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 and upon signature of both parties.

(5) 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, EPA withdraws authorization pursuant to 40 C.F.R. § 233.53(b), or DEP voluntarily transfers the program 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) ~~Subject to any applicable privileges, Aa~~Any information obtained or used in the administration of the State 404 Permit Program shall be available to EPA and ~~without restriction.~~ EPA will manage this information in accordance with any rights and privileges under applicable laws and regulations. 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.

Commented [A1]: We are not aware of any privileges that would prohibit FL from sharing permit information with EPA, and the regulations specifically require effluent data and other relevant data to be shared. We recommend instead clarifying that EPA will handle the information in accordance with relevant privileges.

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 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.

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(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~~ conflict 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~~EPA shall review the State 404 Permit Program ~~shall be~~ established by DEP ~~and shall be reviewed annually by EPA~~consistent with the program reporting requirements of 40 C.F.R. § 233.52. The State shall also allow EPA routinely to review State records, reports, and files relevant to the administration and enforcement of the approved program consistent with 40 C.F.R. § 233.13(b). This does not preclude EPA from initiating independent or parallel enforcement action in accordance with Sections 309 and 404(n) of the CWA.

Commented [A2]: Added language to make consistent with 40 CFR 233.13(b).

(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

(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).

~~(2)~~(3) The State shall supply the Regional Administrator with copies of public notices for permit applications for which permit review has been waived whenever requested by EPA, pursuant to 40 C.F.R. § 233.50(a)(1).

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

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

~~(4)~~(5) ~~For~~When DEP receives a ~~DEP~~new permit application~~s seeking renewal~~for continued work on a long term project ~~of~~ for which a permit ~~a previously issued permit~~with a long term planning document had been previously issued, pursuant to [cite Florida rule when finalized],

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~~EPA waives the requirements of Section 404(j) and the regulations adopted thereunder except if~~ DEP will identifi~~es~~y fundamentally new factual information included in the ~~renewal application~~new permit application. In such instances, EPA's review shall be limited to matters related to such new factual information.

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 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~~ DEP's decision not ~~failure~~ to accept the recommendations together with ~~reasons for so doing~~supporting rationale. 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.

Commented [A3]: FYI, Region 4 and FDEP staff have been working intensely on a solution to the five year limit problem to put in their program description or program rules. The draft handbook circulated earlier this week provides, for example:

(a)Permitting

The applicant shall apply for one phase at a time. The most up-to-date version of the long-term planning document from Step 2 shall be included with the application for each phase, with a summary of any changes made to the document since the application for the last phase was submitted. The applicant should apply for the next phase one year before the permit for the previous phase expires or is projected to be completed – whichever is sooner. This will give the agencies time to process the application for the next phase, including putting the project out on public notice and potential federal agency review. Allowing one year for processing will help prevent project delays and will help provide a seamless transition between phases.

Note: The long-term conceptual planning method is intended to provide the applicant and the Agency with information that can assist with successful permitting of a project. Agency review of a long-term conceptual planning document does not constitute pre-approval of subsequent phases of the project. There is no guarantee that a permit will be issued for any future phase of the project; each phase must be public noticed and is subject to potential federal agency review.

I have edited this language to try and make it consistent with the handbook. For example, the handbook specifically states that permit renewals are not permitted in the 404 program, so I struck the word "renewal." The language in the MOA still goes further than the handbook language, e.g., by limiting EPA review (note slight inconsistency with highlighted language above) so we will need to make sure everyone is on the same page with our draft MOA language.

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(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.

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 pursuant to 40 C.F.R. § 233.50(a)(3).

Commented [A4]: Should we clarify what this means? "significant permit action, such as public notice of a proposed approval," etc?

Commented [A5R4]: Following discussion, we thought we would leave this term general for now, and defer to the state as to whether to provide examples of significant actions.

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.

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(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.

~~(7)~~(8) The State may administratively continue expiring Corps-issued or State-issued permits until the effective date of a new permit consistent with 40 C.F.R. 233.38.

E. Coordination Concerning Discharges with Reasonable Potential for Affecting Endangered or Threatened Species

(1) Consistent with the 404(b)(1) Guidelines regulations, no discharge of dredged or fill material shall be permitted if the discharge jeopardizes the continued existence of endangered or threatened species or results in the likelihood of destruction or adverse modification of designated critical habitat. 40 CFR 230.10(b)(3). In addition, the permitting authority must specify whether the proposed disposal sites for the discharge of dredged or fill material comply with the requirements of the 404(b)(1) Guidelines (including the prohibition against jeopardy found in 230.10(b)(3)). 40 CFR 230.12. If there does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the 404(b)(1) Guidelines, then the permitting authority must specify that the discharge fails to comply with the 404(b)(1) Guidelines. 40 CFR 230.12(a)(3)(iv).

~~(1)~~

~~(2)~~ DEP may share the application documentation with Florida Fish & Wildlife Conservation Commission (FWC) at any time, including~~If,~~ prior to providing public notice for a complete permit application and submitting such notice to EPA in accordance with 40 CFR 233.50~~(c~~1(b)(2~~1~~). ~~DEP's initial review of the permit application indicates that proposed discharges may have reasonable potential to affect a threatened or endangered species, DEP may share the application documentation with Florida Fish & Wildlife Conservation Commission (FWC).~~ DEP and FWC may coordinate to assess the potential effects on protected species.

(2)

EPA and DEP intend to engage in negotiations to establish a separate agreement with USFWS and NMFS that would guide the approach to addressing proposed discharges that have a reasonable potential to affect listed species. This separate agreement would complement the processes established in this Agreement and would not displace any provisions in this Agreement.

(3)

~~(3)~~

~~a. If during the early pre-application review of the proposed project, where threatened or endangered species are identified as potentially present on the project site, the applicant, after discussions with DEP, takes steps to avoid and/or mitigate for any endangered or threatened species such that reasonable potential to affect an endangered or threatened species no longer exists, federal review will not be triggered under 40 CFR 233.51(b)(2). The proposed discharge(s) may still fall into another category identified in subsection II.B.(1) of this Agreement.~~

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~~b. If during the early review of a proposed project, DEP takes significant action related to the consideration of a pending permit application where endangered or threatened species are identified as potentially present on the project site, DEP shall promptly transmit that notice of action to EPA. Consistent with 40 CFR §233.50, if EPA indicates it plans to object to the issuance of the potential permit and identifies the steps that DEP must take to address those objections, DEP may not issue the permit and must provide EPA the information necessary to address the objection. If DEP neither satisfies EPA's objections nor denies the permit, DEP shall send a permit application package to the Army Corps of Engineers and the Secretary of the Army shall process the permit application.~~

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(4)

~~3.~~ If DEP determines that the proposed discharge has reasonable potential to affect protected species, then the proposed discharge is not eligible for EPA waiver of federal review. 40 CFR 233.51(b)(2). DEP will transmit the public notice for the complete permit application and other required documents to EPA for review pursuant to 40 CFR 233.50(a). DEP will also include in the transmission 1) a description of DEP's findings, including any findings as to whether DEP believes that any effects to listed species or habitat comply with the 404(b)(1) Guidelines; 2) any supporting analysis or documentation from DEP and/or FWC; 3) any relevant information developed or obtained during coordination with the state or federal wildlife agencies; 4) any recommendations to EPA regarding whether, in the State's judgment, effects to listed species or habitat should be addressed through the procedures under section 7(a)(2) of the Endangered Species Act that would apply in the event, pursuant to the procedures described below, the permit application were to be transferred to the Army Corps of Engineers.

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(5)~~4.~~ EPA will review the public notice for the complete permit application pursuant to 40 CFR 233.50. EPA will share the public notice and other information needed for the review with the Corps, NMFS, & USFWS for federal review and they will provide any comments to EPA pursuant to the procedures in 40 CFR 233.50(b).

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a. The FWS and NMFS shall notify EPA within 15 days of receipt of the public notice and other information needed for the USFWS and NMFS review if they wish to comment on the public notice or draft permit. The USFWS and NMFS must submit their evaluation and comments to the Regional Administrator and the State within 50 days of receipt of the public notice and other information.

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b. If the discharges may affect a Federally-listed species or designated critical habitat, but if, after coordination with FWS and/or NMFS and/or Florida FWC, DEP finds the discharges are not likely to

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adversely affect listed species or designated critical habitat (e.g., the effects are beneficial, insignificant, or discountable), and the USFWS and/or NMFS agrees with that finding, the USFWS and/or NMFS will provide a written concurrence with any comments on the permit application. The letter of concurrence from the USFWS and/or NMFS will state that the proposed discharges are not likely to adversely affect listed species or designated critical habitat and therefore the discharges are not expected to result in take of listed species as long as the permittee is in compliance with the permit conditions. The letter of concurrence will be attached to the final permit.

c. If the USFWS and/or NMFS finds that the discharges are likely to adversely affect listed species or designated critical habitat, but those effects would be eliminated through remedial measures (e.g. project modifications and/or permit conditions) recommended by the Service, the Service will provide those remedial measures to the State and EPA in Services' comments on the permit application. To the extent practicable, the Services' recommended remedial measures will incorporate previously established best management practices (BMPs) or Standard Local Operating Procedures for Endangered Species (SLOPES) where those BMPs or SLOPES will eliminate or mitigate adverse effects on listed species or designated critical habitat from the discharges.

d. If the USFWS and/or NMFS finds that the discharges are likely to adversely affect listed species or designated critical habitat, and the Service determines those adverse effects cannot be eliminated by remedial measures, the USFWS and/or NMFS will provide an explanation of this finding in their comments on the permit application. EPA will consider the comments and recommended remedial measures from USFWS and/or NMFS when reviewing the permit pursuant to 40 CFR 233.50(e)(2) and considering whether to object to the permit.

e. If the State disagrees with the recommended remedial measures from USFWS and/or NMFS, the State will provide a written response to the USFWS, NMFS, and EPA within 20 days of receipt of the Service comments explaining the State's position and providing any supporting information or documentation. EPA will consider the USFWS' and/or NMFS' comments and recommended remedial measures when reviewing the permit pursuant to 40 CFR 233.50(e)(2) (see section J below) and when considering whether to object to the permit.

f. At any time, if there is reason to believe the discharges may affect a Federally-listed species or designated critical habitat, the applicant may initiate ESA § 10 procedures with the Service(s) and seek an incidental take permit.

~~If the discharges may affect a threatened or endangered species, but if, after coordination with FWS and/or Florida FWC, DEP believes the discharges are not likely to adversely affect listed species (e.g., the effects are beneficial, insignificant, or discountable), and the Service agrees with that finding, the Service may provide concurrence in writing and no further coordination would be required.~~

~~b. Alternatively, if there is reason to believe the discharges may likely affect an endangered or threatened species, the applicant may initiate ESA § 10 procedures with the Service and seek an incidental take permit.~~

(6)~~5.~~ After receipt of any comments from the Corps, NMFS, & USFWS, EPA will decide whether to comment, object, or require permit conditions pursuant to 40 CFR 233.50(d). Under 233.50(d), if the [HYPERLINK "https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=08daa2db2e632a93f539dd8ae386bca8&term_occur=9&term_src=Title:40:Chapter:I:Subchapter:H:Part:233:Subpart:F:233.50" \o "Regional Administrator"] intends to comment upon, object to, or make recommendations with respect to a permit application, draft general permit, or the Director's failure to accept the recommendations of an affected [HYPERLINK "https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=2dd85978b57d4ab9346031870a2650c5&term_occur=8&term_src=Title:40:Chapter:I:Subchapter:H:Part:233:Subpart:F:233.50" \o "State"] submitted pursuant to [HYPERLINK "https://www.law.cornell.edu/cfr/text/40/233.31" \l "a" \o "§ 233.31(a)"], he shall notify the Director of his intent within 30 days of receipt. If the Director has been so notified, the permit shall not be issued until after the receipt of such comments or 90 days of the [HYPERLINK "https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=08daa2db2e632a93f539dd8ae386bca8&term_occur=10&term_src=Title:40:Chapter:I:Subchapter:H:Part:233:Subpart:F:233.50" \o "Regional Administrator"]'s receipt of the public notice, draft general permit or Director's response ([HYPERLINK "https://www.law.cornell.edu/cfr/text/40/233.31" \l "a" \o "§ 233.31(a)"]), whichever comes first. The [HYPERLINK "https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=08daa2db2e632a93f539dd8ae386bca8&term_occur=11&term_src=Title:40:Chapter:I:Subchapter:H:Part:233:Subpart:F:233.50" \o "Regional Administrator"] may notify the Director within 30 days of receipt that there is no comment but that he reserves the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a hearing.

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a. Under the 404(b)(1) Guidelines, an EPA objection to a proposed permit could arise if the proposed permit is "outside requirements of the Act, these regulations, or the 404(b)(1) Guidelines." 40 CFR 233.50(e)(2). EPA could object based on a finding by EPA that the proposed activities will jeopardize the continued existence of species listed as endangered or threatened under the Endangered

Species Act or result in the likelihood of the destruction or adverse modification of designated critical habitat. 40 CFR 230.10(b)(3).

b. In deciding whether to exercise its objection authority, EPA will consider any information and recommendations submitted by the State and give appropriate deference to the State's views given the substantial expertise of Florida agencies related to protection of endangered and threatened species. If EPA finds that the proposed discharge will jeopardize the continued existence of listed species or results in the likely destruction or adverse modification of designated critical habitat, EPA intends to object to the permit as failing to comply with the 404(b)(1) Guidelines or communicate a requirement for permit conditions in order to ensure compliance with the 404(b)(1) Guidelines.

c. If EPA objects to a permit or communicates a requirement for a permit condition, DEP cannot issue the permit. Pursuant to 40 CFR 233.50, options for proceeding after an EPA objection are:

1~~a~~. EPA withdraws the objection or requirement for a permit condition and the State may then issue the permit.

2~~b~~. DEP revises the permit to satisfy the objection or requirement for a permit condition.

3~~c~~. If DEP neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Corps shall process the permit application. If the Corps processes the permit application, the Corps will be responsible for fulfilling any applicable requirements under section 7(a)(2) of the Endangered Species Act.

F. Optional Early Coordination Concerning Discharges with Reasonable Potential for Affecting Endangered or Threatened Species

(1) Pursuant to the State's procedures, DEP may review a proposed project prior to application submittal. If during ~~the early pre-application~~ review of the proposed project prior to application submittal (pre-application review)~~by DEP~~, DEP or the permit applicant potential effects to listed species ~~identifies threatened or endangered species~~ or designated critical habitat ~~as potentially present on the project site~~from proposed discharges, DEP may engage with EPA in a pre-application meeting to discuss these potential impacts to ~~threatened or endangered~~Federally-listed species or critical habitat.

(2) After the meeting described above, DEP may determine that the application, if submitted, is likely to present significant issues regarding ~~threatened or endangered~~Federally-listed species or designated critical habitat and that DEP is unlikely to be able to meet EPA's potential objections. Such a determination by DEP shall be considered a "significant action taken by the State agency related to the consideration of any permit application" under 40 CFR 233.50(a)(3). If DEP takes significant action related to the consideration of a

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pending permit application where endangered or threatened species are identified as potentially present on the project site, DEP shall promptly transmit that notice of action to EPA.

(3) Upon receipt of notice of DEP's determination that an application, when submitted, is likely to present significant issues regarding threatened or endangered species or critical habitat, EPA may object to DEP's issuance of the potential permit and identify the steps that DEP must take to address those objections. DEP may not issue the permit and must provide EPA the information necessary to address the objection. If DEP neither satisfies EPA's objection nor denies the permit, DEP shall notify EPA that it cannot meet EPA's objection and send a permit application package to the Army Corps of Engineers and the Secretary of the Army shall process the permit application.

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G. Coordination of Mitigation Banking

~~F. Pursuant to program description.~~

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~~(1)~~ DEP and EPA agree that mitigation banking projects shall be subject to review by an Interagency Review Team (IRT). Mitigation banking instruments and in-lieu fee program instruments shall be processed by the Corps in accordance with 33 C.F.R. Part 332. For those whose service areas either wholly or partially include State assumed waters, ~~the Corps shall invite DEP to~~DEP may be a co-chair of the Interagency Review Team.

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

Commented [A9]: Confirming that will delete because the Corps is chair of the IRT, so perhaps this should go in Corps MOA instead.

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.

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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

(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.

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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:

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.

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C. State 404 Permit Program 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.

(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 revisions in accordance with 40 C.F.R. § 233.16(d).

a. If the proposed revisions are not substantial, notice of approval may be given by letter to the Governor or designee, per 40 C.F.R. § 233.16(d)(2).

b. If EPA determines that the proposed revisions are substantial, EPA shall publish notice of the proposed revisions, provide opportunity for a public hearing, consult with the Corps, USFWS, and NMFS, and review the proposed modification in accordance with 40 C.F.R. § 233.16(d)(3). Such changes shall not be effective until review and approval by EPA and publication of notice in the Federal Register.

(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, a supplemental Attorney General's statement, program description, or other documents or information necessary to evaluate the State 404 Permit Program's compliance with the requirements of the CWA and regulations at 40 C.F.R. Part 233.

(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) Pursuant to 40 CFR section 233.16(b), DEP shall revise the State 404 Permit Program as necessary because of a modification to 40 CFR Part 233 or any other applicable Federal statute or regulation. The program shall be revised within one year of the date of promulgation of

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such regulation, except if the state must amend or enact a statute in order to make the required revision, the revision shall take place within two years.

(6) Any program modifications that necessitate modifications to this Agreement shall not be effective until the modified agreement is signed by DEP and EPA, and EPA gives notice of approval of program modifications.

V. GENERAL PROVISIONS

A. This Agreement contains the entire agreement between the Parties to this Agreement relating to the settlement and transactions contemplated hereby, and supersedes any and all prior agreements, understandings, representations, and statements between the Parties, whether oral or written. The Parties are entering into this Agreement based solely on the representations and warranties herein and not based on any promises, representations, and/or warranties not found herein. No modification, waiver, amendment, discharge, or change of this Agreement shall be valid unless the same is in writing.

B. This MOU does not create any right or benefit, substantive or procedural, enforceable by law or equity, by any persons, their officers or employees, or any other person. This MOU does not apply to any person outside of DEP and EPA.

C. The signatory agencies do not waive any administrative claims, positions, or interpretations they may have with respect to the applicability or enforceability of the ESA, the CWA, or Florida laws.

D. Nothing in this MOA shall be interpreted as obligating the signatory agencies for the expenditure of funds in excess of appropriations authorized by law, or otherwise commit the signatory agencies to actions for which they lack statutory authority.

E. Nothing in this agreement authorizes any take of federally listed threatened or endangered species.

F. The headings in this Agreement are for convenience of reference only and shall not limit or otherwise affect the meaning hereof.

~~A.~~G. If any provision of this Agreement is held to be illegal or invalid by a court of competent jurisdiction, such provision shall be deemed to be severed and deleted; and neither such provision, nor its severance and deletion, shall affect the validity of the remaining provisions.

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~~V.~~VI. SIGNATURES

Florida Department of Environmental Protection

Date: _____ By: _____

United States Environmental Protection Agency Region IV

Date: _____ By: _____

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