The Honorable Billy Cypress, Chairman
Miccosukee Tribe of Indians of Florida
P.O. Box 440021 Tamiami Station
Miami, FL 33144

Subject: Consultation Under the National Historic Preservation Act Regarding the State of Florida's Request to Assume Administration of a CWA Section 404 Program

Dear Chair Cypress:

On August 20, 2020, the state of Florida submitted a request to the U.S. Environmental Protection Agency's Region IV Office (EPA) to assume the administration of a Clean Water Act Section 404 program (CWA Section 404), which relates to the permitting of discharges of dredged or fill material into waters of the United States. Pursuant to the CWA Section 404 and its implementing regulations (40 C.F.R. Part 233), the EPA is the federal agency charged with approving or denying Florida's request. The EPA has 120 days within which to complete this action (i.e., by December 17, 2020). The request does not seek program assumption over any discharges into waters located in Indian country in the State. The EPA would like to initiate consultation with the Miccosukee Tribe of Indians of Florida under Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended, on our Action on the State's request to assume the CWA Section 404 program.

The NHPA establishes historic preservation as a Federal agency policy and provides for the identification and protection of historic properties. Section 106 of the NHPA requires Federal agencies to take into account the effects of their actions (known as "Federal undertakings" in the statute and NHPA regulations) on historic properties that are listed or eligible for listing on the National Register of Historic Places and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The NHPA also provides important roles and consultation opportunities for Indian tribes in connection with federal undertakings that may affect historic properties of religious and cultural significance to tribes, even if located outside of Indian country. See NHPA Section 101(d)(6)(B); 36 C.F.R. § 800.2(c)(2)(ii).

Federal undertaking is defined in the ACHP's implementing regulations (36 CFR § 800.16(y)) to mean "a project, activity, or program funded in whole or part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." The Federal agency must determine if its action is an undertaking, and, if so, whether the undertaking has the potential to cause effects to historic properties. See 36 C.F.R. § 800.3(a). Historic properties are defined in the NHPA regulations to mean prehistoric or historic districts, sites, buildings, structures, or objects that are included in, or are eligible for inclusion in, the National Register of Historic Places. See 36 CFR § 800.16(l).

The approval of the State of Florida's request to assume the CWA Section 404 program is a Federal undertaking with the potential to cause effects to historic properties. In accordance with 36 CFR §

800.3(f)(2), the EPA invites you or your designated consultation representative(s) to participate in the Section 106 consultation process prior to a final Agency action on Florida's request.

We anticipate that notice of the proposed action will be provided to the public for comment in the near future. You are receiving this information before it is distributed to the public in order to invite your participation in the NHPA consultation process. The EPA is committed to government-to-government consultation on with the Miccosukee Tribe of Indians of Florida on this Federal undertaking, in accordance with the NHPA and its regulations. Your insights and knowledge would be helpful in this consultation effort. The Miccosukee Tribe of Indians of Florida will also have the opportunity to submit comments throughout the public comment period in addition to this opportunity for consultation.

At this link [HYPERLINK "https://usepa.sharepoint.com/f:/r/sites/R4/r4_wetlands_stream_regulatory_section/Shared%20Documents/Florida%20Assumption%20EPA%20Internal/Shared%20Package%20Folder?csf=1&web=1%20"] is a copy of Florida's submittal, which includes the following components: a letter from Governor Ron DeSantis requesting program approval; a complete program description; Florida DEP General Counsel Justin G. Wolfe's statement; a Memorandum of Agreement with the EPA Regional Administrator; a Memorandum of Agreement with the Secretary of the Army; and copies of all applicable Florida statutes and regulations, including those governing applicable Florida administrative procedures. This information will also be available to the public upon publication of the Federal Register notice referenced above. The timeline for the consultation process begins with this letter. Please let us know within 30 days of receiving this letter if you wish to consult on this undertaking. Due to COVID-19, the consultation meetings will be held by phone or through virtual meeting platforms.

Please note that under separate cover the EPA is also extending the opportunity for consultation and coordination with your office regarding the EPA's action to approve or disapprove Florida's request to assume administration of a CWA Section 404 program in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes*[1] and the *EPA Policy on Consultation and Coordination with Indian Tribes: Guidance for Discussing Tribal Treaty Rights*[2].

We look forward to consulting with you or your designated consultation representative(s) under NHPA on Florida's request to assume the CWA Section 404 program. If you have any questions regarding this matter, please contact me at (404) 562-9345, or have a member of your staff contact Mr. Kelly Laycock at (404) 562-9132, or [HYPERLINK "mailto:laycock.kelly@epa.gov"].

Sincerely,

Jeaneanne M. Gettle, Director
Water Division

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[1] https://www.epa.gov/tribal/forms/consultation-and-coordination-tribes

[2] https://www.epa.gov/tribal/epa-policy-consultation-and-coordination-indian-tribes-guidance-discussing-tribal-treaty
Region 4 recognizes that, although the Tribe may not have any treaties currently in effect, the Tribe may have other sources of reserved rights that carry the force of federal law.

cc: Gene Duncan, Water Resources Director, Miccosukee Tribe of Indians of Florida

Fred Dayhoff, Tribal Historic Preservation Officer, Miccosukee Tribe of Indians of Florida