STATE OF FLORIDA'S 404 ASSUMPTION PACKAGE

- August 20, 2020, the State of Florida submitted their 404-assumption package.
- Below is background, key points, and talking points from the EPA Office of Water:

CLEAN WATER ACT (CWA) SECTION 404 ASSUMPTION RULEMAKING AND ACTIVITIES

BACKGROUND:

- Under Clean Water Act Section 404, a permit is required before dredged or fill material can be discharged into "waters of the United States," including certain wetlands. Section 404(g)(1) of the CWA provides states and tribes the option of administering the CWA Section 404 permit program in certain waters within the state's or tribe's jurisdiction.
    - To date, only Michigan (1984) and New Jersey (1994) have assumed the CWA Section 404 program – the Army Corps of Engineers (Corps) retains permitting authority for the rest of the country.
    - States and tribes have cited various reasons for not assuming the CWA Section 404 program including lack of dedicated federal funding, inconsistency between state and federal authorities, lack of partial assumption authority, and lack of clarity on which waters of the U.S. the Corps retains.
- In 2018, the EPA announced it would clarify the regulations addressing the requirements and process for states and tribes to assume the CWA Section 404 dredged and fill permitting program. EPA has engaged with our partners and solicited comment on several issues as we revise the regulations:
    - From 2015-2017, EPA convened a subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT) an EPA Federal Advisory Committee to provide recommendations on how the EPA could clarify which waters states and tribes may assume under CWA Section 404(g) for purposes of issuing dredged or fill permits. (NACEPT sent recommendations to the Administrator in June of 2017).
    - In July 2018, the Assistant Secretary of the Army for Civil Works issued a memorandum to the Corps clarifying which waters states and tribes may assume.
    - Between October 2018 and January 2019, the EPA held early input sessions with states and consulted with tribes on what should be clarified in the regulatory revision. (58 tribes and 22 states participated).
    - The Navigable Waters Protection Rule (NWPR) is distinct from this rulemaking as the NWPR clarifies which waters are jurisdictional under the CWA, whereas this rule will clarify who is the permitting authority for a jurisdictional water.
- How state programs and permits are treated under the Endangered Species Act (ESA) has been identified as an obstacle to states and tribes assuming the 404 program.
    - In May 2020, EPA issued a *Federal Register* Notice seeking public comment on whether the Agency should reconsider its current position that consultation under ESA section 7(a)(2) is not required when EPA approves a state or tribe's request to assume a section 404 program. If the EPA determines it has discretion when approving a state or tribal request for assumption, it may be required to consult with the USFWS and NMFS under ESA section 7. The comment period for the *Federal Register* notice closed on July 6, 2020.

    - Assistant Administrator Dave Ross issued a memorandum on EPA's position on August 27, 2020.
- Florida submitted a request to assume a Section 404 program on August 20, 2020.
    - EPA worked with Florida and other states on addressing ESA considerations in program assumption and the Agency identified Florida as a designated federal representative to work with the Departments of Interior and Commerce on initial informal consultation on Florida's program effort prior to Florida's request being submitted to EPA.
    - EPA Region 4 Administrator Mary Walker and Noah Valenstein, Secretary of the Florida Department of Environmental Protection (FDEP), signed a Memorandum of Agreement (MOA) outlining state and federal program administration and enforcement responsibilities (July 31, 2020). The MOA is one of a number of required elements in a package for Florida to assume a CWA Section 404 program.
    - EPA determined all the package components are included and will have 120 days from the date of receipt to review the request and FDEP's program for consistency with the CWA requirements, coordinate with our federal partners, solicit public comment, and make a determination on FDEP's request. The 120-days ends on December 17, 2020.
    - EPA has initiated consultation with the USFWS under ESA Section 7 on the approval of Florida's program by submitting a biological evaluation to the USFWS, which evaluates the possible effects of EPA's potential approval of an assumption request on ESA-listed species, proposed species, designated critical habitat, and proposed critical habitat (50 C.F.R. 402.12). A biological evaluation also considers whether EPA's approval of an assumption request is likely to adversely affect any species or habitat.
    - EPA has also initiated consultation under Section 106 of the NHPA on the approval of Florida's program. The Agency will develop a Programmatic Agreement that builds upon the strong Operating Agreement signed by the FDEP and the State Historic Preservation Office.
    - The Seminole Tribe, the Miccosukee Tribe, the Choctaw Nation of Oklahoma, the Poarch Band of Creek Indians, the Muscogee (Creek) Nation, the SHPO, and FDEP have responded and requested consultation. In response to these requests, EPA held consultation meetings with the Seminole Tribe, the Choctaw Nation of Oklahoma, and the Poarch Band of Creek Indians. Consultation meetings are scheduled with the Muscogee (Creek) Nation and the Miccosukee Tribe of Indians of Florida.

KEY POINTS:

- In 1977, Congress gave states and tribes the authority to assume the CWA Section 404 dredged and fill permitting program for certain waters within their state/tribal boundaries. Under Section 404(g), EPA approves state and tribal requests to assume the program.
- EPA is currently working with Florida, Minnesota, Nebraska, and Oregon who are actively engaging EPA as pursue assumption of the program.

- In response to input from states and tribes, the Agency initiated a rulemaking to revise our 1988 regulations to clarify and modernize the regulations. EPA anticipates proposing the rule by the end of the calendar year.

TALKING POINTS:

- EPA is taking action to better balance the responsibilities for protecting our environment between the federal government and states.
- A priority of the Administration is to see more states and tribes assume administration of the Clean Water Act section 404 dredged or fill permitting program for waters within their jurisdiction.
- EPA has initiated a national rulemaking to modernize our existing assumption regulations to reduce barriers for states and tribes to assume the Section 404 permitting program and expects to issue a proposal in 2020.
- EPA is working closely with states such as Florida to support their efforts to assume a CWA Section 404 permitting program and received their assumption request on August 20.
- EPA will have 120 days to review the request and their program for consistency with the CWA requirements, coordinate with applicable government agencies, solicit public comment, and make a determination on their request.
- Two virtual public hearings are scheduled for October 21 and 27.
- By empowering states and tribes to take on this permitting responsibility, greater efficiencies can be achieved in infrastructure and other permitting decisions while continuing to protect the environment.