UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW
ATLANTA, GEORGIA 30303-3104

August 31, 2020

The Honorable Stephanie Bryan
Chair of the Poarch Band of Creek Indians
5811 Jack Springs Road
Atmore, Alabama 36502

Subject: Offer of Consultation and Coordination on the Environmental Protection Agency's Action on the State of Florida's Request to Assume Administration of a CWA Section 404 Program

Dear Chair Bryan:

The U.S. Environmental Protection Agency is extending the opportunity for consultation and coordination with federally recognized Indian tribes with interests in Florida on the EPA's upcoming action to approve or disapprove Florida's request to assume administration of a Clean Water Act (CWA) Section 404 program for certain State waters.

The CWA established the Section 404 program under which the U.S. Army Corps of Engineers (Corps) may issue permits for the discharge of dredged or fill material into "waters of the United States" as identified in the CWA. Section 404(g)(1) of the CWA provides states and tribes the option of submitting to the EPA a request to assume administration of a CWA Section 404 program in certain waters within state or tribal jurisdiction.

To assume a Section 404 program, a state or tribe must have a program that regulates discharges of dredged or fill material consistent with the requirements of the CWA and its implementing regulations at 40 C.F.R. Part 233, and submit to the EPA a request to assume the program. Among other requirements, a state or tribe's Section 404 program must: (1) be at least as stringent as required by the CWA and its implementing regulations; (2) provide for sufficient public participation; (3) ensure compliance with the Section 404(b)(l) Guidelines, which provide environmental criteria for permit decisions; and (4) have adequate enforcement authority.

Any state or tribe that seeks to administer a CWA Section 404 program under 40 C.F.R. Part 233 shall submit to the EPA Regional Administrator: (a) a letter from the Governor of the state requesting program approval; (b) a complete program description, as set forth in 40 C.F.R. § 233.11; (c) an Attorney General's statement or a statement from the attorney for those State or interstate agencies which have independent legal counsel, as set forth in 40 C.F.R. § 233.12; (d) a Memorandum of Agreement with the EPA Regional Administrator, as set forth in 40 C.F.R. § 233.13; (e) a Memorandum of Agreement with the Secretary of the Army, as set forth in 40 C.F.R. § 233.14; and (f) copies of all applicable state statutes and regulations, including those governing applicable state administrative procedures.

On August 20, 2020, the State of Florida submitted to the EPA a request under Section 404(g) of the CWA seeking to administer a Section 404 program, which triggered the EPA's statutory review of the submission. The EPA has determined that the submission is complete as described above, and will approve or disapprove the program on or before December 17, 2020, consistent with the statutory requirement to approve or disapprove not later than the one-hundred-twentieth day after the date of the receipt of a complete program request. The EPA will publish notice of Florida's submission in the Federal Register in the near future. The Federal Register notice will describe how to provide comments to the EPA during the public comment period and will also announce virtual public hearings to be held during the public comment period. Please refer to the Federal Register notice for the hearing dates and times. In addition to engaging in the tribal consultation offered by this letter, the Poarch Band of Creek Indians is encouraged to participate in the public comment process by submitting written comments and/or participating in public hearings.

If the EPA approves Florida's request, the assumed program will not apply to waters within "Indian country,"[1] as that term is defined at 18 U.S.C. § 1151. Nonetheless, because some of the State waters are adjacent to such Tribal waters, Tribal resources could be impacted by this action. If discharges proposed for CWA Section 404 permitting by Florida may affect waters of another state or tribe, and if an affected state or tribe's recommendations for addressing the effects are not accepted by Florida, those permits are also subject to federal review, which may include review by the EPA, the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and/or the National Marine Fisheries Service.

The EPA would therefore like to invite the Poarch Band of Creek Indians to consult on this matter prior to a final Agency action on Florida's request.

A copy of Florida's submittal may be found at this link: 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. The submittal 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.

Should the Poarch Band of Creek Indians accept this offer to consult, the consultation and coordination process will be conducted 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] The EPA invites you and your designated consultation representative(s) to participate in this process. The timeline for the consultation and coordination process begins with this letter and will end on September 30, 2020 (30 days).

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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.

The EPA contact person for this consultation and coordination process is Mr. Kelly Laycock. In addition, Ms. Eve Zimmerman, the Water Division Tribal Consultation Advisor, is available to provide support. The EPA offers to consult with you by phone or video conference. At your discretion, please contact Mr. Laycock to schedule a conference call as soon as possible to allow sufficient time for us to consider your input before our final decision. During this call, the EPA can provide information about our upcoming action and would be happy to obtain your input for consideration by the agency. The EPA personnel will be available for follow-up discussions should you desire additional information.

If the EPA has not received a response from the Poarch Band of Creek Indians by September 30, 2020, the Agency will interpret the lack of response as a decline of the offer to consult on Florida's request although the Tribe may still provide public comments as outlined in the Federal Register Notice. EPA personnel will continue to keep the Poarch Band of Creek Indians apprised of this matter and will consider later requests for consultation to the extent that meaningful consultation can occur.

Please note, the EPA will also be extending the opportunity for consultation with the Poarch Band of Creek Indians under Section 106 of the National Historic Preservation Act of 1966 (NHPA), as amended, on our action on the State's request to assume the CWA Section 404 program. The NHPA consultation will be initiated through a separate letter.

If you have any questions regarding this letter, please do not hesitate to call me at (404) 562-9345 or have a member of your staff contact Mr. Laycock at (404) 562-9132 or laycock.kelly@epa.gov, or Ms. Zimmerman at (404) 562-9259 or Zimmerman.Eve@epa.gov.

Sincerely,

JEANEANNE GETTLE

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Date: 2020.08.31 13:31:59 -04'00'

Jeaneanne M. Gettle, Director
Water Division

cc: Kristi Weatherford, Environmental Director, Poarch Band of Creek Indians