RA BRIEF
FLORIDA ASSUMPTION OF STATE 404 PROGRAM

Date Updated: 08/28/2020 **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 (100%)
   - Complete program description (100%)
   - Attorney General's statement (100%)
   - EPA/DEP MOA (100%)
   - Corps/DEP MOA (100%)
   - Copies of all applicable state statutes and regulations, including those governing applicable state administrative procedures (reviewing for completeness)

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 held three public meetings as webinars on April 2, 6, and 10 and extended the comment period through 4/30/20. FDEP staff sent EPA staff a link to all public comments received. FDEP did not receive a challenge to their rulemaking. FDEP then issued a Notice of Chance (NOC) to incorporate edits to the Rule. FDEP have indicated they expect to submit the application package to EPA in mid-July. Ex. 5 Deliberative Process (DP)
   - Ex. 5 Deliberative Process (DP)
2. FDEP submitted a final Biological Assessment to the EPA on 7/24/20. EPA staff are reviewing and are making revisions to transition the document to EPA's Biological Evaluation and draft a transmittal letter to the USFWS regarding ESA consultation with a recommended signature by no later than 8/27/2020.
3. Ex. 5 Deliberative Process (DP)
4. During a 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. FDEP leadership has since indicated that FDEP does not currently plan to seek an extended review period.
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 has been 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 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 asked FDEP how assumption of the 404 program would affect their current coordination procedures and FDEP asked EPA to weigh in. WSRS engaged NEPA before responding to FDEP. NEPA staff contacted FDOT to better understand their concerns. FDOT joined the standing FDEP/EPA weekly call on 5/26 to ensure there are no remaining concerns. Staff clarified aspects of how a state 404 program would be administered, and the agencies collectively concluded that the procedures would remain in effect and provide ongoing coordination.
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 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 met with St. Joe on 4/24 and discussed further with EPA on a 4/28 call. EPA confirmed with

FDEP that per 40 CFR 233.21(a), upon program approval the State can administer and enforce general permits previously issued by the Secretary in State regulated waters.

10. The RA and the Secretary for FDEP signed the EPA-FDEP MOA on 7/31/2020.
11. FDEP staff requested EPA input on documents regarding delineation and jurisdiction expected to be submitted as part of the assumption package. EPA staff had calls on 6/15 and 6/17.
12. FDEP included a draft FDEP-FWS-FWC MOU and a draft SHPO operating agreement as appendices to their draft program description. FDEP and the Florida SHPO executed the Operating Agreement 8/6/2020; FDEP shared this final document 8/13/2020.
13. Ex. 5 Deliberative Process (DP)
14. EPA Regional staff have engaged contractor support for public meeting logistics and managing public comments.
15. EPA staff shared comments with FDEP on 7/24/20 regarding a draft Attorney General statement that FDEP had provided.
16. EPA staff provided suggested edits on the draft FDEP-Corps MOA with FDEP and the Corps on 7/27/20. The FDEP-Corps MOA was finalized and signed 8/6/2020.
17. FDEP shared a pre-review copy of most elements of their request package 8/13/2020; the Governor's request letter has not yet been signed.
18. EPA received Florida's assumption package on 8/20/20 and staff determined the assumption request is complete. Below is a status of the correspondence relating to 404 assumption that will be issued in the next several days:
    - The letter signed by the RA to Governor DeSantis will be issued on 8/28/2020.
    - The notification letters to the Corps, the FWS and NMFS are also expected to be issued on 8/28/2020.
    - The Tribal consultation letters have been routed and will likely be ready for issuance on 8/31/2020.
    - Staff are awaiting final review by OGC before routing the Feder Register notice, which we anticpate will begin routing by 8/28/2020.
    - The ESA consultation letters will likely begin routing on 8/31/2020.
    - The NHPA consultation letters will likely begin routing on 8/31/2020.
19. EPA and the Advisory Council on Historic Properties (ACHP) met on Aug 25 to introduce teams and discuss basics of consultation.