Message

From: Kupchan, Simma [Kupchan.Simma@epa.gov]
Sent: 7/17/2019 9:31:02 PM
To: Ghosh, Mita [Ghosh.Mita@epa.gov]; Hicks, Matt [Hicks.Matthew@epa.gov]; Nagrani, Kavita [Nagrani.Kavita@epa.gov]; Mcgill, Thomas [Mcgill.Thomas@epa.gov]; Laycock, Kelly [Laycock.Kelly@epa.gov]; Calli, Rosemary [Calli.Rosemary@epa.gov]; Hurld, Kathy [Hurld.Kathy@epa.gov]
CC: Wade, Alexis [Wade.Alexis@epa.gov]
Subject: FW: 404 ASSUMPTION
Attachments: FDEP White Paper - ESA Consultation with Assumption Approval_.pdf; FDEP Summary Paper - ESA Consultation with Assumption Approval.pdf

FYI. Kathy, I have a question Ex. 5 AC/DP

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Simma Kupchan
EPA Office of General Counsel
Water Law Office
WJC North Building # 7426Q
202-564-3105

From: Leopold, Matt (OGC)
Sent: Wednesday, July 17, 2019 4:56 PM
To: Fotouhi, David <Fotouhi.David@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>
Subject: FW: 404 ASSUMPTION

FYI, let's discuss on Thursday. Thanks

Matthew Z. Leopold
General Counsel
U.S. Environmental Protection Agency
(202) 564-8040

From: Valenstein, Noah <Noah.Valenstein@dep.state.fl.us>
Sent: Wednesday, July 17, 2019 4:10 PM
To: Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Ross, David P <ross.davidp@epa.gov>
Cc: Walker, Mary <walker.mary@epa.gov>; Wolfe, Justin G. <Justin.G.Wolfe@dep.state.fl.us>; Wildeman, Anna <wildeman.anna@epa.gov>
Subject: 404 ASSUMPTION

Dear Mr. Leopold and Mr. Ross:

The Florida Department of Environmental Protection greatly appreciates the tremendous efforts by the U.S. Environmental Protection Agency over the last two years to facilitate state assumption under Section 404 of the Clean Water Act. As you both know, Section 404 assumption can streamline permitting processes, reduce costs and duplication of effort by state and federal authorities, and better align the 404 program with other delegated programs. The Trump Administration should be applauded for striving – in the spirit of cooperative federalism and environmental protection – to make 404 assumption a reality for more states. For our part, FDEP is continuing to move forward with efforts to apply for and obtain 404 assumption, which we hope to complete at the earliest possible opportunity. We are especially appreciative of the Administration's recent efforts to clarify the "assumable waters" issue. Looking ahead, FDEP remains committed to working closely with EPA, the U.S. Army Corps of Engineers, and other stakeholders on the state and federal rulemaking processes necessary to make 404 assumption a reality in Florida.

Though substantial progress in our state 404 application process has occurred, a significant barrier to effective Section 404 assumption remains. Specifically, where the Corps administers the 404 program, Section 7 of the Endangered Species Act embodies a streamlined and efficient process to ensure protection of endangered species, which may not be

available when a state administers the 404 program. It is our understanding that other states have grappled with this ESA-based barrier to 404 assumption. With this concern in mind, FDEP recently retained outside counsel at Latham & Watkins and Baker Botts LLP to help FDEP evaluate the range of options under existing law for addressing and potentially resolving this concern. Based on that review, and as outlined in the enclosed white paper and summary paper, FDEP believes that EPA can and should engage in a one-time ESA Section 7 programmatic consultation with the Services in connection with the *initial review* of a state's 404 assumption application. This approach, which would bring state 404 permits within Section 7's exemption from take liability, is both lawful and good policy. Because of the unique statutory text and legislative history found in Section 404, as outlined in our white paper, this approach will not implicate any other EPA authority.

Obtaining 404 assumption for the State of Florida is one of my highest priorities for FDEP at this time. To that end, I would respectfully request an opportunity to meet with you both in person in Washington DC at your next earliest availability. I have asked Justin Wolfe, FDEP's General Counsel, to help arrange that meeting.

Thank you for your time and attention to this matter, and for your service to our nation at EPA.

Sincerely,

Noah Valenstein
Secretary, Florida DEP