EPA'S AUTHORITY TO RESOLVE THE "INCIDENTAL TAKE" BARRIER TO STATE 404 ASSUMPTION

The Administration should be applauded for striving to make Section 404 assumption a reality for more states. A significant remaining barrier to 404 assumption, which EPA can and should resolve, arises from the "incidental take" provisions of the Endangered Species Act (ESA). Unique among EPA delegation statutes, Clean Water Act (CWA) Section 404 gives EPA discretion to consider the protection of listed species – and hence, engage in ESA Section 7 consultation – when initially deciding whether to approve state assumption. Consultation here allows for take coverage for state permittees and greatly improves the utility of 404 assumptions especially in states with many listed species. This approach is supported by statutory text, legislative history, and policy, and will not adversely impact EPA obligations under other delegation statutes.

Why is "incidental take" coverage a serious obstacle to 404 assumption?
Where the U.S. Army Corps of Engineers administers the 404 program, a streamlined process under ESA Section 7 allows for incidental take of listed species. However, thus far, where a state administers the 404 program, permittees must avoid entirely adverse impacts to listed species or otherwise seek an Incidental Take Permit from the USFWS and/or NMFS ("Services") under ESA Section 10. This Section 10 process, with the requirement to prepare a Habitat Conservation Plan, can take years to complete and usually at much higher cost.

Why is this especially critical to Florida's plans for 404 assumption?
This ESA-concern is a serious hurdle to establishing an effective and efficient 404 program in Florida, where 135 ESA-listed species occur (the third most of any state). It is estimated that approximately ten percent of 404 permits issued in Florida require some form of incidental take coverage. This includes many large real estate, mining, agriculture, and utility industry projects with significant economic benefits to Florida and its citizens. Thus, unless a solution is found for this issue, large-scale projects in Florida will almost always require extensive federal permitting under the ESA notwithstanding 404 assumption. Other states have also begun to raise this ESA-related hurdle to assumption.[1]

What is the best solution for addressing the "incidental take" obstacle to 404 assumption?
EPA should engage in a *one-time* ESA Section 7 programmatic consultation with the Services in connection with the *initial* review of a state's 404 assumption application. This would allow the Services to issue a programmatic Biological Opinion ("BiOp") and a programmatic incidental take statement ("ITS"). The BiOp with ITS would identify procedural requirements for state 404 permits. These would support the Services' determination that assumption would not result in jeopardy to any listed species and would bring that state's 404 permits within Section 7's exemption from take liability. This streamlined permitting process would reduce costs and duplication of effort by state and federal authorities.

As a general legal matter, when is ESA Section 7 triggered?
ESA consultation is triggered when an "agency has discretion in administering the [statute] to consider the protection of endangered or threatened species as an end."[2] EPA lacks this discretion when approving state delegations under CWA Section 402.[3] No court has ruled if 404 assumption triggers consultation.

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[1] *See* Letter from Western Governors Association to David Ross, et al. (Oct. 10, 2018) ("[ESA] was identified as an area of potential complication in states' assumption of Section 404 permitting authority…").

[2] *Florida Key Dey v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008) (interpreting 16 U.S.C. 1536(a)(2)).

[3] *NAHB v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007) ("Nothing in [402(b)] authorizes the EPA to consider the protection of [listed] species as an end in itself when evaluating a [402] transfer application").

Does the statutory text support ESA consultation when initially approving state 404 assumption?
Yes. Unlike Section 402, the text of Section 404 gives EPA discretion to consider protection of listed species. In fact, Section 404(h)(1) requires EPA, in deciding whether to approve state assumption, to determine whether the state has authority "[t]o issue permits which … assure compliance with … the [Section 404(b)(1)] guidelines…" In turn, the Section 404(b)(1) guidelines expressly prohibit state permits that "jeopardize the continued existence" of listed species or are likely to result in "the destruction or adverse modification of [critical] habitat." 40 C.F.R. § 230.10(b)(3). And, under Section 404(g)-(h), EPA must share assumption applications with USFWS and "tak[e] into account" any USFWS comments.

Is this view consistent with the legislative history of Section 404?
Yes. In particular, the Senate Report accompanying the 1977 Amendments shows that the drafters understood these provisions to "preserve[] the Administrator's *discretion* in addressing the concerns of [USFWS], yet affords them reasonable and early participation which can both strengthen the State program and avoid delays in implementation..." S. Rep. 95-370, at 78 (1977) (emphasis added).

Did EPA originally agree that approval of state 404 assumption triggered Section 7?
Yes. EPA engaged in Section 7 consultation for New Jersey's assumption of the 404 program. After informal consultation and based on an agreement between EPA, the USFWS, and New Jersey, USFWS concurred that New Jersey's assumption of the 404 program was not likely to adversely affect federally-listed species (and thus, USFWS did not issue a programmatic BiOp or ITS).

Was the "Silva Letter" – issued by the Obama Administration in 2010 – correct?
No. The brief letter signed by former Associate Administrator Silva in December 2010 resulted from a rushed review, ignored the actual text and legislative history of Section 404, and misapplied Supreme Court precedent. The Silva Letter had the effect – whether intended or not – of creating another serious hurdle to 404 assumption especially in states with many listed species.

How would consultation work in actual practice?
EPA would conduct a *programmatic* consultation with the Services as to its threshold decision whether to approve assumption. The Services' regulations—including the existing rules and recently proposed changes—allow for programmatic consultation in these contexts. In response, the Services could issue a BiOp addressing whether assumption would jeopardize listed species, along with an ITS covering future state 404 permits. To help facilitate the process, the state agency could submit a Biological Assessment. 50 C.F.R. § 402.08. Moreover, EPA and any state may agree to extend the timeframe for 404 assumption review, which can be used to accommodate Section 7 consultation. *See* 50 C.F.R. § 402.14(e). A recent example – EPA's Cooling Water Intake Structure Rule – shows how programmatic consultation (leading to a BiOp with ITS) has been used in a context with similar dynamics.

How long would it take EPA to complete consultation on a state assumption application?
With active support by the state and EPA, programmatic consultation and final approval of 404 assumption could be completed in less than a year.

Will this approach adversely impact other EPA statutory authorities involving state delegations?
No. Unlike Section 404, the approval criteria in the following state delegation/primacy statutes do not give EPA discretion to consider impacts to listed species at the time of approval: CAA Sections 111 and 112, SDWA Sections 1413 (PWS state primacy) and 1425 (UIC state primacy), RCRA Section 3006(b), and FIFRA Section 26. Nor do these statutes require EPA to engage with the Services.

The enclosed white paper provides a more comprehensive legal analysis concerning EPA's authority to undertake this approach.