# Florida's CWA §404 Program Assumption Effort

INTERNAL BRIEFING FOR THE REGIONAL ADMINISTRATOR

OCTOBER 2, 2017



EPA is always here and willing to assist those states interested in Assuming the CWA 404 program.
Really appreciate that you are talking to us in the beginning stages Early engagement helps ensure any request we receive is accompanied by a complete package and that EPA understands your program as we undertake any review.
Assumption is one of the best example of cooperative federalism, something Administrator Pruitt speaks of often.
EPA has always believed a strong working relationship with the states and tribes is the most efficient way to manage the nations aquatic resources.

I understand that Florida has looked into assumption before so you all are probably well on your way in putting together a package. However, those efforts were some time ago and Florida laws have changed and there are additional CWA regulations (such as the mitigation rule) so I encourage you to work with my staff as you move forward with this effort.

I have a brief PPT with the basics of the assumption requirements, process and EPA role in state CWA 404 programs I thought I'd go through if you are amenable.

I also want to cover an additional effort we are undertaking at State's requests to facilitate assumption – and that is to help clarify for which waters a state may assume 404 permitting authority and for which waters the USACE retains.

# Agenda

- Overview
- The Statutory and Regulatory Authority and Requirements
  - Authority
  - Requirements: Request Package and Criteria
  - Approval Process
- Florida Effort
  - FL's Exploration of 404 Assumption
  - 404 Permitting in FL
  - FL's Environmental Resource Permit (ERP) Program
  - Status and Potential Next Steps to Assist FL
  - Florida's Current Focus
- Additional Information
  - EPA Staff Supporting FL's Effort
  - Complete Assumption Request Package: Program Description, AG Statement, FL-EPA MOA, FL-USACE MOA
  - EPA oversight
    - State Permit Process Once Assumed
    - Annual Report and Consistency
  - NACEPT's Assumable Waters Subcommittee Recommendations

# Authority

- CWA §404(g)
  - States* may assume administration of the permit and enforcement program for certain waters
    - NACEPT's Assumable Waters Subcommittee recommendations on how EPA could provide clarity submitted May 2017
- CWA §404(h) and 40 CFR part 233
  - Lists state requirements for assumption
  - Lists EPA responsibilities: approval and oversight of assumed program
  - Lists requirements and process for review and modification of state program

* For this presentation: state refers to state or tribe



State requirements: Part 233 subpart A (233.1 – 233.4), subpart B (233.11- 233.14)
Program approval: Subpart B (233.10, 233.15)
Revisions to state programs: 233.16
Program operation: Subpart D (233.30)
Federal oversight: subpart F (233.50-233.53)
RA approval w/ concurrence– delegation manual cpt. 2, 2-43
CWA §404(h-l) and 40 CFR part 233 describe:
State and tribal program requirements
Procedures EPA follows and criteria EPA applies in the approval and oversight of CWA §404(g) programs includes (b)(1) guidelines, public notice and comment procedures, federal coordination
Process to request approval of state/tribal 404 program - 120 day process, can be extended
Assumption request package contents including:
Description of the scope and structure of the state or tribes program
Memorandum of Agreement with EPA – includes program administration and enforcement coordination
Memorandum of Agreement with USACE – includes list of waters that are not assumed by the state or tribe – the USACE retains permitting authority over these waters

# Requirements: Request Package and Criteria

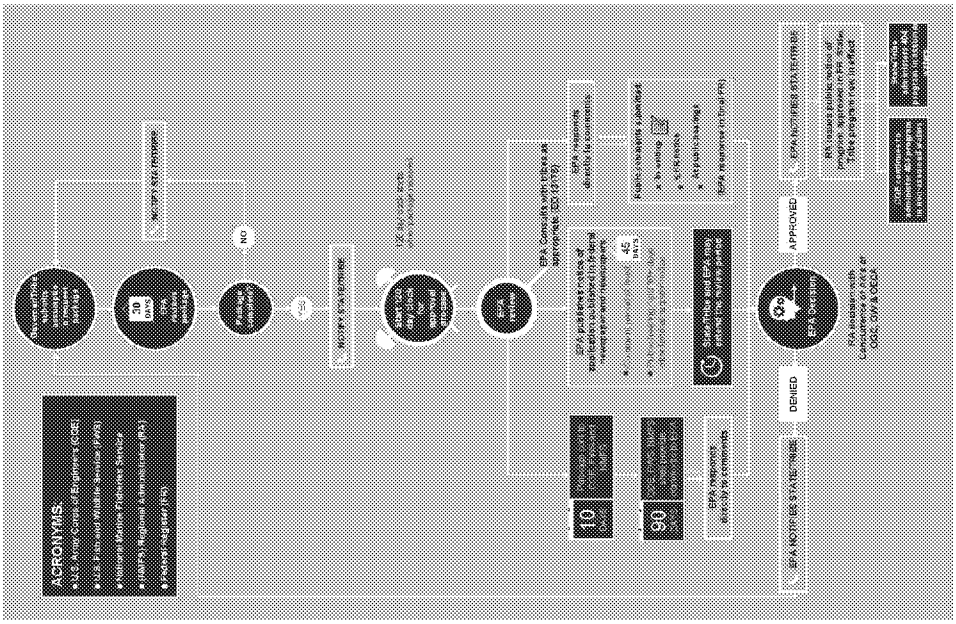
**Governor transmits request to the Regional Administrator**

- Complete assumption request package must include:
  - Letter from Governor
  - Complete program description
  - Attorney General's statement
  - MOA with EPA Regional Administrator
  - MOA with Secretary of Army (through Chief USACE)
  - All applicable state statutes and regulations administering the program

**Criteria for Assumption**

- State or Tribal programs must be consistent with and no less stringent than the Act and implementing regulations
- State or Tribal programs must:
  - Have equivalent scope of jurisdiction
  - Regulate at least the same activities
  - Provide for sufficient public notice and allow public participation
  - Ensure compliance with the CWA 404(b)(1) guidelines
  - Have adequate enforcement authority

# Approval Process




Draft – internal - predecisional

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# FL's Exploration of 404 Assumption

- FL Department of Environmental Protection (FDEP) seriously considered assumption in 1993
  - Action by the FL legislature regarding the scope of jurisdiction of state waters prevented FDEP from having an approvable assumption package
- FDEP has informally notified EPA that they are exploring assumption
  - FDEP currently engaging stakeholders; not yet publicly announced
  - Goal to assume program by the end of Governor Rick Scott's term (2018)
  - Region 4 staff in communication with FDEP staff
  - High priority to provide any needed assistance

# 404 Permitting in FL

- Significant 404 permitting activity
- 8,436 miles of coastline
- 26,000 stream/river miles
- 11.4 million acres of wetlands

# FL's Environmental Resource Permit (ERP) Program

- Provides regulatory structure that we understand the state wishes to use for an assumed 404 program
- Administered by FDEP and the State Water Management Districts
- Regulates activities involving alteration of surface water flows
  - Dredging and filling in wetlands and other surface waters;
  - Construction in uplands that generates stormwater runoff
- Used by Florida as mechanism for CWA 401 certification of USACE's 404 permits

# Status of EPA Assistance to FDEP

- EPA team assembled, ready to assist Florida as needed *(see page 12)*
- Met with FDEP in Tallahassee on September 25-26, 2017
  - Discussed many of the details of FDEP's existing program
  - Agreed to communicate regularly and to strive to work through issues early
  - Identified various questions, issues and challenges to overcome
    - Differing methodologies for determining jurisdiction of state vs. federal waters
    - Existing state requirements for exemptions for agriculture activities, permit duration, default period for permit issuance
    - Commitments in the EPA/State memorandum of agreement
  - Identified several action items
- Will communicate using OneDrive, teleconferences and in-person

# FL's Current Focus

- Any needed state legislative changes to be consistent with federal requirements
  - Largely dependent on how their Attorney General interprets their existing authorities
  - EPA's input will help inform Florida's decisions on issues to advance to the legislature
  - The Florida Legislature's general session begins in January
    - Committee meetings delayed due to Hurricane Irma, may begin in October.
- MOA with the USACE
  - FDEP staff are currently in communication with the USACE Jacksonville District
  - The USACE is in the process of delineating the universe of assumable waters
    - USACE's approach is consistent with their recommendations in the May 2017 Assumable Waters Subcommittee Report
    - USACE expects process to be completed by July 2018

# Additional Information

# EPA Staff Supporting FL's Effort

- EPA Region 4
  - Thomas McGill - primary point of contact for FDEP
  - Rosemary Calli and Chris Parker – program/technical experts
  - Phil Mancusi-Ungaro and Matt Hicks – Regional Counsel
- EPA Headquarters
  - Kathy Hurld – OWOW
  - Heidi Nalven – OGC
  - Jeffrey Speir - OECA

## Complete Assumption Request Package:
Program Description, AG Statement, FL-EPA MOA, FL-USACE MOA

**Program Description**

- Scope and structure of program
  - Jurisdiction
  - Activities regulated
  - Anticipated coordination
  - Permit review criteria
  - Scope of permit exemptions
- Procedures for permitting, administrative review and judicial review – including forms
- Structure and organization of state agency(ies) responsible for program administration
- Funding and staffing levels
- Anticipated workload
- Compliance, evaluation and enforcement programs
- Clarification of waters under state jurisdiction and those under USACE jurisdiction
- Best management practices -to satisfy farm, forest and temporary mining roads exemption provisions

For all of these sections, the state will need to provide a description of how the state definitions, program, statutes, regulations are consistent with the requirements (e.g., a comparison is one approach, incorporation by reference is another)

# Complete Assumption Request Package:

## Program Description, AG Statement, FL-EPA MOA, FL-USACE MOA cont.

**Attorney General's Statement**

- Citations of: statutes, administrative regulations and judicial reviews demonstrating adequate authority
- Legal analysis of the effect of state laws regarding private property takings
- Certification of the authority of each state agency to administer the program
- Analysis of authority over Indian lands - not assuming authority over Indian lands ≠ partial assumption

**MOA with EPA Region 4 Administrator**

- Classes and categories of permits for which EPA waives federal review
- Provisions for state reporting on program implementation
- EPA and FL state roles and coordination e.g., Compliance monitoring, enforcement
- Provisions for modification of the MOA - Including transfer or withdrawal

**MOA with USACE**

- Description of waters of the U.S. over which USACE retains 404 permitting authority
- Procedures for transfer of pending permit applications upon program approval
- Identification of any USACE general permits to be assumed by FL - Includes plan for transferring responsibility
- Identification of current enforcement cases

# EPA Oversight: State Permit Process Once Assumed

- State transmits to EPA notice of every permit application received
- EPA reviews permits, where federal review is not waived
  - EPA coordinates USACE, USFWS, & NMFS comments
- FL-EPA MOA identifies categories of projects for which EPA review is waived. EPA cannot waive review of:
  - Draft general permits
  - Discharges that may impact endangered species
  - Discharges that may adversely impact waters of another state
  - Discharges with known or suspected toxic or hazardous pollutants
  - Discharges proximal to public water supply intakes
  - Discharges within critical State/Federal areas
- State shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed
- Permit is transferred to USACE, if EPA's objection is not resolved

EPA may require review of additional categories or all permits e.g.,
In NJ, EPA also reviews NJ permits that
fill >5 acres of freshwater wetlands or state open waters and/or any regulated activity which results in significant reductions in the ecological, commercial, or recreational values of >5 acres of freshwater wetlands or state open waters
are culvert enclosures of >100 feet with >200 cubic yards of fill
channelize >500 feet of a river or stream

In MI EPA also reviews MI permits that
discharge into critical areas
are major discharges as defined in the MOA e.g., culverts >100 feet, wetlands fill >10,000 yds3 of material

# EPA Oversight: Annual Report and Consistency

**Review Annual Report**

- State submits draft annual report
- Draft annual report made available for public review

**Ensure Consistency with CWA and implementing regulations**

- Ensure new statutory or regulatory requirements incorporated by the state
- Review changes to the state program
- Undertake periodic program review and evaluation
- Withdrawal of program approval (if necessary)

# NACEPT's Assumable Waters Subcommittee Recommendations (May 2017)

- Several process recommendations were supported by all
- Majority recommendations:
  - *Waters to be retained* – Primary Dependence on Rivers and Harbors Act Section 10 Lists of Navigable Waters to Define USACE Retained Waters. *(Waters Alternative B)*
  - *Wetlands to be retained* -- USACE Retains All Wetlands Landward to an Administrative Boundary Established During the Development of the Memorandum of Agreement with the USACE, with a 300-foot National Administrative Boundary as a Default. (Wetlands *Alternative C3)*
- USACE recommendations:
  - *Waters to be retained* – Section 10 waters plus CWA (a)(1) TNW Waters as Retained Waters. *(Alternative C )*
  - *Wetlands to be retained* – USACE Retains All Adjacent Regardless of Furthest Reach. (wetlands *Alternative A)*
- August 1, 2017, letter from ECOS, ACWA and ASWM requested the Administrator adopt the majority's recommendations