



Colonel Jason A. Kirk, District Commander  
Department of the Army  
Jacksonville District Corps of Engineers, Regulatory Division  
Att'n: Determination of Navigable Waters  
P.O. Box 4970  
Jacksonville, Florida 32232-0019

April 18, 2018

Via Email [Navigability\\_Determination@usace.army.mil](mailto:Navigability_Determination@usace.army.mil)  
[Jason.a.kirk@usace.army.mil](mailto:Jason.a.kirk@usace.army.mil)

Dear Colonel Kirk:

Please accept these comments on behalf of Florida Wildlife Federation, the Conservancy of Southwest Florida, the Miami Waterkeeper, and the St. Johns Riverkeeper regarding the navigability of waters in the State of Florida within the meaning of Section 10 of the Rivers and Harbors Act of 1899 (RHA), 33 U.S.C. § 403, for purposes of determining the Corps' jurisdiction should the U.S. Environmental Protection Agency (EPA) grant Florida's anticipated request to administer its own permitting program under Section 404(a) of the Clean Water Act of 1972 (CWA), 33 U.S.C. § 1344, in waters of the United States.<sup>1</sup>

Since 1936, the **Florida Wildlife Federation** (FWF) has worked to ensure that Florida's wildlife and fragile environment have a voice. Among other things, FWF is dedicated to protecting Florida's waterways, as wildlife cannot thrive where wetlands are drained, waters polluted and habitats degraded or destroyed. The **Conservancy of Southwest Florida** is dedicated to the protection of Southwest Florida's land, water, wildlife and future through advocacy, science, education, and wildlife rehabilitation. The Conservancy was founded in 1964 in response to plans to build a road through Rookery Bay and carries on its mission to preserve wetlands and downstream areas important to the health of the ecosystem, economy, and quality of life. **Miami Waterkeeper's** (MWK) mission is to defend, protect, and preserve South Florida's watershed through citizen engagement and community action rooted in sound science and research. MWK works to ensure swimmable, drinkable, fishable water for all. The **St. Johns Riverkeeper** mission is to be an independent voice that defends, advocates, and activates others to protect and restore the St. Johns River, Florida's longest and most significant river for commercial and recreational use.

---

<sup>1</sup> These comments are also supported by several additional **Florida Waterkeepers**, independent organizations belonging to Waterkeeper Alliance, whose members combine firsthand knowledge of their waterways with an unwavering commitment to the rights of their communities and to the rule of law. (See Exhibit 1 at 2, Letter from Florida Waterkeepers.)



We oppose Florida's attempt to assume jurisdiction over Section 404 permitting, which would imperil invaluable water resources in the state. We urge the Corps to recognize the unique complexity of waters in Florida; to ensure any assessment of Section 10 versus assumable waters is transparent, comprehensive, based in science, and informed by public participation; and to retain the maximum jurisdiction possible under federal law in the Nation's interest.

## The Unique Nature and Value of Waters in the State of Florida

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, U.S. Geological Survey, *Florida Waters: A Water Resources Manual* 49 (2002), available at <http://www.swfwmd.state.fl.us/publications/files/floridawaters.pdf>; Florida Department of State, Quick Facts, <http://dos.myflorida.com/florida-facts/quick-facts/> (last visited April 12, 2018); Florida Department of Environmental Protection, *2016 Integrated Water Quality Assessment for Florida* 34 (2016) available at <https://floridadep.gov/sites/default/files/2016-Integrated-Report.pdf>.

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), available at [https://www.cengage.com/custom/enrichment\\_modules/bak/data/1426628390\\_Florida-LowRes\\_watermarked.pdf](https://www.cengage.com/custom/enrichment_modules/bak/data/1426628390_Florida-LowRes_watermarked.pdf). With approximately 11 million acres of wetlands, Florida has more than any of the other conterminous states. U.S. Geologic Survey, *National Water Summary on Wetland Resources Water Supply Paper 2425*, available at [https://water.usgs.gov/nwsum/WSP2425/state\\_highlights\\_summary.html](https://water.usgs.gov/nwsum/WSP2425/state_highlights_summary.html). These often shallow wetlands are vast and diverse and include rare habitats such as mangrove swamps and hydric hammocks. See Purdum, *Florida Waters: A Water Resources Manual* 49.

In addition to these expansive surface waters, Florida has more groundwater than any other state. See *id.* Florida's unusual terrain is significant. As the groundwater seeps beneath the ground through sinkholes, underground caverns, and limestone channels and cracks, it connects to Florida's abundant surface waters in fluctuating and intricate ways. *Id.* at 49-52. The interconnectedness of surface and ground waters make determining watershed boundaries and drainage patterns particularly challenging. See *id.* at 52. Drainage patterns have been described as "disjointed" because rivers and streams do not continuously flow on the surface but instead disappear at times in the karst terrain. *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), <https://today.ucf.edu/florida-declared-a-global-biodiversity-hotspot/>. Freshwater resources in Florida provide nesting, foraging, wintering and migrating habitats for numerous species of fish and wildlife. Florida Fish and Wildlife Conservation Commission, *Florida's Freshwater Priority Resources: A Guide for Future Management 1* (2017), available at <http://myfwc.com/media/4386049/fwpriorityresourcesguide.pdf>.

These resources are relied on by high numbers of threatened and endangered plants (26%) and animals (45%) 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 and Frank Mazzotti, University of Florida/IFAS Extension, *Threats to Florida's Biodiversity* (1996), available at <https://edis.ifas.ufl.edu/pdffiles/UW/UW10700.pdf>; Zenaida Kotala, *Florida Declared a Global Biodiversity Hotspot*, UCF Today (Feb. 26, 2016), available at <https://today.ucf.edu/florida-declared-a-global-biodiversity-hotspot/>.

Florida's waterways are unique, extensive and complex. Identifying wholesale which Florida waterbodies constitute navigable waters of the United States for purposes of assumption is impracticable. It is sure to lead to jurisdictional conflict, regulatory uncertainty, public confusion, administrative delay and costly litigation.

In addition, Florida's waters are critical to several multi-billion dollar industries, including agriculture and tourism, affecting interstate commerce. See, e.g., Visit Florida, *Tourism Fast Facts*, <https://www.visitflorida.org/about-us/what-we-do/tourism-fast-facts/> (last visited April 18, 2018); Florida Department of Agriculture and Consumer Services, *Florida Agriculture Overview and Statistics*, <https://www.freshfromflorida.com/Divisions-Offices/Marketing-and-Development/Education/For-Researchers/Florida-Agriculture-Overview-and-Statistics> (last visited April 18, 2018). The United States can and should retain jurisdiction over these waters to the greatest extent possible under federal law.

### Florida's Rush to Assume Jurisdiction is Ill-Advised

As stated above, we oppose Florida's attempt to assume jurisdiction over Section 404 permitting—something that after careful study more than a decade ago the State determined would not be feasible in Florida. We see no need for the State to revisit this issue, and to do so now is a wasteful expenditure of time and resources for all involved. We are particularly concerned that the Governor is aggressively fast-tracking a plan to assume jurisdiction without giving sufficient consideration to all the issues at stake or providing adequate opportunity for

meaningful public input and participation. Florida's plan is ill-advised and ill-conceived. We urge the Corps not to succumb to pressure to expedite this process.

In 2005, Florida thoroughly considered, but ultimately declined to pursue, assumption of the Section 404 program. See Florida Department of Environmental Protection, *Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)*, Sept. 30, 2005 ("2005 FDEP Report," attached as Exhibit 2).

Among other things, the FDEP observed that "[b]ecause all coastal waters and a significant number of inland waters are deemed navigable" these waters "would be excluded from state assumption under current federal law[.]" 2005 FDEP Report at 2. The FDEP concluded that for assumption in Florida to be feasible, several changes to state and federal law would be required. *Id.* at 3-5. The FDEP recognized that "the boundaries between navigable and non-navigable waters are not clearly defined in many waters" in Florida, and that as a result, Florida would "not [be] able to assume the federal program in large portions of the state." *Id.* at 8.

Relevant circumstances have not changed in the intervening 10+ years so as to justify Florida revisiting assumption. Specifically, Florida has failed to: (1) perform an updated study of the feasibility of assumption in Florida, (2) identify meaningful changes in the science, evidence, and circumstances that would warrant departing from its conclusion not to pursue assumption in the past, (3) provide adequate opportunity to the public to provide input on whether assumption should be pursued, (4) provide complete and accurate information to state legislators when they were presented with state agency-driven enabling legislation, (5) maintain and properly staff and fund its existing permitting and regulatory programs, (6) ensure adequate protection of Florida waters already under the State's jurisdiction, (7) request any resources to ensure the capacity to administer an additional federal program, or (8) strengthen state laws to ensure adequate protection of Florida's waters and meet federal standards. We understand that if Florida proceeds with this plan and submits an assumption application to EPA, the EPA will afford the public an opportunity to comment on that application. We intend to submit additional information at that time.

Given the lack of consideration and study by the State of Florida, the complexity of the waters involved, and the environmental, commercial and other interests that are at stake, it would be premature for the Corps to render navigability determinations for purposes of state assumption. To continue to rush this process will only create more confusion for the public, more uncertainty for the regulated community, and more challenges for ensuring that waters of the United States in Florida receive the full protections afforded by federal law.

In light of the foregoing, we also urge the Corps to recognize the impracticability of attempting to delineate where its navigable waters begin and end for purposes of assumption at this time, and to convey these challenges to the State of Florida for further review, study, public input and deliberation.

### Florida's Department of Environmental Protection Is Not Equipped to Administer a Section 404 Program

Adequate funding and staff are a critical component of determining whether a state can adequately administer an important CWA program such as Section 404 permitting affecting the destruction or pollution of wetlands. Yet, rather than increase resources to take on such a large and important endeavor, over the past eight years Florida's Governor has severely reduced staff and funding for the State's Department of Environmental Protection, including in its wetlands regulatory division.

The Tampa Bay Times described Florida's recent environmental record as an "environmental disaster." *Editorial: The Rick Scott record: an environmental disaster*, Tampa Bay Times, Sept. 5, 2014 (Exhibit 3), available at <http://www.tampabay.com/opinion/editorials/editorial-the-rick-scott-record-an-environmental-disaster/2196359>. The State's leading paper observed that the 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.<sup>2</sup> Plainly, this is not a department equipped to assume a major new program that must protect waters in Florida.

In 2016, an analysis released by Public Employees for Environmental Responsibility (PEER) found that in 2015 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. PEER, *Scott's Undeclared Polluters' Holiday Stains Florida* (Aug. 17, 2016), press release available at <https://www.peer.org/news/news-releases/scott%e2%80%99s-undeclared-polluters%e2%80%99-holiday-stains-florida.html>; PEER, *Report on Enforcement Efforts By the Florida Department of Environmental Protection Calendar Year 2015*, report available at [https://www.peer.org/assets/docs/fl/8\\_18\\_16\\_DEP\\_Report\\_on\\_2015\\_Enforcement.pdf](https://www.peer.org/assets/docs/fl/8_18_16_DEP_Report_on_2015_Enforcement.pdf) (both are attached as Exhibit 4).

---

<sup>2</sup> See also St. Johns Riverkeeper, *State Failing to Protect Our Waterways*, <http://www.stjohnsriverkeeper.org/blog/state-agencies-failing-environment/> (compilation of newspaper articles describing the State's environmental record).



Despite having a weakened and underfunded agency, on December 28, 2017, the Florida legislature quietly introduced a bill to authorize the FDEP to pursue assumption over Section 404 waters. FDEP assured legislators that assumption would be simple, that it would only streamline and expedite permit approvals, that the State would provide the same federal protections required under the current program, that very few permits were at issue, and that no additional resources would be needed. Legislators relied on these baseless representations throughout the legislative process.

On January 29, 2018, the State's leading paper urged against allowing Florida to pursue assumption, citing the same concerns about the FDEP. *Editorial: Don't Let Florida Take Over Wetlands Permitting*, Tampa Bay Times, Jan. 29, 2018 (Exhibit 5), available at [http://www.tbo.com/opinion/editorials/Editorial-Don-t-let-Florida-take-over-wetlands-permitting\\_164963973](http://www.tbo.com/opinion/editorials/Editorial-Don-t-let-Florida-take-over-wetlands-permitting_164963973) (raising concerns about the reduction of the DEP 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.").

Nevertheless, according to former FDEP Secretary Victoria Tschinkel, Florida legislators "tripped over themselves in a stampede" to pass vague enabling legislation on behalf of those who seek "fast and simple permitting." Victoria Tschinkel, *Do Not Leave Wetlands Protection to Chance*, Orlando Sentinel, Mar. 9, 2018 (Exhibit 6), available at <http://www.orlandosentinel.com/opinion/os-ed-do-not-leave-wetlands-protection-to-chance-20180309-story.html>.

On March 9, 2018, former Secretary Tschinkel urged the Governor to veto the bill, noting 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 Corps' Determination of What Waters Can Be Assumed Under 33 U.S.C. § 1344(g) Requires Time, Resources, Public Input, Transparency and Scientific Integrity

As the Corps notes in its Public Notice, any Section 404 program proposed by Florida would not include navigable waters of the United States, which remain under exclusive federal jurisdiction under federal law. 33 U.S.C. § 403; *id.* § 1344(g). Specifically, federal law provides that waters and their adjacent wetlands that are "presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast" constitute "navigable waters" and therefore cannot be delegated to a state for administration of a Section 404 permitting program. 33 U.S.C. § 1344(g)(1).

To determine which waters and their adjacent wetlands are presently used or are susceptible to use in their natural condition or by reasonable improvement as a means to transport commerce and therefore not assumable under federal law, FDEP has asked the Corps to engage in extensive, highly complex mapping on an expedited basis. Public records from FDEP indicate that the agency expects the Corps to complete this mammoth technical analysis by July 2018 so that the FDEP can submit its assumption application to the EPA in August 2018.

FDEP's rushed approach to such important issues disregards the need for thorough study and analysis to ensure waters in the State of Florida are protected; creates confusion in the public and among the regulated community; precludes meaningful public participation; and is likely to lead to disastrous results. Plainly, determining which waters are or in their natural condition or with reasonable improvement could be, used in interstate commerce---particularly Florida's critical tourism and agriculture industries—is a fact and science-intensive process that requires documentation of each water at issue. The Corps should resist political pressure to unnecessarily rush and take short cuts on a project of such lasting consequence to so many.

### The Corps' Request for Public Comment

It is notable that in this hurried environment, the Corps issued its Public Notice regarding these determinations on March 19, 2018, days before Florida's enabling legislation had even been signed into law. The Corps' notice seeks input relative to determining which waters in Florida would remain under federal jurisdiction pursuant to Section 10 of the RHA if Florida's request to assume jurisdiction under Section 404 of the CWA is approved by the EPA. Jacksonville District U.S. Army Corps of Engineers, *Public Notice: Determination of Navigable Waters*, March 19, 2018 (Exhibit 7). The Corps invited the public to submit comments "regarding use of waters in the [S]tate of Florida for navigation. This includes identification of those rivers, streams, lakes, etc.[.] associated with past, current, or potential future commerce, commercial traffic, or recreational activities." *Id.* at 2. The deadline to submit comments was 30 days from the date of the notice, or April 18, 2018.

On April 10, 2018, the Corps circulated a document titled "UPDATED PUBLIC NOTICE" and "Cessation of Public Comment Period." Jacksonville District U.S. Army Corps of Engineers, *UPDATED PUBLIC NOTICE*, April 10, 2018 (Exhibit 8). That notice did not withdraw the March 19, 2018 Public Notice but summarily stated without explanation that "the comment period originally set to expire on April 20, 2018, is considered closed until further notice[.]"

It is not clear what the Corps' "cessation" notice means, or what the basis for its issuance may have been, if any. In any event, the public is entitled to comment on the Corps' March 19, 2018 Public Notice. These comments are submitted in compliance with the Public Notice deadline.



We note that the original comment period of 30 days was already unreasonably short for the task at hand. Nevertheless, we and other members of the public began diligently working on submissions. Those submissions must be taken into account in any decision the Corps is considering and/or makes.

The Corps should extend the formal comment period for an additional 60 days through and including June 20, 2018, as well as schedule workshops around the State of Florida to allow local experts to provide critical information relevant to the Corps' navigability studies.

### Determination of Navigable Waters in Florida

As 33 U.S.C. § 1344(g)(1) makes clear, the waters and adjacent wetlands that are not assumable by a state specifically include those that are "presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast." 33 U.S.C. § 1344(g)(1). Decades of administrative action and case law relating to the CWA and RHA have established that use in "interstate or foreign commerce" can also include use for recreational commerce activities such as fishing, swimming and boating. *See, e.g., State of Utah By & Through Div. of Parks & Recreation v. Marsh*, 740 F.2d 799, 803-04 (10th Cir. 1984) (interstate commerce included recreational use of lake by interstate travelers for fishing, hunting, boating, camping, wildlife viewing and other activities).

Given Florida's extensive water resources and unique hydrology, it is plain that any navigability study by the Corps will require a thorough analysis of numerous waterways to determine which waters may be assumable. This undertaking must pay special attention to the rivers, streams and adjacent wetlands located throughout the State.

Although "conclusive determinations of navigability can be made only by federal Courts," 33 C.F.R. § 329.14(a), navigability determinations by federal agencies are "accorded substantial weight by the courts." It is therefore imperative that "when jurisdictional questions arise, district personnel *carefully investigate* those waters which may be subject to Federal regulatory jurisdiction[.]" *Id.* (emphasis added). Navigability determinations may have to be "revised or reversed . . . to reflect changed rules or interpretations of the law." *Id.*

The determination of whether a waterbody is a water that can or cannot be assumed under Section 404(g) is to be made by the division engineer in a report of findings based on criteria set out in the Corps' regulations. These reports must be reviewed by district counsel before the division engineer issues a final determination. 33 C.F.R. § 329.14(b). Each report by the division engineer should include a number of facts, including but not limited to the name of the



waterbody, its physical characteristics, approximate discharge volume, fall per mile, extent of tidal influence, range between high and ordinary low water, improvements, nature and location of significant obstructions, authorized projects, list of known survey documents or report describing the waterbody, past or present interstate commerce, potential use for interstate commerce, state or federal court decisions relating to navigability of the waterbody, and the Corps' finding regarding navigability. *Id.* § 329.14(c).

Federal regulations provide that “[s]pecific inquiries regarding the jurisdiction of the Corps of Engineers can be answered only after a determination whether (1) the waters are navigable waters of the United States or (2) If not navigable, whether the proposed type of activity may nevertheless so affect the navigable waters of the United States that the assertion of regulatory jurisdiction is deemed necessary.” *Id.* § 329.15(c).

Importantly, each district of the Corps is required to maintain a tabulated list of final determinations of navigability, and to update these lists “as necessitated by court decisions, jurisdictional inquiries, or other changed conditions.” *Id.* § 329.16(a). Since the district’s list “represent[s] only those waterbodies for which determinations have been made[,] absence from that list should not be taken as an indication that the waterbody is not navigable.” *Id.* § 329.16(b). Under federal regulations, “[d]eletions from the list are not authorized” and “changes are not considered final until a determination has been made by the division engineer” following updated findings. *Id.* § 329.16(c).

Waterbodies that may not presently be navigable but with reasonable improvements could be made navigable are subject to federal jurisdiction. *Id.* § 329.8(b). Artificial and privately-owned waterbodies may also be deemed navigable. *Id.* § 329.8(a)(1)-(3). Any waterbody that has in the past been navigable either in its natural or improved state remains navigable as a matter of law regardless of its subsequent use or navigability, unless there has been a Congressional declaration of the waterbody’s non-navigability. *Id.* § 329.9. The existence of past or present obstructions does not necessarily defeat the navigability of a waterbody. *Id.* § 329.10.

The Corps’ jurisdiction also “extend[s] laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark.” *Id.* § 329.11(a). “Marshlands and similar areas are thus considered navigable in law, but only so far as the area is subject to inundation by the ordinary high waters.” *Id.* § 329.11; *see also id.* § 329.12(b); *United States v. DeFelice*, 641 F.2d 1169, 1175 (5th Cir. 1981) (“even shallow tidal areas, like sloughs or marshes below the elevation of a mean high water line” are subject to regulation under the Rivers and Harbors Act).



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 must be based on technical information, hydrology and science. By necessity, adjacency determinations must 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 will be imperative to solicit information from the public, as there are entities and individuals with relevant expertise located throughout the State.

## Conclusion

Given the enormity of this undertaking, its lasting implications for waters in the State of Florida, and the communities, industries and wildlife that rely on them, and the national interests embodied in the Clean Water Act and Rivers and Harbors Act, we urge the Corps to ensure that its process is fully transparent, rooted in evidence-based science, and informed by meaningful opportunities for public input and participation. We further urge the Corps to retain the maximum jurisdiction available under federal law.

Sincerely,

Tania Galloni  
Managing Attorney

cc: Donald W. Kinard, Chief of the Regulatory Division, U.S. Army Corps of Engineers, Jacksonville District, [donald.w.kinard@usace.army.mil](mailto:donald.w.kinard@usace.army.mil)

Tori White, Deputy Chief of the Regulatory Division, [tori.white@usace.army.mil](mailto:tori.white@usace.army.mil)

Trey Green, Atlanta Regional Administrator, U.S. EPA, [Glenn.trey@Epa.gov](mailto:Glenn.trey@Epa.gov)

Thomas McGill, U.S. EPA, [Mcgill.Thomas@epa.gov](mailto:Mcgill.Thomas@epa.gov)

Pace Wilber, National Marine Fisheries Service, [pace.wilber@noaa.gov](mailto:pace.wilber@noaa.gov)

Larry Williams, U.S. Fish and Wildlife Service, Vero Beach, Florida,  
[larry\\_williams@fws.gov](mailto:larry_williams@fws.gov)