6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 233

[EPA-HQ-OW-2018-0640; FRL-10014-54-Region 4X]

Public Notice on Florida's Request to Assume Administration of a Clean Water Act Section 404 Program

AGENCY: Environmental Protection Agency

ACTION: Notice.

SUMMARY: The Clean Water Act (CWA) established the Section 404 program, under which 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 authorizes states and tribes to administer their own permit program for the discharge of dredged or fill material into navigable waters, other than those waters that the CWA reserves as subject to Corps jurisdiction. On August 20, 2020, the Environmental Protection Agency (EPA) received from the Governor of the State of Florida, a complete program submission for regulating discharges of dredged or fill material into waters within the jurisdiction of the State in accordance with the CWA. Pursuant to CWA Section 404(h) and EPA's implementing regulations at 40 CFR 233.15, EPA will hold public hearings and is opening a 45-day comment period. EPA will fully consider comments when taking action to approve or disapprove Florida's request to assume a CWA Section 404 program. EPA intends to take this action by December 17, 2020, consistent with the timeframes established in the CWA and implementing regulations.

EPA has determined that approval of a state CWA Section 404 program is a federal undertaking as defined under the National Historic Preservation Act (NHPA). Therefore, in accordance with the Advisory Council on Historic Preservation regulations, 36 CFR part 800

Protection of Historic Properties, EPA is initiating a programmatic consultation under Section 106 of the NHPA and is seeking comment on this action regarding Florida's request to assume a CWA Section 404 program.

DATES: Comments on EPA's decision to approve or disapprove under CWA Section 404 must be received on or before [**45 days after date of publication in the Federal Register**]. Comments associated with the consultation under section 106 of the NHPA may also be submitted on or before [**45 days after date of publication in the Federal Register**].

ADDRESSES: You may send comments on both actions (Florida's request to assume a CWA Section 404 program and EPA's consultation under NHPA section 106), identified by Docket ID No. EPA-HQ-OW-2018-0640, by any of the following methods:

- *www.regulations.gov*: Follow the on-line instructions for submitting comments and accessing the docket and materials related to this notice.
- *E-mail*: 404Assumption-FL@epa.gov
- *Mail*: Mr. Kelly Laycock, Oceans, Wetlands and Streams Protection Branch, USEPA Region 4, 61 Forsyth St SW, Atlanta, GA 30303.

Instructions: All submissions received must include the Docket ID No. EPA-HQ-OW-2018-0640 for these actions. Comments received may be posted without change to [HYPERLINK "https://www.regulations.gov/" \h], including any personal information provided.

Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are open by appointment only, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via [HYPERLINK "https://www.regulations.gov/"] or email at 404Assumption-FL@epa.gov, as there may be a delay

in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on the EPA Docket Center services and the current status, please visit us online at [HYPERLINK "https://www.epa.gov/dockets"].

The virtual hearings will be held on October 21, 2020 and October 27, 2020. The hearing held on October 21, 2020 will convene at 9:00 a.m. and will conclude no later than 12:00 p.m. EDT. The hearing held on October 27, 2020 will convene at 5:00 p.m. EDT and will conclude not later than 8:00 p.m. EDT. For information about registration for these virtual public hearings, please see [HYPERLINK "https://www.epa.gov/aboutepa/about-epa-region-4-southeast"].

FOR FURTHER INFORMATION CONTACT: Mr. Kelly Laycock, Oceans, Wetlands and Streams Protection Branch, USEPA Region 4, 61 Forsyth St SW, Atlanta, GA 30303; (404) 562-9262; email address: 404Assumption-FL@epa.gov.

SUPPLEMENTARY INFORMATION: The State's submission may be read online through the Federal eRulemaking Portal, Docket No. EPA-HQ-OW-2018-0640, the EPA's Docket Center, available at [HYPERLINK "https://www.regulations.gov"]. The State's submission is also on file and may be inspected and copied (for a per page charge) at the EPA Docket Center Reading Room located at WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. Due to COVID-19, access to the EPA Docket Center Reading Room will be allowed by appointment only. Procedures to make an appointment to visit the EPA Docket Center Reading Room can be found at [HYPERLINK "https://www.epa.gov/dockets/epa-docket-center-reading-room"].

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I. General Information

A. Does this action apply to me?

States and tribes that have assumed or are considering assuming the administration of a CWA Section 404 dredged or fill material permitting program as well as regulated entities and members of the public in the State of Florida may be interested in providing input on the issues described in this document.

Tribal and State Historic Preservation Offices as well as members of the public with knowledge of or interest in the identification (and location) of historic properties in the State of Florida, the effects of discharges from dredged or fill activities into waters of the United States on these historic properties, or ways to mitigate or avoid adverse effects of such discharges may be interested in commenting on EPA's consultation on this action under section 106 of the NHPA.

B. What should I consider as I prepare my comments?

Comments may consider whether the state program meets the requirements of Section 404(g) of the CWA and its implementing regulations. Comments may also consider the impacts of EPA's approval or disapproval of Florida's request on historic sites located within the State of Florida in accordance with section 106 of the NHPA.

Submit your comments, identified by Docket ID No. EPA-HQ-OW-2018-0640, at [HYPERLINK "https://www.regulations.gov"] (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the

docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit [HYPERLINK "https://www.epa.gov/dockets/commenting-epa-dockets"].

The EPA Docket Center and Reading Room are open by appointment only, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via [HYPERLINK "https://www.regulations.gov/" \h] as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at [HYPERLINK "https://www.epa.gov/dockets" \h].

EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our federal partners so that we can respond rapidly as conditions change regarding COVID-19.

C. How can I participate in the virtual public hearing?

EPA is deviating from its typical approach because the President has declared a national emergency. Because of current CDC recommendations, as well as state and local orders for

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social distancing to limit the spread of COVID-19, EPA cannot hold in-person public meetings at this time.

The virtual hearings will be held on October 21, 2020 and October 27, 2020. The hearing held on October 21, 2020 will convene at 9:00 a.m. and will conclude no later than 12:00 p.m. EDT. The hearing held on October 27, 2020 will convene at 5:00 p.m. EDT and will conclude not later than 8:00 p.m. EDT.

EPA will begin pre-registering speakers and listen-only attendees for the hearings upon publication of this notice in the *Federal Register.* For a link to the on-line registration page, please visit [HYPERLINK "https://www.epa.gov/aboutepa/about-epa-region-4-southeast"]. Immediately following registration, you will receive an email confirming your registration and providing a unique link to the webinar. Speakers will be signed up to speak in the order that their registration is received. The last day to pre-register to speak at a hearing will be October 9, 2020. On October 20, 2020, EPA will post a general agenda for the hearing that will list the order of pre-registered speakers and their approximate timeslots at: [HYPERLINK "https://www.epa.gov/aboutepa/about-epa-region-4-southeast"]. Please note that timeslots will be estimated and speakers are encouraged to join the webinar at least 15 minutes prior to the start of their estimated speaking time.

EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Oral comments shall be limited to no more than five (5) minutes. EPA recommends that commenters prepare their oral statement in advance to ensure it can be completed within five minutes. EPA also recommends that commenters also submit the text of their oral comments

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(with any relevant supplementary information) as written comments to the rulemaking docket. EPA encourages commenters to provide EPA with a copy of their oral testimony electronically (via email) by emailing it to Mr. Kelly Laycock at 404Assumption-FL@epa.gov.

EPA may ask clarifying questions during the oral testimony but will not respond to the comments at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. The proceedings of the hearings will be recorded. After the public hearing, verbatim transcripts of the sessions will be included in the rulemaking docket.

Please note that any updates made to any aspect of the hearing will be posted online at [HYPERLINK "https://www.epa.gov/aboutepa/about-epa-region-4-southeast"]. While EPA expects the hearing to go forward as set forth above, please monitor our website to determine if there are any updates. EPA does not intend to publish a document in the *Federal Register* announcing updates.

To request services for special accommodations, please pre-register for the hearing with Mr. Kelly Laycock at 404Assumption-FL@epa.gov and describe your needs by October 7, 2020. EPA will seek to arrange special accommodations as needed to support hearing participation if given advanced notice.

II. Background

A. Clean Water Act Section 404(g)

The CWA established the Section 404 program, under which the Secretary of the Army, acting through the Chief of Engineers of the 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 states and tribes the option of submitting to EPA a request to

assume administration of a CWA Section 404 program in certain waters within state or tribal jurisdiction.

The regulations establishing the requirements for the approval of state or tribal programs under section 404 of the CWA were published in the *Federal Register*, at 53 FR 20764, (June 6, 1988) (40 CFR parts 232 and 233), and can be accessed at [HYPERLINK "https://www.epa.gov/cwa404g/statutory-and-regulatory-requirements-assumption-under-cwa-section-404" \h]. "State regulated waters" are defined in 40 CFR 232.2 as "those waters of the United States in which the Corps suspends the issuance of Section 404 permits upon approval of a state's section 404 permit program by the Administrator under section 404(h). The program cannot be transferred for those waters which 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 the high tide line, including wetlands adjacent thereto." The Corps retains CWA Section 404 permitting authority over waters of the United States within "Indian country" as that term is defined at 18 U.S.C. 1151, unless a tribe has assumed the 404 program within Indian country. *See* 40 CFR 233.1(b).

A state application to administer a Section 404 program must include the following: (a) A letter from the Governor of the state requesting program approval; (b) a complete program description as set forth in 40 CFR 233.11; (c) an Attorney General's statement or a statement from the attorney for those state or interstate agencies which have independent legal counsel, as set forth in 40 CFR 233.12; (d) a Memorandum of Agreement with the EPA Regional Administrator, as set forth in 40 CFR 233.13; (e) a Memorandum of Agreement with the Secretary of the Army, as set forth in 40 CFR 233.14; and (f) copies of all applicable state

statutes and regulations, including those governing applicable state administrative procedures. 40 CFR 233.10.

EPA has reviewed the State of Florida's program submission and consistent with 40 CFR 233.15 has determined that it is a complete request for State program approval that meets the submittal requirements of 40 CFR 233.10. The Governor's request proposes that FDEP administer a permit program for regulated activities in waters regulated by the State under section 404(g)(1), as identified in the Memorandum of Agreement with the Secretary of the Army, in accordance with section 404 of the CWA. The main statutory and regulatory authorities to administer and enforce the State 404 program can currently be found in the State's submission to assume the program and are available on FDEP's webpage at [HYPERLINK "https://floridadep.gov/water/water/content/water-resource-management-rules" \h].

The State 404 program would provide for the issuance of general permits and individual permits. The State has adopted 38 general permits which are listed in 62-331 F.S. as part of their package submittal. A complete description of the individual permit process and the standards for granting of an individual permit are found at 62-331 F.S. In addition, there are standard requirements for all regulated activities in State-assumed waters. No permit shall be issued in certain specified circumstances, including when the permit does not comply with the requirements of the CWA or implementing regulations, including the CWA Section 404(b)(1) Guidelines. 40 CFR 233.20. Florida's laws outline a number of requirements applicable to State 404 permits, including that "no dredge or fill activity shall be permitted if there is a practicable alternative to the proposed activity which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences," and an individual permit cannot be issued if it "[c]auses or contributes to

violations of any applicable State water quality standard, except when temporarily within a mixing zone proposed by the applicant and approved…" by FDEP at 62-331.053 F.S.

Currently, Florida operates the Environmental Resource Permit program (ERP), which regulates the disposal of dredged or fill material into waters of the State under State law. State-regulated activities under ERP that go beyond the purview of the CWA are not subject to EPA approval or oversight under 40 CFR part 233.

The Memorandum of Agreement between FDEP and the Secretary of the Army, available in the docket for this action, identifies procedures for the transfer of all pending permit applications for discharges into the waters assumed by the State. 40 CFR 233.14. Pursuant to the Memorandum of Agreement, existing Section 404 permits already issued by the Corps as of the effective date of State assumption will remain with the Corps during the already approved lifespan of that permit.

The Regional Administrator is required to approve a state request to assume the Section 404 program unless the state program does not meet the requirements of Section 404(h) of the CWA and its implementing regulations. Among other authorities, the state must have: (1) Adequate authority to issue permits which comply with all pertinent requirements of the CWA, including but not limited to, the Section 404(b)(1) Guidelines, and which may be issued for fixed terms not to exceed 5 years; (2) adequate authority, including civil and criminal penalties, to abate violations of the permit or permit program; and (3) authority to ensure that the Administrator, the public, and any other affected state or tribe are given notice of each permit application and that the public and affected states and tribes are provided an opportunity for public hearing before a ruling on each such application. 33 USC 1344(h)(1).

The procedures for EPA's review and approval or disapproval of a state Section 404 program are outlined in 40 CFR 233.15. In summary, once a state submits an assumption package that is complete, a 120-day statutory review period commences, which may be extended by mutual agreement of the state and EPA. EPA shall provide copies of a complete assumption package within 10 days of receipt to the Corps, the National Marine Fisheries Service (NMFS), and the United States Fish and Wildlife Service (USFWS) for review and comment. Within 90 days of EPA's receipt of a complete program submission, the Corps, FWS, and NMFS shall submit to EPA any comments on the state program. EPA shall publish notice of the state's application in the *Federal Register*, state newspapers, and via mail to interested parties. EPA shall provide for a public comment period of not less than 45 days as well as a public hearing not less than 30 days after such notice is published in the *Federal Register*. EPA shall also provide notice of an opportunity to consult to federally recognized Indian tribes in the state.

Within 120 days of receipt of a complete program submission (unless EPA and the state extend the statutory review period), EPA shall approve or disapprove the program based on whether the state's program fulfills the requirements of the Act and 40 CFR part 233, taking into consideration all comments received. EPA will prepare a summary of significant comments received and responses to these comments, as well as respond individually to comments received from the Corps, USFWS, and NMFS.

If EPA approves Florida's program, EPA will notify the State and the Corps and publish notice in the *Federal Register*. Transfer of the program to the State is not effective until this notice is published. EPA may only disapprove the State's program if it is inconsistent with the requirements of the CWA and 40 CFR part 233. If EPA disapproves the State's program it shall notify the State of the reasons for the disapproval and of any revisions or modifications to the

State's program which are necessary to obtain approval. If the State resubmits a program submission remedying the identified problem areas, the approval procedure and statutory review period shall begin upon receipt of the revised submission. EPA maintains oversight of State-issued permits pursuant to 40 CFR 233.50.

If EPA approves this program, EPA will also codify the approved program in 40 CFR 233 subpart H.

B. National Historic Preservation Act Section 106 Consultation

In accordance with 36 CFR 800.2(d), EPA is providing information and seeking comment on EPA's potential approval of Florida's request to assume a CWA Section 404 program and any potential effects of such approval on historic properties. The National Historic Preservation Act of 1966, as amended, (NHPA) establishes historic preservation as a federal agency policy and provides for the identification and protection of historic properties and resources. Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties that are listed or eligible for listing on the National Register of Historic Places and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The approval of the State of Florida's request to assume the CWA Section 404 program would be an undertaking pursuant to 36 CFR 800.16(y), and therefore, in accordance with Section 106 of the NHPA and the ACHP's implementing regulations at 36 CFR part 800, EPA has initiated consultation regarding this undertaking. EPA has invited the ACHP, FDEP, the State Historic Preservation Officer

(SHPO), and Indian tribes with interests in the State of Florida to participate as consulting parties.

The State's administration of the Section 404 program and its issuance of permits over time has the potential to affect historic properties, including cultural resources or historic properties of religious and cultural significance. FDEP and the SHPO have entered into an Operating Agreement which sets forth a process to identify historic properties that may be impacted by Florida's issuance of Section 404 permits, and to develop recommendations for resolving adverse effects. As discussed in the State's Operating Agreement, such effects could potentially include, but are not limited to, the following:

i. Physical destruction of or damage to all or part of the property, including inundation;

ii. Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access;

iii. Change of the character of the property's use or of physical features within the property's setting, or impacts to the landscape that contribute to its historic significance;

iv. Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features; and

v. Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian Tribe.

Pursuant to the Operating Agreement, if the parties cannot reach agreement on the determination or resolution of effects, they may forward any outstanding issues to EPA for decision-making consistent with EPA's permitting review authorities under 40 CFR 233.50. The Operating Agreement provides comprehensive procedures for assessing the effects of Florida's 404 program on historic properties and therefore will considerably inform EPA's Section 106 consultation.

EPA solicits comments on this undertaking and any potential effects on historic properties at the Federal eRulemaking Portal, Docket No. EPA-HQ-OW-2018-0640. The comment period closes [**45 days after date of publication in the Federal Register**].

C. Endangered Species Act Consultation

The Endangered Species Act (ESA) Section 7 directs each federal agency to ensure, in consultation with the USFWS and NMFS, that ''any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of'' listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. 1536(a)(2). EPA views consultation under ESA Section 7 to be required if a decision to approve a state or tribal CWA Section 404 program may affect ESA-listed species or designated critical habitat. EPA's position is set forth in a memorandum issued by David P. Ross, Assistant Administrator for the Office of Water, dated August 27, 2020, following the consideration of comments received during a public participation process that is outside of the scope of this notice. Accordingly, EPA is conducting ESA Section 7 consultation during the Agency's review of the State of Florida's request to assume administration of a CWA Section 404 program because EPA has determined that the Agency's potential approval of the program may affect ESA-listed species or designated critical habitat. *See* [HYPERLINK "https://www.epa.gov/cwa404g/consultation-cwa-section-404-program-requests-endangered-species-act-and-national-historic"] for more information regarding EPA's position on ESA Section 7 consultation under CWA Section 404(g).

Dated: September 2, 2020.

Mary Walker,

Regional Administrator, EPA Region 4.