RA BRIEF
FLORIDA ASSUMPTION OF STATE 404 PROGRAM

Date Updated: 9/16/2018 **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 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.

Critical Messages:

1. EPA is prepared to begin our review immediately upon receipt of a package from Florida (i.e., drafted federal register noticing public review and comment period and a public hearing, transmittal letters to other federal agencies, Tribal consultation letters, etc.). 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 September 21, 2018.
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 the 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.

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 continues work on a key component of the MOA, the Retained Waters List.
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.
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. The EPA understands that FDEP intends to share some draft documents with the EPA for informal review by September 21, 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. 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.
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.
3. FDEP may share copies of the revised draft MOA with the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service later this week.
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.

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.

2. The Corps and FDEP have also not reached closure on who will have authority to make 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.

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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. 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 ESA § 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. **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.

☐ Get 5-year conceptual approach in writing from FDEP

EPA is still awaiting receipt of a draft final rule from FDEP. Based on the most recent discussions we do not believe FDEP will include language that is inconsistent with federal requirements.

☒ 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 intends to share the most recent copy of the draft EPA-FDEP MOA with NMFS by September 14.

☒ 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)