



March 11, 2020

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

Attn.: Heather Mason
Via Email: Heather.Mason@FloridaDEP.gov

RE: Request for Hearing: Proposed Rules Related to State Assumption of the Clean Water Act Section 404 Program

Ms. Mason,

On behalf of our respective organizations and our thousands of members, we are writing to express our concerns regard the Florida Department of Environmental Protection's proposal to assume jurisdiction under Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344, for wetland permitting in waters of the United States. Each signatory below is an independent organization, member of Waterkeepers Florida, and a member of Waterkeeper Alliance, a global movement of on-the-water advocates who patrol and protect over 100,000 miles of rivers, streams, and coastlines. More than 350 Waterkeeper Organizations worldwide combine firsthand knowledge of their waterways with an unwavering commitment to the rights of their communities and to the rule of law.

The concerns outlined below arise from proposed revisions to Chapter 62-330, the proposed promulgation of Chapter 62-331, the Draft 404 Handbook, and the Department's Statement of Estimated Regulatory Costs ("SERC") all of which were published on February 19, 2020.

Affected Interests

Florida's waterways are uniquely connected and are critical to our public health, our economy, and our environment. In light of our rapidly growing population and increasing development pressure, it is essential that these waters are afforded the utmost oversight and protection to ensure that the resources on which we depend are adequately protected. CWA Section 404 requires permits for the discharge of dredge and fill material into Waters of the United States, including wetlands. Florida has particularly fragile and critical areas that are regulated by Section 404 dredge and fill permits, and which require the highest level of review and scrutiny.

Currently, federal Section 404 permits and state Environmental Resource Permits overlap in that both must be obtained for impacts above regulatory thresholds in federal waters. The additional oversight provided by the federal government based on their historic jurisdiction and agency

expertise in this area is critical to adequately protecting our waterways. The federal authority to govern our waters has its origins in the Commerce Clause of the Constitution due to the central role that our waterways play in interstate commerce. Traditionally, wetlands have been subject to federal jurisdiction as well due to their critical role in providing watershed connectivity. As such, CWA authority should remain with the federal government. Any delegation to the state would be inappropriate and incongruous with the spirit of the law. Our organizations vehemently oppose the state of Florida's attempt to assume this authority.

State Assumption Issues

Furthermore, assumption of this process by FDEP would eliminate the additional scrutiny of federal laws that apply to federal permits actions. For example, Section 7 of the Endangered Species Act mandates direct consultation with the United States Fish and Wildlife Service for any federal activity that may affect a federally listed species. Florida's waterbodies provide critical habitat to a variety of listed species. The survival of these species depends on diligent protection of the water on which they depend. DEP's proposed rules, however, do not explain how compliance with the ESA will be achieved. Additionally, the National Environmental Policy Act (NEPA) requires federal agencies to prepare an extensive Environmental Impact Statement (EIS) for any major federal action significantly affecting the quality of the human environment. Currently, the issuance of a Section 404 permit by the Corps constitutes "federal action" under NEPA. Since no law that parallels NEPA exists at the state level, Section 404 permits issued by the state would no longer be subject to the rigorous review provided by an EIS.

Moreover, this delegation would add additional regulatory burden to FDEP, which is already under-resourced for its current responsibilities. For example, FDEP is woefully behind schedule on Total Maximum Daily Load development and is regularly behind in enforcement actions related to the National Pollutant Discharge Elimination System permit program. Additional responsibilities will divert resources away from these critical pre-existing duties. It is important to note that the Environmental Protection Agency (EPA) would not provide any federal funding to Florida for the administration of the 404 permitting program. Due to the value of these resources to our state, the large scope of this permitting program, and FDEP's already limited resources, FDEP's assumption of this responsibility would not guarantee the level of protection that our water requires.

The Public's Concerns

There has been substantial public opposition to the state's proposed assumption of Section 404 authority. Despite this opposition, FDEP has continued to move forward, limiting the opportunity for public involvement in the rulemaking process and has failed to be transparent in rule development. Many questions from the public remain unanswered, including a clarification as to precisely which waters would remain under federal jurisdiction. Furthermore, given the current uncertainty regarding the very definition "Waters of the United States" under the Clean Water Rule, it is clear that FDEP's rule making on this matter is premature.

Waterkeepers Florida has voiced opposition to state assumption since 2018 when the group submitted a letter to the Senate Environmental Preservation and Conservation Committee voicing

opposition to SB 1402 and the partner House bill. Additionally, the details of the current proposal were not included in the original legislation.

The Clean Water Act was developed, in part, because state governments were failing to manage waters in a manner that was protective of public and environmental health. Power to implement the Section 404 permit program was thus assumed by federal agencies. FDEP's attempt to take this authority undermines this purpose and puts Florida's water resources at stake.

Request for Hearing

Waterkeepers Florida is of the position that members of the public should be permitted to participate in this rule-making to the fullest extent that the law provides. Public input is integral to the agency decision-making process and any proposal this large in scope should be subject to multiple public hearings allowing for public involvement across the state. Waterkeepers Florida thus requests a series of public hearings throughout the state. *See* Fla. Stat. § 120.54(3)(c)1 and Rule 28-103.004, F.A.C. Specifically, we request hearings in Miami, Jacksonville, and Ft. Myers.

Waterkeepers Florida also requests that the Department release all materials it intends to submit to the EPA as part of any CWA Section 404 assumption application package. This will allow for public access to important decision-making documents upon which the Department relies and will allow for more substantive public comment on the proposed rules.

Sincerely,

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