RA BRIEF
FLORIDA ASSUMPTION OF STATE 404 PROGRAM

Date Updated: 06/05/2020 **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 (90%)
   - 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)

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Considerations:

1. FDEP published Notices of Proposed Rule for the State 404 Program on 2/19/20. FDEP has held three public meetings as webinars on April 2, 6, and 10 and extended the comment period through 4/30/20. FDEP staff have send EPA staff a link to all public comments received. FDEP did not receive a challenge to their rulemaking. The next step is to issue a Notice of Chance to incorporate edits to the Rule which will open a second challenge window but a much more narrow one. Any challenge after the NOC would have to show the party was not substantially affected by the original Rule but is substantially affected after the changes. The NOC was filed by FDEP staff with their OFARR on 6/5/20, with an anticipated publication of 6/8/20. FDEP have indicated they expect to submit the application package to EPA in mid-July.
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 is also implementing weekly calls with EPA until the BA is ready for formal submission to the Services. FDEP staff submitted a draft revised BA on 4/28/20 and requested any comments by 5/28/20. WD staff have discussed the BA with the RA and had a call on 5/13 to discuss with the AA. EPA staff discussed BA edits with FDEP staff on 5/19, 5/28 and 5/29.
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. WSRS has engaged NEPA before responding to FDEP. NEPA staff contacted FDOT to better understand their concerns. FDOT staff will be joining the standing FDEP/EPA weekly call on 5/26 to ensure there are no remaining concerns.

8. By letter dated 4/15/2020, NMFS informed FDEP that they have concluded that Endangered Species Act (ESA)-listed species under NMFS' jurisdiction do not occur in waters that are assumable by the state, and that they assume that EPA "will make a "no effect" determination for NMFS' ESA-listed species that were originally identified as part of this proposed assumption."
9. FDEP staff made EPA aware the St. Joe Company is requesting to have the Department include Regional General Permits SAJ-86, SAJ-105, and SAJ-114 in the proposed State 404 Program Rule. FDEP is meeting with St. Joe on 4/24 and will discuss further with EPA on 4/28 call. Initial discussions on the 4/28 call pointed to 40 CFR 233.21(a) which states upon program approval, the State can administer and enforce general permits previously issued by the Secretary in State regulated waters.
10. FDEP staff sent EPA the latest draft of FDEP/EPA MOA on 5/20/20 and indicated the FDEP/FWC/USFWS MOU will be coming very soon. EPA staff have begun drafting edits on the MOA and intend to discuss with FDEP staff. EPA staff received the FDEP/FWC/USFWS MOU on 6/2/20 and have begun reviewing.