# PROGRAMMATIC AGREEMENT AMONG THE U.S. ENVIRONMENTAL PROTECTION AGENCY, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, THE FLORIDA DIVISION OF HISTORICAL RESOURCES-STATE HISTORIC PRESERVATION OFFICER, AND THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION REGARDING THE SECTION 106 PROCESS FOR THE EPA's APPROVAL OF THE STATE OF FLORIDA'S REQUEST TO ASSUME A CLEAN WATER ACT (CWA) SECTION 404 PERMITTING PROGRAM

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WHEREAS, the U.S. Environmental Protection Agency (EPA) is the federal agency responsible for administering compliance with, and enforcement of, the CWA (33 U.S.C. §§ 1251 et seq.); and

WHEREAS, 33 U.S.C. § 1344(g) and 40 C.F.R. Part 233 provide for a state or an Indian tribe, as defined in 40 C.F.R. § 233.2, to administer its own permit program for the discharge of dredged or fill material into waters of the United States, other than those waters that the CWA reserves as subject to U.S. Army Corps of Engineers jurisdiction; and

WHEREAS, the Florida Department of Environmental Protection (FDEP) has submitted to the EPA a complete request to administer a permit program for discharges of dredged or fill material into waters of the United States assumed by the state pursuant to CWA Section 404(g)(1), not including discharges to waters in Indian country as defined at 18 U.S.C. Section 1151; and

WHEREAS, EPA initiated consultation in accordance with Section 106 of the National Historic Preservation Act (NHPA) of 1966, as amended, and its implementing regulations at 36 C.F.R. Part 800 regarding EPA's decision on Florida's request to assume the CWA Section 404 program in waters within the state pursuant to Section 404(g)(1); and

WHEREAS, a programmatic agreement is appropriate pursuant to 36 C.F.R. § 800.14(b)(1)(ii) because effects on historic properties cannot be fully determined prior to approval of Florida's assumption of the CWA 404 permitting program; and

WHEREAS, this Programmatic Agreement (hereinafter the "PA") serves as a tool which sets forth a process to assure compliance with Section 106 of the NHPA in connection with the EPA's program assumption decision, enhances coordination on the consideration of potential impacts on historic properties, seeks value-added outcomes from the Section 106 process, and provides a comprehensive process for resolution of disputes concerning effects determinations or resolution of adverse effects associated with state 404 permits by utilizing the EPA's existing permit review framework under 40 C.F.R. § 233.50; and

WHEREAS, the role of a State Historic Preservation Officer (SHPO) under Section 106 of the NHPA and 36 C.F.R. Part 800 is to advise, assist, review and consult with federal agencies as they carry out their historic preservation responsibilities and respond to requests within a specified period of time; and the Florida SHPO reflects the interests of Florida and its citizens in the preservation of the state's cultural heritage; and

WHEREAS, the Florida SHPO will advise and assist the FDEP with carrying out its historic preservation responsibilities under the Florida Historical Resources Act; and

WHEREAS, the State of Florida created a regulatory framework, to be codified in Chapter 62-331, Florida Administrative Code (F.A.C.), for ensuring that impacts to cultural and historic resources will be considered during the processing of state 404 permits by promulgating regulations that will adopt and incorporate the Archaeological Resources Protection Act (ARPA) and Native American Graves Protection and Repatriation Act (NAGPRA); will require no significant impact to historical resources; will include permit conditions that require permittees of individual and general permits to cease work immediately and begin consultation in the event of an unanticipated discovery of historic resources, effects to historic resources, or the identification of unmarked human remains; and will adopt the federally mandated notice and comment period where interested tribes and members of the public may provide comments and recommendations on all state 404 permit applications; and

WHEREAS, to effect a proper and comprehensive review of the effects of state 404 permit actions on historic properties, on August 6, 2020, FDEP and the Florida SHPO entered into an "Operating Agreement between the Florida Department of Environmental Protection and the Florida Division of Historical Resources – State Historic Preservation Officer regarding the State 404 Program" (hereinafter "August 6, 2020 OA") (the August 6, 2020 OA is attached to this PA as Appendix A); and

WHEREAS, FDEP, through the terms of the August 6, 2020 OA, committed to direct engagement with the SHPO and interested Indian tribes early in the application review process, including opportunities to inform FDEP's requests for additional information, provide effects determinations, and make recommendations for the resolution of adverse effects; and

WHEREAS, the Florida SHPO has Secretary of the Interior (SOI)-qualified personnel who will conduct reviews of historic properties pursuant to the August 6, 2020 OA; and

WHEREAS, FDEP has SOI-qualified personnel who will assist FDEP with its obligations under the PA and August 6, 2020 OA; and

WHEREAS, the EPA, by public notice published in the Federal Register on September 16, 2020, stated that "Tribal and State Historic Preservation Offices as well as members of the public with knowledge of or interest in the identification (and location) of historic properties in the State of Florida, the effects of discharges from dredged or fill activities into waters of the United States on these historic properties, or ways to mitigate or avoid adverse effects of such discharges may

be interested in commenting on EPA's consultation on this action under section 106 of the NHPA," 85 Fed. Reg. 57,853; and

WHEREAS, the August 6, 2020 OA was made available for public viewing and comment as part of the FDEP application materials (*see* 85 Fed. Reg. 57,853); and

WHEREAS, the EPA consulted with the Advisory Council on Historic Preservation (ACHP) pursuant to 36 C.F.R. § 800.14(b), and the ACHP is a signatory to this PA; and

WHEREAS, the EPA consulted with FDEP and the Florida SHPO pursuant to 36 C.F.R. § 800.14, and FDEP and the Florida SHPO are signatories to this PA; and

WHEREAS, as stated in Section I.A.2.b.i of the August 6, 2020 OA, Indian tribes possess special expertise in assessing the eligibility of cultural resources or historic properties that may possess religious and cultural significance to the Indian tribe; and

WHEREAS, in coordination with the ACHP, the EPA identified and invited the following eight federally recognized Indian tribes to consult as part of EPA's consideration of the FDEP's request to assume the CWA Section 404 program: the Alabama-Coushatta Tribe of Texas; the Choctaw Nation of Oklahoma; the Coushatta Tribe of Louisiana; the Miccosukee Tribe of Indians of Florida; the Mississippi Band of Choctaw Indians; the Muscogee (Creek) Nation; the Poarch Band of Creek Indians; and the Seminole Tribe of Indians of Florida; and

WHEREAS, based on the responses received from the eight Indian tribes that the EPA contacted, the EPA consulted with the Choctaw Nation of Oklahoma; the Miccosukee Tribe of Indians of Florida; the Muscogee (Creek) Nation, the Poarch Band of Creek Indians; and the Seminole Tribe of Florida (collectively, "Consulting Tribes") pursuant to 36 C.F.R. § 800.14, and invited the Consulting Tribes to provide comments on the draft PA; and

WHEREAS, the EPA has sought comment from the public regarding the identification and protection of historic properties and has taken any comments received into account; and

WHEREAS, nothing in this PA absolves the EPA or FDEP from the requirements for federal review of individual permit applications and draft general permits pursuant to Section 404 of the CWA, 40 C.F.R. Part 233, and the July 31, 2020 Memorandum of Agreement Between the Florida Department of Environmental Protection and the United States Environmental Protection Agency (FDEP-EPA MOA).

**NOW, THEREFORE**, the EPA, the ACHP, the Florida SHPO, and FDEP mutually agree that the EPA, consistent with the provisions of this PA below, will meet its responsibilities under the NHPA through this PA as provided for in 36 C.F.R. § 800.14(b), rather than following the procedure set forth in 36 C.F.R. §§ 800.3 through 800.7.

## STIPULATIONS

The EPA and FDEP, in coordination with the Florida SHPO, shall ensure that the following stipulations are carried out:

I. DEFINITIONS

a. All the definitions in 36 C.F.R. Part 800, Subpart B – The Section 106 Process – are applicable and incorporated herein.

b. All the definitions in 36 C.F.R. Part 800, Subpart C – Program Alternatives – are applicable and incorporated herein.

c. All the definitions in 40 C.F.R. Part 233 are applicable and incorporated herein.

d. Additional definitions and terms that are defined in the August 6, 2020 OA found in Appendix A are applicable and incorporated herein.

II. RELEVANT ENTITIES

a. Parties to the PA

(1) U.S. Environmental Protection Agency. The EPA is the federal agency responsible for administering compliance with, and enforcement of, the CWA. The EPA is responsible for ensuring that the EPA's program assumption decision made pursuant to Section 404(g)(1) of the CWA complies with Section 106 of the NHPA, and its implementing regulations at 36 C.F.R. Part 800.

The EPA has oversight authority over the state CWA 404 program and may review state 404 individual permit applications and draft general permits. Pursuant to Section 404(j) of the CWA and 40 C.F.R. § 233.50, the EPA may in its discretion comment upon, object to, make recommendations, or take no action with respect to a state 404 individual permit application, draft general permit, or a state's failure to accept the recommendations of another state or Indian tribe whose waters may be affected by the issuance of a permit. Any such objection shall be based on the EPA's determination that the proposed permit is: (1) the subject of an interstate dispute under 40 C.F.R. § 233.31(a); and/or (2) outside the requirements of the CWA, the regulations at 40 C.F.R. Part 233, or the CWA Section 404(b)(1) Guidelines, which also address impacts to historic properties.

(2) State Historic Preservation Officer. The Florida SHPO reflects the interests of the state of Florida and its citizens in the preservation of the state's cultural heritage. The Florida SHPO will advise and assist the FDEP with carrying out its historic preservation responsibilities. The SHPO has advised and assisted the EPA in developing this PA to carry out its responsibilities to comply with Section 106 of the NHPA.

(3) Advisory Council on Historic Preservation. The ACHP promotes the preservation, enhancement, and sustainable use of our nation's diverse historic resources, and advises the President and the Congress on national historic preservation policy. The ACHP advised and assisted the EPA with carrying out its historic preservation responsibilities pursuant to Section 106 of the NHPA and its implementing regulations at 36 C.F.R. Part 800.

(4) Florida Department of Environmental Protection. FDEP is the state agency responsible for administering the state CWA 404 program in state assumed waters, which includes the authority to grant or deny applications for state CWA 404 program permits.

b. Other Entities that Participated in Consultation

(1) Indian tribes. Indian tribes mean an Indian tribe, band, nation, or other organized group or community including a Native village, Regional Corporation or Village Corporations, as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. (54 U.S.C. 300309). The state 404 assumption does not include waters in Indian country, as that term is defined in 18 U.S.C. § 1151.

(2) Public. The views of the public are beneficial to informed decision-making in the historic properties review. The EPA sought and considered the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, and confidentiality concerns of private individuals and businesses.

## III. NHPA IMPLEMENTATION AND ADOPTION OF THE AUGUST 6, 2020 OA

FDEP and the Florida SHPO established in the August 6, 2020 OA procedures for the review of proposed permits under the state 404 program to determine whether the proposed projects are likely to have an adverse effect on properties listed, or eligible for listing, on the National Register of Historic Places. The August 6, 2020 OA provides a detailed description of the historic properties review process, including but not limited to: 1) the duties and responsibilities of FDEP and the Florida SHPO; 2) procedures for direct consultation with interested Indian tribes at multiple stages of the review of applications; 3) procedures for public notice and comment; 4) the effects determination and resolution of adverse effects; 5) federal review; 6) unanticipated discovery procedures; and 7) training requirements. This PA adopts the August 6, 2020 OA and its procedures and incorporates them herein. FDEP and the Florida SHPO will consult with the other signatories to this PA prior to amending or terminating the August 6, 2020 OA. Amendments or termination of the August 6, 2020 OA shall be in accordance with sections VII and VIII of Appendix A. If necessary, the PA shall be amended or terminated pursuant to the terms set forth below.

## IV. IDENTIFICATION AND TREATMENT OF HUMAN REMAINS

In the event that human remains are identified prior to, during, or after permitting, FDEP shall follow the provisions of II.C.4 of the August 6, 2020 OA. FDEP shall notify the EPA of the discovery on the same day that it notifies the SHPO, and the Tribal Historic Preservation Officer (THPO)/Indian tribes of the discovery. The signatory parties will comply with any applicable provisions of ARPA and NAGPRA. Activity authorized under the permit shall not resume without written authorization from FDEP, SHPO, the EPA, and THPO/Indian tribes.

## V. EPA REVIEW

a. Section III.C. of the August 6, 2020 OA provides for EPA review of permit applications in the following circumstances, which are consistent with EPA's state 404 permit review authorities under Section 404(j) of the CWA and 40 C.F.R. § 233.50, and with FDEP's discretion to request EPA review of specific projects that would otherwise not require EPA oversight pursuant to Section II(B) of the FDEP-EPA MOA. The circumstances are as follows:

   (1) FDEP shall send a copy of the public notice described in Section II.B. of the August 6, 2020 OA to the EPA in accordance with subsection 62-331.052(2), F.A.C., for those projects that are subject to federal review. Included in the list are projects within critical areas established under state or federal law, including sites identified or proposed under the NHPA;

   (2) FDEP agrees to request, in accordance with section 5.2.5 of the State 404 Program Applicant's Handbook, EPA review of an application under 40 C.F.R. § 233.50 where the parties consulting under the August 6, 2020 OA cannot agree on the effect determination for a proposed activity or where FDEP does not accept the recommendations of one of the parties consulting under the August 6, 2020 OA for the resolution of adverse effects; and

   (3) FDEP shall, in accordance with subsection 62-331.052(3)(b), F.A.C., notify the EPA if FDEP does not accept the effect determination for a proposed activity or recommendations for the resolution of adverse effects of a THPO/Indian tribe, together with FDEP's reason for its decision.

b. The EPA may in its discretion review documentation submitted pursuant to subsection V(a) of this PA, consult with Indian tribes, where appropriate, and develop any comments, objections, or recommendations with respect to permit applications submitted pursuant to subsection V(a)(1) that have the potential to impact historic properties or permit applications that are the subject of a dispute submitted pursuant to subsections V(a)(2) or (3). The EPA will submit to the ACHP a copy of the proposed comments, objections, or recommendations and other pertinent documentation. The EPA will also notify the state pursuant to 40 C.F.R. § 233.50(d) that it is reserving its right to comment. The ACHP, within 30 days of receipt of the

EPA's proposed comments, objections, or recommendations and other pertinent documentation, may provide an advisory opinion regarding the proposed comments, objections, or recommendations. The EPA will consider, but need not follow, the ACHP's advisory opinion in finalizing its comments, objections, or recommendations with respect to the permit application. If the ACHP does not submit an advisory opinion within 30 days of receipt of the EPA's proposed comments, objections, or recommendations, and other pertinent documentation, the EPA will exercise its discretion to finalize its comments, objections, or recommendations, or determine not to finalize such comments, objections, or recommendations. The EPA will transmit any final comments, objections, or recommendations to FDEP for resolution in accordance with 40 C.F.R. § 233.50. The EPA will also transmit any final comments, objections, or recommendations to ACHP, the Florida SHPO, and the Indian tribes, where appropriate.

## VI. CONFIDENTIALITY

All signatory parties to this PA acknowledge that information about Historic Properties, potential Historic Properties, or properties considered historic for purposes of the PA are or may be subject to the provisions of Section 304 of the NHPA. Having so acknowledged, all signatory parties to this PA will ensure that all actions and documentation prescribed by this PA are, where necessary, consistent with the requirements of Section 304 of the NHPA. The signatory parties shall maintain confidentiality in accordance with all applicable laws. FDEP and Florida SHPO shall also maintain confidentiality in accordance with the terms of the August 6, 2020 OA.

## VII. REPORTING AND MONITORING

FDEP shall provide the signatory parties and the Consulting Tribes with an annual report for each state fiscal year ending June 30th by September 30th of each year that the PA is in effect. This annual report will summarize the actions taken to implement the terms of this PA and provide data about the historic properties review process under the August 6, 2020 OA, and, if necessary, recommend any actions or revisions to be considered, including amendments to the PA.

The EPA will schedule a meeting to discuss issues identified in the annual report related to the PA and August 6, 2020 OA if any signatory or Consulting Tribe requests one.

## VIII. AMENDMENT

Any signatory party to this PA may at any time propose amendments to the PA, whereupon all signatory parties shall consult to consider such an amendment for no more than 90 days. This PA may be amended only upon written concurrence of all signatory parties. The amended PA, if any, will be filed with the ACHP. If the EPA determines that a modification of Florida's CWA Section 404 program is warranted based on its review of annual reports submitted by FDEP pursuant to 40 C.F.R. § 233.52, or other lawful basis, the EPA will consider whether the PA

needs to be amended at that time and may propose such amendments to the signatory parties. Amendments to this PA that may alter any aspect of Florida's approved program are not part of Florida's approved program unless and until approved pursuant to 40 C.F.R. § 233.16.

## IX. TERMINATION

a. Any signatory party to this PA may terminate this PA for good cause by providing 90 days' notice to the other signatory parties, provided that the signatory parties will meet during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. If this PA is terminated, the EPA will either execute another programmatic agreement or seek, consider, and respond to the ACHP comments, which the ACHP shall transmit to the EPA within 45 days of request. The termination of this PA does not modify or alter the legal status of the assumed state program.

b. This PA shall remain in effect unless and until program responsibilities are transferred by FDEP to the U.S. Army Corps of Engineers pursuant to 40 C.F.R. § 233.53, program approval is withdrawn pursuant to 40 C.F.R. § 233.53, or the PA is terminated as set forth above.

## X. EFFECTIVE DATE

This PA will be effective 30 days from the date of publication of notice in the Federal Register announcing EPA's approval of FDEP's request to assume the CWA Section 404 program.

## XI. SIGNATURE

This PA may be signed in counterparts.

**SIGNATORY PARTIES**

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**By: Mary S. Walker (DATE)**
**Administrator, EPA Region 4**

**SIGNATORY PARTIES**

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**By: Aimee K. Jorjani (DATE)**
**Chairman, Advisory Council on Historic Preservation**

**SIGNATORY PARTIES**

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**By: Dr. Timothy Parsons (DATE)**
**Director and State Historic Preservation Officer**

**SIGNATORY PARTIES**

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**By: Noah Valenstein (DATE)**
**Secretary, Florida Department of Environmental Protection**