



Everglades
Law Center, Inc.

Defending Florida's Ecosystems and Communities



Sustainable
PALM BEACH COUNTY

November 2, 2020

Mr. Kelly Laycock
US EPA, Region 4
Water Management Division
61 Forsyth Street, SW
Atlanta, GA 30303
Via email: 404Assumption-FL@epa.gov

Re: Comments on Florida's Request to Assume Administration of a Clean Water Act Section 404 Program, Docket ID No. EPA-HQ-OW-2018-0640

Dear Mr. Laycock:

On behalf of the Everglades Law Center, the National Parks Conservation Association, and Sustainable Palm Beach County, we are submitting these comments to your office regarding the Florida Department of Environmental Protection's ("FDEP") request to assume administration of the Clean Water Act ("CWA") Section 404 Program. Many other comments that have been submitted to your office as part of this public comment process highlight myriad issues related to inadequate staffing, funding, and the specifics of Florida's proposed assumption package, especially related to inadequate implementation of federal Endangered Species Act protections. Our comments seek to build on those broader comments. We focus on specific instances in which the federal CWA Section 404 Program, together with required National Environmental Policy Act ("NEPA") analyses, have been critical to protecting the Everglades ecosystem. We emphasize that our specific experience as part of our work related to Everglades restoration has highlighted how a *federal* Section 404 Program, in concert with NEPA processes, has mattered (1) because of the specific requirements of NEPA, (2) because of the public decision-making processes that NEPA enables, and (3) because of critical expert federal oversight of state-led projects with significant environmental impacts.

In short, FDEP's current CWA Section 404 Program assumption proposal offers no requirements for analyses or public engagement processes that mirror those that are currently required by NEPA when the U.S. Army Corps of Engineers ("Corps") issues Section 404 permits. NEPA compliance has been a critical component of the federal implementation of the Section 404 Program over the past several decades in Florida, particularly when very large and ecologically destructive projects are proposed and reviewed by the federal agencies. NEPA has also been critical in ensuring the public's involvement with review and input on proposed large development projects that trigger NEPA reviews and preparation of Environmental Impact Statements ("EISs"). The absence of these protections and public engagement processes in Florida's proposal is deeply concerning.

Everglades Restoration and Florida's National Parks

FDEP's application is especially alarming given the potential loss of critical federal oversight over impacts to Everglades restoration and to Florida's national parks and surrounding ecosystems. The federal government is a partner to the world's largest ecosystem restoration project, Everglades restoration, authorized by Congress under the Comprehensive Everglades Restoration Plan ("CERP") in 2000. Since then, the federal government has made extraordinary investments in Everglades restoration and has authorized 404 permits only after undertaking all necessary NEPA analysis. There is a need to ensure that the many benefits of Everglades restoration and the extensive investments made are not undermined by inadequate oversight of permits impacting wetlands and waters across the region.

Furthermore, the Greater Everglades ecosystem protects the largest subtropical wilderness in the United States and its habitats protect more than 200 state and federally listed threatened and endangered species. Three national park units anchor the Greater Everglades ecosystem: from west to east they are Big Cypress National Preserve, Everglades National Park and Biscayne National Park. Combined, these national park units protect nearly 2.5 million acres including expansive wetlands that are part of Florida's iconic "River of Grass." Numerous other federal, state, and municipal protected wetlands (*e.g.*, Wildlife Refuges, State Parks, Water Conservation Areas, protected Environmentally Endangered Lands) are knitted between and around these national park sites, and thus management and permitting decisions made both within the park units themselves and in the lands surrounding them all have direct effects on the these sites. Federal oversight of the CWA Section 404 Program has ensured robust stakeholder engagement in many decisions and plans affecting Florida's wetlands and thus the national parks that anchor the Greater Everglades ecosystem.

As administration of the Section 404 Program stands, it is administered by the Corps and proposed federal actions/decisions trigger NEPA which in turn helps ensure the highest level possible of public engagement and environmental analyses are undertaken during the review and permitting processes. On the contrary, if Florida assumes Section 404 responsibilities, it is

unlikely that the strict level of public engagement nor robust environmental analyses as required by NEPA would be triggered, as the State's actions may not constitute federal actions. Florida's national park sites, and indeed the entire Greater Everglades ecosystem, deserves the highest level of protection, public accountability, and science-based decision making to ensure their integrity into the future. Administration of the Section 404 Program should therefore remain within the federal government's oversight.

The Scripps Project

As noted above, when the Corps evaluates a project that would affect federally protected wetlands under CWA Section 404 it must also comply with NEPA, but were Florida to assume Section 404 Program, NEPA may not apply. NEPA requires particularly in-depth environmental analyses for "major federal actions" that would "significantly affect" the environment. **These NEPA standards expand on and complement the standards set forth to guide Corps permitting under CWA Section 404, and they do not appear to be integrated in Florida's assumption proposal.** These NEPA protections matter.

In 2005, several environmental groups challenged the Corps' issuance of a permit pursuant to CWA Section 404 to Palm Beach County allowing the dredging and filling of federally jurisdictional wetlands for the development of the Palm Beach County Biotechnology Research Park / Scripps Project. The area the County selected for the project -- Mecca Farms -- was historically part of the Hungryland Slough, and was bordered to the east, west, and north by environmentally sensitive lands and numerous, high value wetlands. Agricultural ditches that criss-crossed the property were permanently inundated and drained into a tributary of the Northwest Fork of the Loxahatchee River, a National Wild and Scenic River. The property had long been considered at the ideal site for water storage to restore the Loxahatchee River.

Although the County had clear plans to develop all of Mecca Farms for its Research Park Project, it applied to the Corps for a permit to develop only a portion of the overall project -- at least at first -- with proportionately reduced impacts to the environment. The Corps had determined that this reduced footprint would not significantly affect the environment, and thus it found that it need not complete the in-depth analyses that would otherwise be required under NEPA. A federal court determined that NEPA required more. In short, the Court held that NEPA did not allow the Corps to "segment" the project to avoid a fair, transparent discussion of alternatives to the project and a full analysis of its environmental effects -- including the indirect, growth-inducing effects of its action. *See Florida Wildlife Federation v. US Army Corps of Engineers*, 404 F. Supp. 2d 1352 (S.D. Fla. 2005).

The end result: the development project was relocated to an urban location and Palm Beach County has now sold the bulk of the Mecca Farms site to the South Florida Water Management District, which plans to use most of the land for water storage and treatment and replenishment

of the Loxahatchee River. These Everglades ecosystem benefits grew out of NEPA analyses that do not appear to be required in the Florida proposal.

The Lake Belt

The requirement that federal agencies evaluating CWA Section 404 permits comply with NEPA is not only important because of the substantive standards that guide NEPA analyses. NEPA is also critical because of the process it dictates, which requires opportunities for meaningful public participation and oversight. **These opportunities are not replicated in Florida's proposal.**

To ensure *meaningful* public participation, the NEPA process allows clear points where the public gets access to detailed environmental information about a proposed action, along with the agency's tentatively selected plan of action, allowing the public to respond to that detailed information and proposed plan. Even if the CWA's specific public process rules are integrated into the state's Section 404 Program, those rules allow only for more limited -- and less informed -- opportunities for public comment. Members of the public are asked to weigh in at the very beginning of the agency's reviews in response to a public notice, with much less information available and often little clarity on the agency's proposed action. For its part, the state administrative process generally requires those who seek to respond to the details of proposed agency action to do so by way of an often costly challenge as part of a state administrative hearing. **The opportunities for informed public comment and engagement under the proposed Florida Section 404 Program are significantly different from, and less accessible than, the opportunities provided by the federal CWA Section 404/NEPA process.**

When the public has an opportunity for *informed* public comment, public engagement can make a difference and provide enhanced protection for environmental resources. In 1991, the limestone mining industry approached federal, state, and local government regulators with a sixty-year plan for mining in wetlands in southeastern Florida, in an area described by the industry as the "Lake Belt," near Everglades National Park. The mining plan required the destruction of tens of thousands of acres of federally protected wetlands, and thus also required permits from the Corps pursuant to CWA Section 404. As part of its permitting process, the Corps first issued a final EIS in 2000, which addressed the issuance of mining permits of fifty years each, for a total of 14,300 acres to be mined in the Lake Belt. The federal process, involving compliance with both regulations pursuant to the CWA Section 404 and to NEPA, continued, and two years later (after significant additional public comment and input in response to the EIS), the Corps issued a Record of Decision collectively approving the limestone mining permit applications, but for a total of approximately 5,400 acres of mining, and a reduced permit term of ten years. *See Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254 (S.D. Fla. 2009).

Environmental groups challenged this decision in court and requested supplemental analyses based on NEPA requirements. A district court agreed, and the Corps developed a supplemental EIS for the project, which assessed in a significantly more detailed way impacts related to wetlands mitigation and seepage -- including the ways in which seepage as a result of Lake Belt rock mining could adversely affect Everglades restoration plans. As a result of the revised NEPA review, the new, revised Corps permits required better mitigation, better protection of wetlands and local wells, and less damaging mining explosives.

NEPA-required processes did result in changes to the permits the Corps issued for Lake Belt mining. But equally important, the public was able to weigh in on the Corps' decision-making process in substantive ways because the various EISs both informed them of the agency's likely actions and provided the information on which the agency was basing its decisions. These opportunities are lacking under Florida's assumption proposal.

Florida State Road 7

Clear federal oversight and authority of the CWA Section 404 Program offers long-standing expertise in evaluating proposals in accordance with federal laws. A federal permitting authority also offers a critical layer of protection when the entity requesting a CWA Section 404 permit is a state agency -- for instance, in the case of state road projects. In contrast, Florida's assumption proposal offers only limited opportunities for federal agencies to weigh in to ensure that Florida's executive agencies offer appropriate, careful review of their sister agencies' proposals.

In 2015 Palm Beach County and the Florida Department of Transportation sought to extend (and widen) State Road 7 approximately 8.5 miles in an area of western Palm Beach County adjacent to the Grassy Waters Preserve ("Grassy Waters"). Grassy Waters is part of the Loxahatchee Slough, the historic northern extent of the Everglades. The wetlands and uplands in Grassy Waters provide valuable habitat for a diverse array of fish and wildlife, including federally endangered species, as well as providing water storage and treatment for surrounding lands. As part of the Corps-managed CWA Section 404 permit process, multiple federal agencies weighed in with detailed comments and concerns about the impacts that the proposed road would have on water resources, native plant communities, and endangered species. State agencies did not weigh in with similar concerns about this locally promoted project -- and, in fact, it took a state appellate court's reversal of a final state permit to force a more careful look by state agencies at the impacts of the road. *See City of West Palm Beach v. Palm Beach County et al.*, 253 So. 2d 624 (Fla. 4th DCA 2018). Especially in situations where another Florida agency is requesting permission to move forward with a project with significant wetland impacts, the greater separation between permit applicant and permit decision maker helps ensure the integrity of the review process. Florida's proposed assumption would eliminate this bulwark against the undue influence of one state agency on another in the Section 404 permitting process.

Thank you for considering our comments and addressing the concerns these examples highlight regarding FDEP's proposal to assume the CWA Section 404 Program.

Sincerely,

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Signatures waived to expedite delivery