

PRE-PUBLICATION NOTICE. The EPA Administrator Andrew R. Wheeler signed the following final rule on January 14, 2021, and EPA is submitting it for publication in the *Federal Register* (FR). EPA is providing this document solely for the convenience of interested parties. This document is not disseminated for purposes of EPA's Information Quality Guidelines and does not represent an Agency determination or policy. While we have taken steps to ensure the accuracy of this Internet version of the final rule, it is not the official version of the final rule for purposes of compliance or effectiveness. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's govinfo website (<https://www.govinfo.gov/app/collection/fr>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQ-OW-2018-0640. Notwithstanding the fact that EPA is posting a pre-publication version, the final rule will not be promulgated until published in the *Federal Register*. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 233

EPA-HQ-OW-2018-0640; FRL-10018-76-OW

Codifying EPA's Adjudicatory Decision on Florida's Clean Water Act Section 404

Program Request

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final Rule

SUMMARY: The U.S. Environmental Protection Agency (EPA or Agency) is updating the Code of Federal Regulations (CFR) to reflect its approval of the State of Florida's Clean Water Act (CWA) Section 404 permit program. EPA approved Florida's assumption of the CWA Section 404 program on December 17, 2020. *See* 85 FR 57853. That approval was effective on December 22, 2020. In order to facilitate transparency and consistency with past practice, EPA is voluntarily amending the CFR to reflect its approval of Florida's assumption of the CWA Section 404 program. In so doing, EPA has determined that there is good cause for making this rule final without prior proposal and opportunity for comment because such notice and opportunity for comment is unnecessary, as it simply codifies the approved Florida CWA Section 404 program. In addition, EPA finds that there is good cause to make this rule effective immediately.

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The incorporation by reference of certain publications listed in the rule is approved by the Director of the *Federal Register* as of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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ADDRESSES: EPA has established a docket for this action under Docket ID No. **EPA-HQ-OW-2018-0640**. All documents in the docket are listed on the <http://www.regulations.gov> web site. Although listed in the index, some information may not be publicly available, e.g., information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form at the EPA Docket Center Reading Room. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. For further information on the EPA Docket Center Services and current status, please visit us online at <https://www.epa.gov/dockets>. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Whitney Beck, Oceans, Wetlands, and Communities Division, Office of Wetlands, Oceans, and Watersheds (Mail Code 4504-T), Environmental Protection Agency, 1200 Pennsylvania Avenue, NW, Washington, DC 20460; telephone number: 202-564-5700; email address: 404g-rulemaking@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Final Rule

The CWA established the Section 404 program, under which the Secretary of the Army, acting through the Chief of Engineers of the U.S. Army Corps of Engineers (Corps), may issue permits for the discharge of dredged or fill material into waters of the United States as identified in the CWA. Section 404(g)(1) of the CWA provides that states and tribes may submit to EPA a request to assume administration of a CWA Section 404 program in certain waters within the

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state's or tribe's jurisdiction. The approved state programs are codified in the regulations at 40 CFR Part 233, subpart H.

This final rule amends 40 CFR Part 233 to reflect EPA's approval of Florida's Section 404 program. The Administrative Procedure Act provides that when an agency for good cause finds that public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest, the agency may issue a rule without providing notice and an opportunity for public comment. 5 U.S.C. § 553(b)(B). EPA has determined that there is good cause for making this rule final without prior proposal and opportunity for comment because such notice and opportunity for comment is unnecessary. As explained below, to enhance public awareness of the approved program and consistent with the Agency's past practice, today's rule simply adds Florida's program to the portion of EPA's regulations that houses the other two approved state Section 404 programs. *See* 40 CFR Part 233, subpart H (identifying approved programs in the states of Michigan and New Jersey). The amendment reflects EPA's previously completed final agency action approving Florida's program. EPA's approval is an informal adjudication process – i.e., a proceeding to which Section 553 of the Administrative Procedure Act (APA) does not apply. The Agency's proceeding (EPA's review and approval) included an opportunity for public comment pursuant to the requirements of 40 CFR 233.15. *See* 85 FR 83553 (December 22, 2020) (providing notice of EPA's action and describing the notice and comment process). EPA's codification of Florida's program is a voluntary and ministerial action codifying an approval decision which was already subject to notice and comment. A new notice and comment process are unnecessary because it would neither provide new information to the public nor provide the Agency with information that would be helpful in developing a final rule.

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On December 17, 2020, EPA approved Florida's request to assume administration of the CWA Section 404 program pursuant to 40 CFR 233.15(g) and (h). (Letter from Mary S. Walker, EPA Regional Administrator to Florida Governor DeSantis). Prior to making its decision, the Agency held a public comment period and two public hearings, from which it received over 3,000 comments. *See* 85 FR 83553. EPA's approval letter informed Florida that "after review of the program and consideration of all comments received . . . Florida's program has the necessary authority to operate a CWA Section 404 program in accordance with the requirements found in CWA Sections 404(g-1) and EPA's implementing regulations." As provided in EPA's regulations, EPA published a notice in the Federal Register informing the public that EPA had "taken final action to approve Florida's assumption of the program." 85 FR 83553. On December 23, 2020, the State of Florida notified the Army Corps of Engineers that, effective December 22, 2020, "FDEP is administering a Section 404 Program within the State of Florida as approved by EPA." Letter from Noah Valenstein, Secretary, Florida Department of Environmental Protection, to The Honorable R.D. James, Assistant Secretary of the Army (Civil Works).

EPA's approval of Florida's program was not an Agency rule pursuant to the APA, 5 U.S.C. 551(4), but rather was an informal adjudication with respect to Florida's specific program assumption application, pursuant to 5 U.S.C. 551(7). Agencies may use adjudications to apply general rules to address specialized or fact-specific questions. *See Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 202 (1947). EPA's approval was an informal adjudication that applied the existing requirements of CWA Section 404 and 40 CFR Part 233 to assess Florida's request to assume the CWA Section 404 program. Because the approval itself was not a rule, the statutory and regulatory requirements pertaining to rule codification in the

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CFR do not apply. *See* 44 U.S.C. 1510(a); 1 CFR 21.1. This codification rule does not affect Florida's authority to administer the CWA Section 404 program.

EPA is nonetheless voluntarily promulgating this rule to facilitate transparency and ensure consistency with past Agency approvals of CWA Section 404 programs. As noted above, the Florida's request for program approval was already subject to notice and comment (85 FR 57853) and EPA has already determined that Florida has met the requirements for program assumption and approved the State's program. Notice and comment on this amendment to the CFR reflecting the approval of Florida's assumption of the program is therefore unnecessary.

In addition, EPA has determined that there would be good cause, consistent with 5 U.S.C. 553(d)(3), for making this final rule effective immediately. Because this rule merely codifies an adjudication that is already effective, the rationale for delayed effectiveness, which is to allow reasonable time for regulated entities to adjust their behavior and prepare for the effective date of the new requirements, does not apply. *See Omnipoint Corp. v. Fed. Comm'n Comm'n*, 78 F.3d 620, 630 (D.C. Cir. 1996); *see also United States v. Gavrilovic*, 551 F.2d 1099, 1104 (8th Cir. 1977) (quoting legislative history). For these reasons, the Agency finds that good cause exists under APA Section 553(d)(3) to make this rule effective immediately upon publication.

Incorporation by Reference

In this action, EPA is codifying Florida's approved CWA Section 404 program. This action amends 40 CFR Part 233 and incorporates by reference Florida's regulatory and statutory authorities applicable to the State's approved CWA Section 404 program. Instead of codifying the Florida statutes and regulations in separate paragraphs, EPA is incorporating by reference a compilation that contains Florida regulations and statutes applicable to the State's Section 404 program. This compilation is incorporated by reference in 40 CFR 233.72 and is available at

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<http://www.regulations.gov> in Docket ID No. EPA-HQ-OW-2018-0640. A complete list of the Florida statutes and regulations contained in the compilation, titled “Florida Regulations and Statutes Applicable to the State’s Approved Clean Water Act Section 404 program,” dated December 14, 2020, is codified as Table 1 to paragraph (a)(1) of 40 CFR 233.72.

II. Statutory and Executive Orders Reviews

Additional information about these statutes and Executive Orders can be found at

<https://www.epa.gov/laws-regulations/laws-and-executive-orders>

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant regulatory action and was therefore not submitted to the Office of Management and Budget (OMB) for review.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 regulatory action because this action is not significant under Executive Order 12866.

C. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA.

D. Regulatory Flexibility Act (RFA)

This action is not subject to the RFA. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA, 5 U.S.C. 553, or any other statute. This rule is not subject to notice and comment requirements because the Agency has invoked the APA “good cause” exemption under 5 U.S.C. 553(b).

E. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–

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1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments or the private sector.

F. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

G. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175.

H. Executive Order 13045: Protection of Children from Environmental Health and Safety

Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in Section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or

Use

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act (NTTAA)

This rulemaking does not involve technical standards.

K. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority

Populations and Low-Income Populations

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This action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations, and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

L. Congressional Review Act (CRA)

This action is subject to the CRA, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. The CRA allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and comment rulemaking procedures are impracticable, unnecessary or contrary to the public interest (5 U.S.C. 808(2)).

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***Codifying EPA's Adjudicatory Decision on Florida's Clean Water Act Section 404 Program
Request
Page 9 of 13***

List of Subjects in 40 CFR Part 233: Environmental protection, Administrative practice and procedure, Incorporation by reference, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

Dated: _____.

Andrew Wheeler,

Administrator.

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For the reasons set forth in the preamble, EPA amends 40 CFR Part 233 as follows:

PART 233 – 404 STATE PROGRAM REGULATIONS

Authority: The authority citation for Part 233 continues to read as follows: 33 U.S.C. 1251 *et seq.*

Part 233 is amended by adding Sec. 233.72 to subpart H to read as follows:

Sec. 233.72 Florida.

The applicable regulatory program for discharges of dredged or fill material into waters of the United States in Florida that are not presently used, or susceptible for use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to the ordinary high water mark, including wetlands adjacent thereto, except those on Indian lands, is the program administered by the Florida Department of Environmental Protection, approved by EPA, pursuant to Section 404 of the CWA. The program became effective on December 22, 2020. This program consists of the following elements.

(a) *Incorporation by reference.* The Florida statutes and regulations cited in paragraph (a)(1) of this section are incorporated by reference as part of the applicable Section 404 Program under the CWA for the State of Florida. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Material is incorporated as it exists on December 14, 2020, and notification of any change in the material will be published in the *Federal Register*. Copies of the Florida regulations and statutes that are incorporated by reference are available from <https://www.flrules.org/> and <https://www.flsenate.gov/Laws/Statutes> and may be inspected at the U.S. Environmental Agency, Water Docket, EPA Docket Center (EPA/DC), EPA WJC West, Room 3334, 1301 Constitution Ave., NW, Washington, DC, 20004. To inspect materials in hard copy at EPA,

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please see the EPA Docket website at <https://www.epa.gov/dockets/epa-docket-center-reading-room> for location and hours. The EPA Docket can be reached at 202-566-1744. You may also inspect the materials at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, email fedreg.legal@nara.gov, or go to www.archives.gov/federal-register/cfr/ibr-locations.html.

(1) Material entitled “Florida Regulations and Statutes Applicable to the State’s Approved Clean Water Act Section 404 program,” dated December 14, 2020 (see Table 1 to paragraph (a)(1) of this section for the table of contents).

Table 1 to paragraph (a)(1) Florida Regulations and Statutes Applicable to the State’s Approved Clean Water Action Section 404 Program

State citation	Topic/subject	Date
Part IV, Chapter 373, F.S. (Management and Storage of Surface Waters)	Management and Storage of Surface Waters	Material is incorporated as it exists on December 14, 2020
Chapter 62-330, F.A.C. (Environmental Resource Permitting)	Environmental Resource Permitting	Material is incorporated as it exists on December 14, 2020
Chapter 62-340, F.A.C. (Delineation of the Landward Extent of Wetlands and Surface Waters)	Delineation of the Landward Extent of Wetlands and Surface Waters	Material is incorporated as it exists on December 14, 2020
Chapter 62-331, F.A.C. (State 404 Program)	State 404 Program	Material is incorporated as it exists on December 14, 2020

(2) [Reserved]

(b) *Other laws*. The following statutes and regulations, although not incorporated by reference, also are part of the approved State-administered program:

(1) Part I-III and V-VI, Water Resources, Chapter 373, F.S.

(2) Administrative Procedure Act, Chapter 120, F.S.

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(3) Environmental Control, Chapter 403, F.S.

(4) Permits, Chapter 62-4, F.A.C.

(5) Exceptions to the Uniform Rules of Procedure, 62-110, F.A.C.

(c) *Memoranda*. The following memoranda, although not incorporated by reference, also are part of the approved State administered program:

(1) The Memorandum of Agreement between EPA Region IV and the Florida Department of Environmental Protection, signed by all parties on July 31, 2020.

(2) The Memorandum of Agreement between the U.S. Army Corps of Engineers and the Florida Department of Environmental Protection, signed by the Assistant Secretary of the Army (Civil Works) on August 5, 2020.

(3) The Memorandum of Understanding between the Florida Fish and Wildlife Conservation Commission, the U.S. Fish and Wildlife Service, and the Florida Department of Environmental Protection, as submitted with the request for approval of the State of Florida's Section 404 Program, with final signature from the U.S. Fish and Wildlife Service on November 16, 2020.

(4) The Operating Agreement between the Florida State Historic Preservation Officer and the Florida Department of Environmental Protection, signed by the Florida State Historic Preservation Officer on August 6, 2020, as submitted with the request for approval of the State of Florida's Section 404 Program.

(5) The Programmatic Agreement between the U.S. Environmental Protection Agency, Florida Department of Environmental Protection, the Florida State Historic Preservation Officer, and the Advisory Council on Historic Preservation, signed by all parties on December 16, 2020.

(d) *Statement of legal authority*. The following documents, although not incorporated by reference, also are part of the approved State administered program:

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(1) General Counsel's Statement, signed by the General Counsel for the Florida Department of Environmental Protection, as submitted with the request for approval of the State of Florida's Section 404 Program.

(2) The program description and any other materials submitted as part of the original application or supplements thereto.