



Florida Department of Environmental Protection
2600 Blair Stone Road
Tallahassee, FL 32399

Att'n: Jessica Melkun
Via Email: Jessica.Melkun@dep.state.fl.us

July 9, 2018

RE: Rule Development Regarding State Proposal to Assume 404 Jurisdiction

Dear Secretary Valenstein:

We submit these public comments on behalf of **Florida Wildlife Federation, The Conservancy of Southwest Florida, Miami Waterkeeper, St. Johns Riverkeeper** and the **Center for Biological Diversity** to express our concerns regarding the Rule Development underway related to the Department's intention to apply for authorization to assume jurisdiction over wetlands permitting under Section 404(a) of the Clean Water Act of 1972 (CWA), 33 U.S.C. § 1344, in waters of the United States. Our organizations are devoted to protecting Florida's lands, water and wildlife, and the communities that rely on them.¹

Public Opposition to Assumption in Florida

As a threshold matter, DEP should recognize that there is considerable public opposition to the state assumption of the 404 program in Florida. In February 2018, the Everglades Coalition issued a resolution opposing SB 1402 and HB 7043, the legislation on which DEP now relies to initiate rulemaking. *See* Exhibit 1, Everglades Coalition, *Resolution Opposing SB1402 and HB7043: State Assumption of Federal State 404 Dredge and Fill Permitting Authority (Feb. 2018)*, https://docs.wixstatic.com/ugd/599879_1752fad35df74c18a139fb2b5f03aae0.pdf.²

On behalf of its more than 60 member organizations, the Everglades Coalition identified a number of concerns regarding state assumption and the risk to Florida's remaining wetlands, which are critical to cleansing water, recharging groundwater, providing fish and wildlife habitat and storm resiliency. The Coalition concluded that "in the face of increased growth and development, the protection and restoration of the Greater Everglades—an ecosystem largely comprised of wetland habitats—is better accomplished by maintaining the existing oversight from federal agencies." *Id.*

¹ A summary of each organization's interests in these issues is provided at the end of this letter.

² The resolution expressed opposition to the bills "as originally filed," and applies with equal force to the bills that were passed since they underwent no modification after filing.



In April 2018, several Florida organizations submitted comments to the U.S. Army Corps of Engineers expressing concerns over the determination of navigable U.S. waters in Florida, a critical issue that has yet to be properly studied or resolved. *See Exhibit 2, Letter from Florida Wildlife Federation, Conservancy of Southwest Florida, Miami Waterkeeper, and St. Johns Waterkeeper (Endorsed by All Florida Waterkeepers) (Apr. 18, 2018); Exhibit 3, Letter from Sierra Club (Apr. 16, 2018); Exhibit 4, Letter from Audubon Florida (Apr. 17, 2018); Exhibit 5, Letter from Florida Conservation Coalition (Apr. 18, 2018); Exhibit 6, Letter from Conservancy of Southwest Florida (Apr. 18, 2018).*

On behalf of the more than 80 organizations that comprise the Florida Conservation Coalition, former Florida Governor and U.S. Senator Bob Graham expressed “serious concerns” over state assumption and urged the Corps to retain the broadest possible jurisdiction in order to best protect Florida’s remaining wetlands. *Id.*

All of Florida’s Waterkeeper organizations have also expressed their opposition to state assumption. *See, e.g., Exhibit 7, Letter to U.S. Army Corps of Engineers from Apalachicola Riverkeeper, Calusa Waterkeeper, Collier County Waterkeeper, Emerald Coastkeeper, Indian Riverkeeper, Lake Worth Waterkeeper, Matanzas Riverkeeper, Miami Waterkeeper, St. Johns Riverkeeper, St. Marys Riverkeeper, Suncoast Waterkeeper, Suwannee Riverkeeper and Tampa Bay Waterkeeper (Apr. 18, 2018).*

The many organizations that oppose assumption in Florida represent hundreds of thousands, if not millions, of Floridians. In light of this considerable public opposition to state assumption, DEP should reconsider whether proceeding with Rule Development is in the state’s interest. Indeed, Governor Rick Scott’s March 23, 2018 signing statement approving HB 7043 stated that the legislation granted the Department “*the authority to explore whether* the state should issue 404 permits.” Exhibit 8 at 1, emphasis added. Whether the state should pursue assumption, therefore, is the threshold question on which DEP should be soliciting input. We strongly believe assumption will not protect Florida’s precious natural resources and urge DEP to abandon this effort.

Rule Development Process

Florida law requires that a notice of rule development “indicate the subject area to be addressed by rule development, provide a short, plain explanation of the purpose and effect of the proposed rule, cite the specific legal authority for the proposed rule, and include the preliminary text of the proposed rules, if available, or a statement of how a person may promptly obtain, without cost, a copy of any preliminary draft, if available.” Fla. Stat. § 120.54(2)(a).

Rules should be drafted “in readable language,” which is defined as avoiding “the use of obscure words and unnecessarily long or complicated constructions” and avoiding “the use of unnecessary technical or specialized language that is understood only by members of particular trades or professions.” *Id.* § 120.54(2)(b).



DEP's rule development has not met these basic standards, largely because so many pieces of the rules that are being developed remain unknown. DEP has provided no process by which the public may be heard on the development of those pieces of the proposal.

Notice of Rule Development

The Department's May 11, 2018, Notice of Rule Development described the purpose and effect of the rule development as follows:

Section 404 of the Clean Water Act (404) provides states the option of assuming administration of the federal dredge and fill permit program in certain waters. By obtaining 404 assumption, Florida will be able to provide a streamlined permitting procedure where an applicant will come to the state to obtain both the Environmental Resource Permitting and 404 authorizations. This will avoid duplication, provide greater certainty to the regulated community, conserve resources, and will afford the state greater control over its natural resources while complying with federal law.

44 Fla. Admin. Reg. 2321 (May 11, 2018). Nothing in the notice, however, advises the public that state assumption specifically implicates—and therefore has an effect on—compliance with and enforcement of several important federal environmental laws, including the National Environmental Policy Act and the Endangered Species Act. Similarly, nothing in the notice advises the public that the question of which waters are assumable, and which are not under the federal Rivers and Harbors Act, is also at issue. Lastly, nothing in the notice advises the public that a state must apply to EPA for approval to implement such a program; instead the notice suggests that a state may simply exercise the “option” to do so.

Proposed Rules

The Department's proposed rules also presume events that have not yet happened. They incorporate “by reference” a number of documents that have not been provided to the public and/or that are being drafted and revised outside of public view and without providing an opportunity to comment in the drafting. These include memoranda of agreement (MOAs) between DEP and EPA, DEP and the Corps, and DEP, EPA and USFWS. This has resulted in a proposal that is both incomplete and misleading.

To begin, the proposed “State 404 Program Applicant's Handbook” states that the EPA “has approved Florida's program to administer Section 404 of the CWA within assumed waters . . . because it is at least as stringent as the federal dredge and fill permitting program under Section 404 of the CWA.” Handbook, Section 1.0. This of course is not true. As this rule development process shows, DEP has not yet developed the program. In addition, DEP has not yet submitted an application to EPA. EPA has not approved any state program in Florida. And EPA has not made any finding regarding the adequacy of any state program.

Again, in this rule development, DEP has not made clear to the public that its proposal is subject to approval by the EPA, nor that the agency has yet to submit an application.

As to the fundamental question of which waters DEP hopes to “assume” jurisdiction over, the Handbook states only that these are “defined” in an MOA between DEP and the Department of the Army, and that the “extent of assumed waters” is also “outlined” in this MOA. Handbook, Section 1.1. *See also id.*, Section 2.0(b)(7) (stating that definition of “assumed waters” or “State-assumed waters” is “delineated” in the MOA). The referenced MOA, however, has not been published to the public for review and comment as to what waters should be assumed in Florida.

As to which categories of projects will continue to be subject to federal review, the proposed Handbook refers to those project categories that are not waived, “as described” in a section of a forthcoming MOA between DEP and EPA. That MOA, however, also has not been published to the public for review and comment as to what waters should be assumed in Florida.

As to how historical resources will be protected, the proposed Handbook states only: “*Currently coordinating.” *Id.*, Section 8.3.

As to how federal listed endangered and threatened species will be protected, the proposed Handbook states only: “*Currently coordinating.” *Id.*

These exceedingly important issues, however, were omitted from DEP’s Notice of Rule Development. Information regarding how they will be addressed has not been provided to the public for comment. DEP should notify the public that the question of which waters are assumable, the treatment of historical resources and the protection of federally listed threatened and endangered species are among the subject areas to be addressed by rule development, and provide an explanation of the effect of the proposed rules on these invaluable resources.

That the proposed rules omit critically important information that they purport to incorporate by reference, or which are yet to be determined, also renders the proposals not “readable,” contrary to Fla. Stat. § 120.54(2)(b).

Rule Development Workshops

Lastly, although an agency is not necessarily required to hold public workshops, “[w]hen a public workshop or hearing is held, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the agency’s proposal and to respond to questions or comments regarding the rule being developed.” Fla. Stat. § 120.54(2)(c).



On May 30, 2018, DEP held a Rule Development Workshop in Tallahassee that included a webinar and was audio-recorded. Workshops were also held on May 31 and June 1, but without a webinar and without an audio recording that has been published to the public.³

Although several representatives of DEP were present at the May 30 workshop, including Kristen Simmons (presiding officer), Heather Mason (environmental consultant), Stephanie Gray (senior attorney) and Lauren Engel (communications director), they were not made “available to explain the agency’s proposal and to respond to questions or comments.” The audio recording demonstrates that a number of public comments and questions were not answered at the workshop.

Sarah Gledhill with Center for Biological Diversity, for example, raised the concern that it was unclear how endangered species would receive the same protection under the new program; asked whether permits would be reviewed under the good cause standard; stated that it was unclear which waters would remain under federal jurisdiction; noted that the Clean Water Act was implemented because states were not managing waters well in the first place; and complained that DEP was relying on MOAs that had not been made available to the public.

DEP’s only response to these questions and comments was to thank Ms. Gledhill and note that they would be taken into consideration. Audio tape: State 404 Program Workshop for Chapters 62-330 and 62-331, held by the Department of Environmental Protection at 53:17 (May 30, 2018), <https://register.gotowebinar.com/recording/recordingView?webinarKey=8324935087855682563®istrantEmail=krivera%40earthjustice.org>.

Defenders of Wildlife observed that rulemaking was premature because the Department had not made available to the public any information about how the agency plans to address endangered species, historic resources or NEPA.

DEP responded generally that MOAs would be made available for public comment. DEP did not, however, respond to any of the questions about how the agency intends to address these critically important issues, or when the Department intends to bring the public into that conversation. *Id.* at 59:13.

³ The Department noticed that it would hold three Rule Development Workshops, to be held in Tallahassee on May 30, 2018, in Orlando on May 31, 2018, and in Ft. Myers on June 1, 2018. The Department further noticed that the Tallahassee Workshop, only, would also be available to the public via webinar, at <https://attendee.gotowebinar.com/register/8324935087855682563>. The public was advised to contact Jessica Melkun, 2600 Blair Stone Road, Tallahassee, Mail Station 3500, Florida 32399, (850)245-8358, Jessica.Melkun@dep.state.fl.us, for more information and that a copy of the “draft rule” was available on the Department’s website at <https://floridadep.gov/water/water/content/water-resource-management-rules-development>.

Victoria Tschinkel, former Secretary of the DEP, asked why DEP wouldn't simply adopt the Corps' 404 program and eliminate the ERP program; noted that there would be conflicts between state and federal wetlands delineation methodologies; and asked whether the agency would be eliminating time restraints on agency decisions and whether EPA would have to review determinations.

DEP responded only that they could not answer why they would not just adopt the Corps' 404 program, and "would get back" on that. DEP did not respond to the remainder of former Secretary Tschinkel's questions and comments. *Id.* at 1:03:34.

An entity called Westervelt Ecological Services raised concerns about discrepancies between state and federal requirements in terms of mitigation. DEP did not respond to these concerns, but only asked that they be submitted in writing and that then the agency would be "happy to address them." *Id.* at 1:11:18.

A number of additional questions and concerns were raised which received no response from the Department, including: What type of public notice process would be available for endangered species protection? (DEP: still working that out with federal and state agencies), *see id.* at 1:14:54; What percentage of permits are not in navigable waters? (DEP: not sure yet), *see id.* at 1:18:20; How will DEP comply with guidelines regarding the ESA? (DEP: still working out the details with EPA), *see id.* at 1:20:13; Will isolated wetlands be non-jurisdictional under the 404 program? (DEP: still working on that answer), *see id.* at 1:20:48; What is the process by which DEP or the applicant must ensure protection of listed species under the ESA? (DEP: still working out the details with state and federal wildlife partners), *see id.* at 1:21:08.

Similar comments and questions were presented by members of the public at the other workshops, including by Amber Crooks for The Conservancy of Southwest Florida at the June 1, 2018 workshop in Ft. Myers. DEP, however, similarly failed to respond to questions and comments there. These included comments and questions regarding how the agency's proposals would: affect environmental review and protection; ensure that federally listed species receive full consideration due under federal law; and accomplish assumption without any additional funding when the agency is already strapped and responsible for many other activities important to environmental protection that could be jeopardized.⁴

DEP's failure to respond to questions and comments regarding the rules being developed rendered the workshop inadequate, in violation of Fla. Stat. § 120.54(2)(c).

⁴ A mitigation bank representative at the Ft. Myers hearing also raised the concern that the proposed rules were not as stringent as the federal 404(b)(1) guidelines, and that assumption would not result in streamlining but rather in inconsistency and chaos.



Conclusion

In light of the public opposition to assumption, the lack of adequate public notice on all topics at issue, the missing materials that are incorporated by reference but not available for public review and comment, and the inability of DEP staff to respond to questions from the public at the workshops held thus far, we respectfully request that the Department abandon rule development at this time.

Sincerely,

Tania Galloni
Managing Attorney

ORGANIZATIONAL INTERESTS

The Florida Wildlife Federation (FWF) has worked to ensure that Florida's wildlife and fragile environment have a voice since 1936. Among other things, FWF is dedicated to protecting Florida's waterways, as wildlife cannot thrive where wetlands are drained, waters polluted and habitats degraded or destroyed.

The Conservancy of Southwest Florida is dedicated to the protection of Southwest Florida's land, water, wildlife and future through advocacy, science, education, and wildlife rehabilitation. The Conservancy was founded in 1964 in response to plans to build a road through Rookery Bay and carries on its mission to preserve wetlands and downstream areas important to the health of the ecosystem, economy, and quality of life.

Miami Waterkeeper's (MWK) mission is to defend, protect, and preserve South Florida's watershed through citizen engagement and community action rooted in sound science and research. MWK works to ensure swimmable, drinkable, fishable water for all.

The St. Johns Riverkeeper mission is to be an independent voice that defends, advocates, and activates others to protect and restore the St. Johns River, Florida's longest and most significant river for commercial and recreational use.

The Center for Biological Diversity (Center) believes that the welfare of human beings is deeply linked to nature — to the existence in our world of a vast diversity of wild animals and plants. Because diversity has intrinsic value, and because its loss impoverishes society, the Center works to secure a future for all species, great and small, hovering on the brink of extinction. It does so through science, law and creative media, with a focus on protecting the lands, waters and climate that species need to survive.