

(b) Description of the State's Permitting, Administrative, Judicial Review, and
Other Applicable Procedures
(Required by 40 C.F.R. § 233.11(b))

Purpose of Section (b)

The purpose of Section (b) is to provide the information required in 40 C.F.R. § 233.11(b), which states: *“The program description as required under §233.10 shall include: (b) A description of the State's permitting, administrative, judicial review, and other applicable procedures;”*

Section (b) does not include a description of compliance procedures, which can be found in section (g) of the program description.

General Summary of Procedures

The State 404 Program requires authorization from the Department prior to conducting any regulated activities. The State 404 Program Rules (Chapter 62-331, F.A.C.), State 404 Program Applicant's Handbook (404 Handbook), and applicable memoranda of agreement or understanding (See section D and E of the package and section (j) of the program description) contain the regulations and procedures the Department will follow to administer the State 404 Program under Section 373.4146, F.S. The 404 Handbook is adopted and incorporated by Rule 62-331.010(5), F.A.C. The following information summarizes the procedures and processes. For a full, detailed description, consult the documents referenced above.

The State 404 Program provides three forms of authorization: verifications of exemption, general permits, and individual permits. The Department will implement the State 404 Program through its six district offices, and its Mining and Mitigation Program (MMP) and Mitigation Banking Program (MBP) in Tallahassee. The headquarters for State 404 Program located in Tallahassee under the Division of Water Resource Management, Submerged Lands and Environmental Resources Coordination (SLERC) program.

Applicants are encouraged to schedule a pre-application meeting to discuss the proposed activity with the Department and gain a better understanding of the application and permitting process. The applicant must submit an application to the district office, or Water Management District (WMD) office when the WMD processes the ERP, where the proposed activity will occur, or to the MMP or MBP in Tallahassee for mining projects and dredge and fill projects associated with mitigation banks. When a WMD receives the application, the WMD will immediately forward a copy of the application to the Department so the Department may process the State 404 Program application. Upon receipt, the application will be uploaded into Oculus, the Department's electronic document management system, and assigned to the staff member responsible for reviewing the project. The Department will follow the procedures detailed in Section 5.0 of the 404 Handbook to evaluate the application.

The Department will verify that the location of the proposed activity is within state assumed waters. If the proposed activity is located within retained waters, within five days of receipt, the Department will refer the applicant to the USACE and no further action on the 404 application will be taken by the Department. Should the USACE receive an application for an activity located within state-assumed waters, within five days of receipt, the USACE will refer the applicant to the Department and no further action on the 404 application will be taken by the USACE. The Department will also determine if the proposed activity may require Section 408 permission from USACE. A project that requires Section 408 permission will have an additional special condition included in the authorization that requires the permittee to receive 408

permission from the USACE prior to commencing the activity. (See the MOA between the Department and the USACE in section E of the package for further detail)

The Department will review the application to determine if all the necessary information is present to evaluate the proposed activity. Verification of delineations of wetlands and other surface waters and any Uniform Mitigation Assessment Method (UMAM) analysis will be performed by a staff member who has passed the Department's internal Certified Wetland Evaluator testing. If additional information is required a Request for Additional Information (RAI) will be sent to the applicant requesting the specific items that are needed or that require additional clarification. If the applicant does not provide a timely response to the RAI within the required timeframes (See the State 404 Handbook, section 5.0), the Department will inform the applicant that the regulated activity does not qualify for a general permit, or if the application is for an individual permit, the permit may be denied. After receiving the applicant's response to the RAI, the Department will have 30 days to determine if the information is sufficient to evaluate the application and advance to the next stage of the review process. When the application meets the conditions for issuance and has undergone any required public notice period or EPA review, the Department will make a final permitting decision on the proposed activity.

Most State 404 Program applications will also require Environmental Resource Permitting (ERP) authorizations established in Part IV of Chapter 373, F.S. Where both an ERP and a State 404 Program authorization are required for a regulated activity, an applicant must receive both authorizations prior to conducting the activity. The ERP authorization must be issued prior to or concurrent with the State 404 Program authorization to provide assurance that the project is in compliance with state water quality standards and the Coastal Zone Management Program (Rule 62-331.070, F.A.C.).

Interagency coordination with the State Historical Preservation Office (SHPO) and Tribal Historical Preservation Office (THPO), Florida Fish and Wildlife Conservation Commission (FWC), U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), Water Management Districts (WMDs), and Environmental Protection Agency (EPA) will be conducted, as required, following the procedures described in their respective operating agreements (See sections D (DEP/EPA MOA) and E (DEP/USACE MOA) of the package and section (j) (DEP/FWC/FWS MOU and DEP/SHPO OA) of the program description) and section 5.2 of the 404 Handbook. A commenting agency may submit questions or comments for the Department to include in the RAI. A commenting agency may also provide comments to EPA and request EPA object to a proposed activity. The Department will forward the applicant's response to the RAI to each commenting agency for review, if applicable. Additional conditions may be included in the final authorization based upon the recommendation of a commenting agency to avoid or minimize potential adverse effects due to the project.

An individual permit is valid for a period not to exceed the time allowed under federal law. If the permittee has commenced construction but construction will not be completed before the authorization expires, the permittee may receive an administrative continuance of the authorization as long as the applicant submits an application for a new permit at least 180 days prior to the expiration of the authorization. Projects that are reasonably expected to take more than one phase to complete shall follow the long-term conceptual planning process described in Section 5.3.2 of the 404 Handbook. General permits are valid until 5 years from the date the general permit becomes effective in rule.

Specific Permitting and Verification Procedures

Verifications of Exemption

Review procedures for State 404 Program verifications of exemption are in Rule 62-331.040, F.A.C. The rule should be consulted for a detailed description of the process. The following is only a summary of the process:

Notification to the Department is not required to perform an activity that is exempt under subsection 62-331.020(1), F.A.C., unless the activity also requires an ERP authorization or notification under Chapter 62-330, F.A.C.

Rule 62-331.040, F.A.C., provides a procedure for review and agency action on exemption requests. If a person desires verification of qualification for an exemption they shall apply as described in subsections 62-330.050(2) and (3), F.A.C. An applicant shall submit the "Request for Verification of an Exemption" Form 62-330.050(1) (see section (f) of the program description). The verification of qualification to conduct an exempt activity is conducted as described in subsections 62-330.050(4) through (7), F.A.C. Where the information in the request is insufficient to determine if the activity is exempt, the Department will provide the applicant a RAI following the procedure previously described. The applicant is provided 60 days to respond to the RAI. The Department will consult with WMDs to ensure the exempt activity is part of on-going operations and is consistent with normal farming, silviculture or ranching practices. Within 30 days of receipt of the completed request or RAI, the Department will use the "Verification of Exemption" template (See section (f) of the program description) to notify the applicant whether the proposed activity is exempt from regulation.

General Permits

Review procedures for State 404 Program general permits are in Rule 62-331.200, F.A.C. The rule should be consulted for a detailed description of the process. The following is only a summary of the process:

The general permits provided by the State 404 Program are adopted from the Nationwide permits (NWP), and one Regional General Permit (RGP) currently offered by the USACE. Because they are modeled closely on the previously reviewed and authorized USACE general permits, they are presumed consistent with 404 (b)(1) guidelines. General permits authorize activities that, if conducted consistent with the permit requirements, will cause only minimal individual and cumulative adverse environmental effects. Compensatory mitigation shall be required, when necessary, to offset impacts authorized under a general permit, unless the general permit specifically states otherwise.

Some general permits do not require notification. Applicants that intend to use a no-notice general permit must coordinate with SHPO to determine if their property is eligible or potentially eligible for listing on the National Register of Historic Places. Notice is required if the property is listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places.

For general permits that require notification, the applicant will submit a "Notice of Intent to Use an Environmental Resource and/or State 404 Program General Permit" Form 62-330.402(1) (see section (f) of the program description) with the appropriate supporting information. The notice must be received by the Department at least 30 days prior to initiating the activities authorized by the general permit (or at such other time as specified in the general permit). Within five days of receipt of the notice, the Department will e-mail SHPO a hyperlink to the application (see DEP/SHPO OA in section (j) of the program description).

Within 30 days of receipt of the notice, the Department may send a “Does Not Qualify (DNQ) letter, which may include a RAI to notify the applicant if they do not qualify for a general permit or if additional information is required. The applicant is provided 60 days to respond to the letter. If the Department determines a project has potential to impact listed species or their habitat, the Department will coordinate with FWS and/or FWC to provide recommendations for project design modifications or permit conditions that will avoid or minimize impacts to the listed species or their habitats. For projects that occur within areas of tribal concern, the Department will consult with the tribe to avoid or minimize impacts to tribal resources.

If the Department determines the application meets the conditions for issuance, the applicant will receive a general permit authorizing the proposed activity. The Department will use the general permit template in section (f) of the program description for this purpose. Where the Department determines the application does not meet the conditions for issuance, the general permit will be denied, or the applicant may request that the application be processed as an individual permit.

Individual Permits

Review procedures for State 404 Program individual permits are in Rule 62-331.052, F.A.C. The rule should be consulted for a detailed description of the process. The following is only a summary of the process:

The State 404 Program requires individual authorization for any regulated activity that does not qualify for a general permit or is not otherwise exempt. An applicant must submit the “Application for Individual and Conceptual Approval Environmental Resource Permit, State 404 Program Permit, and Authorization to Use State-Owned Submerged Lands” Form 62-330.060(1) (see section (f) of the program description) along with any supporting information. The Department first evaluates the application to ensure the activity does not qualify for an exemption or general permit.

The Department will review the contents of the application to determine if the application is administratively complete. “Administratively complete” means the application contains all the items required under the public noticing requirements of Rule 62-331.060, F.A.C. “Technically complete” means an application where each application item is adequate to allow the Department to determine if the proposed project complies with the applicable requirements of Chapter 62-331, F.A.C. Once an application is technically complete, the Department is responsible for ensuring the proposed activity is consistent with the State 404 Program. In doing so, the Department will follow the sequence of review detailed in section 8.2 of the 404 Handbook to evaluate the individual permit application. This process will be followed for all individual permit applications, including those reviewed under section 5.3.2. of the 404 Handbook. A Technical Staff Report (TSR) will be completed by the Department to detail the deciding factors for issuing or denying an authorization. The TSR will include notes of field visits, photographs, and any additional relevant information that was relied upon to make the final permitting decision (see TSR template in section (f) of the program description). The Department will use a RAI to inform the applicant of any deficiencies that cause the application to be administratively or technically incomplete. The applicant is provided 90 days to respond to the RAI.

Public Notice

Public notice provisions may be found in Rule 62-331.060, F.A.C, and section 5.3.1 of the 404 Handbook. Public notices will comply with all requirements therein, even for those projects being reviewed under section 5.3.2 of the Handbook and noticed under paragraph 62-331.060(8), F.A.C. The rule and handbook should be consulted for a detailed description of the public notice procedures. The following is a summary:

Within 10 days of the determination the application is administratively complete the Department will publish the public notice. The public notice requirements are detailed in section 5.3.1 of the 404 Handbook and Rule 62-331.060, F.A.C.

Copies of the public notice will be distributed to the relevant and appropriate parties and commenting agencies. The distribution list may include: applicant, owners of adjoining properties, interested parties, EPA, SHPO, FWS, FWC, federally recognized tribes, or an adjacent state (Alabama or Georgia). The public notice will also be published on the Department's website. Following publication of the public notice there shall be a public comment period of 15 days for certain small projects, or 30 days. The Department will review all comments received from the public or commenting agencies and may, when necessary, send a RAI to ask the applicant to address concerns introduced in the public comment period. During the public comment period, any of the commenting agencies may recommend conditions or project modifications that would reduce or eliminate adverse effects of the proposed activity.

Public Meeting and Public Comment

A public meeting may be held on the proposed activity at the discretion of the Department, when requested by the public, or where there is significant public interest. The public meeting will be scheduled at least 30 days after publishing the public notice. The Department will provide notice of a public meeting at least 30 days prior to the scheduled public meeting. When a public meeting is held the public comment period will be extended until the end of the meeting.

EPA Review

EPA review procedures are described in Rule 62-331.052, F.A.C. and in the DEP/EPA MOA in section D of the package. The rule and MOA should be consulted for a detailed description of the process. The following is a summary:

The Department will provide EPA with the public notice for federal review of the proposed activity. EPA may choose to comment, condition, or object to the proposed activity. Within 30 days of receipt of the public notice, EPA may notify the Department of its intent to comment on the proposed activity. If EPA does not notify the Department of an intent to comment the Department will make a final permit decision to issue or deny the permit 60 days after the end of the public comment period and after the application is technically complete.

Where EPA notifies the Department of an intent to comment the Department will provide EPA 90 days to comment on the proposed activity. When necessary, the Department may use a RAI to communicate any of EPA's comments or concerns with the applicant. The Department will make a final agency action to issue or deny the permit after receiving EPA's comments (and RAI response) and the application is technically complete.

EPA may also choose to condition or object to the proposed activity. When necessary, the Department may provide a RAI to the applicant regarding EPA's conditions or to address an objection. The Department may choose to add EPA's conditions and make a final permitting decision to issue or deny the permit within 90 days of receipt of the objection or condition.

The Department or any interested party may request EPA hold a public meeting within 90 days after receipt of EPA's conditions or objections. EPA will hold a public meeting if requested by the Department or there is significant public interest. If EPA does not hold a public meeting, the Department will make a final permitting decision to issue or deny the permit within 90 days of receipt of the conditions or objections. The Department must notify EPA of its intent to deny the permit prior to a final action.

In circumstances where EPA holds a public meeting, EPA will notify the Department of its decision to affirm, modify, or withdraw the conditions or objection following the public meeting. The Department will have 30 days after EPA gives notice of its decision to make a final permitting decision. The Department may add the terms and conditions and make a final permitting decision to issue or deny the permit or take no action.

The Department will issue an individual permit using the template in section (f) of the program description to notify the applicant the proposed activity is authorized. An individual permit becomes effective when it is signed by the Department and the applicant. If the Department elects to take no action on the application, the Department will notify the applicant and EPA of the intent to take no action and EPA may choose to federalize the project, sending it to the USACE for review. When the Department chooses to deny the authorization or EPA's objections are not resolved, the Department will notify EPA of its intent to deny and the applicant will be notified of the reason for the denial using the template in section (f) of the program description. The denial will include directions for the applicant to appeal the agency decision.

Administrative and Judicial Review

The Department is required to follow procedural statutes and rules to review and act on applications and notices, and to provide a point of entry with respect to agency actions. The applicable statutes and rules include: Chapter 120, F.S., (Florida Administrative Procedures Act), Chapter 28-106 (Uniform Rules of Procedure), and Chapter 62-110, F.A.C. (Department's Exceptions to the Uniform Rules of Procedure).

After processing a permit application, the Department may require a permit applicant to publish a Notice of Proposed Agency Action on Permit Application. The notice must comply with the requirements for format, content, and publication set forth in Rule 62-110.106(7), F.A.C. The applicable timelines for the filing of a petition for administrative hearing following "Receipt of Notice of Agency Action" are set forth in Rule 62-110.106(3), F.A.C. The term "Receipt of Notice of Agency Action" is defined in Rule 62-110.106(2), F.A.C.

Rule 28-106.201(1), F.A.C., provides the initiation of an administrative proceeding shall be made by written petition to the agency responsible for rendering final agency action. A petition for hearing must include all of those items required by Rule 28-106.201(2), F.A.C. If the petition contains all of the required information, the petition may be referred to the Division of Administrative Hearings (DOAH) for the assignment of an administrative law judge (ALJ). Section 120.569(2)(d), F.S.

Section 120.569(1), F.S, applies in any proceeding in which the substantial interests of a party are determined by the Department. Section 120.57(1), F.S., sets forth additional procedures applicable to hearings involving disputed issues of material fact. The ALJ has the power to swear witnesses and take testimony under oath, to issue subpoenas, and to effect discovery on the written request of any party by the manner provided under the Florida Rules of Civil Procedure. Section 120.569(2)(j), F.S. All parties shall have an opportunity to respond, to present evidence, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative. Section 120.57(1)(b), F.S.

The ALJ submits to the Department a recommended order consisting of findings of fact, conclusions of law, and a recommended disposition. All proceedings conducted under this subsection shall be de novo. The Department allows each party 15 days in which to submit written exceptions to the recommended

order. With limited exceptions, the Department's final order must include an explicit ruling on each exception. Section 120.57(1)(k), F.S.

The Department may adopt the recommended order as the final order of the agency. Subject to certain limitations, the Department may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record that the findings of fact were not based upon competent substantial evidence. Section 120.57(1)(l), F.S.

A party who is adversely affected by final agency action is entitled to judicial review. Section 120.68(1)(a), F.S. Appellate proceedings are instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the rendition of the order being appealed. The filing of the petition does not itself stay enforcement of the agency decision; however, the agency also may grant a stay upon appropriate terms. Section 120.68(3) F.S.