RA BRIEF
FLORIDA ASSUMPTION OF STATE 404 PROGRAM

Date Updated: 04/10/2020 **Date Original Prepared:** 8/8/2018 **Priority:** 3

EPA Goal Supported: Cooperative Federalism, Rule of Law and Process

Issue: 404 Assumption by the State of Florida

Location: State of Florida

Context:

1. Involved Parties: EPA, Corps, USFWS, NMFS, FDEP.
2. Interested parties: Florida Governor, the White House, other states, media, and various stakeholders (mining, developers, Tribes, environmental NGOs).
3. Florida is working on an official request to assume administration of a CWA section 404 program. Before making their request, Florida must pass a rule that will set up the required program elements. The Florida rulemaking timeline and possible legal challenges to that rulemaking, resolution of ESA coordination processes, and finalizing the Corps/FDEP MOA which identifies which waters the state will assume and which waters the Corps will retain, are currently driving the timeline.
4. There are 6 required components of Assumption Package, which are listed below with corresponding estimates (by percentage) of the degree to which EPA staff understands Florida has completed these components.
   - Letter from Governor requesting program approval (0%)
   - Complete program description (30%)
   - Attorney General's statement (80%)
   - EPA/DEP MOA (85%)
   - Corps/DEP MOA (75%)
   - Copies of all applicable state statutes and regulations, including those governing applicable state administrative procedures (70%)

Critical Messages:

1. EPA continues to assist Florida with understanding the federal requirements for 404 assumption and is communicating with them regularly regarding their development of a 404 program.
2. The EPA has not yet seen/reviewed, in final or draft, several components of what Florida will ultimately need to submit as part of a complete assumption package.
3. Key outstanding issues include Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

Considerations:

1. FDEP staff sent EPA staff a copy of their revised proposed rule on 2/12/20. FDEP published Notices of Proposed Rule for the State 404 Program on 2/19/20. The 21-day comment period for the rule ended 3/11/20. A public meeting is scheduled for 4/2/20; comments will be accepted by FDEP until the end of the public meeting. FDEP staff also indicated there may be a Notice of Change to the rule which would reset the 21-day comment period. FDEP staff have indicated that the public meetings will now be 3 webinars on April 2, 6, and 10. The end of the comment period will now be 4/17/20. R4 staff participated in webinars held on April 2 and April 6, where the vast majority of participants that spoke expressed opposition to the State assuming the 404 program.
2. FDEP submitted a draft Biological Assessment (BA) to EPA and the Services on 2/25/20 for review and asked EPA to submit comments within one month. After discussions on 3/4/20 FDEP staff informed EPA the BA requires edits and FDEP will send the edited draft back to EPA for additional comments as soon as possible. FDEP is also implementing weekly calls with EPA until the BA is ready for submission to the Services. R4 staff are in communication with FDEP about providing additional clarity regarding their process for deciding whether a proposed 404 project has the reasonable potential to affect federally listed species, which pursuant to 40 CFR 233.51(b) would be sent to the EPA for review. EPA staff hopes to receive such additional clarity from FDEP staff during the week of April 13. Depending on what FDEP provides, EPA staff may potentially elevate this to senior management for input.
3. **Ex. 5 Deliberative Process (DP)**
4. During the 3/4/20 meeting, FDEP staff indicated their leadership's current preference is for EPA to extend its 120-day review period once a complete package is submitted in order to provide a later effective date for implementation of program assumption.
5. EPA staff had an in-person meeting with FDEP 3/4-5/20 to discuss BA, rules, and components of the program description. The next in-person meeting was scheduled for 4/15-16/20 but due to conflicts, FDEP is planning to reschedule sometime in May 2020. Scheduling the next in-person meeting will be postponed due to COVID-19.
6. EPA staff provided notification to the Poarch, Seminole, and Miccosukee tribes that Florida DEP has published their Notice of Proposed Rulemaking on 3/4/2020.
7. FDEP staff have passed on concerns from FDOT. Through a Memorandum of Understanding (MOU) executed on December 14, 2016, the FDOT has assumed Federal Highway Administration's (FHWA's) responsibilities under NEPA for highway projects on the State Highway System (SHS) and Local Agency Program (LAP) projects off the SHS. FDOT has asked FDEP how assumption of the 404 program would affect their current coordination procedures and FDEP has asked EPA to weigh in.