

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HM 799 Dredge and Fill Permitting Program  
**SPONSOR(S):** Local, Federal & Veterans Affairs Subcommittee, Overdorf  
**TIED BILLS:** IDEN./SIM. **BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Local, Federal & Veterans Affairs Subcommittee	15 Y, 0 N, As CS	Melkun	Miller
2) State Affairs Committee	20 Y, 1 N	Melkun	Williamson

### SUMMARY ANALYSIS

Section 404 of the federal Clean Water Act (CWA) provides the principle federal protection for wetlands. 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 (404 program). A state or tribe may seek assumption of the 404 program in certain waters. The state or tribe 404 program must regulate all discharges of dredge and fill material into state assumed waters and must implement its assumed 404 program in accordance to the CWA and its regulations. An application for assumption of the 404 program must include a letter from the Governor of the state requesting the program, a program description, an attorney general's statement, a memorandum of agreement between the state and EPA, a memorandum of agreement between the state and the corps, and copies of all applicable rules and regulations, including those governing applicable state administrative procedures.

On March 23, 2018, the Governor approved ch. 2018-88, Laws of Fla., to authorize DEP to assume administration of the 404 program to regulate the discharge of dredge and fill material into navigable waters. Since that time, DEP has been working with both EPA and the corps to draft memoranda of agreement and assemble the requirements for a complete application. In May of 2018, DEP published a notice of rule development and held three rulemaking workshops to collect public comment on the draft rule, ch. 62-331, F.A.C., to implement the 404 program. A notice of proposed rule has not yet been published.

DEP's application for assumption cannot be considered complete until ch. 62-331, F.A.C., has been adopted and the memoranda of agreement have been finalized. In order for DEP to complete rulemaking, the memoranda of agreement must be finalized.

The memorial urges Congress to direct EPA to issue a memorandum of agreement so Florida may complete the assumption of the 404 program under the CWA.

Legislative memorials are not subject to the Governor's veto power and are not presented to the Governor for review. Memorials have no force of law, as they are mechanisms for formally petitioning the federal government to act on a particular subject.

This memorial does not have a fiscal impact on state or local governments.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation**

##### Federal Wetland Regulations: Section 404 Permits

##### *Jurisdiction*

Section 404 of the federal 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 (404 program).<sup>2</sup> Under the law, no person may discharge dredge and fill materials into navigable waters without a permit.<sup>3</sup>

##### *Permitting Standard*

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:

- No practicable alternative to the proposed activity exists 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>4</sup>

Whenever a federal agency authorizes, funds, or undertakes an activity, it must also evaluate the effects of each proposed action on any federally listed threatened or endangered species or its designated critical habitat.<sup>5</sup> These evaluations often require coordination with the United States Fish and Wildlife Service (FWS) and National Oceanic and Atmospheric Administration (NOAA) Marine Fisheries Service.

##### *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>6</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>7</sup> Comment periods are no more than 30 days and no less than 15 days.<sup>8</sup> The corps evaluates each comment, furnishes the applicant the comments, and determines if a public hearing is necessary.<sup>9</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> 40 C.F.R. § 230.10.

<sup>5</sup> 16 U.S.C. § 1536(a)(2).

<sup>6</sup> 33 C.F.R. § 325.2(a)(1).

<sup>7</sup> 33 C.F.R. § 325.2(a)(2).

<sup>8</sup> 33 C.F.R. § 325.2(d)(2).

<sup>9</sup> 33 C.F.R. § 325.2(a)(3).

After the comment period and possible public hearing, the corps determines whether the section 404 permit should be issued based on the record and applicable law.<sup>10</sup> The corps decides on all applications within 60 days unless precluded by law or procedures required by other laws, such as the CWA.<sup>11</sup>

## Florida Wetland Regulations - Environmental Resource Permits

### *Jurisdiction*

Part IV of ch. 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>12</sup>

The Department of Environmental Protection (DEP), the water management districts (WMDs), and certain local governments delegated by DEP<sup>13</sup> jointly implement Florida's Environmental Resource Permitting program. The agencies' responsibilities are divided according to the Operating and Delegation Agreement<sup>14</sup> and the geographic regions of the WMDs.

### *Permitting Standard*

To receive an environmental resource permit (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>15</sup> It is the intent of DEP and the WMDs that they 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>16</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

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<sup>10</sup> 33 C.F.R. § 325.2(a)(6).

<sup>11</sup> 33 C.F.R. § 325.2(d)(3).

<sup>12</sup> Section 373.413(1), F.S.; 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>13</sup> Section 373.441, F.S.

<sup>14</sup> DEP, *Operating Agreements*, available at: <https://floridadep.gov/ogc/ogc/content/operating-agreements>, (last visited Mar. 18, 2019).

<sup>15</sup> Section 373.414(1), F.S.

<sup>16</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. (June 1, 2018), available at <https://www.flrules.org/gateway/reference.asp?No=Ref-09390> (last visited Mar. 18, 2019).

- The current condition and relative value of functions being performed by areas affected by the proposed activity.<sup>17</sup>

DEP and the WMDs 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>18</sup> If the proposed activity will likely take<sup>19</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>20</sup>

### *Permitting Process*

Once DEP or the WMD receives an application, it evaluates the material to determine if the application is complete.<sup>21</sup> If the application is incomplete, DEP or the WMD must request additional information within 30 days.<sup>22</sup> The applicant must respond to such requests within 90 days.<sup>23</sup> Within 30 days after receipt of such additional information, DEP or the WMD must review the submittal.<sup>24</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>25</sup> Any application that DEP or the WMD does not approve or deny within 60 days is considered approved by default.<sup>26</sup>

Section 404 permits and ERPs overlap in that both must be obtained for impacts above regulatory thresholds in federal waters; however, activities confined to state waters, beyond the limits of federal jurisdiction, require only a state ERP.

### 404 Program Assumption by States and Tribes

#### *Jurisdiction*

A state or tribe may seek assumption of the 404 program in certain waters.<sup>27</sup> The corps retains jurisdiction in tidal waters and waters used as a means to transport interstate or foreign commerce and their adjacent wetlands.<sup>28</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 404 program must regulate all discharges of dredge and fill material into state or tribe assumed waters. EPA will not

<sup>17</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. (June 1, 2018), available at <https://www.flrules.org/gateway/reference.asp?No=Ref-09390> (last visited Mar. 18, 2019).

<sup>18</sup> *Id.* at AH 10.2.2.

<sup>19</sup> 16 U.S.C. § 1532(19), defines "take" to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct; 50 C.F.R. § 17.3 defines "harm," as "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;" 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>20</sup> 16 U.S.C. § 1538(a)(1)(B).

<sup>21</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. (June 1, 2018), available at <https://www.flrules.org/gateway/reference.asp?No=Ref-09390> (last visited Mar. 18, 2019).

<sup>22</sup> Section 373.414(1), F.S.

<sup>23</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. (June 1, 2018), available at <https://www.flrules.org/gateway/reference.asp?No=Ref-09390> (last visited Mar. 18, 2019).

<sup>24</sup> Section 373.414(1), F.S.

<sup>25</sup> Section 373.414(2), F.S.; most state permit decisions in Florida must be made within 90 days; s. 120.60(1), F.S.

<sup>26</sup> Section 120.60(1), F.S.

<sup>27</sup> 33 U.S.C. § 1344(g).

<sup>28</sup> 33 U.S.C. § 1344(g)(1).

approve partial state or tribe 404 programs.<sup>29</sup> The state or tribe must implement its assumed 404 program according to the CWA and its regulations.<sup>30</sup>

When the state or tribe assumes administration of the 404 program, it assumes responsibility for the 404 program, determines the regulated areas and activities, processes individual permits for specific proposed activities, and carries out enforcement activities.<sup>31</sup>

### *Standard for Assumption Approval*

To authorize assumption of the 404 program, EPA must determine whether a state or tribe possesses the 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>32</sup>
  - Are for fixed terms not exceeding five years; and
  - Can be terminated or modified for cause including, but not limited to, 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;
- Issue state administered section 404 permits (state administered 404 permits) that apply, and assure compliance with, all applicable requirements of the CWA to inspect, monitor, enter, and require reports from permit holders;
- 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;
- Assure that EPA receives notice of each state administered 404 permit application;
- Assure that any state (other than the permitting state) whose waters may be affected by the issuance of a state administered 404 permit may submit written recommendations to the permitting state and EPA with respect to any state administered 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;
- Assure that no state administered 404 permit will be issued if anchorage and navigation of any of the navigable waters would be substantially impaired thereby;
- Abate violations of the state administered 404 permit or the 404 program, including civil and criminal penalties and other ways and means of enforcement; and
- Assure continued coordination with federal and federal-state water-related planning and review processes.<sup>33</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 404 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>34</sup> The corps must also transfer to the state all pending applications for dredge and fill activities.<sup>35</sup>

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<sup>29</sup> 40 C.F.R. § 233.1(b).

<sup>30</sup> 40 C.F.R. § 233.1(c).

<sup>31</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 Mar. 18, 2019).

<sup>32</sup> The section 404 guidelines are in 40 C.F.R. Part 230.

<sup>33</sup> 33 U.S.C. § 1344(h)(1).

<sup>34</sup> 33 U.S.C. § 1344(h)(2); 40 C.F.R. § 233.15(h).

<sup>35</sup> 33 U.S.C. § 1344(h)(4).

## *Application Requirements*

An application for the assumption of the 404 program must include a letter from the Governor of the state requesting the program,<sup>36</sup> a program description,<sup>37</sup> an attorney general's statement,<sup>38</sup> a memorandum of agreement between the state and EPA,<sup>39</sup> a memorandum of agreement between the state and the corps,<sup>40</sup> and copies of all applicable rules and regulations, including those governing applicable state administrative procedures, in order to be considered complete.<sup>41</sup>

## Florida's Assumption Status

On March 23, 2018, the Governor approved ch. 2018-88, Laws of Fla., which created s. 373.4146, F.S., to authorize DEP to assume administration of the 404 program to regulate the discharge of dredge and fill material into navigable waters.

Since that time, DEP has been working with both EPA and the corps to draft memoranda of agreement and assemble the requirements for a complete application. In May 2018, DEP published a notice of rule development and held three rulemaking workshops to collect public comment on the draft rule, ch. 62-331, F.A.C., created to implement the 404 program.<sup>42</sup> A notice of proposed rule has not yet been published.

DEP's application for assumption cannot be considered complete until ch. 62-331, F.A.C., has been adopted and the memoranda of agreement have been finalized. In order for DEP to complete rulemaking, the memoranda of agreement must be finalized.

## **Effect of the Memorial**

The memorial urges Congress to direct EPA to issue a memorandum of agreement by July 1, 2019, so Florida may complete the assumption of the 404 program under the CWA.

Copies of the memorial will be sent to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives, and to each member of the Florida delegation of the United States Congress.

Legislative memorials are not subject to the Governor's veto power and are not presented to the Governor for review. Memorials have no force of law, as they are mechanisms for formally petitioning the federal government to act on a particular subject.

## **B. SECTION DIRECTORY:**

Not applicable.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

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<sup>36</sup> 40 C.F.R. § 233.10.

<sup>37</sup> 40 C.F.R. § 233.11.

<sup>38</sup> 40 C.F.R. § 233.12. The statement may also be signed by the general counsel of DEP, instead of Florida's Attorney General.

<sup>39</sup> 40 C.F.R. § 233.13.

<sup>40</sup> 40 C.F.R. § 233.14.

<sup>41</sup> 40 C.F.R. § 233.10.

<sup>42</sup> DEP, *Water Resource Management Rules in Development* (Nov. 5, 2018), available at

<https://floridadep.gov/water/water/content/water-resource-management-rules-development> (last visited Mar. 18, 2019).

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The memorial neither authorizes nor requires administrative rulemaking by executive branch agencies.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 26, 2019, the Local, Federal & Veterans Affairs Subcommittee adopted an amendment and reported the memorial favorably as a committee substitute. The amendment provided that DEP cannot complete rulemaking until the EPA finalizes a memorandum of agreement and urged Congress to direct EPA to finalize a memorandum of agreement by a time certain.

This analysis is drafted to the committee substitute as approved by the Local, Federal & Veterans Affairs Subcommittee.