(g) Description of the State's Compliance Evaluation and Enforcement Programs
(Required by 40 C.F.R. § 233.11(g))

Purpose of Section (g)

The purpose of Section (g) is to provide the information required in 40 C.F.R. § 233.11(g), which states: *"The program description as required under § 233.10 shall include: (g) A description of the State's compliance evaluation and enforcement programs, including a description of how the State will coordinate its enforcement strategy with that of the Corps and EPA".*

I. Compliance & Enforcement Program Overview

Compliance evaluation and enforcement of the State 404 Program will be implemented through the Department's six regulatory district offices, with each district responsible for projects located within its respective administrative boundaries (see sections (a) and (c) of the program description). The districts' day-to-day compliance and enforcement activities for all programs are supervised by the Assistant District Directors, while legal enforcement support is provided by the Office of General Counsel.

Program-specific support for State 404 Program compliance and enforcement will be provided by the Division of Water Resource Management and the Submerged Lands and Environmental Resources Coordination (SLERC) Program. SLERC will be responsible for ensuring statewide consistency in implementation of the State 404 Program. SLERC staff will provide rule interpretation, guidance, and training, and will be responsible for reviewing and auditing district-level activities for consistency with overall program enforcement objectives (see section (c) of the program description).

Compliance and Enforcement Strategy

When appropriate, the Department attempts to resolve certain minor violations informally through compliance assistance. As described under Section IV, below, an initial compliance assistance approach is generally recommended when the corrective actions required to bring the activity into compliance are not complicated, the responsible party does not have a history of non-compliance, and penalties are not appropriate. For more significant violations, or those that cannot be resolved informally, the State employs a combination of the authorities listed under Section V below to address civil, administrative, and criminal actions.

II. Permit Compliance

All State 404 Program individual permits and general permit verifications will be forwarded to district compliance staff for review. Compliance evaluation and review responsibilities include reviewing the issued permit; creating compliance tracking database records; scheduling, conducting, and documenting compliance evaluations; tracking required submittals; and managing documentation and maintaining database records for the project.

The districts will take reasonable measures to inspect permitted activities during active construction to ensure compliance with permit terms and conditions. Individual permit recipients will be required (per 62-330.350(1)(d), F.A.C. via 62-331.054(1), F.A.C.) to notify the Department at least 48 hours prior to commencement of construction of a permitted project, which will allow review to confirm that pre-construction conditions have been met as required and will facilitate compliance monitoring during active construction.

Timing of investigations will be commensurate with agency resources and potential environmental damage. Permit compliance inspections will be prioritized based on project-specific considerations such as compensatory mitigation requirements, regional areas of concern, potential to affect threatened and endangered species, historic properties, or other factors that the district considers important. The districts will also prioritize inspection of projects for which it has received reports of suspected permit violations.

The districts will be responsible for meeting minimum inspection requirements as outlined below.

Minimum Inspection Responsibilities

The Department will annually inspect a minimum percentage of all State 404 Program permitted activities according to the following sliding scale (subject to adjustments and limiting provisions described below):

- Year 1: Inspection of 100% of individual permits and 25% of general permits
- Year 2: Inspection of 50% of individual permits and 20% of general permits
- Year 3: Inspection of 25% of individual permits and 15% of general permits
- Year 4+: Inspection of 20% of individual permits and 10% of general permits

Upward adjustments of the above minimum annual inspection rates will be implemented as deemed necessary by SLERC or upon request by EPA. Minimum annual inspection rates may not be decreased below 20% of individual permits and 10% of general permits. Any inspection conducted prior to commencement of permitted activities shall not count toward satisfaction of these requirements.

In addition to satisfying the above minimum annual inspection rates, the districts will inspect all State 404 Program projects designated as "High Risk" during active construction. Permit compliance projects may be automatically assigned a High Risk designation based on the type/scope of authorized activity or the size of the project area. Staff may also manually designate any compliance or enforcement project High Risk for one of two reasons:

(1) Proximity, which captures proximity to sensitive resources, potential for environmental harm or water quality violations, and/or heightened public concern; or
(2) History, which captures a history of significant non-compliance.

Permit Violations

If permit violations are identified, the permittee will be advised to immediately stop all activities in violation until compliance is restored. Permit violations will be documented according to the same standards for documenting unauthorized activity violations, as described under Section III, below.

When appropriate, the district may attempt to resolve permit violations through informal compliance assistance as described under Section IV, below. However, if compliance is not readily achieved through compliance assistance, or if compliance assistance is not appropriate, the permit may be suspended or revoked per 373.429, F.S., and enforcement is pursued as described under Section V, below.

III. Unauthorized Activities

The Department responds to reports of potential violations from federal, state and local officials, as well as from the general public. When a possible violation is reported, district staff will work with the complainant to gather as much relevant information as possible concerning the condition of the site, the status of the activity, and the parties responsible for the alleged violation. All potential violations of the State 404 Program reported to the Department will be entered into a statewide database and tracked until resolution.

The Department will investigate and provide written responses to all citizen complaints submitted pursuant to State procedures in accordance with 40 C.F.R. § 233.41(e)(2)(i) and as described further under Section V, below.

Prior to onsite inspection, preliminary review of a reported violation is conducted in order to inform and prioritize investigations. At a minimum, pre-inspection research should include review of permitting and enforcement records for the subject site, the owner of record, and any other alleged responsible parties identified by the complainant. Preliminary evaluation will also include review of current and historic aerial imagery, soil surveys, and other available physical or environmental data. Based on the findings of the preliminary research, a field inspection will be scheduled as needed. 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 State 404 Program violations determined to be located within retained waters will be referred to the U.S. Army Corps of Engineers.

Field Investigation and Documentation

Field investigation of a potential State 404 Program violation involving an unauthorized regulated activity will include a determination regarding whether the site falls within the jurisdiction of the State's wetland regulatory programs and whether an unauthorized regulated activity has occurred or is occurring. Generally speaking, a report of a potential State 404 Program violation will also be investigated as a potential violation of the ERP Program, and vice versa. When the inspection confirms that a violation exists, the field investigation will also identify the extent of the violation and the parties responsible.

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., and the Department will also review the wetlands and other surface waters to determine if they are Waters of the United States as needed (see section (a) of the program description). Jurisdictional determinations will be documented using the Chapter 62-340, F.A.C., Data Form, Form 62-330.201(1), incorporated by reference in subsection 62-330.201(1), F.A.C. and as described in Section 7.1 of the ERP Applicant's Handbook, Volume I (62-331.010(3), F.A.C.).

When jurisdiction has been established, the investigator will document the condition 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 findings of the investigation will be documented in an inspection report containing sufficient evidence to prove the elements of the violation. The report should, at a minimum: (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).

Unauthorized Activity Violations

Upon documenting that an unauthorized regulated activity has occurred, the district will immediately issue written notification to the responsible party or parties advising that the violator(s) immediately cease the unauthorized activities, presenting possible options for resolution, and establishing deadlines for response.

When compliance assistance as described under Section IV, below, is an appropriate initial approach, preliminary notification of a violation may be provided as an informal compliance assistance offer. For more significant violations, proceeding directly to formal enforcement as described under Section V, below, by issuing a Warning Letter or Notice of Violation may be the appropriate first step.

IV. Compliance Assistance

When appropriate, the Department will attempt to resolve minor violations of the State 404 Program through informal compliance assistance. Compliance assistance is generally recommended when the corrective actions required to bring an activity into compliance are not complicated, the responsible party does not have a history of non-compliance, and penalties are not warranted. For example, if the inspector identifies a small dredge and fill violation in a residential backyard, the owner did not know about the requirement for a permit, and the owner agrees to restore the area quickly, the case can potentially be resolved without the need for more formal enforcement.

If the Department determines that compliance assistance is appropriate, an initial verbal compliance assistance offer may be provided onsite. The Department will subsequently issue a written notice of non-compliance that presents options for resolution of the violation and establishes deadlines for response or corrective action. The notice of non-compliance will be issued to all related responsible parties and documented by the Department as necessary to ensure that the State maintains accurate records that facilitate identification of repeat violators.

Although the notice of non-compliance establishes deadlines for action by the violator, the Department maintains open lines of communication in an attempt to expeditiously resolve the violation through voluntary corrective actions. If communications break down or if it appears that the violator has not taken appropriate steps to resolve the violation, the Department may also issue a Warning Letter prior to initiating formal enforcement. Enforcement will be pursued as described under Section V, below, if the violation is not readily resolved through compliance assistance.

V. Enforcement

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. Available remedies include:

- Judicial (civil) actions instituted in a court of competent jurisdiction pursuant to 403.121(1), F.S., to:
    - recover damages for injury to air, waters, or property, including plants, animals and aquatic life;
    - impose civil penalties up to $15,000 per offense (for which each day constitutes a separate offense);
- Administrative proceedings initiated per 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, depending on the type and extent of violation;
- Injunctive relief pursuant to 403.131, F.S.; or
- Criminal provisions (403.161 and 373.430, F.S.) enforced by the Office of the State Attorney.

Resolution of a violation through formal enforcement is pursued with the assistance of the Department's Office of General Counsel. Most violations are resolved by means of civil or administrative procedures, with criminal actions pursued only in the most serious cases or in cases that cannot be resolved through other available avenues and for which criminal sanctions are provided. The formal administrative enforcement process is typically initiated by serving a Notice of Violation and is finalized through entry of a Consent Order or Final Order.

Settlements

When formal enforcement is necessary, the Department will attempt to negotiate a consent order to resolve all issues, including recovery of civil penalties, whenever possible and appropriate, before issuing a Notice of Violation or filing a judicial complaint. In accordance with 40 C.F.R. § 233.41(e)(2)(iii), 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 (as addressed under "Public Participation," below).

It is the policy of the Department to avoid permanent environmental harm caused by a violator's activities by requiring remedial actions or ordering removal and restoration. Typical requirements for restoration of a wetland dredge and fill violation may include: fill removal, restoration of pre-violation elevations and contours (which may require submittal of 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 settlement agreement may require the violator to also provide mitigation needed to offset temporal loss of ecological function.

An acceptable State 404 Program settlement will generally include complete physical and ecological restoration of the regulated features on the site, or partial restoration and permit authorization for any unauthorized discharges which will be allowed to remain. The majority of cases will also require the violator to pay a civil penalty.

Corrective Actions
In cases involving unauthorized discharges of dredged or fill material which would not qualify for a State 404 Program permit, the Department should seek complete restoration except in limited circumstances as discussed in this section.

In determining whether to seek complete restoration, the Department will consider whether the unauthorized discharge in question meets the criteria for authorization under the State 404 Program, and whether the restoration is achievable in a practical manner. In cases where the project does not satisfy the requirements of the State 404 Program, complete restoration is almost always preferable to partial restoration and/or compensatory mitigation. This is 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.

The Department may consider accepting compensatory mitigation in lieu of seeking on-site restoration in the following circumstances:

(1) where effective or meaningful ecological restoration is not possible or when restoration activities are expected to cause substantial ecological harm (e.g., unacceptable impacts to Critical Habitat for Threatened or Endangered Species),
(2) when 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
(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.

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.

In those cases where complete restoration is not appropriate and the violator is required to conduct partial restoration and/or provide compensatory mitigation, such restoration and mitigation activities shall be imposed as an enforceable requirement of a binding enforcement or settlement action. 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.

Post-Enforcement Permitting

In the limited circumstances when unauthorized discharges are allowed by the Department to remain in place, that material will be authorized through a State 404 Program individual permit. No such permit shall be approved until resolution has been reached through an appropriate enforcement response and all administrative, legal and/or corrective action has been completed.

Although this post-enforcement permit will be issued "after-the-fact" in the sense that it will follow an enforcement resolution, the Department will avoid explicitly referring to any State 404 Permit as "after-the-fact." This slight difference in terminology allows the Department to maintain consistency with the closely associated ERP Program and prevent misunderstanding by the regulated public. Specifically, the Department's goal is to counter the common misconception that it is acceptable and appropriate to conduct a regulated activity without first obtaining authorization.

If any corrective actions are necessary to render an unauthorized discharge permissible under the State 404 Program, any formal requirements for such corrective actions will be imposed exclusively through the enforcement process. The final settlement agreement should ensure that adequate mitigation takes place to compensate for the impacts of those existing unauthorized discharges that are to remain.

Civil Penalty Assessment

The Environmental Litigation Reform Act (ELRA) was amended in 2020 to authorize the Department to impose up to a total of $50,000 in civil penalties in an administrative action instituted pursuant to Section 403.121(2), F.S.

Civil penalty assessments can be calculated using the ELRA administrative penalty schedule or according to the Penalty Matrix, as described below. Guidance for assessing penalties under each of these options is provided by DEP Directive 923 (Attachment (g)-1) as well as program specific guidelines for characterizing certain types of violations and determining appropriate penalties.

ELRA Administrative Penalty Schedule

ELRA establishes an administrative penalty schedule to provide a more predictable and efficient manner for individuals and businesses to resolve relatively minor environmental disputes. For violations of the State 404 Program, including unauthorized dredge and fill violations affecting up to one acre, administrative penalties may be calculated using the ELRA penalties provided in Sections 403.121(3)(c), (4), and (5), F.S., which are transcribed in Table (g)-1, below.

Table (g)-1: ELRA penalties applicable to the State 404 Program.

Violation (Statutory Language)	Base Penalty	Cite (F.S.)
Unpermitted/unauthorized dredging/filling or unauthorized construction of a stormwater management system	$1,500	403.121(3)(c)
Add-0n 1 – If the dredging/filling occurs in an aquatic preserve, OFW, conservation easement, or Class I or II surface water	+ $3,000	
Add-0n 2 – If the area dredged or filled is greater than 0.25 acre but less than or equal to 0.50 acre	+ $1,500	
Add-0n 3 – If the area dredged or filled is greater than 0.50 acre but less than or equal to 1.0 acre (add $1,500 for *Add-On 2* and an additional $1,500 for *Add-On 3*)	+ $1,500	
Failure to complete required mitigation, failure to record a required conservation easement, or for a water quality violation resulting from dredging/filling activities, stormwater construction activities or failure of a stormwater treatment facility	$4,500	403.121(3)(c)
Failure to properly or timely construct a stormwater management system serving less than 5 acres	$3,000	403.121(3)(c)
Contractors and/or agents that conduct unpermitted or unauthorized dredging or filling shall be assessed a penalty per violation	$7,500	403.121(3)(c)
Failure to satisfy financial responsibility requirements	$7,500	403.121(4)(a)
Failure to install, maintain, or use a required pollution control system or device	$6,000	403.121(4)(b)
Failure to obtain a required permit before construction or modification	$4,500	403.121(4)(c)
Failure to conduct required monitoring or testing	$3,000	403.121(4)(d)
Failure to construct in compliance with a permit	$3,000	403.121(4)(d)
Failure to conduct required training	$1,500	403.121(4)(e)
Failure to prepare, maintain, or update required contingency plans	$1,500	403.121(4)(e)
Failure to submit required notification to the Department	$1,500	403.121(4)(e)
Failure to prepare, submit, maintain, or use required reports or other required documentation	$750	403.121(4)(f)
Failure to comply with any other Departmental regulatory statute or rule requirement	$1,000	403.121(5)

Penalty Calculation Matrix for ERP and State 404 Program Violations

The Department's Penalty Calculation Matrix for the ERP and State 404 Programs, reproduced as Table (g)-2, below, is used to calculate civil penalties for dredge and fill violations affecting over one acre or that otherwise exceed the limitations of the ELRA penalty schedule, or when penalties are pursued via a judicial complaint.

Table (g)-2: Penalty Calculation Matrix for the ERP and State 404 Programs.

		EXTENT OF DEVIATION FROM REQUIREMENT		
ENVIRONMENTAL HARM		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.

The attached document "Guidelines for Characterizing ERP Violations" (Attachment (g)-2) provides program-specific guidance for characterizing violations by Environmental Harm and Extent of Deviation. (Please note that the attached version of said document is pending revisions to the listed statutory penalty amounts to reflect changes effective July 1, 2020.) The guidelines for characterizing the Environmental Harm and Extent of Deviation (starting at page 3) of an ERP violation will also be applied to characterize violations of the State 404 Program, as applicable. Note that for the purposes of determining Extent of Deviation, mitigation shall not be considered a "modification." If the violation requires mitigation to offset impacts, then the Extent of Deviation is Major.

Multi-Day Penalties and Adjustment Factors

When evaluating an enforcement case, the Department carefully considers the circumstances surrounding the case to determine which factors either contributed to or mitigated the violation(s). Such factors may then be used to adjust the penalty amount upward or downward as appropriate and can be applied under both ELRA and the Penalty Matrix.

DEP Directive 923 discusses when and how to assess multi-day penalties as authorized by Section 403.121(6), F.S., and provides guidance for applying various penalty adjustment factors. These factors include:

- Knowing, deliberate, or chronic violations;
- Good faith efforts to comply (or lack of good faith efforts to comply) either prior to or after discovery of the violation by the Department;
- History of noncompliance;
- Economic benefit of noncompliance;
- Ability to pay; and
- Other unique factors.

Specific statutory provisions for penalty adjustments based on history of noncompliance and economic benefit gained from a violation are also described under Sections 403.121(7) and (8), F.S., respectively. Pursuant to Section 403.121(9), F.S., the total administrative penalties assessed for a violation may not exceed $10,000 against any one violator, unless the violator has a history of noncompliance, the economic benefit of the violation exceeds $10,000, or there are multiday violations.

In-Kind Penalties and Pollution Prevention Projects

The Department may approve In-Kind Penalties and Pollution Prevention Projects in lieu of a cash penalty. In-Kind Penalties and Pollution Prevention Projects are assessed at 1.5 times the amount of the penalty if paid in cash and should be considered as provided in DEP Directive 923.

Appeals & Public Participation

The Department's initial document(s) used to institute an administrative enforcement proceeding state its understanding of the facts, conclusions of law, and proper remedies in a particular case. Under the Administrative Procedures Act (Chapter 120, F.S.), a person who is substantially affected by the Department's decisions in these documents has a right to contest the findings and decisions pursuant to Section 403.121(2)(h), F.S.

Public Participation

The Department will provide for public participation in the State 404 Permit Program enforcement process pursuant to 40 C.F.R. § 233.41(e)(2).

In order to satisfy 40 C.F.R. § 233.41(e)(2)(i), the Department will investigate and provide written responses to all citizen complaints submitted pursuant to State procedures as described under Section III, above. However, many complaints reported to the Department are received by callers wishing to remain anonymous. In order to accommodate these complainants, upon request by the caller the Department will provide the option to "opt out" of receiving a written response to their complaint.

As required by 40 C.F.R. § 233.41(e)(2)(ii), the Department will not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation.

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 in accordance with 40 C.F.R. § 233.41(e)(2)(iii). The public noticing will be conducted in accordance with the applicable provisions of Rule 62-331.060(1), F.A.C., as described further at section (b) of the program description.

VI. Coordination and Consistency

Enforcement of the State 404 Program will be coordinated with EPA and the Corps as outlined in each agency's respective memorandum of agreement with the State (see sections 233.13 and 233.14 of this package). The Department will make available without restriction any information obtained or used in the enforcement of the State 404 Program to EPA upon request.

Consistency Initiatives

In order to promote consistency in enforcement of the State 404 Program, all proposed formal enforcement actions will be subject to peer review by SLERC and the Division of Water Resource Management. The peer review process provides for an independent assessment conducted by experts at the Division that is intended to ensure statewide consistency of enforcement actions, satisfy federal requirements under the state review framework, and serve as a check point on the draft penalty calculations and rule references. Division staff will provide comments to the district including any recommendations to improve the quality and consistency of the proposed enforcement actions.

State 404 Program compliance evaluation and enforcement activities conducted at the district level will also be subject to SLERC audit review. At a minimum, SLERC will conduct audit review of 10% of compliance projects for which a violation is discovered plus a minimum percentage of formal enforcement actions according to the following sliding scale:

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

SLERC may conduct additional audits at the discretion of the program, but minimum audit rates may not be decreased below 20% of enforcement actions and 10% of compliance projects for which a violation was discovered. Potential audit projects may be selected or prioritized based on High Risk designation, identification of a violation classified as "significant noncompliance," acreage of a subject violation, or factors corresponding to project significance.

Annual reports submitted to the EPA will describe any concerns identified through these consistency initiatives and provide recommendations for their resolution, as required by 40 C.F.R. § 233.52(b).