



What To Expect From Florida's New Water Permitting Powers

By [Michael Phillis](#)

Law360 (December 22, 2020, 7:29 PM EST) -- With Florida taking over permitting under Section 404 of the Clean Water Act, project developers can expect a streamlined process that will reduce lag time even as state employees grapple with the learning curve of taking the reins from the federal government.

Florida is the first state in more than 25 years to earn approval from the U.S. Environmental Protection Agency to administer permits under Section 404 of the CWA, a program vital for major projects like highways. Michigan and New Jersey are the only other states that administer their own Section 404 permitting programs. The change for Florida, which formally happened Tuesday, means state employees will be vetting proposals for dredge and fill activities that encompass certain wetlands and other federally regulated waters within the state's borders.

The EPA and Florida officials say the state is prepared to vet projects with the same rigorous scrutiny as the federal government. That claim is being met with skepticism from environmental groups that say the change means less opportunity for the public to weigh in, fewer procedural protections and a potentially overwhelming workload for state staffers.

Florida developers have praised the change, saying it will make permitting more efficient while still allowing appropriate review of impacts to federal waters.

Brooke Marcus Wahlberg, a partner at Nossaman LLP, said the overlap between state and federal water programs means the state takeover is likely to create efficiencies.

"You'd like to think that the same guys or gals processing state permits also have the hydrological expertise that it makes sense that they can efficiently do the federal permits," Marcus Wahlberg told Law360. "Ideally, all of that lines up."

Instead of going through separate processes — federal permitting through the Army Corps and permitting for state waters through the Florida Department of Environmental Protection — applications for both will now be done by state officials.

Under the new arrangement, the Florida DEP will process Section 404 permits and continue to work with the state's five water management districts that handle local water resources.

The DEP and those districts currently have an agreement to handle environmental resource permits, or ERPs, which aim to ensure storm water doesn't pollute local waters and deal with

state-regulated dredge and fill issues, according to Susan Roeder Martin, a partner at Nason Yeager Gerson Harris & Fumero PA.

Now, the DEP will handle some federally regulated waters too.

"The 404 program and the ERP program cover a lot of the same things," Martin said. "In the majority of the cases, the water management districts will issue the permits for the ERPs and DEP will issue the permits for the 404 [program], but DEP has been conducting sessions with the water management districts since August to be able to work on this processing together so it should happen in a much quicker manner."

According to documents submitted as part of the plan, the DEP believes there is an 85% overlap between the requirements of the ERPs and Section 404. There are also general permits available for certain categories of projects that allow activities with only minimal impacts. In addition, the federal government will maintain control over some major waters, according to the state's submission.

For developers, the ability to go through just one agency really "streamlines the entire process," said Evan Branosky, an environmental policy program manager for the National Association of Home Builders.

"From our perspective, it is that efficiency realization that results in lower costs. It also accelerates the timeline for providing housing units out to the buyer, and all of that together really is a huge benefit for our members," Branosky told Law360.

When the EPA's approval was announced, Florida DEP Secretary Noah Valenstein emphasized that wetlands and waters are critical to the economy and "way of life in Florida." The DEP said it will use its existing resources, which include roughly 200 employees, to administer the program.

Marcus Wahlberg said there will be keen interest in seeing how smoothly Florida handles the transition.

"I think within the first year, if you start to see permits processed with relative ease, you have a good indicator," she said.

Environmental groups are concerned the reason Florida assumed control over the program is to "make it easier and cheaper for developers" while reducing opportunities for public participation, said Christina Reichert, an attorney with Earthjustice.

"What we're seeing is that the staff they have today, and the funding they have today, is not enough to operate the programs they currently are dealing with," Reichert said. "Add on a new federal program, and what you'll see is staff that don't have the time and resources to fully vet a program to make sure they understand what the potential impacts of that program are, what wetland would be disturbed, what species might be present."

And without a federal connection through the Army Corps, the National Environmental Policy Act's procedural protections won't apply, said Ansley Samson, general counsel for the Everglades Law Center. Those procedural protections help ensure sound government decision-making and provide avenues for public comment, but the public analysis under the state-led program isn't as robust on major projects as NEPA, she said.

"The absence of these protections and public engagement processes in Florida's proposal is deeply concerning," the Everglades Law Center said in comments on the proposal.

Questioned about these issues, the EPA and Florida DEP emphasized that the state program must meet federal standards even if NEPA isn't triggered under the state-administered program. The federal agency said it carefully considered Florida's request to assume control over the program, analyzing issues like its impact on numerous endangered species in part through a consultation with the U.S. Fish and Wildlife Service.