MEMORANDUM OF AGREEMENT BETWEEN THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE DEPARTMENT OF THE ARMY

I. GENERAL

A. Purpose and Authority

(1) Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, to regulate the discharge of dredged or fill material into waters of the United States. The U.S. Army Corps of Engineers, Jacksonville District (Corps), currently administers the Section 404 program in the State of Florida.

(2) Section 404(g) of the CWA, 33 U.S.C. § 1344(g), authorizes a state, with approval from the United States Environmental Protection Agency (EPA), to administer its own permit program for the discharge of dredged or fill material into certain waters of the United States (State 404 Program) in lieu of the permitting program implemented by the Corps. The EPA has promulgated regulations at 40 C.F.R. Part 233 outlining, among other things, its requirements for approving a state program.

(3) The State of Florida (State) is submitting its program to regulate the discharge of dredged or fill material in compliance with the above-cited authorities. This Memorandum of Agreement (Agreement) between the State and the Corps fulfills the requirements of 40 C.F.R. § 233.14.

(4) The Florida Department of Environmental Protection (DEP), pursuant to Part IV of Chapter 373, Florida Statutes, is authorized to issue permits for regulated activities conducted in State regulated waters, including the discharge of dredged and fill material. The Secretary of DEP is given the authority to issue permits pursuant to Part IV of Chapter 373, Florida Statutes, and is the State official charged with administering the State 404 Program when the program is approved in accordance with 40 C.F.R. Part 233.

B. Effective Date and Revisions

(1) This Agreement shall be executed by DEP and the Corps and shall take effect at the time of EPA approval of the State 404 Program, which shall be the effective date published in the Federal Register.

(2) DEP and the Corps agree to maintain a high level of cooperation and coordination and to work in partnership to assure successful and effective implementation of the programs regulating the discharge of dredged or fill material into waters of the United States.

(3) This Agreement, and any procedures established in conformance with it, shall be reviewed periodically, or at least once every 12 months, by DEP and the Corps, except as otherwise provided herein. Either party may request in writing an amendment or modification to

the Agreement. Amendments and modifications shall be in writing and shall be effective upon the signature of both parties and approval by EPA.

(4) This Agreement shall remain in effect until the State 404 Program authorization is modified by EPA, pursuant to 40 C.F.R. § 233.16, in a manner that would affect this Agreement, until EPA's approval is withdrawn pursuant to 40 C.F.R. § 233.53(b), or until DEP voluntarily transfers program responsibilities to the Corps according to the criteria and procedures established in 40 C.F.R. § 233.53(a).

(5) In the event DEP proposes to transfer all or part of the State 404 Program to another State agency in accordance with 40 C.F.R. § 233.16, either this Agreement will be modified to add that other State agency or a new Memorandum of Agreement between the Corps and that State agency will be required.

II. WATERS TO BE RETAINED

A. Pursuant to 404(g) of the CWA, the Corps will retain permitting authority under Section 404 of the CWA for those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, including wetlands adjacent thereto.[1] The Corps will retain responsibility for permitting for the discharge of dredged or fill material in those waters identified in the Retained Waters List (Attachment A), as well as all waters subject to the ebb and flow of the tide shoreward to their mean high water mark that are not specifically listed in the Retained Waters List, including wetlands adjacent thereto landward to the administrative boundary. For purposes of this Agreement, the administrative boundary demarcating the adjacent wetlands over which jurisdiction is retained by the Corps is a 300-foot guide line established from the ordinary high water mark or mean high tide line of the retained water. In the case of a project that involves discharges of dredged or fill material both waterward and landward of the 300-foot guide line, the Corps will retain jurisdiction to the landward boundary of the project for the purposes of that project only. All waters of the United States not retained by the Corps will be assumed by DEP as part of its State 404 Program (State assumed waters). The Corps will provide Retained Waters GIS layers to DEP, and will update the GIS layers as necessary, in accordance with II.C. and III.B, below.

B. The Corps shall retain responsibility for permitting the discharge of dredged and fill material in waters of the United States within "Indian country," as that term is defined at 18 U.S.C. § 1151. Title 18 U.S.C. §1151 defines "Indian country" as: (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original

[1] Section 404(g) of the CWA, 33 U.S.C. § 1344(g), is interpreted and implemented in accordance with Assistant Secretary of the Army for Civil Works, Memorandum dated July 30, 2018, Subject: *Clean Water Act Section 404(g)-Non-Assumable Waters.*

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or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. Indian reservations include lands held in trust by the United States for an Indian tribe even if such lands have not been formally designated as an Indian reservation.

C. Modifications to the Retained Waters List and Retained Waters List GIS layers, including identification of the head of navigation, will be made in the following circumstances: when the Corps makes a navigability determination;[2] a Federal court makes a navigability determination; the United States Congress makes a navigability determination; there are applicable rule changes; or pursuant to Section III.B., below. Any modifications to the Retained Waters List which affect the area of jurisdiction are subject to EPA approval pursuant to 40 C.F.R. § 233.16(d). Nothing in this Agreement affects the authority of the Corps to make determinations of navigability pursuant to 33 C.F.R. Part 329.

III. JOINT COORDINATION PROCEDURES

A. When an application or verification request is received by either party, the application will be screened using the Retained Waters List and GIS layers to determine if the proposed activity will occur within Corps retained waters, as identified in Section II, above. When a proposed activity falls within retained waters, DEP will, within five calendar days of receipt, refer the applicant to the Corps. Likewise, when a proposed activity falls within State assumed waters, the Corps will, within five calendar days of receipt, refer the applicant to DEP.

B. If DEP has reason to believe a proposed activity is within the Corps' jurisdiction as defined in Section II.A., above, but is not within the Retained Waters List or depicted in the retained waters GIS layers, DEP will request the Corps determine whether the project falls within retained waters. The Corps shall provide its determination within seven calendar days of receipt of DEP's request. In the event the Corps determines the proposed activity falls within its jurisdiction, DEP will refer the applicant to the Corps. Within 30 calendar days, the Corps will update its GIS layer and Retained Waters List accordingly.

C. In accordance with Section 10 of the Rivers and Harbors Act of 1899 (RHA), the Corps has regulatory jurisdiction over all obstructions and alterations of navigable waters of the United States, the construction of any structures in or over navigable waters of the United States, and any work affecting the course, location, condition, or capacity of navigable waters of the United States, as defined in 33 C.F.R. Part 329. This includes permit authority under Section 10 of the RHA for those waters that are jurisdictional based solely on historic use (Section 10 historic waters). While the Corps retains authority over Section 10 historic waters, upon the effective date of this Agreement, the State assumes responsibility for permitting the discharge of dredged or fill material within Section 10 historic waters. Therefore, discharges of dredged or fill material in Section 10 historic waters will require a Section 10 permit from the Corps and a 404 permit from

[2] 33 C.F.R. § 329.14

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DEP. Nothing in this Agreement affects the authority of the Corps in implementing regulatory programs pursuant to the RHA.

IV. EXISTING PERMITS AND PENDING PERMIT APPLICATIONS

A. Individual Permits

(1) The time limit for completing work authorized under a Department of the Army (DA) individual permit issued prior to the effective date of assumption for the discharge of dredged or fill material in State assumed waters will remain the expiration date stated in the permit instrument. After the effective date of assumption, an applicant must apply for a new permit from DEP for any work that remains incomplete by the expiration date. The Corps will not review requests for extension of time and will refer the applicant to DEP to apply for a new permit under the State 404 Program. DEP may administratively continue an expiring Corps permit until the effective date of a new permit, if any, consistent with 40 C.F.R. § 233.38, or a decision is made not to issue a new permit.

(2) The Corps retains authority to make minor modifications to DA permits in State assumed waters. Minor modifications are generally ministerial in nature, and shall include the following: a) to correct errors or typographical mistakes; b) to incorporate changes requested by the Corps; c) to change due dates for reporting or performance deadlines; d) to transfer a permit upon a change in ownership or control; and e) to make minor technical changes. Minor modifications may include other minor changes; however, in no case will a minor modification expand the volume or amount, enlarge the footprint, change the location, or extend the duration of the authorized discharge. The Corps will refer modifications that it determines, in its sole discretion, to fall outside the scope of a minor modification to DEP for evaluation of a permit under the State 404 Program.

B. General Permits

(1) The time limit for completing the work under a DA general permit verified prior to the effective date of assumption for the discharge of dredged or fill material in State assumed waters will remain the expiration date stated in the verification letter, to include 12 months after expiration if work has commenced or is under contract to commence. After the effective date of assumption, any work that remains incomplete by the expiration date must receive a new permit from DEP under the State 404 Program. Requests for modifications of verifications under a DA general permit within State assumed waters shall be made to DEP. After the effective date of assumption, no new verifications under general permits will be issued by the Corps within State assumed waters.

(2) Upon EPA approval of the State 404 Program, the FDEP will assume

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administration of the following Regional General Permits in State assumed waters: SAJ-13 (Aerial Transmission Lines in Florida); SAJ-14 (Sub-aqueous Utility and Transmission Lines in Florida); SAJ-86 (Residential, Commercial, Recreational and Institutional Fill in the Choctawhatchee Bay, Lake Powell, and West Bay Basins, Bay and Walton Counties, Florida); SAJ-90 (Residential, Commercial & Institutional Developments in Northeast Florida); SAJ-103 (Residential Fill in Holley By The Sea, a Subdivision in Santa Rosa County); SAJ-105 (Residential, Commercial, Recreational and Institutional Fill in the West Bay Watershed of Bay County, Florida); and SAJ-114 (Residential, Commercial, Recreational and Institutional Fill in the Choctawhatchee Bay and St. Andrew's Bay Watersheds located in Bay County and Walton County, Florida). The Corps will transfer relevant information, files, and records to DEP, pursuant to 40 C.F.R. § 233.14(b)(3).

C. Records Transfer

Upon notification of program approval from EPA, the Corps will transfer to DEP any pending Section 404 program permit application files, including requests for verifications of Regional General Permits identified in Section IV.B(2) above, within State assumed waters. Upon request by DEP, the Corps will provide copies of specific permits for purposes of DEP issuing a new permit. Transfer methods shall be mutually agreed upon by the Corps and DEP.

V. REVIEW OF APPLICATIONS FOR STATE PROGRAM PERMITS

A. Anchorage and Navigation

DEP shall not issue a permit if notified that the Corps has determined, in accordance with 40 C.F.R. § 233.20(d), that anchorage and navigation of any navigable waters would be substantially impaired.

B. Corps Civil Works Projects

(1) Section 14 of the RHA (33 U.S.C. § 408) (Section 408) mandates that any use or alteration of a Corps Civil Works project by another party is subject to the approval of the Corps. Within five calendar days of receipt of a permit application or verification request, DEP agrees to inform the Corps and instruct the applicant to contact the appropriate Corps Section 408 contact person for any activities that may use or alter an existing Corps Civil Works project. Existing Corps Civil Works projects are found in the Jacksonville District Regulatory Source Book, which the Corps will update as necessary. Within 14 calendar days of receipt of the notification from DEP, the Corps will notify DEP if the Corps' approval is required pursuant to Section 408, in which case the State agrees to delay any final State actions until Section 408 review is complete or include a special condition in the permit requiring Section 408 permission prior to construction that will include the Corps' Section 408 contact information. However, where DEP is processing a

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verification of a general permit identified in Section IV.B(2), the State agrees that it cannot verify coverage under the general permit until the Corps issues an authorization pursuant to Section 408.

(2) Corps Civil Works projects involving the discharge of dredged or fill material into waters of the United States must be developed in accordance with the guidelines promulgated under Section 404(b)(1) of the CWA, as amended, unless exempted by Section 404(f) of the CWA. For Corps Civil Works projects in State assumed waters, other than projects specifically authorized by Congress for which the Corps has applied or will apply Section 404(r) of the CWA, the Corps and DEP will develop and follow, as practicable, mutually agreed upon procedures for submission of information necessary for DEP to process an application for a permit under the State 404 Program.

C. Emergency Permits

In accordance with 40 C.F.R. § 233.22(d), DEP shall consult in an expeditious manner with the Corps about issuance of an emergency permit in State assumed waters.

D. State 404 Permits

In accordance with 40 C.F.R. § 233.50(j), if DEP has received an EPA objection or requirement for a permit condition to a permit application or draft general permit in State assumed waters, and in the event that DEP neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Corps shall process the permit application. DEP will provide a copy of the administrative record to the Corps using an agreed upon method to facilitate the Corps' review.

E. Designation of a Non-Federal Representative

If DEP receives an EPA objection or requirement for a permit condition and neither satisfies EPA's objection or requirement for a permit condition nor denies the permit, and, pursuant to the process in 40 C.F.R. § 233.50(j), responsibility for permitting has shifted to the Corps, under Endangered Species Act (ESA) implementing regulations, the Corps may designate a non-federal representative, such as DEP, the Florida Fish and Wildlife Conservation Commission, or the permit applicant to conduct informal ESA consultation or prepare a biological assessment, pursuant to 50 C.F.R. § 402.08. Upon receipt of a permit application package from DEP for a project that has the reasonable potential for affecting endangered or threatened species, the Corps may in its sole discretion, designate the State or the applicant as a non-federal representative for purposes of conducting informal ESA consultation or preparing a biological assessment by giving written notice to designated non-Federal representative. If a permit applicant is involved that is not the designated non-Federal representative, then the applicant and Corps must agree on the choice of the designated non-Federal representative. If a biological assessment is prepared by the designated non-Federal representative, the Corps shall furnish guidance and supervision and shall independently review and evaluate the scope and contents of the biological assessment.

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VI. COORDINATION OF MITIGATION BANKING

A. Mitigation Bank Instruments and In-Lieu Fee Program Agreements

Mitigation banking instruments and in-lieu fee program instruments shall be processed by the Corps in accordance with 33 C.F.R. Part 332. DEP may co-chair any applicable interagency coordination effort.

B. Permits for Mitigation Bank and In-Lieu Fee Projects

With respect to permits for mitigation banks and in-lieu fee projects issued after the effective date of assumption, the boundary of the mitigation bank or of a project under an in-lieu fee program (as distinct from the service area) will be the project boundary for purposes of Section II.A., above, for authorization of discharge of dredged or fill material.

C. Use of Credits from Corps Approved Mitigation Banks for State 404 Permits

DEP may approve the use of credits from a Corps-approved mitigation bank or in-lieu fee program to provide compensatory mitigation for permits issued under the State 404 Program, as long as the use of credits is consistent with the approved mitigation banking instrument or in-lieu fee instrument.

VII. ENFORCEMENT

A. After the effective date of State assumption, the Corps will continue to monitor compliance and enforce the terms and conditions of all DA individual and general permits issued or verified in State assumed waters prior to the effective date of assumption. For general permits previously issued by the Corps but administered by the State after the effective date of assumption, DEP will monitor compliance and enforce the terms of any verifications it issues.

B. The Corps will not be responsible for enforcing against unauthorized discharges of dredged or fill material in violation of the CWA which occur in State assumed waters after the effective date of assumption. Unauthorized discharges include discharges that exceed the volume or amount of discharge authorized under a permit, that occur outside of the areas authorized for discharge under a permit, or that occur outside the period specified in a permit.

C. Except as provided in Section D, DEP will be responsible for enforcing against unauthorized discharges of dredged or fill material in violation of the CWA which occurred in State assumed waters prior to the effective date of State assumption.

D. The Corps will remain the lead agency for ongoing enforcement actions against unauthorized discharges of dredged or fill material in violation of the CWA or against noncompliance with the terms and conditions of a DA permit in State assumed waters that have not been resolved prior to the effective date of State assumption (hereinafter Ongoing Enforcement Action). If there is an unusual circumstance concerning an Ongoing Enforcement Action, the

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parties to this Agreement may discuss DEP taking the lead. For those instances where the Corps, on its own or in coordination with EPA or the United States Department of Justice, resolves an Ongoing Enforcement Action, the Corps will consult with DEP as practicable, and will provide DEP a copy of any consent decree or settlement agreement. DEP will be responsible for issuing any after-the-fact permit for the discharge of dredged or fill material.

VIII. COMMUNICATION BETWEEN PARTIES

A. Communication and record sharing between the parties of this Agreement may be accomplished through electronic means.

B. Following execution of this Agreement, DEP and the Corps will meet as necessary to discuss issues related to State assumption. Following the effective date of State assumption, the Corps and DEP shall meet on a biweekly basis during the first six months of State assumption in order for the Corps and DEP to ensure effective coordination in the implementation of this Agreement.

IX. GENERAL PROVISIONS

A. The Parties are entering into this Agreement based solely on the representations and warranties herein and not based on any promises, representations, and/or warranties not found herein.

B. This Agreement does not create any right or benefit, substantive or procedural, enforceable by law or equity, by any persons, their officers or employees, or any other person. This Agreement does not apply to any person outside of the Corps and DEP.

C. The signatory agencies do not waive any administrative claims, positions, or interpretations they may have with respect to the applicability or enforceability of the CWA, the ESA, the National Historic Preservation Act, or any other applicable federal or State laws or regulations.

D. Nothing in this Agreement shall be interpreted as obligating the signatory agencies for the expenditure of funds in excess of appropriations authorized by law, or otherwise commit the signatory agencies to actions for which they lack statutory authority.

E. Nothing in this Agreement shall affect any of the Corps' tribal trust responsibilities.

F. The headings in this Agreement are for convenience of reference only and shall not limit or otherwise affect the meaning hereof.

G. If any provision of this Agreement is held to be illegal or invalid by a court of competent jurisdiction, such provision shall be deemed to be severed and deleted; and neither such provision, nor its severance and deletion, shall affect the validity of the remaining provisions.

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X. SIGNATURES

Florida Department of Environmental Protection

07/31/2020

Noah Valenstein (Date)
Secretary

Department of the Army

08/05/2020

R.D. James (Date)
Assistant Secretary of the Army
(Civil Works)

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