EPA Responses to Comments from the National Historic Preservation Act Section 106 Consulting Parties on
Florida's Request for Assumption

On August 20, 2020, the Environmental Protection Agency, Region 4, received a complete package from the State of Florida requesting to assume administration of a Clean Water Act (CWA) Section 404 program. EPA determined that approval of the State's request is a federal undertaking pursuant to section 106 of the National Historic Preservation Act (NHPA or Act) of 1966, as amended and initiated consultation under the NHPA via letter on September 2, 2020. EPA subsequently engaged in consultation with the following parties: the Advisory Council on Historic Preservation (ACHP); Florida State Historic Preservation Officer (FL SHPO); the Florida Department of Environmental Protection (FDEP); the Choctaw Nation of Oklahoma; the Miccosukee Tribe of Indians of Florida; the Mississippi Band of Choctaw Indians; the Muscogee (Creek) Nation; the Poarch Band of Creek Indians; and the Seminole Tribe of Indians of Florida. Set forth below are the comments EPA received from each party and a summary of our response to each comment. The comments themselves are shown in black font and the response is in red font. This document provides a response to all issues raised during the NHPA 106 consultation process.

Each bullet below includes a comment in black text followed by EPA's response in red text.

Advisory Council on Historic Preservation (ACHP)

- Given that the Operating Agreement (OA) establishes measures for consulting Indian tribes we would strongly urge EPA to consider their comments and address them within the OA to the extent possible. EPA is not a party to the OA and therefore cannot execute changes in that document specifically to address comments raised. However, EPA believes tribal comments regarding the OA are addressed through the Programmatic Agreement (PA), such as comments concerning reporting and monitoring, the Native American Graves Protection and Repatriation Act (NAGPRA), opportunities for tribal consultation during federal review, and ACHP involvement.
- The disconnect between the PA and the OA has the potential to leave Indian tribes out of implementation of the OA, without sufficient remedy available within the PA itself to rectify this omission. EPA does not agree that there is a disconnect between the documents and believes that the PA addresses comments made by the tribes relative to the OA. Additionally, both the PA and the OA establish and explain how historic and cultural resources will be protected through a tribal consultation process and establish a dispute resolution process to resolve disputes should they arise.
- The federal government has a unique legal relationship with federally recognized tribes, and the relationship cannot be delegated to a state agency without the tribes' approval, so this consultation now, with the federal agency, is critically important. EPA appreciates and values the Agency's government-to-government relationship with federally recognized tribes and has not delegated that relationship or our consultation obligations with such tribes. EPA has consulted with tribes with interests in Florida under Section 106 of the NHPA regarding EPA's undertaking of reviewing Florida's request to assume the CWA 404 program, and EPA has consulted with the three tribes located in Florida regarding Florida's request to assume the Clean Water Act (CWA) 404 program consistent with EPA's tribal consultation policy. We agree with the ACHP about the importance of the NHPA 106 consultation on the undertaking. Should

EPA approve the State's Section 404 program, the State would not assume permitting authority over any waters located in Indian country, as defined at 18 U.S.C. 1151. In those areas, the federal government retains its normal government-to-government consultation with the tribes. For waters outside of Indian country that the State assumes, the PA and OA, along with other assumption documents set forth the process for tribes to raise issues related to their interests to both Florida and to EPA.

- EPA has provided consulting parties with three business days to provide their comments on the PA, which is challenging for all consulting parties to do without advanced notice. It may also be difficult for EPA to meaningfully consider such comments and incorporate them into a revised PA within such a timeline. EPA sent letters inviting the consulting parties to participate in NHPA 106 consultation on EPA's undertaking on September 2, 2020. The Agency has hosted multiple meetings with the tribes, both individually and as a group. Initially EPA invited the eight tribes with interests in Florida to participate on a September 22nd informational webinar. During that webinar EPA provided information on Florida's request to assume the CWA 404 program and an overview of NHPA 106 consultation process that would be utilized. This was to assist the tribes in deciding whether to participate with EPA on NHPA 106 consultation on the undertaking. EPA explained during that meeting that the Agency planned to enter into a programmatic agreement that relied on the OA as a foundational document and provided information about where in the docket the OA could be found. EPA also provided email copies of the OA when requested. During the informational webinar we encouraged tribes to identify to EPA any issues, concerns or gaps in the OA so that, where appropriate, the Agency could address those through the PA. On September 28, October 1, October 7, October 8, October 15, October 30 and December 3, EPA had individual consultation meetings with the five tribes that chose to consult and again encouraged each tribe to identify concerns with the OA so that EPA could, where appropriate, address those concerns through language in the PA. EPA took under advisement all NHPA-related issues raised during these consultation meetings. As a result, the tribes have had an opportunity to provide EPA with comments on the OA and issues associated with EPA's undertaking since early September. EPA acknowledges that it shared the actual draft PA with consulting parties on November 25th and requested comments on the PA by noon December 7th, but EPA has considered all NHPA-related comments received that are pertinent to the PA since September in revising the PA.
- We strongly urge EPA and FDEP to schedule another consultation meeting with tribes in the next week to discuss and consider revisions and modifications to the PA and to the extent possible the OA, so that EPA can adequately respond to their concerns. EPA agreed to have a final consultation meeting with the consulting parties on December 14th and revised the PA to address many of the comments raised by the parties. Importantly, EPA's purpose for this final consultation meeting was to walk through how comments received were addressed in the PA.
- Should it be logistically challenging to do so within the time available, EPA and FDEP might consider extending the 120-day approval process to accommodate additional consultation to address tribal concerns. As we understand, such an extension could be granted upon the agreement of both EPA and FDEP. EPA does not believe an extension of the 120-day review period is necessary, and the Agency notes that CWA Section 404(h) indicates that a state's request to assume administration of the 404 program "shall" be deemed approved if EPA fails to take action within 120 days of application. 33 U.S.C. §§ 1344(h)(1) and (3). NHPA 106 consultation was provided to the consulting parties beginning in early September 2020 and EPA has provided consultation opportunities to all tribes who requested consultation. This has included nine meetings with the consulting tribes. EPA does recognize that the tribes would like to have continuing conversations about how the PA will be implemented, and to that end, EPA

has added a new stipulation that: "within 30 days of the execution of this PA, EPA will engage in and complete further discussions with the FL SHPO, FDEP, the ACHP, and the Consulting Tribes, to consider potential amendments to this PA regarding continuing tribal consultation engagement and EPA oversight of the State's administration of its 404 program. Any amendment adopted pursuant to this clause must comply with subsection VIII. a. of this PA."

Florida Department of Environmental Protection (FDEP)

- FDEP provided edits to the PA on December 4th. Edits included: (1) inclusion of FDEP as signatory and party responsible for reporting and monitoring requirement; (2) addition of certain clarifying "Whereas" clauses; (3) changing threshold for amendment/termination of OA; (4) changing threshold and effect of amendment to PA; and (5) addition of a "good cause" condition for the termination of the PA. The EPA has incorporated FDEP's edits into the programmatic agreement.

Florida State Historic Preservation Office (FL SHPO)

- No Tribal Consultation: The comments provided by the participating Tribes during the Dec. 2 meeting indicate that additional effort is necessary on the part of the EPA to address Tribal concerns and questions. The draft PA is not clear about when EPA will initiate further consultation with Tribes or what process that consultation will follow. Although the Florida Department of Environmental Protection (FDEP) will be responsible for carrying out the day-to-day implementation of Section 404 permit reviews, the EPA will retain oversight of Florida's Section 404 program and the PA should clearly define procedures related to EPA's Tribal consultation following the assumption process. Should EPA approve the State's Section 404 program, the State would not assume permitting authority over any waters located in Indian country, as defined at 18 U.S.C. 1151. In those areas, the federal government retains its normal government-to-government consultation with the tribes. For waters outside of Indian country that the State assumes, the PA and OA, along with other assumption documents set forth the process for tribes to raise issues related to their interests to both Florida and to EPA. For example, the FDEP/EPA MOA states that "[I]n the event a question arises whether activities proposed in a permit application or draft general permit are within Indian country, and thus should be processed by the Corps, information regarding the issue may be presented to FDEP during the comment period and may also be provided to EPA. Such information shall be considered by EPA in exercising its CWA authority to oversee FDEP's program and may, as appropriate, provide a basis for EPA to comment upon, object to, or make recommendations with respect to the permit application or draft general permit." In addition, language was added to the "EPA Review" section of the PA to clarify that EPA may consult with tribes, where appropriate, on permit applications that have the potential to impact historic properties or permit applications that are the subject of a dispute submitted pursuant to Section III.C. of the OA.
- Plain Language Review: To explain how the PA will be implemented and the procedures it will follow, the document heavily references various federal and state laws, regulations, and agreements related to the assumption process. Although this may be legally sufficient, these references cause the PA, and the alternative process it allows, to be difficult to understand. We recommend revising the PA language so that a clear understanding of the process is stated in this agreement. EPA provided further clarification and information on process and roles in the revised draft of the PA. EPA kept the citation references to assure legal sufficiency.

- Clarifying FDEP's Role: The PA should further clarify FDEP's role in the agreement and Section 404 assumption. As our office currently understands, the PA does not assign FDEP roles or responsibilities not already assigned to the agency under other laws, regulations, and agreements related to Section 404 assumption. The PA should clarify and explain what roles and responsibilities FDEP is acquiring relative to historic properties under other laws, regulations, and agreements. The EPA has revised the PA to clarify FDEP's role in reporting and monitoring. FDEP has an extensive role in the historic properties review process outlined in the OA which is adopted and incorporated into the PA.
- Human Remains Discoveries: While other laws, regulations, and agreements address how human remains will be treated under Section 404 assumption, we recommend including a stipulation addressing the applicability of NAGPRA and Section 872.05, Florida Statutes. This will reinforce EPA's commitment to ensuring that human remains are treated appropriately under the PA. The revised PA more fully addresses Native American Grave Protection and Repatriation Act (NAGPRA), including: (1) EPA's role, (2) the notification process, and (3) Tribal concurrence before work continues. The signatory parties to the PA have committed to following all applicable laws, including NAGPRA where applicable. The EPA believes that NAGPRA, the PA, and the OA sufficiently address any concerns and establishes a sufficient and appropriate process for the discovery of human remains.
- Section III: Clarify that the Operating Agreement (OA) between FDEP and our office may be amended or terminated in accordance with the provisions included in the OA. The EPA has amended Section III to clarify that amendments or termination of the OA shall be in accordance with Section VII and VIII of the OA.

Choctaw Nation of Oklahoma

- Desire for individual consultations on individual projects. Should EPA approve the State's Section 404 program, the State would not assume permitting authority over any waters located in Indian country, as defined at 18 U.S.C. 1151. In those areas, the federal government retains its normal government-to-government consultation with the tribes. For waters outside of Indian country that the State assumes, the PA and OA, along with other assumption documents set forth the process for tribes to raise issues related to their interests to both Florida and to EPA. Language was added to the "EPA Review" section of the PA to make it clear that EPA may consult with tribes, where appropriate, on permit applications that have the potential to impact historic properties or permit applications that are the subject of a dispute submitted pursuant to Section III.C. of the OA. Both the PA and the OA also provide a dispute resolution process to resolve disputes should they arise.
- The Tribe wants to ensure they will have the opportunity to review individual projects for concerns. FDEP, through the terms of the OA, committed to direct engagement with the SHPO and interested tribes early in the application review process, including opportunities to inform FDEP's requests for additional information, provide effects determinations, and make recommendations for the resolution of adverse effects. The Tribe intends to offer additional comments for consideration in development of the programmatic agreement including: 1) post review discovery, 2) discovery of human remains, and 3) language regarding non-disclosure agreements and photography prohibitions. The Tribe's additional comments are summarized below. Please see EPA's response to those comments.

- For the actual procedures of NHPA compliance, this PA draws mostly on an Operating Agreement (OA) made between the Florida Department of Environmental Protection and the Florida SHPO. Our understanding is that this agreement was finalized without considering the comments that have been submitted by federally recognized Tribes. It is EPA's understanding that the OA incorporated comments received by the FDEP from the Miccosukee Tribe of Indians of Florida and the Seminole Tribe of Florida. The PA also incorporated comments received from all consulting tribes and provides additional opportunities for consulting tribe involvement.
- In using this already finalized document as the core of NHPA compliance for this PA, the EPA is foreclosing on Tribes' ability to consult in a meaningful way. We request that the OA document be reopened. During its NHPA Section 106 consultation, EPA asked tribes to identify any gaps, concerns, or issues related to the OA, has taken comments provided by the tribes into consideration in drafting the PA, and has made modifications to the PA, where appropriate. As such, EPA believes that the PA and OA, when considered together, address tribal interests.
- According to I.A.2.b.i. of the OA, the Florida Department of Environmental Protection, "shall consult with any tribes that attaches religious and cultural significance to historic properties that me be affected by an application." This conflicts with 36 CFR § 800.(2)(4), which indicates that federal agencies remain responsible for consultation with Tribes even when other NHPA Section 106 duties have been delegated. Executive Order 13175 and the ACHP's statement on "Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act" both affirm this responsibility on the part of federal agencies. A federal agency may delegate its government-to-government consultation responsibility towards a Tribe under the NHPA only with that Tribe's written consent. As this is has not occurred, the EPA still has the responsibility of conducting government-to-government consultation with Tribes on these permits. This needs to be reflected in the OA and PA. EPA appreciates and values the Agency's government-to-government relationship with federally recognized tribes and has not delegated that relationship or consultation with such tribes. EPA's decision on Florida's request to assume the CWA Section 404 program is the relevant undertaking for purposes of NHPA 106 and associated consultation. EPA has consulted with interested tribes pursuant to NHPA 106 on this undertaking and has also consulted with tribes on the CWA 404 program decision consistent with EPA's tribal consultation policy. Should EPA approve the State's Section 404 program, the State would not assume permitting authority over any waters located in Indian country, as defined at 18 U.S.C. 1151, nor would the State assume EPA's consultation obligations. In those areas, the federal government retains its normal government-to-government consultation with the tribes. If Florida assumes the CWA Section 404 program, issuance of permits by the State would not be federal actions calling for government-to-government consultation. That said, EPA may consult with tribes, where appropriate, on permit applications that have the potential to impact historic properties or permit applications that are the subject of a dispute submitted pursuant to Section III.C. of the OA. See Section V(b) of the PA.
- Section I.B.3. of the OA commits Tribes to specific compliance roles. The PA relies upon the OA for the process of NHPA compliance. This can be remedied by reopening the OA and offering Tribes signatory status on the PA. The provision of the OA cited offers the tribes an opportunity to provide information but does not require their participation. The NHPA regulations at 36 CFR § 800.6(c)(2) provide that an entity should be an invited signatory (although is not a required signatory) when that entity assumes a responsibility under the agreement. The tribes do not assume responsibilities under either agreement.

- Section 1.B.4.d. indicates that the applicant will be responsible for coordinating historic properties review for general permit (no notice) applications. This role needs to be clearly defined. EPA believes the applicant's role in coordinating historic properties review for no-notice general permits is sufficiently defined in the section of the OA cited and in FDEP's regulations at 62-331.200(3)(j), F.A.C.
- Regarding Section II.C.4.b. Human remains found in the navigable waterways of the United States are subject to NAGPRA. Choctaw Nation's perspective is that neither the OA nor the PA can remove NAGPRA's jurisdiction from these Native American remains. The OA needs to provide details about how the proposed notification and consultation process will work with EPA's responsibilities under NAGPRA. The revised PA directly addresses NAGPRA, including: (1) EPA's role, (2) the notification process, and (3) Tribal concurrence before work continues. Neither the OA nor the PA alter NAGPRA's jurisdiction over human remains found in "waters of the United States."
- The Choctaw Nation of Oklahoma will not support the PA until the issue of the EPA attempting to delegate its responsibility to conduct government-to-government consultation with federally recognized Tribes under NHPA and NAGPRA has been resolved. EPA's responsibility to conduct government-to-government consultation with federally recognized tribes is not being delegated. Should EPA approve the State's Section 404 program, the State would not assume permitting authority over any waters located in Indian country, as defined at 18 U.S.C. 1151. In those areas, the federal government retains its normal government-to-government consultation with the tribes. Issuance of State 404 permits is not a federal action triggering government-to-government consultation. Nonetheless, EPA may consult with tribes, where appropriate, on permit applications that have the potential to impact historic properties or permit applications that are the subject of a dispute submitted pursuant to Section III.C. of the OA. Furthermore, EPA agrees to comply with all applicable provisions of NAGPRA.
- Assuming that this can be resolved, the Choctaw Nation requests adding to the PA's stipulation 5 wording to the effect that the annual report of activities conducted under this agreement will be sent to all federally recognized Tribes that have expressed an historic interest in Florida, regardless of whether they are signatories to the PA. The PA stipulation now provides that copies of the annual report will be sent to all Consulting Tribes.
- Choctaw Nation requests adding a clause that will automatically terminate this PA after 5 years, unless the signatories agree to continue the agreement for another five years. EPA's approval of a State 404 permit program is final and does not automatically terminate at 5-year or other intervals. EPA can only revoke program approval under the provision of 33 U.S.C. § 1344(i). An automatic termination provision for the PA is therefore inappropriate. Instead, the PA provides that a meeting will be called to discuss issues identified in the annual report related to the PA and the OA, if any of the signatories or the Consulting Tribes request one. Furthermore, the PA provides appropriate termination provisions as negotiated by the parties. Pursuant to the PA: "Any signatory party to this PA may terminate this PA for good cause by providing 90 days' notice to the other signatory parties, provided that the signatory parties will meet during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. If this PA is terminated, the EPA will either execute another programmatic agreement or seek, consider, and respond to the ACHP comments, which the ACHP shall transmit to the EPA within 45 days of request. The termination of this PA does not modify or alter the legal status of the assumed state program."
- Finally, the EPA has indicated that Tribes were selected for consultation on this PA via the information on HUD's website. The HUD website was not created in full consultation with

Tribes and does not necessarily have accurate information on Tribal areas of interest. The Jena Band of Choctaw Indians and the Seminole Nation of Oklahoma should be afforded the opportunity to consult on this agreement as well. NHPA regulations require EPA to make a reasonable and good faith effort to identify tribes that shall be consulted in the NHPA Section 106 process. See 36 CFR 800.2(c)(2)(ii)(A). EPA believes it met this obligation. EPA coordinated with the ACHP and based on their recommendation used the HUD website. From that website, EPA identified and invited the following eight federally recognized tribes to consult: the Alabama-Coushatta Tribe of Texas; the Choctaw Nation of Oklahoma; the Coushatta Tribe of Louisiana; the Miccosukee Tribe of Indians of Florida; the Mississippi Band of Choctaw Indians; the Muscogee (Creek) Nation; the Poarch Band of Creek Indians; and the Seminole Tribe of Indians of Florida. This list of federally recognized tribes for which EPA intended to carry out consultation was provided to the ACHP and ACHP did not indicate that EPA needed to modify or add to this list.

Miccosukee Tribe of Indians of Florida

- The Tribe has cultural resources and an interest in a variety of lands. The Tribe believes permits on those lands should trigger government-to-government consultation and an opportunity for tribes to be involved in the project. Issuance of State 404 permits is not a federal action triggering government-to-government consultation. Nonetheless, EPA may consult with tribes, where appropriate, on permit applications that have the potential to impact historic properties or permit applications that are the subject of a dispute submitted pursuant to Section III.C. of the OA.
- The Tribe takes the position that all of Florida is still Indian country. The Tribe has cultural sites that would be in assumed waters and permits affecting those sites would not trigger consultation. The Tribe would like to get notice and have a chance to comment on all permits that could affect cultural resources. For example, reservoir releases in state-assumed waters may impact Tribal waters. In addition, the Tribe considers wetlands to be cultural resources, and these resources are extensively located throughout Florida. Should EPA approve the State's Section 404 program, the State would not assume permitting authority over any waters located in Indian country, as defined at 18 U.S.C. 1151. In addition, FDEP, through the terms of the OA, committed to direct engagement with the SHPO and interested tribes early in the application review process, including opportunities to inform FDEP's requests for additional information, provide effects determinations, and make recommendations for the resolution of adverse effects. FDEP has committed to providing notice on all permit applications where the tribes have expressed an interest in being notified. Pursuant to F.A.C. 62-331.060(2)(a)(8), FDEP will provide the Tribe with notice of "any activity that is within two miles of the Miccosukee Federal Reservation; Miccosukee Reserve Area; Krome Avenue, Dade Corners, Cherry Ranch, or Sherrod Ranch Reservations; and Coral Way, Lambick, or Sema Trust Properties. Also, for any activity within the Miccosukee Tribe's reserved rights areas, including but not limited to: within Big Cypress National Preserve; within Big Cypress National Preserve addition lands; within Everglades National Park; within Rotenberger Wildlife Management Area; or within Water Conservation Area 3-A."
- In the Operating Agreement between the Florida Department of Environmental Protection (FDEP) and the State Historic Preservation Officer (SHPO), the timeframe for coordination with tribes is very narrow and too small of a window. FDEP, through the terms of the OA, committed to direct engagement with the SHPO and interested tribes early in the application review process, including opportunities to inform FDEP's requests for additional information.

- The Tribe currently gets notice from the Corps on all of the proposed 404 projects and does not see the same triggers in what the State is presenting for their program or in the NHPA Section 106 process. The Tribe would also like government-to-government consultation for all projects that affect Tribal resources. In accordance with the process described in Section II.A. of the OA, the FDEP will email THPO/tribes notification within five days of receipt of an application for a State 404 Program Permit and provide the THPO/tribes an opportunity to review the application for potential effects to cultural resources or historic properties of religious or cultural significance, seek additional information from the applicant, provide an effects determination, and provide initial recommendations for resolution of any adverse effects within an initial review period (i.e., before FDEP provides public notice of administratively complete State 404 Program individual permit applications). The PA and the OA also both establish a dispute resolution process related to the protection of historic and cultural resources to resolve disputes should they arise. As explained above, FDEP will send the Miccosukee Tribe of Indians of Florida notice of administratively complete permit applications for activities within areas of interest to the Tribe. See 62-331.060(2)(a)(8), F.A.C. Issuance of State 404 permits is not a federal action triggering government-to-government consultation. Nonetheless, EPA may consult with tribes, where appropriate, on permit applications that have the potential to impact historic properties or permit applications that are the subject of a dispute submitted pursuant to Section III.C. of the OA.
- The Tribe believes that certain lands, including the Everglades National Park and Big Cypress National Preserve, are Indian country as described in the enabling legislation for those lands. EPA understands the Tribe's interest in ensuring that the State will not assume permitting authority over waters in Indian country. Should EPA approve the State's Section 404 program, the State would not assume permitting authority over any waters located in Indian country, as defined at 18 U.S.C. 1151. EPA's decision on Florida's request to assume the Section 404 program does not redefine or change what is Indian country nor does it alter the legal status of any land. EPA believes that case-specific questions regarding permitting authority will be addressed during implementation of the State's 404 program, should it be approved.
- The Tribe's federally-codified Settlement Agreement with the State of Florida indicates that certain lands which the State has perpetually leased to the Tribe shall be treated as if they are reservation lands for certain purposes. The Tribe's position is that these leased lands are therefore Indian country. The Tribe explained that the State took the Tribe's land to build a portion of I-75, and the Tribe had a particular understanding of being provided reservation land at the time of the Settlement Agreement. The Tribe further explained that this issue has not been litigated because the State has agreed with the Tribe's interpretation. Section II.B of the Corps/FDEP MOA, submitted as part of Florida's package, states that retained waters include Indian country, as defined at 18 U.S.C. 1151. Section I.B.2 of the EPA/FDEP MOA likewise notes that FDEP will not administer or enforce authority over Indian country and states that "[i]n the event that a question arises whether activities proposed in a permit application or draft general permit are within Indian country, and thus should be processed by the Corps, information regarding the issue may be presented to FDEP during the comment period and may also be provided to EPA. Such information shall be considered by EPA in exercising its CWA authority to oversee FDEP's program and may, as appropriate, provide a basis for EPA to comment upon, object to, or make recommendations with respect to the permit application or draft general permit." Section 4.1 of the State 404 Program Applicant's Handbook, incorporated by reference into F.A.C. 62-331.010(5), also makes clear that the Corps retains jurisdiction for projects within Indian country. EPA's decision with respect to Florida's request to assume the Section 404 Program does not make a determination whether or not any specific lands, including the leased

lands, meet the definition of Indian country, as set forth at 18 U.S.C. 1151 nor does it affect the legal status of those or any other lands.

- The Tribe has not seen a copy of the final Operating Agreement between FDEP and the SHPO and has also not yet seen the draft Programmatic Agreement. The Tribe received the link to FDEP's assumption package which included the final OA on September 2, 2020 and received a draft PA on November 25, 2020.
- The Tribe does not want to be lumped with other Tribes on the Programmatic Agreement because Miccosukee Tribe has its own unique concerns. The EPA acknowledges the Tribe's decision; however, the EPA still attempted to address as many of the Tribe's comments and concerns as feasible in the provisions of the PA.
- The Tribe is concerned that the State legislature has passed a law that requires construction of a reservoir which has cultural burial grounds right in the middle of it. The Tribe is concerned that the State is bound by law and will not take appropriate measures to protect these cultural burial grounds. The Tribe does not support relocation, inundation or any effects on human remains. EPA acknowledges the Tribes comments and notes that if human remains are identified prior to, during, or after permitting, FDEP shall follow the provisions of II.C.4 of the OA. The OA establishes how historic and cultural resources will be protected through a tribal consultation process and a dispute resolution process to resolve disputes should they arise. FDEP shall notify the EPA of the discovery on the same day that it notifies the SHPO, and the Tribal Historic Preservation Officer (THPO)/tribes of the discovery. The PA signatory parties will comply with any applicable provisions of ARPA and NAGPRA. Activity authorized under the permit shall not resume without written authorization from FDEP, SHPO, the EPA, and THPO/tribes.
- The Tribe's understanding is that FDEP is not going to seek any more resources to run the 404 program, and they do not believe that FDEP can adequately manage the programs they have now. EPA finds that FDEP has committed sufficient resources and staffing to address anticipated workload. CWA Section 404(h) requires that the Administrator determine whether a state has the authority to "issue permits" that assure compliance with applicable requirements of the CWA, to ensure public participation in the permitting process, to abate permit violations, and to coordinate with other states, EPA, or other federal agencies as appropriate. EPA's implementing regulations, in turn, require the State's program description to include "[a] description of the funding and manpower which will be available for program administration," along with an estimate of the anticipated workload, e.g., number of discharges. 40 CFR 233.11(d). EPA has determined that Florida's program description, Section (d), meets this requirement by providing a description of the funding and manpower that FDEP will dedicate to the program. Importantly, neither the CWA nor the implementing regulations establish a particular threshold of staff or resources that states must commit to the Section 404 program. EPA has found FDEP's commitment of resources and staffing sufficient to address anticipated workload associated with a Section 404 program. The resources of other state programs are not among the criteria that EPA applies in reviewing state or tribal program requests. 33 U.S.C. 1344; 40 C.F.R. Part 233. Additionally, EPA retains its oversight responsibilities under the CWA with respect to Section 404 programs assumed by a state.
- The Tribe is concerned that FDEP will allow for Water Management Districts to take over a portion of the 404 permitting program permitting requirement and did not see anything in FDEP's proposed program that would prohibit that. Florida's 404 assumption package identifies FDEP as the sole permitting authority. Changes to any approved program would require approval pursuant to 40 C.F.R. Section 233.16(d).
- The Miccosukee Tribe affirmatively declines to join as a party to the drafted Programmatic Agreement (PA), and strongly objects to the process of grouping Native American Tribes as a

way to fast track the process. The EPA acknowledges the Miccosukee Tribes decision to not participate in the PA. Nevertheless, the EPA attempted to address the Miccosukee's comments and concerns as feasible in the provisions of the PA.

- The EPA and other Federal Agencies have a trust responsibility through a myriad of Federal regulations including Section 106 consultation and NAGPRA. Florida Department of Environmental Protection is legally limited in assuming these responsibilities, and the PA does not adequately describe a parallel process. The EPA is cognizant of its role as a federal agency under Section 106 of the NHPA and NAGPRA. EPA's decision on Florida's request to assume the CWA 404 program is the relevant undertaking for purposes of NHPA 106. EPA coordinated with the ACHP and based on their recommendation to use the HUD website to determine which tribes EPA should consult with. From that website, EPA identified and invited the following eight federally recognized tribes to consult: the Alabama-Coushatta Tribe of Texas; the Choctaw Nation of Oklahoma; the Coushatta Tribe of Louisiana; the Miccosukee Tribe of Indians of Florida; the Mississippi Band of Choctaw Indians; the Muscogee (Creek) Nation; the Poarch Band of Creek Indians; and the Seminole Tribe of Indians of Florida. This list of federally recognized tribes for which EPA intended to carry out consultation was provided to the ACHP and ACHP did not indicate that EPA needed to modify or add to this list. EPA has consulted with the five of these tribes that accepted the invitation to consult pursuant to NHPA 106 and has also consulted with three of the five on the CWA 404 program decision consistent with EPA's tribal consultation policy. EPA is not delegating its NHPA consultation to the State. If Florida assumes the 404 program, issuance of permits by the State would not be a federal action triggering government-to-government consultation. That said, EPA may consult with tribes, where appropriate, on permit applications that have the potential to impact historic properties or permit applications that are the subject of a dispute submitted pursuant to Section III.C. of the OA. See Section V(b) of the PA. The PA also contains a NAGPRA provision that more clearly enumerates EPA's role and specifies that work will not proceed without written permission from the tribes.
- The trust responsibility cannot be delegated to the State without the Miccosukee Tribe's approval and the Miccosukee Tribe does not give approval for the EPA to neglect these responsibilities. The process of assumption as described in the PA drastically removes existing legal protections for sacred and culturally significant sites. As stated above, EPA is not delegating its NHPA 106 consultation or any NAGPRA responsibilities to the State.
- The 120-Day review by EPA should be extended until such protections can be afforded through the development of appropriate procedures. As explained above, EPA does not believe an extension of the 120-day review period is necessary or appropriate and that the OA and PA, along with provisions of Florida's program, provide protections for Tribal interests. EPA does recognize that the tribes would like to have continuing conversations about how the PA will be implemented, and to that end, EPA has added a new stipulation that: "within 30 days of the execution of this PA, EPA will engage in and complete further discussions with the FL SHPO, FDEP, the ACHP, and the Consulting Tribes, to consider potential amendments to this PA regarding continuing tribal consultation engagement and EPA oversight of the State's administration of its 404 program. Any amendment adopted pursuant to this clause must comply with subsection VIII. a. of this PA."
- The Tribe has traditional, aboriginal, and statutory rights to use and occupy the greater Everglades, Big Cypress National Preserve, Everglades National Park and Water Conservation 3A, in additional to its existing reservation properties. Among these are the right of occupation,

subsistence and traditional and cultural uses. The Tribe has significant culturally sensitive sites within these areas which are protected under the Native American Graves Protection and Repatriation Act (NAGPRA). The protection of these enumerated rights and the lands of the Tribe are ensured by the trust responsibility of the Federal Government to all tribal nations. The Environmental Protection Agency (EPA), and the Army Corps of Engineers (USA COE), as federal partners to the Miccosukee Tribe, must assure that the State of Florida's assumption of 404 permitting does not adversely impact or abrogate those rights. Should EPA approve the State's Section 404 program, the State would not assume permitting authority over any waters located in Indian country, as defined at 18 U.S.C. 1151. EPA's decision on Florida's request to assume the Section 404 program does not redefine or change what is Indian country nor does it alter the legal status of any land. In addition, Section II.B of the Corps/FDEP MOA, submitted as part of Florida's package, states that retained waters include Indian Country, as defined at 18 U.S.C. 1151. Section I.B.2 of the EPA/FDEP MOA likewise notes that FDEP will not administer or enforce authority over Indian Country and states that "[i]n the event that a question arises whether activities proposed in a permit application or draft general permit are within Indian country, and thus should be processed by the Corps, information regarding the issue may be presented to FDEP during the comment period and may also be provided to EPA. Such information shall be considered by EPA in exercising its CWA authority to oversee FDEP's program and may, as appropriate, provide a basis for EPA to comment upon, object to, or make recommendations with respect to the permit application or draft general permit." Section 6.1 of the State Program Applicant's Handbook, incorporated by reference into F.A.C. 62-331.010(5), also makes clear that the Corps retains jurisdiction for projects within Indian country. EPA's decision with respect to Florida's request to assume the Section 404 Program does not change the definition of Indian country as set forth at 18 U.S.C. 1151.

- The Miccosukee are concerned with the ability of the Florida Department of Environmental Protection (FDEP), to implement the proposed 404 program due to a lack of resources. FDEP has undergone dramatic cuts to staffing, reductions in expertise and inadequate enforcement of existing environmental mandates, particularly in recent years. Because of the adverse effect COVID-19 has had on local, state and federal governments, large shortfalls in budget expectations for the State may further impact DEP and their 404 program. EPA must carefully consider not only the adequacy of Florida's authority to administer the CWA § 404 program, 40 C.F.R. § 233.l(a), but also the funding and resources available for program administration and estimated workload to determine its ability to administer the program, 40 C.F.R. § 233.11. FDEP's claims that it can simply fold a 404 program into its existing ERP program and rely on staff and resources allocated by the legislature as necessary to operate only the ERP program, must be rejected. EPA acknowledges the concerns about the availability of staff, resources, and expertise to appropriately administer the State's Section 404 permitting program, including specific concerns about previous FDEP staff cuts and department vacancies. CWA Section 404(h) requires that the Administrator determine whether a state has the authority to "issue permits" that assure compliance with applicable requirements of the CWA, to ensure public participation in the permitting process, to abate permit violations, and to coordinate with other states, EPA, or other federal agencies as appropriate. EPA's implementing regulations, in turn, require the State's program description to include "[a] description of the funding and manpower which will be available for program administration," along with an estimate of the anticipated workload, e.g., number of discharges. 40 C.F.R. § 233.11(d). EPA has determined that Florida's program description, Section (d), meets this requirement by providing a description of the funding and manpower that FDEP will dedicate to the program. Importantly, neither the CWA nor the implementing regulations establish a particular threshold of staff or resources that states must

commit to the Section 404 program. EPA has found FDEP's commitment of resources and staffing sufficient to address anticipated workload associated with a Section 404 program. Florida estimated the anticipated workload by considering Corps permitting data for the previous five years and overlap with ERP permitting, in part using a Corps GIS analysis to compare retained versus assumed waters. Based on this analysis, FDEP found an 85% overlap between ERP and Section 404 program review requirements (Program Description, section e, at 9). Additionally, FDEP would only assume a portion of the Corps permitting load because the Corps retains jurisdiction over Section 10 Rivers and Harbors Act waters and permitting in Indian country, and because the State already reviews permits per the State Programmatic General Permit issued by the Corps. The State then estimated processing time for permits based on their type (e.g., general permits vs. individual permits; small, medium, or large projects; permitting or compliance activities), accounted for quality control auditing, determined staff hours required for such activities, and calculated staffing needs. EPA acknowledges that the State currently operates a wetlands regulatory program as part of the ERP, which includes functional roles and staff with technical areas of expertise overlapping those of a CWA Section 404 program. "The ERP program is staffed with permit processors, compliance processors, and support professionals that are experts in or familiar with the subject matter required for effective review of applications under Section 404 of the Clean Water Act." (Program Description, section d, at 2). Florida has described redirecting the current staff of 211 working in the State's ERP program to cover both ERP and the State 404 program, with an additional 18 positions reallocated for the State 404 program for a total of 229 positions (Program Description, section d, at 3). Annual salary and benefits would come to approximately $15,182,822, funded through various trust funds listed in the program description (Program Description, section d, at 2). Florida has provided a detailed breakdown of the ample permitting and compliance staff and managers that will be working in each of its districts. In total, the Districts will have 8 compliance managers and 7 compliance/permitting managers; and 33 compliance staff and 32 permitting/compliance staff (Program Description, section d, at 6-9). Based on the information provided by FDEP, EPA finds that FDEP has provided the information necessary to demonstrate that the agency has committed sufficient resources and staffing to address anticipated workload.

- Federal action triggers a myriad of other federal protections, including the Endangered Species Act (ESA) that protect the rarest and most at-risk wildlife in our state, the Magnuson-Stevens Act that protects Essential Fish Habitat and our world-class fisheries, the National Environmental Policy Act (NEPA) that protects our quality of life and helps ensure good decision making, and the National Historic Preservation Act (NHPA) that protects our history and cultural resources. The State of Florida has no substitute for these federal laws. In the past, public participation through NEPA and the Corps' permitting authority have informed, modified and/or halted projects that were authorized by FDEP but would have been detrimental to Florida. Moreover, Florida has severely limited access to the courts and the ability of the Miccosukee to challenge unlawful permits in an independent forum. This creates an additional lack of oversight and accountability that would further undermine public confidence in a State 404 program and the ability of those affected to hold FDEP accountable when the State falls short. It is imperative that EPA deny this application unless and until the State adopts the same protections as NEPA, ESA and NHPA, and judicial mechanisms that ensure accountability. Florida's 404 program provides for significant state and federal interaction and review. As stated in Section (b) of Florida's Program Description: "Interagency coordination with the State Historical Preservation Office (SHPO) and Tribal Historical Preservation Office (THPO), Florida Fish and Wildlife Conservation Commission (FWC), U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), Water Management Districts (WMDs), and Environmental Protection Agency

(EPA) will be conducted, as required, following the procedures described in their respective operating agreements (See sections D (DEP/EPA MOA) and E (DEP/USACE MOA) of the package and section (j) (DEP/FWC/FWS MOU and DEP/SHPO OA) of the program description) and section 5.2 of the 404 Handbook. A commenting agency may submit questions or comments for the Department to include in the [Request for Additional Information (RAI)]. A commenting agency may also provide comments to EPA and request EPA object to a proposed activity. The Department will forward the applicant's response to the RAI to each commenting agency for review, if applicable. Additional conditions may be included in the final authorization based upon the recommendation of a commenting agency to avoid or minimize potential adverse effects due to the project." EPA acknowledges that NEPA does not apply to permits issued under Florida's 404 program and thus a NEPA-related challenge in federal court is unavailable. EPA's regulations do not require particular procedures for judicial review of state-issued permits, and nothing in Florida's judicial review procedures is inconsistent with federal requirements. Challenges to actions of a state in issuing or denying a permit pursuant to a state-assumed Section 404 program are typically heard in state court, and EPA recognizes that different states have different procedures for judicial review, and that those procedures may also differ from federal procedures. As the Seventh Circuit Court of Appeals explained in addressing EPA's and the Corps' failure to exercise jurisdiction over a Section 404 permit application where Michigan had assumed the Section 404 program, "[i]t is not the unique province of the federal courts to adjudicate administrative law challenges related to the Clean Water Act." Menominee Indian Tribe of Wisconsin v. EPA, 947 F.3d 1065, 1071 (7th Cir. 2020).

- Florida proposed an unprecedented approach that places our listed species in grave danger. Instead of evaluating impacts and potential jeopardy to listed species at the project-specific permit level, FDEP proposed that the U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) engage in a one-time programmatic consultation that would only identify procedural requirements for state permit processors to use to determine whether there will be jeopardy to listed species. While we agree that EPA must perform a S. 7 consultation on its decision to approve or disapprove a state's or tribe's assumption of the program, the Miccosukee are concerned that a programmatic consultation, especially as proposed by FDEP, will not be adequate to protect listed species in the State. Under a programmatic consultation, EPA must review Florida's proposed criteria and process for ensuring state issued permits will not cause jeopardy to listed species. More importantly, EPA may only approve Florida's program if it determines the program fulfills this requirement while taking into account comments from the Services and the Corps. (40 C.F.R. § 233.15(g)). The Miccosukee request that EPA require programmatic and permit-specific government-to-government consultation to ensure protection of species and deny Florida's application until these conditions are met. ESA implementing regulations set forth at 50 C.F.R. § 402.02 describe a programmatic consultation as "a consultation that is addressing an agency's multiple actions on a program, region, or other basis. Programmatic consultations allow the Services to consult on the effects of programmatic actions such as . . . [a] proposed program, plan, policy, or regulation providing a framework for future proposed actions." In its Biological Opinion, USFWS noted that "the scope of EPA's approval of FDEP's request to administer the CWA 404 program in assumable waters is essentially statewide, covering an array of operations that may affect a wide variety of ESA-proposed and –listed species and proposed and designated critical habitat" and that "[b]ecause this is a consultation on a programmatic action, it is not feasible, nor is it required, to conduct a meaningful site-specific and species-specific effects analysis in this BiOp." U.S. Fish and Wildlife Service, Programmatic Biological Opinion for U.S. Environmental Protection Agency's Approval of FDEP's Assumption of the Administration of the Dredge and Fill Permitting Program Under

Section 404 of the Clean Water Act (November 17, 2020) at 54 ("Biological Opinion"). The State 404 program rule at 62-331, F.A.C. prohibits issuance of a permit that is likely to jeopardize the continued existence of endangered or threatened species or result in the likely destruction or adverse modification of habitat designated as critical for these species. In addition, as stated above, the CWA Section 404(b)(1) Guidelines prohibit the discharge of dredged or fill material if it jeopardizes the continued existence of listed species or results in the likelihood of the destruction or adverse modification of designated critical habitat. The program submission describes how the State will comply with the Section 404(b)(1) Guidelines. The Program Description states that the MOU between FWC, USFWS, and FDEP outlines coordination procedures for listed species reviews. Program Description, Section (j) – Additional Information at 2. The draft MOU between FWC, USFWS, and FDEP was included in the appendix of the Program Description. FDEP will monitor adverse effect determinations on listed species and critical habitat by incorporating information into its permit tracking database, similar to the information collected by the Corps. This data collection will assist in facilitating compliance with permit conditions and can also be shared with USFWS. Failure to include the protection measures as permit conditions that are designed to avoid jeopardy or adverse modification of designated critical habitat could ultimately result in the State either denying the permit or the State informing the EPA that it will neither issue nor deny the permit, which would result in the EPA transferring the permit to the Corps for processing in accordance with 40 C.F.R. § 233.50(j). The USFWS' Biological Opinion finds that this process is not likely to jeopardize listed species or result in the destruction or adverse modification of designated critical habitat.

Muscogee (Creek) Nation

- There should be consultation with Tribes on the undertakings that would otherwise be taking place with the Corps. EPA appreciates and values the Agency's government-to-government relationship with federally recognized tribes and has not delegated that relationship or consultation with such tribes. EPA's decision on Florida's request to assume the CWA Section 404 program is the relevant undertaking for purposes of NHPA 106 and associated consultation. EPA has consulted with interested tribes pursuant to NHPA 106 on this undertaking and has also consulted with tribes on the CWA 404 program decision consistent with EPA's tribal consultation policy. Should EPA approve the State's Section 404 program, the State would not assume permitting authority over any waters located in Indian country, as defined at 18 U.S.C. 1151. EPA's decision on Florida's request to assume the Section 404 program does not redefine or change what is Indian country nor does it alter the legal status of any land. While issuance of state 404 permits is not a federal action triggering government-to-government consultation, EPA may consult with tribes, where appropriate, on permit applications that have the potential to impact historic properties or permit applications that are the subject of a dispute submitted pursuant to Section III.C. of the OA.
- The Tribe noted that previously established Programmatic Agreements under section 106 of the NHPA often take a long time (e.g., up to a year). The Tribe does not believe a Programmatic Agreement can be completed within 2 months, as the process requires a lot of consultation and coordination. EPA has met with interested tribes and believes that the PA appropriately reflects their input, and therefore that additional time is not needed. In addition, EPA is required by the CWA to act on Florida's assumption request within 120 days. 33 U.S.C. §§ 1344 (h)(1) and (3). EPA does recognize that the tribes would like to have continuing conversations about how the PA will be implemented, and to that end, EPA has added a new stipulation that: "within 30 days of the execution of this PA, EPA will engage in and complete further discussions with the FL

SHPO, FDEP, the ACHP, and the Consulting Tribes, to consider potential amendments to this PA regarding continuing tribal consultation engagement and EPA oversight of the State's administration of its 404 program. Any amendment adopted pursuant to this clause must comply with subsection VIII. a. of this PA."

- The Tribe requested a draft of the Programmatic Agreement as soon as possible. The EPA provided the draft PA to the tribes on November 25, 2020. EPA sent letters inviting the consulting parties to participate in NHPA 106 consultation on EPA's undertaking on September 2, 2020. The Agency has hosted multiple meetings with the tribes, both individually and as a group. Initially EPA invited the eight tribes with interests in Florida to participate on a September 22nd informational webinar. EPA explained during that meeting that the Agency planned to enter into a programmatic agreement that relied on the OA as a foundational document and provided information about where in the docket the OA could be found, as well as provided email copies of the OA when requested. During the informational webinar we encouraged tribes to identify to EPA any issues, concerns or gaps in the OA so that, where appropriate, the Agency could address those through the PA. On September 28, October 1, October 7, October 8, October 15, October 30 and December 3, we had individual consultation meetings with the five tribes that chose to consult and again encouraged each tribe to identify concerns with the OA so that EPA could, where appropriate, address those concerns through language in the PA. EPA took under advisement all NHPA-related issues raised during these consultation meetings. As a result, the tribes have had an opportunity to provide EPA with comments on the OA and issues associated with EPA's undertaking since early September. EPA acknowledges that it shared the actual draft PA with consulting parties on November 25th and requested comments on the PA by noon December 7th, but EPA has considered all NHPA-related comments received that are pertinent to the PA since September in revising the PA.
- The Tribe requested a meeting with the Advisory Council on Historic Preservation and all interested Tribes to discuss and review the Programmatic Agreement. The EPA met with the ACHP, Florida SHPO, FDEP, and interested tribes on December 2, 2020. The EPA scheduled a follow-up meeting with these same parties on December 14, 2020.
- The Tribe expressed that they are a sovereign nation, not the public, and therefore should not be bound to a 30-day review period for projects that may impact culturally sensitive areas. FDEP, through the terms of the OA, committed to direct engagement with the SHPO and interested tribes early in the application review process, including opportunities to inform FDEP's requests for additional information, provide effects determinations, and make recommendations for the resolution of adverse effects. In addition to this initial review period, FDEP has committed to providing notice on all permit applications where the tribes have expressed an interest in being notified. EPA may consult with tribes, where appropriate, on permit applications that have the potential to impact historic properties or permit applications that are the subject of a dispute submitted pursuant to Section III.C. of the OA.
- The Tribe believes that the undertaking is an adverse effect. EPA acknowledges the Tribe's comment. The PA establishes procedures to appropriately address any effects of the undertaking and evidences EPA's compliance with Section 106 of the NHPA.
- The Tribe expressed that they are culturally connected with the Seminole Tribe and speak the same language. The EPA acknowledges the Tribe's comment.
- The Tribe expressed that they did not understand why EPA in this instance is viewing the EPA's review of the State of Florida's request as an undertaking that requires consultation under section 106 of the NHPA, while in other instances the EPA did not conduct section 106 consultation (e.g., the Tribe expressed that the EPA did not conduct 106 consultation in our

delegation of programs to Oklahoma). On August 27, 2020, EPA Assistant Administrator for Water, Mr. David Ross, signed a memorandum that changed the Agency's position regarding whether or not approval of state and tribal requests to assume a CWA Section 404 program is a discretionary action. This determination was made after the solicitation and consideration of input received through the Federal Register (EPA-HQ-OW-2020-0008-0001. FR Vol 85, No. 99; May 21, 2020) and letters to Tribes (see attachment May 18, 2020). In the memorandum EPA determined that going forward, the Agency should consult with the Services under section 7 of the Endangered Species Act if a decision to approve a state or tribal CWA Section 404 program may affect ESA-listed species or designated critical habitat (see "Memorandum: Endangered Species Act Section 7(a)(2) Consultation for State and Tribal Clean Water Act Section 404 Program Approvals"). The memo further states: "EPA's determination that CWA Section 404 provides the requisite discretionary involvement or control for the ESA to apply to EPA's approval of a state or tribal CWA Section 404 program does not modify or alter the application of the ESA to other EPA actions not analyzed here, such as actions under the CWA (other than state assumption of CWA Section 404 programs), Safe Drinking Water Act, the Resource Conservation and Recovery Act, or other statutes implemented by EPA." The same rationale and limitations of applicability regarding EPA's potential obligation to consult under the ESA on CWA Section 404 program approvals applies to EPA's undertakings pursuant to section 106 of the National Historic Preservation Act. This discretionary authority is unique to the transfer of CWA Section 404 permitting authority. There is no requirement in CWA Section 402 for EPA to take into consideration the views of the Services, and there is no corollary in the CWA Section 402 program to the CWA Section 404(b)(1) Guidelines. These provisions in CWA Section 404 provide discretion to EPA that is not present in the Section 402 context.

- The Tribe expressed that they do not understand why they were not consulted prior to the execution of the Memorandum of Agreement between EPA and the State of Florida and the execution of the Memorandum of Agreement between the U.S. Army Corps of Engineers and the State of Florida. EPA's decision on Florida's request to assume the CWA 404 program is the relevant undertaking for purposes of Section 106 of the NHPA. We have consulted with tribes pursuant to Section 106 of the NHPA and have also consulted on the State's CWA 404 program request consistent with EPA's tribal consultation policy. The tribes were free to express their views on the FDEP/EPA MOA, FDEP/Corps MOA, and any other aspect of the State's 404 assumption application during this consultation period
- OA, pg.1, I(A)(2)(b): "Indian Tribes" definition should only include federally recognized tribes. Bands, groups, and communities are public entities, not federally recognized tribes. Wanted to know where this language came from. The EPA acknowledges the Tribe's comment but points out that "bands, groups, and communities" are also included in the NHPA regulatory definition of Indian tribe: tribes mean "an Indian tribe, band, nation, or other organized group or community including a Native village, Regional Corporation or Village Corporations, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (54 U.S.C. 300309)."
- OA, pg.1, I(A)(2)(b): The Tribe is unaware of consultation on state undertakings as they have only been contacted about federal undertakings in the past. The Tribe asked for examples of when Tribes are consulted on state undertakings. For the State 404 permitting process, consultation triggers are described in detail in the OA. EPA recommends you contact the Florida SHPO to discuss Florida's process for tribal consultation on state undertakings, as well as for other examples when this has occurred.

- OA, pg.2, I(A)(2)(b)(i): The Tribe asked whether the State plans to consult with state recognized tribes? If so, the Tribe considers them to be the public and they should not be grouped with or consulted with federally recognized tribes. The State has indicated to EPA that it intends to consult with federally recognized tribes as part of the State 404 permitting process.
- OA, pg.2, I(B)(1): From the Tribe: "Who at the [FDEP] is conducting historic properties review? Who is making the NRHP determinations? An SOI-qualified historian, archaeologist, etc. is required to make these decisions. We need to see the CV or resumes of the [FDEP] Staff who will make these determinations. The lead agency (the [FDEP]) is responsible for making determinations of no effect, no adverse effect, no historic proprieties effected, adverse effect, etc. Will the [FDEP] do this or will the SHPO do this? Through Section 106 consultation, tribes are asked to concur with the State or lead agency's finding of effect or let them know if there are cultural or religious properties that could be impacted by the 404 permit." Both FDEP and Florida SHPO have State reviewers that are Secretary of the Interior-certified. Florida SHPO, in coordination with FDEP, conducts reviews of historic properties pursuant to the OA.
- OA, pg.3, I(B)(1)(b): The Tribe thinks the language stating that FDEP has duties and responsibilities *"To THPO or Indian Tribe when the interested Indian Tribe does not have a THPO."* is worded weirdly. Why not just put "federally recognized tribes with an area of interest?" This language is consistent with NHPA regulatory language at 36 C.F.R. Section 800.2(c)(2).
- OA, pg.3, I(B)(1)(b): From the Tribe: "Again, we have to remember that "Indian Tribe" as it is now, does not stipulate that they are federally recognized, but seems they could also be a band or some type of group (i.e. the public)." The State intends to consult with federally recognized tribes as part of the State 404 permitting process.
- OA, pg.4, I(B)(1)(d): From the Tribe: "Tribes and public/local governments are listed separately here, which is correct. Due to this, do not try to send the Muscogee (Creek) Nation public notices when we are not the public. We are a sovereign nation and we will not take public notices as consultation on projects." In accordance with the process described in Section II.A. of the OA, the FDEP will email THPO/tribes notification within five days of receipt of an application for a State 404 Program Permit and provide the THPO/tribes an opportunity to review the application for potential effects to cultural resources or historic properties of religious or cultural significance, seek additional information from the applicant, provide an effects determination, and provide initial recommendations for resolution of any adverse effects within an initial review period (i.e., before FDEP provides public notice of administratively complete State 404 Program individual permit applications). In addition to this initial review period, FDEP has committed to providing notice on all permit applications directly to tribes that have expressed an interest in being notified. The PA and the OA also both establish a dispute resolution process to resolve disputes should they arise regarding historic and cultural resources.
- OA, pg.4, I(B)(1)(d): From the Tribe: "How will the public be notified? Newspaper? Mail?" FDEP will publish notice on its website. FDEP also mails the notice to adjacent property owners.
- OA, pg.4, I(B)(1)(d): The OA states, *"In the event the [FDEP] employs a historic resource coordinator, the [FDEP] will coordinate with SHPO and the THPO/Indian Tribes to establish procedures to streamline certain categories of projects."* From the Tribe: "Streamlining certain projects would require another agreement document (e.g. programmatic agreement)." EPA acknowledges the Tribe's comment.
- OA, pg.5, I(B)(2)(c)(ii): Regarding FDEP's duty and responsibility to *"On the same day received, provide information related to an unanticipated discovery, effects to historic resources, or the identification of unmarked human remain on issued no-notice general permits, general permits,*

and individual permits," the Tribe wants to know how this will be done. By email? Phone call? FDEP indicates this is typically done by email and phone.

- OA, pg.5, I(B)(3)(a)(i): Regarding FDEP's duty and responsibility to *"Review general permit and expedited applications to determine the presence or absence of cultural resources or historic properties of religious and cultural significance or request that the project be evaluated as an individual permit because of potential historical resources concerns,"* the Tribe asks: "Why are there expedited applications? This should not be a regular occurrence and putting this here makes it seem as if the agreement is giving them the chance to expedite all the applications they want. Why is this process needed? Are archaeological surveys required by applicants? Expedited applications only occur for subsequent phases of an on-going project. The entire project will be put out for comment for the first phase. For expedited applications, FDEP will review the changes to the permit not addressed during the previous permitting phase. Where there are no changes to the project, the notice will provide the public an opportunity to submit comments, materials, or evidence pertaining to identification of material site changes or potential noncompliance. The Florida SHPO can request an archeological survey on a specific permit or project.
- OA, pg.7, II(A)(1): Regarding FDEP's email/notification of consultation during the initial review of a state permit, the Tribe states, "This will not be a public notice to the Tribe. Additionally, we want information provided pertaining to any surveys or sites that are in the area (FLSHPO)." In accordance with the process described in Section II.A. of the OA, the FDEP will email THPO/tribes notification within five days of receipt of an application for a State 404 Program Permit. FDEP is working on a specific notification template format for the tribes. In addition, THPOs/tribes can ask FDEP to seek additional survey information. Information pertaining to any survey or sites will be subject to the confidential stipulation in the PA.
- OA, pg.9, II(B)(1)(a): Regarding the following procedures, *"[FDEP] will* provide *a public notice of all administratively complete State 404 Program individual permit applications pursuant to the provisions of Rule 62-331.060, F.A.C. SHPO, THPO/Indian Tribes shall receive an email notification of the public notice in accordance with paragraph 62-331.060(2)(a), F.A.C.,"* the Tribe states the following: "A public notice does not constitute tribal consultation. A consultation letter template should be made and used when notifying tribes and inviting them to consult on a state undertaking." We have notified Florida SHPO and FDEP of your comment as well. FDEP is working on a specific notification format for the tribes.
- OA, pg.9, II(B)(2): Regarding the following procedures, *"The public notice shall specifically mention and solicit comment on the historic properties review process, including any initial effects determinations and recommendations received by SHPO/THPO/Indian Tribes during the Department's initial review of the application. If the initial determination is that the activity will have no effect on historic properties, a "no potential to cause effect" or "no effect" statement shall be included in the public notice,"* the Tribe states the following, "This is a concern. Tribal comments should not be included in a public notice or be made available to the public. Also, the public should not receive an archaeological report. If any information is posted online for them to review with the application, then it should be highly redacted. Confidentiality is a major issue when identifying or when a project impacts a cultural site." The PA and OA address this concern by setting out a process for withholding confidential and sensitive information.
- OA, pg.10, II(D): The Tribe asked "Why do the no-notice [General] permits require a quick 15-day review? What is the nature of the no-notice permits? What are examples of when this would apply? Explain further." Under a no-notice permit the applicant is required to contact the Florida SHPO directly to determine if there are any properties determined to be eligible or potentially eligible for listing on the National Register of Historic Places before using a general permit. If

Florida SHPO identifies a potential adverse effect or issue then at that point, the no-notice permit is no longer applicable, and the applicant must contact FDEP and proceed under a general permit.

- OA, pg.13, III(B)(1)(b): Regarding the following statement on continued consultation on the resolution of adverse effects, "*The Department, the SHPO, and THPO/Indian Tribes, if participating, may agree to invite other individuals or organizations to become consulting parties,*" the Tribe asks, "What other individuals or organizations would be invited? For a disagreement, would the ACHP involved?" It is EPA's understanding that other individuals or organizations that may be invited to become consulting parties would include parties that may have an interest and/or consultative role in the historic properties review of State undertaking related to the administration of the State 404 permitting program. See Section I.A. of the OA. The ACHP may be involved in disputes that are elevated to EPA for review pursuant to Section III.C. of the OA and Section V of the PA.
- OA, pg.13, III(B)(1)(c): Regarding the following statement on continued consultation on the resolution of adverse effects, "*The Department shall make information available to the public, subject to any confidentiality requirements. The Department shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking*," the Tribe asks "Why would the public be involved if it is a disagreement between the Tribes and EPA? They should not be privy to this information." This language is consistent with language from the ACHP regulations contained in 36 CFR Section 800.6(a)(4).
- OA, pg.14, III(B)(2)(e): Regarding the following statement on the resolution of adverse effects, "*If agreement cannot be reached, the Department shall attempt to continue consultation to reach an acceptable agreement. However, if agreement is not possible, the Department shall proceed according to Section III.C*," the Tribe states "The ACHP should be involved if no agreement can be made." The PA provides for ACHP involvement when disputes are elevated.
- OA, pg.15, III(C)(3): Regarding the following statement on federal review, "*The Department shall, in accordance with paragraph 62-331.052(3)(b), F.A.C., notify the EPA if the Department does not accept the effect determination of a proposed activity or recommendations for the resolution of adverse effects of the THPO/Indian Tribes, together with the Department's reason for doing so, in which case the EPA can comment upon, object to, or make recommendations*," the Tribe asks "Who at the EPA will make this determination? What staff will work on this? Will they be an archaeologist? SOI-qualified individuals?" EPA officials will make the determination in consultation with ACHP.
- OA, pg.15, IV: Regarding the "Terms and Definitions" section, the Tribe states, "Add general permit" and "no-notice permit" to this." The OA is an agreement between the FDEP and the Florida SHPO; EPA is not a party to the OA. The OA is a final document that was submitted by the State of Florida as part of its completed assumption package.
- OA, pg.16, VI: Regarding the "Training Requirements, A-C" section, the Tribe states, "Yes, there should be training. The use of "occasional" means that it could happen a few times every year or just once every ten years. You need to define this better," and "Also, who will contact the Tribes so that they can provide training?" FDEP or Florida SHPO will be responsible for contacting the tribes for training. If the Tribe is interested in providing training, please contact FDEP or Florida SHPO.
- Comment to add Federally-recognized to tribe. The PA was revised to add a citation to the 40 C.F.R. Section 233.2 which provides a definition for Indian Tribe that includes "any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation."

- Comment to explain what is in Appendix A in first mention. The PA was revised to reference Appendix A later in the document.
- Comment to consider adding a WHEREAS that will outline the THPO role under Section 106 of the NHPA. The PA does not have a role for the THPO because this undertaking does not occur on Indian country. Should EPA approve the State's Section 404 program, the State would not assume permitting authority over any waters located in Indian country, as defined at 18 U.S.C. 1151. In those areas, the federal government retains its normal government-to-government consultation with the tribes.
- Comment that FDEP should be written out in first mention. The PA was revised to reflect this change.
- Comment asking why did EPA wait so long to give Tribes a draft PA for them to review? We know that ACHP received the Draft PA on Oct 21, 2020. Tribes received the PA on November 25th, one day before Thanksgiving and were asked to meet one week later for consultation. There has not been enough time for all parties who have interest and obligations under Section 106 to consulting meaningfully on this undertaking. EPA sent letters inviting the consulting parties to participate in NHPA 106 consultation on EPA's undertaking on September 2, 2020. The Agency has hosted multiple meetings with the tribes, both individually and as a group. Initially EPA invited the eight tribes with interests in Florida to participate on a September 22nd informational webinar. During that webinar, EPA provided information on Florida's request to assume the CWA 404 program and an overview of the NHPA 106 consultation process that would be utilized. This was to assist the tribes in deciding whether to participate with EPA on NHPA 106 consultation on the undertaking. EPA explained during that meeting that the Agency planned to enter into a programmatic agreement that relied on the OA as a foundational document and provided information about where in the docket the OA could be found, as well as provided email copies of the OA when requested. During the informational webinar we encouraged tribes to identify to EPA any issues, concerns or gaps in the OA so that, where appropriate, the Agency could attempt to address those through the PA. On September 28, October 1, October 7, October 8, October 15, October 30 and December 3, EPA had individual consultation meetings with the five tribes that chose to consult and again encouraged each tribe to identify concerns with the OA so that EPA could, where appropriate, address those concerns through language in the PA. EPA took under advisement all NHPA-related issues raised during these consultation meetings. As a result, the tribes have had an opportunity to provide EPA with comments on the OA and issues associated with EPA's undertaking since early September. EPA acknowledges that it shared the actual draft PA with consulting parties on November 25th and requested comments on the PA by noon December 7th, but EPA has considered all NHPA-related comments received that are pertinent to the PA since September in revising the PA.
- Comment asking why the Seminole Nation of Oklahoma wasn't contacted. The NHPA regulations require EPA to make a reasonable and good faith effort to identify tribes that shall be consulted in the NHPA Section 106 process. See 36 CFR 800.2(c)(2)(ii)(A). EPA believes it met this obligation. EPA coordinated with the ACHP and based on their recommendation used the HUD website. Using the HUD website, EPA identified and invited the following eight federally recognized tribes to consult: the Alabama-Coushatta Tribe of Texas; the Choctaw Nation of Oklahoma; the Coushatta Tribe of Louisiana; the Miccosukee Tribe of Indians of Florida; the Mississippi Band of Choctaw Indians; the Muscogee (Creek) Nation; the Poarch Band of Creek

Indians; and the Seminole Tribe of Indians of Florida. This list of federally recognized tribes for which EPA intended to carry out consultation was provided to the ACHP and the ACHP did not indicate that EPA needed to modify or add to this list.

- Comment stating there needs to be another WHEREAS that states the role of the tribes in the agreement. We are not the public. We are sovereign nations and deserve to be invited as a concurring party or an invited signatory to this agreement. Tribes who own lands in FL should be offered signatory status in our opinion. EPA appreciates the tribes' request to be a signatory. EPA has carefully considered tribal input in the development of the PA and believes the PA reflects important and appropriate opportunities for tribal involvement going forward, as well as well thought out dispute resolution processes. The signatories to the PA are those entities that are required parties under the NHPA regulations and those that assume a required responsibility under the PA.
- Comment asking about NAGPRA compliance, stating, "We generally suggest that you try to avoid removing and curating unmarked burials, especially those of likely Native Americans. If you are a NAGPRA reporting institution, you must comply with NAGPRA regulations for any remains or associated grave goods that you take into your possession (visit the National NAGPRA webpage for more information). Additionally, pursuant to Section 872.05(6)(c), *Florida Statutes*, the State Archaeological consults with the Seminole Tribe of Florida and the Miccosukee Tribe of Indians of Florida to determine the final disposition of Native American remains. The revised PA directly addresses NAGPRA in several provisions. The new language clarifies: (1) EPA's role, (2) the notification process, and (3) Tribal concurrence by the consulting tribes before work continues.
- Basically, FL has created laws that conflict with Federal laws and this PA will undermine our sovereignty since we are not in the State. It is important to point out that MCN has treaty lands in Florida (1739 Treaty of Coweta extended past St. Marys River to the St. Johns.) Should EPA approve the State's Section 404 program, the State would not assume permitting authority over any waters located in Indian country, as defined at 18 U.S.C. 1151. In those areas, the federal government retains its normal government-to-government consultation with the tribes. For waters outside of Indian country that the State assumes, the PA and OA, along with other assumption documents set forth the process for tribes to raise issues related to their interests to both Florida and to EPA. EPA has conducted government-to-government consultation with federally recognized Tribes, including the MCN. The PA provides the MCN along with the other consulting tribes an opportunity to resolve disputes over cultural resources by raising them to EPA. Furthermore, pursuant to the terms of the PA, all parties agree to comply with all applicable provisions of NAGPRA. EPA's decision with regard to Florida's request to assume the Section 404 Program does not alter treaty rights, make a determination whether or not any specific lands meet the definition of Indian country, as set forth at 18 U.S.C. 1151, or affect the legal status of those lands.
- Commenter asks the question, "EPA may review or will review state CWA 404 permits and draft general permits?" EPA may review state CWA 404 permits and draft general permits.
- Comment that the OA Procedures should be attached to PA as appendix. The OA will be attached as an appendix to the PA.
- Question of when the OA was finalized. August 6, 2020.

- Comment stating, "According to I.A.2.b.i. of the OA, the Florida Department of Environmental Protection, "shall consult with any Indian tribe that attaches religious and cultural significance to historic properties that me be affected by an application." This conflicts with 36 CFR 800.2(4), which indicates that federal agencies remain responsible for consultation with Tribes even when other NHPA Section 106 duties have been delegated. Executive Order 13175 and the ACHP's statement on "Limitations on the Delegation of Authority by Federal Agencies to Initiate Tribal Consultation under Section 106 of the National Historic Preservation Act" both affirm this responsibility on the part of federal agencies. A federal agency may delegate its government-to-government consultation responsibility towards a Tribe under the NHPA only with that Tribe's written consent. As this is has not occurred, the EPA still has the responsibility of conducting government-to-government consultation with Tribes on these permits. This needs to be reflected in the OA and PA." EPA is not delegating government-to-government consultation with federally recognized Tribes under NHPA or NAGPRA. Should EPA approve the State's Section 404 program, the State would not assume permitting authority over any waters located in Indian country, as defined at 18 U.S.C. 1151. In those areas, the federal government retains its normal government-to-government consultation with the tribes. Issuance of State 404 permits is not a federal action triggering government-to-government consultation. Nonetheless, EPA has agreed through the PA to evaluate historic property disputes and to comply with all applicable provisions of NAGPRA.
- In comment to the statement, This PA adopts the OA and its procedures and incorporates them herein. The Florida SHPO may amend or terminate the OA if all signatories to this PA agree. In such an event, the PA shall be amended or terminated accordingly pursuant to the terms set forth below, the commenter asks, "What about tribes? What about our comments on the OA?" The PA has an amendment and termination clause that addresses this issue.
- In response to the PA indicating FDEP will send tribes copies of public notices, the commenter states, "As stated previously in comments we submitted to EPA, federally recognized tribe are not the public and its insulting to treat a sovereign nation like the public." We have notified Florida SHPO and FDEP of your comment. FDEP is working on a specific notification format for the tribes.
- In response to the PA indicating the EPA will submit to the ACHP a copy of the proposed comments, objections, or recommendations and other pertinent documentation, the commenter states, "We want to be consulted here. Please add Muscogee (Creek) Nation or 'Tribes' to this review consultation." Language regarding tribal consultation during a dispute has been added to the provisions of the PA.
- Commenter recommends adding Florida SHPO and tribes to the statement, "The EPA will transmit any final comments, objections, or recommendations to FDEP for resolution in accordance with 40 C.F.R. § 233.50." The EPA has added a provision adopting this request in the PA.
- Commenter asks about Tribes who are not signatories, stating, "EPA has not allowed us a seat at the table. Confidentiality is a MAJOR concern for tribes" The EPA invited the eight tribes to consult on the 404 assumption process on September 2, 2020. EPA disagrees with this assertion. EPA held several virtual meetings with the tribes and incorporated language, where appropriate, to address their comments into the PA. The PA and the OA contain provisions setting out a process for withholding confidential and sensitive information. EPA appreciates the tribes'

request to be a signatory. The signatories to the PA are those entities that are required parties under the NHPA regulations and those that assume a required responsibility under the PA.

- Commenter recommends adding tribes to reporting and monitoring by adding them to those receiving annual reports and the ability to request meetings to discuss issues in the annual reports. The EPA has added a provision in the PA that Consulting Tribes shall receive annual reports and shall have the ability to request meetings to discuss issues identified in the annual report related to the PA and OA.

Poarch Band of Creek Indians

- OA relies on SHPO to make effects determination because FDEP doesn't have a qualified archeologist: FDEP has Secretary of the Interior-certified experts on staff to review.
- Need separate communication; SHPO response will not satisfy the Tribe. We have notified Florida SHPO and FDEP of your comment. FDEP is working on a specific notification format for the tribes.
- Shortened review period under the OA: FDEP, through the terms of the OA, committed to direct engagement with the SHPO and interested tribes early in the application review process, including opportunities to inform FDEP's requests for additional information.
- The Poarch Band of Creek Indians wants the NHPA Programmatic Agreement to include a process that ensures that cultural resources are identified, potential effects on those resources are identified, and sets forth how mitigation will be addressed. The OA 3(b)(2)(d) provides the following language: "if the Department, the SHPO, THPO agree on how adverse effects will be resolved then they will enter into a MOA and the consulting tribal parties will be invited to concur."
- The Poarch Band of Creek Indians requested a copy of the draft Programmatic Agreement as soon as possible and expressed concern that they would have sufficient time to review. The Poarch Band of Creek Indians were provided a copy of the draft PA on November 25, 2020.
- The Poarch Band of Creek Indians would prefer to receive a copy of a draft Programmatic Agreement before providing written comments regarding the NHPA consultation. The Poarch Band of Creek Indians were provided a copy of the draft PA on November 25, 2020. Written comments on the NHPA were accepted and responded to through December 14, 2020. EPA does recognize that the tribes would like to have continuing conversations about how the PA will be implemented, and to that end, EPA has added a new stipulation that: "within 30 days of the execution of this PA, EPA will engage in and complete further discussions with the FL SHPO, FDEP, the ACHP, and the Consulting Tribes, to consider potential amendments to this PA regarding continuing tribal consultation engagement and EPA oversight of the State's administration of its 404 program. Any amendment adopted pursuant to this clause must comply with subsection VIII. a. of this PA."
- Will FDEP adopt NWPs? To provide consistency between the State and federal 404 programs, FDEP modeled many of the State's programmatic general permits after nationwide permits. These State general permits will be issued on the date the State program comes into effect and will have a five-year term. In crafting its programmatic general permits, FDEP did not simply incorporate by reference or copy existing Corps permits; it modified these permits including additional requirements, as appropriate, to ensure these permits comply with the Section 404(b)(1) Guidelines and State requirements including but not limited to the State's Environmental Resource Program permits, water quality standards, protection of listed species,

and compliance with the State's Coastal Zone Management Plan. These general permits were available for comment as part of the program package approval and EPA has reviewed them as part of the program request. (See Section 3.2.1 of the State 404 Program Applicant's Handbook).

- Will FDEP perform NEPA? Issuance of state 404 permits is not a federal action triggering the requirement for a NEPA review.
- How stringent will EPA's oversight of Florida's 404 program be after first year or two? FDEP shall provide the signatory parties and the Consulting Tribes with an annual report for each State fiscal year ending June 30th by September 30th of each year that the PA is in effect. This annual report will summarize the actions taken to implement the terms of the PA and provide data about the historic properties review process under the OA, and, if necessary, recommend any actions or revisions to be considered, including amendments to the PA. The EPA will schedule a meeting to discuss issues identified in the annual report related to the PA and OA if any signatory or Consulting Tribe requests one. Further, EPA will retain its oversight obligations under the CWA.
- The consultation process with tribes in regard to the EPA Programmatic Agreement (PA) and the Operating Agreement (OA) has not been inclusive of tribal comments and concerns. Both documents are orientated toward inclusion of Florida State Department of Historic Preservation (SHPO) involvement while relegating roles and responsibilities to Tribes without tribal involvement. The OA was executed with the Florida SHPO when it was offered to tribes for comments. This process is unacceptable and does not adhere to the federal mandate for agencies to treat Tribes as sovereign nations. The PA relies heavily upon the OA with the Florida State Department of Historic Preservation (SHPO). The OA is an agreement between the FDEP and the Florida SHPO; EPA is not a party to the OA. The OA is a final document that was submitted by the State of Florida as part of its completed assumption package. It is our understanding the OA did incorporate comments received by the FDEP from the Miccosukee Tribe and the Seminole Tribe. During its NHPA 106 consultation, EPA asked tribes to identify any gaps, concerns, or issues related to the OA and has taken comments provided by the tribes into consideration in drafting the PA. As such, EPA believes that the PA and OA, when considered together, address tribal interests.
- In the OA the SHPO agrees to perform many of the function of an agency archaeologist: making determination of effect I. B.2.(a)(v) and recommendations to minimize, or mitigate adverse effects on historic properties I.B.2.(a)(vi). These responsibilities are then passed to Tribal Historic Preservation Offices (THPO) I.B.3 without their agreeing to accept the responsibilities. The provision of the OA cited offers the tribes or THPO an opportunity to provide information but does not require their participation.
- Both documents have numerous delegation of authority and assumption of authority that tribes were not a party to drafting. Without the opportunity to have meaningful contribution to what the agreements contain and are to be implemented the Poarch Band of Creek Indians cannot agree to and sign them. As the Poarch Band of Creek Indians have not agreed to an alternate process for consultation on Clean Water Act Section 404 permits issued by the State of Florida potential to effect historic properties, the Poarch Band of Creek Indians will expect the Environmental Protection Agency to follow 36 CFR 800 regulations. The EPA is cognizant of its role as a federal agency under Section 106 of the NHPA and NAGPRA. The EPA is not delegating its NHPA consultation role to the State. If Florida assumes the 404 program, issuance of permits by the State would not be a federal action triggering government-to-government consultation.

That said, if a historic properties dispute arises over of a proposed State 404 permit, both the PA and OA assure tribes the opportunity to raise the dispute to the EPA who, in consultation with the ACHP, will make a determination regarding the matter raised.

- The Poarch Band of Creek Indians support the recommendation of the Advisory Council for Historic Preservation that the Environmental Protection Agency and Florida Department of Environmental Protection to extend the 120-day approval process to allow adequate time to the Poarch Band of Creek Indians to contribute to the drafting of an acceptable PA. Based on the fact that NHPA Section 106 consultation was provided to the consulting parties beginning in early September, EPA does not believe an extension of the 120-day review period is necessary. EPA notes that it is required by the CWA to act on Florida's request to assume the 404permitting program within 120 days. 33 U.S.C. §§ 1344(h)(1) and (3). EPA does recognize that the tribes would like to have continuing conversations about how the PA will be implemented, and to that end, EPA has added a new stipulation that: "within 30 days of the execution of this PA, EPA will engage in and complete further discussions with the FL SHPO, FDEP, the ACHP, and the Consulting Tribes, to consider potential amendments to this PA regarding continuing tribal consultation engagement and EPA oversight of the State's administration of its 404 program. Any amendment adopted pursuant to this clause must comply with subsection VIII. a. of this PA."

Seminole Tribe of Florida

- The Seminole Tribe shared that previous agreements with ACHP and Programmatic Agreements have precluded the Tribe from having a strong say in site-specific situations where cultural significance is at issue. EPA revised the PA, where appropriate, to address many of the issues and concerns raised by the Seminole Tribe. That said, if a historic properties dispute arises over a proposed State 404 permit, both the PA and OA assure tribes the opportunity to raise the dispute to the EPA who, after conferring with the ACHP, will make a determination. The PA also contains a NAGPRA provision that more clearly enumerates EPA's role and specifies that work will not proceed without written permission from the tribes.
- The Seminole Tribe of Florida requested that EPA provide CWA elevation examples from other EPA Regions. Each situation will be addressed on a case-by-case basis, but the EPA intends to discuss with the tribe separately any relevant prior examples.
- The Seminole Tribe of Florida shared that they would have expected EPA to consult with them on this policy change. The Seminole Tribe of Florida treated their comments/process as if EPA's approval of Florida's program wouldn't be discretionary, and were not aware of the Federal Register Notice. EPA acknowledges the Tribe's expectation and while EPA did not formally consult on the policy change, EPA did solicit input from the public and tribes through multiple mechanisms including: emails sent on May 18, 2020, to EPA's lists of tribal environmental and natural resources directors in all 10 Regions and OW's list of tribal water contacts, which includes various internal and external tribal water contacts, organizations, and individuals who have asked to be kept up to date on such announcements. A copy of these emails is attached for reference. EPA would be happy to add any additional contacts for the Seminole Tribe to these lists if necessary. On August 31, 2020, EPA invited the Tribe to engage in government-to-government consultation on our action regarding Florida's request to assume a CWA section 404 program.

- The Seminole Tribe of Florida would appreciate consultation on national policies like the ESA policy change in the future. EPA acknowledges the Tribe's request for consultation on potential future policy changes and will continue to work with the Tribe consistent with the EPA guidance on Tribal Consultation.
- The Seminole Tribe asked whether the BiOp would be updated to account for new species or whether new species would be handled on a permit-by-permit basis. The Biological Opinion's section on reinitiation states that "the listing of a new species or critical habitat shall not trigger reinitiation of consultation on this action (approval of Florida's assumption of the CWA 404 program). Since the State would administer the CWA 404 program, the USFWS has no obligation to conduct section 7 consultation on individual permits because the issuance of such a permit is not a Federal action. However, the State's regulations require that the State comply with the technical assistance process with USFWS for ESA listed species and critical habitat. Accordingly, any effects to newly listed species or their critical habitat would be sufficiently considered and addressed." U.S. Fish and Wildlife Service, Programmatic Biological Opinion for U.S. Environmental Protection Agency's Approval of FDEP's Assumption of the Administration of the Dredge and Fill Permitting Program Under Section 404 of the Clean Water Act (November 17, 2020) at 68.
- The Seminole Tribe of Florida shared that endangered species issues are among the biggest issues and that they are commonly a subject of tribal consultation with the Corps, because of the tribe's geographic location. The EPA acknowledges the Seminole's comment.
- The Seminole Tribe of Florida is interested in having the ability to comment on a proposed project as a downstream affected jurisdiction. FDEP, through the terms of the OA, committed to direct engagement with the SHPO and interested tribes early in the application review process, including opportunities to inform FDEP's requests for additional information, provide effects determinations, and make recommendations for the resolution of adverse effects. FDEP has committed to providing notice on all permit applications where the tribes have expressed an interest in being notified. Pursuant to F.A.C. 62-331.080(2)(a), FDEP will provide the Tribe with notice for any activity that is within six miles of the Seminole Tribe of Florida's Big Cypress or Brighton Reservations; within two miles of the Seminole Tribe of Florida's Immokalee, Lakeland, or Fort Pierce Reservations; within one mile of the Seminole Tribe of Florida's Tampa, Coconut Creek, or Hollywood Reservations; within the Seminole Tribe's reserved rights areas, including but not limited to: within Big Cypress National Preserve; within Big Cypress National Preserve addition lands; within Everglades National Park; within Rotenberger Wildlife Management Area; or within Water Conservation Area 3-A.
- The application from DEP states the GPs will last for 5 years from effective date of transfer, but the Corps existing permit program will expire in 2022. EPA acknowledges that the Corps' Nationwide Permits expire in 2022. However, pursuant to CWA Section 404(h)(1)(A)(ii) and 40 C.F.R. Section 233.23(b), the State may develop general permits for a term not to exceed 5 years. FDEP's general permits will not extend the Corps general permits beyond their statutory limitation of five years in duration. As the State program description states on page 30, nationwide permits and the State's programmatic general permits "will no longer be applicable within assumed waters," and thus there is no extension of the Corps general permits in assumed waters. The State's program does include general permits which the State incorporated into regulations at Florida Administrative Code Chapters 62-330 and 62-331.
- The Seminole Tribe of Florida is concerned about cumulative effects of NWPs on Tribal lands. The EPA acknowledges the commenters concerns.
- The Seminole Tribe of Florida has been following NWP 12 for utilities with particular interest. The EPA acknowledges the Seminole's comment.

- The Seminole Tribe of Florida asked EPA to consider tribally-owned lands not in federal trust when thinking about impacts of general permits. EPA acknowledges the Tribe's comment and request.
- Currently, the Seminole tribe works with SFWMD. Tribe is concerned about coordinating with multiple state agencies and educating them on the tribe's special status; i.e., five WMDs if delegation occurs. The EPA acknowledges the comment. Florida's 404 assumption package identifies FDEP as the permitting authority. A change to Florida's approved program would require approval pursuant to 40 C.F.R. Section 233.16(d).
- ERP component makes up to 85% of overall requirements of 404, according to State package; WMD will be working hand-in-hand on 404 reviews. The EPA acknowledges the comment.
- The Seminole Tribe of Florida would like advance notice and a conversation with EPA if FL makes changes to the program such that Water Management Districts will be implementing the program, especially if the modification is just a letter modification. Florida's 404 assumption package identifies FDEP as the permitting authority. A change to Florida's approved program would require approval pursuant to 40 C.F.R. Section 233.16(d).
- The OA does not currently provide a process or eligibility criteria to determine under what circumstances EPA will involve the ACHP. These criteria should be developed with associated timeframes within the PA. The PA contains a detailed description of the dispute resolution process and ACHP's role.
- The Tribe requests that EPA involve ACHP in review of any disputes between the consulting parties on the area of potential effect and any disputes as to whether a site is eligible or potentially eligible for listing in the National Register of Historic Places (NRHP). These are areas of potential dispute that are not covered by the OA Federal Review section. If there is a dispute, this can be raised to EPA under the current dispute provisions contained in the PA.
- In instances where ACHP's involvement is requested, consulting or commenting Tribes should be provided an opportunity to discuss the dispute with ACHP and EPA. The PA provides an opportunity for the EPA to consult with the tribes when disputes are identified, where appropriate.
- The OA acknowledges at Section I. A.2.b.i that tribes possess special expertise in assessing the eligibility of cultural resources or historic properties that may possess religious and cultural significance. The Seminole Tribe requests that a similar statement be included in the PA. Similar language was included in the revised PA.
- The Tribe is also interested in the possibility of participating in the PA as an invited signatory due to the potential for FDEP's 404 Program to impact religious and culturally significant historic properties and the Seminole Tribe's foreseeable role as a consulting party under the OA.
- The Tribe requests to review the draft PA. The Tribe was provided a copy of the PA on November 25, 2020.
- The Tribe commented that the Operating Agreement does not currently reflect coordination with the ACHP. The PA contains provisions for ACHP coordination.
- The Tribe strongly recommends a Programmatic Agreement be developed to clearly set forth in what circumstances EPA will involve the ACHP. The PA contains provisions for ACHP coordination.
- The Tribe requested that they be a signatory to any Programmatic Agreement and that it be available to the Tribe for review before EPA decides on Florida's application to implement its own Section 404 Program. The Tribe was provided a copy of the PA on November 25, 2020. EPA appreciates the Tribe's request to be a signatory. The signatories to the PA are those entities

that are required parties under the NHPA regulations and those that assume a required responsibility under the PA.

- On September 2, 2020, the Seminole Tribe received an invitation to participate in a Section 106 consultation pursuant to the National Historic Preservation Act. The Seminole Tribe concurs with EPA's determination that approval or disapproval of the State's 404 Program assumption application is a Federal Undertaking triggering a Programmatic Section 106 consultation. On September 28, 2020, the Seminole Tribe participated in formal consultation with EPA on the State's 404 application pursuant to Executive Order 13175, EPA Policy on Consultation and Coordination with tribes, and Section 106 of the National Historic Preservation Act. As requested by EPA, on October 8, 2020 the Seminole Tribe provided comments on areas of the OA with SHPO that should be strengthened in a Programmatic Agreement (PA) with the Advisory Council on Historic Preservation (ACHP) and requested a copy of the draft PA. These comments were acknowledged but have not been responded to. We now understand that EPA did not provide ACHP with the Seminole Tribe's comments. Nor has EPA provided any of the other information to the Tribe that was requested during formal consultation on the assumption package. EPA addressed the Seminole Tribe's comments in the PA. The Seminole Tribe will receive a full response to the comments that it submitted.
- The Seminole Tribe did not receive the draft PA with ACHP until November 25, 2020, the day before the Thanksgiving holiday. The Seminole Tribe was given one week to review the PA before EPA continued consultation with the Seminole Tribe and other Tribes on December 2, 2020. Upon quick review of the PA prior to the consultation, most of the Seminole Tribe's feedback was not incorporated nor did EPA acknowledge the comments already made during the consultation. EPA has requested comments from the Tribes on the PA by noon on December 7th. The Seminole Tribe would like to echo the consultation concerns raised in the December 2 consultation meeting regarding the fast track timing of the PA. It is likely that if the 404 Program is approved, that other states will look to the process utilized by FDEP and EPA to pursue 404 assumption. Yet, despite the national importance of the PA and this consultation process, it appears the PA and protection of cultural resources within the 404 Program is not being given due consideration and an appropriate amount of time for consultation and comment. Review of a draft PA is customarily allotted a minimum of thirty days for Tribal review. It is inappropriate to ask Tribal sovereign nations to agree to a PA that will govern cultural resource review in less than a week's time. Further, the Seminole Tribe has asked to be a signatory or concurring party to the PA and the timeframe set forth by EPA for finalization of the PA does not give adequate time for the Seminole Tribal Council to consider and approve such an important PA. The Seminole Tribe does not believe that the process for the PA and tribal consultation under Section 106 has met EPA's trust responsibilities to Tribes. EPA gave the protection of cultural resources within the 404 Program appropriate time for consultation and comment. EPA revised the PA to address many of the issues and concerns raised by the Seminole Tribe. EPA appreciates the Tribe's request to be a signatory. The signatories to the PA are those entities that are required parties under the NHPA regulations and those that assume a required responsibility under the PA.
- Section III.C of the OA between the Florida Department of Environmental Protection (FDEP) and the State Historic Preservation Office governs Federal Review. Within that section, there are three instances where the FDEP sends an application to EPA for review: 1) during public notice

for projects within critical areas established under state or federal law, including sites identified or proposed under the NHPA; 2) where the consulting parties of the OA cannot agree on the effect determination of a proposed activity or where FDEP does not accept the recommendations of one of the consulting parties for the resolution of adverse effects; and 3) if the FDEP does not accept the effect determination of a proposed activity or recommendations for the resolution of adverse effects of the THPO/Indian Tribes. However, the OA does not currently provide a process for EPA to involve ACHP in review of any disputes between the consulting parties on the area of potential effect and any disputes as to whether a site is eligible or potentially eligible for listing in the National Register of Historic Places (NRHP). Within the OA, the Federal Review provisions fall under the section header "Effects Determinations and Resolution of Adverse Effects." The Seminole Tribe believes that the area of potential effect determination and whether a site is eligible or potentially eligible for listing in the NRHP are additional areas where disputes requiring EPA or ACHP resolution could arise but are not covered by the OA Federal Review section. The Seminole Tribe requests that these additional areas of review be added into the PA at Section IV. The broad language of subsection 1 and 2 of the PA dispute resolution addresses this concern, specifically the language in subsection 2, "where the consulting parties of the OA cannot agree on the effect determination of a proposed activity." A consulting party could raise a dispute of an effects determination based on a disagreement over an area of potential effects or a disagreement over the NRHP determination.

- In instances where ACHP's involvement is requested, consulting or commenting Tribes should be provided an opportunity to discuss the dispute with ACHP and EPA. Currently, ACHP has an informal process in place where ACHP and the Seminole Tribe can have a conversation to discuss the Tribe's concerns. As it stands in the draft PA, there is no mechanism that sets forth this opportunity for discussion in the event of a dispute. EPA added language regarding consultation in the dispute resolution process to address the Tribe's concerns.
- The OA acknowledges at Section I. A.2.b.i that Indian tribes possess special expertise in assessing the eligibility of cultural resources or historic properties that may possess religious and cultural significance. The Seminole Tribe requests that a similar statement be included in the PA. A provision utilizing similar language was added to the PA.
- The Seminole Tribe remains interested in the possibility of participating in the PA as an invited signatory due to the potential for FDEP's 404 Program to impact religious and culturally significant historic properties and the Seminole Tribe's foreseeable role as a consulting party under the OA. EPA appreciates the Tribe's request to be a signatory. The signatories to the PA are those entities that are required parties under the NHPA regulations and those that assume a required responsibility under the PA.
- The Seminole Tribe suggests that FDEP also be included as a signatory to the PA. The 404 Program implementation is FDEP's responsibility, not SHPO's. SHPO should not be the only signatory to the PA from the State. The EPA added FDEP as a signatory to the revised PA.
- The Seminole Tribe agrees with the other Tribes in the consultation that additional Tribes, such as the Seminole Nation of Oklahoma, should have been contacted for consultation. The Seminole Tribe disagrees with the EPA's mechanism for determining which Tribes should be contacted for consultation. Mere reference to a HUD website is insufficient. The NHPA regulations require EPA to make a reasonable and good faith effort to identify Indian Tribes that shall be consulted in the NHPA Section 106 process. See 36 CFR 800.2(c)(2)(ii)(A). EPA believes it

met this obligation. EPA coordinated with the ACHP and based on their recommendation used the HUD website. Using the HUD website, EPA identified and invited the following eight federally recognized tribes to consult: the Alabama-Coushatta Tribe of Texas; the Choctaw Nation of Oklahoma; the Coushatta Tribe of Louisiana; the Miccosukee Tribe of Indians of Florida; the Mississippi Band of Choctaw Indians; the Muscogee (Creek) Nation; the Poarch Band of Creek Indians; and the Seminole Tribe of Indians of Florida. This list of federally recognized tribes for which EPA intended to carry out consultation was provided to the ACHP and ACHP did not indicate that EPA needed to modify or add to this list.

- The Seminole Tribe concurs with the other Tribes that Section VI. Reporting and Monitoring should be updated to reflect whether it is FDEP or SHPO that is responsible for submission of the annual report. Further, all Tribes with an interest in Florida should be provided the report and an opportunity to request a meeting to discuss the annual report. EPA added the following language to address the Seminole Tribe's concern: FDEP shall provide the signatory parties and the Consulting Tribes with an annual report for each State fiscal year ending June 30th by September 30th of each year that the PA is in effect. This annual report will summarize the actions taken to implement the terms of this PA and provide data about the historic properties review process under the OA, and, if necessary, recommend any actions or revisions to be considered, including amendments to the PA.
- As the delegation to FDEP of the 404 Program is perpetual, the Seminole Tribe recommends that a provision be added to the PA that allows for evaluation of the OA and PA every 5 years. This evaluation should include an invitation to interested Tribes. The PA provides that an annual meeting can be requested by any of the signatories or the consulting tribes.
- What remains unclear is the actual process for dispute resolution that will occur between EPA, FDEP, and the Seminole Tribe on non-waivable categories, Indian Country determinations, effects to cultural resources and endangered species. The Seminole Tribe raised this concern in consultation with EPA. EPA affirmed its commitment to Nation to Nation communications with the Seminole Tribe on these categories. In addition, EPA confirmed that the assumption regulations provide enough flexibility for coordination with the Seminole Tribe on 404 permit issues as they arise. Although the process for Tribal coordination on an elevated application has not yet been developed, the Seminole Tribe remains interested in working with EPA on a coordination process that reflects Nation to Nation communications. What is most important to the Seminole Tribe is that this coordination occur ahead of any future dispute arising on a specific 404 application. EPA acknowledges the concern regarding dispute resolution among EPA, FDEP, and the Seminole Tribe of Florida. The EPA has oversight authority over the State CWA 404 program and may review State 404 individual permit applications and draft general permits. Pursuant to Section 404(j) of the CWA and 40 C.F.R. § 233.50, the EPA may in its discretion comment upon, object to, make recommendations, or take no action with respect to a state 404 individual permit application, draft general permit, or a state's failure to accept the recommendations of another state or Indian tribe whose waters may be affected by the issuance of a permit. Any such objection shall be based on the EPA's determination that the proposed permit is: (1) the subject of an interstate dispute under 40 C.F.R. § 233.31(a); and/or (2) outside the requirements of the CWA, the regulations at 40 C.F.R. Part 233, or the CWA Section 404(b)(1) Guidelines. Pursuant to the 40 C.F.R. 233.51 and the FDEP/EPA MOA, FDEP must provide EPA the opportunity to review permit applications that have a reasonable

potential to impact to endangered or threatened species or waters of an Indian tribe, and permit applications with impacts to historic properties. The FDEP/EPA MOA states that in the event a question arises whether activities proposed in a permit application or draft general permit are within Indian country, and thus should be processed by the Corps, information regarding the issue may be presented to FDEP during the comment period and may also be provided to EPA. Such information shall be considered by EPA in exercising its CWA authority to oversee FDEP's program and may, as appropriate, provide a basis for EPA to comment upon, object to, or make recommendations with respect to the permit application or draft general permit. Section III.C. of the OA and Section V of the PA set forth a process whereby EPA may in its discretion develop comments, objections, or recommendations with respect to permit applications that have the potential to impact historic properties or permit applications that are the subject of a historic properties dispute FDEP elevates to EPA pursuant to subsections III.C.2. and 3. of the OA. The EPA may consult with tribes, where appropriate, in developing its comments, objections, or recommendations. The ACHP, within 30 days of receipt of the EPA's proposed comments, objections, or recommendations may provide an advisory opinion which EPA will consider but need not follow. EPA will transmit any final comments, objections, or recommendations to FDEP for resolution in accordance with 40 C.F.R. § 233.50.

- The Seminole Tribe is concerned that a Programmatic Biological Opinion (BO) with Incidental Take Statement attempting to cover all species across Florida for direct, secondary, and cumulative impacts cannot effectively account for every potential future permitting action under the State 404 program. In addition, it appears that the proposed BO is also to cover take for species and critical habitat that have yet to be listed and/or designated. The Seminole Tribe questions the legality of this. The Seminole Tribe is very concerned that this approach will lead to disproportionate effects to the Tribe for conservation of species due to increased opportunity for displacement of species pursuant to the State 404 program. The Seminole Tribe also remains concerned that the proposed Memorandum of Understanding between FDEP, the U.S. Fish and Wildlife Service (Service) and the Florida Fish and Wildlife Conservation Commission (FWC) submitted as part of FDEP's application package is not signed. A final signed MOU should be available for review before EPA acts on the State's application so that it is clear what the final process between the FDEP, the Service, FDEP and Florida Fish and Wildlife Conservation Commission (FWC) will be and what EPA's role will be, if any. ESA implementing regulations set forth at 50 C.F.R. § 402.02 describe a programmatic consultation as a consultation that is addressing an agency's multiple actions on a program, region, or other basis. Programmatic consultations allow the Services to consult on the effects of programmatic actions such as . . . [a] proposed program, plan, policy, or regulation providing a framework for future proposed actions. In its Biological Opinion, USFWS noted that "the scope of EPA's approval of FDEP's request to administer the CWA 404 program in assumable waters is essentially statewide, covering an array of operations that may affect a wide variety of ESA-proposed and –listed species and proposed and designated critical habitat" and that "[b]ecause this is a consultation on a programmatic action, it is not feasible, nor is it required, to conduct a meaningful site-specific and species-specific effects analysis in this BiOp." U.S. Fish and Wildlife Service, Programmatic Biological Opinion for U.S. Environmental Protection Agency's Approval of FDEP's Assumption of the Administration of the Dredge and Fill Permitting Program Under Section 404 of the Clean Water Act (November 17, 2020) at 54 ("Biological Opinion").The State 404 program

rule at 62-331, F.A.C. prohibits issuance of a permit that is likely to jeopardize the continued existence of endangered or threatened species or result in the likely destruction or adverse modification of habitat designated as critical for these species. In addition, as stated above, the CWA Section 404(b)(1) Guidelines prohibit the discharge of dredged or fill material if it jeopardizes the continued existence of listed species or results in the likelihood of the destruction or adverse modification of designated critical habitat. The program submission describes how the State will comply with the Section 404(b)(1) Guidelines, and EPA has determined that FDEP has demonstrated its ability to comply with the Section 404(b)(1) Guidelines. The Program Description states that the MOU between FWC, USFWS, and FDEP outlines coordination procedures for listed species reviews. Program Description, section (j) – Additional Information at 2. The draft MOU between FWC, USFWS, and FDEP was included in the appendix of the Program Description. FDEP will monitor adverse effect determinations on listed species and critical habitat by incorporating information into its permit tracking database, similar to the information collected by the Corps. This data collection will assist in facilitating compliance with permit conditions and can also be shared with USFWS. Failure to include the protection measures as permit conditions that are designed to avoid jeopardy or adverse modification of designated critical habitat would ultimately result in the State either denying the permit or the State informing the EPA that it will neither issue nor deny the permit, which could result in the EPA transferring the permit application to the Corps for processing in accordance with 40 C.F.R. § 233.50(j). The USFWS' Biological Opinion finds that this process is not likely to jeopardize listed species or result in the destruction or adverse modification of designated critical habitat. The draft MOU between FWC, USFWS, and FDEP was included in the appendix of the Program Description. Thus, the public had sufficient information about how the State planned to address issues pertaining to listed species and designated critical habitat in its program and EPA has determined that FDEP demonstrated compliance with all statutory and regulatory requirements necessary to assume the CWA Section 404 program The final, signed MOU was provided with the USFWS Biological Opinion and had no changes.

- At this time no information has been provided to the Seminole Tribe or the public as to the exact waters of the State which will remain under Corps jurisdiction and which waters will be assumed by the State. The Seminole Tribe recognizes that FDEP is not seeking to assume the 404 Program in Indian Country. The Seminole Tribe reiterates prior requests to be provided GIS Layers of the retained versus assumed waters to ensure that Indian Country remains under the jurisdiction of the Corps 404 program and to better understand what waters adjacent to Indian Country will be assumed by the State. EPA disagrees that Florida included insufficient detail in the State's program submission request regarding waters that would be retained by the Corps and waters that would be assumed by the State and disagrees that insufficient detail will lead to unnecessary litigation and confusion in the permitting process. The regulations at 40 C.F.R. § 233.11(h) require the program description to include "[a] description of the waters of the United States within a State over which the State assumes jurisdiction under the approved program; a description of the waters of the United States within a State over which the Secretary retains jurisdiction subsequent to program approval." Florida's Program Description, section h at 2, meets this requirement by providing a description of retained waters and noting that retained waters are also defined in section 2.0 of the State 404 Program Applicant's Handbook and listed in Appendix A of the Handbook. Some listed waters in Appendix A of the Handbook include the

county name or a brief location description. Further, Section 6.1 of the Handbook as well as the Program Description section j make clear that the Corps retains permitting authority for projects within "Indian country" as that term is defined in 18 U.S.C. § 1151. EPA recognizes the concerns that the Corps' GIS layers identifying retained waters were not available to the public during the public comment period. The FDEP-Corps MOA commits that the Corps will provide the GIS layers to FDEP. The GIS layers are intended to serve as a tool supporting identification of retained waters, but are not a requirement for a submittal to assume the CWA Section 404 program. EPA also recognizes that a GIS layer cannot depict a pre-determined administrative boundary, as this is dependent in part upon project-specific characteristics: "In the case of a project that involves discharges of dredged or fill material both waterward and landward of the 300-foot guide line, the Corps will retain jurisdiction to the landward boundary of the project for the purposes of that project only." (FDEP-Corps MOA, Section II.A.)

- The Seminole Tribe does not believe that reliance on the State's existing Environmental Resource Permit Program (ERP), water management district (WMD) staff, FWC staff, and SHPO staff is a viable approach to a 404 Program. FDEP's proposed approach depends heavily on other State agencies, without adequate justification that those agencies have the resources required to implement the program. FDEP is also anticipated to undergo budget cuts in the upcoming year due to the financial impacts of the pandemic. The Seminole Tribe questions whether FDEP has adequate resources to effectively implement an assumed 404 Program. The resources of other state programs are not one of the statutory or regulatory criteria that EPA applies or is required to apply in reviewing state or tribal program requests. 33 U.S.C. 1344; 40 C.F.R. Part 233.
- FDEP's proposed 404 program is not as stringent as the federal program. In enacting legislation to pursue the 404 Program, the Florida Legislature granted FDEP broad authority to "adopt any federal requirement, criteria, or regulations necessary to obtain assumption, including but not limited to the guidelines specified in 40 C.F.R. Part 230 and the public interest review criteria in 33 C.F.R. S 320.4(a)." F.S. 373.4146(2) (2019). Rather than adopting the specific requirements of the 404(b)(1) Guidelines and the Corps' public interest criteria FDEP has referenced the State's Environmental Resource Permitting (ERP) rules and criteria which are in many areas different to and less stringent than the 404 criteria. In accordance with 40 C.F.R. Part 233, an assumed program must be consistent with and no less stringent than the requirements of the CWA and its implementing regulations. EPA has determined that Florida's program is consistent with and no less stringent than the federal program. EPA does not make a determination, and Florida is not required to provide information on, whether Florida's program will go above and beyond the requirements of federal law. In accordance with 40 C.F.R. § 233.10(f), one of the elements of a program submission that a state must submit if it seeks to administer a Section 404 program is copies of all applicable state statutes and regulations, including those governing applicable state administrative procedures. The General Counsel's Statement notes that "[p]rovisions of state law that conflict with federal requirements do not apply to state 404 permits. See § 373.4146(3), Fla. Stat." The statement also provides specific examples, such as exemptions to ERP permitting established in §§ 373.406, 373.4145, and 404.813, Fla. Stat., indicating these exemptions do not apply to State 404 permits, citing to § 373.4146(4), Fla. Stat. The General Counsel certifies that "the state has the authority to regulate all discharges of dredged or fill material into waters regulated by the state under Sections 404 (g)-(l), subject only

to the exemptions provided in 33 U.S.C. § 404(f) and 40 C.F.R. § 232.3" and notes that "[t]he State has promulgated Chapter 62-331, F.A.C., to bridge the gap between existing state and federal law, thus ensuring that the State 404 Program is at least as stringent as, and meets the requirements of, the CWA and 40 C.F.R. Part 230." See Florida's General Counsel's Statement.

- While there may be significant overlap between the 404 and ERP Programs, there are also several distinct differences that impact regulatory outcomes. FDEP's Rule 62-331 and 404 Handbook lack important federal Clean Water Act requirements that should be included for applicants and permit reviewers. FDEP's reliance on Section 10.2.1 of the ERP Applicant's Handbook Volume I to fulfill Subpart H of the 404(b)(1) Guidelines suffers from this shortcoming. Subpart H which provides regulations for Actions to Minimize Adverse Effects of 404 permits governs a variety of specific actions including: the location of the discharge; the material to be discharged; the material after discharge; the method of dispersion; technology-related actions; impacts to plant and animal populations; impacts on human use; and other actions. 40 CFR 230 Subpart H. FDEP's analysis of Rule 62-331 compared to the 404(b)(1) Guidelines on Subpart H acknowledges that Section 10.2.1 is not as specific as the Guidelines and asserts that the regulatory outcome will be the same. The Seminole Tribe disagrees with this assertion and believes that FDEP's program is not as stringent as the federal laws on this point. Section 404(h) of the CWA states that EPA may approve a state or tribal request for assumption only if EPA determines, among other things, that the state or tribe has authority to issue permits which "apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) . . . ." 33 U.S.C. 1344(h). States and tribes are not required to adopt or incorporate the Section 404(b)(1) Guidelines verbatim; however, implementation of state and tribal environmental review criteria must result in a permit that is as consistent with the Section 404(b)(1) Guidelines as would be a permit issued for the same discharge by the Corps. EPA has reviewed Florida's environmental review criteria and found them to be consistent with the Section 404(b)(1) Guidelines.
- The Seminole Tribe understands that FDEP is relying upon analysis by Corps of Nationwide Permits for the General Permits under the State 404 Program. The Corps Nationwide Permit Program is set to expire in 2022, whereas FDEP's General Permits would remain valid for five years after assumption of the Program. The Seminole Tribe questions whether FDEP can rely on an analysis by the Corps if that analysis is no longer valid after the expiration of the Corps program. FDEP is required to independently provide proof that "the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment." See 40 CFR 233.21(b). It is not clear that this has been done. Additionally, the Corps is currently revising the Nationwide Permit Program to, among other thigs, update Nationwide 12 for Utility Lines and separate out Oil and Natural Gas Pipelines from Electric Utility and Communication Lines. FDEP's General Permit 62-331.215 adopted the Corps' 2017 Nationwide 12 language which has been challenged in the courts. The Seminole Tribe is concerned that EPA will be approving a state 404 program that will in essence grandfather in general permits that are no longer valid or legal in the rest of the country. A process for update of the State's proposed General Permits, to the extent they rely on the analysis and justification of the Corps' Nationwide Permit program, should be provided. To provide consistency between the State and federal 404 programs, FDEP modeled many of the State's programmatic general permits after nationwide permits. These State general permits will

be issued on the date the State program comes into effect and will have a five-year term. In crafting its programmatic general permits, FDEP did not simply incorporate by reference or copy existing Corps permits; it modified these permits including additional requirements, as appropriate, to ensure these permits comply with the Section 404(b)(1) Guidelines and State requirements including but not limited to the State's Environmental Resource Program permits, water quality standards, protection of listed species, and compliance with the State's Coastal Zone Management Plan. These general permits were available for comment as part of the program package approval and EPA has reviewed them as part of the program request. (See Section 3.2.1 of the State 404 Program Applicant's Handbook).

- The Seminole Tribe has a longstanding relationship with the South Florida WMD related to the Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida, and the South Florida Water Management District. The Seminole Tribe has spent the last several years and numerous resources developing relationships with FDEP as it takes on more state permitting activities that impact Tribal lands and as part of the State's development of the 404 Program. The Seminole Tribe is pleased that FDEP is pursuing a Tribal Coordinator to foster this relationship further. There remains a concern however that shortly after assumption FDEP may seek to delegate the 404 Program to the five State WMDs. Nothing in state or federal law prevents FDEP from pursuing this option. Currently the 404 Program is set up so that a significant part of the 404 review is conducted by WMD staff during the review of ERP applications. The Seminole Tribe is concerned that delegation to the WMDs would cause significant coordination burdens for the Seminole Tribe. Instead of coordinating with one agency's staff on all the facets of the program the Seminole Tribe would be forced to coordinate and educate all the WMDs on the unique rights regarding implementation of the 404 program as it relates to Indian Country, Tribal waters, cultural resources and species/habitat concerns. Advance notice and an opportunity for consultation and comment should be provided before EPA authorizes delegation in the future by the State. EPA notes that WMDs are not authorized to administer the Section 404 permitting program under Florida's current program structure. WMDs may administer components of the ERP program under state law, and as such, FDEP may coordinate with the WMDs when administering the Section 404 program.
- The Seminole Tribe of Florida is interested in having the ability to comment on a proposed project as a downstream affected jurisdiction. Federal regulations at 40 CFR 233.31 require the following: "If a proposed discharge may affect the biological, chemical, or physical integrity of the water of any State(s) other than the State in which the discharge occurs, the Director shall provide an opportunity for such State(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted by the Director, he shall notify the affected State and the Regional Administrator prior to permit issuance in writing of his failure to accept these recommendations, together with his reasons for so doing. The Regional Administrator shall then have the time provided for in section 233.50(d) to comment upon, object to, or make recommendations."