State 404 Program Public Webinar Part 2

December 14, 2020

Acronyms

- DEP – Florida Department of Environmental Protection
- WMD – Water Management District
- USACE – U.S. Army Corps of Engineers
- EPA – U.S. Environmental Protection Agency
- FWC – Florida Fish and Wildlife Conservation Commission
- USFWS – U.S. 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

Contents

- Tools for Applicants
- Before You Apply
- Submittal
- Department Processing
- Existing USACE Permits
- Mitigation Banks

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

Tools for Applicants

- State 404 Program MapDirect Focus
  - https://ca.dep.state.fl.us/mapdirect/
- Retained Waters Screening Tool
  - https://fdep.maps.arcgis.com/apps/webappviewer/index.html?id=2cb8724cfd18408db80c8f2d7bb68a2e
  - Link on DEP's "404 Assumption" page

Before You Apply

- *Determine if retained/assumed*
- *Fill out appropriate application*

Pre-App Step 1
Agency Jurisdiction

Determine if your project is in USACE-retained or State-assumed waters

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

- DEP will not offer stand-alone WOTUS jurisdictional determinations (JDs) at this time
- WOTUS determinations made upon request with:
  - Application for 62-340, F.A.C., Formal Determination
  - Application for a State 404 Program permit
  - Applicant must submit information demonstrating a water is not a WOTUS (DEP will field-verify)

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.

Demonstration

Retained waters screening tool demonstration

Pre-App Step 2
Fill Out Appropriate Application

- If retained
  - Fill out USACE application and submit to USACE
- If assumed
  - See application matrix in 404 Handbook, section 4.3
  - Fill out all required sections

Application Forms
Overview

- Show forms
- ERP timeframe waiver checkbox
  - Will only waive ERP issuance timeclock
    - 30-day completeness review and 60-/90-day RAI clock not affected
  - So ERP and State 404 authorization may be issued concurrently (but separately)
  - Will facilitate consistency
  - Will reduce/eliminate need for ERP modifications

App Contents
Important Considerations

- **No-notice General Permits**
  - **Applicant responsible for contacting SHPO**
- **Delineation in accordance with Chapter 62-340, F.A.C. (State method)**
- **WOTUS jurisdiction assumed, unless demonstrated otherwise in accordance with 40 C.F.R. 120**

App Contents – 2

Important Considerations

- Maximum permit duration is five years
  - Each permit may only contain five years worth of work
  - Long-term planning procedure
    - 404 Handbook, section 5.3.2
    - Break project into five-year phases
    - Submit information about entire project in long-term planning document (holistic review)
    - One phase permitted at a time

App Contents – 3
Important Considerations

- Concurrent review
  - When possible, DEP will begin review of State 404 and ERP applications at the same time
    - ERP/404 Joint Application
    - Exceptions:
      - Future phases of long-term projects with long ERP
      - Transferred USACE projects
  - Reviewed concurrently as much as possible
    - Timelines will typically diverge at public notice
  - Concurrent review helps ensure consistency between authorizations

App Contents – 4
Important Considerations

- Mitigation
  - Mitigation hierarchy applies
    - 404 Handbook, section 8.5.1
  - Federal credits required to offset State 404 Program impacts
  - General Permits will require mitigation unless specifically stated otherwise within GP rule

App Contents – 5
Important Considerations

- **Alternatives Analysis**
  - **Individual permit applications only**
  - **Guidance in 404 Handbook, Appendix C**
    - **Based on USACE guidance**
  - **Small Landowners**
    - **Regulatory Guidance Letter 95-01 – "Guidance on Individual Permit Flexibility for Small Landowners"**
      - ❑ ***…"it is presumed that alternatives located on property not currently owned by the applicant are not practicable under the Section 404(b)(1) Guidelines."***
      - ❑ **Analysis of onsite avoidance and minimization still required!**

Submittal

- *Submit to Correct Agency*
- *Contents of Submittal*

Submittal
For Assumed Projects

- Determine which agency will process the ERP
  - DEP/WMD Operating Agreements
  - DEP/Local Government Delegation Agreements
- Submit to agency that will process the ERP
  - WMD or Delegated Local Government (DLG) will forward application to DEP
  - ERP will be processed by agency based upon the Operating Agreements
  - DEP will process State 404

Submittal
Application Contents

Include State 404 required information in submittal

- Time waiver checkbox!
- Alternatives analysis
- Listed species information
- WOTUS documentation, if requesting
- GP application, section K
- Individual application, section I
  - "Supplemental Information for State 404 Program Permits"

Department Processing

- *Exemptions*
- *General Permits*
- *Individual Permits*

Exemptions
Process

- 30-day qualification review
- 60-day request for additional information (RAI) if needed
- Remember: State 404 exemptions are limited and different from ERP exemptions [404 Handbook, Appendix B]
- DEP will consult WMD for agricultural exemptions where needed
  - DEP responsible for verification decision

General Permits
Process

- For General Permits requiring notice
  - 30-day qualification review
    - DEP will send to SHPO, THPO, FWC, and USFWS
  - 60-day RAI, if needed
    - "GP Does Not Qualify" Letter
- For No-Notice General Permits
  - Prospective permittee responsible for contacting SHPO prior to use [subsection 62-331.200(3)(j), F.A.C.]

Individual Permits
Process

- 30-day completeness review
  - DEP will send file link to SHPO, THPO, FWC, USFWS upon receipt
- 90-day RAI if needed
- Cycle until "Administratively Complete"
  - Project is in its anticipated final form
    - Alternatives analysis has been reviewed
    - Avoidance and minimization addressed
    - Compensatory mitigation proposed

Individual Permits – 2
Process

- Public Notice within 10 days of "Administratively Complete"
  - Published on DEP website and sent to:
    - Applicant
    - Adjacent Owners
    - Any other agency with jurisdiction
    - Any interested party
    - States or tribes whose waters may be affected
- 15- or 30-day public comment period
  - Most projects 30 days – see subsection 62-331.060(3), F.A.C.

Individual Permits – 3
Process

Tribal Consultation

- Consultation occurs upon application receipt and tribes may also submit comments at the same time as public notice

Individual Permits – 4
Process

- EPA review [subsections 62-331.052(2) and (3), F.A.C., EPA MOA]
  - Copy of public notice
  - Non-waiver project categories
    - Or if DEP does not accept the recommendations of an affected state or tribe
  - EPA may request additional time to comment (90 days)
  - May provide conditions, recommendations, or objection
- DEP may request EPA public meeting
- DEP cannot issue permit until EPA concerns are resolved

Individual Permits – 5
Process

- EPA review, continued
  - If DEP chooses not to perform required steps to eliminate EPA objection or to condition the permit as requested, DEP may choose to take no action on the application
  - DEP must notify EPA of the decision to take no action, and then EPA may "federalize" the application
  - Federalize = transfer to USACE for processing
  - Expected to occur rarely

Individual Permits – 6
Process

After public notice/EPA review process

- If EPA does not comment, DEP may send an additional RAI based on information received during public notice
- Once all information is received, project deemed "Technically Complete" and agency decision is made:
  - Within 60 days where EPA did not comment
  - Within 90 days of public notice where EPA comments/objections/recommendations are resolved or none received
  - Within 30 days after EPA makes a decision after an EPA public meeting

Individual Permits – 7
Process

Agency Action

- Issuance, denial, no action
- If issuance [404 Handbook, section 8.3.4]:
  - Permit sent to Permittee for execution
  - Permittee signs and sends back to agency
  - Agency executes
  - Permit becomes effective upon agency execution
  - Permittee must receive fully executed permit prior to beginning work

Extensions
Administratively Continued

(c) ***Individual permits cannot be extended beyond the duration allowed under federal law but may be administratively continued while an application for a new permit is under review in accordance with section 5.3.3 of this Handbook when unexpected project delays cause a project to require more time to complete.*** [404 Handbook, section 6.0(c)]

Transfers
Rule 62-331.100, F.A.C.

(1) Transfer of an individual permit shall be in accordance with Rule 62-330.340, F.A.C. The phrase "under this Chapter" shall mean Chapter 62-331, F.A.C.

(2) If the permittee sells the property associated with a general permit verification, the permittee shall transfer the general permit verification to the new owner by submitting a completed Form 62-331.100(1) – "Transfer of State 404 Program General Permit Verification", incorporated by reference herein (effective date) (https://flrules.org/Gateway/reference.asp?No=Ref-12042), within 30 days of the sale, to the Agency that processed the original notice.

Emergencies
Rule 62-331.110, F.A.C.

"Emergency conditions" are defined as those that pose an imminent or existing serious threat or danger and require immediate action to protect the public health, safety, or welfare, or the water resources of the Agency, including the health of aquatic and wetland-dependent species; a public water supply; or recreational, commercial, industrial, agricultural or other reasonable uses. Carelessness or the lack of planning on the part of an applicant shall not be sufficient grounds to warrant the granting of an emergency field authorization.

Existing USACE Permits

- *Expiration*
- *Modification*

Expiration
Existing USACE permits

- Existing, valid, USACE 404 permits shall remain valid and administered by the USACE until they expire

- If more time is needed, DEP may "administratively continue" a valid USACE permit while processing a new permit for the project

Modification

Existing USACE permits

The Corps retains authority to make minor modifications to DA permits in State assumed waters. Minor modifications are generally ministerial in nature, and shall include the following: a) to correct errors or typographical mistakes; b) to incorporate changes requested by the Corps; c) to change due dates for reporting or performance deadlines; d) to transfer a permit upon a change in ownership or control; and e) to make minor technical changes. Minor modifications may include other minor changes; however, in no case will a minor modification expand the volume or amount, enlarge the footprint, change the location, or extend the duration of the authorized discharge.
[USACE MOA]

Modification – 2

Existing USACE permits

All other modifications will require a new permit under the State 404 Program

- DEP can "administratively continue" USACE permit while processing State 404 permit
- New permit will be limited to five years in duration

Mitigation Banks

- *Instruments*
- *Permits*

Mitigation Banking Instruments

Mitigation banking instruments and in-lieu fee program instruments shall be processed by the Corps in accordance with 33 C.F.R. Part 332. DEP may co-chair any applicable interagency coordination effort. **[USACE MOA]**

Dredge and Fill Permits

With respect to permits for mitigation banks and in-lieu fee projects issued after the effective date of assumption, the boundary of the mitigation bank or of a project under an in-lieu fee program (as distinct from the service area) will be the project boundary for purposes of Section II.A., above, for authorization of discharge of dredged or fill material. **[USACE MOA]**

Federal Credits

Subsection 62-331.130, F.A.C.

(3) Federal credits from mitigation banks or in-lieu fee programs approved by the Corps shall be accepted by the Agencies to offset impacts for permits when the number and resource type of credits available are appropriate to offset impacts.

Remember

- Environmental Resource Permits (ERPs) are still required for projects that also require a State 404 Permit
- Jurisdiction under Chapter 62-340, F.A.C. is broader than WOTUS, ensuring non-WOTUS wetlands continue to be protected through ERP

Contact Information

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DEP 404 Assumption Website:
https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/404-assumption

FLORIDA DEPARTMENT OF
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