



State 404 Program Compliance & Enforcement

October 6, 2020



404 Trainings Review

- **Introduction to the State 404 Program**
- **Processing State 404 Program Permits**
- **Alternatives Analysis Review**
- **Secondary and Cumulative Effects**
- **Documenting Wetlands Using the Chapter 62-340, F.A.C., Data Form**
- **Mitigation and Mitigation Hierarchy**
- **Listed Species Coordination**



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References

- **404 Assumption Package: Program Description (PD)**
 - **Section (g) – Enforcement**
- **Memoranda of Agreement (MOAs) with the U.S. Environmental Protection Agency (EPA)/the U.S. Army Corps of Engineers (USACE/Corps)**
- **Guidelines for Characterizing ERP Violations (July 2020)**



Introduction

CWA Enforcement
Transfer of Responsibility
Elements of a 404 Violation



CWA Enforcement

Current Procedures

- **CWA Section 404 enforcement responsibilities are shared by EPA and the Corps as outlined in the 1989 EPA/USACE MOA (and further clarified via local Field Level Agreements)**
- **USACE is responsible for:**
 - “routine” enforcement against violators who were unaware of the regulations, and
 - enforcement of the conditions of Corps-issued permits
- **EPA is responsible for:**
 - “repeat violators”
 - “flagrant” violations
 - classes of cases or individual cases that it requests
 - cases when USACE recommends an administrative penalty



CWA Enforcement – 2

EPA Enforcement Authority

- **CWA Section 308 – gather information, conduct inspections, monitor, etc., for enforcement and permitting needs**
- **CWA Section 309(a) – issue administrative compliance orders for violations of Section 301 (which prohibits discharges in the absence of CWA 402 or 404 permits) and of Section 308**
- **CWA Section 309(b) – bring civil actions**
- **CWA Section 309(c) – assess criminal penalties**
- **CWA Section 309(d) – assess civil penalties**
- **CWA Section 309(g) – assess administrative penalties**



Transfer of Responsibility

- **Per EPA MOA, Section III.B.:**

“EPA will retain responsibility for any pending enforcement actions undertaken by EPA prior to the date of EPA’s approval of the State 404 Permit Program.”

- **Per USACE MOA, Section VII.A.:**

“After the effective date of State assumption, the Corps will continue to monitor compliance and enforce the terms and conditions of all DA individual and general permits issued or verified in State assumed waters prior to the effective date of assumption.”



Transfer of Responsibility – 2

- **Per USACE MOA, Section VII.D.:**

“The Corps will remain the lead agency for ongoing enforcement actions against unauthorized discharges of dredged or fill material in violation of the CWA 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 (hereinafter Ongoing Enforcement Action). If there is an unusual circumstance concerning an Ongoing Enforcement Action, the parties to this Agreement may discuss DEP taking the lead.”



Elements of a 404 Violation

The elements of a CWA Section 404 violation are:

- 1. Discharge of Dredged or Fill Material**
- 2. Into Waters of the United States (WOTUS)**
- 3. From a Point Source**

“...the conveyance of dredged or fill material by mechanized earthmoving equipment constitutes a “point source” within the meaning of the Act.” See 33 U.S.C. § 1362(14)
- 4. By a Person**

“...a “person” is, inter alia, any “individual, corporation, partnership, [or] association ...” 33 U.S.C. § 1362(5)
- 5. Without Authorization (or Exemption)**



Compliance & Complaint Evaluation Procedures

Permit Compliance

Levels of Service (LOS)

Unauthorized Activities (Complaints)

Field Investigation & Documentation



Permit Compliance

- **All State 404 Program individual permits and General Permit (GP) verifications will be subject to compliance tracking**
- **Individual permit conditions will require submittal of construction commencement notice 48 hours in advance**
 - **General condition per section 62-330.350(1)(d), F.A.C., via section 62-331.054(1), F.A.C.**
 - **“... will allow review to confirm that pre-construction conditions have been met as required and will facilitate compliance monitoring during active construction.”**



Levels of Service

Minimum Annual Inspection Rates

- **State 404 Program Levels of Service (LOS) will require inspection of a minimum percentage of permitted activities annually, according to the following sliding scale:**
 - **Year 1: 100% of individual permits and 25% of GPs**
 - **Year 2: 50% of individual permits and 20% of GPs**
 - **Year 3: 25% of individual permits and 15% of GPs**
 - **Year 4+: 20% of individual permits and 10% of GPs**
- **Allows for upward adjustments (if deemed necessary by SLERC or upon request by EPA)**
- **Minimums can not be decreased below 20% of individual permits and 10% of GPs**



Levels of Service – 2

- **“Any inspection conducted prior to commencement of permitted activities shall not count toward satisfaction of these requirements.”**
- **LOS also requires inspection of all 404 projects designated “High Risk”**
 - **Applies to both permit compliance and enforcement projects**
 - **Must be inspected during active construction**



Unauthorized Activities (Complaints)

- **All potential 404 violations reported to DEP must be entered into the statewide database and tracked until resolution**
 - i.e., all complaints have to be tracked in ERPce
- **To satisfy 40 C.F.R. § 233.41(e)(2)(i), the Department will “investigate and provide written responses to all citizen complaints”**
 - If a complainant specifically requests to remain anonymous, we can provide an option to “opt out” of receiving a written response



Complaint Review

Prior to Inspection

- **Minimum pre-inspection investigation of a reported violation should include review of:**
 - **Regulatory history for the site, property owner, and other alleged responsible parties (e.g., contractors);**
 - **Current and historic aerial imagery;**
 - **Soil surveys; and**
 - **Other available physical or environmental data**
- **“Timing of investigations will reflect the nature and location of the suspected violations, the anticipated impacts, and the most effective use of inspection resources available.”**
- **Any reported 404 violations determined to be located within retained waters will be referred to the USACE**



Complaint Review – 2

Field Investigation

- **At a minimum, field investigation of a potential 404 violation will determine whether:**
 - 1. the site falls within the jurisdiction of the State's wetland regulatory programs; and**
 - 2. an unauthorized regulated activity has occurred or is occurring**
- **A report of a potential 404 violation will also generally be investigated as a potential ERP violation (and vice versa)**
- **If a 404 violation is confirmed, the field investigation will also identify the full extent of the violation and the parties responsible**



Jurisdictional Determinations

- **All field investigations will include verification of the landward extent of wetlands and other surface waters in accordance with Chapter 62-340, F.A.C.**
 - Even if the site is entirely uplands
- **When necessary, jurisdiction determined using 40 C.F.R. Part 120 (new WOTUS rule effective 6/22/2020)**
- **Jurisdictional determinations documented using the Chapter 62-340, F.A.C., Data Form and as described in Section 7.1 of AH Vol. I**



Field Inspections & Documentation

- **“Where jurisdiction has been established, the investigator will document the conditions of the site as necessary to demonstrate whether or not violations of the ERP or State 404 Programs have occurred or are occurring”**
- **If a violation exists, the investigation findings are documented in an inspection report “containing sufficient evidence to prove the elements of the violation”**



Recall: Elements of a 404 Violation

The elements of a CWA Section 404 violation are:

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“...the conveyance of dredged or fill material by mechanized earthmoving equipment constitutes a “point source” within the meaning of the Act.” See 33 U.S.C. § 1362(14)
- 4. By a Person**

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- 5. Without Authorization (or Exemption)**



Field Inspections & Documentation – 2

- **At a minimum, the inspection report should:**
 - a) establish jurisdiction;**
 - b) provide a detailed description of the illegal activity, including the location and date of the violation, the persons responsible, and the cause of the violation; and**
 - c) provide a detailed description of the existing environmental conditions at the site**
- **“To the greatest extent practicable, field investigations will be conducted and documented in a manner that is sufficiently thorough to prevent the need for follow-up inspection(s).”
[PD Section (g), pg. 5]**



Permit & Unauthorized Activity Violations

- **All violations documented immediately upon discovery**
- **Promptly issue a written notice of non-compliance (e.g., Compliance Assistance Offer, Warning Letter, etc.) to the permittee or responsible party that:**
 - **advises the recipient to immediately cease the unauthorized activities;**
 - **presents possible options for resolution; and**
 - **establishes deadlines for response**
- **The notice “will be issued to all related responsible parties and documented as necessary to ensure that the State maintains accurate records that facilitate identification of repeat violators”**
- **If necessary, a permit may be suspended or revoked, per section 373.429, F.S.**



Post-Discovery Procedures

Compliance Assistance

Enforcement

Civil Penalties

Settlements

Corrective Actions



Compliance Assistance

Compliance assistance is generally recommended when:

- 1. the corrective actions required to bring an activity into compliance are not complicated;**
- 2. the responsible party does not have a history of non-compliance; and**
- 3. penalties are not warranted**

EXAMPLE: An inspector identifies a small dredge and fill violation in a residential backyard. If the owner did not know about the permit requirement, and agrees to restore the area quickly, the case can potentially be resolved without the need for more formal enforcement.



Enforcement Authority

Section 373.129(7), F.S., authorizes enforcement of the State 404 Program in the same manner and to the same extent as provided in sections 373.430, 403.121(1) and (2), 403.131, 403.141, and 403.161, F.S.

- **Same enforcement authority as ERP**



Enforcement Options

Available remedies include:

- **Judicial (civil) actions per section 403.121(1), F.S., to recover damages and impose civil penalties up to \$15,000 per offense (for which each day constitutes a separate offense);**
- **Administrative proceedings initiated per section 403.121(2), F.S., to recover damages, order abatement/control of the violation or other appropriate corrective action, and assess penalties up to \$50,000;**
- **Injunctive relief pursuant to section 403.131, F.S.; or**
- **Criminal provisions [sections 403.161, and 373.430, F.S.] enforced by the Office of the State Attorney**



Civil Penalties

- **Base penalties calculated using either:**
 - **the Environmental Litigation Reform Act (ELRA) administrative penalty schedule [section 403.121, F.S., as amended], or**
 - **the updated ERP Penalty Matrix**
- **In ELRA, apply the same (3)(c) “dredge and fill” penalties**
- **Apply DEP Directive 923 guidance re: multi-day penalties, adjustment factors, in-kind penalties and pollution prevention projects**
- **Penalty calculations must be documented for all 404 enforcement cases**



404 Penalty Matrix

The Penalty Calculation Matrix below will be used for the State 404 Program:

ENVIRONMENTAL HARM	EXTENT OF DEVIATION FROM REQUIREMENT			
		MAJOR	MODERATE	MINOR
	MAJOR	\$15,000 to \$12,000	\$11,999 to \$9,000	\$8,999 to \$6,900
	MODERATE	\$6,899 to \$4,800	\$4,799 to \$3,000	\$2,999 to \$1,800
	MINOR	\$1,799 to \$750	\$750 ¹⁾	\$750 ¹⁾

1)– Environmental Education may be an acceptable substitute.



Settlements

- **When formal enforcement is necessary, the Department will attempt to negotiate a consent order when appropriate**
- **An acceptable State 404 Program settlement will generally include either:**
 - **Complete physical and ecological restoration of the regulated features on the site, or**
 - **Partial restoration and a permit authorization for any unauthorized discharges which will be allowed to remain**
- **Most cases will also require the violator to pay a civil penalty**



Corrective Actions

- **Corrective actions shall be required via enforceable conditions of a binding settlement or enforcement action**
- **Typical restoration requirements for a 404 violation may include:**
 - **fill removal, restoration of pre-violation elevations and contours (which may require topographic surveys), and replanting;**
 - **maintenance work including exotic species control; and**
 - **monitoring and reporting to ensure that the restoration trends toward and achieves success as expected**
- **When necessary, a violator may also be required to provide mitigation needed to offset temporal loss of ecological function**



Corrective Actions – 2

Complete vs. Partial Restoration

- **In determining whether to seek complete restoration, consider whether:**
 - **the unauthorized discharge in question meets the criteria for authorization under the State 404 Program; and**
 - **the restoration is achievable in a practical manner**
- **If the unauthorized discharges would not qualify for a State 404 Program permit, the Department should seek complete restoration except in the limited circumstances discussed in the following slides**



Corrective Actions – 3

Preference for Complete Restoration

“Complete restoration is almost always preferable to partial restoration and/or compensatory mitigation [because] complete restoration not only replaces the lost functions and values provided by the impacted water resources, but also maintains a level playing field within the regulated community by ensuring that all discharges are evaluated using the same guidelines.”



Corrective Actions – 4

Restoration vs. Mitigation

The Department may consider accepting compensatory mitigation in lieu of restoration in the following circumstances:

- 1. Where effective or meaningful ecological restoration is not possible or restoration activities are expected to cause substantial ecological harm (e.g., unacceptable impacts to critical habitat for threatened or endangered species);**
- 2. Where restoration is not practicable (e.g., when, due to the nature of the violation, the system is not expected to return to the functional equivalent as the system prior to the discharge); and/or**
- 3. Where the property is now owned by a good-faith purchaser (who was not aware of the violation and/or did not benefit from the action) and the equities strongly favor allowing the new owner to retain the fill**



Corrective Actions – 5

Restoration vs. Mitigation cont.

- **“These determinations will be made on a case-by-case basis with adequate consideration of all the relevant facts and circumstances of the case and must be documented in the Department’s enforcement file.”**
 - If complete restoration is not required, must complete a technical staff report (TSR)
- **“Where unauthorized discharges are allowed to remain in place, the Department should assess penalties which prevent violators from gaining a competitive advantage over entities that do not violate the law and which are sufficient to deter future non-compliance with the State 404 Program permitting procedures.”**



Additional Procedures

Post-Enforcement Permitting
Public Participation
Coordination
Consistency Initiatives



Post-Enforcement Permitting

- **If any unauthorized discharges are allowed to remain in place, the material must be authorized through a State 404 Program individual permit**
 - Referred to as an “after-the-fact” permit in EPA/USACE MOAs, but the Department will not use the same terminology; see PD Section (g)
- **Corrective action requirements will be imposed exclusively through the preceding enforcement process**
- **A post-enforcement permit shall not be approved “until resolution has been reached through an appropriate enforcement response and all administrative, legal and/or corrective action has been completed”**



Public Participation

- **The Department has committed to provide for public participation in the State 404 Program enforcement process pursuant to 40 C.F.R. § 233.41(e)(2)**
- **Three components:**
 - 1. The Department will investigate and provide written responses* to all citizen complaints submitted pursuant to State procedures [40 C.F.R. § 233.41(e)(2)(i)]**

**As described previously, upon specific request by a complainant the Department will provide the option to “opt out” of receiving a written response.*



Public Participation – 2

- 2. The Department will not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation [40 C.F.R. § 233.41(e)(2)(ii)]**
- 3. The Department will publish notice of and provide at least 30 days for public comment on any proposed settlement of a State 404 Program enforcement action [40 C.F.R. § 233.41(e)(2)(iii)]**



Federal Coordination

- **State 404 Program compliance & enforcement will be coordinated with EPA and USACE as outlined in the respective MOAs**
- **USACE/State MOA, Section VII.D.:**

“... If there is an unusual circumstance concerning an Ongoing Enforcement Action, the parties to this Agreement may discuss DEP taking the lead. For those instances where the Corps, on its own or in coordination with EPA or the United States Department of Justice, resolves an Ongoing Enforcement Action, the Corps will consult with DEP as practicable, and will provide DEP a copy of any consent decree or settlement agreement. DEP will be responsible for issuing any after-the-fact permit for the discharge of dredged or fill material.”



Federal Coordination – 2

EPA Oversight

- **EPA/State MOA, Section III.C.:**

“FDEP shall notify EPA of the status of compliance and enforcement actions through submission of an annual report described in Section IV.B. of this Agreement.”

- **EPA/State MOA, Section III.D.:**

“EPA may request the opportunity to review any compliance and enforcement record. FDEP shall provide to EPA a copy of the file when requested. Claims of confidentiality for such information shall be governed by 40 C.F.R. § 233.3.”



Federal Coordination – 3

EPA Oversight cont.

- **EPA/State MOA, Section III.E.:**

“FDEP shall coordinate with EPA when a violation is identified that is within the permit and discharge categories in Section II.B.(1) of this Agreement. FDEP shall provide a summary of the unauthorized activity and inform EPA of the status of the file as enforcement actions are taken, including any decision to accept an after-the-fact permit application. In the event that an after-the-fact permit application is accepted, FDEP shall follow the permit review procedures set forth in this Agreement, the CWA and its implementing regulations.”



Federal Coordination – 4

EPA Oversight cont.

- **EPA/State MOA, Section III.H.:**

“If FDEP proposes to resolve a compliance or enforcement issue through a consent agreement (administrative or judicial), and where the impact of the violation is such that federal review would not be waived as described in Section II.B.(1) of this Agreement, FDEP shall provide EPA 30 days to review and comment on the draft consent agreement prior to signature. If EPA objects to a provision of the draft consent agreement, the executed consent agreement implementing that provision shall not constitute authorization under Section 404 of the CWA. FDEP shall provide a copy of the executed consent agreement and any after-the-fact State 404 permits to EPA.”



Federal Coordination – 5

Referral to EPA

- **EPA/State MOA, Section III.F.:**

“FDEP may refer information regarding possible or alleged violations to EPA and may request that EPA consider initiating a parallel or independent enforcement action. Such circumstances include, but are not limited to:

- 1) Violations that have or have a reasonable potential to have direct impacts on waters of a tribe or another state;**
- 2) Major or repeat offenses; and**
- 3) Violations that have, or will potentially have, major adverse resource impacts or impacts on special federal resources, such as federally listed threatened or endangered species.”**



Federal Coordination – 6

EPA Enforcement Action

- **EPA/State MOA, Section III.G.:**
 - “EPA may initiate independent or parallel enforcement actions in accordance with Sections 309 and 404(n) of the CWA.”
- **EPA/State MOA, Section III.J.:**
 - “Prior to proceeding with federal enforcement action against a possible or alleged State 404 Permit Program permit violator or unauthorized discharge, and for purposes of providing notice only, EPA shall inform FDEP (specifically to the Secretary of FDEP or his/her designee) that federal enforcement action is to be initiated. It is expected that preliminary staff discussions will take place between EPA and FDEP representatives before initiation of federal enforcement actions.”



Other Coordination

- **The U.S. Fish and Wildlife Service (USFWS)/Florida Fish and Wildlife Conservation Commission (FWC)**
- **State Historic Preservation Office (SHPO)**
- **Adjacent states & tribes**
 - **EPA/State MOA, Section III.K.: “When a violation is identified that may affect the waters of tribes and/or other states, FDEP shall provide a summary of the violation and inform the tribes and/or other states of the status of the file as enforcement actions are taken, including any decision to accept an after-the-fact permit application.”**
- **Water Management Districts (WMDs)**



Consistency

Peer Review

- **All proposed State 404 Program formal enforcement actions will be subject to Peer Review by SLERC and the Division**
- **Ensures consistency in enforcement actions statewide**
- **Focus on draft penalty calculations, rule references, and corrective action requirements**



Consistency – 2

Division Audits

State 404 Program compliance & enforcement activities will also be subject to audit review by SLERC. At a minimum, SLERC will audit 10% of compliance projects for which a violation is discovered plus a minimum percentage of enforcement actions according to the following sliding scale:

- **Year 1: Audit review of 50% of enforcement actions**
- **Year 2: Audit review of 25% of enforcement actions**
- **Year 3+: Audit review of 20% of enforcement actions**



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