EARTHJUSTICE

October 23, 2020

Mr. Kelly Laycock
Oceans, Wetlands and Streams Protection Branch
USEPA Region 4
61 Forsyth St., SW
Atlanta, GA 30303

Via: 404Assumption-FL@epa.gov & regulations.gov

Re: Request to Reconsider Completeness Determination Regarding State of Florida's Application to Assume Administration of a Clean Water Act Program (Docket # EPA-HQ-OW-2018-0640-0001; EPA-HQ-OW-2018-0640)

Dear Mr. Laycock:

We write to urge the U.S. Environmental Protection Agency ("EPA") to reconsider its determination that the State of Florida has submitted a "complete" application to assume jurisdiction over the Clean Water Act Section 404 program.[1] As demonstrated below, Florida's application was not, and is not, complete regarding at least three issues: protection of listed species, identification of assumed waters, and staffing. EPA should suspend the public comment period and review of Florida's application until the State cures these deficiencies and submits a complete program proposal to the agency. See 40 C.F.R. § 233.15(a) (statutory review period shall not begin if EPA finds that a State's submission is incomplete).

On September 16, 2020, EPA published a Federal Register notice stating that it had received "a complete program submission" for 404 assumption from the State of Florida on August 20, 2020. See Florida's Request to Assume Administration of a Clean Water Act Section 404 Program, 85 Fed. Reg. 57,853 (Sept. 16, 2020). Based on its determination that the submission was complete, EPA initiated a 45-day public comment period that concludes on November 2, 2020, as required by the Clean Water Act and the Administrative Procedure Act ("APA"), 40 C.F.R. § 233.15(e) and 5 U.S.C. § 553, and is set to make a decision on the application by December 18, 2020. See 33 U.S.C. § 1344(h)(1) (providing for decision on application within 120 days of receipt); 40

[1] We previously made this request in oral comments at EPA's October 21, 2020, virtual public hearing on Florida's application.

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C.F.R. § 233.15(a) (120-day statutory review period begins when EPA receives complete State program submission as set out in 40 C.F.R. § 233.10).

Public notice requirements under the APA are (1) intended to improve the quality of agency rulemaking by ensuring that regulations are tested by exposure to diverse public comment; (2) an essential component of fairness to affected parties; and (3) an opportunity for parties to develop evidence in the record to support their objections to a rule, which in turn enhances the quality of judicial review. 5 U.S.C. § 553; Small Refiner Lead Phase-Down Task Force v. U.S. Env't Prot. Agency, 705 F.2d 506, 547 (D.C. Cir. 1983) (internal citations and quotation marks omitted).

In this case, the State of Florida has failed to provide a complete program submission to EPA, and EPA should reverse its determination otherwise. Permitting the public only to comment on an incomplete application undermines the agency's rulemaking by precluding meaningful testing, denies fairness to affected parties, and precludes the opportunity to develop evidence in the record that will prove necessary to judicial review, should EPA grant the application, as the State and industry supporters of the program have indicated they fully expect will happen.

Incomplete Submission Regarding Endangered Species Act Protections

First, the State has not demonstrated how it will ensure no jeopardy to listed species to comply with the Section 404(b)(1) Guidelines' no-jeopardy provision. 33 U.S.C. § 1344(h)(1)(a) (state must demonstrate it has authority to issue permits which "apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title"); 40 C.F.R. § 230.10(b)(3) (prohibits issuance of permits that will "[j]eopardize[] the continued existence of species listed as endangered or threatened under the [ESA], or result[] in likelihood of the destruction or adverse modification … [of] critical habitat" unless an exemption is granted by the Endangered Species Committee). See also 40 C.F.R. § 233.11(a)–(c) (requiring that State assumption application include description of scope and structure of State's proposed program, description of State's permitting procedures, and description of structure and organization of all State agencies that will be involved, including the responsibilities of each and how they will coordinate administration of the program).

Instead, the State has indicated that it will rely on an anticipated programmatic biological opinion and an anticipated, associated incidental take statement it expects will result from a Section 7 consultation that is apparently underway between EPA and U.S. Fish and Wildlife Services and the National Marine Fisheries Services. See Memorandum of Agreement between Florida Department of Environmental Protection and the United States Environmental Protection Agency, Jul. 31, 2020; Memorandum of Understanding between Florida Fish and Wildlife Conservation Commission, United States Fish and Wildlife Services, and the Department of Environmental Protection, Aug. 5, 2020. As this information was not submitted with the State's August 20, 2020, application, the program submission was not complete. Further, without the

ability to review this critical information, affected parties are unable to provide informed comments on whether Florida will be able to meet the no-jeopardy requirements.

Indeed, it was not until August 27, 2020, that EPA agreed with Florida's novel premise that the agency is required to consult with the Services if a decision to approve a 404 assumption application may affect listed species or designated critical habitat (reversing EPA's prior, longstanding position on this issue). U.S. Env't Prot. Agency, Memorandum on Endangered Species Act Section 7(a)(2) Consultation for State and Tribal Clean Water Act Section 404 Program Approvals (2020) (Exhibit 1). EPA indicated that it would henceforth engage in a one-time Section 7 programmatic consultation which would allow the Services to issue "a programmatic biological opinion and programmatic incidental take statement for the state or tribal permitting program."

EPA further stated that:

> The [programmatic] biological opinion and incidental take statement could establish additional procedural requirements and permitting conditions or measures *that help ensure the state or tribal permitting program and individual permits issued pursuant to that program*, as well as EPA's approval of that program, *do not result in jeopardy to any listed species*. *This process*, assuming compliance with any applicable permit conditions or measures, *would* extend ESA Section 9 liability protections to individual permits issued pursuant to the state or tribal program and *place state and tribal CWA Section 404 permitting on equal footing with the Corps' permitting program*.

Id. at 7 (emphasis added).

Taken together, EPA and Florida's positions demonstrate that the yet-to-be-completed consultation, and the yet-to-be-completed biological opinion and incidental take statement that are expected to result from consultation, are an essential component of Florida's assumption application. As a result, Florida's program submission too is not complete, and EPA's determination to the contrary is in error.

As things stand, Florida cannot possibly establish that its program, and any permits that would issue under the program, comply with federal law. See, e.g., 33 U.S.C. § 1344(h)(1)(A)(i) (a state plan to assume dredge and fill permitting must comply with the guidelines issued under § 404(b)(1)); 40 C.F.R. § 233.23 (requiring that "[f]or each permit the [state] Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines"). And affected parties cannot possibly provide meaningful comment on whether Florida will ensure no jeopardy to listed species, a matter of fundamental fairness to which they are entitled under the APA.

Incomplete Identification of Assumed Waters

Second, Florida has failed to identify the waters that would be assumed under its proposed program. EPA regulations require an assumption application to include "[a] description of the waters of the United States within a State over which the State assumes jurisdiction under the approved program" and a description of the waters within the state over which the U.S. Army Corps of Engineers retains jurisdiction if the program is approved. 40 C.F.R. § 233.11(h).

To start, Florida has created an unnecessary labyrinth for anyone to try to understand the waters that are implicated in its assumption application. In fact, none of the program-related definitions are provided by statute or in the State's implementing regulations, but rather appear in an applicant handbook. See Fla. Admin. Code Ann. r. 62-331.030 (providing that "Terms used in this Chapter are defined in section 2.0 of the 404 Handbook").
The 404 Handbook, in turn, defines "State-assumed Waters" or "Assumed Waters" by reference to the Florida legislation that authorized (but did not require) the Florida Department of Environmental Protection to pursue assumption. See Fla. Dep't of Env't Prot., State 404 Program Applicant's Handbook § 2.0(b)(47) [hereinafter "404 Handbook"] ("'State-assumed Waters' or 'Assumed Waters' means those waters as defined in Section 373.4146(1), F.S."). Florida Statutes Section 373.4146(1) provides no further clarity, stating simply that "the term 'state assumed waters' means waters of the United States that the state assumes permitting authority over pursuant to s. 404 of the Clean Water Act, Pub. L. No. 92-500, as amended, 33 U.S.C. ss. 1251 et seq., and rules promulgated thereunder, for the purposes of permitting the discharge of dredge or fill material." In other words, Florida defines state-assumed waters as those waters over which the state assumes jurisdiction.

The 404 Handbook does provide an actual definition for the opposite of state-assumed waters, which are the "Retained Waters." 404 Handbook § 2.0(b)(41). Although Florida's definition does not explain this to the reading public, retained waters are navigable waters over which the U.S. Army Corps of Engineers would retain exclusive permitting jurisdiction under Section 10 of the Rivers and Harbors Act of 1899 if state assumption is granted. 33 U.S.C. § 403. Among other things, Florida explicitly defines "Retained Waters" as including those "identified in the Retained Waters List (Appendix A). 404 Handbook § 2.0(b)(41). Appendix A, in turn, consists of a 4-page list of rivers and creeks, mostly by name only), dated August 23, 2019.

The "Retained Waters List" maintained by the U.S. Army Corps of Engineers ("Corps") for Florida has been the subject of substantial controversy and change since Florida began its efforts to assume the 404 program in 2018. On March 19, 2018, the Corps initiated a 30-day public comment period to end on April 20, 2018, "regarding use of waters in the state of Florida for navigation … [including] identification of those rivers, streams, lakes, etc. associated with past, current, or potential future commerce, commercial traffic, or recreational activities" for purposes

of navigability analyses to determine "which waters are subject to permitting authority under Section 10" and "determining the waters that would be retained by the Corps if the EPA approves the State's application for Section 404 Program assumption." U.S. Dep't of the Army, Public Notice: Determination of Navigable Waters, Mar. 19, 2018 (Exhibit 2). On April 5, 2018, the Corps posted its solicitation for public comment on this matter on the website for the Jacksonville District. Press Release, U.S. Army Corps of Eng'rs, Corps Seeks Public Comment Regarding Water Use for Navigation (Apr. 5, 2018), https://www.saj.usace.army.mil/Media/News-Releases/Article/1485269/corps-seeks-public-comment-regarding-water-use-for-navigation (Exhibit 3).

On April 10, 2018, the Corps issued an "Updated Public Notice" summarily terminating the comment period effective immediately, deeming "the comment period originally set to expire on April 20, 2018 . . . closed until further notice." U.S. Dep't of the Army, Updated Public Notice: Cessation of Public Comment Period, Apr. 10, 2018 (Exhibit 4). More than two years later, there has been no "further notice," and no further opportunity for the public to comment on this matter of exceptional public importance, even now that Florida has submitted its 404 application to EPA.

Notably, however, the Corps' list of Retained Waters that appears to be part of Florida's submission to EPA (4 pages long) is drastically reduced as compared to the Retained Waters list supplement produced by the Corps in October 2017 (17 pages long).

Notwithstanding the Corps' abrupt and unexplained change of course in soliciting public comment in 2018, we, and several other members of the public, submitted comments in line with the original deadline of April 18, 2018. This included comments by Senator Bob Graham, on behalf of the Florida Conservation Coalition, as well as the Sierra Club, Audubon Florida, The Conservancy of Southwest Florida, and Florida's Water and River Keepers.

In our letter, we reminded the Corps about Florida's extensive water resources and unique hydrology, and that any navigability study would require a thorough analysis of numerous waterways to determine which waters may be assumable. This undertaking would require special attention to the rivers, streams and adjacent wetlands located throughout the State. We further noted that determining the adjacency of wetlands in particular will require time, investigation and evidence and will be of critical importance to Florida's residents and economies. These determinations must be based on technical information, hydrology and science. By necessity, adjacency determinations must be made case by case, based on site-specific characteristics of the area's hydrology, topography and vegetation, among other factors. To perform such studies, it will be imperative to solicit information from the public, as there are entities and individuals with relevant expertise located throughout the State.

Other commenters echoed similar concerns. The Sierra Club demonstrated that even at the time, the Corps' lists of navigable waters was incomplete and inadequate. Letter from Frank Jackalone, Sierra Club Fla. Chapter, to Jason A. Kirk, U.S. Army Corps of Eng'rs, Apr. 16, 2018 (Exhibit 5). The Corps' list identified 492 rivers and creeks and 110 lakes. A supplement to the list totaled 1,767 rivers and creeks and 1,186 lakes. The text prefacing that supplement stated that "[t]he District makes no claim that these lists are complete or completely accurate."

The Conservancy of Southwest Florida submitted scores and scores of additional waterways that it urge the Corps to consider as navigable as well for Section 10 purposes. Letter from Amber Crooks, Conservancy of Sw. Fla., to the Dep't of the Army, Apr. 18, 2018 (Exhibit 6). Audubon Florida urged the Corps to use the October 2017 list as a baseline and to supplement that list with additional navigable waterways subject to Section 10 Rivers and Harbors Act jurisdiction. Letter from Julie Wraithmell, Audubon Fla., to Donald W. Kinard, U.S. Army Corps of Eng'rs, Apr. 17, 2018 (Exhibit 7). Florida's Water and River Keepers emphasized the critical importance of the Corps properly identifying all Section 10 waters in the State. Letter from Rachel Silverstein, Miami Waterkeeper, et al. to Colonel Jason A. Kirk, U.S. Army Corps of Eng'rs, Apr. 18, 2018 (Exhibit 8).

Florida's 404 program submission to EPA, however, contends with none of this. It purports to limit the "Retained Waters" to an anemic 4-page list that is vague, incomplete and has not been subject to notice and comment. Indeed, the list is grossly lacking as it reflects a far more restrictive view of retained waters than the Corps possessed in 2017, and the Corps has failed to engage the public in performing an adequate navigability study that would accurately reflect the scope of exclusive federal jurisdiction.
Moreover, Florida has failed to provide the public with GIS or other mapping that would in fact demonstrate the scope of the jurisdiction it intends to claim if its 404 assumption application is granted. Without this information, members of the public across the state are unable to evaluate and comment on the impact this proposal will have on the waters that are of ecological and economic benefit to them. By failing to adequately and accurately identify those waters over which the state would assume jurisdiction, Florida's application is incomplete.

Incomplete Description of Available Funding and Staffing

Third, Florida has failed to provide EPA and the public with complete information regarding how it would implement, operate and enforce a Section 404 program, particularly given the substantial impact the COVID-19 pandemic has had on State coffers. See 40 C.F.R. § 233.11(d) (program description must include "[a] description of the funding and manpower which will be available for program administration").

As a preliminary matter, the Florida Department of Environment Protection has stated that its 404 program would also rely on staff and resources from two other state agencies, namely the

Florida Fish and Wildlife Commission and the State Historic Preservation Office, to ensure protection of listed species and cultural resources. Memorandum of Understanding between Florida Fish and Wildlife Conservation Commission, United States Fish and Wildlife Services, and the Department of Environmental Protection, Aug. 5, 2020; Operating Agreement between Florida Department of Environmental Protection and the Florida Division of Historical Resources-State Historic Preservation Officer Regarding the State 404 Program, Aug. 6, 2020. However, Florida's description of funding and manpower contains no information regarding the funding and manpower, if any, available at either of those state agencies to meet the obligations of an assumed 404 program.

Instead, Florida relies solely on resources purportedly available at the Department of Environmental Protection. In doing so, however, Florida completely fails to disclose to EPA that state coffers are under severe strain as a result of the COVID-19 pandemic that since March 2020 has infected more than 750,000 Floridians, and resulted in the deaths of another 16,267 Floridians. Fla. Dep't of Health, Florida COVID-19 Dashboard, https://fdoh.maps.arcgis.com/apps/opsdashboard/index.html#/8d0de33f260d444c852a615dc7837c86 (last visited Oct. 23, 2020) (Exhibit 9).

Tax revenues for the state plummeted in April, May and June 2020 as a result of the pandemic. In July 2020, Governor DeSantis vetoed $1 billion in spending from the 2020-2021 budget in response to the crisis. In August 2020, Florida agencies were asked to cut 8.5% of their budgets to adjust for budget shortfalls resulting from the pandemic. See Christine Sexton, *Florida Agencies Asked to Cut 8.5 Percent to Adjust for COVID-19*, Tampa Bay Times, Aug. 12, 2020, https://www.tampabay.com/florida-politics/buzz/2020/08/12/florida-agencies-asked-to-cut-85-percent-to-adjust-for-covid-19. (last visited Oct. 23, 2020) (Exhibit 10).

Florida has not acknowledged these important facts, much less addressed how its state agencies can be expected to do more—namely implement, operate and enforce a Section 404 program—with so much less. Indeed, as several commenters noted during EPA's October 21, 2020, public hearing on the application, the Department already is unable to meet its obligations to operate and enforce programs already under its purview. This fact is amply demonstrated in the widespread impaired waters throughout the State, as well as the recurring toxic algae crisis that has made national headlines and the Department's grossly inadequate record of enforcing its existing programs.

The fact is that resources at the Department have been gutted in recent years. *Editorial: The Rick Scott Record: An Environmental Disaster*, Tampa Bay Times, Sept. 5, 2014, https://www.tampabay.com/opinion/editorials/editorial-the-rick-scott-record-an-environmental-disaster/2196359/ (observing that the Rick Scott administration had reduced water management budgets, rushed through permitting, weakened enforcement, caused widespread layoffs,

provoked a brain drain of experts in the field, and replaced experts with political appointees focused on advancing business interests rather than environmental stewardship). (last visited Oct. 23, 2020) (Exhibit 11).

The unprecedented budget strains the state is facing will make it impossible to recover any semblance of staffing and funding that would make assumption of a Section 404 program feasible any time soon.

The Department's claim that it will be able to operate a Section 404 program without any additional funding from the State—a fundamentally flawed premise that the legislature relied on when granting the authority for the state agency to pursue assumption—is untenable. It either reflects the Department's erroneous belief that Section 404 is merely "duplicative" of state regulations (it is not), demonstrates the Department's intention to treat its pre-existing regulations and Section 404 as one and the same (it may not), or suggests that the Department simply will not adequately implement, operate or enforce a Section 404 program (it cannot).

Conclusion

As demonstrated above, Florida has failed to provide EPA with a complete program submission in at least three, critical respects. EPA should therefore suspend the public comment period and review of Florida's application until the State cures these deficiencies and submits a complete program proposal to the agency. See 40 C.F.R. § 233.15(a) (providing that statutory review period shall not begin if EPA finds that a State's submission is incomplete).

In the alternative, we request that EPA extend the review period pursuant to 40 C.F.R. § 233.15(g) and the public comment period until all materials are provided and the public is given adequate notice and opportunity to comment in accordance with federal law. See also Clean Water Section 404 Program Definition and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764, 20,767 (June 6, 1988).

Sincerely,

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