RA BRIEF
FLORIDA ASSUMPTION OF STATE 404 PROGRAM

Date Updated: *8/29/2018* **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: Governor Rick Scott, 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, as well as 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. Key outstanding issues include: Ex. 5 Deliberative Process (DP)

   Ex. 5 Deliberative Process (DP)

5. EPA senior leaders met FDEP leaders on August 28, as a follow-up to the meeting hosted by the EPA on August 21. EPA continues to work with Florida and other stakeholders to address issues and finalize documents (Memorandums of Agreement) necessary for FL to complete its assumption package. The status of the action items from the meetings are included on the last page of this document.

Critical Messages:

1. Florida may submit a package requesting state assumption of CWA 404 program administration as early as September 1. For the multiple components of the assumption package that EPA has not yet seen or reviewed in draft, FDEP has indicated that they will share some draft components by August 31. In the event Florida submits such draft components by August 31 and then submits a formal package by September 1, EPA staff will have insufficient time to fully review and identify any problems or issues. Assisting FDEP with the development of a 404 assumption program remains a high priority for Region 4. EPA staff are actively communicating with Florida staff to help ensure the State's process for submission and the EPA's review process will be conducted as efficiently as possible.
2. Legal challenges to the currently proposed state rule could delay Florida's timeline for submittal. Florida staff have indicated they intend to proceed with a Notice of Proposed Rule as the next step in their rulemaking process for 404 assumption. WPD staff are not certain at what point during the rulemaking process that Florida will formally submit their 404 assumption package to the EPA. If FDEP submits a

package prior to the rule being deemed adopted by submittal to the Department of State, FDEP will be asking EPA to move forward with our review without lawfully adopted rules, bringing into question whether the package would meet federal requirements for completeness. Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

3. Upon receipt of a complete request package, EPA's 120-day statutory review must include a public hearing, a 45-day public comment period, and consideration of comments received from the public, USACE, USFWS, and NMFS.
4. Florida DEP and stakeholders are interested in using ESA § 7 consultation where threatened and endangered species may be impacted, but § 7 is only triggered by federal agency actions. Region 4 staff have drafted potential language to be used in the EPA-FDEP MOA regarding coordination procedures for proposed 404 projects for which there is a reasonable potential for federally-listed species to be impacted.
5. Florida and the Corps of Engineers are negotiating a memorandum of agreement, which among other things will identify the River and Harbors Act Section 10 waters to be retained by the Corps of Engineers and the administrative boundary for adjacent wetlands to such waters. Florida and the Corps are striving to complete the MOA by September 1.
6. The Clean Water Act specifically limits state-issued 404 permits to fixed terms no longer than five years. However, there is significant interest in determining how to review projects that by their nature have durations greater than five years. For Corps-issued 404 permits of more than five years, EPA has in the past sought periodic review. (e.g., every five years) of ongoing activities.
7. Florida is developing implementation procedures regarding their process for delineating wetlands, which will provide clarity regarding the relationship between waters of the state and waters of the United States. FDEP is making good progress on this effort and is considering informal input from the Corps and the EPA.

Considerations:

Components of FDEP's draft assumption package not yet shared with the EPA

1. The EPA understands that FDEP is making best efforts to share some draft documents with the EPA for informal review by August 31, which we believe may include the following:
    a. Draft letter from the Governor;
    b. Draft complete program description (e.g., resources needed to administer the program, updated regulatory cross-walk, final delineation implementation strategy)
    c. Draft Attorney General Statement;
    d. Updated version of draft MOA between the State and the Corps; and
    e. Updated version of the rules that FDEP intends to use to implement the program
2. FDEP has invited the EPA to meet in Tallahassee during the week of September 3, where we expect to discuss these documents.

EPA-Florida MOA

1. Draft EPA-FDEP MOA language regarding coordination procedures for proposed 404 projects for which there is a reasonable potential for federally-listed species to be impacted has been shared with FDEP staff for consideration.

2. EPA staff received relatively minor feedback from FDEP staff on the language; however, it is not yet clear whether FDEP wishes to include such language in the EPA-FDEP MOA.
3. EPA received a draft legal analysis regarding ESA consultation from FDEP on Aug 28, which presents an alternate approach for a state-assumed 404 program. This submittal is currently undergoing review by OGC and OW.
4. If/when EPA and FDEP reach agreement on any ESA language to add to the MOA, such language should be shared with the U.S. Fish and Wildlife Service and the NOAA National Marine Fisheries Service for the purpose of identifying any of their questions or concerns prior to the formal submission of the assumption package.

Corps-Florida MOA

1. The Corps and Florida met on August 27 and 28 for the purpose of working through the outstanding issues relating to their MOA, including the universe of assumable waters, permit transfers, and mitigation banking.
2. FDEP shared a draft copy of the Corps-State MOA with the EPA on Aug 28.
3. Both FDEP and EPA staff have identified issues related to the permit requirements for USCOE Civil Works projects in assumed waters. This issue is under review.
4. The EPA also identified two other issues which are currently under review.
   a.
   b.

Ex. 5 Deliberative Process (DP)

5. The Corps and Florida have identified other MOA issues that they continuing to discuss and at this time have no specific date for follow up.

CWA five-year permit limit

1. Some stakeholders want to develop a way to allow for details on an entire project that will take longer than five years to be linked to the initial permit to streamline subsequent permit phases.
2. Region 4 has discussed with Florida the technical process and procedural issues required by the statute and regulations regarding permitting of large projects of inherently long duration.
3. EPA is awaiting information from FDEP to understand how the State intends to permit long-term projects through a State-administered 404 program.

FLORIDA ASSUMPTION OF STATE 404 PROGRAM

Location Visual: Water Management Districts of Florida

Expanded Facts:

1. A complete assumption package must include:
    - Letter from the Governor requesting the program
    - A complete program description (e.g., regulatory cross-walk, wetland delineation methodology)
    - Attorney General Statement
    - Memorandum of Agreement between the State and EPA
    - Memorandum of Agreement between the State and the Corps
    - Copies of all applicable State statutes and regulations

Timelines

2. Florida's timeframe for finalizing rulemaking is uncertain, and the timing of the formal submission of their 404 assumption request with respect to their rulemaking process is also uncertain.
3. Legal challenges to Florida's rule are generally viewed as likely, which could add 60 days for a single challenge to several months for multiple challenges.
4. EPA has 120 days to review a state's assumption request. **This includes a requirement for **at least a 45-day public comment period** after Federal Register notification, and **at least one public hearing**.**

    EPA receives state's request to assume program

    EPA determines program submission is complete & so notifies state

    EPA provides copies of State's submission to Corps, FWS, & NMFS (HQ & regional)

    - Corps, FWS, & NMFS comments due within 90 days

    EPA initiates consultation with tribes per Executive Order (timeline not specified)

    Notices of complete application: Federal Register, newspapers, interested parties

    - FR Notice triggers 45-day public comment period
    - Public hearing(s) 30+ days after FR Notice publication
    - ****Florida has requested in writing that EPA hold multiple public hearings.****

EPA reviews & considers comments received.

- Prepares summary of significant comments, response to public comments
- Responds individually to comments from Corps, FWS, & NMFS

If EPA approves, notify state & publish approval in Federal Register

ESA

5. ESA § 7 consultation is triggered by federal agency actions. Incidental take *statements* are a possible outcome of § 7 consultation (vs. incidental take *permits* under §10).
6. Only a federal Service (FWS or NMFS) can issue biological opinions and incidental take statements or permits.
7. Under ESA § 7 regulations a federal action agency may designate a non-federal representative to conduct informal consultation or prepare a biological *assessment* (vs. opinion) (50 CFR § 402.08). If a permit or license applicant is involved and is not the designated non-Federal representative, then the applicant and Federal agency must agree on the choice of the designated non-Federal representative. The ultimate responsibility for compliance with section 7 remains with the federal agency.
8. ESA § 10 consultation is triggered by actions of non-federal entities (e.g., states). ESA regulations require writing a Habitat Conservation Plan (requiring time and resources) when seeking an incidental take permit, and FWS policy also involves internal consultation, taking additional time. ESA § 10 consultation can result in an incidental take *permit* (*vs.* incidental take *statement* under §10).

CWA five-year permit limit

9.

10.

11. **Ex. 5 Deliberative Process (DP)**

12.

Status of Remaining EPA Action Items from AAOW-OGC-R4-FDEP Aug 21/28 Meetings

☐ Draft expanded ESA language for EPA-FDEP MOA > WDD > RA > OW & OGC

Draft shared by Region 4 with FDEP.

☐ Get 5-year conceptual approach in writing from FDEP

Not yet received. FDEP has indicated that this will be a topic of discussion at an in-person meeting in Tallahassee scheduled for Sep 5-7.

☐ OGC provide input on when package can legally be considered complete, which determines when Federal Register notice can be published

This matter is still under review.

☒ Re-engage NMFS

NMFS participated in the Aug 28 teleconference hosted by EPA. A call between EPA and NMFS staff scheduled for Aug 30. Tallahassee scheduled for Sep 5-7.

☐ EPA's General Counsel will review the legal analysis shared by FDEP regarding a proposed alternative approach regarding ESA consultation in the context of 404 assumption.