

Municipalities across the state are regularly out of compliance with conditions of their FDEP-issued Municipal Separate Stormwater System permits. FDEP cannot keep up with National Pollutant Discharge Elimination System (“NPDES”) permits and hundreds of locations in South Florida have not even secured the requisite NPDES permits for their properties. If FDEP cannot adequately enforce existing administrative responsibilities, they will not be able to handle the additional demands of assuming Section 404 authority. Furthermore, the State of Florida recently transferred to FDEP all responsibility for regulating the more than 2,700,000 septic tanks that exist in the state. This is a burdensome undertaking on an agency that is already under-resourced and falling behind on its existing obligation. If FDEP were to receive Section 404 permitting authority, resources would be diverted away from FDEP’s existing duties or vice versa – a diversion that our precious water resources cannot afford.

Incomplete Application Package

In the application, FDEP refused to answer “resource related” questions, failed to explain how the agency would “streamline” its currently understaffed and overworked wetlands division to take on a new federal program, and had not finalized, nor provided, memoranda of agreement that explain how the Department would implement the program. FDEP’s assumption application fails to adequately describe or list the waters that will be assumed if Florida’s application were to be granted, which is critical information for the public and involved agencies. The maps that were provided in the application are low resolution and nearly impossible to read with any specificity. The list of waters is similarly vague, with no clarification about where these waterways are located.

Also, FDEP’s application has failed to explain how endangered species will be adequately protected under their proposed assumption of the Section 404 program. Instead, it pointed to an anticipated programmatic biological opinion from the Fish and Wildlife Service and National Marine Fisheries Service that will dictate the procedures to be followed at the permit review level to ensure jeopardy will be avoided. However, this document is not part of their application or available to the public for consideration. EPA must require FDEP to submit a clear and complete application to ensure full and informed public participation in its development of a state 404 program before considering the application.

Inadequate Public Involvement

The timing of the public hearings on FDEP’s application presents major barriers to access. FDEP insisted on holding the public portion of its rulemaking process at the peak of the COVID-19 pandemic in March and April 2020, and during a statewide state of emergency which included mandatory state and local stay at home orders. Forward movement on this process ran counter to the wishes of tens of thousands of Floridians who requested that the agency not proceed with rulemaking during the peak of a pandemic. This decision limited the ability of the public to fully and meaningfully participate in this process. Ultimately, virtual public hearings run the risk of excluding those without the resources to attend.

Despite the problems with public involvement, FDEP received numerous comments opposing assumption of Section 404 authority. During the rulemaking process, a multitude of stakeholders