

Regulatory Division Jacksonville District

State of Florida Assumption of the 404 Program

10 December 2020



Regulatory

Environmental
Stewardship

Hydropower

Flood Damage Reduction

Recreation

NAVIGATION

US Army Corps of Engineers
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U.S. ARMY

Assumption

- MOA Roles and Authority
- MOA Components
 - ▶ Retained Waters
 - ▶ Joint Coordination Procedures
 - ▶ Existing Permits and Pending Permit Applications
 - ▶ Review of Applications for State Program Permits
 - ▶ Mitigation Banking
 - ▶ Enforcement



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Roles & Responsibilities

EPA's role in the Assumption Process (CWA § 404(h) and 40 C.F.R. § 233):

- Work with States to enhance capacity/capability and develop programs
- Coordinate federal oversight
- Evaluate and approve/disapprove state program (Regional Administrator has the lead and approval authority)

U.S. Army Corps of Engineers (Corps)' role in the Assumption -
Execute MOA with the State which will include transfer of
pending permit applications

Florida Department of Environmental Protection (FDEP)'s Role –
Implement the State 404 Program



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FDEP/Army MOA

Purpose and Authority

- Memorandum of Agreement (MOA) between the State and the Department of the Army (DA) was signed on August 5, 2020
- The MOA fulfills the requirements of 40 C.F.R. § 233.14.
- Effective date is the date Environmental Protection Agency (EPA) publishes a notice in the Federal Register approving State Assumption



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Retained Waters

1. Those waters in the **Retained Waters List** (currently there are 567 waters on this list).
2. All waters subject to the **ebb and flow of the tide** shoreward to their mean high-water mark.
3. Wetlands adjacent to waters identified on the **Retained Waters List landward to the administrative boundary and wetlands adjacent to waters subject to the ebb and flow of the tide, landward to the administrative boundary.** (A 300-foot guideline established from the ordinary high water mark or mean high tide line of the retained or tidal waters).
4. Those waters of the United States within “**Indian Country**”



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Joint Coordination Procedures

- Each agency will screen applications to determine if the proposed activity will occur within Corps retained waters or State assumed waters.
- Each agency will refer the applicant to the appropriate agency within five calendar days of receipt.
- Updates to Retained Waters List and GIS data layers
- Section 10 Historic Waters could require a Section 10 permit from the Corps and a Section 404 permit from the State



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EXISTING PERMITS AND PENDING PERMIT APPLICATIONS

Individual Permits - After the effective date of assumption and within assumed waters:

- any work that remains incomplete after the expiration date of the Corps' permit, the applicant must apply for a new permit from FDEP under the State 404 Program.
- the Corps will not review requests for extension of time and will refer the applicant to FDEP to apply for a new permit under the State 404 Program.
- FDEP may administratively continue an expiring Corps permit until the effective date of a new permit, if any, consistent with 40 C.F.R. § 233.38, or a decision is made not to issue a new permit.



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EXISTING PERMITS AND PENDING PERMIT APPLICATIONS

The Corps retains authority to make **minor modifications to DA permits in State assumed waters**, including:

- 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.

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.



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EXISTING PERMITS AND PENDING PERMIT APPLICATIONS

General Permits - After the effective date of assumption and within assumed waters:

- Any work that remains incomplete after the expiration date of a Corps' permit must receive a new permit from FDEP under the State 404 Program.
- Requests for modifications of verifications under a DA General Permit within State assumed waters shall be made to FDEP.
- No new verifications under DA General Permits will be issued by the Corps within State assumed waters.



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EXISTING PERMITS AND PENDING PERMIT APPLICATIONS

Transfer of 7 existing Corps administered General Permits:

FDEP will assume administration of the following Regional General Permits in State assumed waters:

- ▶ **SAJ-13** (Aerial Transmission Lines in Florida);
- ▶ **SAJ-14** (Sub-aqueous Utility and Transmission Lines in Florida);
- ▶ **SAJ-86** (Residential, Commercial, Recreational and Institutional Fill in the Choctawhatchee Bay, Lake Powell, and West Bay Basins, Bay and Walton Counties, Florida);
- ▶ **SAJ-90** (Residential, Commercial & Institutional Developments in Northeast Florida);
- ▶ **SAJ-103** (Residential Fill in Holley By The Sea, a Subdivision in Santa Rosa County);
- ▶ **SAJ-105** (Residential, Commercial, Recreational and Institutional Fill in the West Bay Watershed of Bay County, Florida); and
- ▶ **SAJ-114** (Residential, Commercial, Recreational and Institutional Fill in the Choctawhatchee Bay and St. Andrew's Bay Watersheds located in Bay County and Walton County, Florida).



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REVIEW OF APPLICATIONS FOR STATE PROGRAM PERMITS

Corps Civil Works Projects: The Corps may get involved!

The FDEP will coordinate all applications or permit verifications within State assumed waters that may use or alter a Corps Civil Works project with the SAJ and/or SAM Section 408 coordinator:

- ▶ Within five calendar days, FDEP agrees to inform the Corps and instruct the applicant to contact the appropriate Corps Section 408 contact person for any activities that may use or alter an existing Corps Civil Works project.
- ▶ Within 14 calendar days of receipt of the notification from FDEP, the Corps will notify FDEP if the Corps' approval is required pursuant to Section 408.

The State could:

- delay final State actions until Section 408 review is complete
- OR
- include a special condition in the permit requiring Section 408 permission prior to construction that will include the Corps' Section 408 contact information.



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REVIEW OF APPLICATIONS FOR STATE PROGRAM PERMITS

EPA's Objections: The Corps may get involved!

In State assumed waters, if FDEP has received an EPA objection or requirement for a permit condition to a permit application or draft general permit **and** in the event that FDEP neither satisfies EPA's objections or requirement for a permit condition nor denies the permit,

the Corps shall process the permit application (Section V.D of the MOA):

- ▶ Under the Endangered Species Act (ESA), the Corps may designate a non-federal representative, such as FDEP, the Florida Fish and Wildlife Conservation Commission, or the permit applicant to conduct informal ESA consultation or prepare a biological assessment, pursuant to 50 C.F.R. § 402.08 (Section V.E of the MOA).



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Coordination of Mitigation Banking

- Mitigation Banking and In-Lieu Fee Program Instruments shall be processed by the Corps.
- FDEP may co-chair any interagency coordination effort
- FDEP may approve the use of credits from a Corps-approved mitigation bank or in-lieu fee program to provide compensatory mitigation for permits issued under the State 404 Program
 - ▶ as long as the use of credits is consistent with the approved mitigation banking instrument or in lieu fee instrument



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Enforcement

After the effective date of Assumption and in State Assumed waters,

the Corps will:

- conduct enforcement and compliance on all DA permits issued prior to the effective date of assumption
- remain the lead agency for ongoing enforcement actions against unauthorized discharges of dredged or fill material in violation of the Clean Water Act or against noncompliance with the terms and conditions of a DA permit in State assumed waters that have not been resolved prior to the effective date of State assumption

the FDEP will:

- enforce unauthorized discharges of dredged or fill material in State Assumed waters
- monitor compliance and enforce any verification it issues for General Permits issued by the Corps but administered by the State



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Questions?

For the **Corps**, please visit the Corps' website under "Regulatory News" at:

<https://www.saj.usace.army.mil/Missions/Regulatory>

If you have general questions regarding the Corps implementation, email us at:

Florida404Program@usace.army.mil



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