Message

**From**: Kupchan, Simma [Kupchan.Simma@epa.gov]
**Sent**: 7/20/2020 5:17:10 PM
**To**: Wehling, Carrie [Wehling.Carrie@epa.gov]; Wade, Alexis [Wade.Alexis@epa.gov]; Neugeboren, Steven [Neugeboren.Steven@epa.gov]
**CC**: Eisenberg, Mindy [Eisenberg.Mindy@epa.gov]; Marshall, Tom [marshall.tom@epa.gov]
**Subject**: RE: ESA FRN Comment Summary

I agree with Carrie's concerns. To the extent they affect Dave's thinking, Florida would probably want to know that before they submit a package, which could be imminent. We can discuss with David tomorrow.

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**From:** Wehling, Carrie <Wehling.Carrie@epa.gov>
**Sent:** Friday, July 17, 2020 3:24 PM
**To:** Wade, Alexis <Wade.Alexis@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Neugeboren, Steven <Neugeboren.Steven@epa.gov>
**Cc:** Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Marshall, Tom <marshall.tom@epa.gov>
**Subject:** FW: ESA FRN Comment Summary

**Ex. 5 Deliberative Process (DP)**

I am out next week but I think Alexis is going to be setting up a time with David to discuss the ESA comments next week so perhaps you all can consider raising this process issue with him then.
Thanks.
Carrie

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**From:** Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>
**Sent:** Friday, July 17, 2020 2:41 PM
**To:** Aguirre, Janita <Aguirre.Janita@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>; Wade, Alexis <Wade.Alexis@epa.gov>; Kupchan, Simma <Kupchan.Simma@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>
**Subject:** FW: ESA FRN Comment Summary

FYI

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**From:** McDavit, Michael W. <Mcdavit.Michael@epa.gov>
**Sent:** Friday, July 17, 2020 2:39 PM
**To:** Ross, David P <ross.davidp@epa.gov>; Fotouhi, David <Fotouhi.David@epa.gov>; Goodin, John <Goodin.John@epa.gov>; Walker, Mary <walker.mary@epa.gov>
**Cc:** Eisenberg, Mindy <Eisenberg.Mindy@epa.gov>; Hurld, Kathy <Hurld.Kathy@epa.gov>; Frazer, Brian <Frazer.Brian@epa.gov>; Barnhart, Megan <barnhart.megan@epa.gov>; Beck, Whitney <beck.whitney@epa.gov>; Gettle, Jeaneanne <Gettle.Jeaneanne@epa.gov>
**Subject:** ESA FRN Comment Summary

Hi Dave, Mary, and David,

Attached is the summary (Word doc) of the comments received on the ESA FRN.

I have also attached the comment letters that asserted a need for a permit by permit section 10 process (or section 7 process or some other implied step), regardless of a section 7 programmatic consultation. Below is a short summary of most of these positions:

- The **American Petroleum institute** and **Defenders of Wildlife** specifically point to section 10 as more appropriate for project specific consultation and ITPs. **National Wildlife Federation** states that process is used in New Jersey and is appropriate.

- **National Association of Homebuilders** discusses Section 10 and expresses that "when states are responsible for issuing dredge and fill permits, the federal link that provides access to ESA Section 7 consultation ceases to exist. As a result, permittees whose authorized activities may result in the "take" of a federally-listed species must complete the onerous ESA Section 10 permitting process." However, they also note that the current procedures governing EPA's oversight of the wetlands permits issued by states that have assumed the program provide a vehicle for addressing incidental take- "the CWA Section 404(b)(1) Guidelines already include a pathway to ESA Section 7 consultation for permit applicants in states that are authorized to run the program. NAHB strongly encourages EPA to retain its current position and incorporate it into the Memoranda of Agreement (MOA) of all states seeking assumption of the CWA Section 404 program."

- **SELC** stated: A state "may not impose less stringent requirements for any purpose" in implementing its own 404 program, 40 C.F.R. § 233.1(d), which includes the substantive duty of ensuring that no permits are issued that would jeopardize the continued existence of listed species or result in likely destruction or adverse modification of critical habitat, id. C.F.R. § 230.10(b)(3). States or tribes would be responsible for completing these analyses and meeting these requirements.

- **Earth Justice** stated: Additionally, programmatic consultation over state delegation of a CWA § 404 program alone is not enough. EPA must first consult with the Services and to determine whether a

state can fulfill the requirements of the CWA and its implementing regulations, including § 404(b)(1) guidelines and their no jeopardy mandate. 40 C.F.R. §§ 233.1(a), 233.15(g). Overarching programmatic consultation does not relieve the state of its responsibility to determine at the site-specific permit level whether there will be no jeopardy to listed species prior to the issuance of permits for the discharge of dredged or fill material pursuant to the CWA's 404(b)(1) guidelines.

- **Western Urban Water Coalition** (WUWC), which filed an amicus brief in the Home Builders case, states that "Although the Court in Home Builders addressed a different provision under the CWA – Section 402 – the case has informed EPA's interpretation of CWA Section 404, and for good reason. Like Section 402, the Section 404 language related to state dredged and fill programs is set forth in the clearest of mandatory terms: EPA "shall approve" the state's application to transfer the permitting program if the state has met the criteria set forth in § 404(h)(1); it "shall . . . notify" the state if corrective action is needed; and, if corrective action is not taken, EPA "shall . . . withdraw approval of such program." 33 U.S.C. § 1344(h), (i). Section 404's list of statutory criteria is exclusive and, like the list under Section 402, the criteria "all relate to whether the state agency that will be responsible for permitting has the requisite authority under state law to administer" the dredged and fill program."

Let us know if you have questions or need more information.

Have a safe weekend,
**Mike**

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