UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW
ATLANTA, GEORGIA 30303-3104

September 2, 2020

The Honorable Stephanie Bryan
Chair of the Poarch Band of Creek Indians
5811 Jack Springs Road
Atmore, Alabama 36502

Subject: Consultation Under the National Historic Preservation Act Regarding the State of Florida's Request to Assume Administration of a CWA Section 404 Program

Dear Chair Bryan:

On August 20, 2020, the U.S. Environmental Protection Agency, Region 4 received a request from the State of Florida to assume the administration of a Clean Water Act Section 404 program (CWA Section 404) for regulating discharges of dredged or fill material into waters of the United States. Pursuant to the CWA Section 404 and its implementing regulations (40 C.F.R. Part 233), the EPA is the federal agency charged with approving or denying Florida's request. The EPA has 120 days within which to complete this action (i.e., by December 17, 2020). The request does not seek program assumption over any discharges into waters located in Indian country.[1] The EPA would like to initiate consultation with the Poarch Band of Creek Indians under Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended, on our Action on the State's request to assume a CWA Section 404 program.

The NHPA establishes historic preservation as a federal agency policy and provides for the identification and protection of historic properties. Section 106 of the NHPA requires federal agencies to take into account the effects of their actions (known as "Federal undertakings" in the statute and NHPA regulations) on historic properties that are listed or eligible for listing on the National Register of Historic Places and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The NHPA also provides important roles and consultation opportunities for Indian tribes in connection with federal undertakings that may affect historic properties of religious and cultural significance to tribes, even if located outside of Indian country. See NHPA Section 101(d)(6)(B); 36 C.F.R. § 800.2(c)(2)(ii).

[1] Title 18 U.S.C. § 1151 defines "Indian country" as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Under this definition, Indian reservations include lands held in trust by the United States for an Indian tribe even if such lands have not been formally designated as an Indian reservation.

"Federal undertaking" is defined in the ACHP's implementing regulations (36 C.F.R. § 800.16(y)) to mean "a project, activity, or program funded in whole or part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." The Federal agency must determine if its action is an undertaking, and if so, whether the undertaking has the potential to cause effects to historic properties. See 36 C.F.R. § 800.3(a). Historic properties are defined in the NHPA regulations to mean prehistoric or historic districts, sites, buildings, structures, or objects that are included in, or are eligible for inclusion in, the National Register of Historic Places. See 36 C.F.R. § 800.16(l).

The approval of the State of Florida's request to assume the CWA Section 404 program is a federal undertaking with the potential to cause effects to historic properties. In accordance with 36 C.F.R. § 800.3(f)(2), the EPA invites you or your designated consultation representative(s) to participate in the Section 106 consultation process prior to a final Agency action on Florida's request.

The EPA will publish notice in the Federal Register of the proposed action for public comment in the near future. You are receiving this information before it is distributed to the public in order to invite your participation in the NHPA consultation process. The EPA is committed to government-to-government consultation with the Poarch Band of Creek Indians on this federal undertaking in accordance with the NHPA and its regulations. Your insights and knowledge would be helpful in this consultation effort. The Poarch Band of Creek Indians will also have the opportunity to submit comments throughout the public comment period in addition to this opportunity for consultation.

At this link https://usepa.sharepoint.com/:f:/r/sites/R4/r4_wetlands_stream_regulatory_section/Shared%20Documents/Florida%20Assumption%20EPA%20Internal/Shared%20Package%20Folder?csf=1&web=1 is a copy of Florida's submittal, which includes the following components: a letter from Governor Ron DeSantis requesting program approval; a complete program description; Florida DEP General Counsel Justin G. Wolfe's statement; a Memorandum of Agreement with the EPA Regional Administrator; a Memorandum of Agreement with the Secretary of the Army; and copies of all applicable Florida statutes and regulations, including those governing applicable Florida administrative procedures. This information will also be available to the public upon publication of the Federal Register notice referenced above. The timeline for the consultation process begins with this letter. Please let us know within 30 days of receiving this letter if you wish to consult on this undertaking. Due to COVID-19, the consultation meetings will be held by phone or through virtual meeting platforms.

Please note that under separate cover, the EPA is also extending the opportunity for consultation and coordination with your office regarding the EPA's action to approve or disapprove Florida's request to assume administration of a CWA Section 404 program in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes*[2] and the *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights.*[3]

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[2] https://www.epa.gov/tribal/forms/consultation-and-coordination-tribes.

[3] https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes-guidance-discussing-tribal-treaty. Region 4 recognizes that, although the Tribe may not have any treaties currently in effect, the Tribe may have other sources of reserved rights that carry the force of federal law.

We look forward to consulting with you or your designated consultation representative(s) under the NHPA on Florida's request to assume a CWA Section 404 program. If you have any questions regarding this matter, please contact me at (404) 562-9345, or have a member of your staff contact Mr. Kelly Laycock at (404) 562-9132, or laycock.kelly@epa.gov.

Sincerely,

Jeaneanne M. Gettle, Director
Water Division

cc: Larry Haikey, Tribal Historic Preservation Officer
Poarch Band of Creek Indians

Kristi Weatherford, Environmental Director
Poarch Band of Creek Indians