

Florida assumes Section 404 Wetland Permitting Program: What developer clients in Florida need to know now

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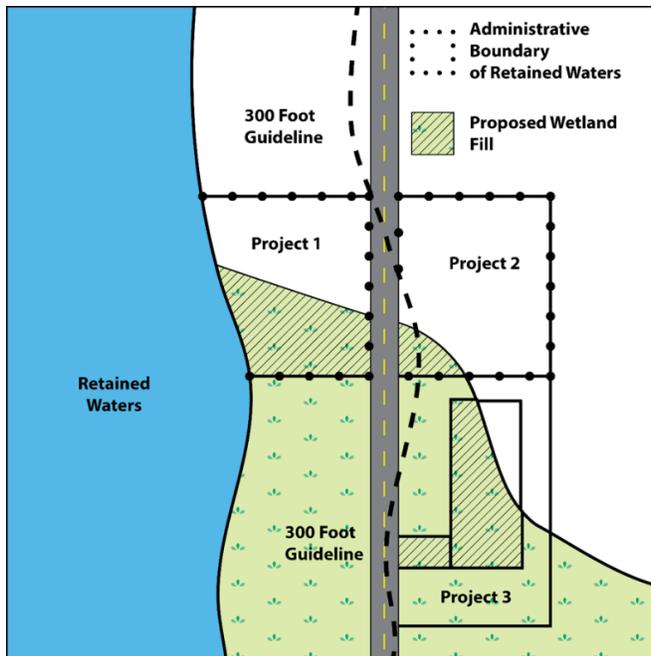
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Land developers, industries, and local governments often must obtain a Clean Water Act section 404 permit from the U.S. Army Corps of Engineers (Corps) to fill in jurisdictional wetlands to build projects. On December 22, 2020, the Florida Department of Environmental Protection (DEP) was approved to become the third state entity to take over a portion of this permitting program. 85 Fed. Reg. 83,553 (Dec. 22, 2020). Given Florida's long-standing, parallel state wetlands permitting program, this development should improve timeliness and efficiency of that program, but the transition process has at times been a bit bumpy. On January 14, 2021, a number of environmental organizations filed a complaint for declaratory and injunctive relief in federal district court seeking a declaration that the U.S. Environmental Protection Agency's action in approving Florida's State 404 program violates the Administrative Procedure Act. The complaint also alleged violations of the Endangered Species Act and Rivers and Harbors Act. As of this writing, no stay has been sought. Complaint, *Ctr. for Biological Diversity v. U.S. Evtl. Prot. Agency*, Civil No. 21-cv-119 (D.D.C. Jan. 14, 2021).

What did DEP take over?: Assumed versus Retained Waters + 300 feet

DEP took over from the Corps all section 404 permitting in areas of the state called "Assumed Waters." Assumed Waters are all jurisdictional wetlands located more than 300 feet from the edge of a navigable freshwater body or a tidal waterbody. The Corps kept section 404 permitting in areas called "Retained Waters," which are wetlands within 300 feet of the edge of a navigable freshwater body or a tidal waterbody. The Corps also kept permitting for impacts within these waterbodies. A list of Retained Waters where the Corps keeps permitting is in [Appendix A](#) of the State 404 Program Applicant's Handbook. DEP has developed a [DEP Assumed Waters screening tool](#) to map your project.

If a dredge or fill activity will impact jurisdictional wetlands both within and beyond 300 feet of the edge of a navigable or tidal waterbody, you will apply to the Corps; the Corps will assume permitting authority over the entire project footprint. This figure from the State 404 Applicant's Handbook explains the 300-foot concept:



Example 2 from State 404 Applicant's Handbook.

Source: State 404 Applicant's Handbook at Section 4.1, p. 16.

State 404 Applicant's Handbook, Section 4.1, p. 16, "Example 2: Projects with dredge and fill activity and project boundaries waterward and/or landward of the 300-foot guideline. Projects 1 and 2 are retained and processed by the Corps. Project 3 does not include any dredge or fill activities waterward of the 300 foot guideline, and therefore is not retained by the Corps, and will be processed by the state Agency."

What permitting criteria will apply?

DEP adopted a new rule, Chapter 62-331, Florida Administrative Code (FAC), and, by reference, a State 404 Program Applicant's Handbook. DEP also amended the state's existing wetland program, the Environmental Resource Permitting (ERP) rules in Chapter 62-330, FAC, to govern processing and review of State 404 permits. State 404 Program applications must comply with both the state ERP rule requirements (where applicable) as well as additional (or alternative) federal-only requirements, such as an alternatives analysis, public notice and comment period, and coordination procedures with federal and state agencies, such as federal tribes, the U.S. Fish and Wildlife Service, and the Florida Fish and Wildlife Conservation Commission. The State 404 Program is intended to be the functional equivalent of the federal section 404 rules. DEP also adopted general permits corresponding to Corps-issued nationwide permits (NWPs) and regional general permits, to the extent those permits apply in Assumed Waters. These general permits authorize specified activities with only minimal individual and cumulative adverse environmental effects. General permits are specified in Rules 62-331.200 through 62-331.248,

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FAC, and are valid for five years from December 22, 2020. Some of these require prior notice to DEP. General permits are available for activities such as linear transportation projects, utility lines, boat ramps, and residential developments, provided jurisdictional impacts do not exceed certain thresholds. Note that the State 404 Program general permits correspond to the 2017 version of the NWP and do not currently incorporate the 2021 NWP finalized on January 8, 2021.

What happened to Section 404 permit applications pending at the Corps on December 22, 2020?

Section 404 permit applications pending at the Corps on December 22, 2020, that propose wetland impacts in Assumed Waters were transferred to DEP. Approximately 450 pending applications were transferred. On receipt of the electronic files from the Corps, one of six DEP district offices will finish the review of these applications and make the State 404 permitting decision.

What happens to the State Wetland Permitting Program?

Both the State ERP and State 404 Programs will operate side-by-side in both Retained Waters and Assumed Waters. The State 404 permit application form also lets you apply for an ERP, if needed. One of the five water management districts or DEP, based on activity proposed, will review the ERP application, while DEP processes the State 404 application. However, a State 404 permit application is not subject to the same timeframes as an ERP application, so permit applicants may need to waive ERP processing deadlines to enable DEP and the water management district to review the ERP and State 404 permit applications simultaneously.

Which agency is handling section 404 dredge and fill enforcement?

The Corps will retain authority for enforcement actions ongoing as of December 22, 2020, and all section 404 permits issued by that date. The Corps also has enforcement authority for violations occurring in Retained Waters.

DEP has enforcement authority for section 404 permits DEP issues and for authorized activities in Assumed Waters. DEP also has enforcement authority over general permits issued by the Corps but administered by DEP for impacts to wetlands in Assumed Waters.