



November 2, 2020

US EPA, Region 4 Water Division, OWSPB
c/o Kelly Laycock
Atlanta Federal Center
61 Forsyth Street, SW
Atlanta, GA 30303

Via Email to: 404Assumption-FL@epa.gov

RE: Comments in Opposition to FDEP's Assumption Application Package: Docket No. EPA-HQ-OW-2018-0640, FRL-10014-54-Region 4

Dear Mr. Laycock,

On behalf of our respective organizations and our thousands of members, we are writing to express our opposition to the Florida Department of Environmental Protection's ("FDEP") application to assume jurisdiction under Section 404(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, for wetland permitting in waters of the United States.

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.

Our state has more than 130 listed species, more than 7,700 lakes (greater than 10 acres), 33 first-magnitude springs, 11 million acres of wetlands, almost 1,200 miles of coastline, and approximately 27,561 linear miles of rivers and streams. As Floridians, clean water is integral not only to our quality of life but also to our economy. Everglades National Park alone generates more than \$100 million annually in tourism revenue. Our outdoor recreation industry generates \$58.6 billion annually and our state is widely recognized as the Sport Fishing Capital of the World. Our waterways support billions of dollars in commerce each year and create tens of thousands of jobs for Floridians. Any risk posed to these waterways is a direct risk to our economy and our livelihoods.

Federal oversight is critical to the protection of wetlands and waterways in the State of Florida. To date, FDEP has not submitted evidence to show that its program would be as stringent or protective as the current federal program – thus, we oppose this assumption application request.

Loss of Federal Protections

Floridians cannot afford to lose the protection of federal laws that are triggered when federal agencies operate the 404 program, including, but not limited to, the Endangered Species Act which

protects the rarest and most at-risk wildlife in our state; the Magnuson-Stevens Act which protects Essential Fish Habitat and our world-class fisheries; the National Environmental Policy Act (“NEPA”) which protects our quality of life and helps ensure prudent decision making; and the National Historic Preservation Act which protects our historical and cultural resources.

Federal oversight of Clean Water Act Section 404 permits has informed, modified, and halted projects that were otherwise greenlighted by FDEP and would have resulted in adverse impacts to Florida’s water resources. Our water resources are vulnerable and deserve additional scrutiny in order to avoid those adverse impacts. Both state and federal levels of review are essential to protecting our resources from local political pressure and special interests, particularly given the demands of our growing population, increasing development, and sprawl. Nearly half of Florida’s wetlands have already been destroyed due to development and sprawl, so maintaining this federal level of review is imperative.

Further, Florida has severely limited access to the courts and the public’s ability to challenge unlawful permits in an independent forum. This creates an additional lack of oversight and accountability that would further undermine public confidence in a state 404 program. Floridians need access to federal courts to ensure accountability in the 404 program and a fair, accessible forum when agencies fall short.

Inadequate State Resources

FDEP lacks the resources, staff, and funding to implement, operate, and enforce a Section 404 program. In a 2005 report, FDEP itself found that assumption would be extremely costly, yet FDEP now does not anticipate requiring additional financial resources to implement this program. This ignores the fact that they would need to train overworked employees to consider and process state-level wetland permits and 404 permits differently. FDEP’s position is unrealistic, especially considering that the state of Florida is facing major budget shortfalls due to the COVID-19 pandemic and a downturn in the economy.

In addition, state assumption of Section 404 authority is not in the public interest because it will create a multi-million-dollar taxpayer burden. The only two states—New Jersey and Michigan—that have assumed Section 404 jurisdiction have spent millions of dollars to develop and operate their programs. Michigan is currently trying to return this burdensome responsibility to the federal government. Florida has considerably more wetlands and higher biodiversity than these states, and as such would require a higher level of expertise, resources, and scrutiny to adequately administer this program.

FDEP’s Failure to Meet Existing Regulatory Demands

FDEP has failed to adequately enforce environmental regulations already within its purview. For example, FDEP is sorely behind in the development of Total Maximum Daily Loads (“TMDLs”) and Basin Management Action Plans (“BMAPs”) for impaired waterbodies across the state, FDEP-established Best Management Practices (“BMPs”) for stormwater and agriculture are not meeting their intended pollution reduction goals, and there are waterbody sites across the state that have not had consistent water quality testing in years.

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

raised concerns about the proposal and expressed opposition to it. This opposition has not waned as this process has moved forward. The vast majority of comments at both public hearings have been opposed to this application.

The Florida Department of Environmental Protection is rushing to take over wetlands permitting and has created a proposal that is incomplete, full of uncertainty, and one that puts our water resources at risk. Additionally, this process has carved many constituencies out of the conversation and public involvement has been inadequate for a decision of this magnitude.

Waterkeepers Florida and the undersigned organizations urge you to deny FDEP's application package for assumption of Clean Water Act Section 404 authority in order to ensure that our water resources retain the critical federal protections and oversight that our wetlands and vulnerable water resources so desperately need.

Sincerely,
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Florida Conservation Voters



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Cape Coral Friends of Wildlife



Environment Florida



Hendry-Glades Audubon Society



Florida Bay Forever Save Our Waters



Our Santa Fe River



Peace River Audubon



Sierra Club Calusa Group



Conservancy of Southwest Florida



Florida Division of the Izaak Walton League of America



Florida Springs Council



Paddle Florida, Inc.

Florida Keys Chapter of the Izaak Walton League of America



“Ding” Darling Wildlife Society



South Florida Wildlands Association



Surfrider Foundation



Save the Manatee Club



1000 Friends of Florida



Animal Legal Defense Fund