RA BRIEF
FLORIDA ASSUMPTION OF STATE 404 PROGRAM

Date Updated: 10/25/2018 **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, 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. Key outstanding issues include: Ex. 5 Deliberative Process (DP)

Ex. 5 Deliberative Process (DP)

5. EPA continues to work with Florida and other stakeholders to address issues and finalize documents (e.g., Memoranda of Agreement) necessary for FL to complete its assumption package.

Critical Messages:

1. EPA is prepared to begin our review immediately upon receipt of a package from Florida (i.e., drafted Federal Register Notice for public review and comment period and a public hearing, transmittal letters to other federal agencies, Tribal consultation letters, etc.).
2. 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 EPA's review process will be conducted as efficiently as possible.
3. 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. If FDEP submits a package prior to the rule being deemed lawfully adopted the package would not meet the requirements of a complete package.
4. 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.
5. Some 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 drafted language now incorporated 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. HQ is drafting a five-agency MOA (EPA, DOI/FWS, FDEP, NMFS, and USACE) to address ESA coordination (OGC

lead). An EPA and DOI/FWS working group met for the first time on 10/10 to discuss ESA coordination procedures. A smaller core EPA-DOI/FWS working group is meeting weekly to agree to a path forward and language for ESA coordination.

6. 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. The Corps has provided FDEP with a draft Retained Waters List. One other outstanding issue identified is responsibility (Corps vs. FDEP) for processing modifications of existing Corps permits.
7. 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. FDEP's draft rule 62-331 addresses this with long-term planning review required for the first permit proposed for large projects. During discussions with EPA on Oct 19-22, FDEP asked for EPA's perspective regarding proposed modifications to their draft 404 Handbook, which is referenced in their draft rule, proposed by a third-party regarding long-term projects. EPA staff have proposed a response for consideration by EPA senior management and will follow-up with FDEP verbally after receiving feedback from senior management.
8. Florida has developed implementation procedures regarding their process for delineating wetlands, which provides clarity regarding the relationship between waters of the state and waters of the United States. With the most recent revision, FDEP staff addressed EPA concerns; they plan to incorporate the implementation strategy into the program description component of their request submittal.

Considerations:

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

1. EPA understands that FDEP intends to share some draft documents with EPA for informal review ahead of package submission, 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 (draft shared on Sep 17), final delineation implementation strategy)
    c. Draft Attorney General Statement (draft shared on Sep 6);
    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 (pre-review draft shared on Sep 14-17). EPA provided pre-review comments 9/20, 10/5, & 10/9. FDEP was presented with third-party recommended changes to the draft rule and asked EPA's opinion of those changes during teleconferences held on Oct 19-22. EPA staff drafted a response to FDEP for consideration by senior management and are awaiting feedback prior to responding to FDEP. FDEP's advancing the draft rule depends on receiving this response.
2. The next FDEP-EPA in-person meeting, which will include review of draft submission documents, will likely occur soon after FDEP initiates their Notice of Proposed Rulemaking.

EPA-Florida MOA

1. During meetings in Tallahassee on September 5-7, FDEP agreed to include EPA's proposed ESA language, with the exception of a sentence that acknowledged that the Corps may designate FDEP as a non-Federal representative for the purposes of informal ESA consultation. HQ is in the process of editing the MOA, including ESA language (OGC lead).

2. FDEP and EPA staff agreed to other minor revisions to bring the MOA into closer alignment with federal regulations. An updated draft MOA has been shared with the WPD Director. Other edits are being prepared by OGC.
3. FDEP shared copies of the revised draft MOA with the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service between Sep 14 and 18.
4. In the event that additional revisions to the MOA may be warranted as FDEP proceeds with developing its assumption program, EPA staff recommend that the MOA should not be signed until the State is closer to having a complete package that is ready to submit.
5. OGC has provided R4 staff with suggested edits to the EPA-FDEP MOA. R4 staff reviewed the proposed changes and raised some questions with OGC staff regarding consistency with the language in the draft 5-agency MOA. We understand OGC staff will discuss the issues with their management next week and recommends the draft MOA not yet be shared with FDEP.

Corps-Florida MOA

1. Based on the most recent version of the draft MOA that was shared with EPA staff, there is no specific language that presents problems or issues regarding consistency with federal requirements. However, as the list and description of retained waters is still under development by the Corps, the EPA does not know the level of clarity and specificity that will be provided regarding the delineation between retained waters and assumed waters. FDEP received an updated draft Retained Waters List from the Corps Oct 4.
2. The Corps and FDEP have not reached closure on who will have responsibility for making modifications to currently active Corps permits in assumed waters, which potentially has implications for the long-term (i.e., > 5-year) permits issued by the Corps.
3. The draft MOA now provides clarity that permits are required for civil works projects in assumed waters that are not subject to 404(r).
4. At the request of OGC, EPA staff shared language for FDEP's consideration that acknowledges the Corps may designate FDEP as a non-Federal representative for the purposes of informal ESA consultation. FDEP staff expressed that they are not interested in including such language.
5. OGC has provided R4 staff with suggested edits to the Corps-FDEP MOA. R4 staff notified OGC staff that we have questions and comments we would like to discuss on Oct 29. We recommend the draft MOA should not be shared with FDEP or the Corps until discussions with OGC have been completed.

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, or a statement from the attorney for those State or interstate agencies which have independence legal counsel (likely FDEP General Counsel)
    - 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. FDEP is changing the rule language regarding long-term planning, and will re-submit the draft rule for internal review, as well as review by the Governor's OFARR, which could result in the Notice of Proposed Rulemaking (NOPR) during the first half of November. The publication of the NOPR would initiate the three-week public comment period (to be followed by a week for a public hearing).
3. FDEP was presented with third-party recommended changes to the 404 Handbook, which is cited in their draft rule, and asked EPA's opinion of those changes. A draft response has been elevated to EPA senior management; staff are awaiting edits or a green light to verbally communicate a response to FDEP. FDEP's advancing the draft rule depends on receiving this response.
4. 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.

5. 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

6. 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 procedures, which are triggered by non-federal actions).
7. Only a federal Service (FWS or NMFS) can issue biological opinions and incidental take statements or permits.
8. 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 ESA § 7 remains with the federal agency.
9. ESA § 10 procedures are 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 § 7).
10. HQ has drafted a five-agency MOA, to include EPA, DOI/FWS, FDEP, NMFS, and the Corps, to address including ESA language coordination (OGC lead), which was shared with R4 and FWS on Oct 17.
11. An EPA and DOI/FWS working group met for the first time Oct 10 to discuss ESA coordination procedures, and continues meeting weekly to agree to ESA coordination procedures and MOA language. A key next step is determining when to involve the other three potential party agencies.

CWA five-year permit limit

12. Ex. 5 Deliberative Process (DP)

13. Ex. 5 Deliberative Process (DP)

14. Ex. 5 Deliberative Process (DP)

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

FDEP has agreed to include all of EPA's suggested language, with the exception of the statement that acknowledged the Corps may designate the State as a non-Federal representative for the purposes of informal ESA consultation. Additional edits recommended by the Office of General Counsel have not yet been shared, but potentially could be superseded by five-agency ESA MOA.

☒ Get 5-year conceptual approach in writing from FDEP

EPA reviewed the portion of FDEP's preliminary version of FDEP's draft rule and 404 Handbook for language addressing long-term conceptual planning. In an email sent on Sep 20, EPA recommended minor edits and clear references in the rule to the detailed description in the Handbook. FDEP staff requested a discussion with EPA regarding a set of comments they received on their draft rule from a 3rd party that proposes changes to permitting projects that exceed 5 years. FDEP ultimately proceeded without incorporating the 3rd party language into the draft rule.

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

OGC has determined that State assumption rules must be lawfully adopted in order for EPA to determine the package to be complete.

☒ Re-engage NMFS

FDEP shared the most recent copy of the draft EPA-FDEP MOA with NMFS on Sep 18.

☒ 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.

Ex. 5 Deliberative Process (DP)