



## REGION 4 ADMINISTRATOR

ATLANTA, GA 30303

November 16, 2023

Secretary Emile D. Hamilton  
Florida Department of Environmental Protection  
Marjory Stoneman Douglas Building  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399

Dear Secretary Hamilton:

Thank you for the draft annual report your office provided regarding the Florida Department of Environmental Protection's (FDEP) administration of its Clean Water Act Section 404 program for the reporting period July 1, 2022, through June 30, 2023. The U.S. Environmental Protection Agency received the draft report on September 29, 2023. The FDEP's submission of the draft annual report and the EPA's comments, questions, and requests for additional information are pursuant to the program reporting requirements set forth at 40 C.F.R. § 233.52, as well as described in the Memorandum of Agreement between our two agencies.

The EPA's comments regarding the draft annual report are enclosed. In accordance with the requirements set forth in 40 C.F.R. § 233.52(e), FDEP must finalize the annual report, incorporating and/or responding to the EPA's comments, and transmit the final report to the EPA within 30 days of receipt of this letter.

If you have any questions or wish to discuss these matters, please contact me, or have a member of your staff contact Mr. César A. Zapata, Acting Director of the Water Division, at [Zapata.Cesar@epa.gov](mailto:Zapata.Cesar@epa.gov) or 404-562-9345.

Sincerely,

Jeaneanne M. Gettle  
Acting Regional Administrator

Enclosure

The comments that follow are organized under similar headings included in the Florida Department of Environmental Protection's (FDEP) draft annual report. Some related topics are grouped together to facilitate effective comments.

### **Executive Summary**

#### Public Participation

The draft annual report states that FDEP is not aware of any instance where a member of the public stated that the information contained within the Clean Water Act (CWA) Section 404 public notices was insufficient. Given that statement, the EPA understands that public comment information has been tracked and monitored. If this is incorrect, please clarify in the final annual report.

### **An Assessment of the Cumulative Impacts of the State's Permit Program on the Integrity of the State Regulated Waters**

FDEP states that it reviews cumulative impacts in accordance with relevant handbook sections. Section 8.3.5 of the State 404 Program Applicant's Handbook (404 Handbook) states that cumulative effects attributable to dredge or fill activities in aquatic resources should be protected, and FDEP shall collect information and solicit information from other sources about cumulative impacts on the aquatic ecosystem. This information shall be documented and considered during the decision-making process concerning the evaluation of individual permit applications and monitoring of existing permits. To supplement the information provided by FDEP in the draft annual report and to facilitate the EPA's evaluation of FDEP's assessment of cumulative impacts, FDEP needs to provide additional information demonstrating how FDEP assesses cumulative impacts for proposed CWA Section 404 projects. Specifically, the EPA requests that FDEP include a discussion regarding cumulative impacts for projects that include a primary purpose and need for economic development or are likely to result in induced development. The EPA also requests that the final annual report describe FDEP's process for determining a single and complete project, logical termini, large, phased developments, and measures taken to prevent "piecemealing" of projects to reduce impacts to general permit thresholds.

#### Compensatory Mitigation

Appendix 1 is labeled "Impacts and Mitigation." However, the tables only depict mitigation for CWA Section 404 project impacts accomplished at mitigation banks and do not indicate other forms of compensatory mitigation requirements as set forth in Section 8.5 of FDEP's 404 Handbook. The final annual report needs to include all compensatory mitigation required for CWA Section 404 project impacts during the reporting period, including use of out-of-service area mitigation banks, advanced off-site permittee responsible mitigation areas, on-site permittee-responsible mitigation, and on- or off-site preservation. If compensatory mitigation was not required, please explain why.

#### FDEP's Delineation of the Landward Extent of Wetlands and Surface Waters

For CWA Section 404 permitting purposes, FDEP must correctly delineate the landward extent of wetlands and surface waters, as required in Chapter 62-340 F.A.C. This requirement is also outlined in various sections of FDEP's approved Program Description and acknowledged by FDEP in its own guidance document titled "Delineations for projects that May Require a State 404 Program Permit" (Delineation Guidance), as well as in FDEP's draft annual report. Based on information provided in the draft annual

report, including the information presented in the Program Auditing section of the draft annual report, and the EPA's review of information in FDEP's Oculus database, FDEP does not consistently comply with required delineation protocols. For example, FDEP is not always including complete documentation of delineations, classifying soils correctly, identifying hydrologic indicators correctly, or using required 62-340 F.A.C. data forms. These issues are described further below in the context of the Program Auditing section of the draft annual report. Consistently accurate implementation of the required delineation method is essential to ensuring that the extent of waters that may be impacted by a proposed project are correctly assessed.

The draft annual report references the Delineation Guidance, which the EPA expects FDEP to update based on the constructive discussions between EPA and FDEP staff held on September 19 and 20, 2023, regarding the Delineation Guidance. Specifically, the EPA expects that the Delineation Guidance will be revised to explicitly articulate that formal determinations performed previously for environmental resource program (ERP) permitting purposes that are not in compliance with 62-340 F.A.C. requirements, will not be used for CWA Section 404 permitting purposes. The EPA also expects the Delineation Guidance to clearly articulate that field verification by FDEP certified wetland evaluators (CWEs) is always required as specified in FDEP's Program Description Section (e). In addition, to ensure delineations pursuant to 62-340 F.A.C. are fully documented, the Delineation Guidance should describe the process for determining the number of data forms that are necessary to complete in consideration of the site conditions.

The EPA also notes that during the reporting period, the EPA engaged in conversations with the Corps of Engineers and transmitted a letter July 28, 2023, confirming the approach outlined in FDEP's Applicant's 404 Handbook and the MOA with respect to permitting projects that involve discharges of dredged or fill material both waterward and landward of the 300-foot guideline to be a reasonable way of addressing a potentially confusing and complex situation. Specifically, under the approach laid out in the Handbook, the Corps retains jurisdiction to the landward boundary of the project proponent's activities, encompassing all waters of the United States impacted by those activities for the purposes of that project. A few applications with such impacts both waterward and landward of the 300-foot guideline had been submitted to both FDEP and the Corps during the reporting period due to uncertainty in this matter. Following the EPA's July 28 letter, applicants began directing these applications to the Corps. FDEP and the Corps should continue to utilize the joint coordination procedures in Section III of the MOA between FDEP and the Department of the Army if questions arise concerning whether a permit application or verification request involves an activity in assumed or retained waters.

### **The Number and Nature of Individual and General Permits Issued, Modified, and Denied**

For future annual reports, the EPA requests that FDEP report the number of public notices that were transmitted to the EPA for federal review, with a description of which MOA category (or the EPA's request) triggered transmittal for review. Please also indicate the permitting decision for each project on which the EPA commented.

#### Application Withdrawals

During the reporting period, approximately 1,017 CWA Section 404 permit applications were withdrawn. FDEP does not require applicants to provide a reason for their withdrawal, but the draft annual report provides several examples including withdrawals for activities that already had an existing Corps permit.

The EPA requests that for future annual reports FDEP track and report the reasons for permit withdrawals, including withdrawals based on a No Permit Required (NPR) verification issued by FDEP, as this information may assist FDEP with the identification of additional information or guidance that may be helpful in clarifying the process for permit applicants.

#### Long-Term Projects

During the reporting period, FDEP issued one expedited subsequent phase CWA Section 404 permit. Additionally, two long-term project CWA Section 404 applications were withdrawn and four are currently under review.

FDEP issued one CWA Section 404 permit on a project that was not forwarded to the EPA for review when public noticed, failing to meet CWA Section 404 program requirement outlined in Section 5.2.5 (a)(2) of FDEP's 404 Handbook, for a project with reasonable potential for affecting endangered or threatened species. FDEP is required to forward all permit applications that fall within the non-waiver categories to the EPA for review, as well as any projects described in one - three in the subsequent section of FDEP's 404 Handbook, even if they would otherwise not require EPA review.

FDEP must carefully review long-term CWA Section 404 project applications to confirm whether review by the EPA is required. Given the potential extent of impacts that may be associated with CWA Section 404 long-term projects, the EPA intends to follow-up with FDEP under separate cover, regarding the EPA's potential interest in reviewing CWA Section 404 long-term project applications, that would otherwise not require EPA's review.

#### **An Estimate of Extent of Activities Regulated by General Permits**

The EPA understands that CWA Section 404 authorizations issued under the 62-331.215 General Permit for Utility Line Activities (GP) during the reporting period exceed the allowable impact threshold specified by the GP. Specifically, FDEP's draft annual report states that 68 activities were authorized by the GP that impacted a total of 46.28 acres, which indicates that the average impact of the authorized activities (*i.e.*, approximately 0.68 acres) exceeds the threshold of 0.5 acres for each activity set forth by the GP. To be in compliance with the 62-331.215 GP, each authorization must not exceed the 0.5-acre threshold for each activity and FDEP must modify its use of the 62-331.215 GP to comply with program requirements.

#### No Permit Required (NPR) Verifications

Based on information provided by FDEP and the EPA's review of files in FDEP's Oculus database, FDEP is not issuing NPR verifications in compliance with program requirements, nor uploading relevant documentation in FDEP's Oculus database. Almost half (approximately 47%) of the NPR verification files are missing required supporting documentation. About 27% (approximately one quarter) of the NPR verifications did not include onsite confirmation, as required in FDEP's Program Description Section (a), in FDEP's required forms titled "Information Required for a WOTUS Determination in State-assumed Waters" (WOTUS forms), and as indicated in FDEP's own NPR Guidance document. Of the NPR verifications that included onsite inspections, approximately 14% did not include the required 62-340 F.A.C. data forms. In addition, approximately 8% of the NPR verifications did not include FDEP's required WOTUS forms.

The draft annual report characterizes NPR verifications as preliminary in nature, and the EPA believes this is not an accurate characterization. As communicated in the EPA's letter to FDEP, dated April 6, 2023, regarding the draft annual report issued last year, the language included in FDEP's NPR verification letters clearly states that FDEP has verified that the activity as proposed does not require a permit or other form of authorization, and that the verification is valid for a period of five years unless new information warrants a revision to the verification. Therefore, FDEP should avoid making reference to NPR decisions as preliminary, as such characterizations contradict language in the NPR verification letters and may confuse regulated entities, citizen stakeholders and regulators.

The draft annual report references FDEP's NPR Guidance, which the EPA expects FDEP to update based on the constructive discussions between EPA and FDEP staff held on September 19 and 20, 2023 regarding the NPR Guidance. Specifically, the EPA expects FDEP to more explicitly articulate in the NPR Guidance that NPR verifications are official FDEP assessments used to confirm that the applicant does not need a CWA Section 404 permit and valid for a period of five years unless new information warrants a revision to the NPR verification. The EPA also requests that FDEP clearly articulate that NPR verifications are used exclusively for FDEP's implementation of its assumed CWA Section 404 program, and therefore are not binding on the federal government. In addition, the NPR Guidance should explain that in certain circumstances pilings may require a CWA Section 404 permit. Further, the NPR Guidance should state that prior to FDEP's issuance of an NPR verification all supporting documentation must be uploaded into the Oculus database.

**Number of Permit Applications Received but Not Yet Processed**

Based on the information provided by FDEP, there were 1,126 applications for general and individual permits under review as of June 30, 2023. FDEP points out this total is 100 fewer outstanding applications than the previous reporting period year. The EPA is nonetheless concerned with the large number of outstanding CWA Section 404 permit applications, particularly in contrast to the 1,028 individual and general permits issued, modified, or denied, and the 1,017 applications withdrawn during this same reporting period. FDEP attributes the smaller number of pending applications to the hiring of additional staff, training, and experience with the program. The FDEP draft annual report states that 29 of 33 new allotted positions were filled, and 208 agency staff were trained as CWEs during the reporting period. The final annual report should describe whether FDEP believes the current staffing levels and training are adequate to address the pending and future CWA Section 404 permit applications, and any plans by Florida to ensure that FDEP's staffing and training levels are sufficient to successfully implement its CWA Section 404 program.

**The Number of Violations Identified and Number and Nature of Enforcement Actions Taken and The Number of Suspected Unauthorized Activities Reported and Nature of Action Taken**

The draft annual report outlines the number of general and individual CWA Section 404 permits issued and the number of CWA Section 404 permit compliance inspections completed each reporting period. The draft annual report does not, however, report how many CWA Section 404 permit compliance inspections were completed by permit type, general or individual.

The EPA also observed that over a quarter of the CWA Section 404 permit compliance inspections identified violations. The draft annual report neither indicates whether the inspected site had a

CWA Section 404 permit prior to inspection nor differentiates whether the identified violations were CWA Section 404 permit violations or unauthorized activities needing a permit. The draft annual report also states that formal enforcement was taken on 25 of the 76 violations identified as part of the permit compliance inspections; however, the draft annual report does not identify the specific formal enforcement action taken.

For both the current and future annual reports, FDEP should provide specific counts of CWA Section 404 permit compliance inspections by type, general or individual, in addition to separate counts for compliance inspections conducted on sites that were not permitted prior to the inspection. FDEP should also provide additional details for formal enforcement actions including the specific type of formal action taken, identification numbers of the enforcement actions, and the recipient of the enforcement action.

The EPA is also continuing its evaluation of the information collected during the enforcement program review. This included the review of FDEP digital files, case files at the district offices, and site evaluations conducted during the recent visits to the district offices. Upon completion of this review, the EPA will provide FDEP its findings and discuss any potential actions to address the findings.

**Historical, Cultural, and Tribal Resources** The draft annual report indicated there were seven instances in which consulting parties determined a proposed CWA Section 404 project had the potential to adversely affect historic properties eligible for listing in the National Register of Historic Properties or of other religious and cultural significance and that the State Historic Preservation Office (SHPO) requested additional preservation steps prior to implementation of the permits in each of these instances. These projects and the final determinations are listed in Table 11.

The draft annual report further states that the Seminole Tribe of Florida (STOF) requested additional information for 54 permit applications and provided 28 letters of no objection. The EPA requests that the report describe the outcome, resolution, and/or any further communication from the STOF regarding the remaining balance of 26 permit applications.

As discussed in previous annual reporting comments by the EPA, tracking where in the process (advance notice or public notice) a response from the SHPO or a Tribe is received is useful information for the EPA and the public. We request that FDEP include this information in the final annual report and all future annual reports. We also ask that future annual reports account for which of these projects are sent to the EPA for federal review, and how comments are resolved.

**Listed Species**

In the final annual report, please indicate whether all permit applications for projects with reasonable potential for affecting federally endangered or threatened species were transmitted to the EPA for federal review, as required by the MOA between FDEP and the EPA. The final report should also indicate the number of these permits for which the EPA provided comment, and which permits, if any, involved authorized take.



### **Program Auditing**

FDEP's program audit findings underscore the EPA's concern that FDEP is not consistently complying with its program requirements. According to FDEP's draft annual report, 227 formal determinations were audited by FDEP staff to assess compliance with the required 62-340 F.A.C. method for the delineation of wetlands and surface waters. Results from the audit revealed that the required 62-340 F.A.C. delineation method is being inconsistently and incorrectly applied. For example, Table 15 summarizes results from the formal determination audit that identifies approximately 17% of the files did not correctly classify soils and about 17% of the files lacked data form documentation required under the 62-340 F.A.C. delineation method.

FDEP also audited 85 individual permits issued for the reporting period. Table 16 summarizes results from the individual permit audit, that identifies approximately 33% of the files did not correctly assess hydrologic indicators, about 45% of the files did not have water level indicators recorded correctly, and approximately 19% of files were missing required 62-340 F.A.C. data forms.

In addition, FDEP audited 167 general permit files. In Table 17, FDEP reported results from the general permit audit that included confirmation that about 6% of delineations were not verified by a CWE as required, approximately 20% of soils were not correctly characterized, and about 12% of hydrologic indicators were not assessed correctly. Also in Table 17, FDEP reported that approximately 23% (almost one quarter) of the general permit files did not correctly address and document compensatory mitigation.

The audit findings from this reporting period also identify insufficiencies that FDEP discovered during last year's annual reporting period. These include the need to take the following actions to address shortcomings, as reflected elsewhere in this letter:

- Ensure field findings and site inspections are performed accurately and required records are included in project files.
- Ensure that project files include all required documentation.
- Provide site visit training on best practices to prepare for a site visit.
- Reenforce that 62-340 F.A.C. data forms are required for the renewal and reissuance of formal determination authorizations, and that all formal determinations require field verification consistent with the required Chapter 62-340, F.A.C. delineation method.

Identification of issues during the audit process should facilitate the development and implementation of corrective actions to ensure the issues do not reoccur in subsequent reporting cycles. The EPA expects the final annual report to describe steps that FDEP will take to ensure the issues identified in the audit findings are addressed.

### **Other Information/Summary**

In the draft annual report, FDEP indicates that the number of staff supporting certain aspects of the CWA Section 404 program has increased. For example, in total, approximately 355 positions support in some capacity the state 404 program (from 212 reported to serve in this capacity in last year's final annual report). A permitting team of 119 individuals process and review applications (from 90 listed in last year's final annual report); with 90 of these individuals spending the majority of each workday evaluating

ENCLOSURE: Assessment of FDEP's 9/29/2023 Draft Annual Report

activities for the assumed program (instead of 69 described in last year's final annual report). The draft annual report also states that the 2022 legislature allocated an additional 33 employees to FDEP for implementation of its CWA Section 404 program, effective as of July 1, 2022, and FDEP has filled 29 of those 33 positions.

During the past 18 months, FDEP officials made public statements about the challenge of retaining staff in the Department's CWA Section 404 program. Maintaining significant staff knowledge and expertise is required to effectively implement the program; loss of experienced staff can affect timeliness and rigor of project reviews, contributing to issues such as those identified above. Developing staff expertise may warrant a year or more of training and experience, which would be undermined by a significant level of staff turnover. EPA appreciates that measures such as salary increases may help address staffing and retention. Consistent with the request made by the EPA to FDEP in our letter dated April 10, 2023, the annual report should describe what steps, if any, that FDEP has taken to improve retention in its CWA Section 404 program and any steps that FDEP is taking to improve staff retention. In addition, please describe whether staff retention has improved or changed since the previous reporting cycle.