

**Florida Oceanographic Society
Resolution
EPA Clean Water Act Section 404 Program
(DRAFT-3-8-21)**

WHEREAS Congress enacted the Clean Water Act to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251. The impetus for enacting the Clean Water Act was the states’ failure to control water pollution as evidenced by disasters like the Cuyahoga River catching on fire and the Hudson River filling with raw sewage and toxic waste; and

WHEREAS The Clean Water Act Section 404 wetlands permitting program (404 program) regulates the discharge of dredged or fill materials into waters of the United States, including wetlands, 33 U.S.C. § 1344, and is a vital tool to meet the Clean Water Act’s goals, recognizing that the degradation and destruction of wetlands is “among the most severe environmental impacts;” and

WHEREAS Under the federal 404 program, it is the U.S. Army Corps of Engineers (USACE) that reviews and, where appropriate, approves permits; and

WHEREA Congress enacted the Endangered Species Act of 1973 (ESA) to, among other things, “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] provide a program for the conservation of such endangered species and threatened species;” and

WHEREAS Pursuant to Section 7(a)(2) of the ESA, the USACE must engage in formal consultation with U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (collectively, “the Services”) whenever it appears that a Section 404 permit applicant’s proposed activity may adversely affect listed species; and

WHEREAS Through this process, permittees may obtain protection from ESA liability for any incidental harm (called “incidental take”) to listed species on a project by project basis; and

WHEREAS The Clean Water Act creates a path for states to administer their own dredge and fill permit program, if the state’s program is at least as stringent as the federal program. 33U.S.C. § 1344(h)(1); and

WHEREAS Each such state must submit a “full and complete” application showing that it meets this high bar. *Id.* § 1344(g); 40 C.F.R. §§ 233.10, 233.15(a) wherein a state 404 program, it is a state agency, rather than the USACE, that reviews 404 permit applications and issues 404 permits; and

WHEREAS Before a state may assume the 404 program, the U.S. Environmental Protection Agency (EPA) must determine that the state has demonstrated authority to issue permits that assure compliance with the Clean Water Act Section 404(b)(1) Guidelines, which, among other

things, prohibit the issuance of 404 permits that would jeopardize the existence of ESA-listed species, or result in the likelihood of destroying or adversely modifying critical habitat identified under the ESA. 33 U.S.C. § 1344(h)(1)(A)(i); 40 C.F.R. §§ 230.10(b)(3), 233.11(a)–(c), 233.23; and

WHEREAS Under ESA Section 7(a) consultation between the Services and federal agencies, including the associated incidental take protection, does not extend to projects regulated under state-operated 404 programs. 16 U.S.C. § 1536(a); and

WHEREAS Permittees must always comply with the ESA’s take prohibition, and must therefore pursue ESA Section 10 consultation with the Services to try to obtain protection from incidental take liability if a project may harm listed species. 16 U.S.C. § 1539; and

WHEREAS When the EPA approves a state’s 404 program, the Administrator must notify the state and the Corps, and, upon notification from the state that it is administering the program, the USACE must suspend its issuance of permits covered by the state program. 33 U.S.C. § 1344(h)(2)(A); and

WHEREAS Transfer of 404 permitting authority to a state is not effective until after notice is published in the Federal Register. 40 C.F.R. § 233.15(h). and as of the effective date of an approved state program, the USACE must suspend all issuance of Section 404 permits in state-regulated waters; and

WHEREAS The EPA provides that “the required publication or service of a substantive rule shall be made not less than 30 days before its effective date” subject to certain exceptions not applicable here. 5 U.S.C. § 553(d); and

WHEREAS In the many years that Section 404 state assumption has been authorized under the Clean Water Act for programs that meet stringent federal standards, the EPA has approved only two: In 1984, the EPA approved Michigan’s program, and in 1994, the EPA approved New Jersey’s program.; and

WHEREAS In 2005 and in 2012, Florida considered pursuing assumption of the 404 Program but abandoned the effort considering conflicts between state and federal law, the high costs associated with administering the program, and permittees’ concerns regarding protection against ESA liability while many other states, including most recently Arizona, have reached similar conclusions; and

WHEREAS On August 20, 2020, Florida applied to the EPA proposing to take over the 404 program without adopting all federal requirements, without demonstrating “no jeopardy” to ESA-listed species, and without adequately identifying the waters over which it would assert jurisdiction. The state also claimed it would require no funding to administer and enforce the program, even amidst major budget cuts resulting from a pandemic which the state did not address or even acknowledge in the application; and

WHEREAS On August 28, 2020, the EPA nonetheless determined that the application was “complete” as of the submission date; and

WHEREAS The EPA’s “completeness” determination triggered a 120-day deadline to approve or deny the application by December 18, 2020, unless the EPA and Florida agreed to extend the timeline. See 33 U.S.C. § 1344(h)(1); 40 C.F.R. § 233.15(a); and

WHEREAS On August 28, 2020, and at Florida’s request, the EPA reversed its long-standing position that agency review of an assumption application was a non-discretionary act, thereby triggering a duty to engage in ESA consultation with the Services. The EPA agreed with the state that this duty required only a one-time programmatic consultation for purposes of considering the application; and

WHEREAS the EPA then reviewed and approved the Florida application on a time table that violated those deadlines fixed under applicable law and substituted conditions on its action to answer deficiencies inherent in the Florida application in order to cause its actions to take effect before the end of calendar year 2020;

NOW, THEREFORE, BE IT:

Resolved That the Florida Oceanographic Society believes that the wetlands of Florida and indeed the entire World are ecologically critical to man and should not be disturbed except under careful and comprehensive regulation and only a wetlands permit review program that takes into account issues that transcend the borders of any state and is at least as stringent as or superior to that provided under the existing federal 404 program is sufficient to meet these objectives;

Resolved That any state program for such a review adopted in lieu of that provided by the USACE pursuant to its current existing 404 review program must: i) manifestly meet this criteria and ii) any state application to conduct a review program be timely submitted and appropriately and thoughtfully reviewed by EPA to assure proper coordination of this process with others not limited to the provisions of the ESA; and iii) contain provisions that assure that the proposed state review process to be substituted for the federal receive adequate and consistent funding to perform this task;

Resolved That especially in light of the State of Florida having a long history of adopting ecological standards and procedures which have then been wholly ignored or underfunded, the aforesaid application of the State of Florida manifestly failed to meet the specific provisions of the CWA, EPA, and the standards and conditions cited above and thus, the entire process should be deemed void; and

Resolved That for all of the foregoing reasons the Florida Oceanographic Society requests that both the Governor of the State of Florida and the appropriate officers of the federal government and the EPA rescind the entire process by which the Florida application was approved under the understanding that if any such process if be followed in the future be performed in accordance with the specific standards and precept set forth above.

IN TESTIMONY WHEREOF, the Board Chair of Florida Oceanographic Society authorizes and forwards this Resolution on behalf of Florida Oceanographic Society by signature below:

DULY PASSED AND ADOPTED THE ____ DAY OF M a r c h 2021.

Allen Herskowitz, Chair, Board of Directors
Florida Oceanographic Society

Mark Perry, Executive Director
Florida Oceanographic Society