

# **Clean Water Act Section 404**

## **Compliance Evaluation and Enforcement Program Review Report**

**Florida Department of Environmental Protection**

**Division of Water Resource Management**



Prepared by:

U.S. Environmental Protection Agency, Region 4

Enforcement and Compliance Assurance Division

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**CWA Section 404 Compliance Evaluation and Enforcement  
Program Review Report**

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**Title and Approval Sheet**

**Title: CWA Section 404 Compliance Evaluation and Enforcement Program Review Report  
Florida Department of Environmental Protection, Division of Water Resource Management**

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## **Executive Summary**

The U.S. Environmental Protection Agency's Region 4 Office in Atlanta, Georgia delegated authority to implement a Clean Water Act (CWA), Section 404 program in the state of Florida within assumed waters to the Florida Department of Environmental Protection (FDEP). As a part of oversight responsibilities cited in 40 C.F.R. § 233.40 and in accordance with Section III(D) of the 2020 Memorandum of Agreement between FDEP and EPA, FDEP's "Program Description, Section (g) – Description of the State's Compliance and Enforcement Programs," and pursuant to the EPA's oversight role, the EPA is tasked to complete an in-depth review of the state's enforcement program for states which have been delegated this authority. On September 9, 2022, in accordance with its oversight role, the EPA initiated a review of FDEP's CWA Section 404 enforcement and compliance program.

In its oversight capacity, the EPA requested information pertaining to FDEP's inspection and enforcement activities occurring between December 22, 2020, and September 9, 2022. On November 30, 2022, the EPA received the requested information from FDEP and began conducting an offsite Enforcement Review (ER) of the provided materials. Following the document review, inspectors from EPA, Region 4's Water Enforcement Branch in the Enforcement and Compliance Assurance Division conducted in-person file reviews and site visits at each of FDEP's six District Offices. The review included an examination of state policies and how the policies are implemented through a review of selected sites' data files and other pertinent program documentation.

As part of the ER, the EPA evaluated the following:

1. Sites for which FDEP has issued either individual or general Section 404 permits.
2. Permitted sites for which FDEP has performed Section 404 inspections.
3. Section 404 inspections where violations were identified.
4. Section 404 inspections that have led to informal or formal enforcement.
5. Suspected unauthorized Section 404 activities, including, how these activities were brought to FDEP's attention, and whether the unauthorized activities were confirmed or awaiting further investigation.
6. Sites with Section 404 violations identified by FDEP, including:
  - a. Issued warning letters,
  - b. Issued Notices of Violation,
  - c. Issued compliance assistance offer letters,
  - d. Issued Short Form Consent Orders and executed Short Form Consent Orders,
  - e. Issued Long Form Consent Orders and executed Long Form Consent Orders,
  - f. Issued Settlement Agreements and executed Settlement Agreements,
  - g. Assessed penalties and collected penalties, and
  - h. Issued Post-Enforcement Permits and executed Post-Enforcement Permits.

After consideration of the information collected during the review, the EPA found the following aspect of FDEP's program that is being implemented at a high level:

- FDEP consistently issued detailed inspection reports.

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After consideration of the information collected during the review, the EPA is requiring the following program improvements:

- FDEP must conduct permit compliance inspections at the minimum levels outlined in the Program Description, Section (g).
- FDEP must correctly apply the requirements of FDEP's regulations and guidances when calculating and assessing penalties related to CWA Section 404 violations.
- FDEP should revise Directive 923 to ensure capture of economic benefit and to ensure violators do not gain an economic advantage over those who comply with the law (or their own financial position had they complied with the law), achieve general deterrence among the regulated community, and ensure assessed penalties are appropriate to the violations.
- FDEP should review the history of non-compliance, permit applications, and permit issuance when researching and ascertaining the prior knowledge of a violator.
- FDEP should consult with the U.S. Army Corps of Engineers (ACOE) and inquire into prior history with the Corps on persons and/or entities where violations are documented and/or suspected by FDEP.
- FDEP must follow the requirements of regulations and guidance when calculating and applying penalties to violations to ensure that the full time-period that the impacts are occurring are being captured (Directive 923 and PD(g)), such that penalties are appropriately assessed for continuous violations.
- FDEP should develop an internal process for quarterly updates to the administrative record that includes but is not limited to case status, return to compliance, and enforcement records.
- FDEP must ensure enforcement escalation follows the Program Description, Section (g).
- FDEP should implement a peer review process to ensure all data is entered in OCULUS appropriately and timely.
- FDEP should include in future Annual Reports, at a minimum, the file number/project name associated with enforcement actions so that information can be accessed via FDEP's OCULUS database.

## **I. Introduction**

The Section 404 (wetlands) Program was established by the U.S. Environmental Protection Agency under the authority of the Clean Water Act (CWA). The Section 404 Program implements and enforces the requirements of the CWA that apply to the discharge of dredged or fill material into waters of the United States, including wetlands. Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects. The fundamental goal of the Section 404 Compliance Evaluation and Enforcement Program review is to ensure compliance with 40 C.F.R. § 233 and that a permit is obtained before dredged or fill material are discharged into waters of the United States, unless the activity is exempt from Section 404 regulation.

The CWA provides states and tribes the option of assuming administration of the Section 404 program in certain waters within state or tribal jurisdiction. The Florida Department of Environmental Protection (FDEP) assumed administration of the Section 404 Program on December 22, 2020. States and tribes can assume administration of the Section 404 program only in certain waters. FDEP's Memorandum of Agreement with the U.S. Army Corps of Engineers (ACOE) identifies the waters to be regulated by the state and those that are retained by the ACOE. In circumstances where states, federally recognized tribes, and U.S. territories have not assumed administration of the Section 404 Program, regulatory authority stays with the EPA under a Direct Implementation Program. For Florida, EPA continues to directly implement its authority for the Section 404 Program in Indian Country.

One of EPA's primary responsibilities is to conduct oversight of the state agencies that implement assumed programs. The EPA, Region 4, Water Enforcement Branch in the Enforcement and Compliance Assurance Division conducted an Enforcement Review (ER) of Florida's CWA Section 404 enforcement program. The ER was completed both remotely and in person by the following EPA review team; Chris Parker, Joel Strange, and Rachel Earwood, and with the assistance of the EPA's Office of Enforcement and Compliance Assurance contractor (Eastern Resource Group, Inc.), and FDEP staff.

In September 2022, Region 4 requested from FDEP, information on the state's inspection and enforcement activities for the period from December 22, 2020, to September 9, 2022. This information was gathered in accordance with Section III.D of the MOA between FDEP and the EPA, the EPA, FDEP's "Program Description, Section (g) – Description of the State's Compliance and Enforcement Programs," and pursuant to the EPA's oversight role. Information requested included:

1. Sites for which FDEP has issued either individual or general Section 404 permits.
2. Permitted sites for which FDEP has performed Section 404 inspections.
3. Section 404 inspections where violations were identified.
4. Section 404 inspections that have led to informal or formal enforcement.
5. Suspected unauthorized Section 404 activities, including, how these activities were brought to FDEP's attention, and whether the unauthorized activities were confirmed or awaiting further investigation.
6. Sites with Section 404 violations identified by FDEP, including:

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- a. Issued warning letters,
- b. Issued Notices of Violation,
- c. Issued compliance assistance offer letters,
- d. Issued Short Form Consent Orders and executed Short Form Consent Orders,
- e. Issued Long Form Consent Orders and executed Long Form Consent Orders,
- f. Issued Settlement Agreements and executed Settlement Agreements,
- g. Assessed penalties and collected penalties,
- h. Issued Post-Enforcement Permits and executed Post-Enforcement Permits, and
- i. Criminal referrals, settlements, or convictions.

On November 30, 2022, the EPA received the requested information from FDEP and began conducting the review of the provided materials. Submittals from FDEP were sent electronically and included either links to the FDEP's OCULUS website where the information could be accessed or the applicable file number, project name, facility number, and/or contractor identification number so that the documents could be retrieved for review. Following the document review, staff from the EPA conducted in-person file reviews and site visits at FDEP's District Offices in Pensacola, Jacksonville, Orlando, Tampa, West Palm, and Ft. Myers. During the in-person file reviews, the EPA Team focused on review of the following file types: files with warning letters, files with informal enforcement (compliance assistance offers), files that required site restoration and/or mitigation, and files with assessed penalties.

### **II. Purpose**

The purpose of the ER was to evaluate the consistency and conformance of FDEP's enforcement process with the applicable regulations and guidance. This entailed evaluating the state's program against the requirements of 40 C.F.R Part 233 and Florida's approved CWA Section 404 program. Additionally, the review aimed to evaluate whether the enforcement strategies included tiered enforcement to ensure a timely return to compliance.

### **III. Objectives**

The objective of the ER was to evaluate FDEP's compliance and enforcement program implementation. Specifically, the EPA wanted to assess the state's implementation of its Section 404 compliance evaluation and enforcement program, its ability to address violations of permits or other program requirements, its addressing of unauthorized activities, its assessing and collecting of penalties and administrative fines, its implementation of alternative enforcement methods approved by the Administrator, and its conducting of inspection and monitoring activities subject to regulations.

### **IV. Scope of Review**

The EPA ER team examined records over the period of December 22, 2020, through September 9, 2022. The review, which entailed evaluating file information retrieved from FDEP's OCULUS database, included:

- 118 Compliance Activities (Inspections).

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- Compliant reports where unauthorized activities or permit violations were suspected.
- 93 Warning Letters.
- One (1) Notice of Violation.
- 96 Compliance Assistance Offers.
- 11 Long Form Consent Orders.
- One (1) Settlement Agreement.

Additional information for the program review was obtained through:

- State personnel interviews,
- Offsite reviews of files utilizing FDEP's OCULUS database site, and
- In-person file reviews and site visits.

The sources listed above were utilized to evaluate FDEP's ability to successfully implement its compliance and enforcement program and identify opportunities for improvement in its compliance and enforcement program. File reviews included a review of identified violations and an evaluation of the enforcement tools issued for consistency with Section III.D of the MOA between FDEP and the EPA, and FDEP's "Program Description, Section (g) – Description of the State's Compliance and Enforcement Programs," and to ensure the action appropriately addressed the violations and would result in return to compliance and that general deterrence is achieved.

It is important to note that this report only represents a snapshot in time during the period of review. The EPA recognizes that the state may have implemented changes to their data system and policies since the review was conducted.

### **V. Enforcement Review Findings**

#### **A. State Program Organizational Structure**

The compliance and enforcement of the State 404 Program is implemented through FDEP's six regulatory district offices, with each district responsible for projects located within its respective administrative boundary. District office staff are responsible for conducting compliance inspections, permit compliance inspections, complaint investigations, case development, penalty calculations, and other enforcement related activities. The district office's compliance and enforcement activities are supervised by the Assistant District Directors and legal support is provided by the Office of General Counsel.

Program specific support for State 404 Program compliance and enforcement is provided by the Division of Water Resource Management and the Submerged Land and Environmental Resources Coordination (SLERC) Program. SLERC is responsible for ensuring statewide consistency in the implementation of the State 404 Program. SLERC staff provide rule interpretation, guidance, and training, and is responsible for reviewing and auditing district level activities.



**B. State Enforcement Policies and Processes**

As described in FDEP’s Program Description, Section (g), compliance evaluation and review responsibilities include reviewing the issued permit; creating compliance tracking database records; scheduling, conducting, and documenting compliance evaluations; tracking required submittals; and managing documentation and maintaining database records for projects. FDEP districts are to take reasonable measures to inspect permitted activities during active construction and timing of inspections will be prioritized based on project-specific considerations (outlined in FDEP’s Program Description, Section (g)). The districts also prioritize inspections of projects where reports of suspected permit violations have been reported.

The district offices are also responsible for meeting the minimum number of inspections as follows:

- Year 1 – Inspection of 100% of Individual Permits and 25% of General Permits
- Year 2 – Inspection of 50% of Individual Permits and 20% of General Permits
- Year 3 – Inspection of 25% of Individual Permits and 15% of General Permits
- Year 4 and beyond – Inspection of 20% of Individual Permits and 10% of General Permits

FDEP also requires that the above annual inspection rates may not be decreased below 20% of individual permits and 10% of general permits issued. Additionally, the districts are to inspect all State 404 Program projects designated as High Risk. High Risk projects are either designated automatically based on the type/scope of authorized activity or size of the project area or they may be designated by staff if the project is close in proximity to sensitive resources, there is potential for environmental harm or water quality violations, heightened public concern, or history of significant non-compliance.

If permit violations are identified, the permittee will be advised to immediately stop all activities in violation until compliance is restored. Permit violations will be documented according to the same standards for documenting unauthorized activity violations. When appropriate, the districts may attempt to resolve permit violations through informal compliance assistance. If compliance is not readily achieved through compliance assistance, or if compliance assistance is not appropriate, the permit may be suspended or revoked, and then enforcement is pursued.

When a possible unauthorized activity is reported or suspected, the district offices will investigate and provide written response to all complaints submitted to FDEP. If a violation exists, the findings of the investigation will be documented in an inspection report containing sufficient evidence to prove the elements of the violation. Upon documenting that an unauthorized regulated activity has occurred, the district will immediately issue written notification to the responsible party or parties advising that the violator(s) immediately cease the unauthorized activities, presenting possible options for resolution, and establishing deadlines for response. There are several enforcement responses available including informal enforcement in the form of a compliance assistance offer (typically used for minor violations that are not complicated and there is no history of non-compliance). If or when the violator does not comply with the compliance assistance offer, FDEP may escalate the enforcement response through the issuance of a warning letter, a

notice of violation, issuance of a Consent Order or Final Order.

**C. Program Deficiencies and Corrective Actions**

**1. Inspections - Failure to Meet Program Inspection Commitments**

The review of Section 404 inspection reports showed FDEP inspections to be timely and complete. However, permit compliance inspections failed to meet program description requirements as required in the Program Description Section (g) (PD(g)). Over the period of review, FDEP reported 118 permit compliance inspections. After further review, the EPA determined that 55 of those inspections were in response to unauthorized and/or unpermitted activities. Adjusting the inspection percentage by removing the 55 inspections of unpermitted activities shows that only 9.6% of the general permits (GPs) issued and 11.2% of the individual permits (IPs) issued by FDEP were inspected for permit compliance. Per PD(g), FDEP was required to inspect in years one and two 25% and 20% of GPs and 100% and 50% of IPs.

Per the requirements of PD(g), FDEP must conduct permit compliance inspections at the minimum levels outlined in PD(g). These inspection numbers, which are provided by FDEP in its annual reports, should be reported as separate categories (permit compliance inspections and general compliance inspections). As noted in the EPA's review, many inspections previously reported were of unpermitted facilities/sites and should not be reported as permit compliance inspections.

**2. Penalty Calculations - Incorrect Application of Florida Regulations When Calculating Penalties**

The review of compliance and enforcement documents showed FDEP incorrectly applying Sections 3(c), 4, and 4(c) of the Environmental Litigation Reform Act (ELRA). ELRA Section 3(c) states "For a dredge and fill or stormwater violation, the department shall assess a penalty of \$1,500 for unpermitted or unauthorized dredging or filling..." and "In addition to the penalties authorized in this subsection, the department shall assess a penalty of \$7,500 per violation against the contractor or agent of the owner or tenant that conducts unpermitted or unauthorized dredging or filling." ELRA Section 4 states "In an administrative proceeding, in addition to the penalties that may be assessed under subsection (3), the department shall assess administrative penalties according to the following schedule:" and specifically 4(c) then states, "For failure to obtain a required permit before construction or modification, \$4,500."

EPA's review of FDEP's Section 404 penalty actions involving sites impacting one acre or less found no instances where ELRA Section 4(c) was applied to penalty calculations. Per FDEP Directive 923 and PD(g), FDEP must operate consistent with the requirements in its regulations and guidance when calculating and assessing penalties related to CWA violations.

**3. Penalty Calculations – Failure to Incorporate Economic Benefit**

Per the EPA's February 1984 *Policy on Civil Penalties* and December 2001 *Revised CWA Section 404*

*Settlement Penalty Policy*, every effort should be made to recover the economic benefit of noncompliance, with the objective of placing violators in no better financial position than they would have been had they complied with the law. The EPA's review of the penalties assessed by FDEP showed that economic benefit is neither being calculated nor captured for values associated with the delayed and/or avoided cost of mitigation, increased property values, or competitive advantage.

In accordance with EPA penalty guidance, FDEP must make a sufficient effort to recover economic benefit of noncompliance. This includes, but is not limited to, operating in accordance with PD(g)(V) and revising Directive 923 to capture economic benefit for all cases (ELRA and non-ELRA). The revised policy must ensure violators do not gain an economic advantage over those who comply with the law (or their own financial position had they complied with the law), general deterrence is achieved among the regulated community, and penalties assessed are appropriate to the violation.

#### **4. Penalty Calculations – Failure to Account for History of Non-Compliance**

The EPA's review of penalties assessed by FDEP showed only one instance where history of non-compliance was considered in the penalty calculation. This was irrespective of there being instances where violators had documented prior program knowledge. During the in-person file reviews, the District Offices explained that an internal tracking database (ERPce) was used to track and monitor prior knowledge and/or violations by persons and/or entities. The EPA staff could not determine if the internal tracking database was accessible statewide to all the District Offices or if it was specific to the individual District Offices. The District Offices also indicated that they do not consult or inquire with the ACOE on the history of a person or entity when a violation is discovered.

FDEP must remove history of non-compliance limitations in Directive 923 to ensure that repeat violators do not continue to violate the law (thereby achieving specific deterrence) and that penalties assessed are appropriate to the violation. The EPA encourages FDEP to continue tracking prior knowledge and/or violations and to ensure that ERPce is available throughout the FDEP District Offices. The EPA also expects FDEP to not only review history of non-compliance but also history of permit applications and permit issuance when researching and ascertaining the prior knowledge of a violator. Additionally, the EPA requests that FDEP consult with the ACOE and inquire into prior history with the ACOE on persons and/or entities where violations are documented and/or suspected by FDEP.

#### **5. Penalty Calculations – Single Day Penalty Calculations**

The review of penalties assessed by FDEP showed penalties being calculated using a single-day factor. Specifically, regardless of the impact area and severity of impact of unauthorized discharges, penalties were only assessed for the day of discovery. The District Offices indicated that most violators cease activity and begin working with FDEP to resolve the violations; therefore, FDEP only applies a single-day multiplier when calculating the penalty. The EPA disagrees with this approach as the unauthorized discharges did not occur in a single day and would have continued until the violation was resolved. Therefore, FDEP must follow requirements of regulations and guidance when calculating and applying penalties to violations to ensure that the full time-period that the impacts are occurring are being

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captured (Directive 923 and PD(g)), such that penalties are appropriately assessed for continuous violations.

### **6. Return to Compliance**

The EPA's review showed that many files did not include case updates for one year or more. Prior to the in-person file reviews in each District, the EPA provided a list of case files where it could not be determined from a review of the records if compliance had been achieved. At the time of the in-person review, most of the reviewed case files had closeout letters placed in the administrative record after the EPA sent the list of cases for review. The District Offices had paper and/or electronic records that had not been placed in the administrative record and the District Offices indicated that they would make efforts to timely update the records. The EPA recommends that FDEP develop an internal process for quarterly updates to the administrative record that includes case status.

### **7. Tiered or Adequate Enforcement Response – Compliance Assistance Offers**

From the EPA's review of case files with Compliance Assistance Offers, files were observed as being incomplete and/or without addressing resolutions or record documenting a return to compliance. Of the 64 site files reviewed during the district office visits, 25 had no indication that the site had returned to compliance. Additionally, 10 of the sites had violations that appeared to warrant a formal enforcement action (outlined in PD(g)) such as a warning letter or notice of violation. FDEP must timely update the administrative record to include case status and return to compliance and if no response is provided by the violator, FDEP must escalate the enforcement response as outlined in PD(g).

### **8. Tiered or Adequate Enforcement Response – Warning Letters**

The EPA's review found instances where permit non-compliance and/or unauthorized activities identified and characterized as significant non-compliance only received warning letters. Of the 44 site files reviewed during the district office visits that received warning letters, the EPA noted concern with 35. Of these 35, 29 had no indication of a return to compliance and 6 were not resolved until after being identified by EPA for review. FDEP must timely update the administrative record to include case status and return to compliance. If no response is provided by the violator, FDEP must escalate the enforcement response as outlined in PD(g). Additionally, FDEP must document and include in the administrative record the response for all enforcement activities (Compliance Assistance Offers, Warning Letters, Notices of Violation, and Long Form Consent Orders). If no response is received or when warranted, FDEP must escalate the enforcement response as outlined in PD(g).

### **9. Data**

The EPA's review of compliance and enforcement activities is limited by the data included in FDEP's Annual Reports to the EPA. Currently, the Annual Reports only include the total number of actions taken making program oversight difficult without requesting additional information from FDEP. The EPA requests that FDEP include in future Annual Reports, at a minimum, the file number/project name

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associated with enforcement actions so that information can be accessed via FDEP's OCULUS database.

### **VI. References**

*Program Description, Section (g) Description of the State's Compliance Evaluation and Enforcement Programs*

*Memorandum of Agreements Between the Florida Department of Environmental Protection and The United States Environmental Protection Agency*

*State of Florida Department of Environmental Protection Administrative Directive 923 (DEP 923) June 10, 2022, Settlement Guidelines for Civil and Administrative Penalties*

**END OF REPORT**