



Introduction to the State 404 Program

August 11, 2020



Contents

- **What is the State 404 Program?**
- **Jurisdiction**
- **What is Regulated?**
- **Permits and Verifications**
- **Regulations**
- **Interagency Coordination**
- **Differences between ERP and 404**
- **Quality Control**
- **Compliance**
- **Training**
- **Takeaways**
- **Contacts and Resources**



CWA Section 404 Permitting Program

- **404(a) Dredge and fill permitting program**
- **Administered by U.S. Army Corps of Engineers (Corps) by default**
- **404(g) provision in Clean Water Act (CWA) to allow states/tribes to assume authority to administer**
- **US Environmental Protection Agency (EPA) approves state/tribal programs**
- **Only two states already assumed**
 - New Jersey & Michigan
- **Florida will be first in nearly 30 years**



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 publishes approval of the state program 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 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 the Corps**
- **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)**
- **Still jurisdictional under ERP, even if not WOTUS (ERP has broader jurisdiction)**



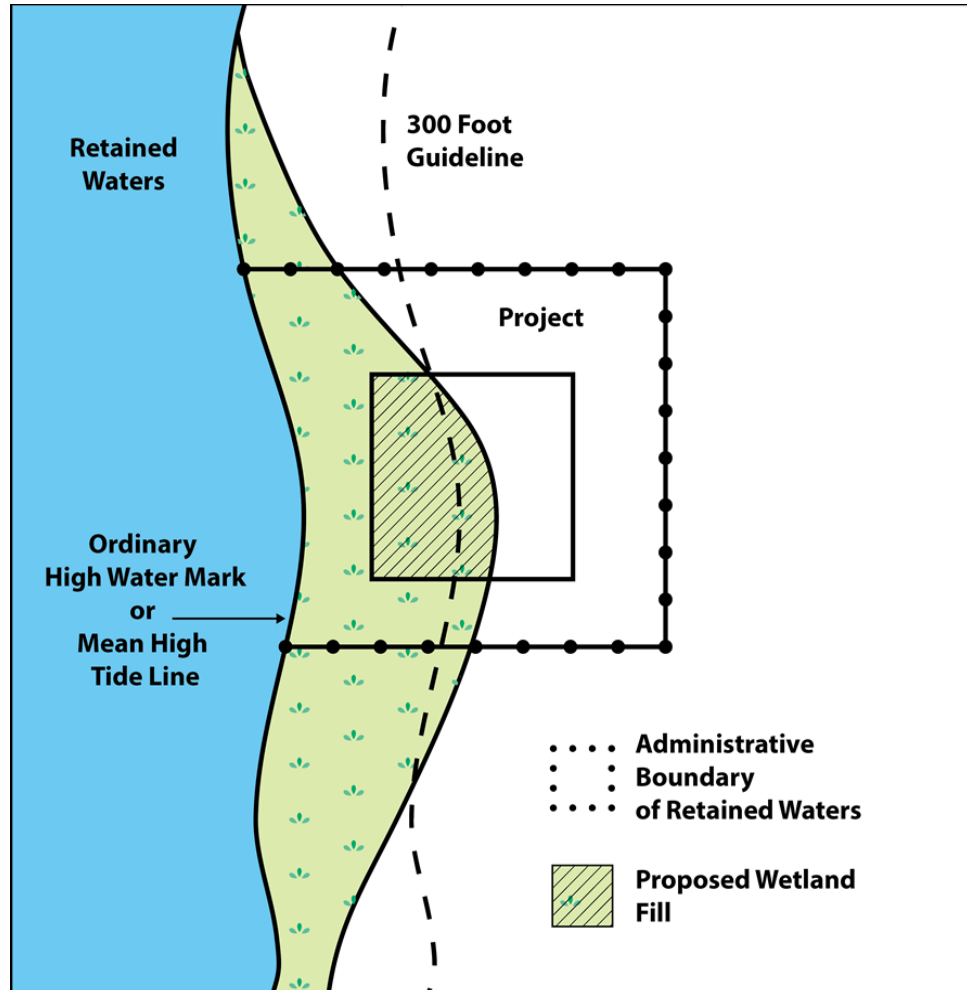
Efficiency

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.”

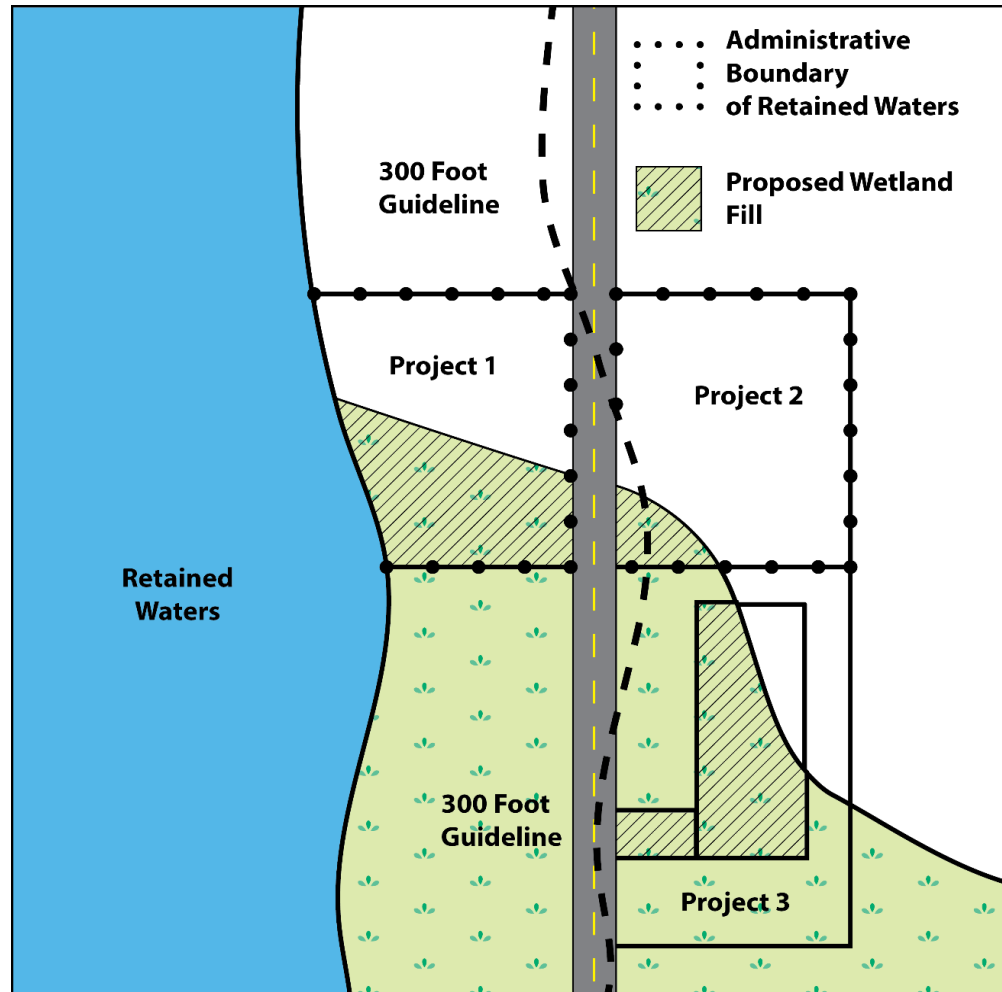


Example 1



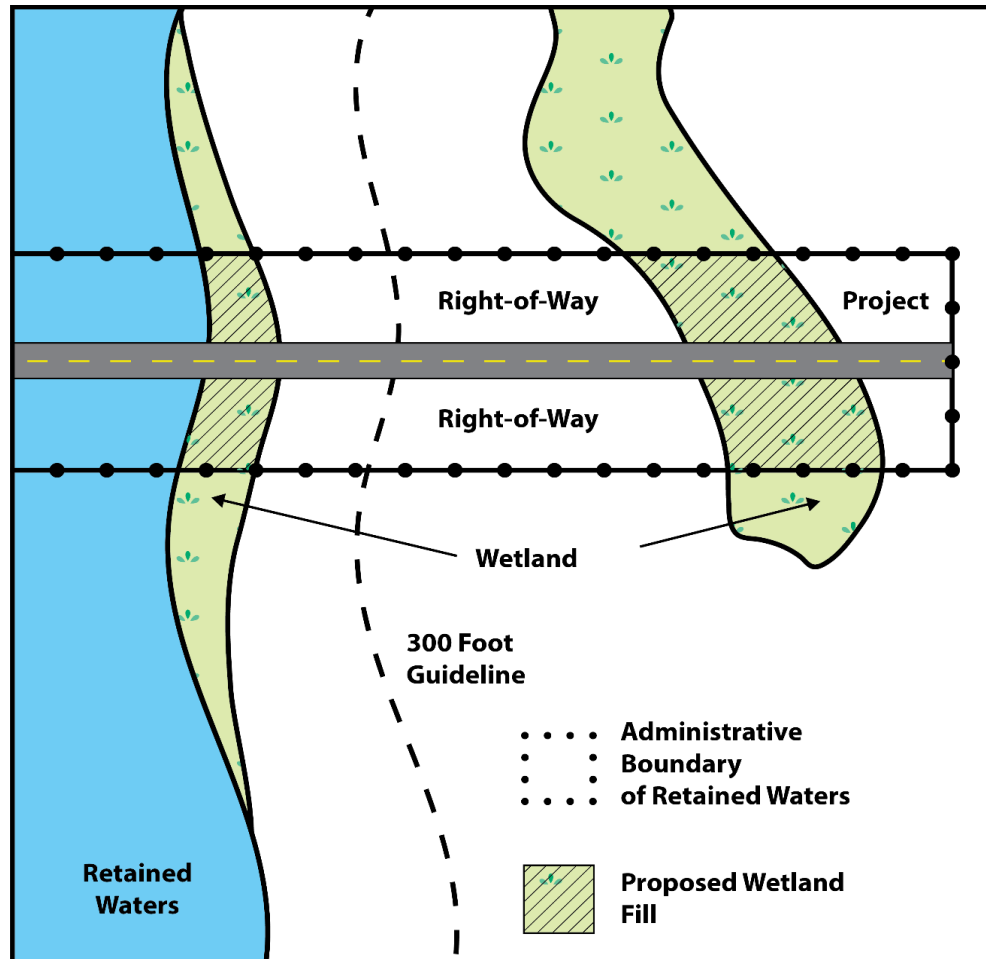


Example 2





Example 3





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.



Authorizations

Exemptions

- **Limited exemptions under 40 C.F.R. § 232.3 (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**
- **Noticed/No Notice**
- **May require mitigation**
- **May add specific conditions**
- **Require coordination with State Historic Preservation Office (SHPO) and possibly wildlife agencies (Florida Fish and Wildlife Conservation Commission [FWC], U.S. Fish and Wildlife Service [USFWS])**
- **Expire five years from effective date in rule**



Authorizations - 3

Corps Regional General Permits

- **Assuming administration of seven Corps 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 (404 Handbook, section 5.3.2)**



Interagency Coordination

Terms:

Memorandum of Agreement (MOA)

Memorandum of Understanding (MOU)

Operating Agreement (OA)



Corps MOA

DEP/Corps

- **Retained waters**
- **Project screening (Corps 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**



SHPO OA

DEP/SHPO

- **Intended to be at least as stringent as federal review under Section 106 of the National Historic Preservation Act, but using state authorities**
- **Includes input from Florida's federally recognized tribes**
- **Lays out coordination procedures**



Adjacent States and Tribes

- **Miccosukee Tribe of Indians of Florida**
- **Seminole Tribe of Florida**
- **Poarch Band of Creek Indians (Alabama)**
- **Alabama**
- **Georgia**



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**
- **Working on creating coordination procedures**
- **Details to be presented in future webinar**



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



Quality Control

Auditing, Data Collection



Mandatory Data Collection

Required by federal law

- **Used for annual report to EPA**
- **Used to evaluate cumulative impacts of program**
- **Used to justify/evaluate/re-approve general permits**
- **Used to track coordination outcomes**
- **MUST be collected for ALL State 404 Program permitting/compliance actions**



Data Collected

Will include, but is not limited to:

- Project area
- Impact Acreage
- Functional loss/gain (UMAM)
- Mitigation acreage
- FLUCCS/FNAI community types
- Mitigation bank credits required/purchased
- Mitigation bank credit type
- Other mitigation type
- Species coordination data
- Number, nature of exemptions, GPs, individual permits issued/withdrawn/modified/denied
- Number of violations identified
- Number, nature of enforcement actions taken
- Number of suspected unauthorized activities reported/nature of action taken
- Historical/tribal resources coordination data



Program Auditing

Required by federal law

- **Done by SLERC subject matter experts**
- **100% of Formal Determinations**
- **Percentage of permitting and compliance actions**
- **Percentage of permit/compliance-related delineations**
- **Used for annual report to EPA**
- **Required to identify issues and find solutions**



Compliance

- **In accordance with state law**
- **Public notice of proposed settlement actions**
- **All proposed enforcement actions subject to peer review**



Initial Training

Weekly starting 8/11/2020

- **Introduction to State 404 Program**
- **Processing State 404 Program Permits (Focus on Procedures)**
- **Alternatives Analysis Review**
- **Review of Cumulative and Secondary Effects**
- **Chapter 62-340, F.A.C. Data Form**
- **Mitigation & Mitigation Hierarchy**
- **Listed Species Coordination**
- **Documenting the Decision (TSR)**
- **Compliance and Enforcement**
- **Historical Resources Coordination**
- **EPA Oversight and Review/ Public Notice Procedures**
- **ERP/404 Coordination**
- **WOTUS Jurisdictional Determinations**
- **Records and Data Collection**
- **State 404 Program Tools**
- **Listed Species Coordination**
- **Exemption Walk-through**
- **General Permit Walk-through**
- **Individual Permit Walk-through**
- **Compliance Walk-through**



Ongoing Training

Regularly Scheduled

- **Wetland delineation field training**
- **Advanced delineation field training**
- **Certified Wetland Evaluator training**
- **Regulatory training**

As-Needed

- **Topics as need arises**
- **Frequently throughout first year**



Takeaways

We are all in this together!

Ask for help!

Communicate ideas!

We can do this!



Contacts/Resources

Topic	Contacts
404 Permit Processing and Regulatory Training	Heather Mason – Heather.Mason@FloridaDEP.gov Mac James – Mac.James@FloridaDEP.gov
404 Compliance and Enforcement Training	Savanna Harrison – Savanna.Harrison@FloridaDEP.gov
404 Delineations/Jurisdiction/Training	Eric Hickman – Eric.Hickman@FloridaDEP.gov
Listed Species Coordination and Training	Mary Duncan – Mary.J.Duncan@FloridaDEP.gov
Historical Resources Coordination and Training	TBD
404 Data and Maps	Camille Beasley – Camille.Beasley@FloridaDEP.gov

