Florida Department of Environmental Protection  
2600 Blair Stone Road  
Tallahassee, FL  32399

Attn: Jessica Melkun  
Via Email: Jessica.Melkun@dep.state.fl.us

July 9, 2018

RE: FDEP Rule Development Regarding Proposal to Assume 404 Jurisdiction

Dear Secretary Valenstein,

On behalf of our respective organizations and our thousands of members, we are writing to request that the Florida Department of Environmental Protection (FDEP) abandon rule development related to Clean Water Act (CWA) Section 404(a) assumption of jurisdiction from the federal government for wetland permitting. Each signatory below is an independent organization and member of Waterkeeper Alliance, a global movement of on-the-water advocates who patrol and protect over 100,000 miles of rivers, streams, and coastlines. More than 300 Waterkeeper Organizations worldwide combine firsthand knowledge of their waterways with an unwavering commitment to the rights of their communities and to the rule of law.

Florida’s waterways are uniquely connected and are critical to our public health, our economy, and our environment. In light of our rapidly growing population and increasing development pressure, it is essential that these waters are afforded the utmost oversight and protection to ensure that the resources on which we depend are adequately protected. CWA Section 404 requires permits for the discharge of dredge and fill material into Waters of the United States, including wetlands. Florida has particularly fragile and critical areas that are regulated by Section 404 dredge and fill permits, and which require the highest level of review and scrutiny. Currently, federal Section 404 permits and state Environmental Resource Permits overlap in that both must be obtained for impacts above regulatory thresholds in federal waters. The additional oversight provided by the federal government based on their historic jurisdiction and agency expertise in
this area is critical to adequately protecting our waterways. The federal authority to govern our waters has its origins in the Commerce Clause of the Constitution due to the central role that our waterways play in interstate commerce. Traditionally, wetlands have been subject to federal jurisdiction as well due to their critical role in providing watershed connectivity. As such, CWA authority should remain with the federal government. Any delegation to the state would be inappropriate and incongruous with the spirit of the law. Our organizations vehemently oppose the state of Florida’s attempt to assume this authority.

Furthermore, assumption of this process by FDEP would eliminate the additional scrutiny of federal laws that apply to federal permits actions. For example, Section 7 of the Endangered Species Act mandates direct consultation with the United States Fish and Wildlife Service for any federal activity that may affect a federally listed species. Florida’s waterbodies provide critical habitat to a variety of listed species. The survival of these species depends on diligent protection of the water on which they depend. Additionally, the National Environmental Policy Act (NEPA) requires federal agencies to prepare an extensive Environmental Impact Statement (EIS) for any major federal action significantly affecting the quality of the human environment. Currently, the issuance of a Section 404 permit by the Corps constitutes “federal action” under NEPA. Since no law that parallels NEPA exists at the state level, Section 404 permits issued by the state would no longer be subject to the rigorous review provided by an EIS.

Moreover, this delegation would add additional regulatory burden to FDEP, which is already under-resourced for its current responsibilities. For example, FDEP is woefully behind schedule on Total Maximum Daily Load development and is regularly behind in enforcement actions related to the National Pollutant Discharge Elimination System permit program. Additional responsibilities will divert resources away from these critical pre-existing duties. It is important to note that the Environmental Protection Agency (EPA) would not provide any federal funding to Florida for the administration of the 404 permitting program. Due to the value of these resources to our state, the large scope of this permitting program, and FDEP’s already limited resources, FDEP’s assumption of this responsibility would not guarantee the level of protection that our water requires.

There has been substantial public opposition to the state’s proposed assumption of Section 404 authority. Despite this opposition, FDEP has continued to move forward, limiting the opportunity for public involvement in the rulemaking process and has failed to be transparent in rule development. Many questions from the public remain unanswered, including a clarification as to precisely which waters would remain under federal jurisdiction. Furthermore, given the current uncertainty regarding the very definition “Waters of the United States” under the Clean Water Rule, it is clear that FDEP’s rule making on this matter is premature.

The Clean Water Act was developed, in part, because state governments were failing to manage waters in a manner that was protective of public and environmental health. Power to implement the Section 404 permit program was thus assumed by federal agencies. FDEP’s attempt to take this authority undermines this purpose and puts Florida’s water resources at stake.
In addition, we fully support comments submitted by Earthjustice regarding the state’s proposal to administer its own permitting program under Section 404(a) of the Clean Water Act of 1972, 33 U.S.C. § 1344, in waters of the United States.

Sincerely,

Rachel Silverstein
Miami Waterkeeper

Laurie Murphy
Emerald Coastkeeper

Lisa Rinaman
St. Johns Riverkeeper

John Cassani
Calusa Waterkeeper

Jen Lomberk
Matanzas Riverkeeper

Harrison Langley
Collier County Waterkeeper

Andrew Hayslip
Tampa Bay Waterkeeper

John Quarterman
Suwanee Riverkeeper

Andy Mele & Justin Bloom
Suncoast Waterkeeper

Marty Baum
Indian Riverkeeper

Reinaldo Diaz
Lake Worth Waterkeeper

Georgia Ackerman
Apalachicola Riverkeeper