1***DRAFT DELIBERATIVE. DO NOT RELEASE UNDER FOIA. NOTHING CONTAINED HEREIN SHALL BE CONSTRUED AS CREATING ANY RIGHTS OR BINDING EITHER PARTY***

MEMORANDUM OF AGREEMENT BETWEEN THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

I. GENERAL

A. Purpose

This Memorandum of Agreement (hereinafter "Agreement") between the Florida Department of Environmental Protection (DEP) and Region IV of the United States Environmental Protection Agency (EPA) defines the federal and state roles in carrying out the policies, regulations, and procedures necessary to administer the permit program established pursuant to Section 404 of the Clean Water Act (CWA), Title 33 of the United States Code (U.S.C.), § 1251 *et seq.* (hereinafter "State 404 Permit Program"), and to facilitate program coordination between DEP and EPA. DEP does not exercise jurisdiction over Indian country, as that term is defined in 18 U.S.C. § 1151, and will not be seeking such authority through this Agreement. This Agreement does not create any substantive standards relating to any aspect of the 404 Permit Program or impose any legal obligations on the public and does not alter applicable provisions of Section 401 of the CWA.

B. Authorities

DEP shall administer and enforce the State 404 Permit Program in accordance with those state laws and administrative rules that EPA has defined as components of the federally authorized State 404 Permit Program in the State of Florida (40 C.F.R. § 233.7X), and in accordance with Section 404 State Program Regulations (40 C.F.R. Part 233), the CWA, Section 404(b)(1) Guidelines (40 C.F.R. Part 230, Section 404(b)(1) Guidelines for Specifications of Disposal Sites for Dredged or Fill Material) (hereinafter "404(b)(1) Guidelines"), and provisions contained in this Agreement and the Memorandum of Agreement between DEP and the United States Army Corps of Engineers (Corps).

C. Effective Date and Revisions

(1) This Agreement shall be executed by DEP and EPA and shall take effect at the time of EPA approval of the State 404 Permit Program, which shall be the effective date published in the Federal Register.

(2) DEP and EPA agree to maintain a high level of cooperation and coordination and to work in partnership to assure successful and effective administration of the State 404 Permit Program.

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(3) Nothing in this Agreement shall be construed to restrict in any way EPA's authority to fulfill its oversight and enforcement responsibilities under the CWA, nor shall it restrict DEP's enforcement responsibilities under Florida law.

(4) This Agreement, and procedures established in conformance with it, shall be reviewed periodically by DEP and EPA. Either party may request in writing an amendment or modification to the Agreement. Amendments and modifications to this Agreement shall be in writing and shall be effective upon completion of the process outlined in 40 C.F.R. § 233.16.

(5) At least ten percent (10%) of the projects that have been issued a permit under the State 404 Program shall be reviewed by EPA and the Corps every twelve months for consistency with the criteria and conditions of the project's permit, and the project's consistency with state and federal policy and standards concerning the 404 Program. The findings will be made available to DEP and to the public annually.

~~(4)~~(6)

~~(5)~~(7) This Agreement, and any amendments and modifications thereto, shall remain in effect until the State 404 Permit Program authorization is modified in a manner that would affect this Agreement or withdrawn by EPA pursuant to 40 C.F.R. § 233.53(b) or is voluntarily transferred by DEP to the Corps according to the criteria and procedures established in 40 C.F.R. § 233.53(a).

D. Confidentiality

(1) All of the information EPA transfers to DEP will be provided subject to the procedures and limitations of 40 C.F.R. § 233.3 and applicable Florida law.

(2) Any information obtained or used in the administration of the State 404 Permit Program shall be available to EPA without restriction. If information has been submitted to DEP under a claim of confidentiality, DEP must inform EPA of such a claim. All information submitted by DEP subject to a claim of confidentiality shall be treated in accordance with the procedures of 40 C.F.R. Part 2, 40 C.F.R. § 233.3(c), and applicable Florida law.

E. Computing Time Periods

In computing any period of time prescribed by this Agreement, the day on which the designated period of time begins shall not be included. Saturdays, Sundays, and state and federal holidays shall be included. When a stated time expires on a Saturday, Sunday, or legal holiday, the stated time period shall be extended to include the next business day.

F. State Agreement with Corps

(1) Prior to the assumption of the 404 Permit Program by DEP, the Jacksonville District of the Corps administered the 404 Permit Program in Florida. The District

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Engineer of the Jacksonville District has been delegated the authority to enter into a Memorandum of Agreement which will identify procedures for the transfer of the 404 Permit Program to DEP pursuant to CWA requirements.

(2) DEP's Memorandum of Agreement with the Corps stipulates permit processing responsibilities for activities which involve non-assumable waters, as well as transfer of permitting authority from the Corps to DEP. The Memorandum of Agreement identifies the State waters to be regulated, coordination procedures, general permit procedures, transfer of records, protection of navigation or anchorage, permitting for Corps water resource projects, and permitting for emergency work. The legal effect of the Memorandum of Agreement between DEP and the Corps is conditioned upon approval of the State 404 Permit Program.

G. State Agreements with Other Agencies

The State may enter into agreements with other agencies, including, but not limited to, the United States Fish and Wildlife Service (USFWS). To the extent any of these agreements or parts of these agreements are inconsistent with the requirements of the CWA, implementing regulations, or other assumption related statutes or implementing regulations, the agreement or that part of the agreement will not become part of the assumed program. Any revisions to the State 404 Permit Program must comply with the procedures laid out in 40 C.F.R. § 233.16.

II. PERMIT APPLICATION REVIEW AND PERMIT ISSUANCE

A. Lead Agency Responsibility for State 404 Permit Program

(1) DEP will be the lead agency in Florida for administering the State 404 Permit Program for waters assumed consistent with the Memorandum of Agreement between DEP and the Corps. DEP shall administer the State 404 Permit Program as approved by EPA using this Agreement, applicable state and federal laws, and any separate working agreement which shall be entered into with EPA as necessary for full administration of the State 404 Permit Program. The strategies and priorities for permit review, compliance monitoring and enforcement of permits, and unauthorized discharges of dredged or fill material into waters of the United States over which DEP has assumed jurisdiction under the State 404 Permit Program shall be established by DEP and shall be reviewed annually by EPA. This does not preclude EPA from initiating independent or parallel enforcement action in accordance with Sections 309 and 404(n) of the CWA.

(2) DEP may delegate the State 404 Permit Program to State governmental agencies in Florida but will maintain oversight and will retain the ability to revise or rescind permits issued by the delegated entities. If DEP proposes to delegate all or part of the State 404 Permit Program, such delegation is not effective until the Regional Administrator approves the delegation pursuant to 40 C.F.R. § 233.16.

B. Waiver of Review

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(1) Pursuant to Section 404(k) of the CWA and 40 C.F.R. § 233.51, EPA waives the requirements of Section 404(j) and the regulations adopted thereunder regarding federal review of DEP permit applications for all but the following categories of permits:

a. Draft general permits;

b. Discharges with reasonable potential for affecting endangered or threatened species as determined by USFWS;

c. Discharges with reasonable potential for adverse impacts on waters of another state or tribe;

d. Discharges known or suspected to contain toxic pollutants in toxic amounts (Section 101(a)(3) of the CWA) or hazardous substances in reportable quantities (Section 311 of the CWA);

e. Discharges located in proximity of a public water supply intake;

f. Discharges within critical areas established under state or federal law, including but not limited to national and state parks; fish and wildlife sanctuaries or refuges; national and historical monuments; wilderness areas and preserves; sites identified or proposed under the National Historic Preservation Act; and components of the National Wild and Scenic Rivers System;

g. Discharges impacting compensatory mitigation sites, including mitigation banks, in lieu fee program sites, and permittee responsible mitigation sites; and

h. Discharges impacting sites that are owned or managed by federal entities, and activities by an applicant that is a federal entity.

(2) EPA may terminate waiver of the review of categories of permit applications outlined in this Agreement pursuant to 40 C.F.R. § 233.51(a).

(3) EPA may request review of specific permit actions within 30 days of receipt by sending DEP written notice.

(4) DEP may, at the agency's discretion, request EPA review of specific projects that would otherwise not require EPA oversight.

C. Coordination with Other States and Tribes

(1) Whenever DEP receives an application for a permit that has a reasonable potential to impact the waters of the states of Alabama or Georgia, or waters within "Indian country," as that term is defined at 18 U.S.C. § 1151, DEP shall transmit a copy of the public notice to the potentially impacted state or federally recognized tribe (per the list published annually by the Secretary of the Interior pursuant to § 104 of the Federally Recognized Indian

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Tribe List Act of 1994 (Pub. L. No. 103-454, 108 Stat. 4791, 4792)) and to EPA. EPA shall assist in the identification of regulatory contacts in these other states and tribes.

a. The potentially impacted state or tribe shall provide comments to DEP within 30 days of the date of the public notice regarding the potential impact of the proposed project.

b. DEP shall consider the comments and concerns of the potentially impacted state or tribe when making a decision on the application and shall provide a copy of the final permit decision to a state or tribe that provides comments. If DEP does not accept these recommendations, DEP shall notify the Regional Administrator prior to permit issuance in writing of his/her failure to accept the recommendations together with reasons for so doing. The Regional Administrator shall then have the time provided for in 40 C.F.R. § 233.50(d) to comment upon, object to, or make recommendations with respect to a permit application.

c. Pursuant to 40 C.F.R. § 233.50, EPA may object to the issuance of a State 404 permit by DEP if it finds that the proposed project would fail to comply with the 404(b)(1) Guidelines due to the impact on waters of another state or waters within "Indian country," as that term is defined at 18 U.S.C. § 1151. In this instance, DEP shall proceed as specified in Section 404(j) of the CWA and Section D of this Agreement.

(2) Both EPA and DEP agree that this Agreement does not waive any legal claims, rights, or positions that the United States or DEP have over what constitutes "Indian country," as statutorily defined at 18 U.S.C. 1151.

D. Permit Processing and Federal Comment

(1) DEP shall promptly submit public notices, via weblink, providing EPA access to complete permit applications in the categories identified in Section II.B.(1) of this Agreement for review and coordination in accordance with Section 404(j) of the CWA and 40 C.F.R. Part 233, Subpart F.

(2) Material submitted to EPA, which may be forwarded by electronic means, shall include:

a. A copy of the public notice for any complete permit application received by DEP, except those for which permit review has been waived under this Agreement. Any supplemental or additional materials submitted to DEP, including but not limited to information on project alternatives, environmental assessment, or mitigation plans, shall also be forwarded promptly to EPA. Whenever requested by EPA, DEP shall supply copies of public notices for permit applications, or supplemental materials, even for projects for which permit review has been waived.

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b. A copy of each draft general permit whenever the State intends to issue a general permit that affects State assumed waters, including minor project categories defined under State law.

c. For permit applications that are subject to federal review, and for draft general permits, notification of when DEP takes a significant permit action.

d. A copy of every permit issued and a copy of any denial of a permit.

e. A copy of DEP's response to comments or recommendations made by another state or tribe if DEP does not accept such recommendations.

(3) EPA shall, not later than 30 calendar days from the date of receipt of a permit application or draft general permit from DEP, notify DEP if EPA does not intend to review the permit application or draft general permit.

(4) EPA shall coordinate review with the Corps, USFWS, and National Marine Fisheries Service (NMFS), and submit comments to DEP in accordance with the requirements of, and in the timeframes specified in, Section 404(j) of the CWA and its implementing regulations. However, EPA shall make every attempt to provide comments or objections within the timeframe specified in Florida law, to the extent that the timeframe does not conflict with federal law. DEP shall notify EPA of DEP's decision deadlines for each application or draft general permit.

(5) DEP shall respond to any such comments or objections received from EPA in the manner specified in Section 404(j) of the CWA and 40 C.F.R. Part 233. DEP shall provide a copy of a draft permit that satisfies the Regional Administrator's objection or requirement for a permit condition, or DEP shall provide its intent to deny the permit application to EPA as provided by Section 404(j) of the CWA and 40 C.F.R. Part 233.

(6) If DEP does not resolve an objection or requirement for a permit condition, and DEP does not deny a State Environmental Resource Permit (ERP), then the State ERP shall not provide authorization under Section 404 of the CWA, and the applicant shall be notified of this fact in writing.

(7) DEP shall contact EPA, the Corps, USFWS, and NMFS to solicit comments pertaining to issuance of an emergency permit as soon as possible after the emergency permit is requested, but no later than the day of issuance of the emergency permit. DEP shall send a copy of the written emergency permit to the EPA.

E. Coordination of Mitigation Banking

(1) DEP and EPA agree that mitigation banking projects shall be subject to review by an Interagency Review Team (IRT). The IRT shall be chaired by DEP, or its delegate,

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except where the mitigation bank, including any part of the proposed service area, is in an area where the Corps retains Section 404 jurisdiction, in which case DEP may invite the Corps as co-chair of the IRT.

(2) EPA may participate on the IRT at EPA's discretion.

III. COMPLIANCE MONITORING AND ENFORCEMENT

A. EPA will continue to directly implement its authority for the 404 Permit Program in "Indian country," as that term is defined at 18 U.S.C. § 1151, including conducting necessary compliance monitoring and enforcement actions for activities and sites located on Indian country.

B. EPA will retain responsibility for any pending enforcement actions undertaken by EPA prior to the date of EPA's approval of the State 404 Permit Program. DEP shall have primary responsibility for compliance monitoring and enforcement of the State 404 Permit Program. DEP will take timely and appropriate enforcement action against persons in violation of permit conditions of permits issued pursuant to the State 404 Permit Program and against persons conducting unauthorized discharges of dredged or fill material into waters of the United States over which DEP has assumed jurisdiction under the State 404 Permit Program.

C. DEP shall notify EPA of the status of compliance and enforcement actions through submission of an annual report described in Section IV.B. of this Agreement.

D. EPA may request the opportunity to review any compliance and enforcement record. DEP shall provide to EPA a copy of the file when requested.

E. DEP shall coordinate with EPA when a violation is identified that is within the permit and discharge categories in Section II.B.(1) of this Agreement. DEP shall provide a summary of the unauthorized activity and inform EPA of the status of the file as enforcement actions are taken, including any decision to accept an after-the-fact permit application. In the event that an after-the-fact permit application is accepted, DEP shall follow the permit review procedures set forth in this Agreement, the CWA and its implementing regulations.

F. DEP may refer information regarding possible or alleged violations to EPA and may request that EPA consider initiating a parallel or independent enforcement action. Such circumstances include, but are not limited to:

(1) Violations that have or have a reasonable potential to have direct impacts on waters of a tribe or another state;

(2) Major or repeat offenses; and

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(3) Violations that have, or will potentially have, major adverse resource impacts or impacts on special federal resources, such as federally listed threatened or endangered species.

G. EPA may initiate independent or parallel enforcement action in accordance with Sections 309 and 404(n) of the CWA.

H. If DEP proposes to resolve a compliance or enforcement issue through a consent agreement (administrative or judicial), and where the impact of the violation is such that federal review would not be waived as described in Section II.B.(1) of this Agreement, DEP shall provide EPA 30 days to review and comment on the draft consent agreement prior to signature. If EPA objects to a provision of the draft consent agreement, the executed consent agreement implementing that provision shall not constitute authorization under Section 404 of the CWA. DEP shall provide a copy of the executed consent agreement and any after-the-fact State 404 permits to EPA.

I. DEP shall provide for public participation in the State 404 Permit Program enforcement process pursuant to 40 C.F.R. § 233.41(e)(2).

J. Prior to proceeding with federal enforcement action against a possible or alleged State 404 Permit Program permit violator or unauthorized discharge, and for purposes of providing notice only, EPA shall inform DEP that federal enforcement action is to be initiated. This notification shall be made to the Secretary of DEP or his/her designee. It is expected that preliminary staff discussions will take place between EPA and DEP representatives before initiation of federal enforcement action.

K. When a violation is identified that may affect the waters of tribes and/or other states, DEP shall provide a summary of the violation and inform the tribes and/or other states of the status of the file as enforcement actions are taken, including any decision to accept an after-the-fact permit application.

IV. PROGRAM MAINTENANCE

A. Program Review and Oversight

EPA may, in accordance with Section 404(i) of the CWA, conduct periodic evaluations of the State 404 Permit Program.

B. Reporting

(1) DEP shall submit to EPA an annual report evaluating Florida's administration of the State 404 Permit Program, identifying problems the State has encountered in administration of its program, and recommendations for resolving these problems. The report shall include:

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a. An assessment of the cumulative impact of the State 404 Permit Program on the integrity of state regulated waters.

b. A summary of the number and nature of individual and general permits issued, modified, or denied during the year, and permits not yet processed.

c. A summary of the number and nature of violations or suspected violations identified and the nature of enforcement actions taken.

d. An estimate of the extent of total impact to state regulated waters from individual and general permits.

e. A summary of any significant changes in program operations or procedures.

f. Other information of particular concern or interest.

(2) Within 60 days of receipt of the draft annual report, EPA will complete review of the report and transmit comments, questions, or requests for additional information to DEP.

(3) DEP may modify the report to address the comments of EPA. The final report shall be made available to the public.

(4) The period for the annual report shall be the State fiscal year ending June 30th, and the report shall be submitted to EPA by September 30th of each year.

C. Modifications

(1) DEP shall promptly notify EPA of any proposed or actual change to DEP's statutory or regulatory authority or any other modifications which are significant to administration of the State 404 Permit Program, including, but not limited to:

a. An action by the State Legislature to strike down or limit State authorities, or that contemplates cessation of the administration of the Section 404 Permit Program by the State of Florida.

b. An action by a State court striking down or limiting State authorities.

c. Revision of the State's legal authorities needed to maintain consistency with changes to applicable federal regulations.

d. Proposed transfer of the program in whole or in part to another State agency.

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(2) In response to notification of a change in the State 404 Permit Program in accordance with paragraph (1), EPA shall inform DEP in writing of specific concerns regarding State authority and shall provide the State an opportunity to make any necessary program corrections in accordance with 40 C.F.R. § 233.16(d).

(3) Whenever EPA has reason to believe that circumstances have changed with respect to the State 404 Permit Program, EPA may request, and DEP shall provide, documentation or information as necessary to evaluate State 404 Permit Program compliance with the requirements of the CWA and its implementing regulations.

(4) If DEP determines that it will no longer administer the State 404 Permit Program, DEP shall provide notice to EPA and the Corps not less than 180 days prior to cessation of program operation, and shall arrange for transfer of all program materials to the Corps.

(5) EPA shall promptly notify DEP of any changes required to the State 404 Permit Program due to a modification to any applicable federal statute or regulation.

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V. SIGNATURES

Florida Department of Environmental Protection

Date: _____ By: _____

United States Environmental Protection Agency Region IV

Date: _____ By: _____

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