EARTHJUSTICE

November 2, 2020

Mr. Kelly Laycock
Oceans, Wetlands and Streams Protection Branch
USEPA Region 4
61 Forsyth St., SW
Atlanta, GA 30303

Via: 404Assumption-FL@epa.gov & regulations.gov

Re: Comments in Opposition to State of Florida's Application to Assume Administration of a Clean Water Act Program (Docket # EPA-HQ-OW-2018-0640-0001; EPA-HQ-OW-2018-0640)

Dear Mr. Laycock:

We write on behalf of several local, state and national conservation organizations devoted to protecting Florida's lands, water and wildlife to urge the U.S. Environmental Protection Agency ("EPA") to deny Florida's request for authorization to assume jurisdiction over permitting under Section 404(a) of the Clean Water Act of 1972 ("CWA"), 33 U.S.C. § 1344, in waters of the United States.[1] See State of Florida's Program Submission to Assume the Clean Water Act Section 404 Permitting Program (Aug. 20, 2020) [hereinafter "Assumption Application"]; Florida's Request to Assume Administration of a Clean Water Act Section 404 Program, 85 Fed. Reg. 57,853 (Sept. 16, 2020). The environmental community, which is comprised of countless Florida families, has steadfastly opposed Florida's effort to assume a Section 404 program because this would jeopardize vital natural resources at a time of unprecedented population growth combined with striking environmental degradation. These concerns have been echoed by the public, which also has consistently voiced opposition to Florida's proposal.

[1] These comments are filed on behalf of Center for Biological Diversity, Conservancy of Southwest Florida, Florida Wildlife Federation, Miami Waterkeeper and St. Johns' Riverkeeper. The comments are also endorsed by Environmental Confederation of Southwest Florida, Friends of the Everglades, the National Parks Conservation Association, Natural Resources Defense Council and Sierra Club.

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Introduction

Under the Clean Water Act, the purpose of Section 404 includes restoring and maintaining "the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredge and fill material," recognizing that the degradation and destruction of wetlands is "among the most severe environmental impacts." See 40 C.F.R. § 230.1(a). The Clean Water Act, and the rules promulgated thereunder, create an important, and deservedly complex regulatory framework aimed at achieving these goals.

Florida's proposed program claims no such lofty goals. To the contrary, the State has repeatedly articulated its objectives as streamlining the permit process in order to approve permits more quickly, and at less cost, to developers. To achieve this goal, Florida has proposed a program full of gaps and shortcuts that are not consistent with federal law.

Of particular concern, Florida proposes to take on the consequential responsibility of a Section 404 program without devoting an additional cent of resources to the undertaking. The proposal comes at a time when the State has consistently failed to meet its existing obligations regarding environmental protection, and when it faces severe budget shortfalls as a result of dramatic revenue losses related to the COVID-19 pandemic.

Florida's application must be denied for at least three reasons: (1) the submission is not complete, (2) the proposed program is not as stringent as federal law, and (3) Florida is not equipped to administer and enforce Section 404. Approving Florida's application would jeopardize the State's vital wetlands and the species and communities that rely on them.

For ease of reference and review, these comments are organized into five main sections. Part I addresses Florida's failure to protect the environment, and its disastrous environmental record even as the State proceeded to pursue assumption. Part II describes Florida's move to enact legislation authorizing assumption, the extensive public opposition to that legislation, and the authorizing legislation's language.

Part III addresses the complex and highly contested matter of identifying assumable versus retained waters in Florida, including the U.S. Army Corps of Engineers' ("Corps") 2018 public notice and comment period that was begun as a result of Florida's intention to pursue assumption, but then abruptly terminated without explanation. Part IV describes the Florida Department of Environmental Protection's ("FDEP") rule-making process for purposes of developing an assumption program, including a highly flawed rule development phase, the publication of incomplete proposed rules, and the limitation of public comment to a time in Florida when the public was most distracted by the emerging coronavirus crisis, and its impact on health, jobs, child care, food security and safety.

In Part V, we outline the gross deficiencies in Florida's application to the EPA, beginning in Section A with the incompleteness of the application. In Part V. B. we provide a comprehensive review of deficiencies in the application on the merits.

Part V. B.1. includes a detailed review of Florida's failures to demonstrate adequate authority to carry out a Section 404 program, as well as many areas in which the state program is not as stringent as federal law. The topics addressed include the failure to adopt and comply with all 404(b)(1) Guidelines; unlawful rules related to general permits, emergency permits, permit conditions and permit application processes; the failure to meet coordination requirements, provide for adequate public notice, and ensure adequate process for decisions on permit applications; the failure to meet requirements for compliance evaluation programs; inadequate enforcement authority, including less stringent state criminal liability and inadequate opportunities for public participation in enforcement; and the failure to address the effect of state takings law on implementation of the program.

Part V.B.2. addresses how Florida's scheme fails to ensure protection of listed species under the Endangered Species Act ("ESA"). Part V.B.3. discusses the insufficiency of resources available to FDEP to adequately implement a Section 404 program. Part V.B.4. outlines the on-going failures in FDEP's enforcement record, demonstrating FDEP's incapacity to adequately enforce existing programs, much less adopt a new one. Part V.B.5. addresses differences between state and federal access to the courts for purposes of challenging 404 permits and pursuing citizen suits.

Part V.B.6. describes the on-going failure to adequately define assumable versus retained waters in Florida, and provides additional information that must be considered to ensure that the full breadth of retained waters is identified. Part V.B.7. demonstrates how Florida's waterways, and the public, cannot afford to lose existing federal safeguards under federal law.

Taken separately, and collectively, the gross deficiencies in Florida's submission require that the application be denied.

I. Florida's Failure to Protect the Environment

Florida enjoys some of the most vast, and valuable, wetlands in the United States. These wetlands provide essential services to support clean water, resilience, and biodiversity. They also provide economic value because of the critical interstate industries, such as tourism, that rely heavily on visitors' attraction to Florida's natural environment.

Yet in recent years, FDEP has been gutted, resulting in devastating harm to Florida's wetlands and water quality. FDEP has regularly failed to meet its obligations to adequately enforce

environmental protections already under its purview. It cannot possibly establish that it is capable of doing more, with less, today.

A. Florida's Exceptional Waterways

Florida's water resources are stunning and uniquely complex. The State's distinctive peninsular shape, flat topography and karst terrain create prolific coastlines, rivers, springs and lakes. With almost 1,200 miles of coastline, more than 7,500 lakes (greater than 10 acres), 33 first-magnitude springs, and approximately 27,561 linear miles of rivers and streams, water is one of Florida's most prominent features. See Elizabeth Purdum, Florida Waters: A Water Resources Manual from Florida's Water Management District 49 (2002) (Exhibit 1).

Countless valuable wetlands are widely distributed throughout the State, including the renowned Everglades and Big Cypress Swamp. See, e.g., Albert Hine, Geology of Florida, 17–18 (2009) (Exhibit 2). With approximately 11 million acres of wetlands, Florida has more wetlands than any of the other conterminous states. U.S. Geologic Surv., National Water Summary on Wetland Resources: Water Supply Paper 2425 (1996) (Exhibit 3). These often shallow wetlands are vast and diverse and include rare habitats such as mangrove swamps and hydric hammocks. See Purdum, supra, at 49. In addition to these expansive surface waters, Florida has more groundwater than any other state. See id.

Florida's waters help sustain some of the world's most diverse species. Florida lies within the North American Coastal Plan, the World's 36th Biodiversity Hotspot, and is considered the richest area biologically for endemic species. Zenaida Kotala, Florida Declared a Global Biodiversity Hotspot, UCF Today, Feb. 26, 2016 (Exhibit 4). Freshwater resources in Florida provide nesting, foraging, wintering and migrating habitats for numerous species of fish and wildlife. Fla. Fish & Wildlife Conservation Comm'n, Florida's Freshwater Priority Resources: A Guide for Future Management 1 (2018) (Exhibit 5).

These resources are relied on by high numbers of threatened and endangered plants (26% of them rely on wetlands) and animals (45% of them rely on wetlands) and, as such, are designated as critical habitat under the Endangered Species Act. Id. Due to having one of the highest rates of habitat loss, Florida's water resources and the species that depend on them are some of the most threatened. See Denise Rocus & Frank Mazzotti, Threats to Florida's Biodiversity, University of Florida/IFAS Extension (1996) (Exhibit 6); Kotala, supra.

In addition, Florida's waters are critical to several multi-billion dollar industries, including agriculture and tourism, affecting interstate commerce. See, e.g., Tourism Fast Facts, Visit Florida (last visited Nov. 1, 2020) (Exhibit 7); Florida Agriculture Overview and Statistics, Fla. Dep't of Agric. & Consumer Servs. (last visited Nov. 1, 2020) (Exhibit 8).

B. Florida's Disastrous Environmental Record

In recent years, FDEP has grossly failed to meet its existing obligations. A 2014 Editorial in Florida's leading paper, the Tampa Bay Times, decried FDEP's recent record as "an environmental disaster." Editorial, The Rick Scott Record: An Environmental Disaster, Tampa Bay Times, Sept. 5, 2014 (Exhibit 9). FDEP's failures stem from reduced water management budgets, rushed permitting, weakened enforcement, widespread layoffs provoking a brain drain of experts in the field, and the replacement of experts with political appointees focused on advancing business interests rather than environmental stewardship.

A 2016 analysis released by Public Employees for Environmental Responsibility ("PEER") found that FDEP had opened 81% fewer enforcement cases, collected the lowest number of fines in 28 years, and assessed no penalties in a third of the cases. Press Release, PEER, Scott's Undeclared Polluters' Holiday Stains Florida (Aug. 17, 2016) (Exhibit 10); PEER, Report on Enforcement Efforts by the Florida Department of Environmental Protection Calendar Year 2015 (2016) (Exhibit 11). See also Jimmy Orth, State Failing to Protect Our Waterways, St. Johns Riverkeeper, Feb. 1, 2013 (compilation of newspaper articles describing the State's environmental record) (Exhibit 12).

II. Florida's Assumption Legislation

It was against this backdrop of demonstrably inadequate environmental protection that, in 2017, FDEP sought authorization from the state legislature to pursue assumption of the Section 404 program. See State Assumption of Federal Section 404 Dredge and Fill Permitting Authority, S.B. 1402, 2017 Leg. (Fla. 2018) (Exhibit 13). A similar effort had been considered, but rejected, in 2005, after FDEP concluded that the complexity of Florida's extensive waterways weighed against assumption, and that for assumption in Florida to be feasible, several changes to state and federal law would be required. See Fla. Dep't of Env't Prot., Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida) 2–5 (Sept. 30, 2005) (Exhibit 14). At that time, FDEP also recognized that assumption would require "substantial staff resources" in order for the State to be able to take on the additional responsibilities and workload required under federal law. Id. at 3–4, 6–7.

A January 19, 2018, bill analysis recognized that FDEP would have to undertake a number of activities that might generate costs to the agency, including those related to rulemaking, modifications to its existing applications, databases and permit tracking systems, program administration, and permit processing. FDEP assured legislators, however, that it did "not anticipate an increase in permitting administration expenditures" with assumption, and that it "believe[d] that, upon assumption, the processing of state 404 permits, as well as enforcement activities for state 404 permits, can be absorbed without an increase in staffing or administrative

costs." Bill Analysis and Fiscal Impact Statement: S.B. 1402, 2017 Leg., at 16 (Fla. Feb. 13, 2018) (Exhibit 15).

FDEP therefore sought no resources from the legislature to develop, implement, operate and enforce Section 404. FDEP advised legislators it would not even charge permittees a fee for Section 404 permits. Id.

A. Floridians Object to Legislation Authorizing Pursuit of Assumption

On January 22, 2018, Waterkeepers from across Florida urged legislators to reject the proposed legislation, citing concerns about FDEP taking on an additional program without additional resources. In particular, the Waterkeepers pointed out how FDEP "already woefully under-regulates" stormwater permits delegated to the State by the federal government under the Clean Water Act. Letter from Rachel Silverstein, Miami Waterkeeper, et al., to Senate Environmental Preservation and Conservation Committee Members, Jan. 22, 2018 (Exhibit 16).

On January 29, 2018, the State's leading paper urged against allowing Florida to undertake assumption in light of FDEP's inadequate resources and performance. Editorial, Don't Let Florida Take Over Wetlands Permitting, Tampa Bay Times, Feb. 4, 2018 (Exhibit 17) (raising concerns about the reductions in FDEP's workforce and funding for environmental programs; "There is no reason to have confidence that the state agency is prepared to take on this obligation ... The wetlands are too important to Florida's economy and to public safety in a coastal state to put the interests of developers ahead of the general good.").

In February 2018, the Everglades Coalition issued a resolution opposing the legislation. Everglades Coal., Resolution Opposing SB1402 and HB7043: State Assumption of Federal State 404 Dredge and Fill Permitting Authority (Feb. 2018) (Exhibit 18). On behalf of its more than 60 member organizations, the Everglades Coalition identified a number of concerns regarding state assumption and the risk to Florida's remaining wetlands, which are critical to cleansing water, recharging groundwater, providing fish and wildlife habitat and storm resiliency. The Coalition concluded that "in the face of increased growth and development, the protection and restoration of the Greater Everglades—an ecosystem largely comprised of wetland habitats—is better accomplished by maintaining the existing oversight from federal agencies." Id.

On March 9, 2018, former FDEP Secretary Victoria Tschinkel urged the Governor to veto the bill, which she observed had been rushed on behalf of those who seek "fast and simple permitting" rather than in the best interests of the State. Victoria Tschinkel, Florida's Treasured Wetlands on the Eve of Destruction—We Cannot Allow It, Orlando Sentinel, Mar. 9, 2018 (Exhibit 19). Former Secretary Tschinkel noted, among other things, that "Florida has already

lost half its wetlands, with great negative effects on water quality, fish nurseries, wildlife habitat and flood control." Id.

On March 23, 2018, Governor Scott signed the bill into law. The Governor's signing statement approving the legislation stated that it granted FDEP "the authority *to explore whether the state should* issue 404 permits." Letter from Gov. Rick Scott to Sec. Kenneth W. Detzner, Mar. 23, 2018 (Exhibit 20) (emphasis added). Nothing in the legislation required FDEP to proceed with assumption.

B. Florida's Statutory Authorization to Pursue Assumption

Florida Statutes § 373.4146 codified the legislation authorizing FDEP to pursue Section 404 assumption. Id. Among other things, the statute authorizes FDEP to "adopt any federal requirements, criteria, or regulations necessary to obtain assumption," including "the guidelines specified in 40 C.F.R. part 230 and the public interest review criteria in 33 C.F.R. s. 320.4(a)." Fla. Stat. § 373.4146(2).

The statute provides that "[p]rovisions of state law which conflict with federal requirements identified in subsection (2) do not apply to state administered section 404 permits." Id. § 373.4146(3). The statute does not specify, however, what those conflicts are, nor does it enact any changes to state law to resolve state and federal law conflicts.

As set forth in detail below, Florida law conflicts with federal law in several critical respects. Moreover, Florida's proposal does not create a Section 404 program that is as stringent as that which exists under federal law. The program submission must therefore be denied.

III. Florida's Assumable Waters, Federal Retained Waters

Florida Statutes § 373.4146 failed to grapple with one of the most critical questions regarding assumption: the question of which waters will be assumed. Instead, the provision tautologically defines "state assumed waters" as those "waters of the United States that the state assumes permitting authority over pursuant to [Section 404]." Id. § 373.4146(1).

The question of which waters the State intends to assume jurisdiction over, however, is central to an evaluation of the program. See 40 C.F.R. § 233.11(h) (state submission must include a "[d]escription of the waters of the United States over which the State assumes jurisdiction [and a] description of the waters over which the federal government retains jurisdiction.").

In light of the centrality of this question for purposes of Florida's interest in assumption, on March 19, 2018, the Corps initiated a 30-day public comment period to end on April 20, 2018,

"regarding use of waters in the state of Florida for navigation … [including] identification of those rivers, streams, lakes, etc. associated with past, current, or potential future commerce, commercial traffic, or recreational activities" for purposes of navigability analyses to determine "which waters are subject to permitting authority under Section 10" and "determining the waters that would be retained by the Corps if the EPA approves the State's application for Section 404 Program assumption." U.S. Dep't of the Army, Public Notice: Determination of Navigable Waters, Mar. 19, 2018 (Exhibit 21).[2]

As a result of the Corps' notice, a number of stakeholders across Florida prepared to submit comments on the \question of assumable versus retained waters. As evidenced by the FDEP's 2005 Report describing the complexity of Florida's waterways, properly identifying the scope of retained waters is essential both to those who seek maximum protection for those vital resources, and for the regulated community that seeks clarity when it comes to permit requirements.

On April 10, 2018, however, the Corps issued an "Updated Public Notice" summarily terminating the comment period effective immediately, deeming "the comment period originally set to expire on April 20, 2018 ... closed until further notice." U.S. Dep't of the Army, Updated Public Notice: Cessation of Public Comment Period, Apr. 10, 2018 (Exhibit 23). The Corps provided no explanation for its sudden reversal.

Notwithstanding the Corps' abrupt and unexplained change of course, many stakeholders proceeded to submit comments in accordance with the original deadline of April 18, 2018. This included comments by Senator Bob Graham on behalf of the Florida Conservation Coalition, which is comprised of more than 80 organizations, Letter from Bob Graham, Fla. Conservation Coal., to U.S. Dep't of the Army, Apr. 18, 2018 (Exhibit 24), as well as comments by the Sierra Club, Audubon Florida, Conservancy of Southwest Florida, and Florida's Water and River Keepers. Letter from Amber Crooks, Conservancy of Sw. Fla., to U.S. Dep't of the Army, Apr. 18, 2018 (Exhibit 25); Letter from Rachel Silverstein, Miami Waterkeeper, et al., to Jason A. Kirk, U.S. Army Corps of Eng'rs, Apr. 17, 2018 (Exhibit 26); Letter from Julie Wraithmell, Audubon Fla., to Donald W. Kinard, U.S. Army Corps of Eng'rs (Exhibit 27); Letter from Frank Jackalone, Sierra Club Fla. Chapter, to Jason A. Kirk, U.S. Army Corps of Eng'rs, Apr. 16, 2018 (Exhibit 28).

In a letter we submitted, we reminded the Corps about Florida's extensive water resources and unique hydrology, and that any navigability study would require a thorough analysis of numerous waterways to determine which waters may be assumable. This undertaking would

[2] On April 5, 2018, the Corps posted its solicitation for public comment on this matter on the website for the Jacksonville District. Press Release, U.S. Army Corps of Eng'rs, Corps Seeks Public Comment Regarding Water Use for Navigation (Apr. 5, 2018) (Exhibit 22).

require special attention to the rivers, streams and adjacent wetlands located throughout the State. We further noted that determining the adjacency of wetlands in particular will require time, investigation and evidence and will be of critical importance to Florida's residents and economies. These determinations would have to be based on technical information, hydrology and science. By necessity, adjacency determinations would have to be made case by case, based on site-specific characteristics of the area's hydrology, topography and vegetation, among other factors. To perform such studies, it would be imperative to solicit information from the public, as there are entities and individuals with relevant expertise located throughout the State. Letter from Tania Galloni, Earthjustice, to Jason A. Kirk, U.S. Army Corps of Eng'rs, Apr. 18, 2018 (Exhibit 29).

Other commenters echoed similar concerns. The Sierra Club demonstrated that even at the time, the Corps' lists of navigable waters was incomplete and inadequate. Letter from Frank Jackalone, Sierra Club Fla. Chapter, to Jason A. Kirk, U.S. Army Corps of Eng'rs, supra. The Corps' list identified 492 rivers and creeks and 110 lakes. A supplement to the list totaled 1,767 rivers and creeks and 1,186 lakes. The text prefacing that supplement included the disclaimer that "[t]he District makes no claim that these lists are complete or completely accurate." U.S. Army Corps of Eng'rs, Supplement to the Jacksonville District Navigable Waters Lists (Oct. 5, 2017) (Exhibit 30).

The Conservancy of Southwest Florida submitted scores and scores of additional waterways that it urged the Corps to consider as navigable as well for Section 10 purposes. Letter from Amber Crooks, Conservancy of Sw. Fla., to the U.S. Dep't of the Army, supra. Audubon Florida urged the Corps to use the October 2017 list as a baseline and to supplement that list with additional navigable waterways subject to Section 10 Rivers and Harbors Act jurisdiction. Letter from Julie Wraithmell, Audubon Fla., to Donald W. Kinard, U.S. Army Corps of Eng'rs, supra. Florida's Water and River Keepers emphasized the critical importance of the Corps properly identifying all Section 10 waters in the State. Letter from Rachel Silverstein, Miami Waterkeeper, et al. to Colonel Jason A. Kirk, U.S. Army Corps of Eng'rs, supra.

The Corps provided no response to any of these public comments. And, more than two years later, there has been no "further notice" and no further solicitation for comment on the Corps' determinations regarding Florida's retained waters.

IV. Florida's Section 404 Rule-Making

Meanwhile, Florida proceeded to initiate rule-making to develop its Section 404 program. Florida's rule-making process was marred by a number of deficiencies throughout. Those problems have resulted in the State's grossly inadequate program submission now under review.

A. Florida's Rule Development

On May 11, 2018, FDEP initiated rule development for the purposes of developing its Section 404 program. FDEP described the purpose and effect of its undertaking as:

> Section 404 of the Clean Water Act (404) provides states the option of assuming administration of the federal dredge and fill permit program in certain waters. By obtaining 404 assumption, Florida will be able to provide a streamlined permitting procedure where an applicant will come to the state to obtain both the Environmental Resource Permitting and 404 authorizations. This will avoid duplication, provide greater certainty to the regulated community, conserve resources, and will afford the state greater control over its natural resources while complying with federal law.

44 Fla. Admin. Reg. 2321 (May 11, 2018). Notably, FDEP's stated objectives did *not* include enhancing protection of Florida's waterways, ecosystems or communities. To the contrary, FDEP's objectives were identified as streamlining permitting, avoiding duplication, providing greater certainty to the regulated community, conserving resources and exerting greater "control over [the State's] natural resources." Id.

FDEP held rule development workshops in Tallahassee on May 30, 2018, in Orlando on May 31, 2018, and in Ft. Myers on June 1, 2018. Although Florida law requires that agencies holding public workshops make available staff who can respond to questions and comments on a rule in development, Fla. Stat. § 120.54(2)(c), members of the public who attended these workshops raised a number of concerns that were left unanswered. Letter from Tania Galloni, Earthjustice, to Noah Valenstein, Fla. Dep't of Env't Prot., Jul. 9, 2018 (Exhibit 31).

These included questions about how listed species would be protected, which waters would remain under federal jurisdiction, and how FDEP would assume the 404 program without any funding when the state agency is already under-resourced. Members of the public also expressed concerns about FDEP's reliance on memoranda of agreement that had not been completed or made available to the public for comment. FDEP responded that the MOAs would be made available for public comment, but they never were.

On October 1, 2018, FDEP issued a Statement of Estimated Regulatory Costs ("SERC"). Fla. Dep't Env't Prot., Statement of Estimated Regulatory Cost, 62-331 (Oct. 1, 2018) (Exhibit 32) [hereinafter "404 Assumption SERC"]. In Florida, a SERC is required whenever a proposed rule is "likely to directly or indirectly increase regulatory costs in excess of $200,000 in the aggregate in this state within 1 year after the implementation of the rule." Fla. Stat. § 120.54(3)(b)(1)(b). In estimating regulatory costs, a SERC "shall include," among other things, "[a]n economic analysis showing whether the rule directly or indirectly … [i]s likely to increase regulatory costs,

including any transactional costs,[3] in excess of $1 million in the aggregate within 5 years after the implementation of the rule." Id. § 120.541(2)(a)(3).

In the SERC for its Section 404 program, FDEP estimated that there are an average of 723 permits currently issued by the Corps under Section 404, and that this would total about 3,615 permits over 5 years. FDEP, however, provided *no estimate* of the resources it would take for the State to review, issue, monitor, and enforce those permits.

FDEP omitted any reference to additional, related tasks that would require resources, such as determining whether the State has jurisdiction over a proposed project under a state-assumed program, providing guidance to applicants on the new requirements and processes, making exemption determinations, reviewing applications that are ultimately not granted, conducting investigations, meeting monitoring and reporting requirements, reviewing and issuing permit modifications and revocation, and public notice and public hearing requirements.

Under Florida law, a SERC must include "[a] good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule." Id. § 120.541(2)(b). While FDEP's SERC acknowledged the more than 3,600 additional permits the State would now have jurisdiction over, that number answers only part of the question. See 404 Assumption SERC at 2–3. The number of individuals and entities likely to be "required to comply with the rule" includes not only those who are granted permits, but anyone who may seek to discharge dredged or fill material into waters of the United States, and those who make such discharges without authorization.

Similarly, FDEP stated that the only persons likely to be affected are those who are "currently subject to a 404 permit" issued by the Corps. This response demonstrates that FDEP takes an unduly narrow view of operating a 404 program, and as a consequence, has taken an unreasonably limited view of the number of individuals and entities likely to be affected. FDEP wholly failed to provide a general description of those who are likely to be affected, other than existing permittees.

A SERC must also include "[a] good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues." Fla. Stat. § 120.541(2)(c). FDEP responded to this

[3] "Transactional costs" are defined as "direct costs that are readily ascertainable based upon standard business practices, and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used or procedures required to be employed in complying with the rule, additional operating costs incurred, the cost of monitoring and reporting, and any other costs necessary to comply with the rule." Fla. Stat. § 120.541(2)(d).

question by claiming "none." FDEP's response failed to account for costs to other state agencies it intends to rely on to operate a 404 program, including Florida's Fish and Wildlife Commission and the State Historic Preservation Office. 404 Assumption SERC at 3, E.1, E.3; Assumption Application B, app. c–-d, j.

FDEP stated that it "intends to implement the proposed rule with existing resources" and "intends to enforce the proposed rule with existing resources." 404 Assumption SERC at 3, E.1, E.3. FDEP's response provides no good faith estimate *of the cost* and therefore no reasonable basis to support the conclusion that this cost can be borne by "existing resources." FDEP's response also begs the question of why the agency has existing resources that are not being used to serve its existing duties under state law, and whether appropriations for existing programs may lawfully be used for other purposes.

In response to the requirement to provide "[a] good faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities," Fla. Stat. § 120.541(2)(d), FDEP again stated "none," asserting that "[t]his proposed rule will only affect the department." 404 Assumption SERC at 3-4, E.2, E.4. Here, FDEP again failed to acknowledge and account for the other state agencies that would incur costs related to a 404 program.

The only costs that FDEP estimated were those related to "multiple 5-year permit applications for large projects that will take more than 5 years to complete," which FDEP estimated would cost $600,000 per year. But even the bases for this calculation remain unclear. FDEP did not specify who is expected to bear these costs, and for what exactly. FDEP did not include in this estimate the cost of the initial permit on the basis that it would be the same as a permit from the Corps, see 404 Assumption SERC at 3, at n. 1, but did not explain whether or why the subsequent permit cost would be any different. FDEP also averred that these estimated costs would be offset by savings, but again did not specify what those savings would be and to whose benefit they would inure.

FDEP failed to identify the costs it would incur to process each individual 404 permit, or to manage all the general permits over which it seeks to assume jurisdiction, much less to perform all of the additional duties that operating a 404 Program would require. Yet even if one were to use FDEP's estimate of $5,000 for a long-term project permit renewal as a baseline, that cost alone for the more than 700 permit actions FDEP expects to take would cost $3,500,000 per year.

FDEP summarily added that "[t]here will be an overall cost savings to the regulated public," but did not in any way quantify that statement, provide an estimate of the costs to FDEP and thus to Florida taxpayers, or account for the loss of environmental review necessary to protect Florida's wetlands and the communities and industries that rely on Florida's natural environment.

Indeed, the benefits of the proposed program were touted as including costs savings related to *avoiding* review under the National Environmental Policy Act ("NEPA"), the reduction in time to process permits, and "allow[ing] the permittee to access the value of [large] projects sooner than if the permit was issued under the federal 404 program." 404 Assumption SERC at F., G.

B. Florida's Proposed Rules, Coronavirus Comment Period

On February 19, 2020, FDEP published the totality of its proposed rules, including proposed revisions to Chapter 62-330, the proposed promulgation of Chapter 62-331, the Draft 404 Handbook, and the same SERC. Fla. Dep't of Env't Prot., Notice of Proposed Rule, 62-330 (Feb. 19, 2020) (Exhibit 33). In response to the notice, many affected persons requested that FDEP hold a public hearing, in accordance with Florida law, see Fla. Stat. § 120.54(3)(c)1, which FDEP ultimately set for April 2, 2020. See, e.g., Letter and Resolution from Everglades Coalition to Heather Mason, Fla. Dep't of Env't Prot., Mar. 9, 2020 (Exhibit 34); Fla. Dep't of Env't Prot., Notice of Hearing, 62-330 (Mar. 11, 2020) (Exhibit 35).

On March 1, 2020, however, Governor Ron DeSantis issued an executive order directing the declaration of a public health emergency in the State arising from the novel coronavirus, COVID-19. See Exec. Order No. 20-51 (Fla. 2020) (Exhibit 36). On March 9, 2020, the Governor declared a state of emergency, finding that COVID-19 posed a risk to the entire state of Florida. See Exec. Order No. 20-52 (Fla. 2020) (Exhibit 37).

On March 17, 2020, Governor DeSantis announced that all schools would remain closed until April 15, 2020. See Orlando Sentinel Staff, Florida Coronavirus Update for Tuesday: Three Field Hospitals Slated to Open; K-12 Schools to Close through April 15; State Announces 7th Death, 216 Positive Tests, Orlando Sentinel, Mar. 17, 2020 (Exhibit 38). Governor DeSantis also imposed drastic restrictions on certain service industries, including restaurants and bars, to reduce the spread of the virus. See Exec. Order No. 20-68 (Fla. 2020) (Exhibit 39).

On March 19, 2020, we requested that FDEP postpone the hearing until no earlier than May 15, 2020, in light of the emergency conditions facing Floridians and the health, economic and child care hardships Florida families and small businesses suddenly found themselves facing. Letter from Tania Galloni, Earthjustice, to Heather Mason, Fla. Dep't of Env't Prot., Mar. 19, 2020 (Exhibit 40).

On March 23, 2020, FDEP issued a superseding notice of hearing, announcing that the public hearing related to this rulemaking would take place via three separate video conferences on April 2, 6, and 10th and that the public comment period for the rulemaking was extended until

midnight on April 17, 2020. Fla. Dep't of Env't Prot., Notice of Hearing, 62-330 (as revised Mar. 23, 2020) (Exhibit 41).

On March 30, 2020, the Florida Conservation Coalition ("FCC") urged FDEP to suspend its rule-making in light of the public health emergency, and to resume at a time when the public could meaningfully participate. Letter from Bob Graham & Lee Constantine, Fla. Conservation Coal., to Noah Valenstein, Fla. Dep't of Env't Prot., Mar. 30, 2020 (Exhibit 42). FCC observed that proceeding with rulemaking at this exceptionally difficult time for a struggling public was not "an essential government function or statutorily mandated" and "not necessary to protect the public or the environment." On March 31, 2020, the Everglades Coalition raised similar concerns. Letter from Mark Perry & Marisa Carrozzo, Everglades Coal., to Heather Mason, Fla. Dep't of Env't Prot., Mar. 31, 2020 (Exhibit 43). On April 1, 2020, Governor DeSantis extended the stay at home order until April 30, 2020. Exec. Order 20-91 (Fla. 2020) (Exhibit 44).

On April 17, 2020, FDEP again notified interested parties that "due to these extenuating circumstances" related to COVID-19, FDEP would hold two additional telephonic hearings on April 24 and April 27, 2020. FDEP also extended the public comment period for this rulemaking to midnight on April 30, 2020.

On April 20, 2020, as COVID-19 cases in Florida continued to grow exponentially, and Florida families experienced growing unemployment with little relief in sight, Florida's Waterkeepers urged FDEP to suspend rulemaking so the public could meaningfully participate. Letter from Lisa Rinaman, Waterkeepers Fla., to Heather Mason, Fla. Dep't of Env't Prot., Apr. 20, 2020 (Exhibit 45). The Waterkeepers again highlighted that proceeding with 404 program rulemaking was far from an essential activity.

FDEP did not heed any of these calls, and ended the opportunity for public comment on April 30, 2020. This was a time of great uncertainty, especially in parts of the State then hit the hardest with cases of COVID-19, and was well before American society had begun to come to terms with extensive community spread of the coronavirus, and settle into some form of a "new normal."

FDEP's proposal remained fundamentally flawed in several respects, including: (1) FDEP's decision to remove references to memoranda of agreement ("MOA") with federal agencies from the proposed rules, and not to disclose the content of those MOAs so as to allow for public comment before the State submits an application to the EPA, despite having told the public that it would; (2) a lack of clarity around the definition of waters of the United States, retained waters and assumed waters; (3) the failure to properly define administrative boundaries; (4) the risk to Tribes of loss of consultation rights and protections for impacts to adjacent lands; (5) differences between state and federal wetlands delineation methodologies, and the impacts of those

differences; (6) the failure to adopt all Section 404(b)(1) Guidelines; (7) questions around the role of water management districts and FDEP's intentions regarding further delegation; (8) the rationale for proposing the less protective 300 foot buffer, and its lack of basis in science; (9) inadequate consideration of secondary and cumulative impacts; (10) the failure to assess the impacts of proposed general permits and provide those analyses for public input; and (11) the failure to articulate how endangered species would be protected. Letter from Tania Galloni, Earthjustice, to Heather Mason, Fla. Dep't of Env't Prot., Apr. 30, 2020 (Exhibit 46).

In response to some of the concerns raised, FDEP acknowledged that key issues were not resolved (including those relating to protection of listed species, which the public was told was part of an MOA process "still in its infancy"), claimed that certain critical topics such as staffing and resources were "outside the scope" of the public comment opportunity, and advised that the public should direct their concerns to the EPA rather than to their state agency crafting the plan that would ultimately be submitted. Id.[4] FDEP then proceeded to finalize its rules.

That FDEP limited the information available to the public, and then further confined the public comment period to the very time period when Floridians were most focused on their health, jobs and families as a result of statewide public health emergency was a disservice to the public. It resulted in a grossly inadequate program. It also deprived the public of a meaningful opportunity to comment and be heard. It further undermined public confidence in FDEP's responsiveness to the community. It is emblematic of why the EPA should not entrust administration of the federal Clean Water Act Section 404 program to the State.

V. Florida's Submission to the EPA

Florida's application must be denied for at least three reasons: (1) the submission is not complete, (2) the proposed program is not as stringent as federal law, and (3) Florida is not equipped to administer and enforce Section 404. Approving the State's application would jeopardize the State's vital wetlands and the species and communities that rely on them.

[4] See also Transcript of Public Hearing, Florida Department of Environmental Protection's February 19, 2020, Notice of Proposed Rules for Florida Administrative Code Chapters 62-330 and 62-331 (Apr. 2, 2020) (Exhibit 47); Transcript of Public Hearing, Florida Department of Environmental Protection's February 19, 2020, Notice of Proposed Rules for Florida Administrative Code Chapters 62-330 and 62-331 (Apr. 6, 2020) (Exhibit 48); Transcript of Public Hearing, Florida Department of Environmental Protection's February 19, 2020, Notice of Proposed Rules for Florida Administrative Code Chapters 62-330 and 62-331 (Apr. 10, 2020) (Exhibit 49); Transcript of Public Hearing, Florida Department of Environmental Protection's February 19, 2020, Notice of Proposed Rules for Florida Administrative Code Chapters 62-330 and 62-331 (Apr. 24, 2020) (Exhibit 50); Transcript of Public Hearing, Florida Department of Environmental Protection's February 19, 2020, Notice of Proposed Rules for Florida Administrative Code Chapters 62-330 and 62-331 (Apr. 27, 2020) (Exhibit 51).

A. EPA Should Reverse Completeness Determination As Florida's Application Fails to Satisfy 40 C.F.R. §233.11

On August 20, 2020, Florida submitted its application package to the EPA. On August 28, 2020, the EPA acknowledged receipt and deemed the application complete. Letter from Mary S. Walker, U.S. Env't Prot. Agency, to Gov. Ron DeSantis, Aug. 28, 2020 (Exhibit 52). On September 16, 2020, EPA published a Federal Register notice stating that it had received "a complete program submission" for 404 assumption from the State of Florida on August 20, 2020. See 85 Fed. Reg. 57,853.

Based on its determination that the submission was complete, the EPA initiated a 45-day public comment period that concludes on November 2, 2020, as required by the Clean Water Act and the Administrative Procedure Act ("APA"), 40 C.F.R. § 233.15(e) and 5 U.S.C. § 553, and is set to make a decision on the application by December 18, 2020. See 33 U.S.C. § 1344(h)(1) (providing for decision on application within 120 days of receipt); 40 C.F.R. § 233.15(a) (120-day statutory review period begins when the EPA receives complete State program submission as set out in 40 C.F.R. § 233.10).

Florida's submission, however, is incomplete in at least three critical respects: (1) failing to demonstrate how the State will ensure no jeopardy to listed species to comply with the Section 404(b)(1) Guidelines' no-jeopardy provision, 33 U.S.C. § 1344(h)(1)(a), 40 C.F.R. §§ 230.10(b)(3), 233.11(a)–(c), given that the State is relying on processes and procedures that have yet to be developed; (2) failing to adequately identify the waters that would be assumed under its proposed program, id. § 233.11(h); (3) failing to provide complete information regarding how it would implement, operate and enforce a Section 404 program, particularly given the substantial impact the COVID-19 pandemic has had on State coffers, id. § 233.11(d).

At the October 21, 2020, the EPA public hearing on Florida's submission, we urged the EPA to reverse its completeness determination in light of critical omissions in Florida's application. We reiterated and elaborated on those concerns in our October 23, 2020, again requesting reconsideration of the completeness determination, and suspension of the public comment period until the deficiencies are cured. See id. § 233.15(a) (providing that statutory review period shall not begin if the EPA finds that a State's submission is incomplete).

Permitting the public only to comment on an incomplete application undermines the agency's rulemaking by precluding meaningful testing, denies fairness to affected parties, and precludes the opportunity to develop evidence in the record that will prove necessary to judicial review, should the EPA grant the application, as the State and industry supporters of the program have indicated they fully expect will happen. 5 U.S.C. § 553; Small Refiner Lead Phase-Down Task

Force v. U.S. Env't Prot. Agency, 705 F.2d 506, 547 (D.C. Cir. 1983) (internal citations and quotation marks omitted).

We fully adopt and incorporate herein the issues raised in the hearing and in our letter. Letter from Bonnie Malloy, Earthjustice, to Kelly Laycock, U.S. Env't Prot. Agency, Oct. 23, 2020 (Exhibit 53); Transcript of Public Comment Hearing, Application by the State of Florida to Assume Administration of the Clean Water Act Section 404 Permitting (Oct. 21, 2020) (Exhibit 54) [hereinafter "Oct. 21, 2020, Hearing Transcript"]; Transcript of Public Comment Hearing, Application by the State of Florida to Assume Administration of the Clean Water Act Section 404 Permitting (Oct. 27, 2020) (Exhibit 55) [hereinafter "Oct. 27, 2020, Hearing Transcript"].

And we again urge the EPA to reverse its determination that the application is complete or to extend the review period pursuant to 40 C.F.R. § 233.15(g) and the public comment period until all materials are provided and the public is given adequate notice and opportunity to comment in accordance with federal law. See also Clean Water Section 404 Program Definition and Permit Exemptions; Section 404 State Program Regulations, 53 Fed. Reg. 20,764, 20,767 (Jun. 6, 1988). Alternatively, the EPA should deny the application for incompleteness.

Notwithstanding the fatal deficiencies in Florida's application, stakeholders from across Florida participated in the EPA's hearings on the program submission, which were held virtually on October 21 and October 27, 2020. Aside from a handful of representatives from industries with a financial interest in accelerated and cheaper permits, the overwhelming view expressed by commenters, including Florida legislators and the Florida Department of Agriculture and Consumer Services, was to oppose Florida's request to assume. Oct. 21, 2020, Hearing Transcript; Oct. 27, 2020, Hearing Transcript.

B. EPA Should Deny Florida's Submission on the Merits

As demonstrated below, Florida's application must also be denied on the merits. Florida's submission fails to provide all components of a complete program submission as required under 40 C.F.R. §§ 233.10(b), 233.11. It fails to fully describe the State's permitting, administrative, judicial review, and other procedures, id. § 233.11(b), particularly insofar as these are less stringent than, or conflict with, federal law. It fails to adequately describe all agencies with responsibilities to administer the program, and fails to provide a reasonable accounting of the resources that would be required of each of these agencies to properly implement, operate and enforce a 404 program. Id. § 233.11(c)-(e).

Florida's submission fails to adequately describe the State's compliance evaluation and enforcement programs, particularly with regard to areas where the State's programs are less stringent than, or conflict with, federal law. Id. § 233.11(g). Florida also fails to address how

the State will coordinate enforcement strategy with the Corps and EPA, as required under 40 C.F.R. § 233.11(g).

Florida's description of the waters of the United States over which the State hopes to assume jurisdiction, id. § 233.11(h), is grossly lacking. The same is true of the State's description of the waters over which the federal government retains jurisdiction, a list that has been unreasonably and unduly reduced by the Corps since the State initiated rulemaking to develop an assumption program.

At its core, Florida's submission fails to demonstrate that the State has adequate legal authority to carry out the program and meet all requirements under the Clean Water Act. id. § 233.12(a). The application must therefore be denied.

1. Florida's Scheme Does Not Grant Adequate Authority to Carry Out Section 404, And is not As Stringent As Federal Law

To apply for approval to assume the Section 404 program, Florida was required to submit a statement demonstrating "that the laws and regulations of the State … provide adequate authority to carry out the program and meet the applicable requirements of this part." Id. The statement must also address the effect of State law regarding the prohibition against takings. Id. § 233.12(c). Where more than one agency will have "responsibility for administering" the program, the statement must include certification "that each agency has full authority to administer the program within its category of jurisdiction[.]" Id.

To meet this requirement, FDEP has submitted a statement by its General Counsel. Assumption Application C. The General Counsel's statement, however, fails to establish adequate authority to carry out the program and meet Section 404 requirements. This includes failures regarding general permits, emergency permits, permit conditions, coordination requirements, public notice, permit review and determinations, compliance evaluation and enforcement. Permeating many of these areas, FDEP has also failed to adopt and failed to establish compliance with all Section 404(b)(1) Guidelines. We begin with those issues first.

a. Failure to Adopt and Comply with 404(b)(1) Guidelines

The General Counsel's statement avers broadly that no permit shall issue unless in compliance with the Clean Water Act and Section 404(b)(1) Guidelines, Assumption Application C at 4, but fails to establish that this is in fact the case. It is evident from Florida's submission that the State declined to adopt the 404(b)(1) Guidelines. Instead, the State relies on a patchwork of State rules and regulations that, even when cobbled together, fail to satisfy 404(b)(1). Even when appearing to adopt some of the language in the Guidelines, the State adds qualifications and caveats that

result in a less stringent standard than under federal law. These failures permeate a number of regulatory requirements, rendering them individually and collectively inadequate under federal law.

The 404(b)(1) Guidelines are intended to "restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material." 40 C.F.R. § 230.1(a). The federal program also creates a presumption against granting a 404 permit by incorporating a "fundamental principle": "dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern." Id. § 230.1(c). The State's purpose, by contrast, is "to provide a streamlined permitting procedure" for ERP and 404 permits.

Rather than incorporating the guiding principles of the 404 program, the State's regulation titled "Intent, Purpose, and Implementation" merely covers methods to be used, conflicts of laws, and coordination between the ERP and 404 permitting programs. Fla. Dep't of Env't Prot., Notice of Proposed Rule, 62-330 (Feb. 19, 2020); Fla. Admin. Code 62-331.010. Through these omissions, the State has failed to satisfy the requirements of the 404(b)(1) Guidelines.

(1) Failure to Adopt 404(b)(1) Definitions

As to the terms used in the State's program, 40 C.F.R. § 230.3, FDEP omits or alters consequential definitions from the 404(b)(1) Guidelines in a manner that limits the breadth and scope of the State's program. First, the State's program fails to define the following terms that appear in 40 C.F.R. § 230.3: "carrier of contaminant," "discharge point," "disposal site," "extraction site," "territorial sea," "waters of the United States," and "wetlands." Without established definitions, neither the public nor the regulated community can have any clear indication as to how the State may interpret and apply those terms. Moreover, the State's omission of these terms raises the question of whether FDEP's applications will be consistent with 404(b)(1).

Particularly troubling is that the State's definition of "pollution" is much narrower than the federal definition in that it only covers pollution that is at a high enough level or amount to be potentially harmful. The federal guideline defines "pollution" as "the man-made or man-induced alteration of the chemical, physical, biological or radiological integrity of an aquatic ecosystem." Id. § 230.3(k). The Florida definition, by contrast, states that pollution §means alterations "in quantities or at levels which are or may be potentially harmful or injurious to human health or welfare, animal or plant life, or property or which unreasonably interfere with the enjoyment of life or property." Fla. Stat. § 403.031(7). Tacking these qualifiers onto what constitutes

"pollution" means that the State would include fewer activities under that definition than would fall under the federal regulation's definition.

The State's proposal also does not adopt, reference, or mention the federal definition of waters of the United States. Instead, the proposed program uses the term "state-assumed waters," which it defines as "all waters of the United States that are not retained waters." Fla. Dep't of Env't Prot., State 404 Program Applicants' Handbook § 1.1 [hereinafter "404 Handbook"].[5] Florida's authorizing legislation similarly defines "state-assumed waters" as "waters of the United States that the state assumes permitting authority over pursuant to s. 404 of the Clean Water Act … and rules promulgated thereunder." Fla. Stat. § 373.4146(1). This definition has no substance and does not reflect the federal definition of waters of the United States.

The State's definition of "mixing zone" omits important clarifying language that it "should not be considered as a place where wastes and water mix and not as a place where effluents are treated." Compare 40 C.F.R. § 230.3(h) with 404 Handbook § 2.0(25). Without this added description, the FDEP's provision would allow a broader definition of a "mixing zone" that would result in a less stringent State program.

The federal guidelines have separate definitions for dredged material and fill material. 40 C.F.R. § 232.2. "Dredged material" means "material that is excavated or dredged from waters of the United States." Id. And "fill material" means "(1) Except as specified in paragraph (3) of this definition, … material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States. (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States. (3) The term fill material does not include trash or garbage." Id.

The State proposes to cover both definitions in the term "material," Assumption Application B, app. j-3, at 8–9, which is defined as "matter of any kind, such as sand, clay, silt, rock, dredged material, construction debris, solid waste, pilings or other structures, ash, and residue from industrial and domestic processes. The term does not include the temporary use and placement of lobster pots, crab traps, or similar devices or the placement of oyster clutch." Environmental Resource Permit Applicant's Handbook, vo. 1 [hereinafter "ERP Handbook"]. It is difficult to understand how the State's definition could explain what "dredge material" is when it is used as

[5] Florida's rules and regulations are obtuse, having relegated key aspects to applicant handbooks rather than providing for them in the rules, which will create confusion for regulators, the regulated community, affected parties, the public and the courts.

an example of "material." Moreover, the State definition does not include the specifics outlined in the definition of "fill material," which is defined based on the function it performs rather than its physical state.

(2) Failure to Adopt 404(b)(1) Procedures

As to General Procedures to be Followed, 40 C.F.R. § 230.5, the State largely incorporated this guideline into the 404 Handbook, but then added qualifying language that restricts the permitting conditions that FDEP must address when issuing a state 404 permit. For example, the federal rule provides that the agency must evaluate dredge and fill material to "determine the possibility of chemical contamination or physical incompatibility of the material to be discharged." Id. The State, however, limited this requirement only to situations where chemical contamination may violate state water quality standards or toxic effluent standards or prohibitions. 404 Handbook § 8.2(g). By restraining its consideration of chemical contamination, the State's program is less restrictive than the federal program.

As to General Permits ("GP"), 40 C.F.R. § 230.7, the State failed to incorporate the full set of requirements for issuance of a GP. The 404(b)(1) Guidelines state that a GP complies with the guidelines if the permitting authority determines that: (1) "The activity in such category are similar in nature and similar in their impact upon water quality and the aquatic environment"; (2) "The activities in such category will have only minimal adverse effects when performed separately"; and (3) "The activities in such category will have only minimal cumulative adverse effects on water quality and the aquatic environment. Id. § 230.7(a). The State's program, however, omits the requirement that GPs may only be issued if "[t]he activities in such category are similar in nature and similar in their impact upon water quality and in the aquatic environment." See Fla. Admin. Code 62-331.200–01.

The State also failed to incorporate the requirements that FDEP must follow when issuing GPs. The 404(b)(1) Guidelines require the permitting authority to "set forth in writing an evaluation of the potential individual and cumulative impacts of the category of activities to be regulated under the General Permit." 40 C.F.R. § 230.7(b). Moreover, the 404(b)(1) Guidelines require that the State complete this evaluation before the GP is issued and must publish the results with the final permit. Id. The State, by contrast, has not adopted any procedures for it to follow when considering and issuing GPs. See Fla. Admin. Code. 62-331.200–01, 62-330.401. Instead, it takes the position that the State must follow the requirements of 40 C.F.R. pt. 233 when creating a GP, "but this information is not presented in the rule." Assumption Application B, app. j-3, at 58. However, 40 C.F.R. § 233.21 requires compliance with the 404(b)(1) Guidelines, and it is unclear how the State could ensure compliance with the guidelines without incorporating them into the State's program. Notably, and as discussed further below, the State also seeks to issue

GPs with the program submitted, even though it has failed to take any of the required steps to do so lawfully.

As to Restrictions on Discharge, 40 C.F.R. § 230.10, federal regulations prohibit any discharge that "causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard." Id. Rather than adopting this language, the State has proposed an alternative prohibition that would prohibit discharges that "[c]auses or contributes to violations of any applicable State water quality standard, *except when temporarily within a mixing zone proposed by the applicant and approved by the Agency*." Fla. Admin. Code 62-331.053(2) (emphasis added). Where the 404(b)(1) Guidelines require the permitting authority to "consider" dilution areas when determining whether violations would occur, the State program creates an exemption for temporary violations in those areas.

The State program also fails to incorporate the requirement that a determination of whether a discharge would cause or contribute to significant degradation of wetlands or other surface waters be based on factual determinations, evaluations, and tests required by the 404(b)(1) Guidelines "subparts B and G, after consideration of subparts C through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts." 40 C.F.R. § 230.10(c). However, as described in these comments, the State has failed to fully incorporate the provisions that appear in those subparts. The State also fails to include the requirement to put "special emphasis on the persistence and permanence of the effects" outlined in those subparts.

Regarding the requirement that discharges not jeopardize the continued existence of endangered or threatened species, or result in the likelihood of the destruction or adverse modification of critical habitat, id. § 230.10(b)(3), the State has promulgated language to say that "compliance with any requirements resulting from consultation with, or technical assistance by, the Florida Fish & Wildlife Conservation Commission, the U.S. Fish & Wildlife Service, and the National Marine Fisheries Service for purposes of the State 404 Program, and review, as it pertains to endangered or threatened species, by the U.S. Environmental Protection Agency" "shall be determinative for purposes of evaluating violations of this subparagraph." Fla. Admin. Code 62-331.053(3)(a)(4). As discussed below in Section V.B.2, however, the technical assistance process is still being developed, and depends on other agencies who lack the resources necessary to carry out review of all State 404 permits. FDEP has failed to even submit information related to the available resources of those agencies, much less establish that those resources exist and are adequate.

As to Factual Determinations, 40 C.F.R. § 230.11, the 404(b)(1) Guidelines lay out specific, factual determinations that permitting authorities must use to determine the individual, cumulative, and secondary effects of a proposed discharge of dredged or fill material on physical substrate; water circulation, fluctuation, and salinity; suspended particulate/turbidity;

contaminants; aquatic ecosystem and organism; and the proposed disposal site. Id. The State's regulations do not incorporate or apply the guideline's defined set of factual determinations. And they do not require FDEP to make the requisite factual determinations when considering whether to issue a 404 permit.

Although Fla. Admin. Code 62-331.053(6) contains broad categories of effects considered to determine whether a permit will cause or contribute to significant degradation of wetlands or other surface waters, that section fails to incorporate the specific effects identified in 40 C.F.R. § 230.11, and leaves broad discretion for FDEP to interpret what effects it will consider. It also omits consideration of effects on physical substrate, water circulation, fluctuation, salinity, and suspended particulate/turbidity, and only includes vague descriptions of the other potential effects of a proposed project that must be considered.

FDEP also relies on Fla. Admin. Code 62-330.301, but that provision only places obligations on permit applicants to provide "reasonable assurances" that their proposed projects will not cause adverse effects.[6] The federal guidelines, importantly, obligate *the permitting authority* to make factual findings on those effects, rather than relying whole cloth on assurances submitted by permit applicants. 40 C.F.R. § 230.11. FDEP has not adopted such a requirement for itself. This regulation also fails to include the full swath of identified effects from Section 230.11.[7]

As to Findings of Compliance or Noncompliance with the Restrictions on Discharge, 40 C.F.R. § 230.12, the 404(b)(1) Guidelines require that the permitting authority, after deciding whether to issue or deny a permit, must make findings that "include the factual determinations required by § 230.11, and a brief explanation of any adaptation of these Guidelines to the activity under consideration." 40 C.F.R. § 230.12(b). The state regulations do not require the agency to make the factual determinations laid out in 40 C.F.R. § 230.11, and therefore do not require that the agency include those factual determinations in any final permit decisions.

(3) Failure to Adopt 404(b)(1) Consideration of Impacts

Subparts C–F identify a whole host of impacts that must be considered when reviewing a permit and identify the significance of each for purposes of meeting the Clean Water Act's objectives. Florida fails to adopt or implement these considerations for Section 404 permits. Subpart C requires the permitting authority to consider potential impacts to substrate, suspended particulates/turbidity, water, current patterns and water circulation, normal water fluctuations, ad

[6] ERP Handbook § 5.5.4.1 says that the agency makes permitting decisions based on a determination of whether the permit applicant provided these reasonable assurances. However, determining whether an applicant's assurances are reasonable is a far cry from making the factual determination whether a proposed project will cause adverse effects.

[7] These same flaws are present in the ERP Handbook §§ 10.2.7, 10.2.8, and 11.0.

salinity gradients. 40 C.F.R. §§ 230.20–25. Subpart D requires the permitting authority to consider potential impacts to endangered species, fish, crustaceans, mollusks, other aquatic organisms, and wildlife. Id. §§ 230.30–32. Subpart E requires the permitting authority to consider potential impacts to sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes. Id. §§ 230.40–45. Subpart F requires the permitting authority to consider the potential impacts to water supplies, fisheries, recreation, aesthetics, and parks by defining these categories of effects and outlining specific adverse effects that could occur within each of these categories. Id. §§ 230.50–54.

Rather than adopt these criteria, the State's submission cites to a patchwork of complicated, piecemeal elements of ERP and state 404 regulations and applicant handbooks in an effort to claim that these constitute an equivalent program. Assumption Application B, app. j-3, at 79–100. But they do not add up.

For example, 40 C.F.R. § 230.31 defines "aquatic organisms in the food web," and then describes the possible loss of environmental characteristics and values that could result from dredge and fill activities:

> The discharge of dredged or fill material can variously affect populations of fish, crustaceans, mollusks and other food web organisms through the release of contaminants which adversely affect adults, juveniles, larvae, or eggs, or result in the establishment or proliferation of an undesirable competitive species of plant or animal at the expense of the desired resident species. Suspended particulates settling on attached or buried eggs can smother the eggs by limiting or sealing off their exposure to oxygenated water. Discharge of dredged and fill material may result in the debilitation or death of sedentary organisms by smothering, exposure to chemical contaminants in dissolved or suspended form, exposure to high levels of suspended particulates, reduction in food supply, or alteration of the substrate upon which they are dependent. Mollusks are particularly sensitive to the discharge of material during periods of reproduction and growth and development due primarily to their limited mobility. They can be rendered unfit for human consumption by tainting, by production and accumulation of toxins, or by ingestion and retention of pathogenic organisms, viruses, heavy metals or persistent synthetic organic chemicals. The discharge of dredged or fill material can redirect, delay, or stop the reproductive and feeding movements of some species of fish and crustacea, thus preventing their aggregation in accustomed places such as spawning or nursery grounds and potentially leading to reduced populations. Reduction of detrital feeding species or other representatives of lower trophic levels can impair the flow of energy from primary consumers to higher trophic levels. The reduction or potential elimination of food chain organism populations decreases the overall productivity and nutrient export capability of the ecosystem.

Id. The provisions cited by the State fail to incorporate either the definition or the potential effects laid out in this 404(b)(1) Guideline. See Fla. Admin. Code 62-330.301(1)(d)–(e) (creating broad conditions for permit issuance that activities not adversely affect functions that serve fish and wildlife or affect the quality of receiving waters such that the state water quality standards are not met); id. 62-330.302(1)(a)(1), (2), (4) (requiring permittees to provide reasonable assurances about broadly defined effects of the proposed activity to the public health, safety, or welfare or the property of others; the conservation of fish and wildlife, including endangered or threatened species and their habitats; fishing, recreational values or marine productivity); ERP Handbook § 10.2.3.1(a)–(b) (generally requiring evaluation of public health and impacts to shellfish harvesting); id. § 10.2.3.4(a)–(b) (generally requiring consideration of effects to sport or commercial fisheries or marine productivity; existing recreational uses of wetlands); id. § 10.2.5 (generally requiring consideration of effects to waters used for shellfish harvesting).

The same omissions are evident for substrate, 40 C.F.R. § 230.20, suspended particulates/ turbidity, id. § 230.21, water, id. § 230.22, current patterns and water circulation, id. § 230.23, normal water fluctuations, id. § 230.24, salinity gradients, id. § 230.25, threatened and endangered species, id. § 230.30, fish, crustaceans, mollusks and other aquatic organisms in the food web, id. § 230.31, wildlife, id. § 230.32, sanctuaries and refuges, id. § 230.40, wetlands, id. § 230.41, mud flats, id. § 230.42, vegetated shallows, id. § 230.43, coral reefs, id. § 230.44, riffle and pool complexes, id. § 230.45, municipal and private water supplies, id. § 230.50, recreational and commercial fisheries, id. § 230.51, water-related recreation, id. § 230.52, and parks, national and historical monuments, national seashores, wilderness areas, research sites and similar preserves, id. § 230.54.

The only provision in Subparts C–F that the State incorporated into its program was for aesthetics. Compare id. § 230.53 with 404 Handbook § 8.3.2. For aesthetics, the State incorporated the federal provision word-for-word. 404 Handbook § 8.3.2. This demonstrates that the State knew how to appropriately adopt the Guidelines, but that it chose not to do so for any of the other categories in Subparts C–F.

(4) Failure to Adopt 404(b)(1) Compensatory Mitigation

Subpart J outlines the compensatory mitigation program for losses of aquatic resources associated with dredge and fill activities. Again, here, the State attempts to use a grab bag of ERP and state 404 program regulations and guidelines to cobble together what it identifies as equivalent to the lengthy provisions of Subpart J. However, the rules contain meaningful omissions and differences so that the State program fails to maintain the stringency of these 404(b)(1) Guidelines. Many of these issues arise in the failure to use the federal definitions of terms relevant to mitigation. 40 C.F.R. § 230.92.

For example, the 404 Handbook does not include the definitions from § 230.92 for "advance credits," "credit," "days," "debit," "fulfillment of advance credit sales of an in-lieu fee program," "in-lieu fee program instrument," "instrument," "mitigation banking instrument" and "release of credits." Compare 40 C.F.R. § 230.92 with 404 Handbook § 2.0(b).

There are also meaningful changes to the definitions the State did incorporate. For the definition of "preservation" in the 404 Handbook, the State omits the following language from 40 C.F.R. § 230.92: "Preservation does not result in a gain of aquatic resource area or functions." Compare 40 C.F.R. § 230.92 with 404 Handbook § 2.0(b).

The State's definition of "creation," which is intended to incorporate the federal definition of "establishment," omits a vital clarification in the federal definition: "Establishment results in a gain in aquatic resource area and functions." Compare 40 C.F.R. § 230.92 with ERP Handbook vo. 1. This change means that under the State's definition, creation of wetlands could occur even if there is no "gain" in environmental resource functions.

For the definition of "functional capacity," the State points to its definition of "ecological value." The federal guidelines define "functional capacity" as the degree to which an area performs a specific function. 40 C.F.R. § 230.92. The State's definition of "ecological value," by contrast, is much more restrictive and is couched in "values" as compared to "functions." Fla. Stat. 373.403(18). Instead, "ecological value" means the "value of functions performed by uplands, wetlands, and other surface waters to the abundance, diversity, and habitats of fish, wildlife, and listed species. These functions include, but are not limited to, providing cover and refuge; breeding, nesting, denning, and nursery areas; corridors for wildlife movement; food chain support; and natural water storage, natural flow attenuation, and water quality improvement, which enhances fish, wildlife, and listed species utilization." Id. These terms are not equivalent.

The State's definition of "temporal loss" omits the following from the federal guideline: "[H]igher compensation ratios may be required to compensate for temporal loss. When the compensatory mitigation project is initiated prior to, or concurrent with, the permitted impacts, the district engineer may determine that compensation for temporal loss is not necessary, unless the resource has a long development time." Compare 40 C.F.R. § 230.92 with 404 Handbook § 2.0(49). This additional language creates substantive requirements for permit writers, and the State program fails to incorporate it.

As to General Compensatory Mitigation Requirements, 40 C.F.R. § 230.93, the State alters or omits vital portions of this Section, thereby creating less stringent requirements for its mitigation program.

The State's tepid incorporation of the watershed approach to compensatory mitigation falls short of the Federal requirements. The State does not incorporate the federal provision that a watershed approach is "not appropriate in areas where watershed boundaries do not exist, such as marine areas." Compare 40 C.F.R. § 230.93(c)(2)(v) with 404 Handbook § 8.5.2(a)(4). The State omits requirements on the amount of information that a permittee must provide to support a watershed approach. 40 C.F.R. § 230.93(c)(3)(iii). The State program also fails to incorporate the size restrictions for the watershed to be used in a watershed approach intended to ensure that the aquatic resources provided through compensation activities will effectively compensate for adverse environmental impacts resulting from activities authorized by dredge and fill permits. Id. § 230.93(c)(4).

Regarding site selection criteria, the State ignored the federal factors that must be considered when selecting a mitigation site to ensure that the compensatory mitigation project site is "ecologically suitable for providing the desired aquatic resource functions." Id. § 230.93(d)(vi).

The State's program does not adopt requirements that would apply to permit writers as they consider different types of mitigation. The federal rule requires permit writers to document specific findings before permitting out-of-kind compensatory mitigation, a provision absent from the State's program. Id. § 230.93(e)(2)–(3). The State's program also omits the requirement that the permit writer "require a mitigation ratio greater than one-to-one where necessary." Id. § 230.93(f)(2).

Lastly, the State's requirements for demonstrating financial responsibility are not as strict as those required under 40 C.F.R. § 230.93(n)(1). Federal regulations require financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, a standard not incorporated into the State program. Compare id. with ERP Handbook § 10.3.7. The State creates an exemption for projects that have a mitigation cost estimate less than $25,000, but the federal rules do not have a threshold below which a financial responsibility demonstration is no longer required. Compare ERP Handbook § 10.3.7.1 with 40 C.F.R. § 230.93(n)(1). Rather than giving permit writers the ability to determine the necessary amount of required financial assurances, 40 C.F.R. § 230.93(n)(2), the State instead creates a blanket amount of 110% of the cost estimate. ERP Handbook § 10.3.7.2.

b. Unlawful Promulgation of General Permits, 40 C.F.R. §233.21

The General Counsel states that FDEP intends to administer a limited number of regional permits until they expire and that the State "has promulgated a series of general permits." Assumption Application C at 4. The State's rules developed for the 404 program submission purport to include dozens of general permits. Fla. Admin. Code 62-331.210–48. The State, however, has failed to lawfully promulgate any general permit.

As to a state assumed program, federal regulations provide that "[t]he Director may issue a general permit for categories of similar activities if he determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment." 40 C.F.R. § 233.21(b). The terms "State Director" and "Director" are defined as "the chief administrative officer of any State … operating an approved program[.]" Id. § 233.2.

The Director of Florida's proposed program, however, has not made *any* determinations that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. When FDEP proposed to promulgate dozens of general permits modeled after general permits previously developed by the Corps on a national level, the agency provided *zero* evidence of any analysis or study to warrant such a determination.

Instead, FDEP seems to believe that it can simply parrot the language of general permits developed at a national, rather than state, level, and promulgate those for operation at the state level without any process. But the language of the federal regulation governing general permits is clear: "[t]he Director may issue a general permit for categories of similar activities *if he determines* that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment." Id. § 233.21(b) (emphasis added). FDEP did not subject these purported general permits to any study, did not notify the public of any basis to support the propriety of such general permits, did not provide an opportunity for the public to comment on the intention to make any determination under this regulation, and has not provided affirmative evidence of having made an independent, fact-based determination.

FDEP cites no legal authority to disregard the plain language of 40 C.F.R. § 233.21(b). Moreover, FDEP's approach, which purports to give effect to "its" general permits for a duration of five years from the date of the State program's approval, is contrary to five-year limitation on general permits. FDEP's approach therefore not only fails to rely on a proper determination necessary to support the issuance of general permits. It also would unlawfully extend general permits issued initially by the Corps beyond their statutorily limited five-year duration. 33 U.S.C. § 1344(e)(2). This outcome is also unreasonable. Federal law requires the Corps to review its general permits, and the determinations underlying them, every five years. To allow Florida to extend the Corps' underlying rationale beyond the five-year statutory limitation to support continued issuance of general permits for years thereafter conflicts with federal law. Id.

FDEP's proposed program is also less restrictive than 40 C.F.R. § 233.21. The State's regulation unreasonably restricts its ability to require notice of intent of coverage under a GP, omitting the

federal catchall that the agency can require notice "as appropriate." Compare Fla. Admin. Code 62-331.200(3) with 40 C.F.R. § 233.21(d). The State regulation restricts the notice requirement to specifically identified circumstances and limits FDEP's authority to require notice whenever appropriate.

The State has limited its authority by only allowing FDEP to require an individual permit where "sufficient cause exists," which is then defined as a "likelihood that the project will cause more than minimal adverse environmental effects." Fla. Admin. Code 62-331.200(6). The federal rules, by contrast, allow the Director to do so "based on concerns for the aquatic environment," including compliance with the requirement for GPs to have only minimal individual and cumulative adverse environmental effects. 40 C.F.R § 233.21(e). Further, the State's rules omit the automatic revocation of GP coverage once the agency requires an individual permit. Compare Fla. Admin. Code 62-331.200(6) with 40 C.F.R. § 233.21(e).

c. Unlawful Expansion of Emergency Permits, 40 C.F.R. §233.22

The General Counsel Statement avers that Fla. Admin. Code 62-331.110 implements the emergency permit requirements of 40 C.F.R. § 233.22, citing only to subsections (b)(3)–(7). Assumption Application C at 5. Importantly, however, the State creates a much broader set of situations when an emergency permit may be granted than what is authorized under federal law.

Under federal regulations, an emergency permit may only be given "if unacceptable harm to life or severe loss of physical property is likely to occur before a permit could be issued or modified under procedures normally required." 40 C.F.R. § 233.22(a). The State, instead, would allow for the issuance of emergency permits to abate emergency conditions which "pose and imminent or existing serious threat or danger and require immediate action to protect public health, safety, or welfare, or the water resources of the Agency, including the health of aquatic and wetland-dependent species; a public water supply; or recreational, commercial, industrial, agricultural, or other reasonable uses." Fla. Admin. Code 62-331.110(1).

The State's grant of broader authority to issue emergency permits than what is allowed under federal law reflects a less stringent program than the federal program because emergency permits are granted more quickly and with less opportunity for process and review than regular permits. Compare Fla. Admin. Code 62-331.110 with id. 62-331.050–60.

d. Unlawful Limitation of Permit Conditions, 40 C.F.R. §233.23

The General Counsel Statement summarily declares that FDEP satisfies the requirements to comply with federal guidelines, even though many of the 404(b)(1) Guidelines are absent from the State rules, see Section V.B.1.a.

Additionally, the State's regulations omit important requirements outlined in 40 C.F.R. § 233.23: The State omits "minimize" from the federal requirement that permittees "take all reasonable steps to minimize or prevent any discharge in violation of this permit." Compare Fla. Admin. Code 62-331.054(2)(b) with 40 C.F.R. § 233.23(c)(4). The State's regulation omits minimum requirements for individual permits specifying that at least monitoring, reporting, and recordkeeping requirements must include "monitoring and reporting of any expected leachates, reporting of noncompliance, planned changes or transfer of the permit." Compare Fla. Admin. Code 62-331.054(d) with 40 C.F.R. § 233.23(c)(7). FDEP's regulations failed to include the requirement that discharges minimize adverse impacts through *restoration*, and instead only includes minimization through mitigation. Compare Fla. Admin. Code with 40 C.F.R. § 233.23(c)(9). The State's proposed program also omits the requirement for a specific identification and complete description of the authorized activity, instead relying on permit templates that are not incorporated by regulation and do not operate with the force of law. 40 C.F.R. § 233.23(c)(1).

e. Unlawful Permit Application Process, 40 C.F.R. § 233.30

The General Counsel Statement avers that Fla. Admin. Code 62-331.060(1) implements the requirements of 40 C.F.R § 233.30(b)(1)–(4). Assumption Application C at 6. However, the State uses different terms that would restrict the information that must be included in a permit application as compared to federal law. For example, the federal regulations require a description of "methods of discharge" whereas the State uses the term "construction methods," which is not defined by either the State regulations or the 404 Handbook. Compare Fla. Admin. Code 62-331.060(1)(e) with 40 C.F.R. § 233.30(b)(3). The plain meanings of the words "construction" and "discharge" are not equivalent.

The State also fails to incorporate the federal requirement regarding how much detail permit applications must include. Pursuant to 40 C.F.R. § 233.30(d), "[t]he level of detail shall be reasonably commensurate with the type and size of discharge, proximity to critical areas, likelihood of long-lived toxic chemical substances, and potential level of environmental degradation." Id. This language appears only in Appendix C of the 404 Handbook, which is described as guidance for conducting an alternatives analysis based on guidance from the Army Corps Jacksonville District. 404 Handbook, app. C. It is not included as a requirement for permit applications generally and is not incorporated into the rules themselves.

f. Failure to Meet Coordination Requirements, 40 C.F.R. § 233.3

The federal rules require that permits "shall be coordinated with federal and federal-state water related planning and review processes." 40 C.F.R. § 233.3. The General Counsel Statement

fails to provide any information or citation to demonstrate that the State has satisfied this requirement. Assumption Application C at 6. Instead, in the Comparison referenced by the General Counsel and added in Florida's assumption package, FDEP admits that they "did not add this [requirement] to the rule," but states that they "plan to engage in this kind of coordination whenever possible." Assumption Application B, app. j-3, at 32. FDEP has thus failed to ensure compliance with federal coordination requirements. That FDEP may "plan" to coordinate "whenever possible" falls far short of the requirement that permits "shall" be coordinated. Because the State failed to incorporate this requirement into its regulatory program, its program is less stringent than the federal program and must be denied.

g. Inadequate Public Notice, 40 C.F.R. § 233.32

The General Counsel Statement avers that Fla. Admin. Code 62-331.060(2)–(3) fully satisfies the public notice requirements of 40 C.F.R. § 233.32(a)–(c), (e). Assumption Application C at 6–7. However, that is not the case. The federal rules require that public notice be given whenever the following actions occur: (1) receipt of a permit application, (2) preparation of a draft general permit, (3) consideration of a major modification to an issued permit, (4) scheduling of a public hearing, and (5) issuance of an emergency permit. 40 C.F.R. § 233.32(a). Florida's regulations, on the other hand, do not require public notice for receipt of a permit application. Fla. Admin. Code 62-331.060(2)–(3).

h. Inadequate Process for Decision on Permit Application, 40 C.F.R. § 233.34

The General Counsel Statement rightfully explains that the permit decision-making process requires that permit decisions be reviewed for compliance with 404(b)(1) Guidelines. Assumption Application C at 7. However, as we explain in Section V.B.1.a, the State has not adopted or incorporated all of the 404(b)(1) Guidelines.

i. Failure to Meet Requirements for Compliance Evaluation Programs, 40 C.F.R. § 233.40

The General Counsel Statement claims that the State "has authority to enforce rules and regulations" for the State 404 Program. Assumption Application C at 9. However, that statement falls short of the federal requirement that a state "shall maintain a program designed to identify persons subject to regulation who have failed to obtain a permit or to comply with permit conditions." 40 C.F.R. § 233.40(a). As explained in Section V.B.1.k.5, however, the State does not maintain a program to identify violations in its current programs and has not shown how it would be able to do so for a Section 404 program. Having authority and actually using that authority to identify and enforce against violations are two very different things.

Although the State's regulations may provide authority, the State has categorically failed to show it has the resources to "maintain" such a program. See Section V.B.1.k.4.

j. Inadequate Enforcement Authority, 40 C.F.R. § 233.41

The General Counsel claims that Florida law is consistent with and no less stringent than the Clean Water Act enforcement requirements. Assumption Application C at 10. A vital aspect of administering a 404 enforcement program, however, is having adequate staffing and resources. As demonstrated further below, FDEP has not established that it has acquired the resources that would be required to administer and enforce a 404 program. In addition, in light of FDEP's grossly inadequate enforcement record, the EPA cannot reasonably conclude that FDEP would adequately enforce a 404 program when it cannot even adequately enforce the programs currently under its supervision. See SectionV.B.1.k.4.

(1) State Criminal Liability Less Stringent Than Federal Criminal Liability

Significantly, Florida law regarding criminal enforcement is not as stringent as federal law. Under 40 C.F.R. § 233.41(a)(3)(ii), for example, a criminal violation is established by showing (1) a discharge of dredged or filled material, (2) without a required permit or in violation of a permit condition, (3) that is committed willfully or with criminal negligence. Id.

Under Fla. Stat. § 373.430(1)(a), on the other hand, a criminal violation would require proof of an additional element, namely that the pollution (discharge) "caused actual harm or injury to human health or welfare, animal, plant, or aquatic life or property." See, e.g., State v. Hamilton, 388 So. 2d 561 (Fla. 1980) (interpreting identical provision to require proof of actual harm or injury to sustain a criminal conviction).

By requiring an additional element of proof, the state law fails to provide as stringent criminal liability as exists under federal law for unlawful discharges of dredged and fill material.

Moreover, Section 309(c) of the Clean Water Act makes it a crime to *negligently* violate "any permit condition […] in a permit issued under section 404 of this title," or to *negligently* "introduce into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage [or] causes such treatment works to violate any effluent limitation or condition in any permit." 33 U.S.C. § 1319(c)(1)(A), (B). The penalty for such a violation is a fine between $2,500 and $25,000 per day, per violation and/or imprisonment of up to one year; this penalty is doubled for a second violation. Id.

Four circuits have held that this provision requires only proof of simple negligence: the Courts of Appeal for the Third, Fifth, Ninth, and Tenth Circuits.[8] This creates a conflict between the Clean Water Act and both the federal regulation and the state statute at issue in this matter.

Under Florida law, it is unconstitutional to criminally penalize "mere negligent conduct" since that fails to provide "clearly ascertainable standards of guilt by which a citizen may gauge his conduct." State v. Hamilton, 388 So. 2d 561, 563-64 (Fla. 1980). Florida law therefore is not as stringent as to criminal enforcement as is the Clean Water Act. Moreover, this conflict is a matter of Florida constitutional law, and so it cannot be resolved by mere amendment of Florida statutes or regulations.

40 C.F.R. § 233.41(b)(2) states that "*the burden of proof and degree of knowledge or intent required under State law for establishing violations under […] this section shall be no greater than the burden of proof or degree of knowledge or intent EPA must bear when it brings an action under the Act*." Id. (emphasis added). Because criminal negligence in the state statute is a higher level of intent that simple negligence in the Clean Water Act, the Florida Statute conflicts with federal law, and does not provide as stringent criminal enforcement as does federal law. See also Idaho Conservation League, Petitioner, v. U.S. Environmental Protection Agency, Case No. 18-72684 (9th Cir. Sep. 10, 2020) (Exhibit 56) (the EPA abused its discretion in approving a state delegated program with a *mens rea* standard greater than the burden of proof required of the EPA).

Lastly, Florida law provides shorter statutes of limitation for enforcement of environmental crimes. Under federal law, criminal enforcement actions brought under 33 U.S.C. § 1319(c) are generally subject to a five-year statute of limitations. See United States v. Ursitti, 543 F. Supp. 2d 971, 974 (C.D. Ill. 2008) (in case involving a criminal violation of the CWA, citing to § 3282(a) and stating "[t]here is a five-year statute of limitations for criminal offenses, which is applicable to the offenses charged in this case"); see also Joseph J. Lisa, Negligence-Based Environmental Crimes: Failing to Exercise Due Care Can Be Criminal, 18 Vill. Envtl. L.J. 1, 43 n. 109 (2007) (citing 33 U.S.C. § 3282(a) as the applicable statute of limitations provision for criminal enforcement actions under Section 1319(c)).

The statutes of limitation applicable to violations under state law, however, are between one year and three years, depending on the severity of the offense. Fla. Stat. § 373.430(1)(a)–(c) (identifying crimes relating to pollution, failure to comply with permit requirements, and fraud);

[8] United States v. Maury, 695 F.3d 227, 259 (3d Cir. 2012); United States v. Pruett, 681 F.3d 232, 243 (5th Cir. 2012); United States v. Ortiz, 427 F.3d 1278, 1283 (10th Cir. 2005); United States v. Hanousek, 176 F.3d at 1120 (9th Cir. 1999).

id. § 373.430(3)–(5) (setting degree of offense depending on the crime); id. § 775.15 (setting for statute of limitations depending on the severity of the offense).

State law regarding criminal enforcement is therefore deficient also in this regard, making its program less stringent than the federal one.

Although 40 C.F.R. § 233.41(d)(1) authorizes the EPA to approve a state program that has less stringent *penalties* than available under federal law,[9] there is nothing in the Clean Water Act that authorizes the EPA to approve a state program with an enforcement scheme that is less stringent than the federal one in terms of criminal culpability, burden of proof and statutes of limitations. To the contrary, these failures render the program non-approvable.

(2) Public Participation (Enforcement), 40 C.F.R. § 233.41(b)(1)

In addition, pursuant to 40 C.F.R. § 233.41(b)(1), the State "shall provide for public participation in the State enforcement process through either a right of citizen intervention or an assurance that the State will (1) investigate citizen complaints, (2) not oppose citizen intervention, and (3) provide public notice and comment on any proposed settlement of a State enforcement action." Id. § 230.41(e). The General Counsel provides a blanket statement that the State has "authority" to comply with these requirements without citing any law or regulation providing that authority. Assumption Application C at 11.

The General Counsel also relies on the MOA with the EPA to say it has provided assurance that it will comply with 40 C.F.R. § 233.41(e)(2). Assumption Application C at 11. The MOA merely states, "FDEP shall provide for public participation in the State 404 Permit Program enforcement process pursuant to 40 C.F.R. § 233.41(e)(2)." Memorandum of Agreement between Fla. Dep't of Env't Prot. & U.S. Env't Prot. Agency at III.I (Jul. 31, 2020). FDEP, however, has failed to identify any requirement in the state law or regulations to ensure compliance with the requirements of 40 C.F.R. § 233.41(e)(2). Although assurances to the EPA may be helpful, when they are not incorporated into state law, there is a question regarding the extent to which the public is able to enforce those obligations.

k. Failure to Address Effect of State Takings Law on Successful Implementation of Program, 40 C.F.R. § 233.12

The General Counsel Statement must contain a legal analysis of the effect of State law regarding the prohibition on taking private property without just compensation on the successful

[9] Note that the State has claimed that this regulatory provision was "not applicable" to the State's application. Assumption Application B, app. j-3, at 54.

implementation of the State's program. 40 C.F.R. § 233.12(c). Rather than providing this analysis, the Statement focuses on the notion that no matter how broadly Florida courts interpret regulatory takings law, their decisions would be subject to review by the Supreme Court of the United States. Assumption Application C at 12. This reductionist position completely dodges the requirement to provide an actual analysis of the effect of Florida law on the prohibition against takings, since the blanket statement that takings law is ultimately subject to U.S Supreme Court review would apply to any state's submission or statutory scheme. The claim also ignores that the U.S. Supreme Court is a court of limited review, which only grants a select number of petitions for certiorari each year. See *Supreme Court: The Statistics*, 131 Harv. L. Rev. 403, 410 tbl. II(B) (2017) (1.2% of petitions for certiorari were granted review in the 2016 Term). "Review on a writ of certiorari is not a matter of right, but of judicial discretion" and it "will be granted only for compelling reasons." Sup. Ct. R. 10.

In addition to relying on a theoretical U.S. Supreme Court backstop, the General Counsel emphasizes that under Florida law, even when a private property owner brings an as-applied challenge to a regulation, that challenge can proceed without invalidating the underlying regulation. Assumption Application C at 12. This analysis appears to suggest that as long as the underlying regulatory program remains valid, takings law does not inhibit successful implementation of Florida's program. However, the real question is whether it is easier for private property owners to bring regulatory takings cases pursuant to Florida law such that less 404 permit mitigation would occur under a State program as compared to a federal program. The State has not answered that question.

Importantly, the General Counsel Statement completely fails to address the Bert J. Harris, Jr., Private Property Rights Protection Act, Fla. Stat. 70.001 et seq. ("Harris Act"), which Florida's legislature enacted "to provide a remedy for private landowners where their property has been inordinately burdened by government action, but the government action does not amount to a constitutional taking." Cascar, LLC v. City of Coral Gables, 274 So. 3d 1231, 1234 (Fla. Dist. Ct. App. 2019) (citing Fla. Stat. 70.001(1)) (emphasis added). The General Counsel failed to flag, much less address, how this Act would not interfere with operation of a 404 program. Without this explanation, the State has failed to meet the requirements of 40 C.F.R. § 233.12.

2. Florida's Scheme Does Not Ensure Protection of Species Listed Under the Endangered Species Act

Of particular consequence in Florida, the State's assumption application does not comply with the Clean Water Act's 404(b)(1)'s no jeopardy requirement. The State wholly fails to demonstrate how the state program would ensure no jeopardy to listed species. FDEP instead relies on an anticipated, future programmatic biological opinion hoped to be produced from the EPA's ESA Section 7 consultation that would improperly punt all ESA determinations to state

agencies. See Assumption Application B, app. j-2, at 5 (stating "coordination between the USFWS and FDEP related to the proposed action's effects on species will occur through the technical assistance process, which is anticipated to be outlined in the USFWS's biological opinion based on information included in the biological assessment submitted by EPA"); Memorandum of Understanding between Fla. Fish & Wildlife Conservation Comm'n, U.S. Fish & Wildlife Servs., & the Fla. Dep't of Env't Prot., Aug. 5, 2020 (Exhibit 57).

Under a programmatic Section 7 consultation, the EPA must review Florida's proposed criteria and process for ensuring state issued permits will not cause jeopardy to listed species. More importantly, the EPA may only approve Florida's program if it determines the program fulfills the no jeopardy requirement. 40 C.F.R. § 233.15(g). According to FDEP, "[b]ecause of the terms and conditions anticipated in the Program assumption BiOp and its [Incidental Take Statement ("ITS")], the State 404 program would not issue a permit that would jeopardize the continued existence of a species or adversely modify designated critical habitats." Fla. Dep't Env't Prot., ESA Biological Assessment for Clean Water Act Section 404 Assumption by the State of Florida iv (Jul. 24, 2020) (Exhibit 58) [hereinafter "BA"]. FDEP's application however does not contain any such criteria or even the Biological Assessment. Without the criteria in FDEP's application of how it will achieve this requirement, the EPA cannot (1) determine Florida's application is complete, (2) determine whether Florida can fulfill the guidelines' no jeopardy mandate or (3) approve Florida's assumption. See 40 C.F.R. §§ 233.1(a), 233.15(g); Letter from Bonnie Malloy, supra.

Even if a programmatic biological opinion were produced prior to the EPA's assumption decision deadline, it was not part of FDEP's application and has not been part of the administrative review process or subject to notice and comment. 40 C.F.R. § 233.15(a), (e) (requiring the EPA to provide a comment period of not less than 45 days on a state's complete application and provide a copy to U.S. Fish & Wildlife Service ("USFWS") and National Marine Fisheries Service ("NMFS") to review and comment). The EPA would be ignoring its own procedural regulations, and basic tenets of administrative law, to allow Florida to retroactively complete its application and circumvent notice and comment requirements. The EPA simply cannot approve Florida's assumption application based on a biological opinion outside the

public's scrutiny, when the State is relying on that opinion to claim compliance with requirements to assume jurisdiction over the 404 program.[10]

Tellingly, in anticipation of Florida's application, the EPA sought public comment on whether consultation under ESA Section 7 is required when the EPA reviews a state or tribal request to assume CWA § 404 duties. 85 Fed. Reg. 30,953 (May 21, 2020). The EPA's former position was that this was a non-discretionary decision and thus did not trigger ESA Section 7 consultation. Letter from Peter S. Silva, U.S. Env't Prot. Agency, to Steven Brown, Env't Council of the States, Dec. 27, 2010 (Exhibit 59). Florida, however, urged the EPA to reverse course, and it did.

While we agree that consultation should take place,[11] Florida's proposal (now adopted by the EPA) for how a programmatic biological opinion would be treated as ensuring no jeopardy is gravely flawed. Moreover, the actual process Florida claims it will follow to ensure no jeopardy has not been finalized, much less submitted for public review and comment. As a result, two flaws fatal to Florida's application emerge: (1) Florida has not demonstrated that its program will ensure no jeopardy, and (2) the public has been deprived of an opportunity to review Florida's plan and so be able to comment on whether Florida's proposal will ensure no jeopardy.

With over 130 listed species, more than 7,700 lakes (greater than 10 acres), 33 first-magnitude springs, 11 million acres of wetlands, almost 1,200 miles of coastline, and approximately 27,561 linear miles of rivers and streams, water and biodiversity are two of Florida's most prominent features.[12] Section 7 consultation in Florida therefore will involve analyzing limitless projects blanketing most of the State to determine their potential impacts on numerous listed species. FDEP admits in its Biological Assessment that "[b]ecause of the statewide nature of this request, the numerous covered species and diverse habitats, as well as lack of knowledge with respect to

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[10] Moreover, similar to pesticide registrations, 404 program assumption has broad geographical effects making ESA Section 7 consultation one of the most complex which should generate national consultation procedures like public comment. See U.S. Fish & Wildlife Servs. & Nat'l Marine Fisheries Serv., Endangered Species Consultation Handbook 5-3 to 5-4 (Mar. 1998) (Exhibit 60) (Comparing 404 program assumption to pesticides registrations which generates national consultation requests); U.S. Env't Prot. Agency, et al, Enhancing Stakeholder Input in the Pesticide Registration Review and ESA Consultation Processes and Development of Economically and Technologically Feasible Reasonable and Prudent Alternatives, Doc. Id. EPA-HQ-OPP-2012-0442-0038 (Mar. 19, 2013) (Exhibit 61) (providing pesticide registrations with public comment because of ensuring protection of the species will benefit from the general public's input).

[11] See Letter from Kristen L. Boyles, Earthjustice, to Kathy Hurld, U.S. Env't Prot. Agency, Jul. 6, 2020 (Exhibit 62).

[12] See Fla. Fish & Wildlife Conservation Comm'n, Florida's Official Endangered And Threatened Species List, 4 (2018) (Exhibit 63); Purdum, supra; Fla. Dep't of State, Quick Facts (Exhibit 64); U.S. Geologic Survey, supra; Fla. Dep't of Env't Prot., 2016 Integrated Water Quality Assessment for Florida 34 (2016) (Exhibit 65).

where and what type of future permits may be requested, a meaningful site-specific and species-specific analysis is not possible this BA." Fla. Dep't of Env't Prot., ESA Biological Assessment for Clean Water Act Section 404 Assumption by the State of Florida iv (Jul. 24, 2020) (Exhibit 58); see also Letter from James Murphy, Nat'l Wildlife Fed'n, to Kathy Hurld, U.S. Env't Prot. Agency, Jul. 6, 2020 (Exhibit 66). FDEP, however, expects a programmatic biological opinion to be completed in only a few months' time to allow the EPA to meet its assumption decision deadline (which stems from the erroneous determination that Florida's application was complete when submitted).

ESA Section 7 consultation on whether the EPA's approval of Florida's assumption application will jeopardize listed species is a complex, fact intensive analysis. ESA Section 7(a)(2) first places a procedural obligation on the EPA to initiate consultation with FWS and NMFS "at the earliest possible time" to determine what effects a state's assumption of the Section 404 program may have on endangered and threatened species and their critical habitats. ESA § 7(a)(2) next places a substantive obligation on the EPA to ensure its actions will not jeopardize the continued existence of endangered and threatened species or destroy or adversely modify their critical habitats. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14.

The ESA's implementing regulations dictate the precise requirements for satisfying this substantive obligation. Letter from Kristen L. Boyles, supra. To fulfill the ESA Section 7 consultation requirement, USFWS and NMFS must use the best scientific and commercial data available. 16 U.S.C. § 1536(a)(2), (b)(4). Note that even mixed programmatic actions require incidental take statements at the programmatic level if the actions are "reasonably certain to cause take and are not subject to further section 7 consultation." 50 C.F.R. § 402.14(i)(6). The agency cannot merely list a state's threatened and endangered species, dismiss further analysis as requiring too much speculation, or punt all meaningful analysis to the state at some future time.

Florida, however, has proposed that USFWS and NMFS engage in a one-time consultation that would only identify procedural requirements for state permitting under Section 404 needed to support the USFWS' determination that assumption would not result in jeopardy to any listed species. Fla. Dep't of Env't Prot., EPA Approval of State Assumption of Clean Water Act Section 404 Program: Streamlined Approach to Address Endangered Species Act Incidental Take Coverage 1–2 (Exhibit 67). FDEP even provided a Biological Assessment to the EPA in hopes to achieve this goal. FDEP's Biological Assessment was never subject to notice and comment during the State's rulemaking process, nor has it been during the EPA's consideration of the State's 404 program application.

Although referenced in Florida's application, the Biological Assessment has proceeded in a parallel process outside the public eye. Like the anticipated programmatic biological opinion, the Biological Assessment is not part of FDEP's application and therefore cannot be relied on to

satisfy the no jeopardy mandate. Moreover, the Biological Assessment suffers numerous flaws that render it inadequate to support a programmatic biological opinion.

At its core, the Biological Assessment fails to be as protective as the current federal process. First, the Biological Assessment fails to provide site-specific information, thereby preventing the intended state implementing agencies (FDEP and the Florida Fish and Wildlife Conservation Commission ("FWCC")) from even determining the effect of various specific permitting actions. Without site-specific information, FDEP's jeopardy analysis will be flawed. For example, the Biological Assessment includes only about half a page on the state mammal, the critically endangered Florida Panther, even though it is estimated that the current remaining population is only 120–230 adult individuals[13] and is in danger of extinction.[14] With such little information, how can FDEP which has no expertise in the subject be able, even at the project level, to conduct the necessary analysis to ensure no jeopardy?

Additionally, the Biological Assessment provides very limited—almost nonexistent—information about the cumulative impacts of the State's assumption program. The Biological Assessment fails to adequately address the environmental baseline, status of the species, effects of the action, or reasonable and prudent measures designed to reduce any take identified. Instead, these are all punted to the state agencies to decide at the project level. There are other flaws contained in the Biological Assessment as well, including but limited to, lack of information on what constitutes "suitable habitat;" unreasonably short timeframe for USFWS to decide if it will comment; FDEP and FWCC will make effect determinations and assume no comment from USFWS if there is silence (no duty to check); designation of the key deer and red cockaded woodpecker as not regularly utilizing wetlands despite their state or county wetland dependent designations. BA at 87, tbl. 3-1, 23.

While programmatic consultation allows consultation on an agency's multiple actions on a program, including a proposed program or regulation that provides a framework for future proposed actions, 50 C.F.R. § 402.02, under Florida's proposal, the truncated consultation would essentially give the EPA wholesale approval from the USFWS and NMFS for specified and foreseeable actions without any analysis of the effects of the whole action, jeopardy determinations, or take limits, all in direct contravention to the ESA's mandate, implementing regulations, and numerous court holdings. See, e.g., Conner v. Burford, 848 F.2d 1441, 1453–54 (9th Cir. 1988); N. Slope Borough v. Andrus, 642 F.2d 589, 608 (D.C. Cir. 1980); Wild Fish Conservancy v. Salazar, 628 F.3d 513, 521 (9th Cir. 2010); Forest Serv. Empls. for Env't Ethics v. U.S. Forest Serv., 726 F. Supp. 2d 1195, 1225–26 (D. Mont. 2010). Under such an approach,

[13] See U.S. Fish and Wildlife Serv., Florida Panther Population Estimate Updated, Feb. 22, 2017 (Exhibit 69); U.S. Fish and Wildlife Serv., Florida Panther Recovery Plan, 3rd rev. at viii (2008) (Exhibit 69).
[14] See U.S. Fish and Wildlife Serv., Florida Panther 5-Year Review 19 (2009) (Exhibit 70).

the USFWS and NMFS will have failed to fully consult on the action and the EPA will not satisfy its burden to ensure that the proposed action is not likely to jeopardize listed species or destroy or adversely modify critical habitat.

Indeed, even under a programmatic consultation, if assumption is approved, the jeopardy analysis cannot end there. States like Florida must *still* ensure there will be no jeopardy to listed species prior to the issuance of permits for the discharge of dredged or fill material pursuant to the Clean Water Act's 404(b)(1) guidelines. A state's program must be at least as stringent as the federal program, which expressly requires that both individual and general permits comply with the ESA. Overarching programmatic consultation does not relieve the State of its responsibility to determine at the site-specific permit level whether there will be no jeopardy to listed species prior to the issuance of permits for the discharge of dredged or fill material pursuant to the Clean Water Act's 404(b)(1) guidelines. FDEP's application however is silent on how this will be accomplished.

What is known about the EPA's Section 7 consultation process demonstrates that it is flawed in other respects as well, rendering any potential resulting programmatic biological opinion insufficient. First, NMFS made a critical error when failing to consider the entire area that will be affected by Florida's assumption. See 16 U.S.C. 1536(a)(2); 50 C.F.R. § 402.02. Accordingly, NMFS is not engaging in the Section 7 consultation on Florida's 404 assumption, and the EPA will not satisfy its consultation duty. NMFS instead is merely "assum[ing] that the EPA will make a 'no effect' determination for NMFS' ESA-listed species that were originally identified as part of this proposed assumption." Id. This notion is based on NMFS' recent determination that "Endangered Species Act (ESA)-listed species under NMFS' jurisdiction do not occur in waters that are assumable by the state." See Letter from Cathryne Tortorici, Nat'l Marine Fisheries Serv., to Heather Mason, Fla. Dep't of Env't Prot., Apr. 15, 2020 (Exhibit 71).[15] NMFS' jurisdictional determination however is inconsistent with federal law.

Section 7 consultation must occur for species and critical habitat that are in the "action area" and "action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. 402.02(d). NMFS holds that all of the species under its jurisdiction occur in waters that will be retained under the Corps' jurisdiction and thus the agency need not consult. To the contrary, the "action area" isn't limited to the assumed waters, it also includes areas that would experience downstream impacts. Without consulting NMFS, there will be no consideration of whether the no-jeopardy mandate in

[15] Based on NMFS' determination, FDEP's Memorandum of Understanding (MOU) with USFWS and FWCC outlining their plan for state agencies' technical assistance and limited federal oversight excludes NMFS all together.

the Clean Water Act's 404(b)(1) Guidelines is achievable for NMFS' species experiencing downstream impacts.

Next, Florida's proposal is also asking the EPA to delegate its obligations under ESA Section 7(a)(2) to non-federal parties. FDEP's application and MOU with USFWS and FWCC lay out a process whereby the EPA will rely on a future, abridged programmatic biological opinion that merely instructs FDEP and FWCC to determine at the project level if an activity may affect listed species or critical habitat, determine whether there will be jeopardy, and determine what conditions may be necessary to ensure no jeopardy. FDEP's proposal unlawfully delegates the initial effects determination to FDEP (and likely the applicant who will be asked to identify whether species are affected). These determinations must be made by a federal agency. See 16 U.S.C. § 1536(a)(2); Selkirk Conservation All. v. Forsgren, 336 F.3d 944, 955 (9th Cir. 2003) ("[F]ederal agencies cannot delegate the protection of the environment to public-private accords."); Gerber v. Norton, 294 F.3d 173, 184–86 (D.C. Cir. 2002) (USFWS may not delegate species protection obligations to a private permit applicant).

Yet FDEP's application relies on FWCC's assistance to determine impacts to listed species to justify FDEP's ability to adequately ensure no jeopardy to species and to satisfy the Clean Water Act's 404(b)(1) guidelines. See, e.g., Assumption Application B, app. (a)-1. FDEP's application and MOU with USFWS and FWCC creates a procedure for FDEP and FWCC to conduct the necessary species analyses and in fact perform more functions than the Corps currently does under the Federal 404 program. FDEP and FWCC will do initial determinations, determine the adequacy of avoidance measures, and determine the effect of the project. FDEP is relying on FWCC to "ease the transition of the State 404 Program, providing faster and more accurate project reviews and effect determinations as compared to FDEP staff alone." Assumption Application B, app. j-2, at 9–10. While the MOU states USFWS' position is "determinative," there is nothing requiring USFWS to act nor is the MOU incorporated by law. Id. Moreover, USFWS' oversight on future permits is limited and highly dependent on their ability—and desire—to respond within the anticipated insanely tight timeclock restrictions. BA at 77. Indeed, nothing in state law prevents FDEP from ignoring USFWS's recommendations.[16]

Lastly, the Florida Constitution grants FWCC only the power to regulate wildlife and freshwater and marine life. Fla. Const, art. IV, § 9. FDEP has not demonstrated that it has the authority to regulate species under state law that it now claims it would exercise in a state-assumed program. In addition, under Florida law, FWCC is constitutionally barred from regulating water pollution. "Unless provided by general law, [FWCC] shall have no authority to regulate matters relating to air and water pollution." Id. FWCC therefore cannot lawfully exercise its authority over species

[16] Indeed, the fact that some of FDEP's, USFWS', and FWCC's duties and requirements only appear in the MOU raises questions as to their enforceability by affected private citizens.

regulation to act as an essential decision-maker in Section 404, which is a water pollution program.

3. FDEP Does Not Have Sufficient Resources to Adequately Implement a State 404 Program

FDEP lacks the necessary the resources to properly implement, operate and enforce a State 404 program, particularly when FDEP has been unable to adequately resource its existing obligations. The substantial impact the COVID-19 pandemic has had on state coffers only strains FDEP's resources further, undermining its baseless claim that it can take on a 404 program without a cent in additional resources.[17]

FDEP's application summarily asserts it can rely on existing resources to administer and enforce a 404 program while failing to disclose, among other things: (1) FDEP's failure to meet existing regulatory obligations; (2) the significant budget cuts brought on by the global pandemic; and (3) the resource status and needs of other state agencies on which FDEP expects to rely to fulfill obligations under Section 404.

To determine the adequacy of Florida's authority and ability to administer the Clean Water Act Section 404 program, the EPA must assess the funding and manpower available for program administration and the estimated workload. 40 C.F.R. § 233.1(a); 40 C.F.R. § 233.11. As raised already to the EPA, the holes in FDEP's application alone require the EPA to deny Florida's application or determine that FDEP's application is incomplete and require an adequate funding and staffing plan before resuming review of its application. See 40 C.F.R. § 233.11(d) (program description must include "[a] description of the funding and manpower which will be available for program administration"); Letter from Bonnie Malloy, supra.

FDEP's fanciful plan entails "reallocat[ing] existing positions and staff time from elsewhere in [FDEP]" (without demonstrating that FDEP has no competing duty to meet its "elsewhere" obligations) and offset the workforce losses to existing programs with new "efficiencies throughout [FDEP]" (without articulating what those efficiencies would be). Assumption Application B, app. e., at 8. FDEP however only vaguely addresses these supposed "efficiencies" in its application—with a few potential examples like online applications—but fails to identify or quantify the workload or positions these basic efforts would eliminate or quantify gains that might be realized.

[17] FDEP has also recently been given more new duties to complete with limited staff and resources. Ryan Dailey, Florida DEP Gets New Duties, Including Septic Systems Oversight, Under New Law, WFSU, Jun. 30, 2020 (Exhibit 72). The Florida legislature recently transferred authority of septic tank inspection from the Florida Department of Health to FDEP. FDEP was also directed to update its regulations that apply to storm water systems. Id.

In short, FDEP asks the EPA to take its word that the agency will figure its way out of having to allocate a single cent to operate and enforce an entire federal wetlands permitting program that has cost other states millions of dollars to undertake.[18] This fails to demonstrate FDEP's ability to competently administer a state program, and calls into question the adequacy of any program that would not require a penny more to run.

FDEP's 404 Assumption Application likewise does not fully address or disclose all costs that will necessarily be associated with administering a 404 Program. For example, FDEP fails to address: initial resources needed to process all pending (160) applications at the time of assumption, resource needs and costs required for compliance and enforcement of the pending applications that are approved, sufficient staffing, an adequate audit process, costs associated with reissuing general permits, the large area of permits where the claimed "85%" overlap of work with the ERP Program will not be achieved, and several costs associated with implementation. See Doug Fry Aff. (Nov. 2, 2020) (Exhibit 73).

More specifically, FDEP will have to take over an estimated 160 pending 404 permit applications but has failed to even identify how many *trained* staff it has or will be needed to address this sudden influx and the necessary compliance and enforcement which will automatically follow. Id. at 5–8. FDEP has also not substantiated how they arrived at this 85% overlap figure which would not apply to FDEP's new workload of processing 404 permits for activities permitted under the ERP Program by the Water Management Districts and delegated local governments. Id. at 15. For these 404 permits, FDEP would not be processing the ERP permit nor does it have the in-house expertise to do so. Id. at 15–17. The projects processed under the ERP program by the Water Management Districts, for instance, are typically much larger in size and scope (i.e., seawall versus 10,000 acre commercial development), require in depth engineering review, involve hydrology expertise, and are more often located in inland freshwater systems (opposed to FDEP's experience with ERP in mainly coastal systems). Id.

The staffing numbers that FDEP has provided are unrealistically low, id. at 8–10, and have not been supported with the underlying data necessary to evaluate them. See Assumption Application B, app. e (tables are missing underlying data and limited methodology is unclear). These estimates also failed to account for the time spent reviewing permits that were denied or withdrawn. Id. at 8.

FDEP's proposal also includes reliance on other state agencies, FWCC and the State Historic Preservation Office ("SHPO"), to ensure protection of listed species and cultural resources.

[18] Compare 404 Assumption SERC with Fla. Dep't of Env't Prot., Statement of Estimated Regulatory Cost, 62-330 (2012) (Exhibit 74).

Memorandum of Understanding between Fla. Fish & Wildlife Conservation Comm'n, U.S. Fish & Wildlife Servs., & the Fla. Dep't of Env't Prot., Aug. 5, 2020; Operating Agreement between Fla. Dep't of Env't Prot. & the Fla. Div. of Hist. Ress.-State Hist. Pres. Officer Regarding the State 404 Program, Aug. 6, 2020. However, Florida's description of funding and manpower contains no information regarding the funding and manpower, if any, available at either of those state agencies to meet the obligations of an assumed 404 program. FDEP's memorandums also do not commit these agencies to increasing their budgets to implement the Florida Program. Assumption Application B, app. j-1, j-2.

Interestingly, staff at both of those agencies have even expressed concern with FDEP's plan and their ability to administer the 404 program. See Email from Lisa Gregg, Special Activity License Program, Fla. Fish & Wildlife Comm'n, to Jennifer Goff, Conservation Planning Services, Fla. Fish & Wildlife Comm'n, Jan. 14, 2020, 11:26 EST ("FDEP permit processors can't keep up with their current workload now and appropriately consider the impacts of proposed actions to fish and wildlife resources even if you hand it to them on a platter, much less if you added to their workload."); Operating Agreement between Fla. Dep't of Env't Prot. & the Fla. Div. of Hist. Ress.-State Hist. Pres. Officer Regarding the State 404 Program at 9 (draft) (rev'd May 29, 2020) (Exhibit 75) (in response to a 15-day response deadline for a permittee' pre-review request SHPO employee stated "Providing consistent comments within 15 days may not be feasible for our Compliance Section.").

The unprecedented budget strains the State is now facing will make it impossible to recover any semblance of staffing and funding that would make assumption of a Section 404 program feasible any time soon. Tax revenues for the State plummeted in April, May and June 2020 as a result of the pandemic. In July 2020, Governor DeSantis vetoed $1 billion in spending from the 2020–2021 budget in response to the crisis. In August 2020, Florida agencies were asked to cut 8.5% of their budgets to adjust for the anticipated $3.4 billion loss for Fiscal year 2020–2021 resulting from the pandemic. See Christine Sexton, Florida Agencies Asked to Cut 8.5 Percent to Adjust for COVID-19, Tampa Bay Times, Aug. 12, 2020 (Exhibit 76); Fla. Off. of Econ. & Demographic Rsch., Executive Summary: Revenue Estimating Conference for the General Revenue Fund & Financial Outlook Statement (Aug. 14, 2020) (Exhibit 77).

Florida has not acknowledged these important facts, much less addressed how its state agencies can be expected to do more—namely administer a new, complex Section 404 program—with so much less. See, e.g., Doug Fry Aff. FDEP's claim that it will be able to operate a Section 404 program without any additional funding from the State is untenable as further evidenced by the millions of dollars (ranging from 2–3 million to as much as 18 million) other states pursuing

assumption have estimated it to cost.[19] FDEP's position can only mean it would treat a 404 program the same as its existing ERP program or suggests that FDEP simply will not adequately implement, operate or enforce a Section 404 program. Both are indefensible and require the EPA to deny FDEP's assumption application.

4. FDEP's Enforcement Record Continues to Demonstrate an Incapacity to Adequately Enforce Existing Programs, Much Less Adopt New Ones

As was described above, FDEP was gutted in recent years. Editorial: The Rick Scott Record: An Environmental Disaster, Tampa Bay Times, supra (observing that the Rick Scott administration had reduced water management budgets, rushed through permitting, weakened enforcement, caused widespread layoffs, provoked a brain drain of experts in the field, and replaced experts with political appointees focused on advancing business interests rather than environmental stewardship).

As a result, FDEP has been unable to meet its existing obligations to operate and enforce programs already under its purview. This fact is amply demonstrated in the widespread impaired waters throughout the State, as well as the recurring toxic algae crisis that has made national headlines and FDEP's grossly inadequate record of enforcing its existing programs. See, e.g., Doug Fry Aff. (Exhibit 73); PEER, Report on Enforcement Efforts by the Florida Department of Environmental Protection: Calendar Year 2019 6 (2020) (Exhibit 81).

Year after year, analyses of FDEP's enforcement record have demonstrated an inability or unwillingness to meet enforcement obligations, ensure compliance with existing programs, and ultimately provide requisite protection to the State's valuable natural resources. See Press Release, PEER, Florida Eco-Noncompliance Rises as Enforcement Wanes, Jun. 22, 2020 (Exhibit 82); PEER, Report on Enforcement Efforts By the Florida Department of Environmental Protection Calendar Year 2019 (2020) (Exhibit 81); Press Release, PEER, Fewer Florida Eco-Inspections Equals Less Compliance, Sept. 17, 2019 (Exhibit 83); PEER, Report on Enforcement Efforts By the Florida Department of Environmental Protection Calendar Year 2018 (2019) (Exhibit 84); Press Release, PEER, Florida Racks up Second Worst Eco-Enforcement in 30+ Years, Jul. 17, 2018 (Exhibit 85); PEER, Report on Enforcement Efforts By

[19] See, e.g., Va. Dept. of Env't Quality, Study of Costs and Benefits of State Assumption of the Federal § 404 Clean Water Act Permitting Program 2 (Dec. 2012), (Exhibit 78) (estimating assumption to cost $18 million over the first 5 years and $3.4 million annually thereafter); Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study ix (Jan. 2017), (Exhibit 79) (estimated cost increase for state agencies is 4.796 million per year plus a one-time $3 million cost for developing online permitting systems); Az. Dep't of Env't Quality, Clean Water Act § 404 Assumption Roadmap Review Meeting 22 (Exhibit 80) (estimating assumption to cost $2.5 million annually and to be funded by application fees).

the Florida Department of Environmental Protection Calendar Year 2017 (2018) (Exhibit 86); Press Release, PEER Florida Eco-Enforcement Still Scraping Bottom, Aug. 29, 2017 (Exhibit 87); PEER, Report on Enforcement Efforts By the Florida Department of Environmental Protection Calendar Year 2016 (2017) (Exhibit 88).

FDEP's own performance audits and employee testing show that it has failed in many respects to effectively administer its existing ERP Program, the same program the state now touts as the reason why it can so easily assume a 404 program without any additional resources. Internal audit records and employee testing provided to Earthjustice in response to public records requests demonstrate that FDEP has failed to adequately administer the ERP program and show FDEP's consistent inability to properly review permit applications and monitor and enforce issued permits.

For example, in 2013, FDEP staff were tested along with staff from Water Management Districts and specific counties in Florida to assess their skills in delineating wetlands. 2013 Training Test Module Result Summary and Analysis (Exhibit 89) "Though each [FDEP] district tended to have a few relatively high scores, the rest fell across a very wide range, often with the majority being below the statewide average." Id.

The same issues arise when reviewing the audit reports of FDEP staff's ERP permits. For example, the ERP Individual Permit Review for 2015 found that FDEP staff completed site inspections when required in less than half of reviewed examples, most documentation of wetlands impacts was "minimal," and only 24% of projects reviewed that required mitigation provided appropriate mitigation. Allyson Minick & Heather Mason, Submerged Lands & Env't Res. Coordination, Fla. Dep't of Env't Prot., 2015 ERP Individual Permit Reviews 13–14 (as edited 2017) (Exhibit 90). More recent audits of individual permits continue this pattern: few site inspections when required, inadequate mitigation required, and documentation of wetlands impacts missing. See (Exhibit 91) (compilation of individual permit audits provided to Earthjustice in response to public records requests).

Individual audits of compliance and enforcement activities for FDEP's existing ERP program that were provided to Earthjustice in response to public records requests are similarly littered with examples of inadequate documentation, assessment of insufficient or inaccurate penalties, requiring inappropriate or insufficient corrective actions. See (Exhibit 92) (compilation of compliance and enforcement audits provided to Earthjustice in response to public records requests)

Testimony during EPA's public hearings on Florida's assumption application also revealed extensive concerns over FDEP's failure to competently administer many of its other programs as well, such as its Total Maximum Daily Loads Program, Basin Management Action Plans, and

National Pollutant Discharge Elimination System Stormwater Program. Oct. 21, 2020, Hearing Transcript; Oct. 27, 2020, Hearing Transcript.

The consequences of allowing an ill-equipped FDEP to administer the proposed Section 404 program are made all the more stark by the EPA's decision to waive almost all oversight of Florida's program otherwise available under the Clean Water Act, see 33 U.S.C. § 1344(j)-(k), that is not required to be retained under 40 C.F.R. § 233.51(b). Memorandum of Agreement between Fla. Dep't of Env't Prot. & U.S. Env't Prot. Agency at III(b) (Jul. 31, 2020). EPA has not approved an assumption program in decades, and much has changed in the law and wetlands science since the early 1990s. Never has a state with the vast waterways, wetlands and listed species that Florida enjoys assumed the 404 program. For EPA to ensure this high-stakes assumption program complies with Section 404, EPA would have to retain the maximum monitoring and oversight possible for a minimum of two years before relinquishing its Section 404(j) authority.

In any event, the fundamental flaws in Florida's proposed program, combined with its utter lack of resources and capacity to undertake a Section 404 program, demonstrate that the application must be denied.

5. Florida Does Not Afford Comparable Access to the Courts As That Available Under Federal Law

Critical to citizen enforcement of a Section 404 program, Florida's access to the courts is far more restrictive than that allowed under federal law. In its description of the "Administrative and Judicial Review" procedures available in Florida, FDEP fails to mention any of the State's several features that make Florida's administrative and judicial review procedures far more restrictive those available under federal law. Assumption Application B, app. b.

For example, Florida's "Environmental Protection Act" only authorizes "a citizen *of the state*" to maintain an action for injunctive relief to compel government enforcement of environmental laws or against a person or non-governmental entity for violating our environmental laws. Fla. Stat. § 403.412(2)(a) (emphasis added). Paragraph (7) similarly states that "[i]n a matter pertaining to a federally delegated or approved program, *a citizen of the state* may initiate an administrative proceeding under this subsection if the citizen meets the standing requirements for judicial review of a case or controversy pursuant to Article III of the United States Constitution." Id. § 403.412(7) (emphasis added). The ability to intervene in proceedings brought under this statute is also limited to "citizens of the state." Id. § 403.412(5).

Federal law, on the other hand, authorizes citizen suits under the Clean Water Act by "any citizen," 33 U.S.C. § 1365(a) (authorizing suit alleging violation of limitations under the chapter

or against EPA for failure to perform non-discretionary duty or act). The term "citizen" is defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). Unlike the State's law, federal law does not require the adversely affected person to be a citizen of the state where the interest lies.

In addition, a litigant bringing an action under Fla. Stat. § 403.412 is subject to a mandatory fee-shifting provision that has no analog under the Clean Water Act. Under Fla. Stat. § 403.412(2)(f), attorneys' fees must be imposed in favor of any prevailing party and against the losing party, notwithstanding the good faith or merit of the litigant's position. While the State's statute exempts actions involving a state-issued National Pollution Discharge Elimination System permit from this mandatory fee-shifting provision, there is no such exemption for actions involving a Section 404 permit. Id. § 403.412(2)(f). Mandatory fee shifting under Fla. Stat. § 403.412 operates as a barrier to court access for litigants unwilling or unable to risk an adverse fee award no matter the strength of their case.

The Clean Water Act's citizen suit provisions, by contrast, do not require mandatory fee shifting to the prevailing party. Rather, the court "*may* award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party" as the court deems appropriate. 33 U.S.C. § 1365(d) (emphasis added).

Florida's Administrative Procedure Act also restricts access to courts as compared to federal law, by severely limiting the ability to establish standing. To establish associational standing, for example, organizations must demonstrate that a "substantial number" of their members "are substantially affected" by the challenged conduct. See Florida Home Builders Ass'n v. U.S. Dep't of Labor, 412 So.2d 351 (Fla. 1982); Farmworker Rights Org., Inc. v. Dep't of Health & Rehab. Servs., 417 So.2d 753, 754–55 (Fla. 1st Dist. Ct. App. 1982) (to establish associational standing under section 120.57(1) organization must demonstrate that "a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged rule," that "the subject matter of the challenged rule is within the association's general scope of interest and activity," and that "the relief requested is of a type appropriate for a trade association to receive on behalf of its members."); St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt., 54 So. 3d 1051, 1054 (Fla. Dist. Ct. App. 2011) (under Florida APA, associational standing requires showing of harm to substantial interests of a substantial number of members; finding standing under sections 120.569 and 120.57 where organization had 1,500 members, including 50 in the relevant county, and that there had been more than 1,100 member participant ecological boat trips to the area); Friends of the Everglades, Inc. v. Bd. of Trustees of Int'l Imp. Tr. Fund, 595 So. 2d 186, 188 (Fla. Dist. Ct. App. 1992).

Under federal law, on the other hand, associational standing may be established on the basis of a single member's harms resulting from the challenged conduct. See Sierra Club v. Johnson, 436

F.3d 1269, 1279 (11th Cir. 2006) (associational standing of Sierra Club satisfied by affidavit of one member who suffered injury in fact).

Florida's more restrictive access to the courts would deprive affected parties of the ability to vindicate rights and ensure citizen enforcement of Section 404. This further demonstrates that the State should not be permitted to assume the program.

6. Florida Has Not Adequately Defined Assumable Waters vs. Retained Waters

As demonstrated above, the issue of identifying Florida's assumable, versus retained, waters is a contentious issue with enormous consequences for the protections that will be afforded to Florida's waterways. The Corps' sudden retreat to an exceedingly restrictive view of retained waters is unreasonable, and not based in fact. We object to Florida's unduly expansive view of assumable waters—and to the Corps' unduly restrictive view of retained waters—and fully incorporate the comments raised in our letter to the Corps on April 18, 2018, as well as in our October 23, 2020, letter to EPA. Letter from Tania Galloni, Earthjustice, to Jason A. Kirk, U.S. Army Corps of Eng'rs, Apr. 18, 2018, supra; Letter from Bonnie Malloy, supra.

The Corps' failure to follow through on its 2018 notice and comment opportunity for stakeholders to weigh in on this critical question, and the Corps' failure to perform the requisite navigability assessments contemplated with that public notice, undermines the validity of its current view that so few waters belong on its retained list. To the contrary, federal law requires that the Corps retain jurisdiction over many more important waterways in Florida. The Corps' ceding jurisdiction over those waters to Florida for purposes of 404 assumption violates the Rivers and Harbors Act and renders EPA approval of such a program untenable.

In addition, the Corps has advised in the MOA between FDEP and the Corps, 40 C.F.R. §233.14, to provide a retained waters GIS layer to the FDEP. However, this information has not been provided to the public, despite multiple requests, nor, to the undersigned's knowledge, has it been provided to the State.

The Corps has not indicated whether that GIS layer will simply identify retained waters, whether it will actually depict their mean high water lines (MHWL)/ordinary high water marks (OHWM), or the actual pre-determined location of the administrative boundary. It can be quite difficult for staff and applicants to determine such lines, marks, and boundaries, particularly if an applicant's property is not located directly abutting the MHWL/OHWM (where those lines might be discernable by an applicant without a survey), and can be costly where the lines/marks need to be determined by a registered professional.

The only information provided to the public and the EPA is a list of waters provided in FDEP's application. 404 Handbook B, app. A. This list however fails to list numerous waterbodies that were previously on the Corps Retained Waters List in 2017 and that were submitted to the Corps during its comment period in 2018 discussed above in section III. The Conservancy of Southwest Florida and Waterkeepers Florida both submit comments addressing these missing waters which are incorporated herein. Letter from Amber Crooks, Conservancy of Sw. Fla., to Kelly Laycock, U.S. Env't Prot. Agency, Nov. 2, 2020 (Exhibit 93); Letter from Rachel Silverstein, Miami Waterkeeper, et al., to Kelly Laycock, U.S. Env't Prot. Agency, Nov. 2, 2020 (Exhibit 94).

Lastly, Florida's adoption of an only 300-foot buffer zone is unreasonable and inadequate. The only other states to have assumed a 404 program have utilized the more protective 1,000 foot buffer, and no less should be required of Florida in order to satisfy the Clean Water Act.

7. Florida's Waterways, Public Cannot Afford to Lose Existing Federal Safeguards

Florida's unique, and exceptionally valuable, waterways require the maximum protection available under federal law, not a reduction in protections that would follow from FDEP's assumption of Section 404. History has taught that the availability of NEPA review, and the involvement of the Corps in wetlands permitting, have been essential to safeguarding precious resources in Florida.

a. NEPA Safeguards Are Essential Protecting Florida's Wetlands

As stated above, Florida has touted the loss of NEPA review under an assumed state program as a "benefit" and "cost-saving" measure for permit applicants. It is a massive net loss, however, to the public and to protection of Florida's waterways.

Enacted in response to mounting crises across the nation, NEPA promised to correct the blind eye that American policymakers had long turned to environmental impacts of federal agency actions. See S. Rep. No. 91-296, at 4–5 (1969) ("As a result of this failure to formulate a comprehensive national policy, environmental decisionmaking largely continues to proceed as it has in the past. Policy is established by default and inaction. Environmental problems are only dealt with when they reach crisis proportions. Public desires and aspirations are seldom consulted. Important decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades."). Congress recognized that "[t]raditional policies were primarily designed to enhance the production of goods and to increase the gross national product .... [b]ut [that], as a nation, we have paid a price for our material well-being." Id. With the understanding that "the Nation cannot continue to pay the price of past abuse," id., Section

101 of NEPA imposes on the national government an obligation "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." NEPA § 101(a), codified at 42 U.S.C. § 4331(a). The government thus had the "continuing responsibility" to, among other things, "assure for all Americans, safe, healthful, productive, and esthetically and culturally pleasing surroundings." Id. § 101(b)(2).

NEPA also looked to the future: Congress committed the federal government to "fulfill the responsibilities of each generation as trustee of the environment for succeeding generations." Id. § 101(b)(1). Prior to NEPA, federal policymaking did not systematically consider long-term environmental degradation. Instead, the "pursuit of narrower, more immediate goals" had fostered increasing "threats to the environment and the Nation's life support system." See S. Rep. No. 91-296, at 8–9 ("The challenge of environmental management is, in essence, a challenge of modern man to himself. The principal threats to the environment and the Nation's life support system are those that man has himself induced in the pursuit of material wealth, greater productivity, and other important values. These threats—whether in the form of pollution, crowding, ugliness, or in some other form—were not achieved intentionally. They were the spinoff, the fallout, and the unanticipated consequences which resulted from the pursuit of narrower, more immediate goals."). NEPA was enacted as a change in course, forcing policymakers to consider "the long-range implications of many of the critical environmental problems" facing the nation. See id. at 8.

To fulfill its promises, NEPA mandated that federal agencies consider the environmental impacts of their decisions. NEPA § 102. Congress directed federal agencies to meet three goals: First, federal decisions must be informed by detailed environmental analyses. Second, decision makers must develop, study, and consider alternative courses of actions allowing a comparison of the potential environmental impacts of such alternatives. Id. § 102(2)(C)(iii), (E); see Pub. L. No. 94-83 (1975) (amending section 102(2) of NEPA). And third, agencies must involve the public in this evaluation and decisionmaking process.

To this end, NEPA requires that the government:

> utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment[.]

NEPA § 102(2)(A). Agencies must also provide a "detailed statement" on the environmental impacts of proposed decisions "significantly affecting the quality of the human environment" (known as an environmental impact statement or EIS). Id. § 102(2)(C). Within that detailed statement, agencies must disclose "any" unavoidable adverse environmental effects of the

decision. Id. § 102(2)(C)(ii). And they must disclose "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." Id. § 102(2)(C)(v). Moreover, NEPA does not allow agencies to ignore analytic gaps: agencies must find ways to properly weigh "unquantified environmental amenities and values." See id. § 102(2)(b).

NEPA directs federal decisionmakers to study and consider alternatives to their decisions, allowing comparisons the environmental impacts of such alternatives. See id. § 102(2)(C)(iii), (E); Pub. L. No. 94-83 (1975) (amending section 102(2) of NEPA). In particular, federal agencies must "study, develop, and describe appropriate alternatives to recommended courses of action" in "any proposal which involves unresolved conflicts concerning alternative uses of available resources," even if its impacts do not rise to the level requiring an EIS. NEPA § 102(2)(E). See Pub. L. No. 94-83 (1975) (amending section 102(2) of NEPA).

NEPA mandates inclusion of and disclosure to the public and other governmental entities of environmental impact analyses. The statute broadly directs agencies to act "in cooperation" with governmental entities and the public in the decision-making process. NEPA § 101(a). Further, agencies must make available "advice and information useful in restoring, maintaining, and enhancing the quality of the environment" to "States, counties, municipalities, institutions, and individuals." Id. § 102(2)(G).

Unfortunately, as explored in more detail herein, Florida's proposed assumption of the Section 404 program conflicts with NEPA's mandate. The proposal, if accepted, would lead Florida's agencies to make decisions with significant, and sometimes devastating, environmental impacts without ever considering those impacts in advance. It would raise barriers to public participation. And at the end of the day, it would lead to poor decisions, increased litigation, and less transparency.

There are many examples where the NEPA process has been essential to improving proposed projects that would otherwise have had devastating impacts in Florida. The 2005 draft EIS for the Everglades Agricultural Area Reservoir, for example, was the document that first raised issues related to water quality highlighting the need for additional stormwater treatment acreage as part of the project. The approach to water quality has improved in the most recent iteration of the project earlier this year as environmental groups and agencies acknowledged the importance of adequately addressing this important issue. The Corps' initial 2018 NEPA analyses helped further refine areas of uncertainty associated with the project that once addressed will improve its final design and performance. Letter from S. Ansley Samson, Everglades Law Ctr., & Shannon Estenoz, Everglades Found, to Mary B. Neumayr, Council on Env't Quality, Aug. 20, 2018 (Exhibit 95).

The Combined Operations Plan for the southern portion of the Central and Southern Florida (C&SF) Project involved three increments of changes to operations in the southern portion of the C&SF Project (over 3+ years). Through the associated NEPA processes, environmental and economic stakeholders in South Florida and the Florida Keys were able to articulate proposed operational changes to improve environmental conditions in Florida Bay, relying in part on the information made available in draft EISs and environmental assessments describing the proposed changes. Stakeholders continue to raise these issues in ongoing discussions of a final operations plan for recently constructed restoration infrastructure. Because of NEPA, agencies were fully informed of the broad range of stakeholder perspectives and of uncertainties related to the extent to which these projects will deliver the return on taxpayer investment they are intended to produce when operated under certain conditions. Id.

Florida has no state statutory counterpart to NEPA. Approving a state 404 program in Florida therefore deprives the public of the procedural protections and opportunity to participate that are available under federal law through NEPA.

State-issued permits would not be held to NEPA standards, or be subject to challenge in federal court for failing to comply with NEPA. The public would thus be deprived of necessary safeguards to ensure vital protections.

NEPA safeguards under federal law have been vital to protecting wetlands in Florida when federal agencies have fallen short of their obligations. In Florida Wildlife Federation v. United States Army Corps of Engineers, 401 F. Supp. 2d 1298 (S.D. Fla. 2005), for example, deficiencies in complying with the NEPA process for a major development with significant impacts on wetlands planned for Palm Beach County ultimately resulted in modification and re-location of the project to avoid those impacts. There are many such examples where, when the federal government failed to meet NEPA obligations, the agency was held to account under NEPA, resulting in better process and outcomes for Florida's environment. (Exhibit 96) (compilation of articles from Florida, Protect NEPA, https://protectnepa.org/success-stories/florida (last visited Nov. 2, 2020)).

b. The Corps Has Served As Essential Backstop to Harmful FDEP Permit Approvals

As testimony throughout EPA's public hearings illuminated, the Corps has acted as a backstop for FDEP decisions that were not sufficiently protective of the environment. Oct. 21, 2020, Hearing Transcript; Oct. 27, 2020, Hearing Transcript. Whether it is the reduced potential for local political pressure or application of the NEPA process, the Corps does not always agree with FDEP on what is permittable activities. For example, in 2016, FDEP issued a permit for a mitigation bank known as Long Bar Pointe for 260.8 acres along 2 miles of coastline fronting on

Sarasota Bay to Long Bar Pointe. Fla. Dep't of Env't Prot., Notice of Intent to Issue Environmental Resource/Mitigation Bank Permit, No. 338349-001, Apr. 28, 2016 (Exhibit 97). This was a highly controversial project that resulted in the demotion and firing of two FDEP employees who raised concerns over the permit application. Bruce Ritchie, DEP Employee Suspended in 2012 Speaks Out About Her Experience—and the Future, Politico, Mar. 3, 2017 (Exhibit 98) (Former FDEP employee discussing her demotion and the permittee's ability to pressure FDEP); Kathy Prucnell, Environmentalist Appeals Long Bar-DEP Mitigation Permit, Islander (last visited Oct. 31, 2020) (Exhibit 99); Kathy Prucnell, Trio of FISH, Waterkeeper, McClash Challenge Long Bar Permit, FISH Blog, May 24, 2016 (Exhibit 100). Months after FDEP's permit approval, the Corps refused to permit the Long Bar Pointe Mitigation Bank finding it did not have the potential to provide sufficient compensatory mitigation to compensate for unavoidable impacts to waters of the United States. Letter from Donald K. Kinard, Army Corps, to Pete Logan, Long Bar Pointe, Sept. 14, 2016 (Exhibit 101). The Corps denied the mitigation bank application a second time on May 5, 2017. Letter from Donald K. Kinard, Army Corps, to Pete Logan, Long Bar Pointe, May 5, 2017 (Exhibit 102); Hannah Morse, *Corps Denies Long Bar Pointe's Second Mitigation Bank Proposal*, Bradenton Herald, May 5, 2017 (Exhibit 103). In other words, the Corps did not think it could actually operate as a mitigation bank.

Conclusion

Based on the foregoing, we respectfully urge EPA to deny Florida's application.

Sincerely,

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