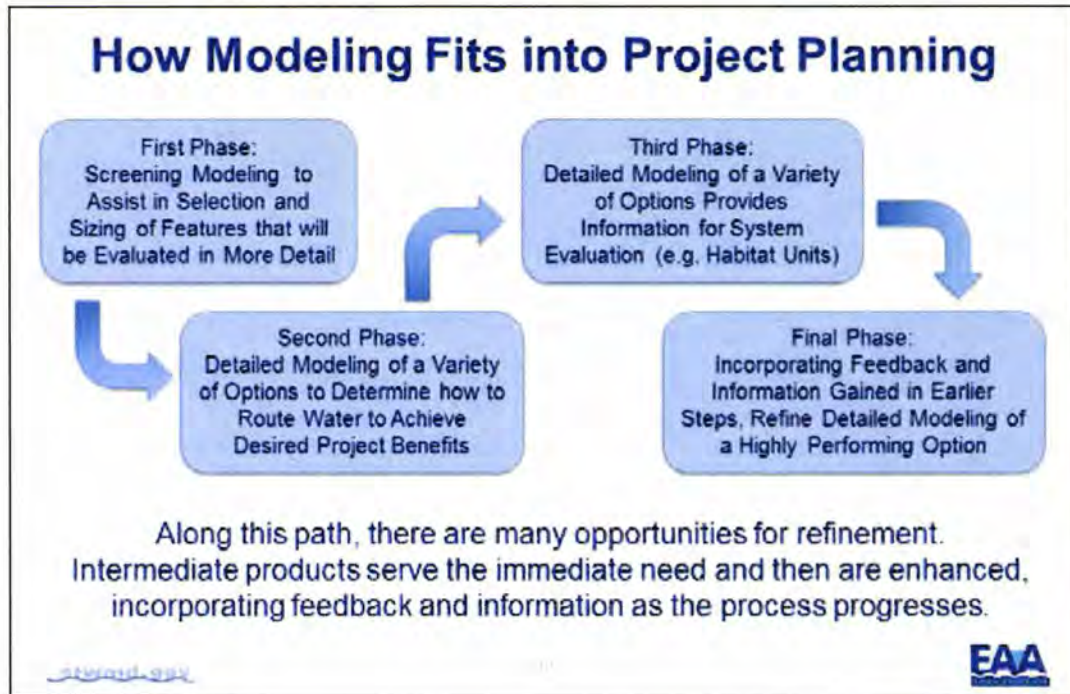
SFWMD will continue to work with its partner agencies to advance methods necessary to accurately monitor and determine compliance of water quality criteria for water entering Everglades National Park as components of the Central Everglades Planning Project (CEPP) are constructed, including the EAA Storage Reservoir.



Left: (1979-1983) Poor water quality marked by high phosphorus levels in Everglades water. Right: (2013-2017) After \$2 billion investment by Florida, including components of Restoration Strategies, water quality standards in more than 90% of the Everglades are being achieved.

The Role of Modeling in the EAA Storage Reservoir Planning Process

The modeling and design of the Everglades Agricultural Area (EAA) Storage Reservoir was based on the framework developed in the Central Everglades Planning Project (CEPP) and peer-reviewed tools that provide a sound engineering and scientific foundation.



During the ongoing planning process, SFWMD modelers have many opportunities for refinement of modeling products. Scientists, engineers and the public provide feedback that is incorporated in the following phases:

1. Screening modeling, the same used in the development of Restoration Strategies and CEPP, including the Dynamic Model for Stormwater Treatment Areas (DMSTA), assisted in selection and sizing of features. To achieve Comprehensive Everglades Restoration Plan (CERP) flows south into the Everglades and meet state water quality standards, additional acres of stormwater treatment areas, working in conjunction with the existing STAs, were identified in this step.
2. Using the Regional Simulation Model (RSM), detailed modeling of alternatives determined how to route water to achieve project benefits. This detailed modeling incorporated the new STA acreage, identified in the screening level modeling, into the system. Using the features on the ground today and authorized in CEPP, the modeling also diverted Lake Okeechobee discharges south to the Everglades.
3. Results of the RSM were used to develop habitat units.
4. Refinement of detailed modeling of a highly performing alternative incorporates feedback and information gained in earlier steps.

Modeling data is available to the public at <ftp://ftp.sfwmd.gov/pub/EAASR/>.

EAA Storage Reservoir Alternatives

Alternative plans for the Everglades Agricultural Area (EAA) Storage Reservoir have been designed, modeled and shared at a series of public meetings in 2017.

The five alternatives under consideration are listed below with storage in acre-feet and associated stormwater treatment areas (STAs).

The conceptual designs for each alternative along with objectives for measuring performance are depicted on pages 10-14. Cost estimates, listed in 2018 dollars, and benefits will be refined through the planning process.

Alternative Configurations

Alternative R240A: **COST EFFECTIVE + BEST BUY**

- 240,000 acre-foot reservoir plus A-1 Flow Equalization Basin
- Reservoir is approximately 10,100 acres and approximately 23 feet deep
- Stormwater Treatment Area (STA) is approximately 6,500 acres

Alternative R240B:

- 240,000 acre-foot reservoir plus A-1 Flow Equalization Basin
- Reservoir is approximately 10,100 acres and approximately 23 feet deep
- Stormwater Treatment Area (STA) is approximately 6,500 acres

Alternative R360C:

- 360,000 acre-foot reservoir
- Reservoir is approximately 19,700 acres and approximately 18 feet deep
- Stormwater Treatment Area (STA) is approximately 11,500 acres

Alternative R360D:

- 360,000 acre-foot reservoir
- Reservoir is approximately 19,700 acres and approximately 18 feet deep
- Stormwater Treatment Area (STA) is approximately 11,500 acres

Alternative C360C: **COST EFFECTIVE + BEST BUY**

- 360,000 acre-foot reservoir
- Same configuration as Alternative R360C
- Can also serve multiple purposes including water supply as identified in the Comprehensive Everglades Restoration Plan (CERP), Component G

- All costs are in 2018 dollars
- Costs and benefits will be refined throughout the planning process
- Selected cost effective + best buy alternatives will be optimized to increase benefits

All Alternatives:

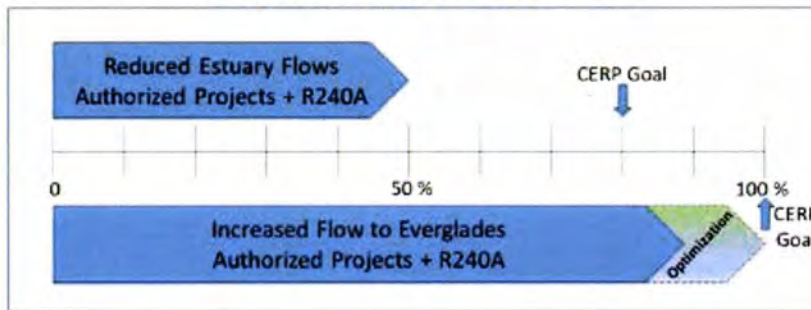
- ✓ **Reduce discharges to Northern Estuaries**
- ✓ **Increase flows to Greater Everglades**
- ✓ **Achieve water quality standards**

Alternative R240A

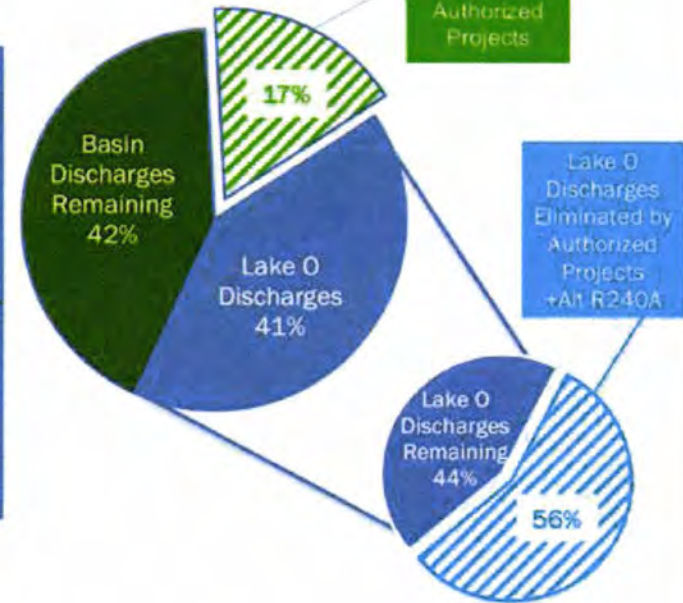
COST EFFECTIVE + BEST BUY



Improved Flow Conditions



% Northern Estuary Events Eliminated



Region	R240 Habitat Unit Lift
Northern Estuaries	2,169
Greater Everglades	10,775
Florida Bay	9,100
Total HU Lift	22,044

Plan Capital Cost \$1.74B⁽¹⁾ – CEPP New Water Component \$0.40B⁽²⁾ = **Capital Cost to Implement Plan \$1.34B**

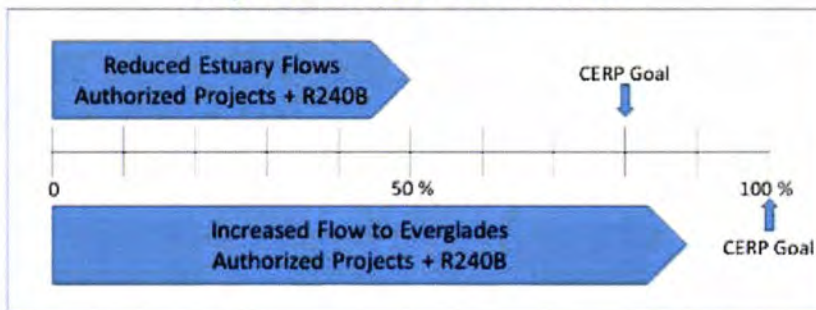
⁽¹⁾Includes Reservoir + Stormwater Treatment Area + Real Estate \$1.64B, Canal Conveyance Improvement \$100M, and Recreation Plan \$2.2M Costs

⁽²⁾Includes CEPP A2 FEB and A2 Recreation Plan

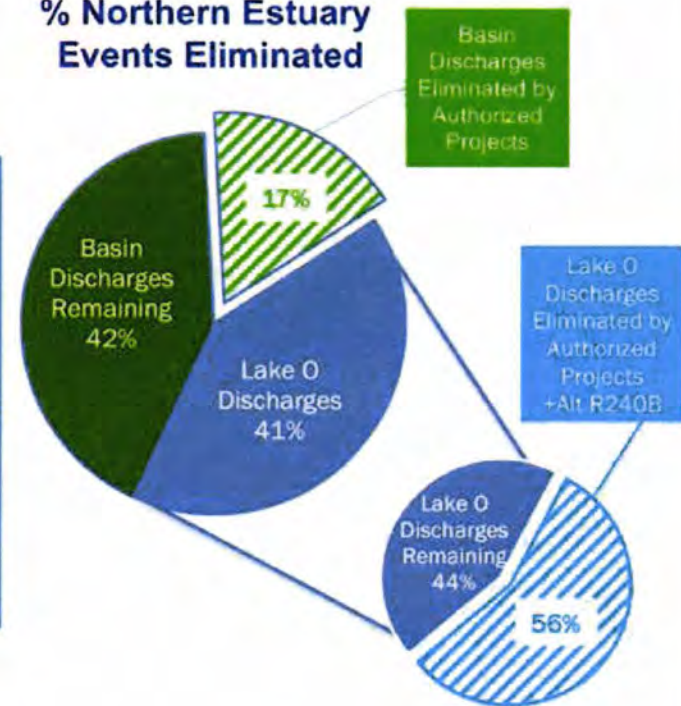
Alternative R240B



Improved Flow Conditions



% Northern Estuary Events Eliminated



Region	R240 Habitat Unit Lift
Northern Estuaries	2,169
Greater Everglades	10,775
Florida Bay	9,100
Total HU Lift	22,044

Plan Capital Cost \$1.76B⁽¹⁾ – CEPP New Water Component \$0.40B⁽²⁾ = **Capital Cost to Implement Plan \$1.36B**

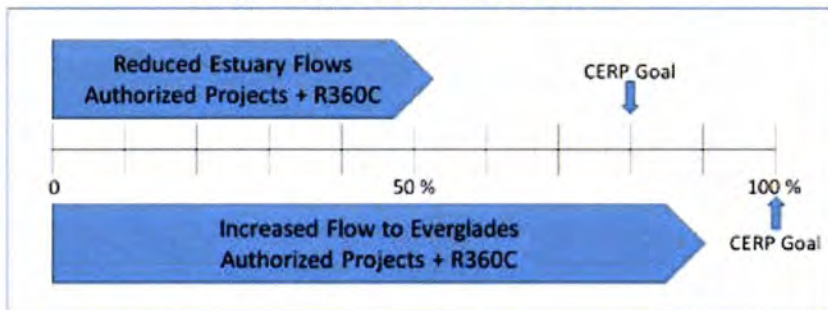
⁽¹⁾Includes Reservoir + Stormwater Treatment Area + Real Estate \$1.66B, Canal Conveyance Improvement \$100M, and Recreation Plan \$2.2M Costs

⁽²⁾Includes CEPP A2 FEB and A2 Recreation Plan

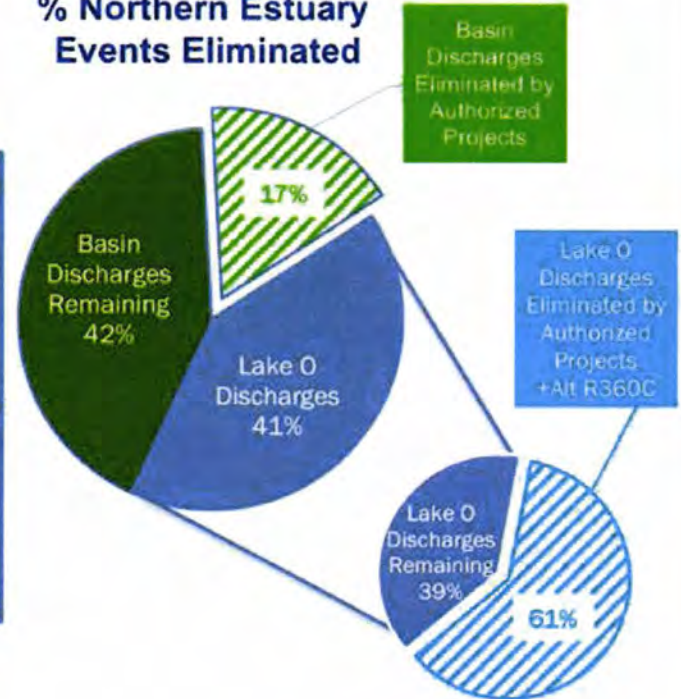
Alternative R360C



Improved Flow Conditions



% Northern Estuary Events Eliminated



Region	R360 Habitat Unit Lift
Northern Estuaries	3,329
Greater Everglades	13,161
Florida Bay	9,900
Total HU Lift	26,390

Plan Capital Cost \$2.11B⁽¹⁾ – CEPP New Water Component \$0.40B⁽²⁾ = **Capital Cost to Implement Plan \$1.71B**

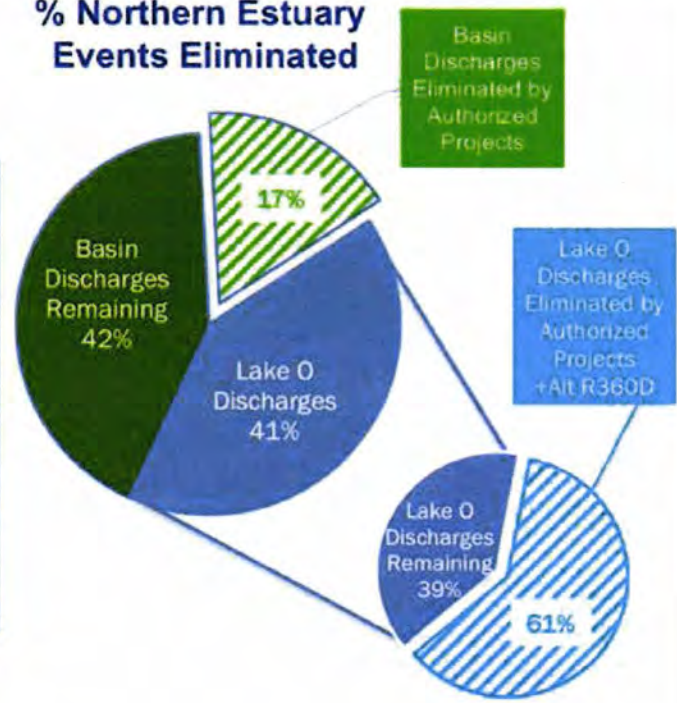
⁽¹⁾Includes Reservoir + Stormwater Treatment Area + Real Estate \$2.01B, Canal Conveyance Improvement \$100M, and Recreation Plan \$2.2M Costs

⁽²⁾Includes CEPP A2 FEB and A2 Recreation Plan

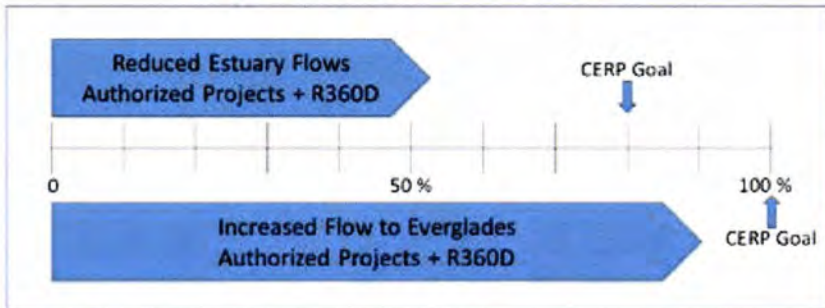
Alternative R360D



% Northern Estuary Events Eliminated



Improved Flow Conditions



Region	R360 Habitat Unit Lift
Northern Estuaries	3,329
Greater Everglades	13,161
Florida Bay	9,900
Total HU Lift	26,390

Plan Capital Cost \$2.11B⁽¹⁾ – CEPP New Water Component \$0.40B⁽²⁾ = **Capital Cost to Implement Plan \$1.71B**

⁽¹⁾Includes Reservoir + Stormwater Treatment Area + Real Estate \$2.01B, Canal Conveyance Improvement \$100M, and Recreation Plan \$2.2M Costs

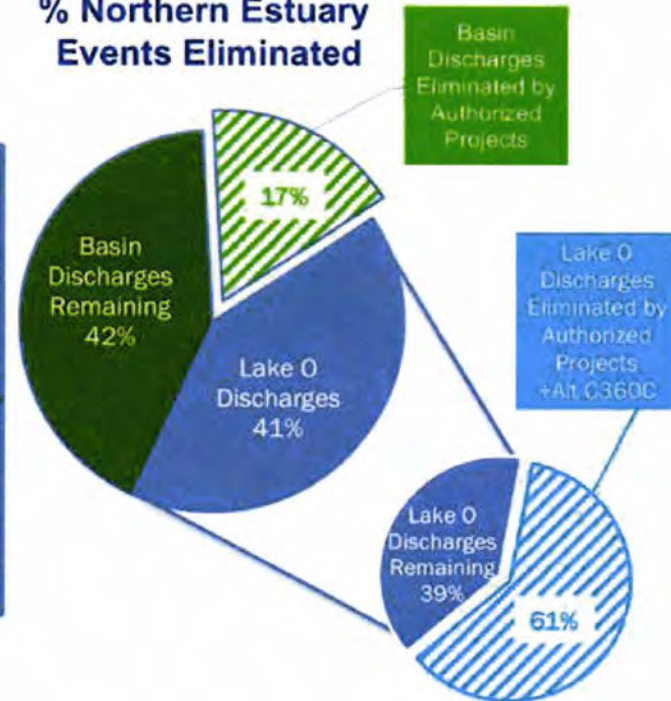
⁽²⁾Includes CEPP A2 FEB and A2 Recreation Plan

Alternative C360C

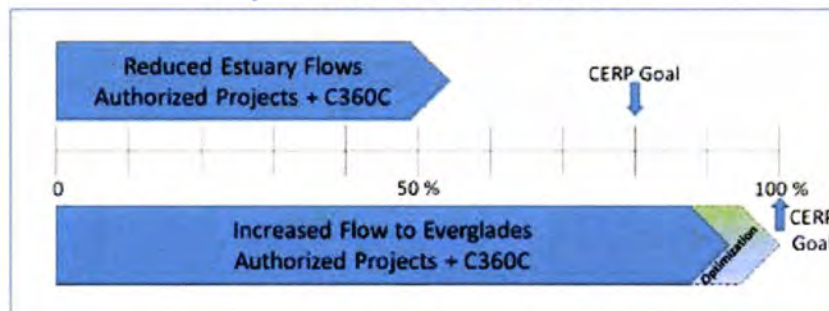
COST EFFECTIVE + BEST BUY



% Northern Estuary Events Eliminated



Improved Flow Conditions



Region	C360 Habitat Unit Lift
Northern Estuaries	4,039
Greater Everglades	13,161
Florida Bay	9,900
Total HU Lift	27,100

Plan Capital Cost \$2.11B⁽¹⁾ – CEPP New Water Component \$0.40B⁽²⁾ = **Capital Cost to Implement Plan \$1.71B**

⁽¹⁾Includes Reservoir + Stormwater Treatment Area + Real Estate \$2.01B, Canal Conveyance Improvement \$100M, and Recreation Plan \$2.2M Costs

⁽²⁾Includes CEPP A2 FEB and A2 Recreation Plan

Plan is Workable and Implementable

There are several state and federal laws, federal planning processes and other considerations that must be addressed in order to obtain the approvals necessary to partner with the federal government in the construction and operation of the Everglades Agricultural Area (EAA) Storage Reservoir project. Major considerations taken into account are listed below.

- Conveyance improvements are needed in the North New River and Miami canals. SFWMD plans to expand these canals within existing state-owned land and remove undulations on the canal bottoms to enhance the movement of water from Lake Okeechobee to the south.
- The project will comply with the requirements of the Water Resources Development Act of 2000 (also known as the Savings Clause) and Section 373.1501 of Florida Statutes by ensuring that existing legal water users and flood protection are not adversely affected by the project.



The Miami Canal (bottom right) is one of two canals where conveyance improvements would be made to ensure the EAA Storage Reservoir works as intended.

- The project will focus on the goals of the EAA Storage Reservoir project as identified in the Comprehensive Everglades Restoration Plan (CERP).
- The existing Central Everglades Planning Project (CEPP) Implementation Report approved by the U.S. Congress includes a sequencing plan for project features. Several CERP and non-CERP projects must be constructed and operating first before implementing most CEPP features to avoid unintended consequences. This EAA Storage Reservoir project will be consistent with CEPP phasing.
- State water quality standards will be achieved, and the reservoir will not cause or contribute to a violation of state water quality standards, permit discharge limits or specific permit conditions.

Public Involvement in the Development of the EAA Storage Reservoir Feasibility Study

SFWMD received extensive public input and developed a plan for recreational opportunities.



Hundreds of stakeholders and interested parties gave input on the project during public meetings like this one on Dec. 21, 2017.

Public Outreach: SFWMD conducted public outreach during the development of the Post Authorization Change Report (PACR). To ensure consistency with the National Environmental Policy Act (NEPA) and ensure eligibility for federal cost sharing, SFWMD held extensive public meetings. All interested parties and key stakeholders were kept apprised of the project through public meetings. During these forums, SFWMD highlighted the project's progress, while soliciting and receiving valuable public input. Additionally, SFWMD maintains a website (www.sfwmd.gov/eaareservoir) where the public can access up-to-date information and submit feedback in realtime.

Recreation: To ensure recreational opportunities were incorporated into the project, SFWMD presented proposed plans at the Water Resources Analysis Coalition Recreational Issues Forum on Dec. 18, 2017. Recreational opportunities for the reservoir and the stormwater treatment areas will include public access sites for hiking and biking on the levees, fishing, hunting and wildlife viewing. Non-motorized boats and public vehicle access will be allowed during managed events.

Real Estate Requirements and Actions

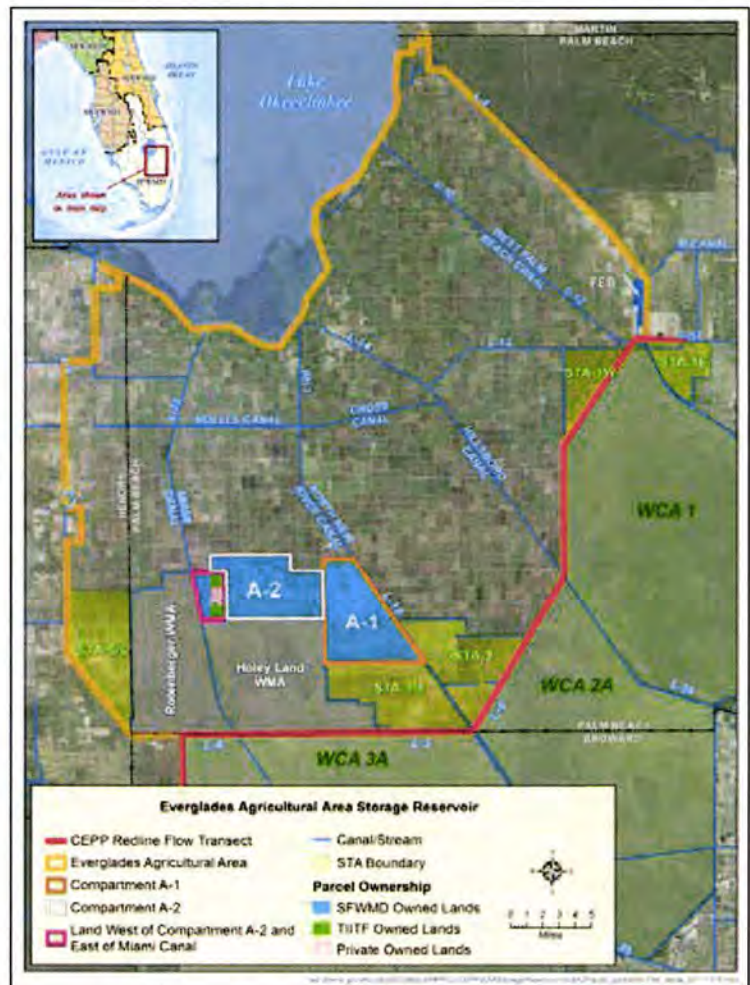
The Legislature directed SFWMD to take several real estate actions to facilitate the planning and implementation of the Everglades Agricultural Area (EAA) Storage Reservoir project. The requirements for real estate actions generally included the pursuit of willing sellers, termination of leases on state lands and land exchanges. SFWMD fulfilled these requirements, while maximizing the use of previously acquired land already in public ownership and adjacent to existing infrastructure.

Purchase of land from willing sellers: SFWMD has actively pursued the purchase of privately held lands in the area to the west of the A-2 parcel identified by the Legislature. SFWMD has made a written acquisition offer to both of the private landowners in those western lands between the A-2 parcel and the Miami Canal, and negotiations are moving forward favorably.

Following SFWMD's inquiry as part of the planning process, 15 private landowners who own the majority of the lands in the EAA notified SFWMD in writing that they are not willing to sell or remove agricultural land out of production for the project. Each of these landowners has an interest of more than 2,500 acres, totaling approximately 80% of the acreage within the EAA. To date, SFWMD inquiries to other EAA owners of parcels larger than 150 acres have been largely unresponsive about their willingness to sell or exchange.

Termination of leases on SFWMD lands in EAA: All SFWMD leaseholders located within the EAA have been notified that their leases will be terminated in accordance with lease terms. The Florida Department of Environmental Protection (FDEP) has been notified that state lands between the A-2 parcel and the Miami Canal will be needed for the project.

Land exchanges: As willing landowners are successfully identified within this planning process, SFWMD will work to exchange state-owned lands for private lands, as long as they can be used effectively in conjunction with existing facilities.



This map shows SFWMD-owned land (blue) and state-owned land (green) described in Senate Bill 10 to be used for the EAA Storage Reservoir project and privately owned land (pink), specifically identified by the Legislature to be acquired for the project. SFWMD has also contacted private landowners throughout the EAA (outlined in yellow) seeking willing sellers of their land.

Independent Reviews

Technical Review: SFWMD will engage an Independent External Peer Review (IEPR) of the draft Central Everglades Planning Project (CEPP) Post Authorization Change Report (PACR) for the EAA Storage Reservoir project study in the coming weeks. Independent, objective peer review is regarded as a critical element in ensuring the reliability of scientific analysis. The purpose of the IEPR is to provide an independent assessment of the project. Assessments include the adequacy and acceptability of the economic, engineering and environmental methods; models, data and analyses used; the range of alternatives; and the adequacy of risk and uncertainty analyses. SFWMD has engaged the same professionals who typically perform this work when the U.S. Army Corps of Engineers is the lead for a project.

Regulatory and Partner Agency Review: Section 373.1501 of Florida Statutes established Florida Department of Environmental Protection (FDEP) oversight to ensure that SFWMD conducts the required evaluations for all Comprehensive Everglades Restoration Plan (CERP) projects. SFWMD has evaluated and will continue to report on how the high-performing alternatives are technically feasible and cost effective. Beginning in mid-January, SFWMD will provide necessary and relevant information to FDEP to ensure consistency with all state laws and that the project can be permitted and operated as proposed, considering:

- a. Water resource issues including water supply, water quality, flood protection and threatened and endangered species.
- b. Project feasibility to determine if CEPP features are cost effective, consistent with CERP and can be operated as part of the Central and Southern Florida (C&SF) system.
- c. Consistency with state and federal laws.
- d. Project assurances to determine that there are no adverse impacts on existing legal users, no diminishment of existing levels of flood protection and that adaptation of water management practices meet restored natural environment.
- e. Coordination between utilities and public infrastructure entities has taken place, reducing impacts to relocation of public infrastructure and utilities.

These evaluations and project information are required to fulfill the requirements of Section 373.1501 Florida Statutes and will be documented in the state compliance report.



SFWMD Working with U.S. Army Corps of Engineers to Help Ensure Federal Approval

SFWMD coordinated with the U.S. Army Corps of Engineers (USACE) and identified several potential mechanisms to develop a feasibility study to modify the storage, treatment and conveyance features in the Central Everglades Planning Project (CEPP) to meet the objectives of Senate Bill 10.



Together with USACE, SFWMD identified the most likely path forward to achieve the timeframes required in Senate Bill 10 and protect the eligibility for federal cost share. The mechanism selected is authorized under Section 203 of the U.S. Water Resources Development Act of 1986 (as amended), which encourages local sponsors to develop feasibility studies with technical assistance from the federal government.

SFWMD and USACE have executed a Memorandum of Agreement for technical assistance for the Post Authorization Change Report to CEPP under Section 203. As a required follow-up step, SFWMD has coordinated with USACE to develop the supporting scopes of work and proposed to fund their participation. Ongoing coordination with the Jacksonville District, South Atlantic Division and Headquarters and the Assistant Secretary of the Army's (ASA) office is continuing to develop and refine the supporting scopes of work that detail the level of technical assistance. After additional guidance was provided by USACE Headquarters, the revisions to the scope of work reduce the value added to the process and are inconsistent with other instances where USACE has provided technical assistance to other local sponsors across the nation. SFWMD will continue to work with the ASA to ensure participation by USACE, resulting in meaningful participation in the remainder of the planning process.

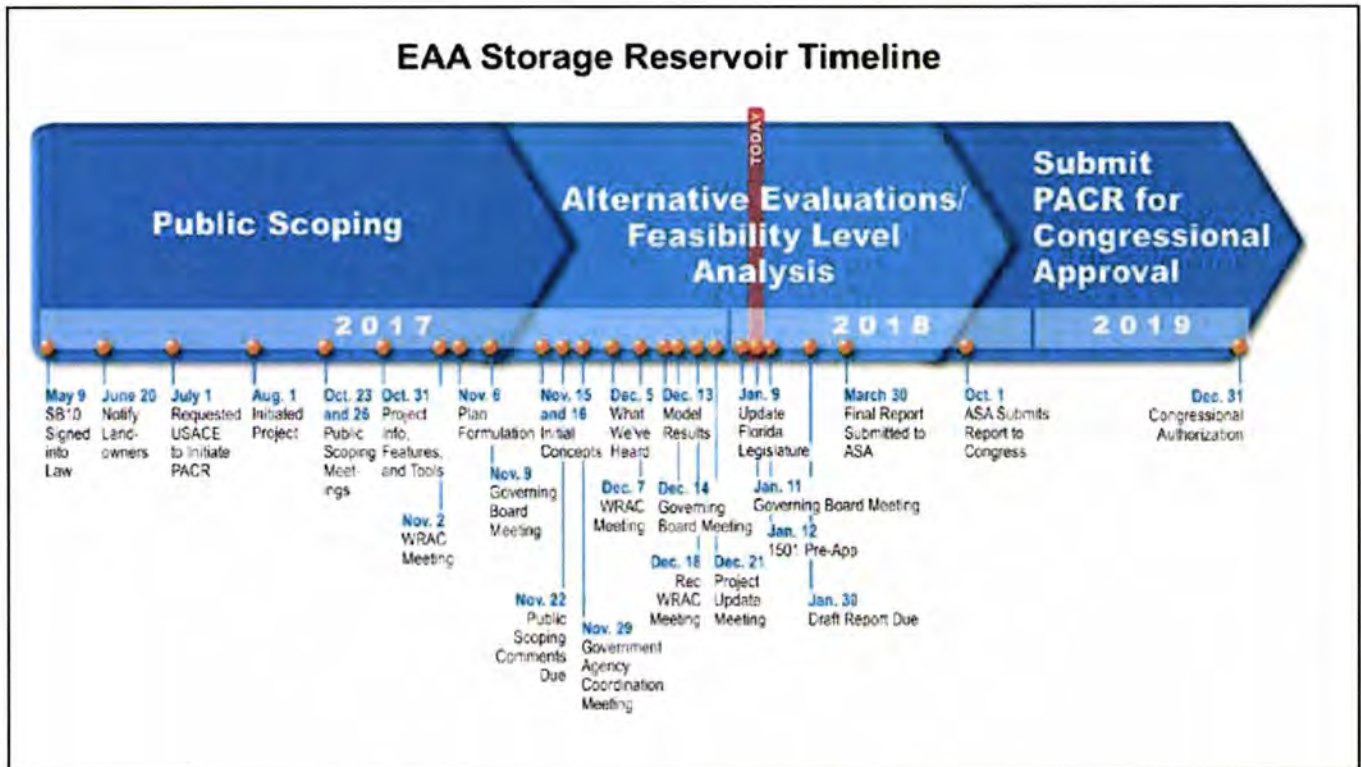
SFWMD and USACE continue to partner on the design and implementation of the authorized portions of CEPP, including the first of three Project Partnership Agreements titled "CEPP South." Such ongoing activities will be necessary to achieve the benefits anticipated by the storage project.



SFWMD is accelerating construction of two features of CEPP, a new flood control structure in Miami-Dade County and Old Tamiami Trail modifications, to increase conveyance of water south through the Everglades.

EAA Storage Reservoir Timeline and Next Steps

The next step after submittal of this progress report to the Legislature is to complete the Central Everglades Planning Project (CEPP) Post Authorization Change Report (PACR) for submittal to the Assistant Secretary for the U.S. Army Civil Works (ASA), by March 30, 2018.



SFWMD will continue to optimize the “cost effective + best buy” alternatives, with these weighed against several factors including:

- **Acceptability:** The extent to which the alternative plans are acceptable in terms of applicable laws, regulations and public policies.
- **Completeness:** The extent to which the alternative plans provide and account for all necessary actions to ensure the realization of the planning objectives, including actions by other federal and non-federal entities.
- **Effectiveness:** The extent to which the alternative plans contribute to achieve the planning objectives.
- **Efficiency:** The extent to which the alternative plans are a cost-effective means of achieving the objectives.

Once the high-performing alternative has been identified, SFWMD will optimize it based on the information gained in the development of the array of alternatives through the public process and in conjunction with multiple additional operational scenarios. The optimization process will refine and document the high-performing alternative’s costs and benefits for inclusion in the March 2018 report for consideration by the ASA.

Progress Report on SFWMD Implementation of Senate Bill 10

Checklist of Senate Bill 10 Requirements

Senate Bill 10 directed the South Florida Water Management District (SFWMD) to perform several tasks regarding the Everglades Agricultural Area (EAA) Storage Reservoir with the ultimate goal of reducing harmful discharges to the coastal estuaries, improving flow to the Everglades and achieving state water quality standards. The table below depicts which tasks SFWMD has completed and which have yet to be completed (TBC).

Task Title	Task Description	Required Completion Date	Completed
Negotiate leased lands	SFWMD is authorized to negotiate the amendment or termination of leases on SFWMD lands within the EAA for the reservoir.	N/A	✓
Identification of leased lands and privately owned lands for project	SFWMD to identify 3,200 acres of leased lands owned by SFWMD or the state and 500 acres of privately owned land for the project.	May 9, 2017	✓
Request PACR development	SFWMD will request that U.S. Army Corps of Engineers (USACE) jointly develop a Post Authorization Change Report (PACR) for CEPP to include EAA Storage Reservoir.	July 1, 2017	✓
Request PACR development	SFWMD and USACE execute memorandum of agreement for technical assistance under Section 203 of Water Resources Development Act (WRDA).	N/A	✓
Contact lessees and private landowners	SFWMD shall contact the lessors and landowners of its interest in acquiring land for the project.	July 31, 2017	✓
Contact TIITF	SFWMD to request Trustees of the Internal Improvement Trust Fund (TIITF) to terminate or amend any leases for lands necessary to implement the project.	July 31, 2017	✓
Water quality standards	Total acreage necessary for additional water treatment may not exceed amount reasonably required to meet state and federal water quality standards.	N/A	✓
Water quality standards	SFWMD shall use the latest version of the Dynamic Model for Stormwater Treatment Areas and other modeling tools in the planning of the reservoir.	N/A	✓
Development of PACR initiated	Development of a PACR must begin by Aug. 1, 2017.	Aug. 1, 2017	✓
Status report to Legislature	SFWMD must report to the Legislature on status of Senate Bill 10 compliance.	Jan. 9, 2018	✓
Request extension	SFWMD may request a time extension to complete the PACR study at the time of the progress report.	Jan. 9, 2018	Not necessary
Submit PACR to U.S. Congress	PACR must be completed, approved by the USACE and submitted to U.S. Congress for approval.	Oct. 1, 2018	TBC
SFWMD requests initiation of PIR	Request for a Project Implementation Report (PIR) must be initiated unless Florida Legislature approves extension of the Oct. 1, 2018 and Dec. 31, 2019 deadlines.	Oct. 1, 2018 or Dec. 31, 2019	TBC
Congressional authorization	U.S. Congress must approve the PACR, thereby authorizing the EAA Storage Reservoir Project.	Dec. 31, 2019	TBC
Request the Corps to re-evaluate LORS	SFWMD shall request USACE to expedite the re-evaluation of Lake Okeechobee Regulation Schedule (LORS).	N/A	TBC

SOUTH FLORIDA WATER MANAGEMENT DISTRICT



**Everglades Agricultural Area Storage Reservoir
Progress Report on SFWMD Implementation of
Senate Bill 10**

**Florida House Natural Resources and
Public Lands Subcommittee**

**Ernie Marks
Executive Director, South Florida Water Management District
Jan. 17, 2018**

SFWMD Approach is Consistent with State Law and CERP

- Senate Bill 10 project goals and objectives for the Everglades Agricultural Area (EAA) Storage Reservoir project were paired with the restoration goals identified in the Comprehensive Everglades Restoration Plan (CERP).
- The EAA Storage Reservoir is one of many CERP storage components (LOWRP, IRL-South/C-44, C-43).
- Benefits to the northern estuaries identified in CERP included an 80 percent reduction in harmful discharges to the estuaries.
- Benefits to Greater Everglades identified in CERP included an annual average increase of approximately 98 billion gallons (300,000 acre-feet) of water to the Everglades.



EAA Storage Reservoir: Project Goals and Objectives

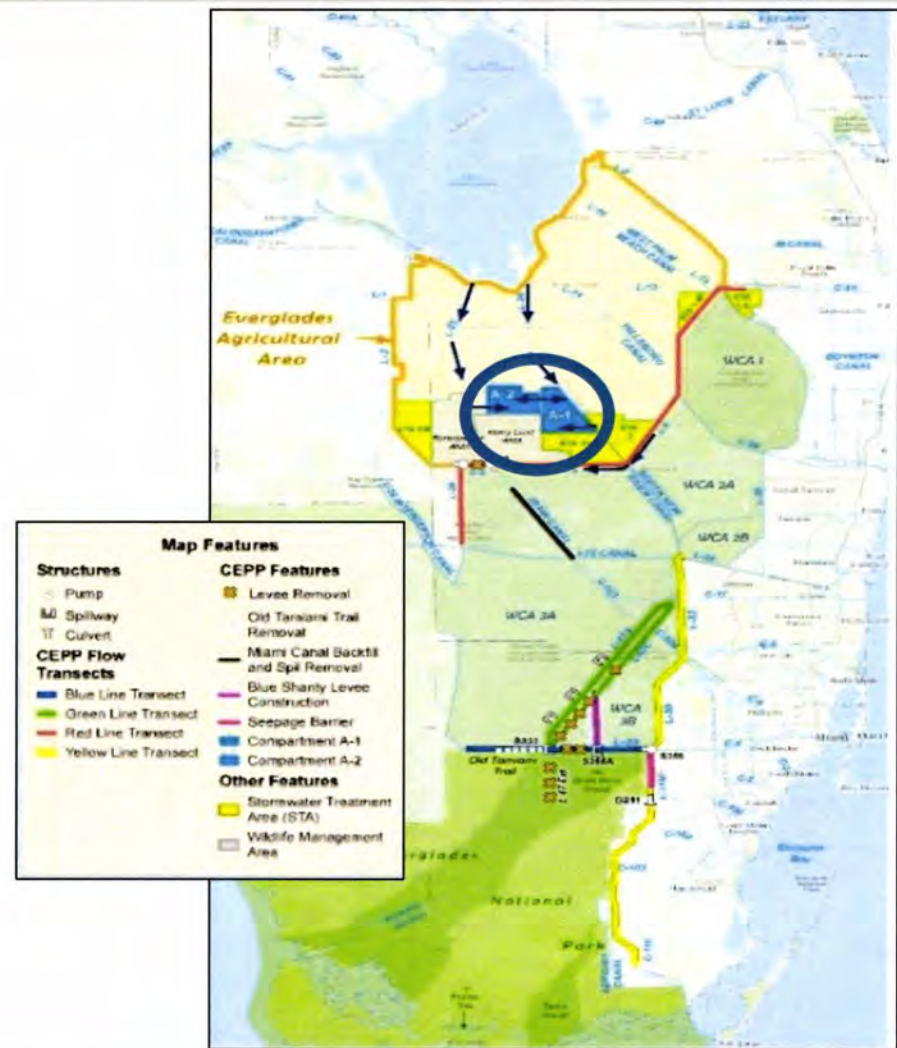
- With the direction provided by state law, while aiming to achieve the goals of CERP and leading the collaboration in the public scoping process, the South Florida Water Management District (SFWMD) identified the goals and objectives of the EAA Storage Reservoir project:



- Reducing high-volume damaging freshwater discharges from Lake Okeechobee to the northern estuaries.
- Increasing freshwater flow to the Everglades system.
- Identifying the next increment of storage, treatment and conveyance south of Lake Okeechobee to reduce ongoing ecological damage to the northern estuaries and Everglades.

CEPP: Starting Point for EAA Storage Reservoir

- The Central Everglades Planning Project (CEPP) included the first increment of EAA storage more broadly described in CERP.
- CEPP opens the south end of the Everglades system and is crucial to achieving EAA Storage Reservoir project goals.
- Consistent with state law, SFWMD is seeking federal approval and cost sharing of the project as a change to the congressionally approved CEPP.



EAA Storage Reservoir Plan is Effective and Implementable

- Several state and federal laws, federal planning processes and other considerations will continue to be considered to obtain necessary approvals to partner with the federal government.
- Public involvement in the development of the study has been extensive.
- Recreational opportunities for the public are included in plan.
- Independent, technical and regulatory reviews are in progress.



Peer Reviewed Modeling Tools - **Water Quality** (DMSTA); **Hydrology** (RSM-BN, RSM-GL);

Hydraulics (HEC-RAS); **Habitat Units**; **Optimization**

Alternative Configurations

Alternative R240A: COST EFFECTIVE + BEST BUY

- 240,000 acre-foot reservoir plus A-1 Flow Equalization Basin
- Reservoir is approximately 10,100 acres and approximately 23 feet deep
- Stormwater Treatment Area (STA) is approximately 6,500 acres

Alternative R240B:

- 240,000 acre-foot reservoir plus A-1 Flow Equalization Basin
- Reservoir is approximately 10,100 acres and approximately 23 feet deep
- Stormwater Treatment Area (STA) is approximately 6,500 acres

Alternative R360C:

- 360,000 acre-foot reservoir
- Reservoir is approximately 19,700 acres and approximately 18 feet deep
- Stormwater Treatment Area (STA) is approximately 11,500 acres

Alternative R360D:

- 360,000 acre-foot reservoir
- Reservoir is approximately 19,700 acres and approximately 18 feet deep
- Stormwater Treatment Area (STA) is approximately 11,500 acres

Alternative C360C: COST EFFECTIVE + BEST BUY

- 360,000 acre-foot reservoir
- Same configuration as Alternative R360C
- Can also serve multiple purposes including water supply as identified in the Comprehensive Everglades Restoration Plan (CERP), Component G

All Alternatives:

- ✓ Reduce Discharges to Northern Estuaries
- ✓ Increase Flows to Greater Everglades
- ✓ Meet Water Quality Requirements

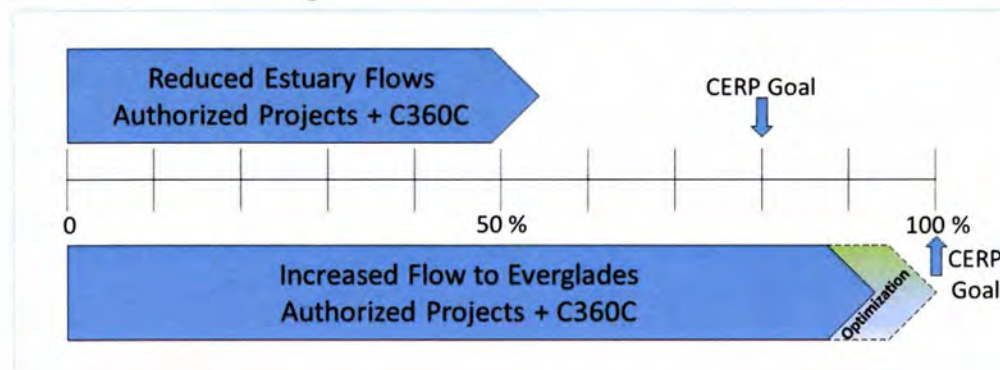
- Costs and benefits will be refined through the planning process
- Selected cost effective + best buy alternatives will be optimized to increase benefits

Alternative C360C

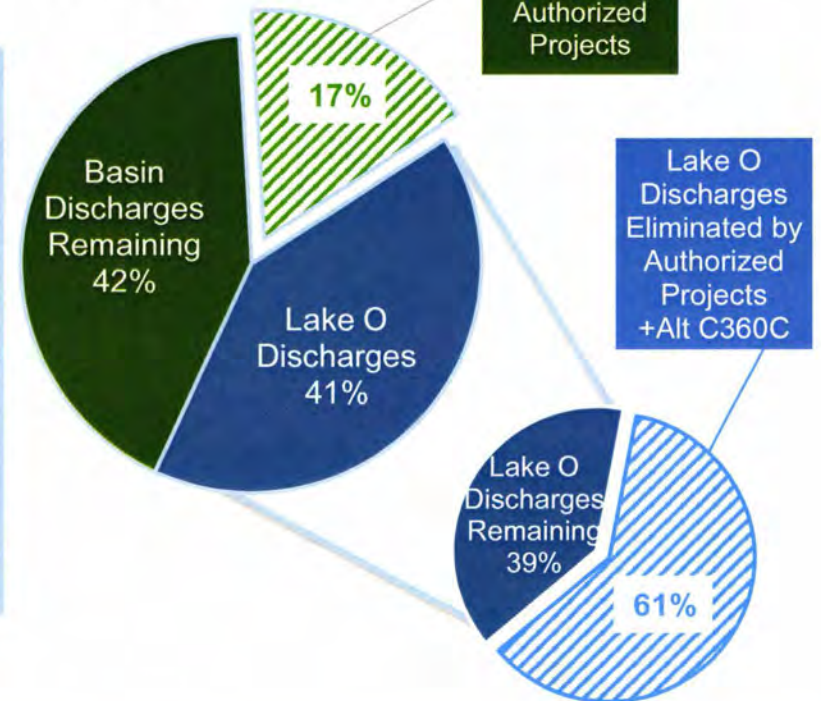
COST EFFECTIVE + BEST BUY



Improved Flow Conditions



% Northern Estuary Events Eliminated



Region	C360 Habitat Unit Lift
Northern Estuaries	4,039
Greater Everglades	13,161
Florida Bay	9,900
Total HU Lift	27,100

Plan Capital Cost \$2.11B⁽¹⁾ – CEPP New Water Component \$0.40B⁽²⁾ = **Capital Cost to Implement Plan \$1.71B**

⁽¹⁾Includes Reservoir + Stormwater Treatment Area + Real Estate \$2.01B, Canal Conveyance Improvement \$100M, and Recreation Plan \$2.2M Costs

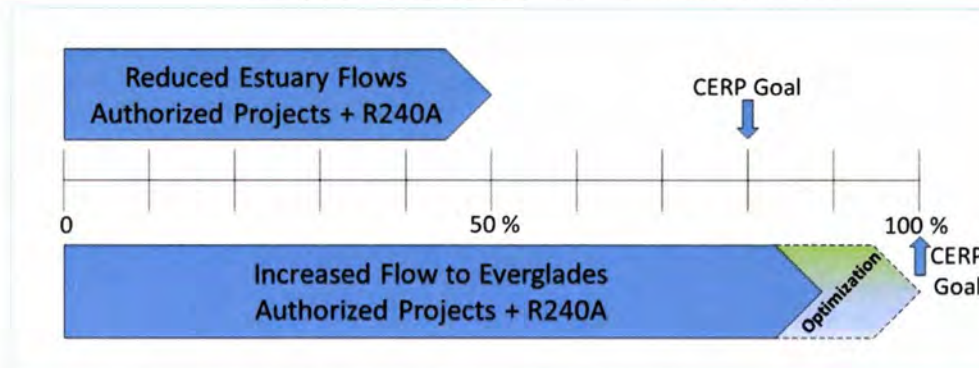
⁽²⁾Includes CEPP A2 FEB and A2 Recreation Plan

Alternative R240A

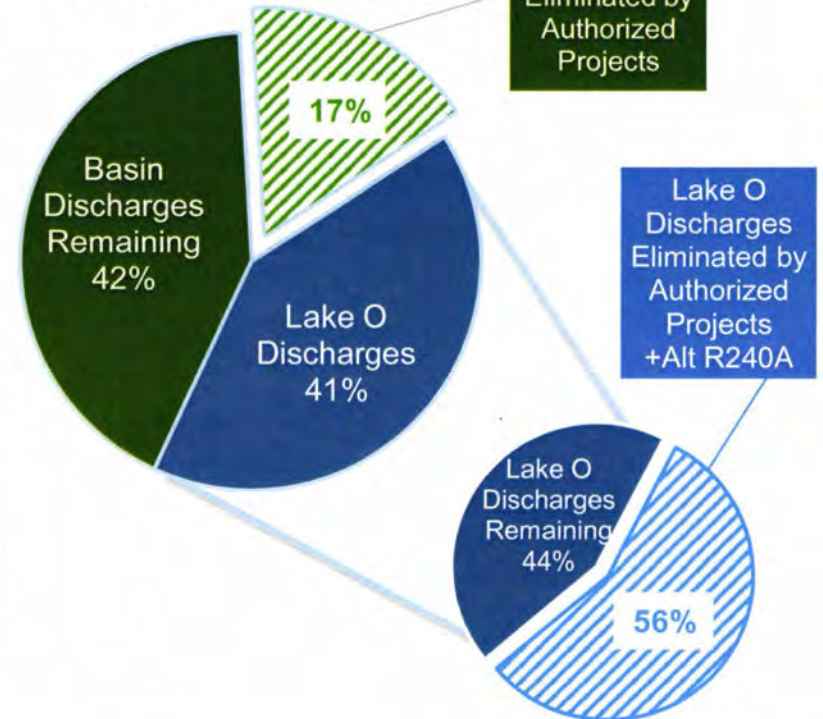
COST EFFECTIVE + BEST BUY



Improved Flow Conditions



% Northern Estuary Events Eliminated



Region	R240 Habitat Unit Lift
Northern Estuaries	2,169
Greater Everglades	10,775
Florida Bay	9,100
Total HU Lift	22,044

Plan Capital Cost \$1.74B⁽¹⁾ – CEPP New Water Component \$0.40B⁽²⁾ = **Capital Cost to Implement Plan \$1.34B**

⁽¹⁾Includes Reservoir + Stormwater Treatment Area + Real Estate \$1.64B, Canal Conveyance Improvement \$100M, and Recreation Plan \$2.2M Costs

⁽²⁾Includes CEPP A2 FEB and A2 Recreation Plan

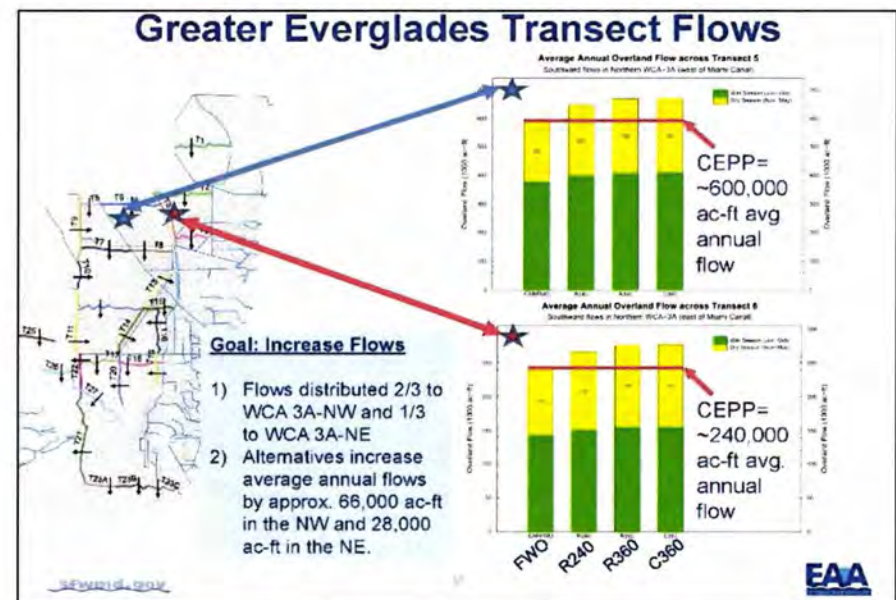
Ecological Benefits to Northern Estuaries

- **All the alternatives help restore the resiliency of the northern estuaries by reducing the number, duration and frequency of harmful discharges from Lake Okeechobee.**
 - **33%** reduction in high-flow discharge events lasting more than 60 days to the Caloosahatchee Estuary for all alternatives, in addition to the benefits provided by CEPP.
 - **55%** reduction in high-flow discharge events lasting more than 42 days to the St. Lucie Estuary for all alternatives, in addition to the benefits provided by CEPP.
 - **50-54%** reduction in discharge volumes from Lake Okeechobee to the northern estuaries, in conjunction with authorized projects.
 - **56-61%** reduction in the number of discharge events from Lake Okeechobee to the northern estuaries, in conjunction with authorized projects.



Ecological Benefits to Greater Everglades

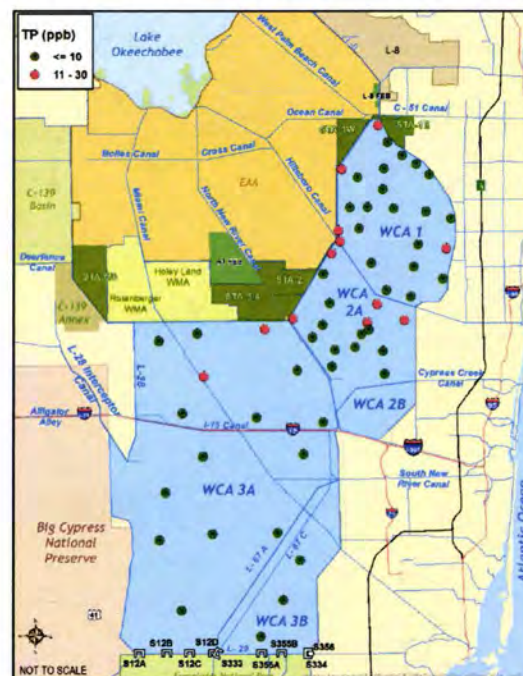
- All alternatives achieve the CERP goal of delivering an annual average of approx. 98 billion gallons (300,000 acre-feet) of clean water south.
- Further optimization of high-performing alternatives will improve this performance.
- When used in conjunction with the other authorized and constructed restoration projects – particularly the C-111 South Dade and Florida Bay projects – all alternatives show a small increase in surface water flows at Taylor Slough and a modest improvement in salinity across Florida Bay performance measure zones.



Reservoir Builds on Successful Improvement of Everglades Water Quality

- Florida has made tremendous investments to achieve water quality in the Everglades.
- New Stormwater Treatment Area sized to continue that progress.
- Successful programs such as Gov. Scott's Restoration Strategies composed the framework used to develop the EAA Storage Reservoir.
- All EAA Storage Reservoir alternatives achieve state water quality standards.

Water Years 2013-2017 Total Phosphorus



90 percent of the Everglades is achieving clean water quality standards for levels of phosphorus at 10 parts per billion

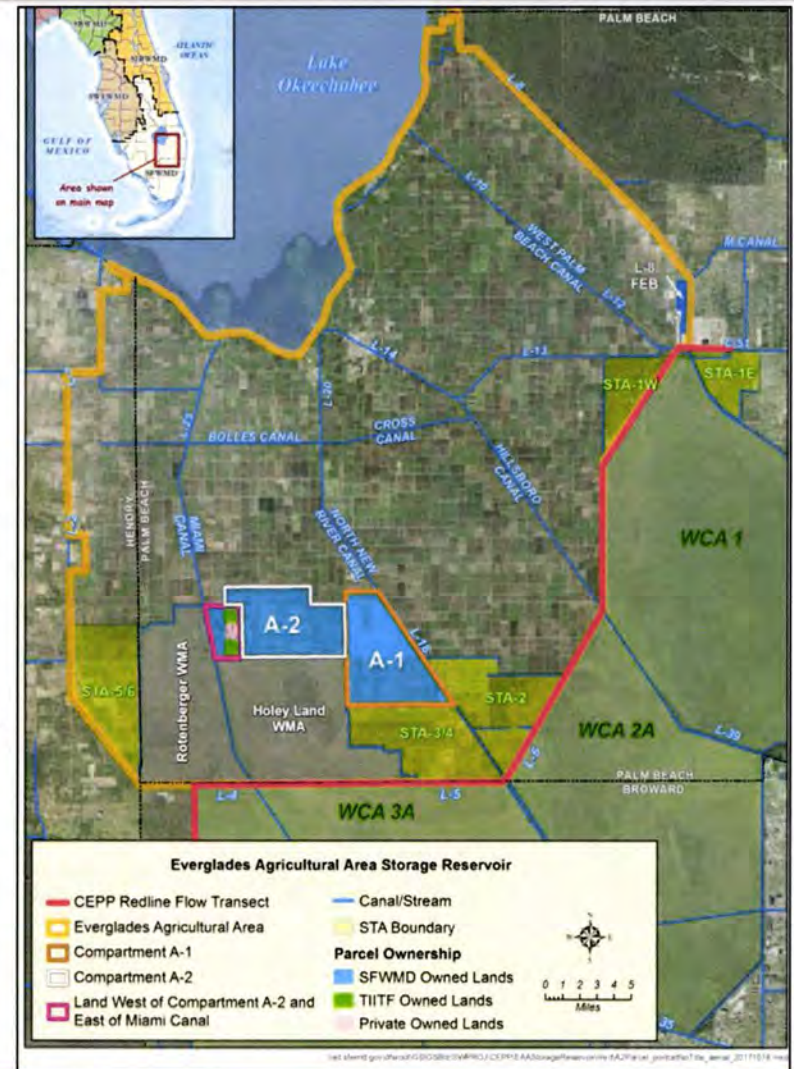
Real Estate Requirements and Actions

➤ Pursuit of willing sellers:

- SFWMD actively pursued purchase of privately held lands in the area west of the A-2 parcel identified by the Legislature. SFWMD submitted a written acquisition offer to both of the private landowners in those western lands between the A-2 parcel and the Miami Canal. Negotiations on western lands are progressing favorably.
- 15 private landowners who own the majority (80%) of the lands in the EAA notified SFWMD in writing that they are not willing to sell or remove agricultural land out of production for the project. SFWMD contacted other private landowners in the EAA, who have been either unresponsive or not willing to remove agricultural land out of production.

➤ **Termination of leases:** SFWMD leaseholders within the EAA have been notified that their leases will be terminated in accordance with lease terms.

➤ **Land exchanges:** SFWMD will continue to coordinate with the Florida Department of Environmental Protection to identify and offer any available state-owned lands for private lands that can build upon the existing project footprint.



SFWMD Working with Federal Partners

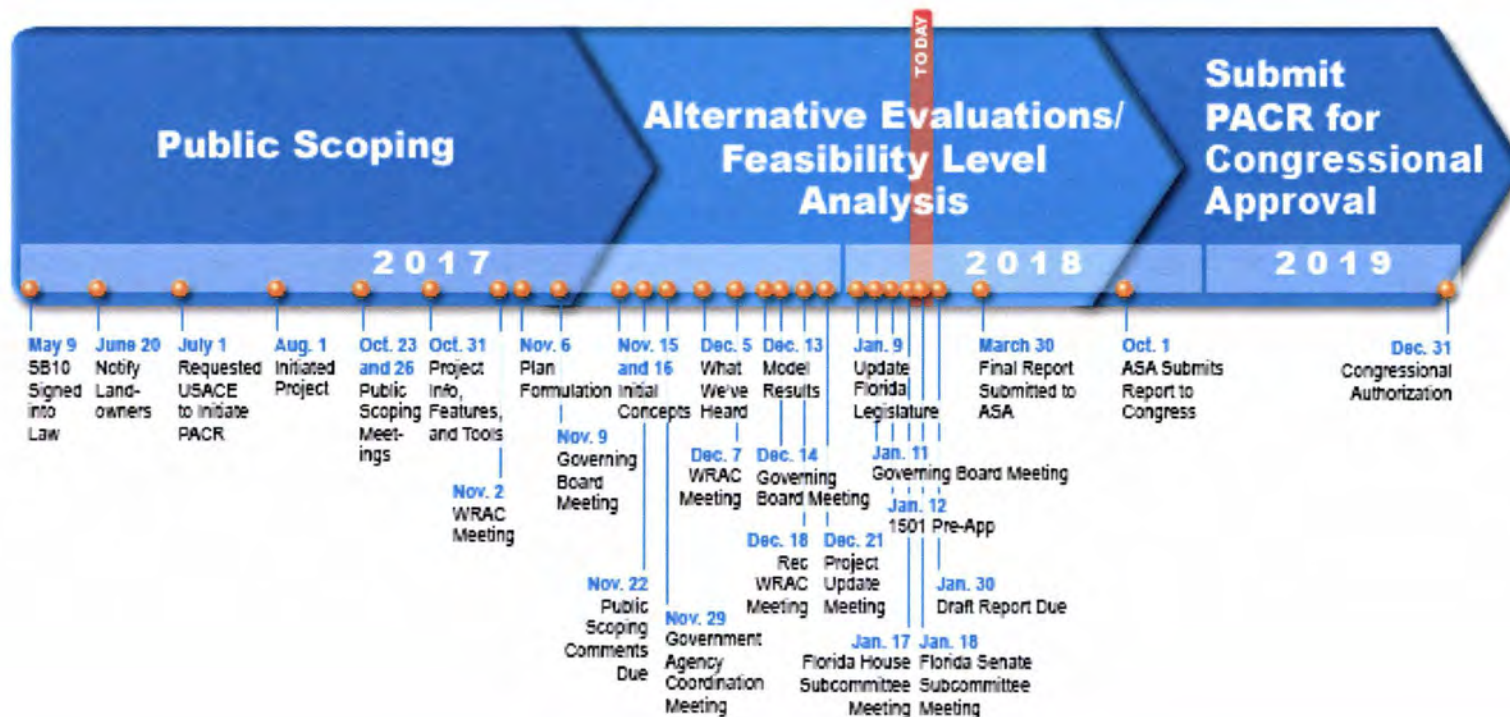
- SFWMD identified the most likely path forward to achieve timeframes in Senate Bill 10 and protect eligibility for federal cost share.
- Mechanism selected is authorized under Section 203 of the Water Resource Development Act of 1986 (as amended), which encourages local sponsors to develop feasibility studies with technical assistance from the federal government.
- Letter exchange between SFWMD and Assistant Secretary of the Army (ASA) Civil Works Office indicated full support of SFWMD efforts and directed staff to prepare a Memorandum of Agreement (MOA) for technical assistance for the Post Authorization Change Report to CEPP under Section 203.
- SFWMD and USACE prepared and executed a MOA for technical assistance.
- As a follow-up step, SFWMD has attempted to develop supporting scopes of work for USACE technical assistance and proposed to fund their participation.
- Letter sent to ASA Civil Works Office expressing concerns regarding policy interpretations and federal delays in executing a scope of work for technical assistance.
- ASA Civil Works Office response still pending.
- Continue to follow federal process requirements and pursue participation by USACE in the planning process.



EAA Storage Reservoir Next Steps

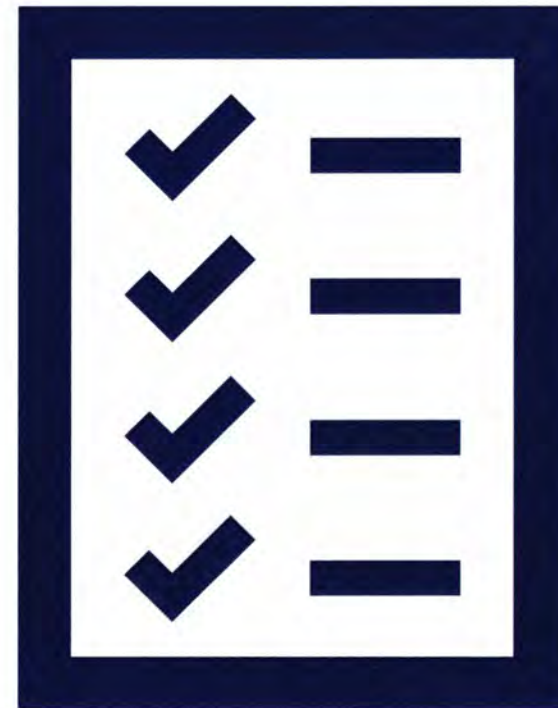


EAA Storage Reservoir Timeline



EAA Storage Reservoir Meets Goals and Objectives of Senate Bill 10

- Alternatives built on foundation of sound scientific data, modeling and public participation.
- Alternatives reduce number, duration and frequency of harmful discharges to northern estuaries.
- Alternatives meet CERP goals for increased flow to Everglades.
- Alternatives meet state water quality standards.
- “Cost effective + best buy” alternatives are workable and implementable.





Questions?

More information is available on SFWMD's website at
www.sfwmd.gov/eaareservoir