THE
MUSCOGEE (CREEK) NATION
HISTORIC & CULTURAL PRESERVATION
P.O. BOX 580 | OKMULGEE, OK 74447
T 918.732.7733 | F 918.758.0649

DAVID HILL
PRINCIPAL CHIEF
DEL BEAVER
SECOND CHIEF

November 2, 2020

Jeanette Gettle
Division Director of Water Division
U.S. Environmental Protection Agency

RE: Proposed Operating Agreement EPA, State of Florida Request to assume the Clean Water Act Section 404 dredge and fill permitting program.

Ms. Gettle,

Thank you for contacting the Muscogee (Creek) Nation concerning the Proposed Operating Agreement for the Florida Department of Environmental Protection and the Florida Division of Historical Resources – State Historic Preservation Officer regarding the State 404 Program. The Muscogee (Creek) Nation has significant cultural history in Florida and we consult under the National Historic Preservation Act (NHPA) Section 106 regulations on undertakings. It should be noted that we had no prior knowledge of this project until our meeting with EPA on October 15, 2020. The Muscogee (Creek) Nation should have been consulted at the same time as other Tribes were contacted. Florida Tribes received extensive consultation before the state's request to administer CWA was even filed. In a document on the regulations website dated Aug 20, 2020, (file:///C:/Users/raebutler/Downloads/EPA-HQ-OW-2018-0640-0006_content.pdf) there is the following statement, "The Department worked diligently with EPA, the U.S. Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) to ensure that the state's process for complying with the requirements of the Endangered Species Act (ESA) is at least as stringent as the federal program. Additionally, the Department has been working with EPA, the State Historic Preservation Office, and Indian Tribes in Florida to ensure that the outcomes of the state's process for protection of historical and cultural resources are at least as protective as those under the federal process." We were contacted late in the process and, due to this, were given very limited time to even review the proposed operating agreement. We have concerns that the state process will not be as protective as the NHPA and we seek examples of how specific types of projects would be carried out by the State.

Overall, the Muscogee (Creek) Nation requests meaningful consultation between our Tribe and the EPA on this proposed undertaking. Additionally, we have reviewed the Proposed Operating Agreement and have a few comments and questions attached to this letter.

Regards,
LeeAnne Wendt

LeeAnne Wendt, M.A., RPA
Historic and Cultural Preservation Department, Tribal Archaeologist
Muscogee (Creek) Nation
P.O. Box 580 | Okmulgee, OK 74447

MCN Comments Regarding the Proposed EPA Operating Agreement

Pg. 1, A. Parties, 2. Consulting Parties, b.

- *Indian tribes. Indian tribes include any Indian Tribe, band, group, or community which are recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians. Indian tribes frequently have an interest in State undertakings which may affect cultural resources on historic properties of religious and cultural significance on ancestral, aboriginal, or ceded lands.*
    - This should just be listed as federally recognized tribes. Bands, groups, and communities are public entities, not federally recognized tribes. Where is this language from?
    - Please provide examples of when Tribes are consulted on state undertakings. The MCN is unaware of consultation on state undertakings as we have only been contacted about federal undertakings in the past.

Pg. 2, A. Parties, 2. Consulting Parties, b. Indian tribes, i.

- *The Department shall consult with any Indian tribe that attached religious and cultural significance to historic properties that may be affected by an application.*
    - It should be "federally recognized Indian tribe."
    - Does the state plan to consult with state recognized tribes? If so, they are the public and should not be grouped with or consulted with federally recognized tribes.

Pg. 2, B. Duties and Responsibilities, 1. The Department

- *The Department shall be responsible for leading the historic properties review.*
    - Who at the Department is conducting historic properties review? Who is making the NRHP determinations? An SOI-qualified historian, archaeologist, etc. is required to make these decisions. We need to see the CV or resumes of the Department Staff who will make these determinations. The lead agency (the Department) is responsible for making determinations of no effect, no adverse effect, no historic proprieties effected, adverse effect, etc. Will the department do this or will the SHPO do this? Through Section 106 consultation, tribes are asked to concur with the State or lead agency's finding of effect or let them know if there are cultural or religious properties that could be impacted by the 404 permit.

Pg. 3, B. Duties and Responsibilities, 1. The Department, b.

- *To THPO or Indian Tribe when the interested Indian Tribe does not have a THPO.*
    - This is worded weirdly. Why not just put "federally recognized tribes with an area of interest."
    - Again, we have to remember that "Indian Tribe" as it is now, does not stipulate that they are federally recognized, but seems they could also be a band or some type of group (i.e. the public).

Pg. 4, B. Duties and Responsibilities, 1. The Department, d. To the public and local governments.

- The Tribes and public/local governments are listed separately here, which is correct. Due to this, do not try to send the Muscogee (Creek) Nation public notices when we are not the public. We are a sovereign nation and we will not take public notices as consultation on projects.

Pg. 4, B. Duties and Responsibilities, 1. The Department, d. To the public and local governments, i.

- *Notify the public…*

ED_005978_00033810-00002 FL CWA 404 Assumption FOIA_Interim Release 9

- How will the public be notified? Newspaper? Mail?

Pg. 4, B. Duties and Responsibilities, 1. The Department, d. Future Coordination

- *In the event the Department employs a historic resource coordinator, the Department will coordinate with SHPO and the THPO/Indian Tribes to establish procedures to streamline certain categories of projects.*
  - Streamlining certain projects would require another agreement document (e.g. programmatic agreement).

Pg. 5, B. Duties and Responsibilities, 2. SHPO, c. To THPO/Indian Tribes, ii

- *On the same day received, provide information related to an unanticipated discovery, effects to historic resources, or the identification of unmarked human remain on issued no-notice general permits, general permits, and individual permits.*
  - How will this be done? By email? Phone call?

Pg. 5, B. Duties and Responsibilities, 3. THPO/Indian Tribes, a. To the Department, i.

- *Review general permit and expedited applications to determine the presence or absence of cultural resources or historic properties of religious and cultural significance or request that the project be evaluated as an individual permit because of potential historical resources concerns.*
  - Why are there expedited applications? This should not be a regular occurrence and putting this here makes it seem as if the agreement is giving them the chance to expedite all the applications they want. Why is this process needed? Are archaeological surveys required by applicants?
  - What is the difference between an individual permit and a general permit?

Pg. 7, II Procedures, A. Consultation during the Depts. initial review of State 404 Program permit, 1.

- *The body of the email/notification shall include:*
  - This will not be a public notice to the Tribe. Additionally, we want information provided pertaining to any surveys or sites that are in the area (FLSHPO).

Pg. 9, II Procedures, B. Consultation during the public notice process, 1. Types of Action, a.

- *The Department will provide a public notice of all administratively complete State 404 Program individual permit applications pursuant to the provisions of Rule 62-331.060, F.A.C. SHPO, THPO/Indian Tribes shall receive an email notification of the public notice in accordance with paragraph 62-331.060(2)(a), F.A.C.*
  - A public notice does not constitute tribal consultation. A consultation letter template should be made and used when notifying tribes and inviting them to consult on a state undertaking.

Pg. 9, II Procedures, B. Consultation during the public notice process, 2.

- *The public notice shall specifically mention and solicit comment on the historic properties review process, including any initial effects determinations and recommendations received by SHPO/THPO/Indian Tribes during the Department's initial review of the application. If the initial determination is that the activity will have no effect on historic properties, a "no potential to cause effect" or "no effect" statement shall be included in the public notice.*
  - This is a concern. Tribal comments should not be included in a public notice or be made available to the public. Also, the public should not receive an archaeological report. If any information is posted online for them to review with the application, then it should be

highly redacted. Confidentiality is a major issue when identifying or when a project impacts a cultural site.

Pg. 10, II Procedures, D. Provisions for State 404 Program General Permits (no notice)

- *If both SHPO and THPO/Indian Tribes do not respond within 15 days of receipt of the request, and the project does not otherwise require notice to the Department to proceed under the 404 general permit, the permittee may proceed with the work, provided all other required authorizations have been obtained.*
    - Why do the no-notice permits require a quick 15-day review? What is the nature of the no-notice permits? What are examples of when this would apply? Explain further.

Pg. 13, III Effects Determination and Resolution of Adverse Effects, B. Resolution of Adverse Effects, 1. Continued Consultation., b.

- *The Department, the SHPO, and THPO/Indian Tribes, if participating, may agree to invite other individuals or organizations to become consulting parties.*
    - What other individuals or organizations would be invited? For a disagreement, would the ACHP involved?

Pg. 13, III Effects Determination and Resolution of Adverse Effects, B. Resolution of Adverse Effects, 1. Continued Consultation., c.

- *The Department shall make information available to the public, subject to any confidentiality requirements. The Department shall provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking.*
    - Why would the public be involved if it is a disagreement between the Tribes and EPA? They should not be privy to this information.

Pg. 14, III Effects Determination and Resolution of Adverse Effects, B. Resolution of Adverse Effects, 2. Resolve Adverse Effects, e.

- *If agreement cannot be reached, the Department shall attempt to continue consultation to reach an acceptable agreement. However, if agreement is not possible, the Department shall proceed according to Section III.C.*
    - The ACHP should be involved if no agreement can be made.

Pg. 15, III Effects Determination and Resolution of Adverse Effects, C. Federal Review, 3.

- *The Department shall, in accordance with paragraph 62-331.052(3)(b), F.A.C., notify the EPA if the Department does not accept the effect determination of a proposed activity or recommendations for the resolution of adverse effects of the THPO/Indian Tribes, together with the Department's reason for doing so, in which case the EPA can comment upon, object to, or make recommendations.*
    - Who at the EPA will make this determination? What staff will work on this? Will they be an archaeologist? SOI-qualified individuals?

Pg. 15, IV Terms and Definitions.

- Add "general permit" and "no-notice permit" to this.

Pg. 16, VI Training Requirements, A-C.

- Yes, there should be training. The use of "occasional" means that it could happen a few times every year or just once every ten years. You need to define this better.
- Also, who will contact the Tribes so that they can provide training?