

## 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	13 Y, 0 N	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. The bill will be effective upon becoming law.

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

**STORAGE NAME:** pcb02a.NRPL

**DATE:** 1/18/2018

## 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.<sup>1</sup> 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).<sup>2</sup> Under the law, no person may discharge dredge or fill materials into navigable waters without a permit.<sup>3</sup> Navigable waters are waters of the United States, including the territorial seas.<sup>4</sup> “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,<sup>5</sup> and waters that have a relatively permanent connection to downstream traditional navigable waters.<sup>6</sup>

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.<sup>7</sup> The Corps identifies wetlands based on a three-factor approach involving indicators of hydrophilic vegetation, hydric soil, and wetland hydrology.<sup>8</sup>

##### *Permitting Standard*

The EPA and the Corps develop regulations for the program.<sup>9</sup> 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.<sup>10</sup>

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<sup>1</sup> 33 U.S.C. § 1344.

<sup>2</sup> 33 U.S.C. § 1344(a) and (b).

<sup>3</sup> 33 U.S.C. § 1344(a).

<sup>4</sup> 33 U.S.C. § 1362(7).

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

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

<sup>7</sup> 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](http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/Wetlands/AGCP_regsupV2.pdf) (last visited January 2, 2018).

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

<sup>9</sup> 33 U.S.C. § 1344(b).

<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> Applicants must first avoid and minimize impacts before proposing mitigation.<sup>18</sup> Applicants may also purchase mitigation credits from a mitigation bank or use an in-lieu fee program credit.<sup>19</sup> Compensatory mitigation is the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources.<sup>20</sup>

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,

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<sup>11</sup> 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](http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/Alternatives/20140624-Preparing_Alternatives_%20Analysis.pdf) (last visited October 30, 2017).

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

<sup>13</sup> 40 C.F.R. § 230.10(b).

<sup>14</sup> 40 C.F.R. Part 230 subparts B, C, F, and G.

<sup>15</sup> 40 C.F.R. Part 230 subpart H.

<sup>16</sup> 16 U.S.C. § 1536(a)(2).

<sup>17</sup> 40 C.F.R. § 230.93(a).

<sup>18</sup> 40 C.F.R. § 230.91(c).

<sup>19</sup> 40 C.F.R. § 230.93(b).

<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup>

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.<sup>23</sup>

### *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.<sup>24</sup> 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.<sup>25</sup> Comment periods are no more than 30 days and no less than 15 days.<sup>26</sup> The Corps evaluates each comment, furnishes the applicant the comments, and determines if a public hearing is necessary.<sup>27</sup>

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.<sup>28</sup> The Corps will decide on all applications within 60 days unless precluded by law or procedures required by other laws, such as the CWA.<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> 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.<sup>32</sup> Permit holders may request extensions of time.<sup>33</sup>

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

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<sup>21</sup> 33 C.F.R. § 320.4(a)(1).

<sup>22</sup> 33 C.F.R. § 320.4(a)(2).

<sup>23</sup> 33 C.F.R. § 320.4(a)(3).

<sup>24</sup> 33 C.F.R. § 325.2(a)(1).

<sup>25</sup> 33 C.F.R. § 325.2(a)(2).

<sup>26</sup> 33 C.F.R. § 325.2(d)(2).

<sup>27</sup> 33 C.F.R. § 325.2(a)(3).

<sup>28</sup> 33 C.F.R. § 325.2(a)(6).

<sup>29</sup> 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).

<sup>30</sup> 33 C.F.R. § 325.4(a).

<sup>31</sup> 33 C.F.R. § 325.6(b).

<sup>32</sup> 33 C.F.R. § 325.6(e).

<sup>33</sup> 33 C.F.R. § 325.6(d).

conditions of the permit based on a reevaluation of the circumstances and conditions of a permit.<sup>34</sup> 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.<sup>35</sup>

### *Exemptions*

The CWA specifically exempts six activities from section 404 permitting.<sup>36</sup> 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.<sup>37</sup>

### *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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> If the Corps approves the state's program, the state takes over issuing the general permits.<sup>42</sup> 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.<sup>43</sup>

Letters of permission (LOP) are a type of permit issued by the Corps with abbreviated procedures.<sup>44</sup> 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.<sup>45</sup>

### *Enforcement*

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

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<sup>34</sup> 33 C.F.R. § 325.7(b).

<sup>35</sup> 33 C.F.R. § 325.7(b), (c), and (d).

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

<sup>37</sup> 33 U.S.C. § 1344(f)(2).

<sup>38</sup> 33 U.S.C. § 1344(e)(1).

<sup>39</sup> 33 C.F.R. § 325.2(e)(2)

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

<sup>41</sup> 33 U.S.C. §1344(g)(1).

<sup>42</sup> 33 U.S.C. §1344(h).

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

<sup>44</sup> 33 C.F.R. 325.2 (e)(1).

<sup>45</sup> 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](http://www.saj.usace.army.mil/Portals/44/docs/regulatory/sourcebook/permitting/letter_of_permission/lop21may96.pdf) (last visited January 4, 2018).

<sup>46</sup> 33 C.F.R. 326.3.

<sup>47</sup> *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.<sup>48</sup> 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.<sup>49</sup>

## 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.<sup>50</sup>

“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.<sup>51</sup> “Surface water” is water upon the surface of the earth, whether contained in bounds created naturally or artificially or diffused.<sup>52</sup> 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.<sup>53</sup>

DEP, the five water management districts (WMDs), and certain local governments delegated by DEP<sup>54</sup> jointly implement Florida’s ERP program. The agencies’ responsibilities are divided according to the Operating and Delegation Agreement<sup>55</sup> and the geographic regions of the WMDs.<sup>56</sup>

### *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.<sup>57</sup> It is

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

<sup>49</sup> 33 C.F.R. § 331.7(f).

<sup>50</sup> 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

<sup>51</sup> Section 373.019(22), F.S.

<sup>52</sup> Section 373.019(21), F.S.

<sup>53</sup> Section 373.4211, F.S.; chapter 62-340, F.A.C.

<sup>54</sup> Section 373.441, F.S.

<sup>55</sup> 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).

<sup>56</sup> 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).

<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup>

DEP and the WMDs require applicants to consider design modifications to reduce or eliminate adverse impacts before proposing mitigation to offset adverse impacts.<sup>60</sup> 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.<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup> If the proposed activity will likely take<sup>64</sup> 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.<sup>65</sup>

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<sup>58</sup> 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).

<sup>59</sup> 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).

<sup>60</sup> 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).

<sup>61</sup> *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.

<sup>62</sup> 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).

<sup>63</sup> *Id.* at AH 10.2.2.

<sup>64</sup> "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).

<sup>65</sup> 16 U.S.C. § 1538(a)(1)(B).

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

### *Permitting Process*

Once DEP or the WMD receives an application, it evaluates the material to determine if the application is complete.<sup>67</sup> If the application is incomplete, DEP or the WMD will request additional information within 30 days.<sup>68</sup> The applicant must respond to such requests within 90 days.<sup>69</sup> Within 30 days after receipt of such additional information, DEP or the WMD must review the submittal.<sup>70</sup> 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.<sup>71</sup> Any application that DEP or the WMD do not approve or deny within 60 days is considered approved by default.<sup>72</sup>

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.<sup>73</sup> 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.<sup>74</sup> The operation and maintenance phase of all ERPs is in perpetuity.<sup>75</sup>

The permit holder may request a modification to an existing, currently valid ERP.<sup>76</sup> 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.<sup>77</sup>

### *Exemptions*

Current law exempts 34 activities from the requirement to obtain an ERP.<sup>78</sup> 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.<sup>79</sup> DEP has identified 60 activities that are exempt from ERP requirements.<sup>80</sup> Further, DEP and the WMDs may determine, on a case-by-case basis, whether a specific activity only minimally or insignificantly has an

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<sup>66</sup> Section 373.414(17), F.S.

<sup>67</sup> 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).

<sup>68</sup> Section 373.4141(1), F.S.

<sup>69</sup> 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).

<sup>70</sup> Section 373.4141(1), F.S.

<sup>71</sup> Section 373.4141(2), F.S.; Most state permit decisions in Florida must be made within 90 days. s. 120.60(1), F.S.

<sup>72</sup> Section 120.60(1), F.S.

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

<sup>74</sup> 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).

<sup>75</sup> 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).

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

<sup>77</sup> Rule 62-330.315(3), F.A.C.

<sup>78</sup> See Sections 373.406 and 403.813(1), F.S.

<sup>79</sup> Section 373.406(6), F.S.

<sup>80</sup> Rule 62-330.051, F.A.C.



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

### *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.<sup>83</sup> General permits authorize activities by rule rather than by individual review of applications.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

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.<sup>88</sup>

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.<sup>89</sup> For administrative remedies, DEP and WMDs may not impose penalties in excess of \$10,000 per notice of violation.<sup>90</sup>

### *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.<sup>91</sup> Also, unlike federal administrative appeals, the hearing officer is free to consider relevant evidence external to the application.<sup>92</sup>

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<sup>81</sup> Section 373.406(6), F.S.

<sup>82</sup> 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).

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

<sup>84</sup> 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).

<sup>85</sup> Section 373.430(3), F.S.

<sup>86</sup> Section 373.430(4), F.S.

<sup>87</sup> Section 373.430(5), F.S.

<sup>88</sup> Section 373.119(1), F.S.

<sup>89</sup> Sections 373.129(5) and (7) and 403.121(1), F.S.

<sup>90</sup> Sections 373.129(7) and 403.121(2), F.S.

<sup>91</sup> Section 120.569(2)(p), F.S.

<sup>92</sup> 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.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup>

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.<sup>97</sup>

### *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;<sup>98</sup>
  - 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

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<sup>93</sup> 33 U.S.C. § 1344(g).

<sup>94</sup> 33 U.S.C. § 1344(g)(1).

<sup>95</sup> 40 C.F.R. § 233.1(b).

<sup>96</sup> 40 C.F.R. § 233.1(c).

<sup>97</sup> 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).

<sup>98</sup> 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.<sup>99</sup>

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.<sup>100</sup> The Corps must transfer to the state all pending applications for dredge and fill activities.<sup>101</sup> If the state chooses to implement the Corps' general permits, the Corps must suspend the administration and enforcement of such general permits.<sup>102</sup> 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.<sup>103</sup>

### *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.<sup>104</sup>

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.<sup>105</sup> 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.<sup>106</sup>

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.<sup>107</sup> 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.<sup>108</sup>

<sup>99</sup> 33 U.S.C. § 1344(h)(1).

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

<sup>101</sup> 33 U.S.C. § 1344(h)(4).

<sup>102</sup> 33 U.S.C. § 1344(h)(5).

<sup>103</sup> 40 C.F.R. § 233.16(b).

<sup>104</sup> 40 C.F.R. § 233.20.

<sup>105</sup> 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](https://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf) (last visited January 4, 2018).

<sup>106</sup> Susan Lockwood, *Assumption, New Jersey Style*, [https://www.aswm.org/pdf\\_lib/assumption\\_nj\\_style.pdf](https://www.aswm.org/pdf_lib/assumption_nj_style.pdf) (last visited January 4, 2018).

<sup>107</sup> 40 C.F.R. § 233.32(b).

<sup>108</sup> 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.<sup>109</sup> If the EPA comments on the state administered section 404 permit application, the state must follow a specific procedure.<sup>110</sup>

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.<sup>111</sup> 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.<sup>112</sup>

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.<sup>113</sup> 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.<sup>114</sup>

Section 404 permits issued by the state must include conditions prescribed by the EPA.<sup>115</sup> This includes that state administered section 404 permits may not exceed five years,<sup>116</sup> 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.<sup>117</sup> A state may continue Corps or state administered section 404 permits until the effective date of the new permits, if state law allows.<sup>118</sup>

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

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<sup>109</sup> 40 C.F.R. § 233.35(b).

<sup>110</sup> 40 C.F.R. § 233.35(a).

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

<sup>112</sup> 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](https://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf) (last visited January 4, 2018).

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

<sup>114</sup> 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).

<sup>115</sup> 40 C.F.R. § 233.23.

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

<sup>117</sup> 40 C.F.R. § 233.36(c)(2)(v).

<sup>118</sup> 40 C.F.R. § 233.38.

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

### *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.<sup>120</sup> A state or tribe that assumes the program may administer and enforce general permits previously issued by the Corps.<sup>121</sup> 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.<sup>122</sup>

### *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.<sup>123</sup>

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.<sup>124</sup>

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.<sup>125</sup>

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.<sup>126</sup> Any state that administers a section 404 permitting program must allow public participation in the state enforcement process.<sup>127</sup>

### *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

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<sup>119</sup> 40 C.F.R. § 233.36(a).

<sup>120</sup> 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](https://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf) (last visited January 4, 2018).

<sup>121</sup> 40 C.F.R. § 233.21(a).

<sup>122</sup> 40 C.F.R. § 233.21(b).

<sup>123</sup> 40 C.F.R. § 233.41(a).

<sup>124</sup> 40 C.F.R. § 233.41(b)(1).

<sup>125</sup> 40 C.F.R. § 233.41(b)(2).

<sup>126</sup> 40 C.F.R. § 233.41(d)(1).

<sup>127</sup> 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.<sup>128</sup>

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 <sup>rd</sup> 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.<sup>129</sup> The Corps would suspend the issuance of 404 permits in state regulated waters on the effective date of the assumption.<sup>130</sup> The Corps would transfer to Florida all pending applications for dredge and fill activities in state assumed waters.<sup>131</sup> If Florida chooses to implement the Corps' general permits, the Corps must suspend the administration and enforcement of such general permits.<sup>132</sup> DEP has indicated that it will issue separate ERP and state administered section 404 permits.

<sup>128</sup> 33 U.S.C. § 1344(i).

<sup>129</sup> 40 C.F.R. § 233.1(b).

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

<sup>131</sup> 33 U.S.C. § 1344(h)(4).

<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup> Each Corps district maintains a list of section 10 waters.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup>

## 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 guidelines<sup>139</sup> and the Corp’s public interest review criteria.<sup>140</sup> 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.<sup>141</sup>

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<sup>133</sup> 33 U.S.C. § 1344(g)(1).

<sup>134</sup> 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](https://www.epa.gov/sites/production/files/2017-06/documents/awsubcommitteeefinalreprot_05-2017_tag508_05312017_508.pdf) (lasts visited January 4, 2018).

<sup>135</sup> 33 C.F.R. § 329.4.

<sup>136</sup> 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](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).

<sup>137</sup> 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](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).

<sup>138</sup> *Id.* at p. 17 – 21, 27 – 33.

<sup>139</sup> 40 C.F.R. Part 230.

<sup>140</sup> 33 C.F.R. § 320.4(a).

<sup>141</sup> 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.<sup>142</sup>

### 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.<sup>143</sup>

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;<sup>144</sup>
- 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.<sup>145</sup> 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;<sup>146</sup>
- Mitigation for state administered section 404 permits may be handled slightly differently to account for different requirements established by the Corps and EPA;<sup>147</sup>
- ERP applicants may seek variances from ERP criteria,<sup>148</sup> while applicants for section 404 permits may not seek variances;<sup>149</sup>
- 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

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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).

<sup>142</sup> 40 C.F.R. § 233.16(b).

<sup>143</sup> 40 C.F.R. § 233.1(c).

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

<sup>145</sup> 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](https://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf) (last visited November 6, 2017).

<sup>146</sup> Section 373.421(1), F.S.

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

<sup>148</sup> Section 373.414(17), F.S.

<sup>149</sup> Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 387 (Cl. Ct. 1988).

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404 permits if it chooses to do so.<sup>150</sup> 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; and<sup>151</sup>
- 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.<sup>152</sup>

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.

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<sup>150</sup> 40 C.F.R. § 233.21(a).

<sup>151</sup> 40 C.F.R. § 233.36(a).

<sup>152</sup> See 120.569(2)(p). F.S.

## 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.<sup>153</sup> 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 executed by DEP and EPA, whichever is shorter. This is similar to the authority granted to applicants in other federally delegated programs.<sup>154</sup>

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

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.<sup>157</sup>

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.<sup>158</sup>

### 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.

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<sup>153</sup> See s. 120.60(1), F.S.

<sup>154</sup> See Section 403.0885(3), F.S.

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

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

<sup>157</sup> This is allowed by federal rule. 40 C.F.R. § 233.38.

<sup>158</sup> Sections 373.103(8), 373.441, F.S.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The PCB may have a fiscal impact on DEP because the department will need to revise its rules to adopt federal regulations necessary to obtain assumption of the program; adopt by rule an expedited permit review process for the reissuance of all state administered section 404 permits; and assume the processing of section 404 dredge and fill permits where authorized. DEP has indicated that the agency can absorb the additional workload within existing resources.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### 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**

None.