State 404 Program Public Webinar Part 1

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Acronyms

- DEP – Florida Department of Environmental Protection
- WMD – Water Management District
- USACE – US Army Corps of Engineers
- EPA – US Environmental Protection Agency
- FWC – Florida Fish and Wildlife Conservation Commission
- USFWS – US Fish and Wildlife Service
- SHPO – State Historic Preservation Office
- THPO – Tribal Historic Preservation Office(r)
- CWA – Clean Water Act
- F.S. – Florida Statutes
- F.A.C. – Florida Administrative Code

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Materials

Florida's assumption materials, including the submitted package, Geographic Information System (GIS) screening tool, and USFWS Biological Opinion (BiOP) available at: https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/404-assumption

Status Updates

- 8/20/2020 – Package sent to EPA
- 12/17/2020 – EPA plans to make decision by this date
- Mid-January 2021 – anticipated effective date if program is approved

CWA Section 404 Permitting Program

- 404(a) Dredge and fill permitting program
- Administered by USACE by default
- 404(g) provision in CWA to allow states/tribes to assume authority to administer
- EPA approves state/tribal programs
- Only two states already assumed
  - New Jersey & Michigan
- Florida working to be first in nearly 30 years

Two-Program Approach

- Environmental Resource Permit (ERP)
  - Still required
  - Only minor changes (forms)
  - Still split between DEP and WMDs
- State 404 Program
  - In addition to ERP
  - Applies only within assumed waters
  - DEP will process all State 404 Program permits

Timeframe Waiver

ERP Timeframes

- Applicants may waive ERP issuance timeframe to allow for concurrent review/agency decision for ERP and 404
- Recommended to facilitate consistency in authorizations
- Reduce need for ERP modifications (and accompanying fee)
- Agencies will always strive for efficiency

Regulations

Statutory Authority

Section 373.4146, F.S.

- "The department has the power and authority to assume…"
- "The department may adopt any federal requirements, criteria, or regulations necessary to obtain assumption…"
- "Provisions of state law which conflict with the federal requirements…do not apply to state administered section 404 permits."

Regulations – 2

Chapter 62-331, F.A.C.

- "State 404 Program"
- Incorporates Environmental Resource Permitting (ERP) wherever possible
- Brings in requirements of federal law
- Incorporates the State 404 Program Applicant's Handbook (404 Handbook)
- Effective upon the date EPA's approval of the state program appears in the Federal Register

Regulations – 3

Chapter 62-330, F.A.C.

- Highly incorporated into the State 404 Program
- Updates to Applicant's Handbook Volume I (AH I), section 7.0
- Chapter 62-340, F.A.C., Data Form
  - Data Form Guide (AH I, Appendix J)
  - Data Form Instructions (AH I, Appendix K)
- Added "State 404 Program" to application form names
- Provisions in conflict with federal law do not apply to the State 404 Program (see 404 Handbook, section 8.4)

Jurisdiction

- **Waters of the United States (WOTUS)**
  40 Code of Federal Regulations (C.F.R.) Part 120
- **Retained Waters**
- **Assumed Waters**
- **Efficiency provision in 404 Handbook, section 1.1**

Jurisdiction – 2

Waters of the United States (WOTUS)

From 373.4146(1), F.S.:

(1) As used in this section, 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.

Retained Waters

404 Handbook, section 2.0, 41.

"Retained Waters" means those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, including wetlands adjacent thereto. The Corps will retain responsibility for permitting for the discharge of dredged or fill material in those waters identified in the Retained Waters List (Appendix A), as well as all waters subject to the ebb and flow of the tide shoreward to their mean high water mark that are not specifically listed in the Retained Waters List, including wetlands adjacent thereto landward to the administrative boundary. The administrative boundary demarcating the adjacent wetlands over which jurisdiction is retained by the Corps is a 300-foot guide line established from the ordinary high water mark or mean high tide line of the retained water. In the case of a project that involves discharges of dredged or fill material both waterward and landward of the 300-foot guide line, the Corps will retain jurisdiction to the landward boundary of the project for the purposes of that project only.

Retained Waters – 2

Indian Country

The Corps also retains permitting authority for projects within "Indian country" as that term is defined at 18 U.S.C. § 1151 (provided below):

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Assumed Waters

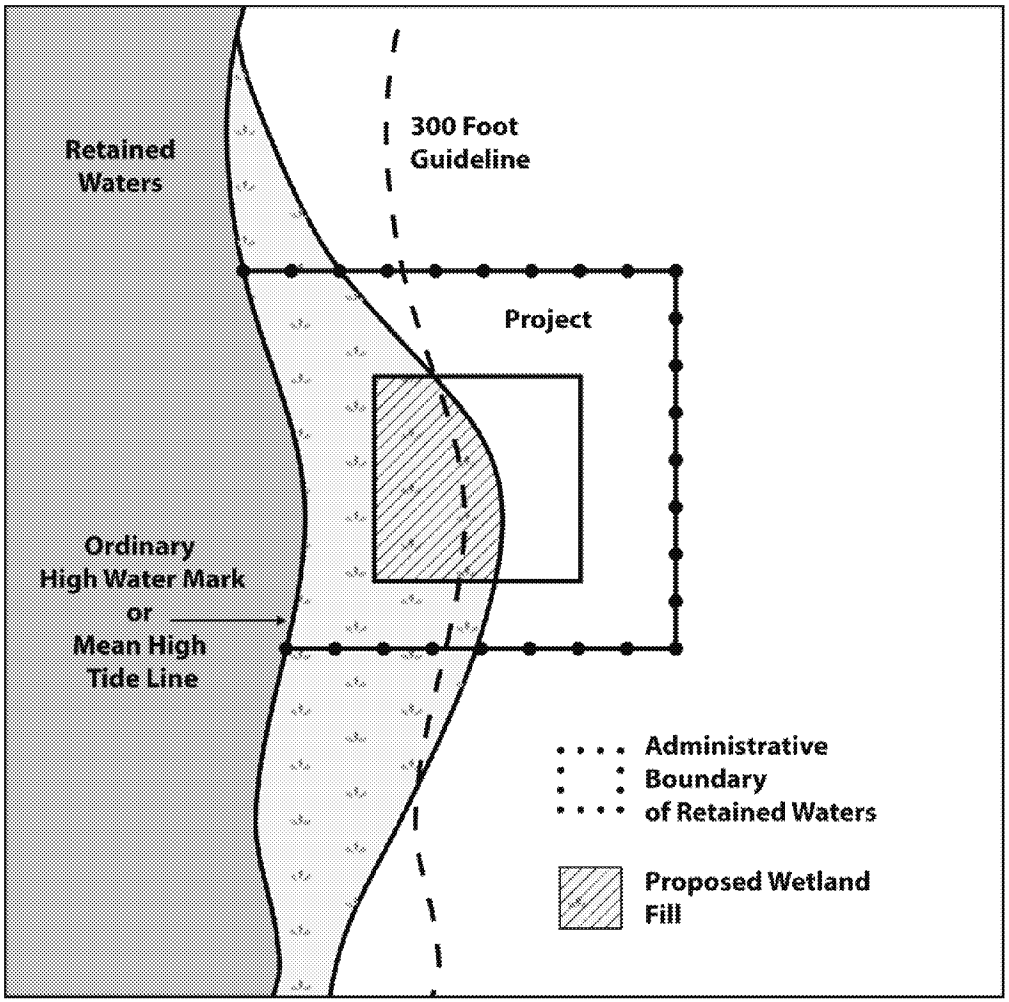
- Waters of the United States where jurisdictional authority is not retained by USACE
- Delineation vs. jurisdiction
  - Delineated using Chapter 62-340, F.A.C.
  - Jurisdiction determined using 40 C.F.R. part 120, when requested/demonstrated by applicant (New WOTUS rule, effective 06/22/2020)
  - Non-WOTUS still jurisdictional under ERP (ERP has broader jurisdiction)

Efficiency

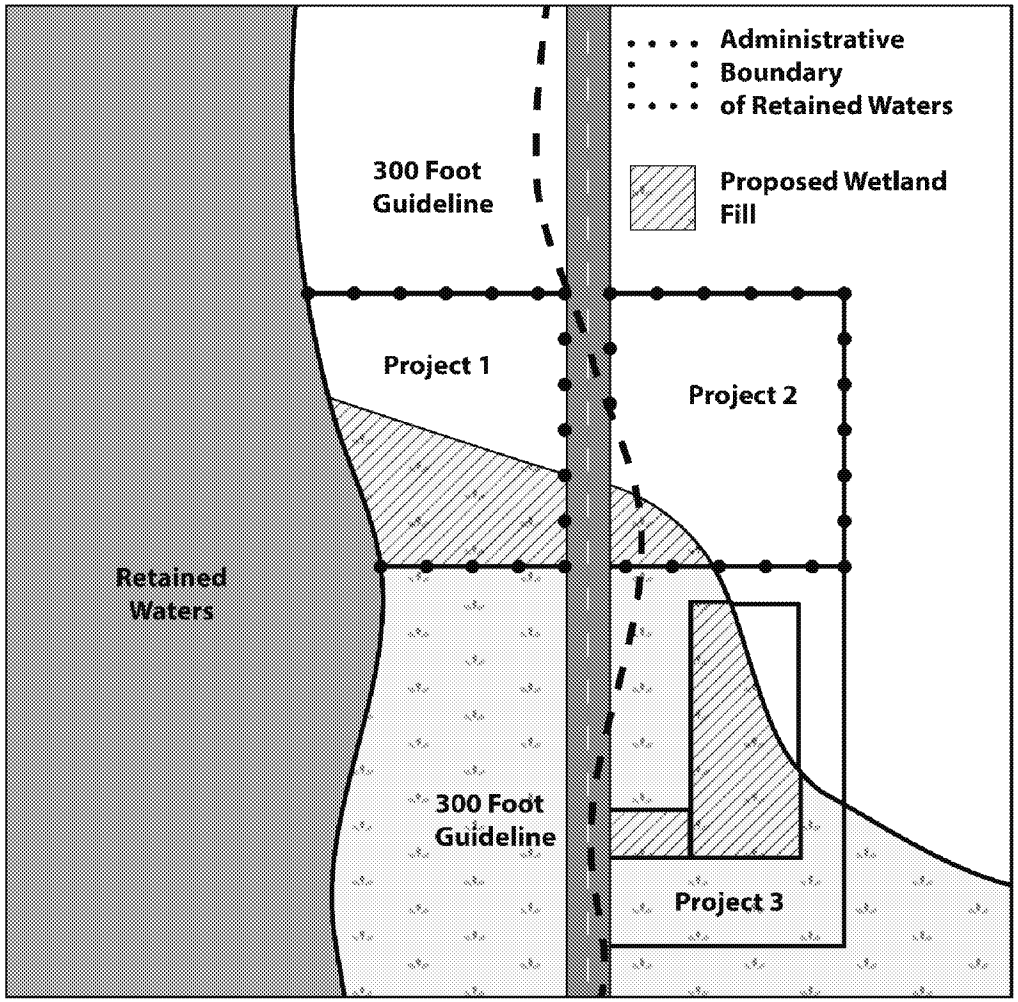
404 Handbook, section 1.1

"To provide certainty, streamlining, and efficiency, the State will consider that any wetlands or other surface waters delineated in accordance with Chapter 62-340, F.A.C., that are regulated under Part IV of Chapter 373, F.S. could be considered Waters of the United States, and will treat them as if they are, unless the applicant clearly demonstrates otherwise."

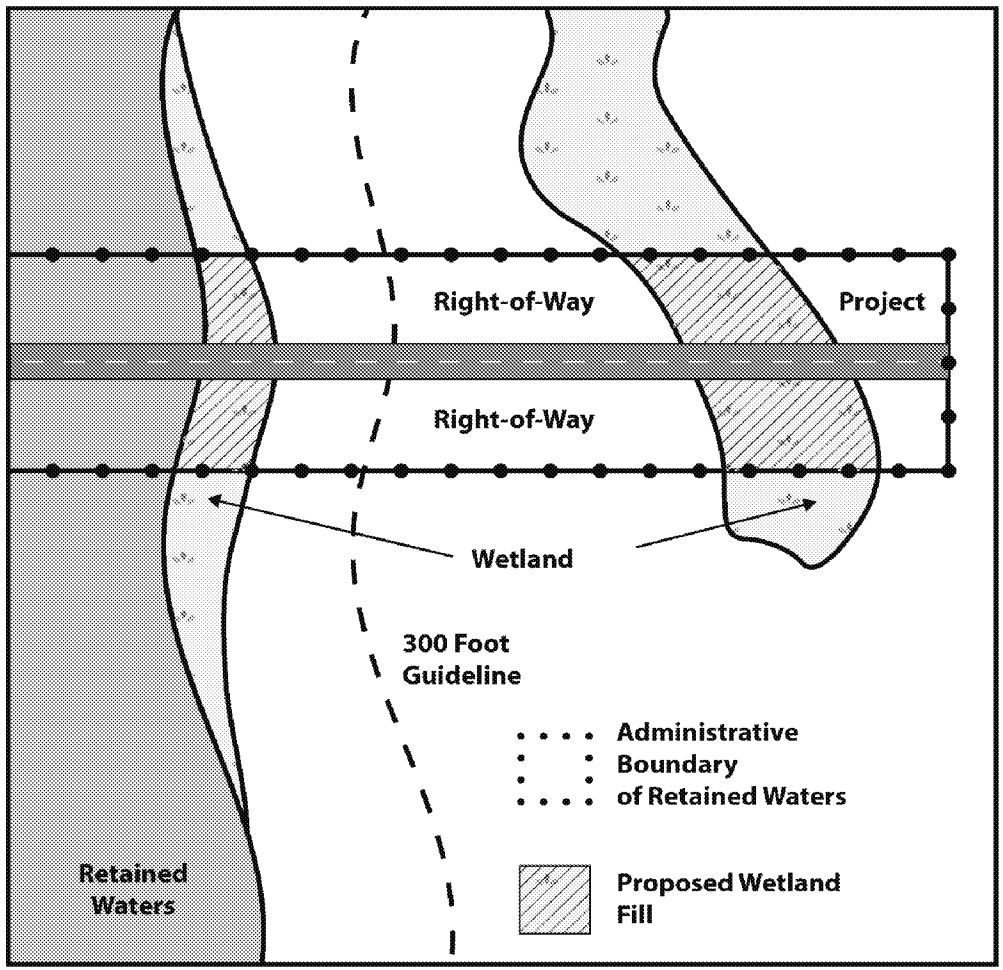
Example 1


Retained Waters
300 Foot Guideline
Project
Ordinary High Water Mark or Mean High Tide Line
Administrative Boundary of Retained Waters
Proposed Wetland Fill

Example 2


Administrative
Boundary
of Retained Waters
Proposed Wetland
Fill
300 Foot
Guideline
Project 1
Project 2
Retained
Waters
300 Foot
Guideline
Project 3

Example 3


Right-of-Way
Project
Right-of-Way
Wetland
300 Foot
Guideline
Administrative
Boundary
of Retained Waters
Retained
Waters
Proposed Wetland
Fill

What is Regulated?

Discharge of Dredged or Fill Material

Definition: "Activity" for the purposes of the State 404 Program only, means "discharge of dredged material" and/or "discharge of fill material" as those terms are defined in 40 CFR § 232.2 (see Appendix B). The terms "dredge," "fill," "dredging," and "filling," when used within Chapter 62-331, F.A.C., or this Handbook shall be interchangeable with "activity" as defined herein.

Discharge of Dredged Material

40 C.F.R. § 232.2

(1) Except as provided below in paragraph (2), the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:

(i) The addition of dredged material to a specified discharge site located in waters of the United States;

(ii) The runoff or overflow, associated with a dredging operation, from a contained land or water disposal area; and

(iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

Discharge of Dredged Material – 2

Does Not Include…

(2) The term discharge of dredged material ***does not include*** the following:

(i) Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable state.

(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(iii) Incidental fallback.

Discharge of Fill Material

40 C.F.R. § 232.2

(1) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials;

Discharge of Fill Material – 2

When are Pilings Fill?

(2) In addition, placement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit ***when such placement has or would have the effect of a discharge of fill material.*** Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

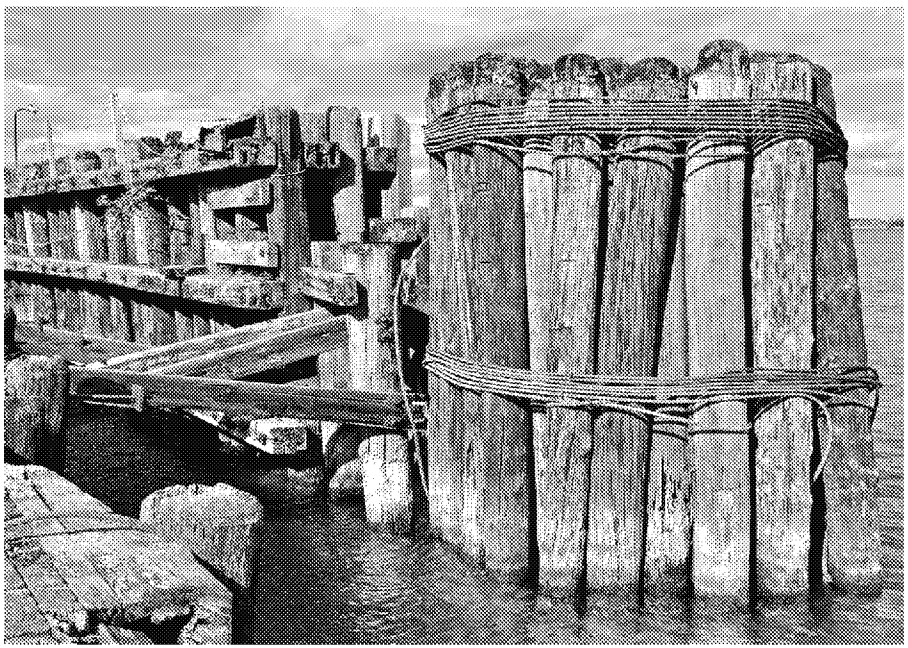
Discharge of Fill Material – 3

When are Pilings NOT Fill?

(i) ***Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit.*** Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in waters of the United States for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material. All pilings, however, placed in the navigable waters of the United States, as that term is defined in 33 CFR part 329, require authorization under section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR part 322).

Pilings

Fill



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Not Fill

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Permits and Verifications

- DEP will process all state 404 program verifications and permits
- No additional fee for State 404 review

Authorizations

Exemptions

- **Limited exemptions under 40 C.F.R. § 232.3 (State 404 Handbook, Appendix B)**
- **Not the same as ERP exemptions**
  - **Seven exemptions**
  - **Agriculture, maintenance, access roads, federal projects**
- ***Read Carefully!***

Authorizations – 2

General Permits

- 37 General Permits (GPs) in Rule
- Not the same as ERP GPs – Modeled after 2017 USACE Nationwide Permits (NWPs)
- Noticed/No Notice
- May require mitigation
- May contain specific conditions
- Require coordination with State Historic Preservation Office (SHPO) and wildlife agencies (FWC, USFWS)
- Expire five years from effective date in rule

Authorizations – 3

USACE Regional General Permits

- Assuming administration of seven USACE Regional General Permits (RGPs)
  - SAJ-13 Aerial Transmission Lines in Florida
  - SAJ-14 Sub-aqueous Transmission Lines in Florida
  - SAJ-86 Certain fill in Bay/Walton Counties
  - SAJ-90 Certain fill in Northeast Florida
  - SAJ-103 Holley-by-the-Sea
  - SAJ-105 Certain fill in Bay County
  - SAJ-114 Certain fill in Bay/Walton Counties

Authorizations – 4

Individual Permits

- Any project within assumed waters that does not qualify for an exemption or GP
- Requires coordination
- Requires public notice
- Maximum five-year duration
- Only five years' worth of work per permit
- Long-term planning (State 404 Handbook, section 5.3.2)

Compliance and Enforcement

- In accordance with state law
- EPA may choose to participate
- Public notice of proposed settlement actions

Existing USACE Permits

- If within assumed waters –
  - Remain effective until they expire
  - Modifications – must get new permit from state (other than certain minor mods – see DEP/USACE MOA)
  - New state permit will be limited to 5 years duration

Interagency Coordination

Terms:

Memorandum of Agreement (MOA)

Memorandum of Understanding (MOU)

Operating Agreement (OA)

USACE MOA

DEP/USACE

- Retained waters
- Project screening (USACE or DEP?)
- Transferring documents
- Compliance and enforcement coordination

EPA MOA

DEP/EPA

- "Waiver of Review" categories
- EPA review procedures
- Compliance coordination

USFWS/FWC MOU

DEP/FWC/USFWS

- Coordination between agencies
- Includes consideration of state and federal listed species
- USFWS Biological Opinion issued 11/17/2020

SHPO OA

DEP/SHPO

- Lays out coordination procedures comparable to those under Section 106 of the National Historic Preservation Act, but using state authorities
- Includes input from Florida's federally recognized tribes

Adjacent States and Tribes

- Alabama
- Georgia
- Miccosukee Tribe of Indians of Florida
- Seminole Tribe of Florida
- Poarch Band of Creek Indians (Alabama)
- Other interested tribes

WMDs and Local Governments

- Coordination required when DEP processes 404 and water management district (WMD) or local government processes ERP
  - Site visit, delineation, project details

Differences

Differences Between ERP and 404

ERP Criteria Not Applicable to 404

404 Handbook, section 8.4

- Chapter 120, F.S. default of processing timeframes
- Certain ERP review timeframes
- Certain mining provisions
- Section 252.363, F.S. emergency extensions
- Volume I, 10.2.1.2 exceptions for elimination and reduction of impacts

Criteria Unique to 404

404 Handbook, section 8.3

- Alternatives analysis
- Aesthetics review
- Mitigation hierarchy
- Permit signatures (individual permits)
- Cumulative effects
- Secondary effects

Next Webinar

December 14, 2020

- **Tools for Applicants**
- **How to Apply**
- **Agency Processing**

Contacts/Resources

- **Email: State_404@FloridaDEP.gov**
- **Website: https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/404-assumption**

FLORIDA DEPARTMENT OF
ENVIRONMENTAL PROTECTION