# EXHIBIT 1

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OW–2018–0640; FRL–10014–54–Region 4]**

## Florida's Request To Assume Administration of a Clean Water Act Section 404 Program

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice and request for comments.

**SUMMARY:** The Clean Water Act (CWA) established the Section 404 program, under which the U.S. Army Corps of Engineers (Corps) may issue permits for the discharge of dredged or fill material into ''waters of the United States,'' as identified in the CWA. Section 404(g)(1) of the CWA authorizes states and tribes to administer their own permit program for the discharge of dredged or fill material into navigable waters, other than those waters that the CWA reserves as subject to Corps jurisdiction. On August 20, 2020, the Environmental Protection Agency (EPA) received from the Governor of the State of Florida, a complete program submission for regulating discharges of dredged or fill material into waters within the jurisdiction of the State in accordance with the CWA. Pursuant to CWA Section 404(h) and EPA's implementing regulations, EPA will hold public hearings and is opening a 45-day comment period. EPA is also initiating a programmatic consultation under Section 106 of the National Historic Preservation Act (NHPA) and is soliciting comments pursuant to NHPA implementing regulations during the 45-day comment period.

**DATES:** Comments on EPA's decision to approve or disapprove under CWA Section 404 must be received on or before November 2, 2020. Comments associated with the consultation under section 106 of the NHPA may also be submitted on or before November 2, 2020. EPA intends to approve or disapprove the State of Florida's request to assume administration of a CWA Section 404 program by December 17, 2020.

**ADDRESSES:** You may send comments on both actions (Florida's request to assume a CWA Section 404 program and EPA's consultation under NHPA section 106), identified by Docket ID No. EPA–HQ–OW–2018–0640, by any of the following methods:

- *www.regulations.gov:* Follow the on-line instructions for submitting comments and accessing the docket and materials related to this notice.
- *Email: 404Assumption-FL@epa.gov.*
- *Mail:* Mr. Kelly Laycock, Oceans, Wetlands and Streams Protection Branch, USEPA Region 4, 61 Forsyth St. SW, Atlanta, GA 30303.

*Instructions:* All submissions received must include the Docket ID No. EPA–HQ–OW–2018–0640 for these actions. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided.

Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are open by appointment only, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email at *404Assumption-FL@epa.gov,* as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on the EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

The virtual hearings will be held on October 21, 2020 and October 27, 2020. The hearing held on October 21, 2020 will convene at 9:00 a.m. and will conclude no later than 12:00 p.m. EDT. The hearing held on October 27, 2020 will convene at 5:00 p.m. EDT and will conclude not later than 8:00 p.m. EDT. For information about registration for these virtual public hearings, please see *https://www.epa.gov/aboutepa/about-epa-region-4-southeast.*

**FOR FURTHER INFORMATION CONTACT:** Mr. Kelly Laycock, Oceans, Wetlands and Streams Protection Branch, USEPA Region 4, 61 Forsyth St. SW, Atlanta, GA 30303; (404) 562–9262; email address: *404Assumption-FL@epa.gov.*

**SUPPLEMENTARY INFORMATION:** The State's submission may be read online through the Federal eRulemaking Portal, Docket No. EPA–HQ–OW–2018–0640, the EPA's Docket Center, available at *https://www.regulations.gov.* The State's submission is also on file and may be inspected and copied (for a per page charge) at the EPA Docket Center Reading Room located at WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. Due to COVID–19, access to the EPA Docket Center Reading Room will be allowed by appointment only. Procedures to make an appointment to visit the EPA Docket Center Reading Room can be found at *https://www.epa.gov/dockets/epa-docket-center-reading-room.*

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### I. General Information

*A. Does this action apply to me?*

States and tribes that have assumed or are considering assuming the administration of a CWA Section 404 dredged or fill material permitting program as well as regulated entities and members of the public in the State of Florida may be interested in providing input on the issues described in this document.

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.

*B. What should I consider as I prepare my comments?*

Comments may consider whether the state program meets the requirements of Section 404(g) of the CWA and its implementing regulations. Comments may also consider the impacts of EPA's approval or disapproval of Florida's request on historic sites located within the State of Florida in accordance with section 106 of the NHPA.

Submit your comments, identified by Docket ID No. EPA–HQ–OW–2018–0640, at *https://www.regulations.gov* (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA's docket any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment

is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.* on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets.*

The EPA Docket Center and Reading Room are open by appointment only, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* as there may be a delay in processing mail and faxes. Hand deliveries or couriers will be received by scheduled appointment only. For further information and updates on EPA Docket Center services, please visit us online at *https://www.epa.gov/dockets.*

EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our federal partners so that we can respond rapidly as conditions change regarding COVID–19.

*C. How can I participate in the virtual public hearing?*

EPA is deviating from its typical approach because the President has declared a national emergency. Because of current CDC recommendations, as well as state and local orders for social distancing to limit the spread of COVID–19, EPA cannot hold in-person public meetings at this time.

The virtual hearings will be held on October 21, 2020 and October 27, 2020. The hearing held on October 21, 2020 will convene at 9:00 a.m. and will conclude no later than 12:00 p.m. EDT. The hearing held on October 27, 2020 will convene at 5:00 p.m. EDT and will conclude not later than 8:00 p.m. EDT.

EPA will begin pre-registering speakers and listen-only attendees for the hearings upon publication of this notice in the **Federal Register**. For a link to the on-line registration page, please visit *https://www.epa.gov/aboutepa/about-epa-region-4-southeast.* Immediately following registration, you will receive an email confirming your registration and providing a unique link to the webinar. Speakers will be signed up to speak in the order that their registration is received. The last day to pre-register to speak at a hearing will be October 9, 2020. On October 20, 2020, EPA will post a general agenda for the hearing that will list the order of pre-registered speakers and their approximate timeslots at: *https://www.epa.gov/aboutepa/about-epa-region-4-southeast.* Please note that timeslots will be estimated and speakers are encouraged to join the webinar at least 15 minutes prior to the start of their estimated speaking time.

EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Oral comments shall be limited to no more than five (5) minutes. EPA recommends that commenters prepare their oral statement in advance to ensure it can be completed within five minutes. EPA also recommends that commenters also submit the text of their oral comments (with any relevant supplementary information) as written comments to the rulemaking docket. EPA encourages commenters to provide EPA with a copy of their oral testimony electronically (via email) by emailing it to Mr. Kelly Laycock at *404Assumption-FL@epa.gov.*

EPA may ask clarifying questions during the oral testimony but will not respond to the comments at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral comments and supporting information presented at the public hearing. The proceedings of the hearings will be recorded. After the public hearing, verbatim transcripts of the sessions will be included in the rulemaking docket.

Please note that any updates made to any aspect of the hearing will be posted online at *https://www.epa.gov/aboutepa/about-epa-region-4-southeast.* While EPA expects the hearing to go forward as set forth above, please monitor our website to determine if there are any updates. EPA does not intend to publish a document in the **Federal Register** announcing updates.

To request services for special accommodations, please pre-register for the hearing with Mr. Kelly Laycock at *404Assumption-FL@epa.gov* and describe your needs by October 7, 2020. EPA will seek to arrange special accommodations as needed to support hearing participation if given advanced notice.

## II. Background

*A. Clean Water Act Section 404(g)*

The CWA established the Section 404 program, under which the Secretary of the Army, acting through the Chief of Engineers of the Corps, may issue permits for the discharge of dredged or fill material into waters of the United States as identified in the CWA. Section 404(g)(1) of the CWA provides states and tribes the option of submitting to EPA a request to assume administration of a CWA Section 404 program in certain waters within state or tribal jurisdiction.

The regulations establishing the requirements for the approval of state or tribal programs under section 404 of the CWA were published in the **Federal Register**, at 53 FR 20764, (June 6, 1988) (40 CFR parts 232 and 233), and can be accessed at *https://www.epa.gov/cwa404g/statutory-and-regulatory-requirements-assumption-under-cwa-section-404.* ''State regulated waters'' are defined in 40 CFR 232.2 as ''those waters of the United States in which the Corps suspends the issuance of Section 404 permits upon approval of a state's section 404 permit program by the Administrator under section 404(h). The program cannot be transferred 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 the high tide line, including wetlands adjacent thereto.'' The Corps retains CWA Section 404 permitting authority over waters of the United States within ''Indian country'' as that term is defined at 18 U.S.C. 1151, unless a tribe has assumed the 404 program within Indian country. *See* 40 CFR 233.1(b).

A state application to administer a Section 404 program must include the following: (a) A letter from the Governor of the state requesting program approval; (b) a complete program description as set forth in 40 CFR 233.11; (c) an Attorney General's statement or a statement from the attorney for those state or interstate agencies which have independent legal counsel, as set forth in 40 CFR 233.12; (d) a Memorandum of Agreement with the EPA Regional Administrator, as set forth in 40 CFR 233.13; (e) a Memorandum of Agreement with the Secretary of the Army, as set forth in 40 CFR 233.14; and (f) copies of all applicable state statutes and regulations, including those governing applicable

state administrative procedures. 40 CFR 233.10.

EPA has reviewed the State of Florida's program submission and consistent with 40 CFR 233.15 has determined that it is a complete request for State program approval that meets the submittal requirements of 40 CFR 233.10. The Governor's request proposes that FDEP administer a permit program for regulated activities in waters regulated by the State under section 404(g)(1), as identified in the Memorandum of Agreement with the Secretary of the Army, in accordance with section 404 of the CWA. The main statutory and regulatory authorities to administer and enforce the State 404 program can currently be found in the State's submission to assume the program and are available on FDEP's web page at *https://floridadep.gov/water/water/content/water-resource-management-rules.*

The State 404 program would provide for the issuance of general permits and individual permits. The State has adopted 38 general permits which are listed in 62–331 F.S. as part of their package submittal. A complete description of the individual permit process and the standards for granting of an individual permit are found at 62–331 F.S. In addition, there are standard requirements for all regulated activities in State-assumed waters. No permit shall be issued in certain specified circumstances, including when the permit does not comply with the requirements of the CWA or implementing regulations, including the CWA Section 404(b)(1) Guidelines. 40 CFR 233.20. Florida's laws outline a number of requirements applicable to State 404 permits, including that ''no dredge or fill activity shall be permitted if there is a practicable alternative to the proposed activity which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences,'' and an individual permit cannot be issued if it ''[c]auses or contributes to violations of any applicable State water quality standard, except when temporarily within a mixing zone proposed by the applicant and approved . . .'' by FDEP at 62–331.053 F.S.

Currently, Florida operates the Environmental Resource Permit program (ERP), which regulates the disposal of dredged or fill material into waters of the State under State law. State-regulated activities under ERP that go beyond the purview of the CWA are not subject to EPA approval or oversight under 40 CFR part 233.

The Memorandum of Agreement between FDEP and the Secretary of the Army, available in the docket for this action, identifies procedures for the transfer of all pending permit applications for discharges into the waters assumed by the State. 40 CFR 233.14. Pursuant to the Memorandum of Agreement, existing Section 404 permits already issued by the Corps as of the effective date of State assumption will remain with the Corps during the already approved lifespan of that permit.

The Regional Administrator is required to approve a state request to assume the Section 404 program unless the state program does not meet the requirements of Section 404(h) of the CWA and its implementing regulations. Among other authorities, the state must have: (1) Adequate authority to issue permits which comply with all pertinent requirements of the CWA, including but not limited to, the Section 404(b)(1) Guidelines, and which may be issued for fixed terms not to exceed 5 years; (2) adequate authority, including civil and criminal penalties, to abate violations of the permit or permit program; and (3) authority to ensure that the Administrator, the public, and any other affected state or tribe are given notice of each permit application and that the public and affected states and tribes are provided an opportunity for public hearing before a ruling on each such application. 33 U.S.C. 1344(h)(1).

The procedures for EPA's review and approval or disapproval of a state Section 404 program are outlined in 40 CFR 233.15. In summary, once a state submits an assumption package that is complete, a 120-day statutory review period commences, which may be extended by mutual agreement of the state and EPA. EPA shall provide copies of a complete assumption package within 10 days of receipt to the Corps, the National Marine Fisheries Service (NMFS), and the United States Fish and Wildlife Service (USFWS) for review and comment. Within 90 days of EPA's receipt of a complete program submission, the Corps, FWS, and NMFS shall submit to EPA any comments on the state program. EPA shall publish notice of the state's application in the **Federal Register**, state newspapers, and via mail to interested parties. EPA shall provide for a public comment period of not less than 45 days as well as a public hearing not less than 30 days after such notice is published in the **Federal Register**. EPA shall also provide notice of an opportunity to consult to federally recognized Indian tribes in the state.

Within 120 days of receipt of a complete program submission (unless EPA and the state extend the statutory review period), EPA shall approve or disapprove the program based on whether the state's program fulfills the requirements of the Act and 40 CFR part 233, taking into consideration all comments received. EPA will prepare a summary of significant comments received and responses to these comments, as well as respond individually to comments received from the Corps, USFWS, and NMFS.

If EPA approves Florida's program, EPA will notify the State and the Corps and publish notice in the **Federal Register**. Transfer of the program to the State is not effective until this notice is published. EPA may only disapprove the State's program if it is inconsistent with the requirements of the CWA and 40 CFR part 233. If EPA disapproves the State's program it shall notify the State of the reasons for the disapproval and of any revisions or modifications to the State's program which are necessary to obtain approval. If the State resubmits a program submission remedying the identified problem areas, the approval procedure and statutory review period shall begin upon receipt of the revised submission. EPA maintains oversight of State-issued permits pursuant to 40 CFR 233.50.

If EPA approves this program, EPA will also codify the approved program in 40 CFR 233 subpart H.

*B. National Historic Preservation Act Section 106 Consultation*

In accordance with 36 CFR 800.2(d), EPA is providing information and seeking comment on EPA's potential approval of Florida's request to assume a CWA Section 404 program and any potential effects of such approval on historic properties. The National Historic Preservation Act of 1966, as amended, (NHPA) establishes historic preservation as a federal agency policy and provides for the identification and protection of historic properties and resources. Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties that are listed or eligible for listing on the National Register of Historic Places and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The approval of the State of Florida's request to assume the CWA Section 404 program would be an undertaking pursuant to 36 CFR 800.16(y), and therefore, in accordance with Section 106 of the NHPA and the ACHP's implementing regulations at 36 CFR part 800, EPA has initiated consultation regarding this undertaking.

EPA has invited the ACHP, FDEP, the State Historic Preservation Officer (SHPO), and Indian tribes with interests in the State of Florida to participate as consulting parties.

The State's administration of the Section 404 program and its issuance of permits over time has the potential to affect historic properties, including cultural resources or historic properties of religious and cultural significance. FDEP and the SHPO have entered into an Operating Agreement which sets forth a process to identify historic properties that may be impacted by Florida's issuance of Section 404 permits, and to develop recommendations for resolving adverse effects. As discussed in the State's Operating Agreement, such effects could potentially include, but are not limited to, the following:

i. Physical destruction of or damage to all or part of the property, including inundation;

ii. Alteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access;

iii. Change of the character of the property's use or of physical features within the property's setting, or impacts to the landscape that contribute to its historic significance;

iv. Introduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features; and

v. Neglect of a property which causes its deterioration, except where such neglect and deterioration are recognized qualities of a property of religious and cultural significance to an Indian Tribe.

Pursuant to the Operating Agreement, if the parties cannot reach agreement on the determination or resolution of effects, they may forward any outstanding issues to EPA for decision-making consistent with EPA's permitting review authorities under 40 CFR 233.50. The Operating Agreement provides comprehensive procedures for assessing the effects of Florida's 404 program on historic properties and therefore will considerably inform EPA's Section 106 consultation.

EPA solicits comments on this undertaking and any potential effects on historic properties at the Federal eRulemaking Portal, Docket No. EPA–HQ–OW–2018–0640. The comment period closes November 2, 2020.

*C. Endangered Species Act Consultation*

The Endangered Species Act (ESA) Section 7 directs each federal agency to ensure, in consultation with the USFWS and NMFS, that ''any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of'' listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. 1536(a)(2). EPA views consultation under ESA Section 7 to be required if a decision to approve a state or tribal CWA Section 404 program may affect ESA-listed species or designated critical habitat. EPA's position is set forth in a memorandum issued by David P. Ross, Assistant Administrator for the Office of Water, dated August 27, 2020, following the consideration of comments received during a public participation process that is outside of the scope of this notice. Accordingly, EPA is conducting ESA Section 7 consultation during the Agency's review of the State of Florida's request to assume administration of a CWA Section 404 program because EPA has determined that the Agency's potential approval of the program may affect ESA-listed species or designated critical habitat. *See https://www.epa.gov/cwa404g/consultation-cwa-section-404-program-requests-endangered-species-act-and-national-historic* for more information regarding EPA's position on ESA Section 7 consultation under CWA Section 404(g).

Dated: September 2, 2020.

**Mary Walker,**

*Regional Administrator, EPA Region 4.*

[FR Doc. 2020–19881 Filed 9–15–20; 8:45 am]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–OAR–2011–0371; FRL 10014–33–OAR]**

## Proposed Information Collection Request; Comment Request; National Volatile Organic Compounds Emission Standards for Architectural Coatings (Renewal)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), titled, National Volatile Organic Compounds Emission Standards for Architectural Coatings to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, the EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through June 30, 2021. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

**DATES:** Comments must be submitted on or before November 16, 2020.

**ADDRESSES:** Submit your comments, referencing Docket ID No. EPA–OAR–2011–0371, online using *https://www.regulations.gov/* (our preferred method), by email to *a-and-r-docket@epa,gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW, Washington, DC 20460.

The EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information, or other information whose disclosure is restricted by statute.

**FOR FURTHER INFORMATION CONTACT:** J. Kaye Whitfield, Sector Policies and Programs Division, Office of Air Quality Planning and Standards, D243–02, Research Triangle Park, North Carolina 27711, telephone number: 919–541–2509; fax number: 919–541–4991; email address: *whitfield.kaye@epa.gov.*

**SUPPLEMENTARY INFORMATION:** Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *https://www.regulations.gov/.* Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/* or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.* The telephone number for the Docket Center is 202–566–1744.

Pursuant to section 3506(c)(2)(A) of the PRA, the EPA is soliciting comments and information on National Volatile Organic Compounds Emission Standards for Architectural Coatings

# EXHIBIT 2

the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's EA.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenter's will be placed on the Commission's environmental mailing list and will be notified of any meetings associated with the Commission's environmental review process. Environmental commenter's will not be required to serve copies of filed documents on all other parties. However, the non-party commenters, will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the eFile link at *http://www.ferc.gov.* Persons unable to file electronically may mail similar pleadings to the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

Dated: December 16, 2020.

**Kimberly D. Bose,**

*Secretary.*

[FR Doc. 2020–28248 Filed 12–21–20; 8:45 am]

**BILLING CODE 6717–01–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OW–2018–0640; FRL–10018–92–Region 4]**

## EPA's Approval of Florida's Clean Water Act Section 404 Assumption Request

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice.

**SUMMARY:** On August 20, 2020, the Environmental Protection Agency (EPA) received from the Governor of the State of Florida a complete program submission to assume regulating discharges of dredged or fill material into waters within the jurisdiction of the State in accordance with Clean Water Act (CWA) section 404(g–l). Receipt of the package initiated a 120-day statutory review period. After careful review of the package submitted, as well as consideration of comments submitted on the package by the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), and the U.S. Army Corps of Engineers (Corps), comments received during consultation with tribes, and over 3,000 comments received from the public, EPA has determined that the State of Florida has the necessary authority to operate a CWA Section 404 program in accordance with the requirements found in CWA section 404(g–l) and EPA's implementing regulations. Therefore, EPA has taken final action to approve Florida's assumption of the program.

**DATES:** Florida's program assumption will be applicable December 22, 2020.

**FOR FURTHER INFORMATION CONTACT:** Mr. Kelly Laycock, Oceans, Wetlands and Streams Protection Branch, USEPA Region 4, 61 Forsyth St. SW, Atlanta, GA 30303; telephone number: (404) 562–9262; email address: *404Assumption-FL@epa.gov.*

**SUPPLEMENTARY INFORMATION:** The CWA established the Section 404 program, under which the Secretary of the Army, acting through the Chief of Engineers of the Corps, may issue permits for the discharge of dredged or fill material into waters of the United States as identified in the CWA. Section 404(g)(1) of the CWA provides states and tribes the option of submitting to EPA a request to assume administration of a CWA Section 404 program in certain waters within state or tribal jurisdiction.

The regulations establishing the requirements for the approval of state or tribal programs under section 404 of the CWA were published in the **Federal Register** at 53 FR 20764 (June 6, 1988) (40 CFR parts 232 and 233), and can be accessed at *https://www.epa.gov/cwa404g/statutory-and-regulatory-requirements-assumption-under-cwa-section-404.* ''State regulated waters'' are defined in 40 CFR 232.2.

The Corps generally retains CWA Section 404 permitting authority over waters of the United States within ''Indian country'' as that term is defined at 18 U.S.C. 1151, unless a tribe has assumed administration of a CWA Section 404 program within Indian country. *See* 40 CFR 233.1(b).

A state application to administer a Section 404 program must include the following: (a) A letter from the Governor of the state requesting program approval; (b) a complete program description as set forth in 40 CFR 233.11; (c) an Attorney General's statement or a statement from the attorney for those state or interstate agencies which have independent legal counsel, as set forth in 40 CFR 233.12; (d) a Memorandum of Agreement with the EPA Regional Administrator, as set forth in 40 CFR 233.13; (e) a Memorandum of Agreement with the Secretary of the Army, as set forth in 40 CFR 233.14; and (f) copies of all applicable state statutes and regulations, including those governing applicable state administrative procedures. 40 CFR 233.10.

On September 16, 2020, EPA published a **Federal Register** notice of its receipt of a complete program assumption request package (85 FR 57853), opened a public comment period, and scheduled two virtual public hearings on the Section 404 program submitted by Florida. EPA held virtual public hearings on October 21, 2020, and October 27, 2020, and received comments submitted to Docket ID No. EPA–HQ–OW–2018–0640 during the public comment period which ended November 2, 2020. EPA received and reviewed over 3,000 comments submitted during the comment period and public hearings, comments provided during tribal consultation, as well as comments from USFWS, NMFS, and the Corps. EPA also consulted under section 7 of the Endangered Species Act with the USFWS, and under section 106 of the National Historic Preservation Act (NHPA) with the Advisory Council on Historic Preservation (ACHP), the Florida State Historic Preservation Officer (Florida SHPO), the Florida Department of Environmental Protection (FDEP), and Indian tribes with interests in the State of Florida on its decision whether to approve Florida's program request. On December 16, 2020, EPA entered into a programmatic agreement with the ACHP, the Florida SHPO, and FDEP which evidences EPA's compliance with section 106 of the NHPA and its implementing regulations. The programmatic agreement became effective on December 16, 2020. EPA has concluded that the State of Florida and FDEP have the necessary authority to operate a program in accordance with the requirements found in CWA section 404 and 40 CFR part 233. EPA has met its requirements under ESA section 7(a)(2) by completing ESA consultation and receiving a ''no jeopardy'' Biological Opinion from the USFWS on November 17, 2020. A summary of the comments received, EPA's responses to the comments, and a memorandum documenting the basis for EPA's decision (''State of Florida's Request to Assume a Clean Water Act Section 404 Program'', December 17, 2020) can be found in the docket for this action

(Docket ID No. EPA–HQ–OW–2018–0640).

All documents in the docket are listed on the *http://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *e.g.,* confidential business information or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form at the EPA Docket Center and Reading Room. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are open by appointment only, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. For further information on the EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.* Publicly available docket materials are available electronically through *http://www.regulations.gov.*

Dated: December 17, 2020.

**Mary Walker,**

*Regional Administrator, EPA Region 4.*

[FR Doc. 2020–28232 Filed 12–18–20; 4:15 pm]

**BILLING CODE 6560–50–P**

## ENVIRONMENTAL PROTECTION AGENCY

**[EPA–HQ–OLEM–2020–0527; FRL–10017–07–OLEM]**

**RIN 2050–ZA18**

### Interim PFAS Destruction and Disposal Guidance; Notice of Availability for Public Comment

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of availability for public comment.

**SUMMARY:** The National Defense Authorization Act for Fiscal Year 2020 (FY 2020 NDAA) was signed into law on December 19, 2019. Section 7361 of the FY 2020 NDAA directs the U.S. Environmental Protection Agency (EPA) to publish interim guidance on the destruction and disposal of perfluoroalkyl and polyfluoroalkyl substances (PFAS) and materials containing PFAS. The EPA is releasing the interim guidance for public comment. The guidance provides information on technologies that may be feasible and appropriate for the destruction or disposal of PFAS and PFAS-containing materials. It also identifies needed and ongoing research and development activities related to destruction and disposal technologies, which may inform future guidance.

**DATES:** Comments must be received on or February 22, 2021.

**ADDRESSES:** You may send comments, identified by Docket ID No EPA–HQ–OLEM–2020–0527, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov/* (our preferred method). Follow the online instructions for submitting comments.
- *Agency website: www.epa.gov/pfas.* Follow the online instructions for submitting comments.
- *Mail:* U.S. Environmental Protection Agency, EPA Docket Center, OLEM Docket, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- *Hand Delivery/Courier:* EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m.–4:30 p.m., Monday–Friday (except Federal Holidays).

*Instructions:* All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to *https://www.regulations.gov/,* including any personal information provided.

Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room are closed to the public, with limited exceptions, to reduce the risk of transmitting COVID–19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via *https://www.regulations.gov/,* as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at *https://www.epa.gov/dockets.*

**FOR FURTHER INFORMATION CONTACT:** Carlos Pachon, TIFSD, OSRTI, OLEM, 5023P, Environmental Protection Agency, 1200 Pennsylvania Ave. NW; email address, *pachon.carlos@epa.gov* or visit *www.epa.gov/pfas.*

**SUPPLEMENTARY INFORMATION:**

#### I. General Information

*A. Does this action apply to Me?*

This interim guidance provides a summary of EPA's current knowledge of technologies for destruction or disposal of PFAS and PFAS-containing materials. This information may be useful to EPA staff, other federal agencies, states, tribes, and local governments, the public, including environmental and public interest groups, as well as commercial and industry groups.

**Peter Wright,**

*Assistant Administrator, Office of Land and Emergency Management.*

[FR Doc. 2020–28376 Filed 12–18–20; 4:15 pm]

**BILLING CODE 6560–50–P**

## FEDERAL DEPOSIT INSURANCE CORPORATION

### Notice to All Interested Parties of Intent To Terminate Receiverships

*Notice is hereby given* that the Federal Deposit Insurance Corporation (FDIC or Receiver), as Receiver for the institutions listed below, intends to terminate its receivership for said institutions.

NOTICE OF INTENT TO TERMINATE RECEIVERSHIPS

| Fund | Receivership name | City | State | Date of appointment of receiver |
|---|---|---|---|---|
| 10109 | Bradford Bank | Baltimore | MD | 08/28/2009 |
| 10110 | Affinity Bank | Ventura | CA | 08/28/2009 |
| 10156 | Greater Atlantic Bank | Reston | VA | 12/04/2009 |
| 10184 | George Washington Savings Bank | Orland Park | IL | 02/19/2010 |
| 10192 | Sun American Bank | Boca Raton | FL | 03/05/2010 |
| 10250 | Nevada Security Bank | Reno | NV | 06/18/2010 |
| 10254 | USA Bank | Port Chester | NY | 07/09/2010 |
| 10263 | First National Bank of the South | Spartanburg | SC | 07/16/2010 |
| 10419 | The First State Bank | Stockbridge | GA | 01/20/2012 |

# EXHIBIT 3

*Presented below are water quality standards that are in effect for Clean Water Act purposes.*

*EPA is posting these standards as a convenience to users and has made a reasonable effort to assure their accuracy. Additionally, EPA has made a reasonable effort to identify parts of the standards that are not approved, disapproved, or are otherwise not in effect for Clean Water Act purposes.*

# Miccosukee Tribe of Indians of Florida

# Water Quality Standards

## March 3, 2021

**Adopted:** December 19, 1997
**Amended:** March 4, 1998
**Amended:** October 6, 1999
**Amended:** July 1, 2004
**Amended:** October 6, 2010
**Amended:** March 3, 2021

# MICCOSUKEE ENVIRONMENTAL PROTECTION CODE
# SUBTITLE B:

# WATER QUALITY STANDARDS FOR SURFACE WATERS OF THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA

## SECTION 1. Introduction

Pursuant to Section 518 of the 1987 Amendments to the Clean Water Act, the US Government's Federal Indian Policy, dated January 24, 1983, and the Environmental Protection Agency's Indian Policy, the Business Council of the MICCOSUKEE TRIBE OF INDIANS OF FLORIDA and its inherent governmental power as an Indian Tribe, a federally-recognized Tribe of Indians, hereby enacts the MICCOSUKEE TRIBE OF INDIANS WATER QUALITY STANDARDS.

**A. PURPOSES:** The purposes of the Miccosukee Tribe's Water Quality Standards are as follows:

1. To establish water body goals for specific water bodies on the Miccosukee Tribe's lands;

2. To designate the uses for which the surface waters of the Miccosukee Tribe shall be protected;

3. To prescribe water quality criteria (narrative, numeric, biological and sediment) imposed in order to sustain the designated uses;

4. To assure that degradation of existing water quality does not occur;

5. To provide a legal basis for regulatory controls;

6. To provide for the protection of Tribal water quality for the benefit of threatened and endangered species listed by the U.S. Fish and Wildlife Service;

7. To promote the health, social welfare and economic well-being of the Miccosukee Tribe of Indians of Florida.

8. To provide a basis for Clean Water Act Section 401 certification.

These purposes shall be accomplished by incorporating the standards set forth in the Miccosukee Tribe Water Quality Standards into the permitting and management process for point source and non-point source discharges, by using those standards to determine when a designated use is threatened, and by using current treatment technologies to control point sources and best management practices for non-point sources of pollution. In accordance with 40 CFR 122.44(d), U.S. EPA retains NPDES permitting authorization.

**B. APPLICABILITY:** The Miccosukee Tribe's Water Quality Standards apply to all Tribal Reservation Surface Waters, i.e., all waters within the exterior boundaries of the Miccosukee Indian Federal Reservation, Miccosukee Reserved Area, Sherrod Ranch, Cherry Ranch, SEMA, Lambick, and Coral Way properties, and the Tamiami Trail, Dade Corners and Krome Avenue Reservations, including water situated wholly or partly within, or bordering upon Tribal properties, whether public, private, or Federally protected lands, e.g., National Parks or Preserves. The Miccosukee Water Quality Standards shall be the basis for regulatory enforcement against discharges outside the boundaries of the Federal Reservation, Miccosukee Reserved Area, and the above-mentioned lands pursuant to all applicable federal enforcement procedures as may be necessary to protect the quality of the water within the Miccosukee Tribe’s lands.

**C. AUTHORITY:** The Miccosukee Tribe's Water Quality Standards are consistent with Section 101(a)(2) of the Federal Water Pollution Control Act, as amended, [33 U.S.C. Section 1251 (a)(2)], which declares that "it is the national goal that, wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983..." The Clean Water Act indicates, in Section 101(a)(3), that it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited. The Miccosukee Tribe also recognizes water supply, agricultural, industrial, religious, ecological preservation, and navigation as other beneficial uses for water on Tribal Lands. These water quality standards were adopted by the Miccosukee Business Council on December 19, 1997 and Amended March 4, 1998. These water quality standards were approved by the United States Environmental Protection Agency on May 25, 1999. These water quality standards are to be used for all purposes of water quality standards under the Federal Clean Water Act consistent with CWA sections 518(e) and 303(c).

**D. POLICY:** The Miccosukee Tribe's Water Quality Standards provide that contamination that may result from the use of water shall not lower the quality of the water below that which is required for recreation and protection and propagation of fish, shellfish, wildlife, and native aquatic plants consistent with preservation of the Everglades Ecosystem within Water Conservation Area 3A (WCA 3A) and Everglades National Park. The Tribe, recognizing the complexity of water quality

management and the necessity to temper regulatory actions with technological progress and social and economic well-being of Tribal members, vows that there will be no compromise with respect to discharges of pollutants which constitute a valid hazard to human health or the preservation of the Everglades ecosystem contained within WCA 3A and Everglades National Park. Furthermore, the Tribe will seek to use the best environmental information available when making decisions on the effects of chronically and acutely toxic substances and carcinogenic, mutagenic, and teratogenic substances. The Miccosukee Tribe of Indians of Florida finds that excessive nutrients (including total Phosphorus) constitute one of the most severe water quality problems threatening the Everglades Ecosystem. It shall be the Tribe's policy to limit the introduction of nutrients from anthropogenic sources into waters of the Tribe. Particular consideration shall be given to the protection from further nutrient enrichment of waters which are presently high in nutrient concentrations or sensitive to further nutrient concentrations and to further nutrient loadings. It is the intent of the Miccosukee Tribe to prevent adjacent water users from using Tribal waters or vegetative communities within Tribal jurisdiction as a biological filter with respect to nutrient removal. These water quality standards take into consideration the water quality standards of downstream waters and provide for the attainment and maintenance of downstream waters. The Miccosukee Tribe's waters in the areas of the North Grass, South Grass, Gap and Miccosukee Reserved Area shall have a nutrient standard consistent with natural oligotrophic levels (including a total phosphorus limitation of 10 parts per billion of water). The most stringent nutrient standards will be applied to the most upstream reaches of the Tribal waters.

**E. WATER QUALITY CONTROL OFFICER:** The Water Quality Control Officer (WQCO) shall operate under the direction of the Miccosukee Environmental Protection Agency (MEPA). The Tribal WQCO shall work in cooperation with the U.S. Environmental Protection Agency and other agencies of the federal government and will ensure that all applicable federal and state agencies are provided a copy of the Tribal Water Quality Standards. The Tribal WQCO is the Director of Tribe's Water Resources Department.

**F. ANTIDEGRADATION:** The antidegradation policy for Tribal waters and the procedures for implementing it are set forth in Section 2, herein.

**G. TRIENNIAL REVIEW:** Pursuant to Section 303(c) of the Clean Water Act [40 CFR 131.20(a) and 40 CFR 25], the Miccosukee Tribe of Indians of Florida shall hold public hearings at least once each three year period for the purpose of reviewing and, as appropriate, amending the Miccosukee Tribe's Water Quality Standards. Public hearings shall be held in accordance with Tribal custom and law and U.S. Environmental Protection Agency regulations. The proposed water quality standards revisions shall be made available to the public prior to the hearing. The Tribe shall submit the revised standards and any supporting analysis to the EPA Regional Administrator for review and approval within 30 days following the final action to adopt revised standards. The Tribal submission shall be consistent with EPA requirements found at 40 CFR 131.6.

**H. WATER QUALITY CRITERIA TO PROTECT USES:** Criteria particular to a use shall be

maintained at all times and at all flow rates. For standing water bodies, criteria particular to a use shall be maintained whenever the water body is present. The General Standards Section, Section 3, shall be maintained at all times and shall apply to the Water Conservation Areas, Flowage Easements, Canals, Ditches, Ponds, and Wetlands. The criteria assigned to a body of water shall be the most stringent criteria required to protect all existing and designated uses for that body of water and shall be used for calculation of permit limits.

**I. STANDARDS TO MANAGE DISCHARGES:** Water Quality Standards shall be the basis for managing discharges attributable to point and non-point sources of pollution. Water quality standards are not used to control natural background phenomena or acts of God.

**J. MODIFICATION OF UNATTAINABLE STANDARDS:** In the event that monitoring of water quality identifies areas of Tribal waters where attainable water quality is less than what is required by the Miccosukee Tribe's Water Quality Standards, then the Miccosukee Tribe of Indians of Florida may modify the Water Quality Standards to reflect attainability. Modification shall be within the sole discretion of the Miccosukee Tribe, but shall be compatible with EPA's use-attainability procedures. 40 CFR 131 specifies the requirements which must be followed in modifying tribal water quality standards to address changes in designated uses.

**K. UPGRADING STANDARDS:** The Miccosukee Tribe's Water Quality Standards may be revised as the need arises, or as the result of updated scientific information. Adoption of the upgraded standards shall be conducted in accordance with procedures set forth for triennial review.

**L. ERRORS:** Errors resulting from inadequate and erroneous data or human or clerical oversight will be subject to correction by the Miccosukee Tribe of Indians of Florida. The discovery of such errors does not render the remaining and unaffected standards invalid. If any provision or the application of any provision of these Water Quality Standards to any person or circumstance, should be held to be invalid, the application of such provision to other persons and circumstances and the remainder of the Water Quality Standards shall not be affected thereby. In the event that EPA discovers some error which would cause the Miccosukee Water Quality Standards to not meet "minimum federal requirements." The EPA will notify the Tribe of such error and provide the Tribe the opportunity to evaluate and modify the error, in accordance with 40 CFR 131.4, 131.5 and 131.22.

**SECTION 2. Antidegradation Policy and Implementation Plan**

**A. ANTIDEGRADATION POLICY:**

**1**. Tribal policy, as it relates to antidegradation, is to conserve the waters of the Tribe, to protect, maintain, and improve the quality and quantity thereof for public water supplies, for the propagation of wildlife, fish and other aquatic life, native Everglades plant and animal communities, and for domestic, agricultural, industrial, recreational, religious, and other beneficial uses. It also prohibits the discharge of pollutants into Tribal waters without treatment necessary to protect those beneficial uses of the waters. To that end the Miccosukee Tribe hereby adopts there following tiers of protection:

**a.** **Tier 1:** Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected. Pollution which causes or contributes to violations of water quality standards are considered harmful to the waters of the Tribe and shall not be allowed. Waters having quality below the criteria established for them shall be protected and enhanced. If the Tribe finds that a new or existing discharge will reduce the quality of the receiving waters below the classification established for them or violate any Tribal rule or standard, it shall refuse to permit the discharge.

**b.** **Tier 2:** Where existing quality exceeds the level of protection necessary to support propagation of fish, shellfish and wildlife and recreation in and on the water, that quality shall be maintained and protected unless the Tribe finds, after full satisfaction of inter-governmental and public participation requirements, that allowing lower water quality is necessary to accommodate important economic and social development in the area in which the waters are located. In allowing such degradation or lower water quality the Tribe shall assure water quality which is adequate to protect existing uses fully. Further, the Tribe shall assure that there shall be achieved the highest statutory and regulatory requirements for all new and existing point sources and all cost effective and reasonable best management practices for non-point source control.

**c.** **Tier 2 3/4 :** Outstanding Miccosukee Waters (OMW): The Miccosukee Tribe recognizes that the waters of its Federal Reservation which are contained within Water Conservation Area 3A and the Miccosukee Reserved Area constitute the Tribe's highest quality waters and must be preserved in as pristine a condition as possible while at the same time allowing for the activities of man. These ecologically important waters are essential to the

survival of the Miccosukee Tribe, therefore: The Miccosukee Tribe hereby designates the waters of its Federal Reservation which are contained within Water Conservation Area 3A (North Grass, South Grass, Gap) and Miccosukee Reserved Area as Class III-A and Outstanding Miccosukee Waters (OMW).

**d.** **Tier 3:** Outstanding Natural Resource Waters (ONRW): Where high quality waters constitute an Outstanding Tribal resource such as waters of parks and wildlife refuges and waters of exceptional ecological and recreational significance, that water quality shall be maintained and protected. These waters shall be designated as Outstanding Natural Resource Waters (ONRW). Currently, no Tribal waters are designated as ONRW.

**B. THERMAL PROTECTION FOR ALL TIERS OF TRIBAL WATER:** In those cases where potential water quality impairment is associated with a thermal discharge involved, the Antidegradation Policy and implementation method is consistent with section 316 of the Clean Water Act. 40 CFR 131.12 (a)(4)

**C. IMPLEMENTATION PLAN:** Acting under authority delegated by the Miccosukee Environmental Protection Agency and the Miccosukee Business Council, the Water Quality Control Officer shall implement the Miccosukee Tribe's Water Quality Standards including the Antidegradation Policy, by establishing and maintaining controls on the introduction of pollutants into surface waters. More particularly, the Tribal Water Quality Control Officer shall do the following:

1. Monitor water quality to assess the effectiveness of pollution controls and to determine whether water quality standards are being attained.

2. Obtain information as to the impact of effluents on receiving waters.

3. Advise prospective dischargers of applicable standards.

4. Review the adequacy of the existing data base and obtain additional data when required.

5. Assess the probable impact of effluents on receiving waters in light of designated uses and numeric standards, narrative standards, biological criteria and sediment criteria.

6. Require the highest and best degree of wastewater treatment practicable and commensurate with protecting and maintaining designated uses and existing water quality.

7. Require development of water quality based effluent limitations and comment on technology-based effluent limitations, as appropriate, for inclusion in any federally issued permit to a discharger pursuant to Section 402 of the Clean Water Act [33 U.S.C. Section 1342].

8. Require that these effluent limitations and other appropriate measures be included in any such permit as a condition for Tribal certification pursuant to Section 401 of the Clean Water Act, [33 U.S.C. Section 1341].

9. Coordinate water pollution control activities with other constituent agencies and other local, tribal, state, and federal agencies, as appropriate.

10. Develop and pursue inspection and enforcement programs for non-point sources in order to ensure that dischargers comply with requirements of the Miccosukee Tribe of Indians of Florida Water Quality Standards and Certification Program and any requirements promulgated thereunder, and in order to support the enforcement of federal NPDES permits by the U.S. Environmental Protection Agency.

11. Require implementation of best management practices to control non-point sources of pollutants to achieve compliance with the Miccosukee Tribe's Water Quality Standards.

**SECTION 3. Classification of Tribal Water Bodies:**

The Miccosukee Tribe hereby adopts the following Water Body Classifications:

**A. CLASS I WATERS:** Those Tribal water bodies which are used to supply potable water.

**B. CLASS II WATERS:** Those Tribal water bodies which are used for the propagation or harvesting of shellfish or other invertebrates used for food sources to humans. Currently, no Class II waters are identified; however, this class is reserved for future designation.

**C. CLASS III-A WATERS:** Those Tribal water bodies which are used for fishing, frogging, recreation (including airboating), and the propagation and maintenance of a healthy, well-balanced population of fish and other aquatic life and wildlife. These waters have been primarily designated for preservation of native plants and animals of the natural Everglades ecosystem.

**D. CLASS III-B WATERS:** Those Tribal water bodies which are used for agricultural or livestock water supply or other beneficial uses. These waters are designated as "fishable and swimmable" but nutrient specific criteria do not apply to these waters. Class III-A and Class III-B criteria are contained in Tables 2, 3, and 4. Class III-B criteria are the same as Class III-A criteria except that total phosphorus, turbidity, dissolved oxygen, ammonia, biological integrity, nuisance species and nutrient criteria shall not apply. Discharges of the above mentioned substances into Class III-B waters shall not be made which result in undesirable aquatic life effects or which result in chronic or acute toxicity to aquatic life. In waters which are designated as Class III-B, dissolved oxygen must be maintained at levels which will support indigenous aquatic life.

## SECTION 4. Tribal Water Quality Standards

The following minimum water quality criteria shall apply to all surface waters of the Miccosukee Tribe of Indians of Florida unless those water bodies are designated with higher or stricter water quality standards. Stricter standards for a given water body shall supersede these general Water Quality Standards. These standards shall provide a legal basis for including whole effluent toxicity requirements in all federally issued permits.

**A. SEDIMENT DEPOSITS:** All Tribal surface waters shall be free from water contaminants, from other than natural causes, that may settle and have a deleterious effect on the aquatic biota or that will significantly alter the physical, chemical and biological properties of the water or the bottom sediments.

**B. FLOATING SOLIDS, OIL AND GREASE:** All Tribal surface waters shall be free from objectionable oils, scum, foam, grease, and other floating materials and suspended substances of a persistent nature resulting from other than natural causes (including visible films of oil, globules of oil, grease, or solids in or on the water, or coatings on stream banks or vegetation). Oil and grease discharged into surface waters shall not exceed 5.0 mg/liter.

**C. COLOR:** All Tribal surface waters shall be free from true color producing materials, from other than natural causes that create an aesthetically undesirable condition. Neither true color nor apparent color shall impair the designated and other attainable uses of a water body. Apparent color producing substances from other than natural sources are limited to concentrations equivalent to 70 color units (CU) on the Platinum - Cobalt Scale for domestic wastewater discharges.

**D. ODOR AND TASTE:** All Tribal surface waters shall be free from contaminants, from other than natural causes, are limited to concentrations that do not impart unpalatable flavor to fish, and that do not result in offensive odor or taste arising from the water, and that do not otherwise interfere with the designated and other attainable uses of a water body. Taste and odor-producing

substances from other than natural origins shall not interfere with the production of a potable water supply by modern treatment methods. The Tribe hereby adopts the Organoleptic Criteria in Table 4.

**E. NUISANCE CONDITIONS:** Plant nutrients or other substances stimulating algal growth, from other than natural causes, shall not be present in concentrations that produce objectionable algal densities or nuisance aquatic vegetation, or that result in a dominance of nuisance species instream, or that cause nuisance conditions in any other fashion. Phosphorus and nitrogen concentrations shall not be permitted to reach levels which result in man-induced eutrophication problems. Total phosphorus shall not exceed 10 parts per billion in Class III-A waters. In Class III-B waters, total phosphorous discharges shall not be made which result in undesirable aquatic life effects or which result in chronic or acute toxicity to aquatic life.

**F. PATHOGENS:** All tribal surface waters shall be virtually free from pathogens. Waters used for irrigation shall be virtually free of Salmonella and Shigella species.

**G. TURBIDITY:** Turbidity in Class I and III-A waters shall not reduce light transmission to a point where aquatic biota are inhibited or alter color or natural appearance of the water, and in no instance shall the turbidity exceed 29 NTU above natural background conditions at any place or at any time. Turbidity shall not reduce light transmission to a point where aquatic biota are inhibited or alter color or natural appearance of the water. In Class III-B waters, turbidity shall not be discharged which result in undesirable aquatic life effects or which result in chronic or acute toxicity to aquatic life.

**H. TEMPERATURE:** All surface waters of the Tribe shall at all places and at all times be free from domestic, industrial, agricultural or other man-induced non-thermal components of discharges which, alone or in combination with other components of discharges produce conditions so as to create a nuisance or cause the introduction of heat [by other than natural causes] and shall not increase the temperature in a canal, outside a mixing zone, by more than 2.7 degrees C (5 degrees F), based upon the monthly average of the maximum daily temperatures measured at mid-depth or three feet (whichever is less) outside the mixing zone. The normal daily and seasonal variations that were present before the addition of heat from other than natural sources shall be maintained. In no case shall man-induced heat be permitted when the maximum temperature specified for the water body would thereby be exceeded. The measurement of the thermal discharge shall be made at that point at which the effluent physically leaves its carrying conduit and discharges into waters of the Tribe, or, in the event it is not practicable to measure temperature at the end of the discharge conduit, a specific point designated by the Tribal WQCO. At all times and under all conditions of flow, the discharge temperature shall be controlled so that at least two-thirds (2/3) of the width of the canal's surface remains at ambient (natural) temperature. Further, no more than one-fourth (1/4) of the cross-section of the canal at a traverse perpendicular to the flow shall be heated by the discharge. High water temperatures caused by unusually high ambient air temperatures are not violations of these standards.

**I. SALINITY / DISSOLVED SOLIDS / CHLORIDES:** Existing mineral quality shall not be altered by municipal, industrial, agricultural, or other waste activities so as to interfere with the attainable uses for a water body. An increase of more than 10% over naturally occurring levels shall not be permitted. Normal daily and seasonal fluctuations shall be maintained.

**J. PH:** The pH of all Tribal surface waters shall not be permitted to fluctuate in excess of 1.0 unit over a period of 24 hours for other than natural causes. pH shall not be less than 6.5 nor greater than 9.0 in order to fully protect aquatic life.

**K. DISSOLVED OXYGEN:** The Dissolved Oxygen standard for Class I and Class III-A waters is a minimum of 5.0 mg/liter. In waters which are designated as Class III-B, dissolved oxygen must be maintained at levels which will support indigenous aquatic life. Dissolved Oxygen levels that are attributable to natural background conditions may be established as alternative dissolved oxygen criteria for a water body or portion of a water body. Daily and seasonal fluctuations in dissolved oxygen levels shall be maintained. Normal diurnal fluctuations in dissolved oxygen which are attributable to the natural processes of photosynthesis shall not be deemed a violation of this standard. Man-induced nutrient eutrophication occurring in Class I and III-A surface waters contributing to increased algal growth and resulting in less than 5.0 mg/liter of dissolved oxygen in the water is a violation of this standard.

**L. BACTERIOLOGICAL QUALITY:** The density of Escherichia coli colony forming units (cfu) shall not exceed a geometric mean density of 126 cfu per 100 milliliters, nor exceed the single sample maximum allowable density of 410 cfu per 100 milliliters which is based on the infrequent use of all Tribal surface waters for bathing. The geometric mean density shall be calculated based on samples collected approximately equally spaced over a 30 day period and used in conjunction with the single sample maximum allowable density to determine attainment of the numeric water quality criteria.

**M. BIOLOGICAL INTEGRITY:** The "Shannon-Weaver Diversity Index of Benthic Macroinvertebrates" shall not be reduced to less than 75% of background levels as measured [procedure to be supplied by US EPA].

**N. NUTRIENTS:** In no case shall nutrient concentrations of Tribal Class I or Class III-A surface waters be altered so as to cause an imbalance in natural populations of aquatic flora or fauna. Total phosphorus concentrations shall not exceed 10 parts per billion in Class III-A waters. In Class III-B waters, nutrients shall not be discharged which result in undesirable aquatic life effects or which result in chronic or acute toxicity to aquatic life.

**O. TOXIC SUBSTANCES:** All Tribal surface waters shall be free from the presence of toxic substances in quantities that are toxic to human, animal, plant, or aquatic life, or in quantities that interfere with the normal propagation, growth, and survival of sensitive aquatic biota. All surface

waters of the Tribe shall at all places be free from any substance, in any concentration, which is carcinogenic, mutagenic, or teratogenic to human beings or to significant, locally occurring, wildlife or aquatic species. Within the mixing zone, there shall be no acute toxicity. There shall be no chronic toxicity at the edge of the mixing zone. For toxic substances lacking EPA published criteria, bioassay data for sensitive indigenous test species / life stages may be used to determine compliance with this narrative standard. Guidance as to the appropriate bioassay test methods will be obtained from: U.S. Environmental Protection Agency, "Quality Criteria for Water, 1986". There shall be no toxicants in Tribal waters that are known to be persistent, bio-accumulative, carcinogenic, and/or synergistic with other stream components. Whole effluent toxicity testing shall be required from all dischargers who wish to discharge into tribal waters. Whole effluent toxicity testing shall comply with EPA's methods and procedures as included in 40 CFR 136 or other tribally approved methodology.

**P. FLOW CRITERIA:** Flow must remain within the characteristic natural regime of the Everglades Ecosystem and must protect for balanced native flora and fauna, all existing and designated uses and water quality standards for Miccosukee Class III-A waters, Outstanding Miccosukee Waters (OMWs).

**Q. MINIMUM WATER LEVEL CRITERIA:** Water depths in the deepest part of sloughs in Miccosukee Class III-A waters (OMWs) must always remain above the surface of the muck to protect against dry-outs that cause: 1) soil oxidation and subsidence, 2) frequent and severe fires, 3) loss of tree islands, 4) long term changes in vegetation and wildlife habitat, 5) loss of aquatic refugia for wildlife, and 6) disruption of wildlife nesting and foraging behavior.

**R. MAXIMUM WATER LEVEL CRITERIA:** Water depth and/or hydroperiod must be maintained to protect all existing or designated uses of Miccosukee Class III-A waters (OMWs).

**S. ACCESSION/RECESSION RATES:** Accession and recession rates must be maintained to protect native flora or fauna, including apple snail breeding, reproduction, or foraging and must protect for the breeding, reproduction, foraging, or nesting of native flora or fauna, including snail kites, wood storks, and other wading birds or all existing or designated uses of Miccosukee Class III-A waters (OMWs).

NOTE: Standards P-S
Anthropogenic alterations have severely degraded the Everglades ecosystem. Narrative Flow Criteria are intended to protect the existing and designated uses for all Miccosukee Class III-A waters, OMWs, from further degradation due to anthropogenic sources, such as flooding or over-drainage. These criteria are not intended to regulate for/against extreme weather events (Acts of God).

**T. CLASS I WATER CRITERIA:** Table 1 contains the criteria for Class I (potable waters). In addition to the criteria in Table 1, Class I surface waters must also meet the criteria in Tables 2, 3, and 4.

**U. CLASS II WATER CRITERIA:** Reserved (No waters yet designated. Criteria will be developed when Class II waters are designated)

**V. CLASS III-A AND CLASS III-B CRITERIA:** Contained in Tables 2, 3, and 4.

# Table 1
## Miccosukee Tribe of Indians of Florida
## Water Quality Standards for Class I Waterbodies

| | Chemicals | CAS Number | Tribal Public Health Goal (mg/l) | Standards MCL (mg/l) |
|---|---|---|---|---|
| 1 | Acenaphthene | 83-32-9 | 0.02 | |
| 2 | Acifluorfen (sodium) | 62476-59-9 | 0.4 | |
| 3 | Acrylamide (Product of dose and monomer shall not exceed a polyacrylamide polymer containing 0.05% monomer dosed at 1mg/L) | 79-06-1 | Zero | TT |
| 4 | Acrylonitrile | 107-13-1 | 0.000051 | _ |
| 5 | Alachlor | 15972-60-8 | Zero | 0.002 |
| 6 | Aldicarb (Two or more of these three chemicals should not exceed 0.007 mg/L) | 116-06-3 | 0.001 | 0.003 |
| 7 | Aldicarb sulfone (Two or more of these three chemicals should not exceed 0.007 mg/L) | 1646-88-4 | 0.001 | 0.002 |
| 8 | Aldicarb sulfoxide (Two or more of these three chemicals should not exceed 0.007 mg/L) | 1646-87-3 | 0.001 | 0.004 |
| 9 | Aldrin | 309-00-2 | 4.9 E-8 | |
| 10 | Ametryn | 834-12-8 | 0.06 | |
| 11 | Ammonium sulfamate | 7773-06-0 | 2 | |
| 12 | Anthracene (PAH) PAH= Polycyclic aromatic hydrocarbon | 120-12-7 | 8.3 | |
| 13 | Atrazine | 1912-24-9 | 0.003 | 0.003 |
| 14 | Baygon | 114-26-1 | 0.003 | |
| 15 | Bentazon | 25057-89-0 | 0.2 | |
| 16 | Benz[a]anthracene (PAH) | 56-55-3 | | |
| 17 | Benzene | 71-43-2 | Zero | 0.005 |
| 18 | Benzo[a]pyrene (PAH) | 50-32-8 | Zero | 0.0002 |
| 19 | Benzo[b]fluoranthene (PAH) | 205-99-2 | 0.0000028 | |
| 20 | Benzo[g,h,i]perylene (PAH) | 191-24-2 | | |
| 21 | Benzo[k]fluoranthene (PAH) | 207-08-9 | 0.0000028 | |
| 22 | bis-2-Chloroisopropyl ether | 39638-32-9 | 0.3 | |
| 23 | Bromacil | 314-40-9 | 0.07 | |
| 24 | Bromobenzene | 108-86-1 | 0.07 | |
| 25 | Bromochloromethane | 74-97-5 | 0.09 | |
| 26 | Bromodichloromethane (THM) The total for trihalomethanes is 0.08 mg/L | 75-27-4 | Zero | 0.08 |
| 27 | Bromoform (THM) The total for trihalomethanes is 0.08 mg/L | 75-25-2 | Zero | 0.08 |
| 28 | Bromomethane | 74-83-9 | 0.01 | |
| 29 | Butyl benzyl phthalate | 85-68-7 | 7 | |
| 30 | Butylate | 2008-41-5 | 0.4 | |
| 31 | Carbaryl | 63-25-2 | 0.4 | |
| 32 | Carbofuran | 1563-66-2 | 0.04 | 0.04 |
| 33 | Carbon tetrachloride | 56-23-5 | Zero | 0.005 |
| 34 | Carboxin | 5234-68-4 | 0.7 | |
| 35 | Chloramben | 133-90-4 | 0.1 | |

| | Chemicals | CAS Number | Tribal Public Health Goal (mg/l) | Standards MCL (mg/l) |
|---|---|---|---|---|
| 36 | Chlordane | 57-74-9 | Zero | 0.002 |
| 37 | Chloroform (THM) The total for trihalomethanes is 0.08 mg/L | 67-66-3 | 0.0057 | 0.08 |
| 38 | Chloromethane | 74-87-3 | 0.03 | |
| 39 | Chlorophenol (2-) | 95-57-8 | 0.0001 | |
| 40 | Chlorothalonil | 1897-45-6 | 0.5 | |
| 41 | Chlorotoluene o- | 95-49-8 | 0.1 | |
| 42 | Chlorotoluene p- | 106-43-4 | 0.1 | |
| 43 | Chlorpyrifos | 2921-88-2 | 0.002 | |
| 44 | Chrysene (PAH) | 218-01-9 | | |
| 45 | Cyanazine | 21725-46-2 | 0.001 | |
| 46 | Cyanogen chloride | 506-77-4 | 2 | |
| 47 | 2,4-D(2,4-dichlorophenoxyacetic acid) | 94-75-7 | 0.07 | 0.07 |
| 48 | DCPA (Dacthal) | 1861-32-1 | 0.07 | |
| 49 | Dalapon (sodium salt) | 75-99-0 | 0.2 | 0.2 |
| 50 | Di(2-ethylhexyl)adipate | 103-23-1 | 0.4 | 0.4 |
| 51 | Di(2-ethylhexyl)phthalate | 117-81-7 | Zero | 0.006 |
| 52 | Diazinon | 333-41-5 | 0.00017 | |
| 53 | Dibromochloromethane (THM) The total for trihalomethanes is 0.08 mg/L | 124-48-1 | 0.06 | 0.08 |
| 54 | Dibromochloropropane (DBCP) | 96-12-8 | Zero | 0.0002 |
| 55 | Dibutyl phthalate | 84-74-2 | 4 | |
| 56 | Dicamba | 1918-00-9 | 4 | |
| 57 | Dichloroacetic acid The total for five haloacetic acids is 0.06 mg/L | 76-43-6 | Zero | 0.06 |
| 58 | Dichlorobenzene o- | 95-50-1 | 0.420 | 0.6 |
| 59 | Dichlorobenzene | 541-73-1 | 0.320 | |
| 60 | Dichlorobenzene p- | 106-46-7 | 0.063 | 0.075 |
| 61 | Dichlorodifluoromethane | 75-71-8 | 1 | |
| 62 | Dichloroethane (1,2-) | 107-06-2 | Zero | 0.005 |
| 63 | Dichloroethylene (1,1-) | 75-35-4 | 0.007 | 0.007 |
| 64 | Dichloroethylene (cis-1,2-) | 156-59-2 | 0.07 | 0.07 |
| 65 | Dichloroethylene (trans-1,2-) | 156-60-5 | 0.1 | 0.1 |
| 66 | Dichloromethane | 75-09-2 | Zero | 0.005 |
| 67 | Dichlorophenol (2,4-) | 120-83-2 | 0.02 | |
| 68 | Dichloropropane (1,2-) | 78-87-5 | Zero | 0.005 |
| 69 | Dichloropropene (1,3-) | 542-75-6 | 0.00034 | |
| 70 | Dieldrin | 60-57-1 | 5.2 E-8 | |
| 71 | Diethyl phthalate | 84-66-2 | 30 | |
| 72 | Diisopropyl methylphosphonate | 1445-75-6 | 0.6 | |
| 73 | Dimethrin | 70-38-2 | 2 | |
| 74 | Dimethyl methylphosphonate | 756-79-6 | 0.1 | |
| 75 | Dimethyl phthalate | 131-11-3 | 270 | |
| 76 | Dinitrobenzene (1,3-) | 99-65-0 | 0.001 | |
| 77 | Dinitrotoluene (2,4-) | 121-14-2 | 0.00011 | |
| 78 | Dinitrotoluene (2,6-) | 606-20-2 | 0.04 | |
| 79 | Dinitrotoluene (2,6 & 2,4) | | 0.005 | |
| 80 | Dinoseb | 88-85-7 | 0.007 | 0.007 |
| 81 | Dioxane p- | 123-91-1 | 0.3 | |
| 82 | Diphenamid | 957-51-7 | 0.2 | |
| 83 | Diquat | 85-00-7 | 0.02 | 0.02 |
| 84 | Disulfoton | 298-04-4 | 0.0007 | |

| | Chemicals | CAS Number | Tribal Public Health Goal (mg/l) | Standards MCL (mg/l) |
|---|---|---|---|---|
| 85 | Dithiane (1,4-) | 505-29-3 | 0.08 | |
| 86 | Diuron | 330-54-1 | 0.1 | |
| 87 | Endothall | 145-73-3 | 0.1 | 0.1 |
| 88 | Endrin | 72-20-8 | 0.00059 | 0.002 |
| 89 | Epichlorohydrin (Product of dose and monomer shall not exceed an epichlorohydrin-based polymer containing 0.01% monomer dosed at 20mg/L) | 106-89-8 | Zero | TT |
| 90 | Ethylbenzene | 100-41-4 | 0.53 | 0.7 |
| 91 | Ethylene dibromide (EDB) = 1,2-dibromoethane. | 106-93-4 | Zero | 0.00005 |
| 92 | Ethylene glycol | 107-21-1 | 14 | |
| 93 | Ethylene Thiourea (ETU) | 96-45-7 | 0.007 | |
| 94 | Fenamiphos | 22224-92-6 | 0.0007 | |
| 95 | Fluometuron | 2164-17-2 | 0.09 | |
| 96 | Fluorene (PAH) | 86-73-7 | 1.0 | |
| 97 | Fonofos | 944-22-9 | 0.01 | |
| 98 | Formaldehyde | 50-00-0 | 1.0 | |
| 99 | Glyphosate | 1071-83-6 | 0.7 | 0.7 |
| 100 | Heptachlor | 76-44-8 | Zero | 0.0004 |
| 101 | Heptachlor epoxide | 1024-57-3 | Zero | 0.0002 |
| 102 | Hexachlorobenzene | 118-74-1 | Zero | 0.001 |
| 103 | Hexachlorobutadiene | 87-68-3 | 0.00044 | |
| 104 | Hexachlorocyclopentadiene | 77-47-4 | 0.05 | 0.05 |
| 105 | Hexachloroethane | 67-72-1 | 0.001 | |
| 106 | Hexane (n-) | 110-54-3 | | |
| 107 | Hexazinone | 51235-04-2 | 0.4 | |
| 108 | HMX = octahydro-1,3,5,7-tetranitro-1,3,5,7-tetrazocine | 2691-41-0 | 0.4 | |
| 109 | Indeno[1,2,3,-c,d]pyrene (PAH) | 193-39-5 | | |
| 110 | Isophorone | 78-59-1 | 0.0084 | |
| 111 | Isopropyl methylphosphonate | 1832-54-8 | 0.7 | |
| 112 | Isopropylbenzene (cumene) | 98-82-8 | 4 | |
| 113 | Lindane = γ − hexachlorocyclohexane | 58-89-9 | 0.0002 | 0.0002 |
| 114 | Malathion | 121-75-5 | 0.0001 | |
| 115 | Maleic hydrazide | 123-33-1 | 4.0 | |
| 116 | MCPA = 4 (chloro-2-methoxyphenoxy) acetic acid | 94-74-6 | 0.03 | |
| 117 | Methomyl | 16752-77-5 | 0.2 | |
| 118 | Methoxychlor | 72-43-5 | 0.04 | 0.04 |
| 119 | Methyl ethyl ketone | 78-93-3 | 4.0 | |
| 120 | Methyl parathion | 298-00-0 | 0.001 | |
| 121 | Metolachlor | 51218-45-2 | 0.7 | |
| 122 | Metribuzin | 21087-64-9 | 0.07 | |
| 123 | Monochloroacetic acid The total for the 5 haloacedic acids is 0.06 mg/L | 79-11-8 | 0.03 | 0.06 |
| 124 | Monochlorobenzene | 108-90-7 | 0.1 | 0.1 |
| 125 | Naphthalene | 91-20-3 | 0.1 | |
| 126 | Nitrocellulose | 9004-70-0 | | |
| 127 | Nitroguanidine | 556-88-7 | 0.7 | |
| 128 | Nitrophenol p- | 100-02-7 | 0.06 | |

| | Chemicals | CAS Number | Tribal Public Health Goal (mg/l) | Standards MCL (mg/l) |
|---|---|---|---|---|
| 129 | N-nitrosodimethylamine | 62-75-9 | 0.7 | |
| 130 | Oxamyl (Vydate) | 23135-22-0 | 0.2 | 0.2 |
| 131 | Paraquat | 1910-42-5 | 0.03 | |
| 132 | Pentachlorophenol | 87-86-5 | Zero | 0.001 |
| 133 | PFOA = Perfluorooctanoic Acid | 335-67-1 | | |
| 134 | PFOS =Perfluorooctane Sulfonate | 1763-23-1 | | |
| 135 | Phenanthrene (PAH) | 85-01-8 | | |
| 136 | Phenol | 108-95-2 | 0.300 | |
| 137 | Picloram | 2/1/1918 | 0.5 | 0.5 |
| 138 | Polychlorinated biphenyls (PCBs) | 1336-36-3 | Zero | 0.0005 |
| 139 | Prometon | 1610-18-0 | 0.4 | |
| 140 | Pronamide | 23950-58-5 | 0.1 | |
| 141 | Propachlor | 1918-16-7 | 0.1 | |
| 142 | Propazine | 139-40-2 | 0.01 | |
| 143 | Propham | 122-42-9 | 0.1 | |
| 144 | Pyrene (PAH) | 129-00-0 | 0.03 | |
| 145 | RDX = hexahydro -1,3,5-trinitro-1,3,5-triazine hexahydro -1,3,5-trinitro-1,3,5-triazine | 121-82-4 | 0.002 | |
| 146 | Simazine | 122-34-9 | 0.004 | 0.004 |
| 147 | Styrene | 100-42-5 | 0.1 | 0.1 |
| 148 | 2,4,5-T (Trichlorophenoxy-acetic acid) | 93-76-5 | 0.07 | |
| 149 | 2,3,7,8-TCDD (Dioxin) | 1746-01-6 | Zero | 0.00000003 |
| 150 | Tebuthiuron | 34014-18-1 | 0.5 | |
| 151 | Terbacil | 5902-51-2 | 0.09 | |
| 152 | Terbufos | 13071-79-9 | 0.0004 | |
| 153 | Tetrachloroethane (1,1,1,2-) | 630-20-6 | 0.07 | |
| 154 | Tetrachloroethane (1,1,2,2-) | 79-34-5 | 0.00017 | |
| 155 | Tetrachloroethylene | 127-18-4 | Zero | 0.005 |
| 156 | Tetrachloroterephthalic acid | 236-79-0 | | |
| 157 | Trichlorofluoromethane | 75-69-4 | 2 | |
| 158 | Toluene | 108-88-3 | 1.0 | 1.0 |
| 159 | Toxaphene | 8001-35-2 | Zero | 0.003 |
| 160 | 2,4,5-TP (Silvex) | 93-72-1 | 0.010 | 0.05 |
| 161 | Trichloroacetic acid<br>The total for the 5 haloacedic acids is 0.06 mg/L | 76-03-9 | 0.02 | 0.06 |
| 162 | Trichlorobenzene (1,2,4-) | 120-82-1 | 0.07 | 0.07 |
| 163 | Trichlorobenzene (1,3,5-) | 108-70-3 | 0.04 | |
| 164 | Trichloroethane (1,1,1-) | 71-55-6 | 0.2 | 0.2 |
| 165 | Trichloroethane (1,1,2-) | 79-00-5 | 0.00059 | 0.005 |
| 166 | Trichloroethylene | 79-01-6 | Zero | 0.005 |
| 167 | Trichlorophenol (2,4,6-) | 88-06-2 | 0.01 | |
| 168 | Trichloropropane (1,2,3-) | 96-18-4 | 0.1 | |
| 169 | Trifluralin | 1582-09-8 | 0.01 | |
| 170 | Trimethylbenzene (1,2,4-) | 95-63-6 | | |
| 171 | Trimethylbenzene (1,3,5-) | 108-67-8 | 10 | |
| 172 | Trinitroglycerol | 55-63-0 | 0.005 | |
| 173 | Trinitrotoluene (2,4,6-) | 118-96-7 | 0.002 | |
| 174 | Vinyl chloride | 75-01-4 | Zero | 0.002 |
| 175 | Xylenes | 1330-20-7 | 10.0 | 10.0 |
| 176 | Methyl tertiary butyl ether (MtBE) | 1634-04-4 | Zero | 20 µg/L |

| | Chemicals | CAS Number | Tribal Public Health Goal (mg/l) | Standards MCL (mg/l) |
|---|---|---|---|---|
| 177 | Ammonia | 7664-41-7 | 30 | |
| 178 | Antimony | 7440-36-0 | 0.0056 | 0.006 |
| 179 | Arsenic | 7440-38-2 | Zero | 0.01 |
| 180 | Asbestos (fibers/l >10Fm length) | 1332-21-4 | 7 million fibers per liter | 7 million fibers per liter |
| 181 | Barium | 7440-39-3 | 2.0 | 2.0 |
| 182 | Beryllium | 7440-41-7 | 0.004 | 0.004 |
| 183 | Boron | 7440-42-8 | 6.0 | |
| 184 | Bromate | 7789-38-0 | Zero | 0.010 |
| 185 | Cadmium | 7440-43-9 | 0.005 | 0.005 |
| 186 | Chloramine = Monochloramine (free chlorine) | 10599-90-3 | 4.0 | 4.0 |
| 187 | Chlorine = Monochloramine (free chlorine) | 7782-50-5 | 4.0 | 4.0 |
| 188 | Chlorine dioxide = Monochloramine (free chlorine) | 10049-04-4 | 0.8 | 0.8 |
| 189 | Chlorite | 7758-19-2 | 0.8 | 1.0 |
| 190 | Chromium (total) | 7440-47-3 | 0.1 | 0.1 |
| 191 | Copper (at tap) | 7440-50-8 | 1.3 | TT = 1.3 If more than 10% of tap samples exceed the MCL |
| 192 | Cyanide | 143-33-9 | 0.140 | 0.2 |
| 193 | Fluoride | 7681-49-4 | 4.0 | 2.0 |
| 194 | Lead (at tap) | 7439-92-1 | Zero | TT = 0.015 |
| 195 | Manganese | 7439-96-5 | ~~0.3~~ | 0.05 |
| 196 | Mercury (inorganic) | 7487-94-7 | 0.002 | 0.002 |
| 197 | Molybdenum | 7439-98-7 | 0.04 | |
| 198 | Nickel | 7440-02-0 | 0.1 | 0.1 |
| 199 | Nitrate (as N) Calculated for a 4kg infant and protective for all age groups | 14797-55-8 | 10.0 | 10.0 |
| 200 | Nitrite (as N) Calculated for a 4kg infant and protective for all age groups | 14797-65-0 | 1.0 | 1.0 |
| 201 | Nitrate + Nitrite (both as N) | | 10.0 | 10.0 |
| 202 | Perchlorate | 14797-73-0 | 0.015 | |
| 203 | Selenium | 7782-49-2 | 0.05 | 0.05 |
| 204 | Silver | 7440-22-4 | 0.0032 | |
| 205 | Strontium | 7440-24-6 | 4.0 | 8 pCi/L |
| 206 | Thallium | 7440-28-0 | 0.00024 | 0.002 |
| 207 | White phosphorous | 7723-14-0 | 0.0001 | |
| 208 | Zinc | 7440-66-6 | 2.0 | 5.0 |
| 209 | Beta particle and photon activity | | Zero | 4.0 mrem/yr. |
| 210 | Gross alpha particle activity | | Zero | 15 pCi/L |
| 211 | Combined Radium 226 & 228 | 7440-14-4 | Zero | 5 pCi/L |
| 212 | Radioactivity (2 or more years) | | Zero | 4 mrem/year |
| 213 | Radon | 10043-92-2 | Zero | 300 pCi/L |
| 214 | Tritium | 10028-17-8 | Zero | 20,000 pCi/L |
| 215 | Uranium | 7440-61-1 | Zero | 0.02 |

| Chemicals | | CAS Number | Tribal Public Health Goal (mg/l) | Standards MCL (mg/l) |
|---|---|---|---|---|
| 216 | Aluminum | 7429-90-5 | 0.05 to 0.2 mg/L | |
| 217 | Chloride | 7647-14-5 | 250 mg/L | See Section 4.I. |
| 218 | Color | | 15 color units | See Section 4.C. |
| 219 | Copper | 7440-50-8 | 1.0 mg/L | |
| 220 | Corrosivity | | non-corrosive | |
| 221 | Foaming agents | | 0.5 mg/L | See Section 4.B. |
| 222 | Iron | 7439-89-6 | 0.3 mg/L | |
| 223 | Odor | | 3 threshold odor numbers | See Section 4.D. and Organoleptic Criteria |
| 224 | pH | | 6.5 – 8.5 | See Section 4.J. |
| 225 | Sulfate | 7757-82-6 | 250 mg/L | 250 mg/L |
| 226 | Total dissolved solids (TDS) | | 500 mg/L | See Section 4.I |
| 227 | Sodium | | 20 mg/L (for individuals on a 500 mg/day restricted sodium diet). | |

| | Chemicals | CAS Number | Tribal Public Health Goal (mg/l) | Standards MCL (mg/l) |
|---|---|---|---|---|
| 228 | *Cryptosporidium* | | Zero | Systems must filter to remove 99% of *Cryptosporidium* |
| 229 | *Giardia lamblia* | | Zero | 99.9% of *Giardia lamblia* killed or inactivated |
| 230 | *Legionella* | | Zero | EPA believes that if *Giardia* and viruses are inactivated, *Legionella* will also be controlled |
| 231 | Heterotrophic Plate Count (HPC) | | Zero | No more than 500 bacterial colonies per mL See Section 3.L |
| 232 | Total Coliforms | | Zero | No more than 5.0% samples total coliform-positive in a month. Every sample that has total coliforms must be analyzed for fecal coliforms; no fecal coliforms are allowed. |
| 233 | Turbidity | | | See Section 3.G and 5.0 NTU in Drinking Water |
| 234 | Viruses & Pathogens (e.g., Salmonella, Shigella and Mycobacterium) | | Zero | 99.99% killed/inactivated |
| 235 | Cylindrospermosin | | 15 | Implementation procedure in progress, use for bathing advisory only |
| 236 | Cyanobacterial Microcystin Toxins | | 8 | Implementation procedure in progress, use for bathing advisory |

**Footnotes:**

**Tribal Public Health Goals** are an estimate of acceptable drinking water levels for chemical substances based on health effects information provided by EPA in the March 2018 Edition of the "Drinking Water Standards and Health Advisories", EPA 822-F-18-001. Tribal Public Health Goals are not legally enforceable Water Quality Standards but are included to serve as guidance to Tribal officials. Chemical substances were included as Tribal Public Health Goals if there were any known risk of carcinogenic effects. They generally equate to the concentration of a chemical in drinking water that is NOT expected to cause any adverse non-carcinogenic effects for a lifetime of exposure. This concentration is generally based on an exposure of a 10 kg child and 70 kg adult consuming 1 liter and 2 liters of water per day respectively for their entire lifetime.

**MCL**'s are Maximum Contaminant Levels and are legally enforceable water quality standards. They represent the highest level of a contaminant that is allowed in drinking water and are set as close to the level at which no known or anticipated adverse effect on health of persons occurs and which allow for an adequate margin of safety. MCL's use the best available analytical and treatment technologies and take cost into consideration.

# Table 2
# Miccosukee Tribe of Indians of Florida
# Water Quality Criteria for Class III-A and Class III-B Waterbodies
# For The Protection of Fish and Aquatic Life and Human Health

## Priority Pollutants

| | Pollutants | CAS Number | Freshwater Fish/Aquatic Life | | Human Health for the consumption of | |
|---|---|---|---|---|---|---|
| | | | CMC[1] (acute) (µg/L) | CCC[1] (chronic) (µg/L) | Water + Organism (µg/L) | Organism Only (µg/L) |
| 1 | Antimony | 7440-36-0 | | | 5.6 | 640 |
| 2 | Arsenic | 7440-38-2 | 340 | 150 | 0.018 | 0.14 |
| 3 | Beryllium | 7440-41-7 | | | 4 | 4 |
| 4 | Cadmium | 7440-43-9 | 1.9 | 0.79 | | |
| 5a | Chromium (III) | 16065-83-1 | 1803 | 86.2 | 100 | |
| 5b | Chromium (VI) | 18540-29-9 | 16 | 11 | 100 | |
| 6 | Copper | 7440-50-8 | 14 | 9.33 | 1,300 | |
| 7 | Lead | 7439-92-1 | 81.64 | 3.18 | | |
| 8a | Mercury | 7439-97-6 | 1.4 | 0.012 | | 0.3 mg/kg |
| 8b | Methylmercury | 22967-92-6 | 1.4 | 0.012 | | 0.3 mg/kg |
| 9 | Nickel | 7440-02-0 | 469.17 | 52.16 | 610 | 4,600 |
| 10 | Selenium | 7782-49-2 | | 5.0 | 170 | 4200 |
| 11 | Silver | 7440-22-4 | 3.78 | | | |
| 12 | Thallium | 7440-28-0 | | | 0.24 | 0.47 |
| 13 | Zinc | 7440-66-6 | 119.82 | 119.82 | 7,400 | 26,000 |
| 14 | Cyanide | 57-12-5 | 22 | 5.2 | 4 | 140 |
| 15 | Asbestos | 1332-21-4 | | | 7 million fibers/L | |
| 16 | 2,3,7,8-TCDD (Dioxin) | 1746-01-6 | | | 5.0E-9 | 5.1E-9 |
| 17 | Acrolein | 107-02-8 | 3 | 3 | 3 | 9 |
| 18 | Acrylonitrile | 107-13-1 | | | 0.051 | 0.25 |
| 19 | Benzene | 71-43-2 | | | 1.2 | 51 |
| 20 | Bromoform | 75-25-2 | | | 4.3 | 120 |
| 21 | Carbon Tetrachloride | 56-23-5 | | | 0.23 | 1.6 |
| 22 | Chlorobenzene | 108-90-7 | | | 100 | 800 |
| 23 | Chlorodibromomethane | 124-48-1 | | | 0.40 | 13 |
| 24 | Chloroethane | 75-00-3 | | | | |
| 25 | 2-Chloroethylvinyl Ether | 110-75-8 | | | | |
| 26 | Chloroform | 67-66-3 | | | 5.7 | 470 |
| 27 | Dichlorobromomethane | 75-27-4 | | | 0.27 | 17 |
| 28 | 1,1-Dichloroethane | 75-34-3 | | | | |
| 29 | 1,2-Dichloroethane | 107-06-2 | | | 0.38 | 37 |
| 30 | 1,1-Dichloroethylene | 75-35-4 | | | 0.057 | 3.2 |
| 31 | 1,2-Dichloropropane | 78-87-5 | | | 0.50 | 15 |
| 32 | 1,3-Dichloropropene | 542-75-6 | | | 0.27 | 12 |
| 33 | Ethylbenzene | 100-41-4 | | | 68 | 130 |
| 34 | Methyl Bromide | 74-83-9 | | | 47 | 1,500 |
| 35 | Methyl Chloride | 74-87-3 | | | | |
| 36 | Methylene Chloride | 75-09-2 | | | 4.6 | 590 |
| 37 | 1,1,2,2-Tetrachloroethane | 79-34-5 | | | 0.17 | 3 |
| 38 | Tetrachloroethylene | 127-18-4 | | | 0.69 | 3.3 |
| 39 | Toluene | 108-88-3 | | | 57 | 520 |

| Pollutants | | CAS Number | Freshwater Fish/Aquatic Life | | Human Health for the consumption of | |
|---|---|---|---|---|---|---|
| | | | CMC[1] (acute) (µg/L) | CCC[1] (chronic) (µg/L) | Water + Organism (µg/L) | Organism Only (µg/L) |
| 40 | 1,2-Trans-Dichloroethylene | 156-60-5 | | | 100 | 4,000 |
| 41 | 1,1,1-Trichloroethane | 71-55-6 | | | 10,000 | 200,000 |
| 42 | 1,1,2-Trichloroethane | 79-00-5 | | | 0.55 | 8.9 |
| 43 | Trichloroethylene | 79-01-6 | | | .6 | 7 |
| 44 | Vinyl Chloride | 75-01-4 | | | 0.022 | 1.6 |
| 45 | 2-Chlorophenol | 95-57-8 | | | 30 | 150 |
| 46 | 2,4-Dichlorophenol | 120-83-2 | | | 10 | 60 |
| 47 | 2,4-Dimethylphenol | 105-67-9 | | | 100 | 850 |
| 48 | 2-Methyl-4,6-Dinitrophenol | 534-52-1 | | | 2 | 30 |
| 49 | 2,4-Dinitrophenol | 51-28-5 | | | 10 | 300 |
| 50 | 2-Nitrophenol | 88-75-5 | | | | |
| 51 | 4-Nitrophenol | 100-02-7 | | | | |
| 52 | 3-Methyl-4-Chlorophenol | 59-50-7 | | | 500 | 2,000 |
| 53 | Pentachlorophenol | 87-86-5 | 19 | 15 | 0.03 | 0.04 |
| 54 | Phenol | 108-95-2 | | | 300 | 300 |
| 55 | 2,4,6-Trichlorophenol | 88-06-2 | | | 1.4 | 2.4 |
| 56 | Acenaphthene | 83-32-9 | | | 20 | 20 |
| 57 | Acenaphthylene | 208-96-8 | | | | |
| 58 | Anthracene | 120-12-7 | | | 300 | 400 |
| 59 | Benzidine | 92-87-5 | | | 0.000086 | 0.00020 |
| 60 | Benzo(a) Anthracene | 56-55-3 | | | 0.0012 | 0.0013 |
| 61 | Benzo(a) Pyrene | 50-32-8 | | | 0.00012 | 0.00013 |
| 62 | Benzo(b) Fluoranthene | 205-99-2 | | | 0.0012 | 0.0013 |
| 63 | Benzo(ghi) Perylene | 191-24-2 | | | | |
| 64 | Benzo(k) Fluoranthene | 207-08-9 | | | 0.0028 | 0.013 |
| 65 | Bis(2-Chloroethoxy) Methane | 111-91-1 | | | | |
| 66 | Bis(2-Chloroethyl) Ether | 111-44-4 | | | 0.030 | 0.53 |
| 67 | Bis(2-Chloroisopropyl) Ether | 108-60-1 | | | 200 | 4,000 |
| 68 | Bis(2-Ethylhexyl) Phthalate | 117-81-7 | | | .32 | .37 |
| 69 | 4-Bromophenyl Phenyl Ether | 101-55-3 | | | | |
| 70 | Butylbenzyl Phthalate | 85-68-7 | | | .10 | .10 |
| 71 | 2-Chloronaphthalene | 91-58-7 | | | 800 | 1,000 |
| 72 | 4-Chlorophenyl Phenyl Ether | 7005-72-3 | | | | |
| 73 | Chrysene | 218-01-9 | | | 0.0028 | 0.018 |
| 74 | Dibenzo(a,h)Anthracene | 53-70-3 | | | 0.00012 | 0.00013 |
| 75 | 1,2-Dichlorobenzene | 95-50-1 | | | 420 | 1,300 |
| 76 | 1,3-Dichlorobenzene | 541-73-1 | | | 7 | 10 |
| 77 | 1,4-Dichlorobenzene | 106-46-7 | | | 63 | 190 |
| 78 | 3,3'-Dichlorobenzidine | 91-94-1 | | | 0.021 | 0.028 |
| 79 | Diethyl Phthalate | 84-66-2 | | | 600 | 600 |
| 80 | Dimethyl Phthalate | 131-11-3 | | | 2,000 | 2,000 |
| 81 | Di-n-Butyl Phthalate | 84-74-2 | | | 20 | 30 |
| 82 | 2,4-Dinitrotoluene | 121-14-2 | | | 0.049 | 1.7 |
| 83 | 2,6-Dinitrotoluene | 606-20-2 | | | | |
| 84 | Di-n-Octyl Phthalate | 117-84-0 | | | | |
| 85 | 1,2-Diphenylhydrazine | 122-66-7 | | | 0.03 | 0.2 |
| 86 | Fluoranthene | 206-44-0 | | | 20 | 20 |
| 87 | Fluorene | 86-73-7 | | | 50 | 70 |
| 88 | Hexachlorobenzene | 118-74-1 | | | 0.000079 | 0.000079 |

| Pollutants | | CAS Number | Freshwater Fish/Aquatic Life | | Human Health for the consumption of | |
|---|---|---|---|---|---|---|
| | | | CMC[1] (acute) (µg/L) | CCC[1] (chronic) (µg/L) | Water + Organism (µg/L) | Organism Only (µg/L) |
| 89 | Hexachlorobutadiene | 87-68-3 | | | 0.01 | 0.01 |
| 90 | Hexachlorocyclopentadiene | 77-47-4 | | | 4 | 4 |
| 91 | Hexachloroethane | 67-72-1 | | | 0.1 | 0.1 |
| 92 | Ideno(1,2,3-cd)Pyrene | 193-39-5 | | | 0.0012 | 0.0013 |
| 93 | Isophorone | 78-59-1 | | | 8.4 | 600 |
| 94 | Naphthalene | 91-20-3 | | | | |
| 95 | Nitrobenzene | 98-95-3 | | | 10 | 600 |
| 96 | N-Nitrosodimethylamine | 62-75-9 | | | 0.00069 | 3.0 |
| 97 | N-Nitrosodi-n-Propylamine | 621-64-7 | | | 0.0050 | 0.51 |
| 98 | N-Nitrosodiphenylamine | 86-30-6 | | | 3.3 | 6.0 |
| 99 | Phenanthrene | 85-01-8 | | | | |
| 100 | Pyrene | 129-00-0 | | | 20 | 30 |
| 101 | 1,2,4-Trichlorobenzene | 120-82-1 | | | 0.071 | 0.076 |
| 102 | Aldrin | 309-00-2 | 3.0 | | 0.00000077 | 0.00000077 |
| 103 | alpha-BHC | 319-84-6 | | | 0.00036 | 0.00039 |
| 104 | beta-BHC | 319-85-7 | | | 0.0080 | 0.014 |
| 105 | gamma-BHC (Lindane) | 58-89-9 | 0.95 | 0.08 | 0.019 | 0.063 |
| 106 | delta-BHC | 319-86-8 | | | | |
| 107 | Chlordane | 57-74-9 | 2.4 | 0.0043 | 0.00031 | 0.00032 |
| 108 | 4,4'-DDT | 50-29-3 | 1.1 | 0.001 | 0.000030 | 0.000030 |
| 109 | 4,4'-DDE | 72-55-9 | | | 0.000018 | 0.000018 |
| 110 | 4,4'-DDD | 72-54-8 | | | 0.00012 | 0.00012 |
| 111 | Dieldrin | 60-57-1 | 0.24 | 0.0019 | 0.0000012 | 0.0000012 |
| 112 | alpha-Endosulfan | 959-98-8 | 0.22 | 0.056 | 20 | 30 |
| 113 | beta-Endosulfan | 33213-65-9 | 0.22 | 0.056 | 20 | 40 |
| 114 | Endosulfan Sulfate | 1031-07-8 | | | 20 | 40 |
| 115 | Endrin | 72-20-8 | 0.086 | 0.0023 | 0.03 | 0.03 |
| 116 | Endrin Aldehyde | 7421-93-4 | | | 0.29 | 0.30 |
| 117 | Heptachlor | 76-44-8 | 0.52 | 0.0038 | 0.0000059 | 0.0000059 |
| 118 | Heptachlor Epoxide | 1024-57-3 | 0.52 | 0.0038 | 0.000032 | 0.000032 |
| 119 | Polychlorinated Biphenyls (PCBs) | | | 0.014 | 0.000064 | 0.000064 |
| 121 | Toxaphene | 8001-35-2 | 0.73 | 0.0002 | 0.00028 | 0.00028 |
| 121 | Dichlorodifluromethane | 75-71-8 | | | 6900 | 570000 |
| 122 | Carbaryl | 63-25-2 | 2.1 | 2.1 | | |

## Footnotes:

**Arsenic Criteria:** For Freshwater CMC and CCC, the recommended water quality criterion was derived from data for arsenic (III), but is applied here to total arsenic, which might imply that arsenic (III) and arsenic (V) are equally toxic to aquatic life and that their toxicities are additive. For Human Health Consumption of Water & Organisms, the water quality criterion for arsenic refers to the inorganic form only.

**Metals Criteria:** All metals are measured as total recoverable unless specifically authorized by the Miccosukee Environmental Protection Agency to use dissolved. Conversion Factors applied in the table are found in Appendix A and B.

**Cadmium, Chromium (III), Lead, Nickel and Zinc Criteria:** The freshwater criterion for these metals are expressed as a function of hardness (mg/L) in the water column. The values given here correspond to a hardness of 100 mg/L. Criteria values for other hardness may be calculated from the following: CMC (dissolved) = $\exp\{m_A [\ln(\text{hardness})] + b_A\}$ (CF), or CCC (dissolved) = $\exp\{m_C [\ln(\text{hardness})] + b_C\}$ (CF) and the parameters specified in Appendix B- Parameters for Calculating Freshwater Dissolved Metals Criteria That Are Hardness-Dependent.

**Pentachlorophenol:** Freshwater aquatic life values for are expressed as a function of pH, and are calculated as follows: CMC = exp(1.005(pH)-4.869); CCC = exp(1.005(pH)-5.134). Values displayed in table correspond to a pH of 7.8.

**Asbestos Criteria:** The criterion for asbestos is the Maximum Contaminant Level (MCL) developed under the Safe Drinking Water Act (SDWA).

**Methylmercury Criterion:** The fish tissue residue criterion for methylmercury is based on a total fish consumption rate of 0.0175 kg/day.

**Selenium Criteria:** The CMC = 1/[(f1/CMC1) + (f2/CMC2)] where f1 and f2 are the fractions of total selenium that are treated as selenite and selenate, respectively, and CMC1 and CMC2 are 185.9 g/l and 12.82 g/l, respectively.

**PCB's:** This criterion applies to total pcbs, (e.g., the sum of all congener or all isomer or homolog or Aroclor analyses.)

**Endrin Criteria:** The derivation of the CCC for Endrin did not consider exposure through the diet, which is probably important for aquatic life occupying upper trophic levels.

**Cyanide Criterion:** The water quality criterion is expressed as g free cyanide (as CN)/L.

**Endosulfan Criteria:** The value for endosulfan is most appropriately applied to the sum of alpha-endosulfan and beta-endosulfan.

**Mercury Criteria:** The water quality criteria was derived from data for inorganic mercury (II), but is applied here to total mercury. If a substantial portion of the mercury in the water column is methylmercury, this criterion will probably be under protective. In addition, even though inorganic mercury is converted to methylmercury and methylmercury bioaccumulates to a great extent, this criterion does not account for uptake via the food chain because sufficient data were not available when the criterion was derived.

**DDT Criteria:** This criterion applies to DDT and its metabolites (i.e., the total concentration of DDT and its metabolites should not exceed this value).

**NRWQC**: The Miccosukee Tribe derived most of these criteria from EPA's "National Recommended Water Quality Criteria" (NRWQC) list. The NRWQC is a compilation of water quality criteria for the protection of aquatic life and

human health in surface waters and is required by Section 307(a)(1) of the federal Clean Water Act. However, the NRWQC does not contain criteria for each and every pollutant on the list. All pollutants were included in the Miccosukee Water Quality Standards to maintain consistence with the NRWQC.

# Table 3
# Miccosukee Tribe of Indians of Florida
# Water Quality Criteria for Class III-A and Class III-B Waterbodies for The Protection of Fish and Aquatic Life and Human Health

## Non Priority Pollutants

| | | | Freshwater Fish/Aquatic Life | | Human Health for the consumption of | |
|---|---|---|---|---|---|---|
| | Pollutant | CAS Number | CMC (acute) (µg/L) | CCC (chronic) (µg/L) | Water + Organism (µg/L) | Organism Only (µg/L) |
| 1 | Alkalinity | | | 20000 | | |
| 2 | Aluminum pH 6.5 – 9.0 | 7429-90-5 | 750 | 87 | | |
| 3 | Ammonia | 7664-41-7 | See Appendix C | | | |
| 4 | Aesthetic Qualities | | NARRATIVE STATEMENT—See Section 4 of the Miccosukee Water Quality Standards for the Narrative Criteria | | | |
| 5 | Bacteria | | FOR PRIMARY RECREATION AND SHELLFISH USES— NARRATIVE STATEMENT—See Section 4.L. of the Miccosukee Water Quality Standards for the Narrative Criteria | | | |
| 6 | Barium | 7440-39-3 | | | 1,000 | |
| 7 | Boron | | NARRATIVE STATEMENT— In accordance with EPA recommendations in *Quality Criteria for Water 1986, "Gold Book"* (p 62-63). | | | |
| 8 | Chloride | 16887-00-6 | 860000 | 230000 | | |
| 9 | Chlorine | 7782-50-5 | 19 | 11 | | |
| 10 | Chlorophenoxy Herbicide (2,4,5,-TP) | 93-72-1 | | | 10 | 400 |
| 11 | Chlorophenoxy Herbicide (2,4-D) | 94-75-7 | | | 100 | 12,000 |
| 12 | Chloropyrifos | 2921-88-2 | 0.083 | 0.041 | | |
| 13 | Color | | NARRATIVE STATEMENT—See Section 4.C. of the Miccosukee Water Quality Standards for the Narrative Criteria | | | |
| 14 | Demeton | 8065-48-3 | | 0.1 | | |
| 15 | Ether, Bis (Chloromethyl) | 542-88-1 | | | 0.00010 | 0.00029 |
| 16 | Gases, Total Dissolved | | Freshwater MCL = 110% SAT | | | |
| 17 | Guthion | 86-50-0 | | 0.01 | | |
| 18 | Hardness | | NARRATIVE STATEMENT—See Section 4.I. of the Miccosukee Water Quality Standards for the Narrative Criteria. | | | |
| 19 | Hexachlorocyclo-hexane-Technical | 608-73-1 | | | 0.0066 | 0.010 |
| 20 | Iron | 7439-89-6 | | 1000 | 300 | |
| 21 | Malathion | 121-75-5 | | 0.1 | | |

| | | | Freshwater Fish/Aquatic Life | | Human Health for the consumption of | |
|---|---|---|---|---|---|---|
| | Pollutant | CAS Number | CMC (acute) (µg/L) | CCC (chronic) (µg/L) | Water + Organism (µg/L) | Organism Only (µg/L) |
| 22 | Manganese | 7439-96-5 | | | 50 | 100 |
| 23 | Methoxychlor | 72-43-5 | | 0.03 | .02 | .02 |
| 24 | Mirex | 2385-85-5 | | 0.001 | | |
| 25 | Nitrates | 14797-55-8 | | | 10,000 | |
| 26 | Nitrosamines | | | | 0.0008 | 1.24 |
| 27 | Dinitrophenols | 25550-58-7 | | | 10 | 1,000 |
| 28 | Nonylphenol | 84852-15-3 | 28 | 6.6 | | |
| 29 | Nitrosodibutylamine | 924-16-3 | | | 0.0063 | 0.22 |
| 30 | Nitrosodiethylamine | 55-18-5 | | | 0.0008 | 1.24 |
| 31 | Nitrosopyrrolidine | 930-55-2 | | | 0.016 | 34 |
| 32 | Oil and Grease | | NARRATIVE STATEMENT— See Section 4.B. of the Miccosukee Water Quality Standards for the Narrative Criteria | | | |
| 33 | Oxygen, Dissolved Freshwater | 7782-44-7 | NARRATIVE STATEMENT - See Section 4.K. of the Miccosukee Water Quality Standards for the Narrative Criteria | | | |
| 34 | Diazinon | 333-41-5 | 0.17 | 0.17 | | |
| 35 | Parathion | 56-38-2 | 0.065 | 0.013 | | |
| 36 | Pentachlorobenzene | 608-93-5 | | | 0.1 | 0.1 |
| 37 | pH | | | 6.5 – 9 | 5 – 9 | |
| 38 | Phosphorus Elemental | 7723-14-0 | | | | |
| 39 | Nutrients | | NARRATIVE STATEMENT— See Section 4.N. of the Miccosukee Water Quality Standards for the Narrative Criteria | | | |
| 40 | Solids Dissolved and Salinity | | | | 250,000 | |
| 41 | Solids Suspended and Turbidity | | NARRATIVE STATEMENT— See Section 4.G. of the Miccosukee Water Quality Standards for the Narrative Criteria | | | |
| 42 | Sulfide-Hydrogen Sulfide | 7783-06-4 | | 2.0 | | |
| 43 | Tainting Substances | | NARRATIVE STATEMENT— See Section 4 of the Miccosukee Water Quality Standards for the Narrative Criteria | | | |
| 44 | Temperature | | SPECIES DEPENDENT CRITERIA— See Section 4.H. of the Miccosukee Water Quality Standards for the Narrative Criteria | | | |
| 45 | 1,2,4,5-Tetrachlorobenzene | 95-94-3 | | | 0.03 | 0.03 |
| 46 | Tributyltin (TBT) | | 0.46 | 0.072 | | |
| 47 | 2,4,5-Trichlorophenol | 95-95-4 | | | 1 | 600 |

**Table 4**
**Miccosukee Tribe of Indians of Florida**
**Water Quality Criteria for Class III-A and Class III-B Waterbodies for Organoleptic Effects (Taste and Odor)**

| | Pollutant | CAS Number | Organoleptic Effect Criteria (µg/L) |
|---|---|---|---|
| 1 | Acenaphthene | 83-32-9 | 20 |
| 2 | Iron | 7439-89-6 | 300 |
| 3 | Monochlorobenzene | 108-90-7 | 20 |
| 4 | 3-Chlorophenol | 108-43-0 | 0.1 |
| 5 | 4-Chlorophenol | 106-48-9 | 0.1 |
| 6 | 2,3-Dichlorophenol | 579-24-9 | 0.04 |
| 7 | 2,5-Dichlorophenol | 583-78-0 | 0.5 |
| 8 | 2,6-Dichlorophenol | 87-65-8 | 0.2 |
| 9 | 3,4-Dichlorophenol | 95-77-2 | 0.3 |
| 10 | 2,4,5-Trichlorophenol | 95-95-4 | 1 |
| 11 | 2,4,6-Trichlorophenol | 88-06-2 | 2 |
| 12 | 2,3,4,6-Tetrachlorophenol | 58-90-2 | 1 |
| 13 | 2-Methyl-4-Chlorophenol | 1570-64-5 | 1800 |
| 14 | 3-Methyl-4-Chlorophenol | 59-50-7 | 3000 |
| 15 | 3-Methyl-6-Chlorophenol | 615-74-7 | 20 |
| 16 | 2-Chlorophenol | 95-57-8 | 0.1 |
| 17 | Copper | 7440-50-8 | 1000 |
| 18 | 2,4-Dichlorophenol | 120-83-2 | 0.3 |
| 19 | 2,4-Dimethylphenol | 105-67-9 | 400 |
| 20 | Hexachlorocyclopentadiene | 77-47-4 | 1 |
| 21 | Nitrobenzene | 98-95-3 | 30 |
| 22 | Pentachlorophenol | 87-86-5 | 30 |
| 23 | Phenol | 108-95-2 | 300 |
| 24 | Zinc | 7440-66-6 | 5000 |

**SECTION 5. Tribal Water Body Uses and Standards Specific to the Uses**

The Miccosukee Lands location map, which includes the following properties, may be found in Appendix D.

**A. NORTH GRASS:** The uses, classification and standards for the surface waters that pass through the Miccosukee Indian Federal Reservation, within the exterior boundaries of the area known as the North Grass. The North Grass is defined as that area bounded by the northern boundary of the Reservation, the eastern edge of the L-28 Levee (which is east of the L-28 Canal), the southern edge of the C-60 Canal, and the eastern boundary of the Reservation.

(See Appendix E)

**1. Designated Uses:**

a. * Preservation of natural populations of native plant and animal communities specific to the Everglades ecosystem
b. * Preservation of the ridge and slough and tree island landscape specific to the Everglades ecosystem
c. * Propagation of fish, wildlife, and aquatic life
d. * Hunting, fishing, frogging, and airboating
e. * Agricultural activities
f. * Cultural activities
g. * Hunting camp leases (previously existing hunting camps only)

[Asterisk (*) indicates an existing use at the time these standards were adopted.]

**2. Classification:** The Miccosukee Tribe hereby adopts the surface waters of the North Grass as a Class III-A water body and an Outstanding Miccosukee Water (OMW). In addition to any other narrative, numeric or sediment standards contained herein, the total phosphorus level should not exceed 10 parts per billion maximum for the surface waters of the North Grass.

**B. SOUTH GRASS:** The uses, classification and standards for the surface waters that pass through the Miccosukee Indian Federal Reservation, within the exterior boundaries of the area known as the South Grass. The South Grass is defined as the area bounded by the southern edge of the C-60 Canal, the eastern boundary of the Reservation, the southern boundary of the Reservation, the eastern edge of the L-28 Canal (which is south of the L-28 Tieback Canal), a line running north from the L-28 Canal (where the L-28 Canal turns northwest to become the L-28 Tieback Canal) until this line intersects the oil pipeline, the center of the oil pipeline until the oil pipeline intercepts the L-28 Interceptor Canal, and the eastern edge of the L-28 Levee (which is east of the L-28 Canal).

(See Appendix F)

1. **Designated Uses:**

a. * Preservation of natural populations of native plant and animal communities specific to the Everglades ecosystem
b. * Preservation of the ridge and slough and tree island landscape specific to the Everglades ecosystem
c. * Propagation of fish, wildlife, and aquatic life
d. * Hunting, fishing, frogging, and airboating
e. * Agricultural activities
f. * Cultural activities
g. * Hunting camp leases (previously existing hunting camps only)

[Asterisk (*) indicates an existing use at the time these standards were adopted]

2. **Classification:** The Miccosukee Tribe hereby adopts the surface waters of the South Grass as a Class III-A waterbody and Outstanding Miccosukee Water (OMW). In addition to any other narrative, numeric, biological or sediment standards contained herein, the total phosphorus level should not exceed 10 parts per billion maximum for the surface waters of the South Grass.

**C. GAP:** The uses, classification and standards for the surface waters that pass through the Miccosukee Indian Federal Reservation, within the exterior boundaries of the area known as the Gap. The Gap is defined as that area which is bounded by the southern boundary of the Reservation, the western boundary of the Reservation, the northeastern edge of the L-28 Interceptor Canal, the oil pipeline which runs generally south from the L-28 Interceptor Canal until the oil pipeline intercepts a line running north from the L-28 Canal where the L-28 Canal turns northwest to become the L-28 Tieback Canal, and the eastern edge of the L-28 Canal (which is south of the L-28 Tieback Canal).

(See Appendix G)

**1. Designated Uses:**

a. * Preservation of natural populations of native plant and animal communities specific to the Everglades ecosystem
b. * Preservation of the ridge and slough and tree island landscape specific to the Everglades ecosystem
c. * Propagation of fish and wildlife
d. * Hunting, fishing, frogging, and airboating
e. * Agricultural activities
f. * Cultural activities
g. * Hunting camp leases (previously existing hunting camps only)

[Asterisk (*) indicates an existing use at the time these standards were adopted.]

**2. Classification:** The Miccosukee Tribe hereby adopts the surface waters of the Gap as a Class III-A waterbody and Outstanding Miccosukee Water (OMW). In addition to any other narrative, numeric, biological or sediment standards contained herein, the total phosphorus level should not exceed 10 parts per billion maximum for the surface waters of the Gap.

**D. TRIANGLE:** The uses, classification and standards for the surface waters that pass through the Miccosukee Indian Federal Reservation, within the exterior boundaries of the area known as the Triangle. The Triangle is defined as the area bounded by the centerline of US Highway I-75, the eastern edge of the L-28 Levee (which is east of the L-28 Canal), the northeastern edge of the L-28 Interceptor Canal, and the western boundary of the Reservation.

(See Appendix H)

**1. Designated Uses:**

a. Light industrial or commercial enterprises
b. Small community development (residential)
c. Agricultural activities
d. * Tourism related activities (including campgrounds and theme parks)
e. * Cattle grazing
f. Retention/Detention reservoirs

[Asterisk (*) indicates an existing use at the time these standards were adopted.]

**2. Classification:** The Miccosukee Tribe hereby adopts the surface waters of the Triangle as a Class III-B waterbody.

**E. RECTANGLE:** The uses and standards for the surface waters that pass through the Miccosukee Indian Federal Reservation, within the exterior boundaries of the area known as the Rectangle. The Rectangle is the area bounded by the centerline of US Highway I-75, the western boundary of the Reservation, the northern boundary of the Reservation, and the eastern edge of the L-28 Levee (which is east of the L-28 Canal).

(See Appendix I)

**1. Designated Uses:**

a. * Industrial or commercial enterprises
b. * Cattle grazing
c. * Small community development (residential)
d. * Agricultural activities
e. * Tourism related activities (including campgrounds and theme parks)
f. * Retention/Detention reservoirs

[Asterisk (*) indicates an existing use at the time these standards were adopted.]

**2. Classification:** The Miccosukee Tribe hereby adopts the surface waters of the Rectangle as a Class III-B waterbody.

**F. MICCOSUKEE RESERVED AREA:** The uses, classification and standards for the surface waters that pass through the area known as the Miccosukee Reserved Area. The Miccosukee Reserved Area is defined as that area in the vicinity of the northern boundary of Everglades National Park, which is designated as Federal Indian Reservation, by action of the United States Congress in Public Law 105-313, dated October 30, 1998.

(See Appendix J)

**1. Designated Uses:**

a. * Residential Community Development
b. * Light Industrial or Commercial Enterprises
c. * Hunting, Fishing, Frogging
d. * Tourism Related Activities
e. * Tribal Administrative and Governmental Headquarters Complex

[Asterisk (*) indicates an existing use at the time these standards were adopted]

**2. Classification:** The Miccosukee Tribe hereby adopts the surface waters of the Miccosukee Reserved Area as a Class III-A waterbody.

**G. TAMIAMI TRAIL RESERVATIONS, KROME AVENUE RESERVATION, AND DADE CORNERS RESERVATION:** The uses, classification and standards for the surface waters that pass through the area known as the Tamiami Trail Reservations and the surface waters that pass through the area known as the Krome Avenue Reservation and the surface waters that pass through the area known as the Dade Corners Reservation. The Tamiami Trail Reservations, Krome Avenue Reservation and Dade Corners Reservation are defined as those areas in the vicinity of Krome Avenue (FL State Road 997) and Tamiami Trail (US Highway 41) which were designated as federal trust lands by action of the Secretary of the Interior in 1989, 1993 and 1995; and those three parcels (approximately 1 1/2 acres each in size) located along the northern edge of Tamiami Trail west of S-12C and east of S-343B, which are held in federal trust as Indian Reservation.

(See Appendix K)

**1. Designated Uses:**

a. * Residential community development
b. * Light industrial or commercial enterprises
c. * Hunting, fishing, frogging and commercial airboating
d. * Tourism related activities
e. Tribal administrative and governmental headquarters complex

[Asterisk (*) indicates an existing use at the time these standards were adopted]

**2. Classification:** The Miccosukee Tribe hereby adopts the surface waters of the Tamiami Trail Reservations, the Krome Avenue Reservation and the Dade Corners Reservation, as Class III-A waterbodies.

**H. SEMA:** The uses, classification and standards for the surface waters that pass through the area known as SEMA. SEMA is defined as that area in the vicinity of Krome Avenue (FL State Road 997) and Tamiami Trail (US Highway 41), which was designated as federal trust land by action of the Secretary of the Interior on June 20, 2012. SEMA is approximately 302 acres in size and located along the southern edge of Tamiami Trail approximately ½ mile east of Miccosukee Resort and Gaming (Krome Avenue Reservation), and along the eastern edge of Krome Avenue.

(See Appendix L)

**1. Designated Uses:**

a. * Cultural activities
b. * Hunting and fishing
c. * Industrial or commercial enterprises
d. Propagation of fish and wildlife
e. Residential community development
f. Agricultural activities
g. Tourism related activities

[Asterisk (*) indicates an existing use at the time these standards were adopted]

**2. Classification:** The Miccosukee Tribe hereby adopts the surface waters of SEMA as a Class III-B waterbody.

**I. Lambick:** The uses, classification and standards for the surface waters that pass through the area known as Lambick. Lambick is defined as that area in the vicinity of Krome Avenue (FL State Road 997) and Tamiami Trail (US Highway 41) which was designated as federal trust land by action of the Secretary of the Interior on June 20, 2012. Lambick is approximately 214 acres in size and located along the northern edge of Tamiami Trail approximately ¼ mile east of Miccosukee Resort and Gaming (Krome Avenue Reservation).

(See Appendix M)

**1. Designated Uses:**

a. * Cultural activities
b. * Hunting and fishing
c. Propagation of fish and wildlife
d. Industrial or commercial enterprises
e. Residential community development
f. Agricultural activities
g. Tourism related activities

[Asterisk (*) indicates an existing use at the time these standards were adopted]

**2. Classification:** The Miccosukee Tribe hereby adopts the surface waters of Lambick as a Class III-B waterbody.

**J. Coral Way:** The uses, classification and standards for the surface waters that pass through the area known as Coral Way. Coral Way is defined as that area in the vicinity of Krome Avenue (FL State Road 997) and Tamiami Trail (US Highway 41) which was designated as federal trust land by action of the Secretary of the Interior on June 20, 2012. Coral Way is approximately 50 acres in size and located along the eastern edge of Krome Avenue approximately 1 mile southeast of Miccosukee Resort and Gaming (Krome Avenue Reservation).

(See Appendix N)

**1. Designated Uses:**

a. * Cultural activities
b. * Hunting and fishing
c. Propagation of fish and wildlife
d. Industrial or commercial enterprises
e. Residential community development
f. Agricultural activities
g. Tourism related activities

[Asterisk (*) indicates an existing use at the time these standards were adopted]

**2. Classification:** The Miccosukee Tribe hereby adopts the surface waters of Coral Way as a Class III-B waterbody.

**K. Sherrod Ranch:** The uses, classification and standards for the surface waters that pass through the area known as Sherrod Ranch. Sherrod Ranch is defined as that area that lies within Hendry County and bounded on the eastern, southern, and southwestern boundaries by the Seminole Big Cypress Reservation including the centerline of the Wingate Mill Canal. The western boundary then follows the Wingate Mill Canal east for ½ mile where the Wingate Mill Canal intersects with the Lard Can Canal. The northwestern boundary of Sherrod Ranch is bounded by the western edge of the Lard Can Canal. The northern boundary line is shared with private agricultural land to the north.

(See Appendix O)

**1. Designated Uses:**

a. *Preservation of natural populations of native plant and animal communities
b. * Cultural activities
c. * Hunting and fishing
d. * Propagation of fish and wildlife
e. * Agricultural activities
f. * Cattle grazing
g. Industrial or commercial enterprises
h. Residential community development
i. Tourism related activities

[Asterisk (*) indicates an existing use at the time these standards were adopted]

**2. Classification:** The Miccosukee Tribe hereby adopts the surface waters of Sherrod Ranch as a Class III-B waterbody.

**L. Cherry Ranch:** The uses, classification and standards for the surface waters that pass through the area known as Cherry Ranch. Cherry Ranch is defined as that area that lies within Highlands County and surrounded on all sides by private agricultural lands. The northern boundary runs along Hickory Branch Creek. The northwest corner is approximately 4 miles south of FL State Road 70 along the L7 Ranch Road. The southwest corner is located at the intersection of the Highlands County boundary line and the Glades County boundary line. The southeastern corner is approximately 2 ¼ miles east along the Glades County boundary line. The eastern boundary runs approximately 1 ¼ miles north of the southeastern corner until it meets Hickory Branch Creek. (See Appendix P)

**1. Designated Uses:**

a. *Preservation of natural populations of native plant and animal communities
b. *Cultural activities
c. *Hunting and fishing
d. *Propagation of fish and wildlife
e. *Agricultural activities
f. *Cattle grazing
g. Industrial or commercial enterprises
h. Residential community development
i. Tourism related activities

[Asterisk (*) indicates an existing use at the time these standards were adopted]

**2. Classification:** The Miccosukee Tribe hereby adopts the surface waters of Cherry Ranch as a Class III-B waterbody.

**SECTION 6. Sampling and Analysis**

**A. Samples:** Sample collection, preservation, and analysis used to determine water quality and to maintain the standards set forth in the Water Quality Standards shall be performed in accordance with procedures prescribed by the latest editions of any of the following authorities:

1. American Health Association, "Standard Methods for the Examination of Water and Wastewater".

2. "Methods for Chemical Analysis of Water and Wastes"; "EPA Guidelines Establishing Test Procedures for the Analysis of Pollutants".

3. It is required that all methods of analysis must be conducted in accordance with 40 CFR Part 136. Also, the Tribal approval of sampling and analysis methods is required to insure that the appropriate method is used.

**B. Bacteriological Surveys:** The monthly geometric mean is used in assessing attainment of standards when a minimum of five samples are collected in a 30 day period. When less than 5 samples are collected in a 30 day period, no single sample shall exceed the applicable upper limit for bacteria density set forth in section 3.

**C. Sampling Procedures:**

1. **Canals**: Canal monitoring stations will be located a minimum distance of 200 feet from any pump stations to ensure adequate vertical and lateral mixing.

2. **Water Conservation Areas:** Sampling stations in the Everglades marsh interior (North Grass, South Grass and Gap) shall be located at least 50 feet towards the interior of the marsh, measured from the banks on any canal which discharges into the Water Conservation Area, to ensure that the sample is, in fact, a marsh sample and not a canal sample. D.O. Levels will be analyzed to obtain the DO volume for each site. In shallow waters (1 ft. or less) a smaller DO measurement may ~~by~~ be obtained. In canal samples, Dissolved Oxygen measurements will be made 3 to 5 feet below the surface of the water.

## SECTION 7. General Policies on Variances and Mixing Zones

This section contains Tribal policies on Variances and Mixing Zones.

**A. VARIANCE POLICY:**

1. Variances may be granted by the Tribal Government to dischargers for pollutant specific criteria. Variances may be granted to allow additional time to attain the standard by implementing corrective procedures and BMPs when the Tribe believes the standard can ultimately be attained. This process shall be allowed with the goal of meeting the criteria rather than removing the designated use of the water body. All variances granted in accordance with the above procedures are subject to final EPA approval.

2. All variances will be reviewed by the Tribal Council and EPA at least once in every three years. As part of the review process, the variance will be subject to public notice, an opportunity for the public to comment, and a public hearing. The public notice shall contain a clear description of the impact of the variance upon achieving water quality standards in the affected stream segment.

3. Variances shall be granted based upon the following guidelines:

    a. The discharger shall demonstrate that meeting the standard is currently unattainable based on one or more of the grounds outlined in 40 CFR 131.10 (g) for removing a designated use.

    b. Granting of the variance shall not result in an unreasonable risk to human health, aquatic biota or the wildlife habitat.

    c. All downstream uses shall be attained and maintained, and the discharger is making reasonable progress toward meeting the standard.

4. The variance request shall include the following information:

    a. The nature and duration of the request.

    b. The relevant results of the water quality analysis and evidence indicating if designated uses are being met which may include but not limited to

biological assessments.

c. Explanation and evidence of pollution control strategies and BMP's for compliance with standards.

d. *Economic and legal factors which are directly relevant to the applicant's* ability to achieve compliance.

e. Proposed compliance schedule including the date each step toward compliance will be achieved, and the final compliance date.

f. A plan of provision for safety should there be an excessive rise in the contaminant level for which the variance is requested.

g. A plan for interim control measures during the effective period the variance.

h. Perform monitoring and other reasonable requirements prescribed by the variance.

i. Review of alternative pollution control strategies.

j. Information believed to be pertinent by the applicant or required by the variance.

5. The Variance request shall be considered and processed as follows:

a. The Tribal Council shall act upon the variance request within 90 days of receipt of the request. Consideration shall be given to the extent of the economic and social impacts of requiring compliance with existing instream criteria.

b. Should the Tribal Council decide to deny the request the applicant shall be notified of the intent for denial. Such notice shall state the reason for denial within 30 days after the receipt of the such notice, the applicant may request a hearing. If no hearing is requested by the applicant within the 30 day period, the applicant shall be denied.

c. If the variance is granted, the applicant shall be notified in writing. This

notice shall identify the variance, the facility covered and the period of time for which the variance shall be effective. The variance shall be effective for a period of three years before rejustification.

d. Variance termination may occur if and when the discharge complies with the standards criteria or may be terminated if the discharger fails to comply with monitoring and other prescribed requirements.

e. The discharger must either meet the standard upon the expiration of the time period or make a new demonstration of "unattainability" and show that reasonable progress is being made toward meeting the standard.

f. The compliance schedule for a variance shall include increments of progress of each contaminant level covered by the variance and implementation of control measures required for each contaminant. All variances granted shall be subject to a public hearing. The hearing shall be designed to promote public knowledge of the variance and hear any grievance or objection.

**B. MIXING ZONES:** All Tribal surface waters, which have effluent being discharged into them, shall have a continuous zone maintained in which the water is of adequate quality to allow the migration of aquatic life with no significant effect on their population. The cross-sectional area of wastewater mixing zones shall be less than 1/4 of the cross-sectional area or flow volume of the receiving canal. The following is the Tribal mixing zone policy that deals with size, shape, location, outfall design and in-zone quality:

1. Mixing Zone Location:

a. Where a mixing zone is allowed, water quality standards are met at the edge of that regulatory mixing zone during design flow conditions and generally provide:

b. A continuous zone of passage that meets water quality criteria for free swimming and drifting organisms; and prevention of impairment of critical resource areas.

c. Location of the mixing zone should be such that it should allow the passage of free-swimming and drifting organisms without any significant effects on their populations. Also it should allow (I) food is carried to the sessile filter feeders and other nonmotile organisms (II) spatial distribution of organisms

and reinforcement of weakened populations are enhanced (III) embryos and larvae of some fish species develop while drifting. Also, the mixing zone location should allow for anadromous and catadromous species must be able to reach suitable spawning areas. Their young must be assured a return route to their growing and living areas. Mixing zone should not create water with inadequate chemical or physical quality which might create barriers or blocks that prevent or interfere with these types of essential transport and movement of the above mentioned fish species.

2. Mixing Zone Size:

a. The area or volume of an individual zone or group of zones must be limited to an area or volume as small as practicable that will not interfere with the designated uses or with the established community of aquatic life in the segment for which the uses are designated. The size of the mixing zone should not cause lethality to passing organisms and that, considering likely pathways of exposure no significant human health risks exist.

b. In the zone immediately surrounding the outfall, the acute criteria should be met at the edge of the zone. In the next mixing zone, chronic criteria should be met at the edge of that mixing zone.

c. The cross-sectional area of the mixing zones shall be less than 1/4 of the cross-sectional area or volume of the receiving water body. The acute mixing zone should be sized to prevent lethality to passing organisms and the chronic mixing zone should be sized to protect the ecology of the receiving waterbody.

3. Mixing Zone Outfall Design:

The Tribal mixing zone policy requires that the best practicable engineering design is used and that the location of the existing or proposed outfall will avoid significant adverse aquatic resource and water quality impacts of the wastewater discharge.

4. Mixing Zone In-Zone Quality:

The Tribal mixing zone policy requires that the In-Zone water be free from:

a. Materials in concentrations that will cause acutely toxic conditions to aquatic life.

b. Materials in concentrations that settle to form objectionable deposits.

c. Floating debris, oil, scum and other material in concentrations that form nuisances.

d. Substances in concentrations that produce objectionable color, odor, taste, or turbidity, and substances in concentrations that produce undesirable aquatic life or result in a dominance of nuisance species.

5. Mixing Zone Shape:

The Tribal mixing zone policy requires that the shape of a mixing zone should be a simple configuration that is easy to locate in a body of water and that avoids impingement on biologically important areas. No shore-hugging plumes are allowed in any Tribal water bodies.

**SECTION 8. Definitions:**

**Acute Toxicity**. A concurrent and delayed adverse effect(s) that results from an acute exposure and occurs within any short observation period which begins when the exposure begins, may be extended beyond the exposure period, and usually does not constitute a substantial portion of the life span of the organism.

**Algae.** Simple plants without roots, stems, or leaves which contain chlorophyll and are capable of photosynthesis.

**Antidegradation.** 40 CFR Section 131.6 requires each State/Tribe to include an antidegradation policy consistent with 40 CFR Section 131.12 when submitting water quality standards to EPA. These policies are designed to protect water quality and provide a method of assessing activities that may impact the integrity of the water body. (The policy set forth in U.S. Environmental Protection Agency Water Quality Standards Regulations under the Clean Water Act whereby existing uses and the level of water quality necessary to maintain those uses is maintained and protected.)

**Aquatic Biota.** A biological association consisting of all interacting populations of aquatic flora and fauna inhabiting a given water body for the whole or a portion of their life cycles.

**Attainable Use.** At a minimum, uses are deemed attainable if they can be achieved by the imposition of effluent limits required under sections 301(b) and 306 of the Act (33 USC 1311 & 1316) and cost effective and reasonable best management practices for nonpoint source control.

**Background.** The condition of a water body in the absence of the activity or discharge under consideration, based on the best scientific information available to the Water Resources Department.

**Best Management Practices (BMPs).** Practices undertaken to control, restrict, and diminish nonpoint sources of pollution, that are consistent with the purposes of the Miccosukee Tribe's Water Quality Standards and with the narrative and numeric standards contained therein; measures, sometimes structural, that are determined to be the most effective practical means of preventing or reducing pollution of water bodies from nonpoint sources.

**Carcinogenic.** Cancer producing.

**Chronic Toxicity.** Any harmful effect sustained by either resident aquatic populations or indicator species used as test organisms in a controlled toxicity test due to long term exposure (relative to the life cycle of the organism) or exposure during a substantial portion of the duration of a sensitive period of the life cycle to a specific chemical substance or mixture of chemicals (as in an effluent). In the absence of extended periods of exposure, early life stages or reproductive toxicity tests may be used to define chronic impacts.

**Color.** True color is the color of the water from which turbidity has been removed. Apparent color includes not only the color due to substances in solution (true color), but also that color due to suspended matter.

**Cumulative.** Increasing by successive additions.

**Designated Uses.** The present and future most beneficial use of a body of water as designated by the Miccosukee Environmental Protection Agency by means of the classification system contained in this document whether or not they are being attained.

**Dissolved Oxygen.** The amount of oxygen dissolved in water or the amount of oxygen available for biochemical activity in water, commonly expressed as a concentration in milligrams per liter.

**Drinking Water.** Water that meets the general criteria set forth in Section 3 above and that meet all applicable treatment requirements in order to be usable for drinking or cooking.

**Effluent Limitation.** Any restriction established by the permitting authority or suggested for inclusion as permit conditions by the Miccosukee Tribe on quantities, rates or concentrations of chemical, physical, biological or other constituents which are discharged from sources into Tribal

waters.

**Eutrophication.** Abundance of or production of algae and macrophytes resulting from inputs of silt, nutrients, and organic matter which would result in increased concentrations of nutrients or seasonal oxygen deficiency. These inputs may be derived from either human induced or natural processes or both.

**Existing Uses.** Those uses actually attained in a surface water body on or after November 28, 1975, whether or not they are referred to in this document.

**Fecal Coliform.** Gram negative, non spore-forming rod-shaped bacteria which are present in the gut or the feces of warm blooded animals. Fecal coliform bacteria generally includes organisms which are capable of producing gas from lactose broth in a suitable culture medium within 24 hours at 44.5+/-0.2 degree Centigrade.

**Geometric Mean.** Antilog of the mean of the logs of a set of numbers.

**Indigenous.** Produced, growing, or living naturally in a particular region or environment.

**Milligrams per Liter (mg/l).** The concentration at which one milligram is contained in a volume of one liter; one milligram per liter is equivalent to one part per million (ppm) at unit density.

**Mixing Zone.** A volume of surface water containing the point or area of discharge and within which an opportunity for the mixture of wastes with receiving surface waters has been afforded.

**Mutagenic.** Any substance, in whole or in part, or combination of substances acting together, which might alter DNA (genetic component) in such a way as to cause a mutation.

**Narrative Standard.** A standard or criterion expressed in words rather than numerically.

**Natural Background.** The condition of the waters in the absence of man-induced alterations based on the best scientific information available to the Tribe. The establishment of natural background for an altered water body may be based upon a similar unaltered water body or on historical pre-alteration data.

**Nonpoint Source.** A source of pollution that is not a discernible, confined, and discrete conveyance; a diffuse source which flows across natural or manmade surfaces, such as run-off from agricultural, construction, or from urban areas.

**NTU.** Nephelometric Turbidity Units; a measure of turbidity in water.

**Nuisance Condition.** A condition involving uncontrolled growth of aquatic plants, usually caused by excessive nutrients in the water. Nuisance Species shall mean species of flora or fauna whose noxious characteristics or presence in sufficient number, biomass, or aerial extent may reasonably be expected to prevent, or unreasonably interfere with, a designated use of those waters.

**Nutrient.** A chemical element or inorganic compound taken in by green plants and used in organic synthesis such as Nitrogen and Phosphorus.

**Pathogen.** Any substance which (might cause) is capable of causing disease, especially micro-organisms such as bacterium or fungus.

**Persistent.** Existing for a long or longer than usual time or continuously.

**pH.** The negative logarithm of the effective hydrogen-ion concentration in gram equivalents per liter; a measure of the acidity or alkalinity of a solution, increasing with increasing alkalinity and decreasing with increasing acidity.

**Point Source.** Any discernible, confined, and discrete conveyance from which pollutants are or may be discharged into a water body, such as effluents from publicly owned treatment works (POTW), slaughter houses, paint industry etc.; does not include return flows from irrigated agriculture.

**Pollution.** Any man-made or man-induced alteration of the physical, chemical, biological or radiological integrity of water.

**Shannon-Weaver Diversity Index.** Negative summation (from i=1 to s) of (Ni/N) log2 (Ni/N) where s is the number of species in a sample, N is the total number of individuals in a sample, and Ni is the total number of individuals in species i.

**Teratogenic.** Any substance which causes fetal malformations (defects induced during development, between conception and birth).

**Toxicity.** State or degree of being toxic or poisonous; lethal or sublethal adverse effects on representative sensitive organisms, due to exposure to toxic materials or conditions.

**Turbidity.** The presence of sediment in water, making it unclear, murky, or opaque. (A measure of

the amount of suspended material, particles, or sediment, which has the potential for adverse impacts on aquatic biota.)

**Use Attainability Analysis.** A structured scientific assessment of the factors affecting attainment of a use for a body of water, which assessment may include physical, chemical, biological, and economic factors, such as those referred to in 40 C.F.R. Section 131.10(g), and guidance for which may be found in U.S. Environmental Protection Agency, "Technical Support Manual: Waterbody Surveys and Assessments for Conducting Use-Attainability Analyses" (Volume 1 = Streams; Volume 2 = Estuarine; Volume 3 = Lake Systems).

**Water Contaminant.** Any substance which alters the physical, chemical, or biological qualities of water.

**Waters of United States.** include:

1. All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

2. All interstate waters, including interstate wetlands.

3. All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce, including any such waters:

(i) which are or could be used by interstate or foreign travelers for recreational or other purposes;

(ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) which are or could be used for industrial purposes by industries in interstate commerce.

4. All impoundments of waters otherwise defined as waters of the United States under this definition;

5. Tributaries of waters in paragraphs (1) through (4) of this definition;

6. The territorial sea; and

7. Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (1) through (6) of this definition.

NOTE: Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria for this definition) are not waters of the United States. (40 CFR 232.2.)

**Wetlands.** Those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that are under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

# APPENDIX A

## Conversion Factors for Dissolved Metals

| Metal | freshwater CMC | freshwater CCC |
|---|---|---|
| Arsenic | 1.000 | 1.000 |
| Cadmium | 1.136672-[(ln hardness)(0.041838)] | 1.101672-[(ln hardness)(0.041838)] |
| Chromium III | 0.316 | 0.860 |
| Chromium VI | 0.982 | 0.962 |
| Copper | 0.960 | 0.960 |
| Lead | 1.46203-[(ln hardness)(0.145712)] | 1.46203-[(ln hardness)(0.145712)] |
| Mercury | 0.85 | 0.85 |
| Nickel | 0.998 | 0.997 |
| Selenium | | |
| Silver | 0.85 | |
| Zinc | 0.978 | 0.986 |

**Note:** All metals will be measured as total recoverable unless specifically authorized by the Miccosukee Environmental Protection Agency to use dissolved.

# APPENDIX B

## Parameters for Calculating Freshwater Dissolved Metals Criteria That Are Hardness-Dependent

| Chemical | $m_A$ | $b_A$ | $m_C$ | $b_C$ | Freshwater Conversion Factors (CF) | |
|---|---|---|---|---|---|---|
| | | | | | CMC | CCC |
| Cadmium | 0.9789 | -3.866 | 0.7977 | -3.909 | 1.136672-[(*ln*hardness)(0.041838)] | 1.101672-[(*ln*hardness)(0.041838)] |
| Chromium III | 0.8190 | 3.7256 | 0.8190 | 0.6848 | 0.316 | 0.860 |
| Copper | 0.9422 | -1.700 | 0.8545 | -1.702 | 0.960 | 0.960 |
| Lead | 1.273 | -1.460 | 1.273 | -4.705 | 1.46203-[(*ln*hardness)(0.145712)] | 1.46203-[(*ln*hardness)(0.145712)] |
| Nickel | 0.8460 | 2.255 | 0.8460 | 0.0584 | 0.998 | 0.997 |
| Silver | 1.72 | -6.59 | | | 0.85 | |
| Zinc | 0.8473 | 0.884 | 0.8473 | 0.884 | 0.978 | 0.986 |

Hardness-dependant metals' criteria may be calculated from the following:

CMC (dissolved) = $\exp\{m_A [ln(\text{hardness})] + b_A\}$ (CF)

CCC (dissolved) = $\exp\{m_C [ln(\text{hardness})] + b_C\}$ (CF)

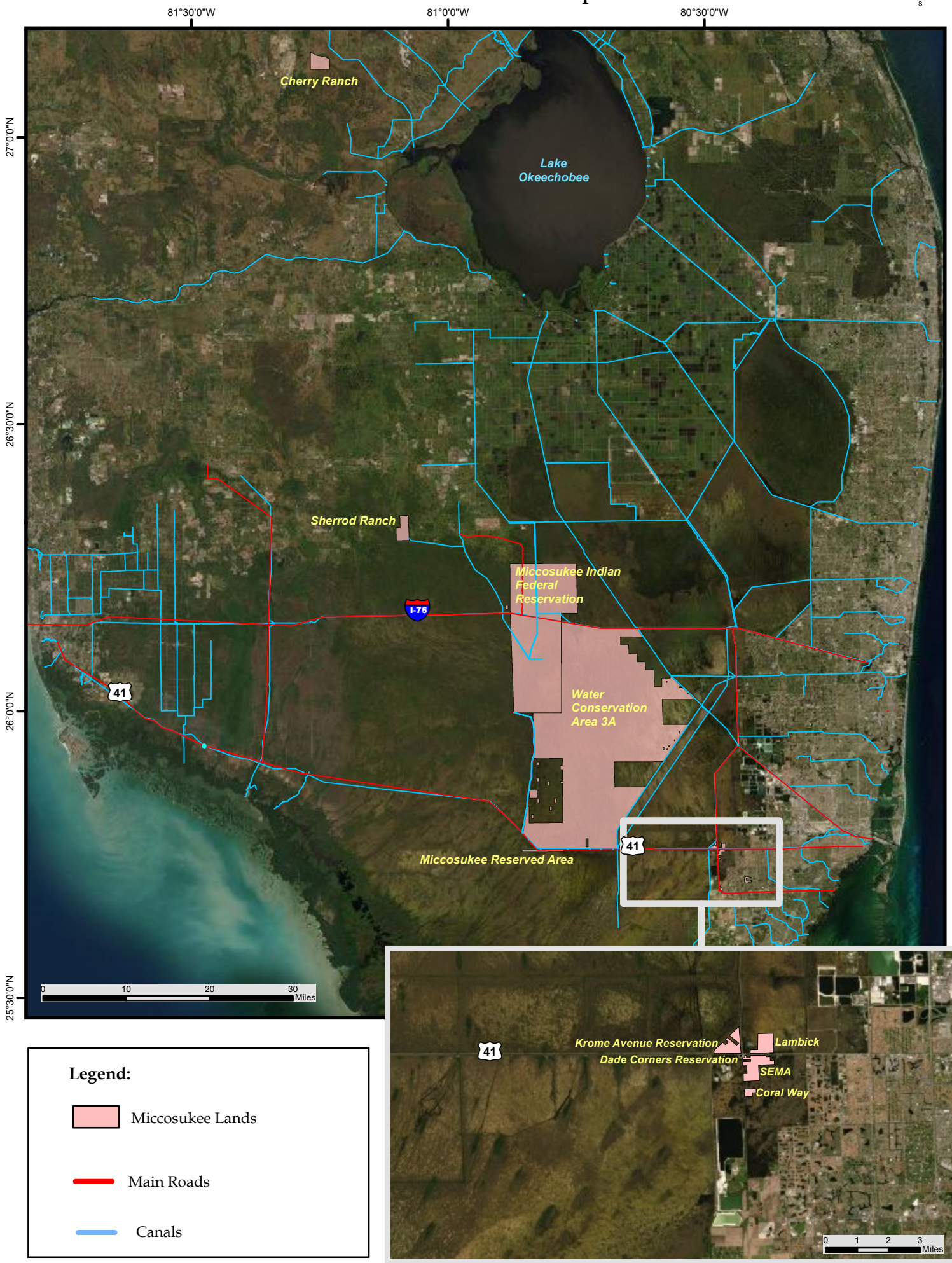
# APPENDIX C

## Calculation of Freshwater Ammonia Criterion

Ammonia criteria shall be in accordance with EPA recommendations as expressed in the section entitled *The National Criteria for Ammonia in Fresh Water* (p. 40-52) of **Aquatic Life Ambient Water Quality Criteria for Ammonia – Freshwater 2013 (April 2013, EPA-822-R-13-001)**. Such information is hereby incorporated by reference. Where mussels in the family Unionoida are absent at a site, ammonia criteria may be calculated on a site-specific basis. Any such site-specific criteria shall be in accordance with the equations and tables expressed in Appendix N of the document referenced above. (and submitted to EPA for approval). The section entitled *The National Criteria for Ammonia in Fresh Water* includes reference to Protection of downstream waters (p. 51-52) and Considerations for site-specific criteria derivation (p. 52).

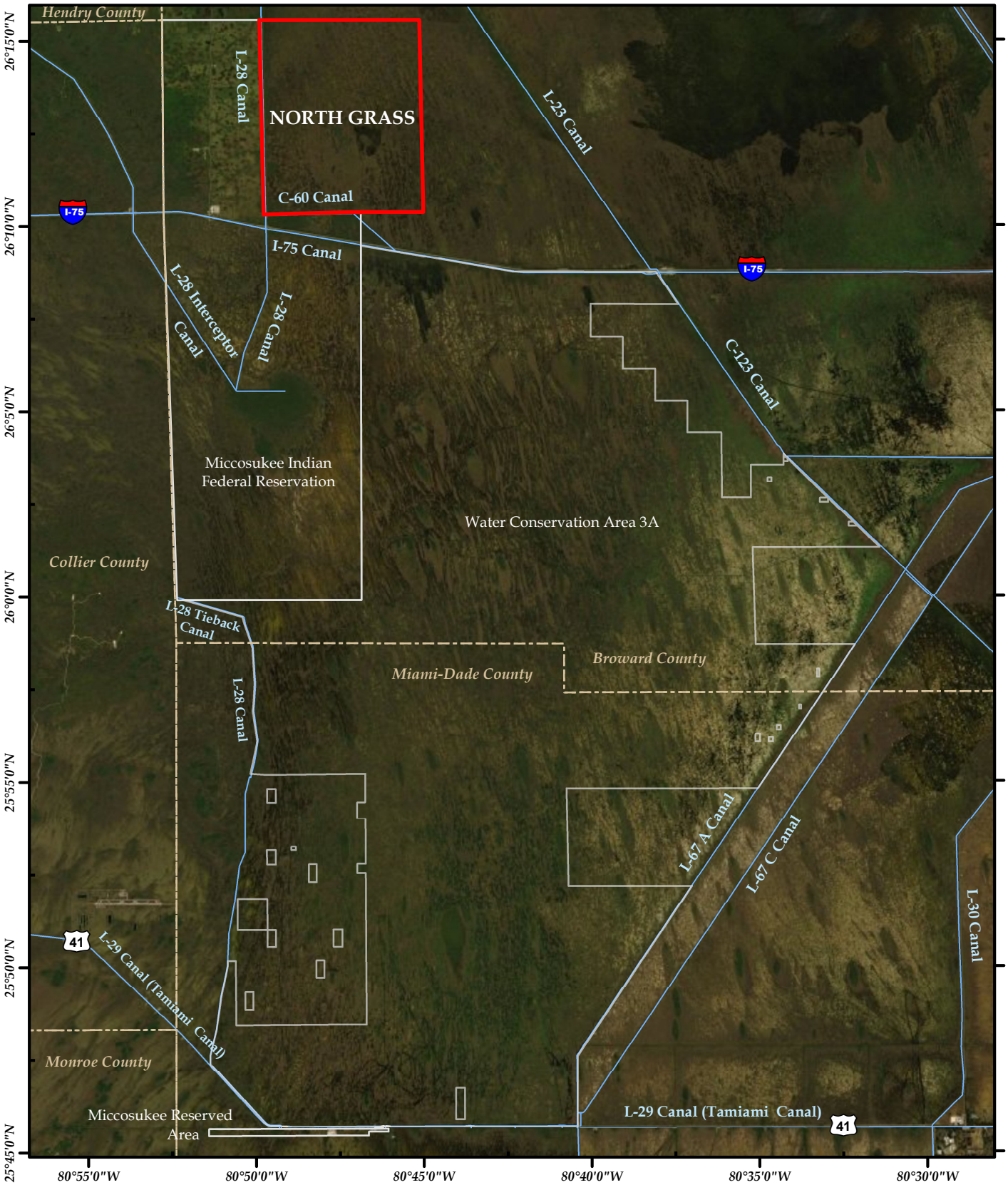
All recommendations contained in EPA's guidance document **Aquatic Life Ambient Water Quality Criteria for Ammonia – Freshwater 2013 (April 2013, EPA-822-R-13-001)** are hereby referenced for use in the development of criteria.

# APPENDIX D
## Miccosukee Lands Location Map



**APPENDIX E**

# North Grass Location Map

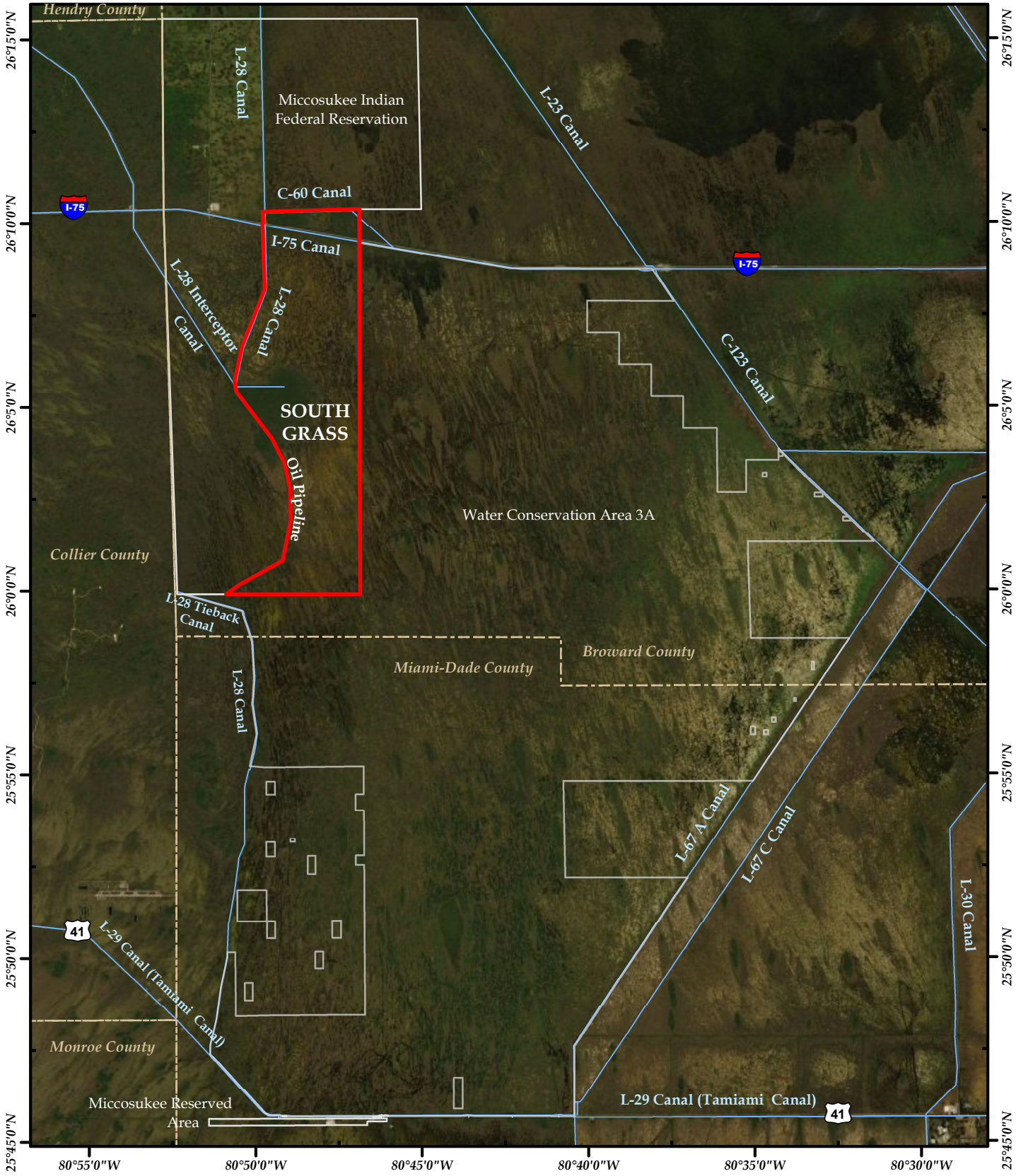



**Legend:**

- North Grass
- Other Boundaries
- Canals
- County Boundaries

**APPENDIX F**

# South Grass Location Map

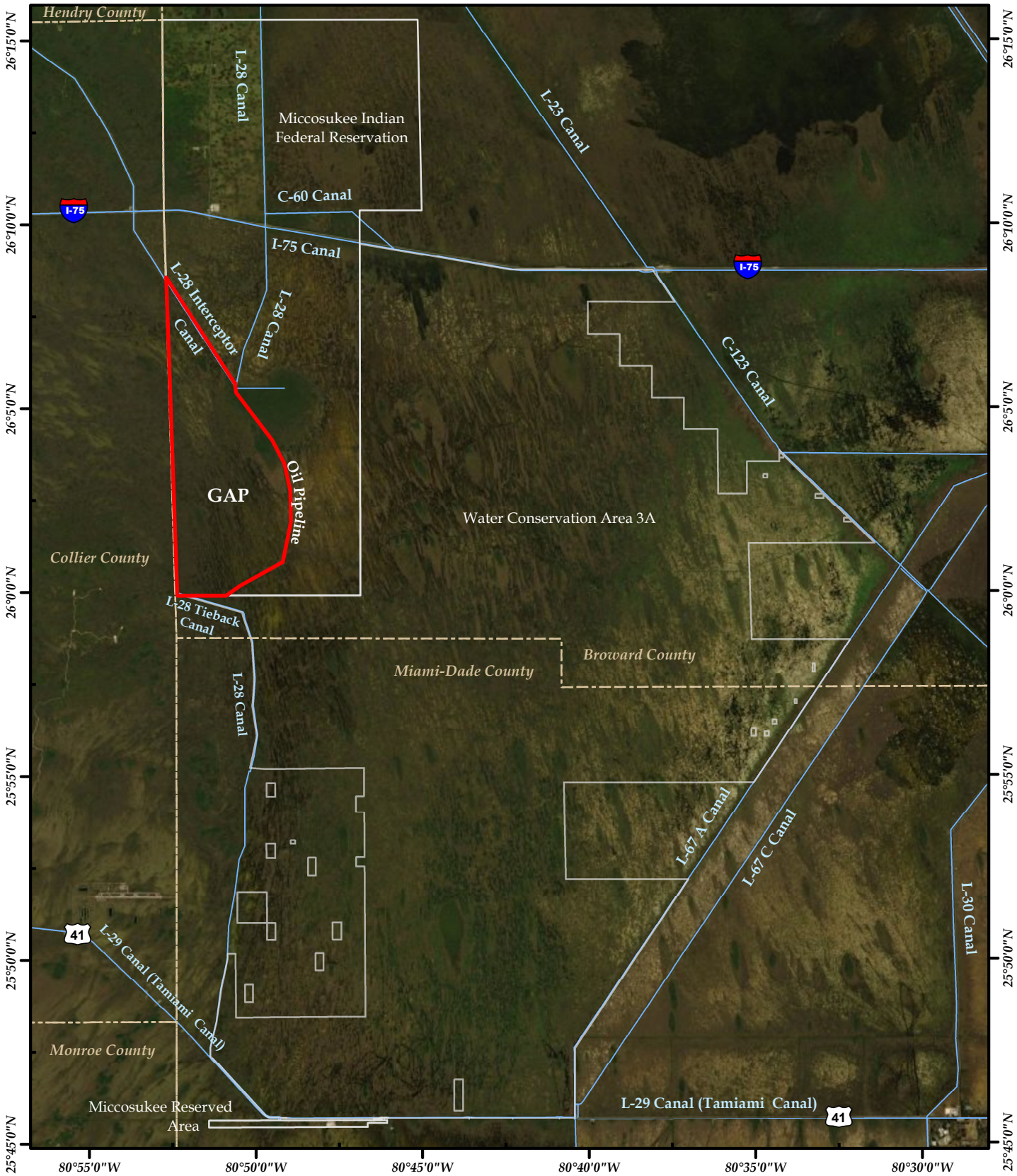



**Legend:**

- South Grass
- Canals
- Other Boundaries
- County Boundaries

**APPENDIX G**

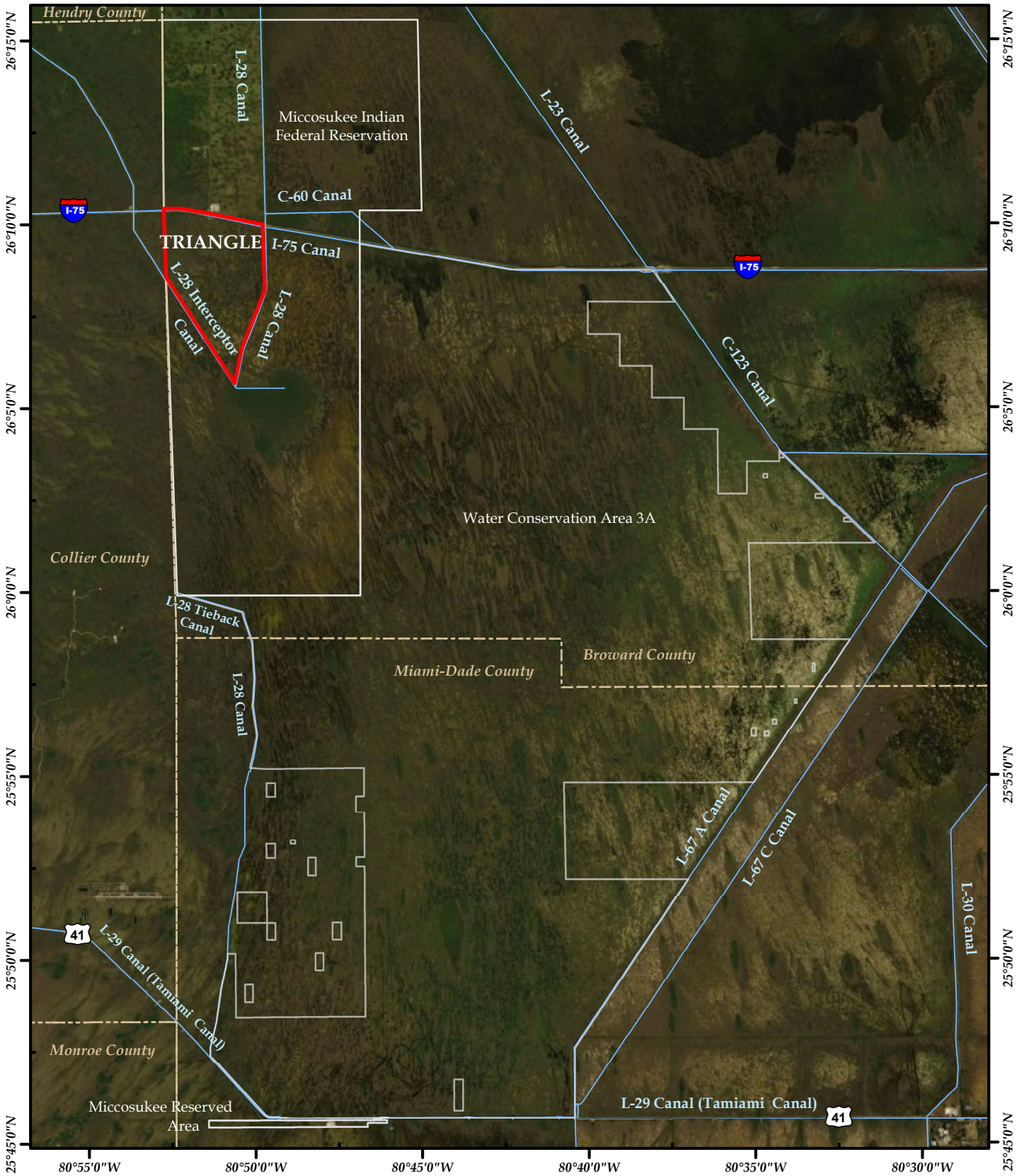
# Gap Location Map




**Legend:**

- Gap
- Other Boundaries
- Canals
- County Boundaries

# APPENDIX H
## Triangle Location Map

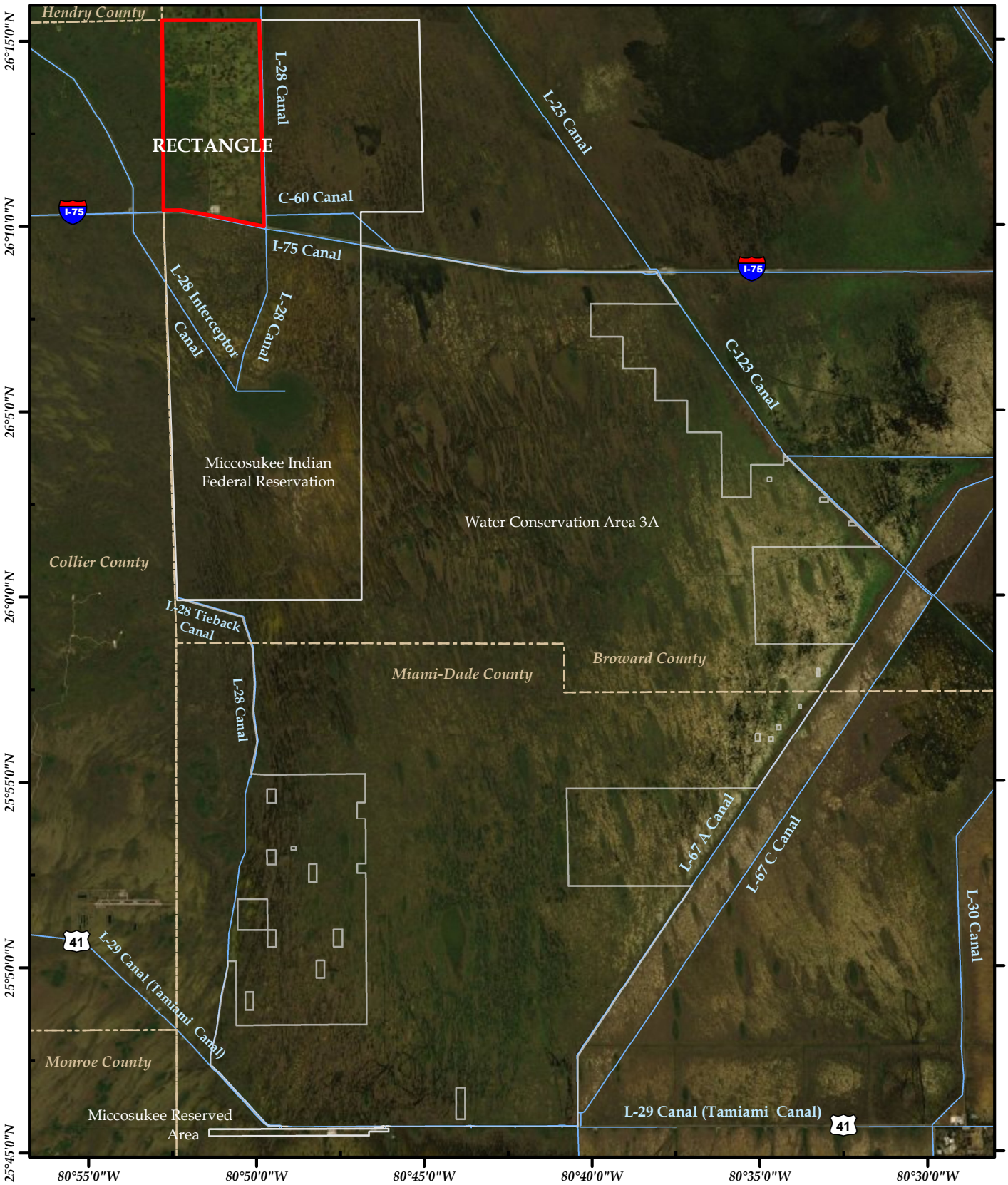



**Legend:**

- Triangle
- Other Boundaries
- Canals
- County Boundaries

**APPENDIX I**

## Rectangle Location Map

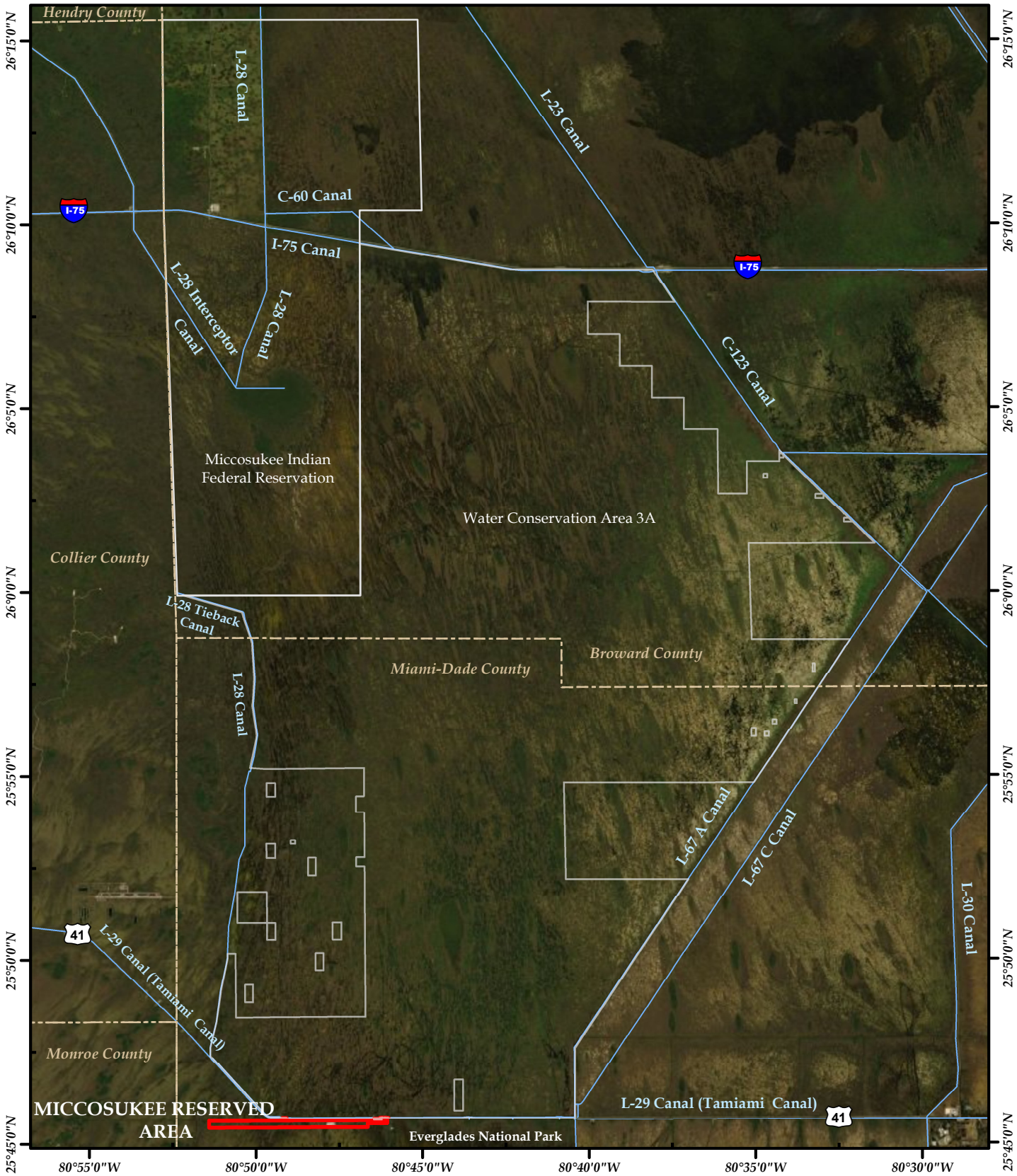



**Legend:**

- Rectangle
- Canals
- Other Boundaries
- County Boundaries

**APPENDIX J**

# Miccosukee Reserved Area Location Map

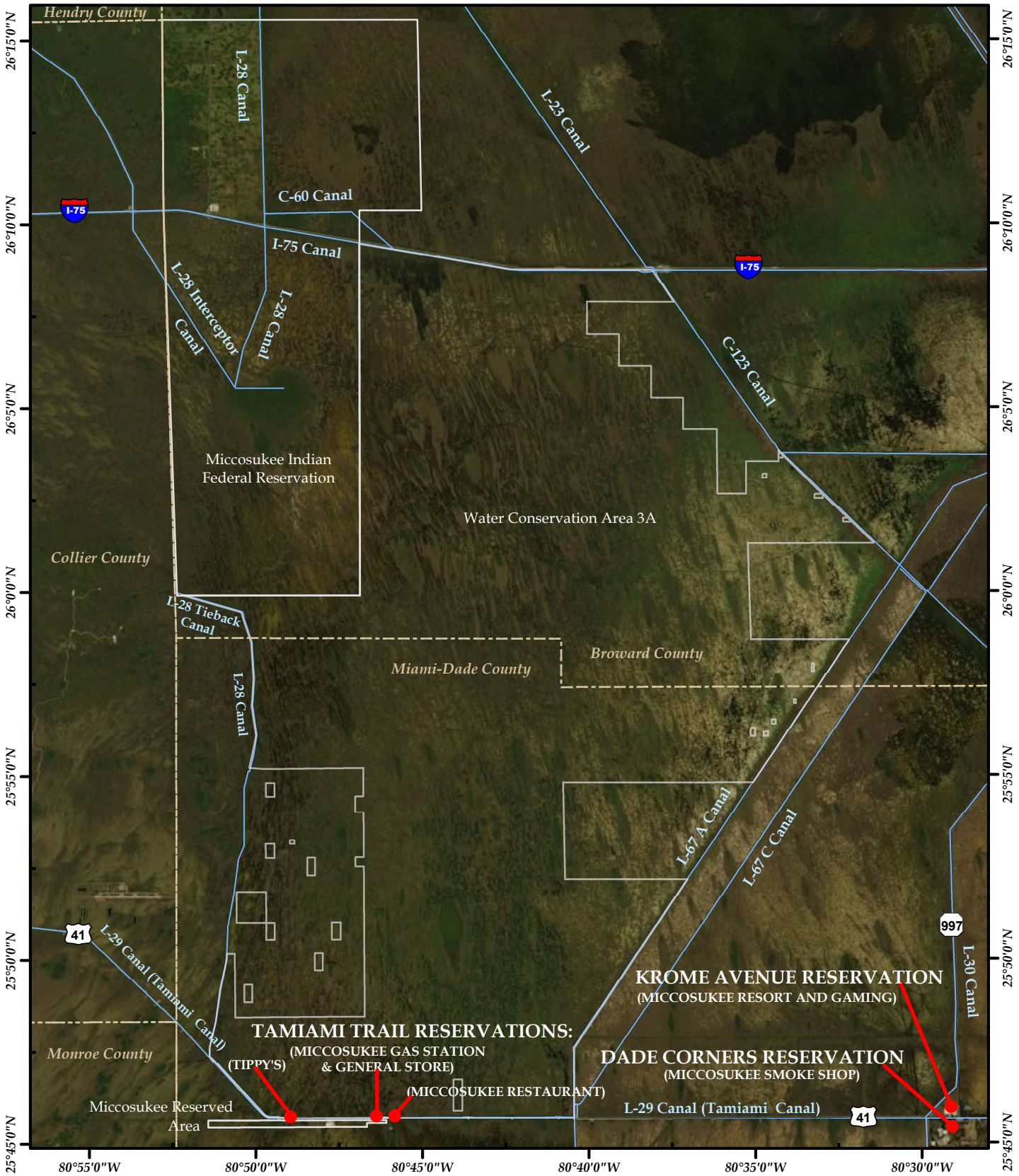



**Legend:**

- Miccosukee Reserved Area
- Other Boundaries
- Canals
- County Boundaries

**APPENDIX K**

# Tamiami Trail, Krome Avenue and Dade Corners Reservations Location Map

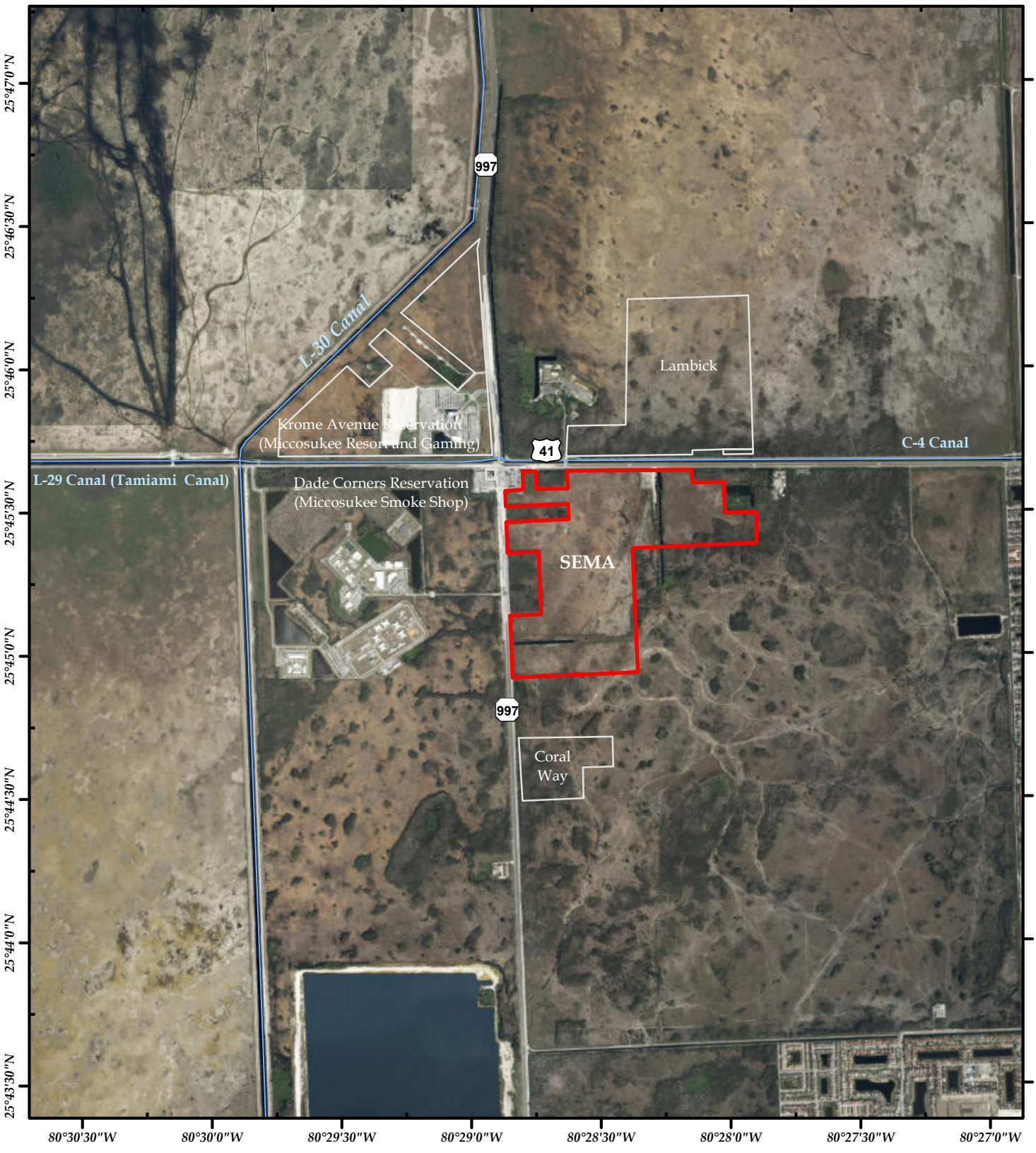



**Legend:**

- Tamiami Trail, Krome Avenue and Dade Corners Reservations
- Canals
- Other Boundaries
- County Boundaries

**APPENDIX I**

# SEMA Location Map



**APPENDIX M**

# Lambick Location Map


**Legend:**

- Lambick
- Property Boundaries
- Canals

**APPENDIX N**

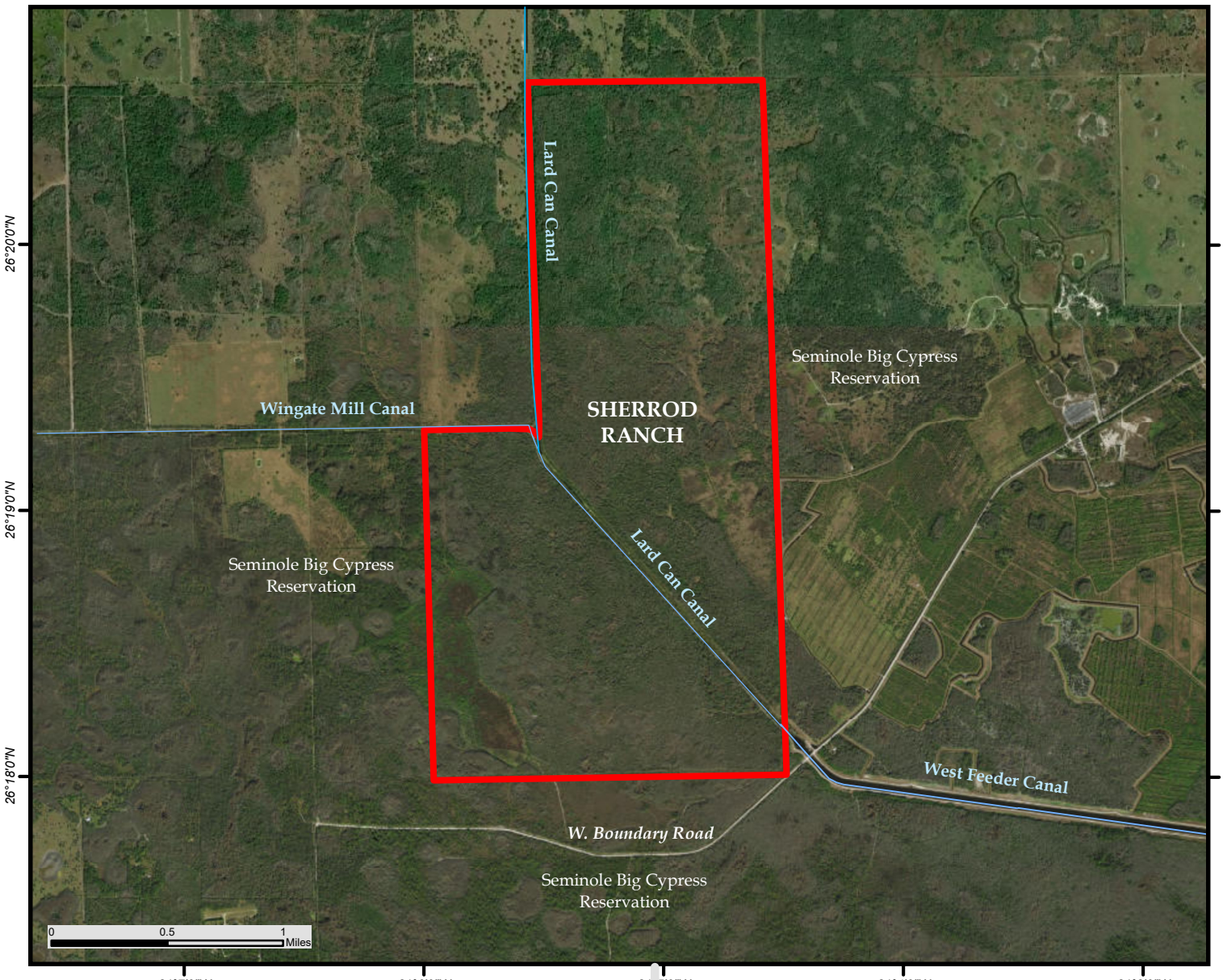
# Coral Way Location Map

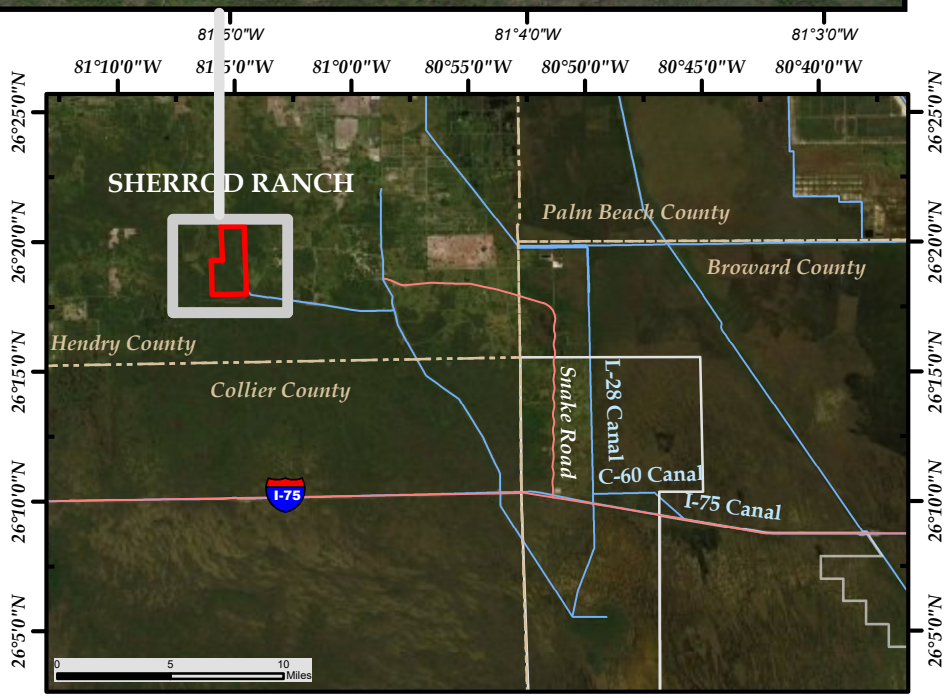

**Legend:**

- Canals
- Coral Way
- Property Boundaries

**APPENDIX Q**

# Sherrod Ranch Location Map



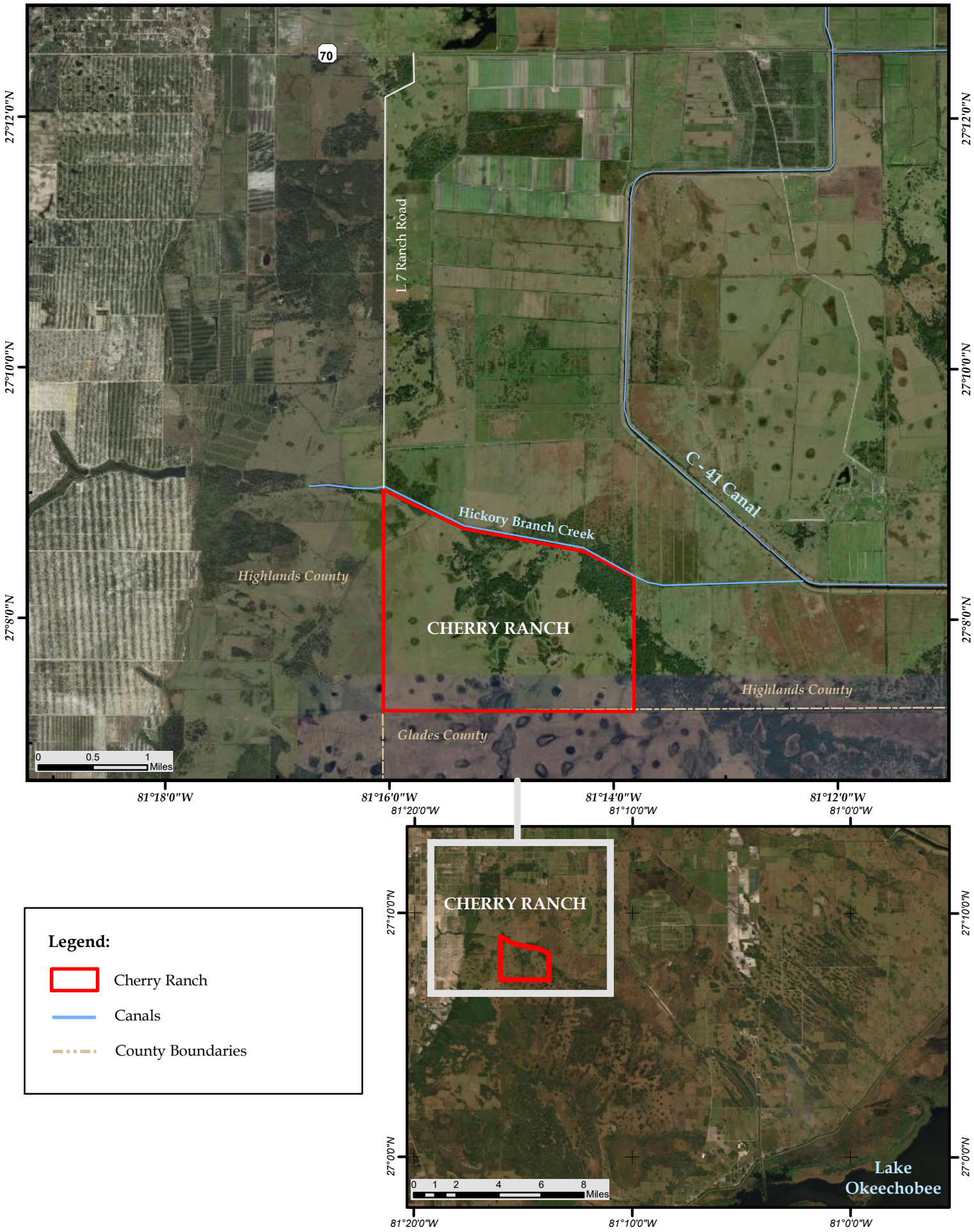




**Legend:**

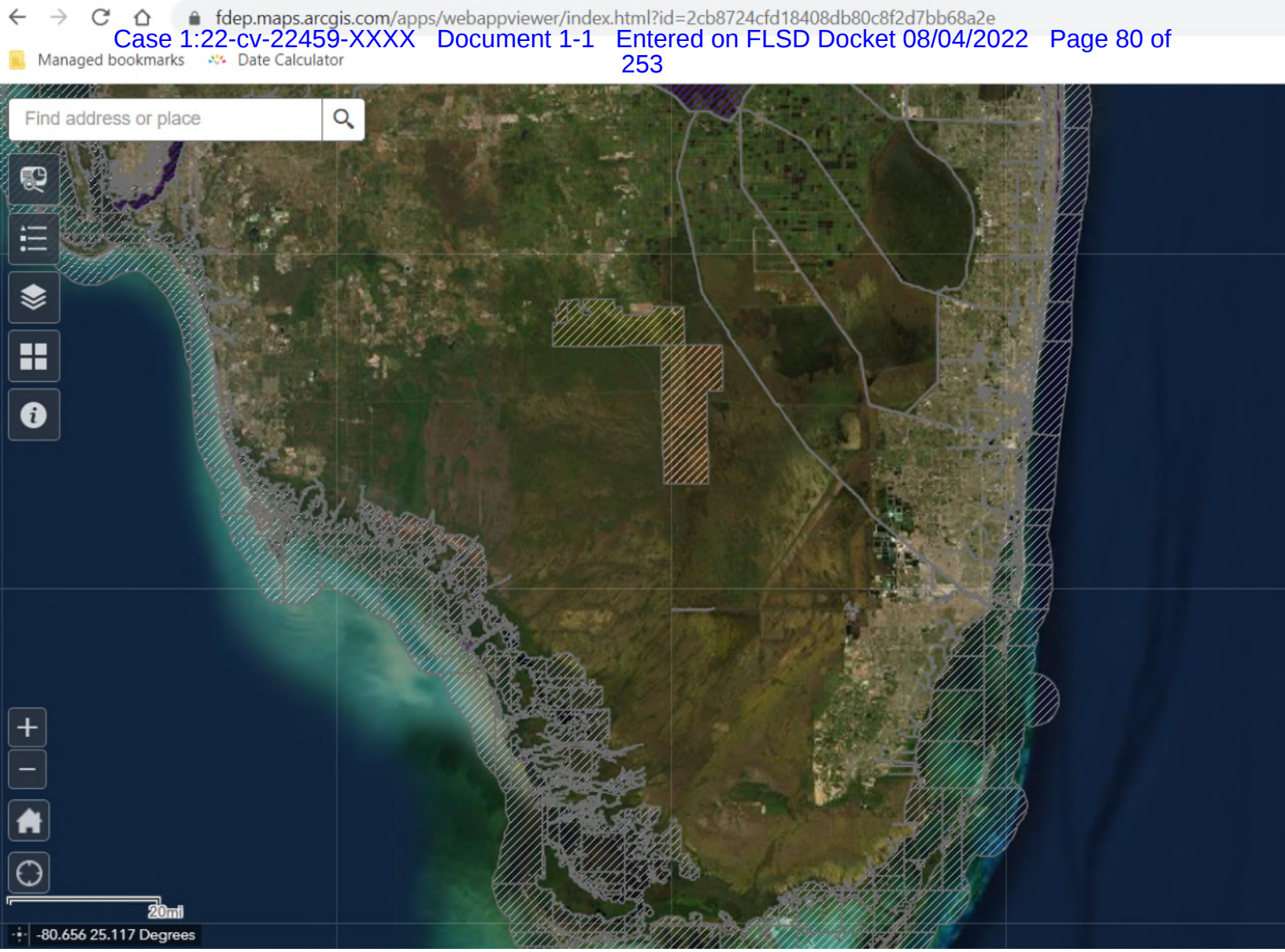
- Sherrod Ranch
- Miccosukee Indian Federal Reservation
- Canals
- County Boundaries
- Primary Roads

**APPENDIX P**

# Cherry Ranch Location Map



# EXHIBIT 4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Managed bookmarks
Date Calculator
Find address or place
20mi
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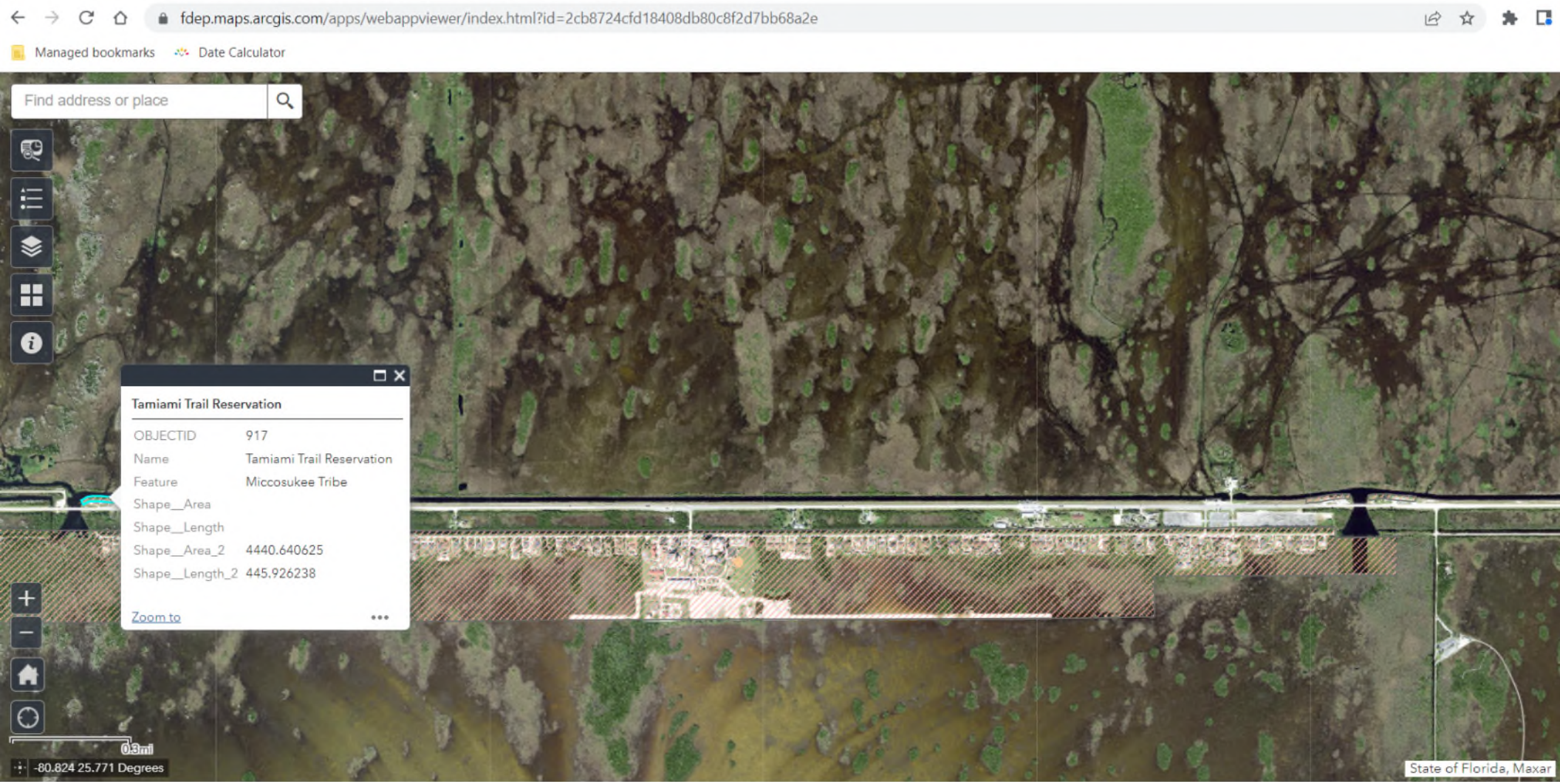
# EXHIBIT 5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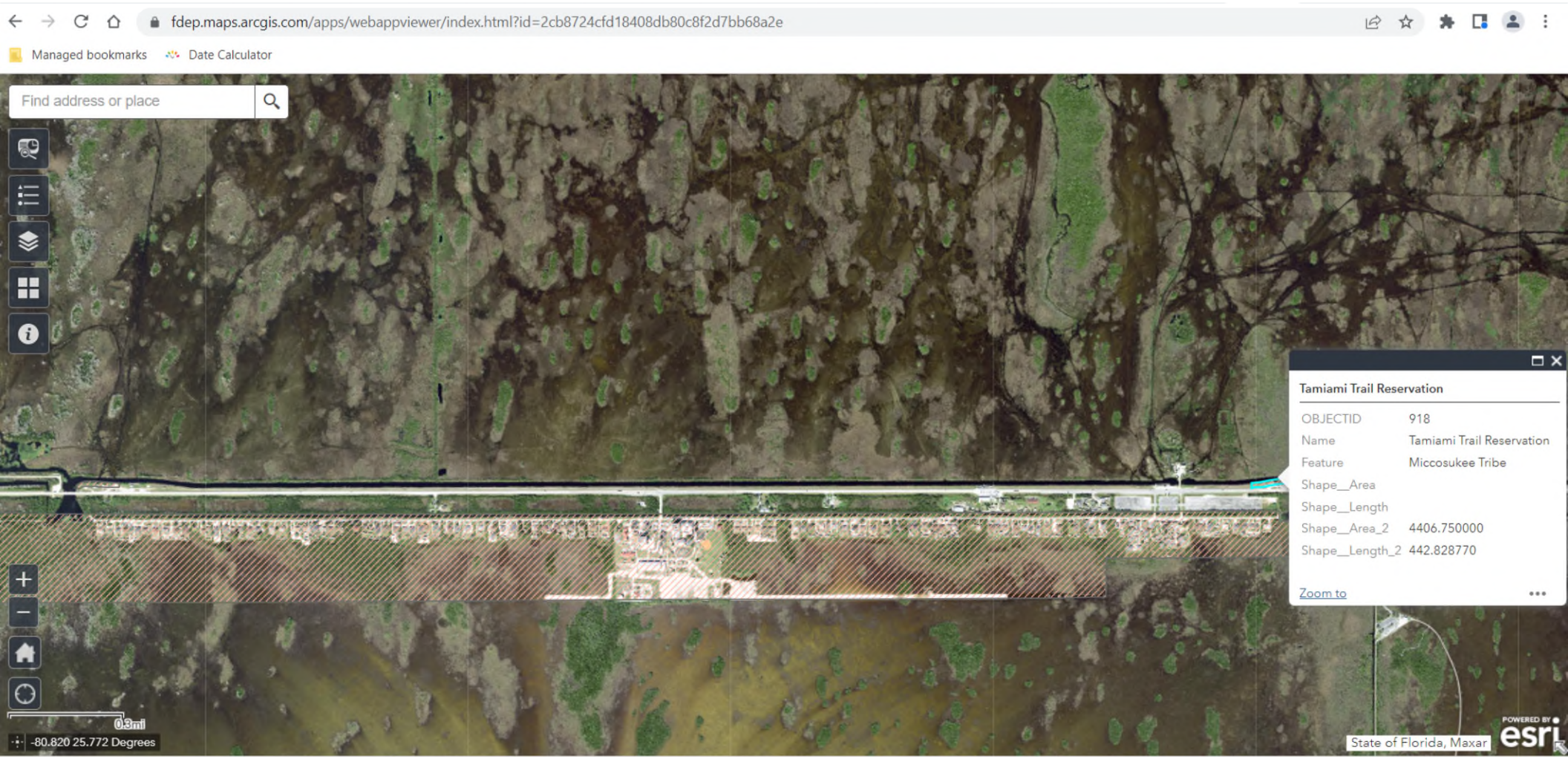
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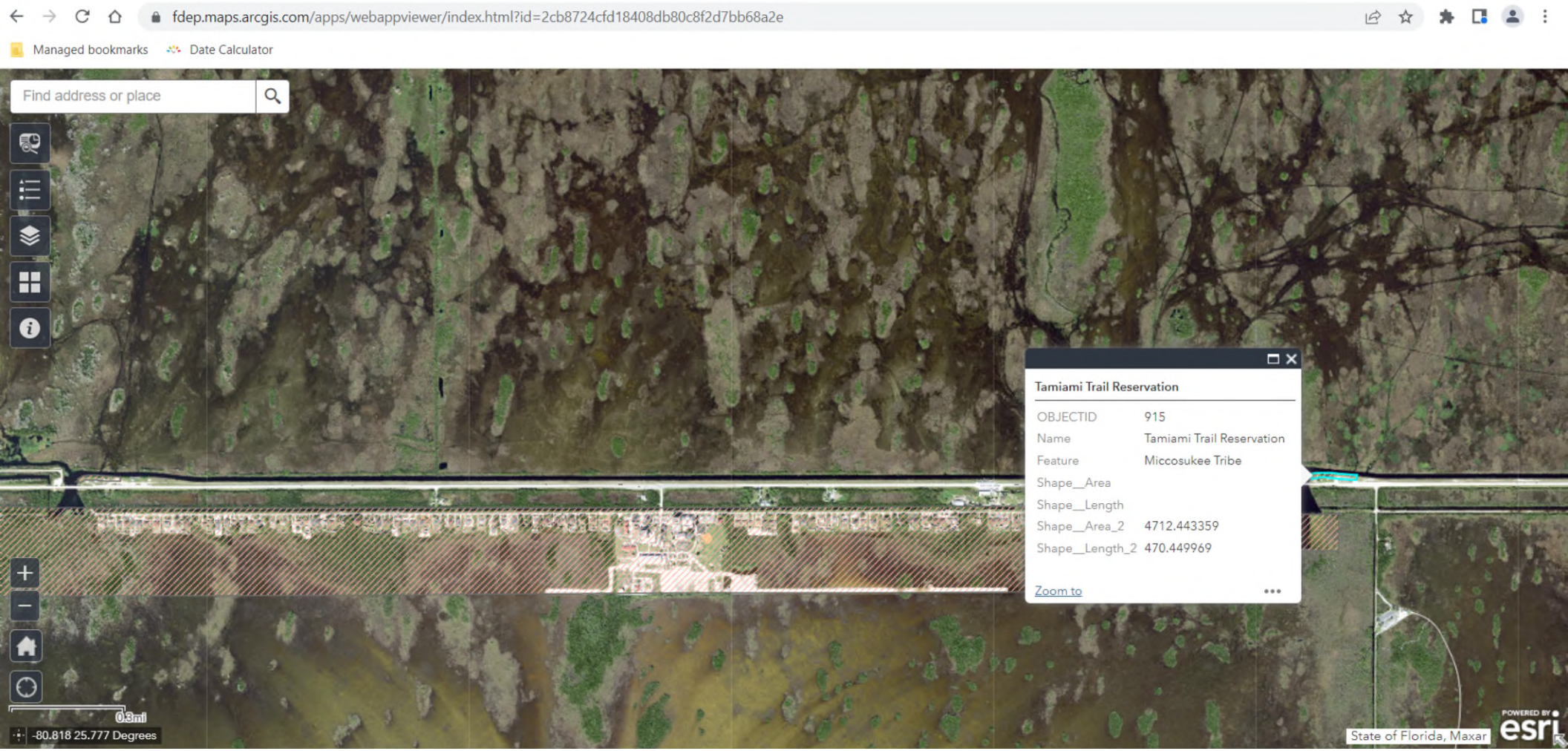
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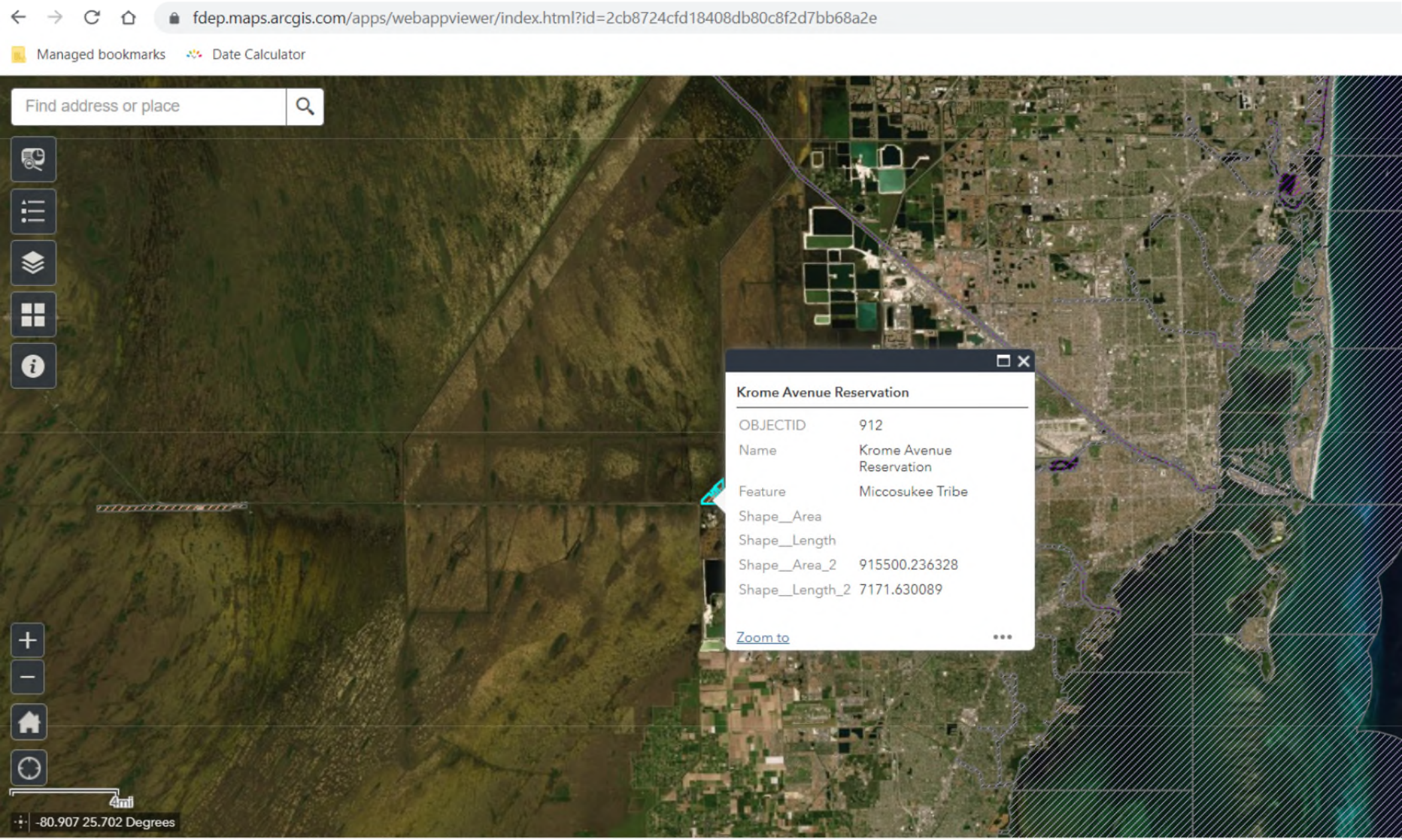
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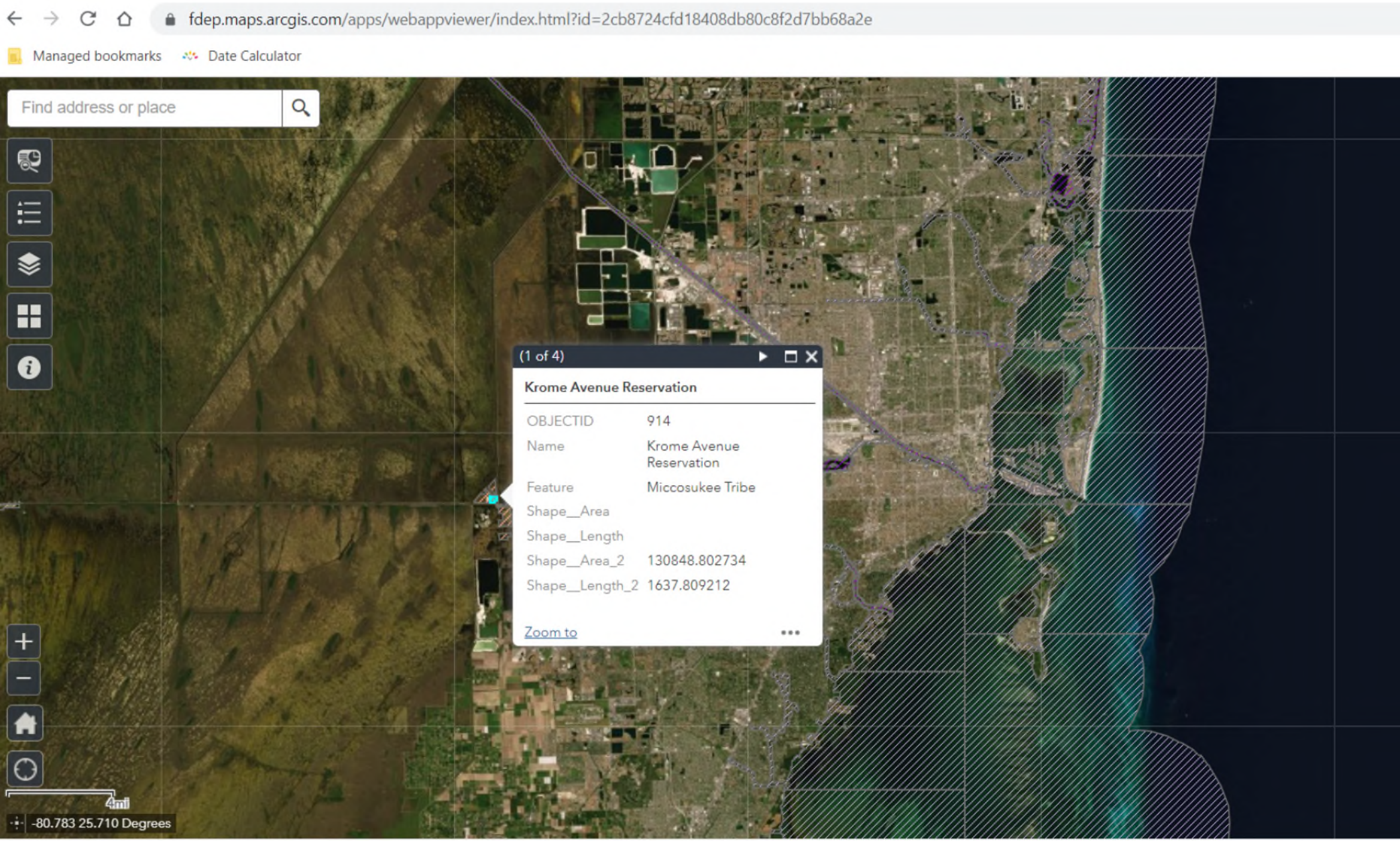
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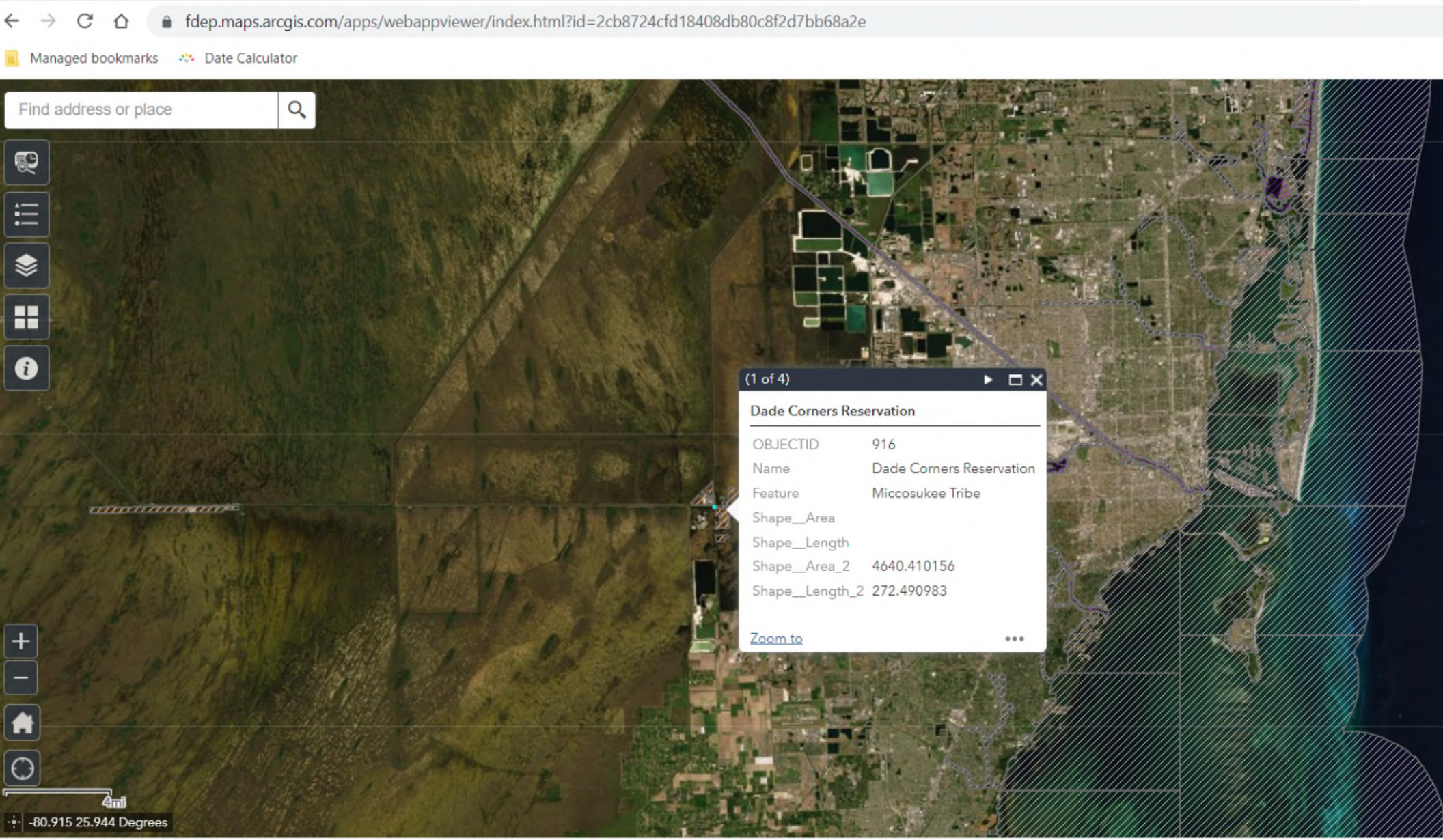
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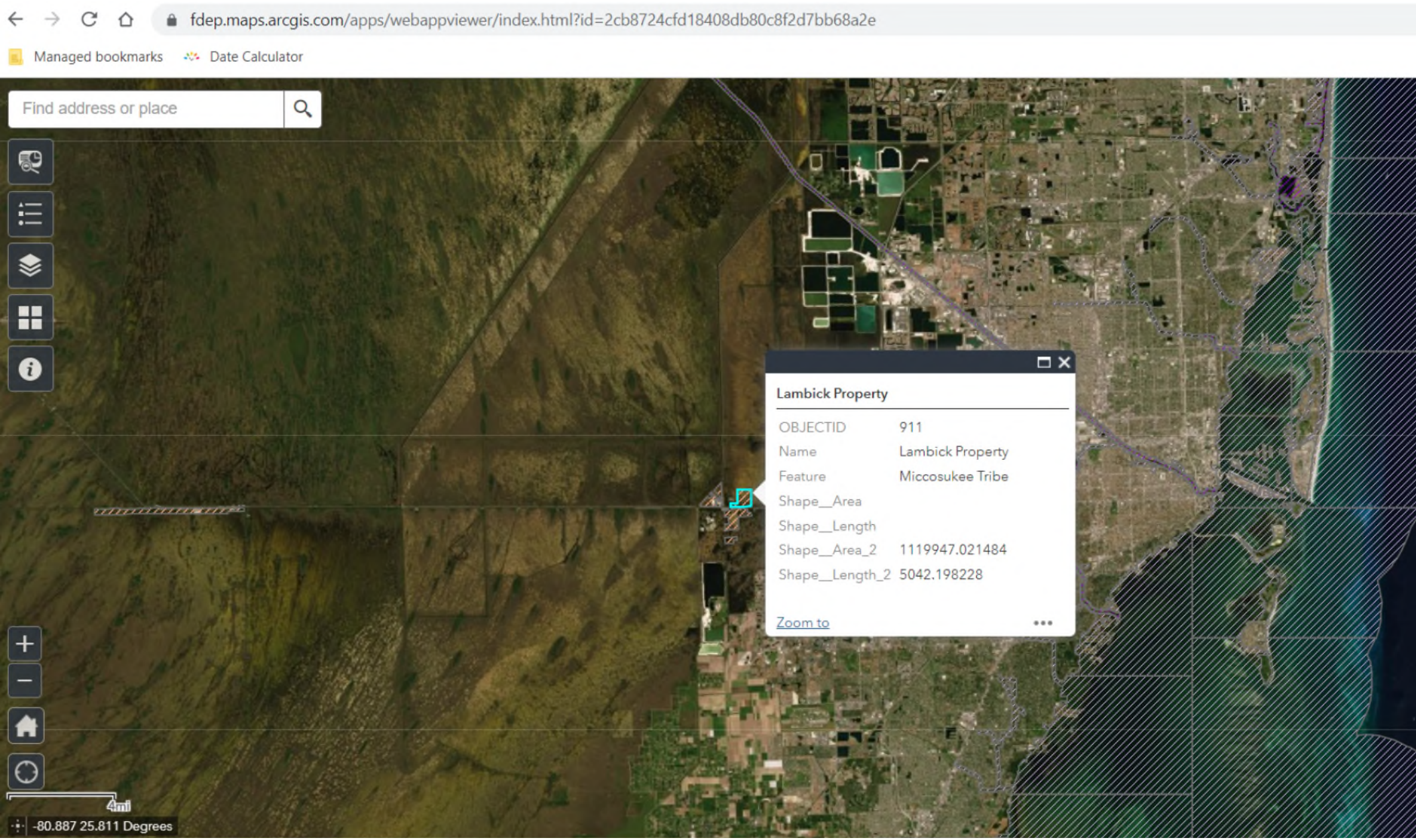
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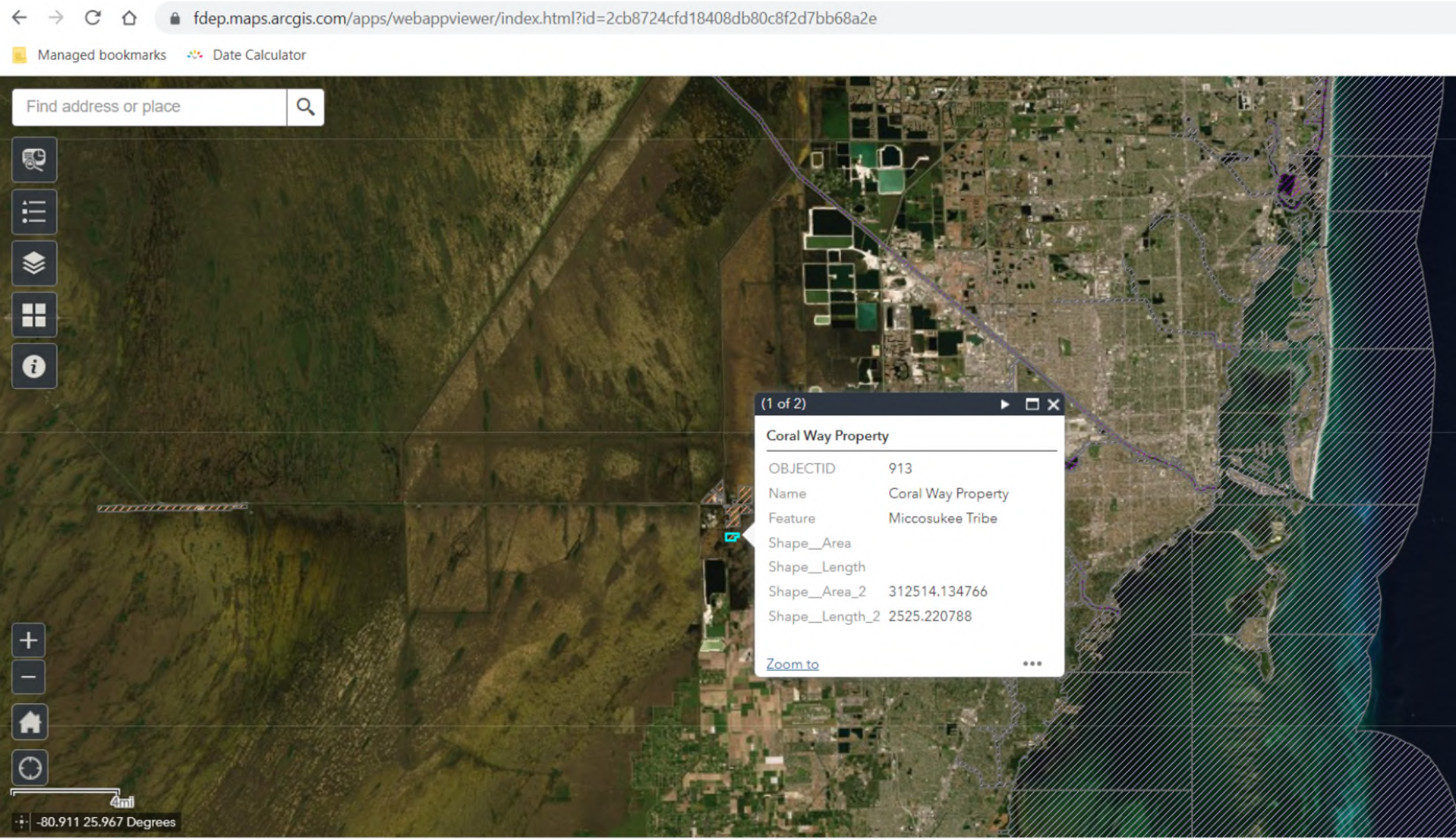
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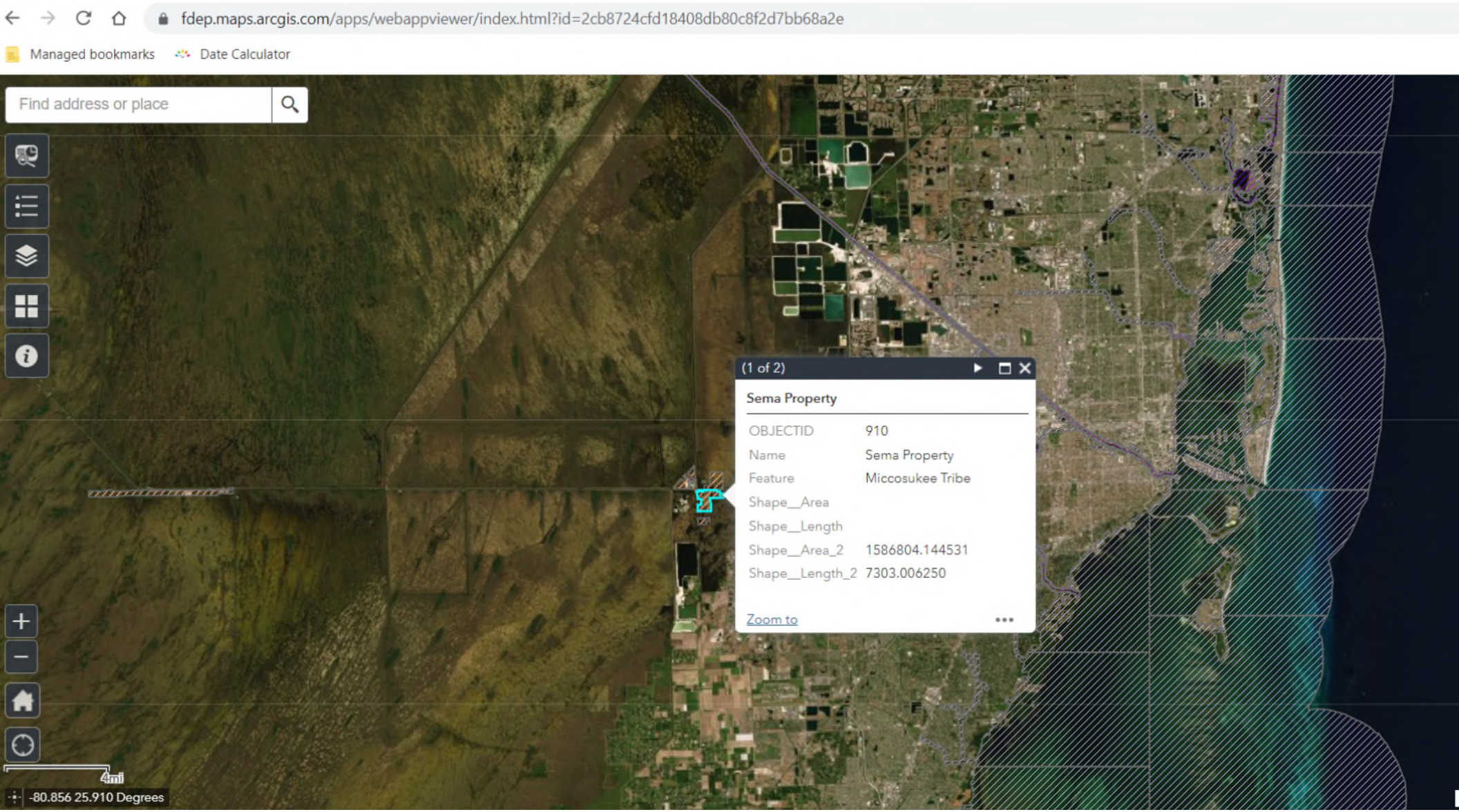
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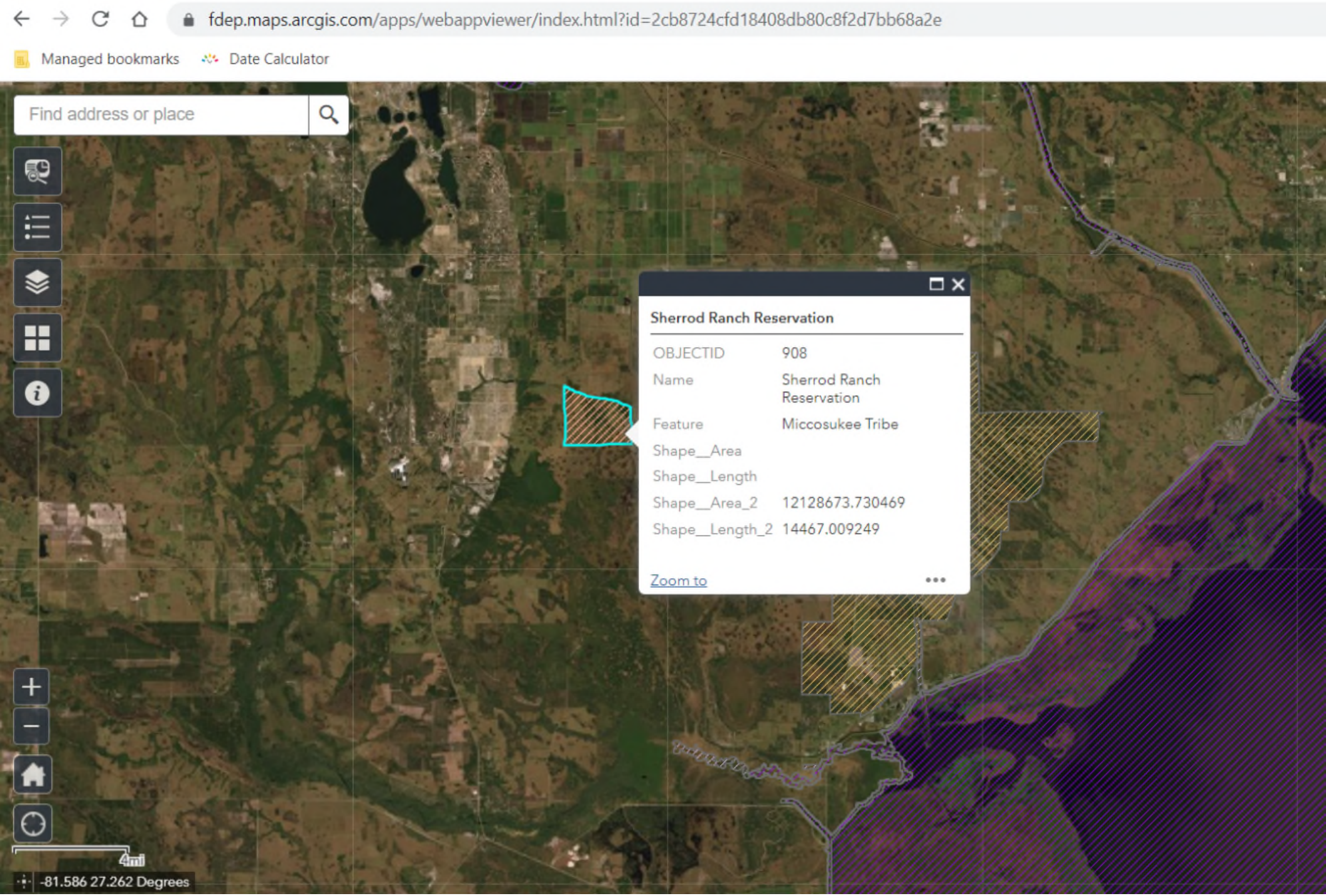
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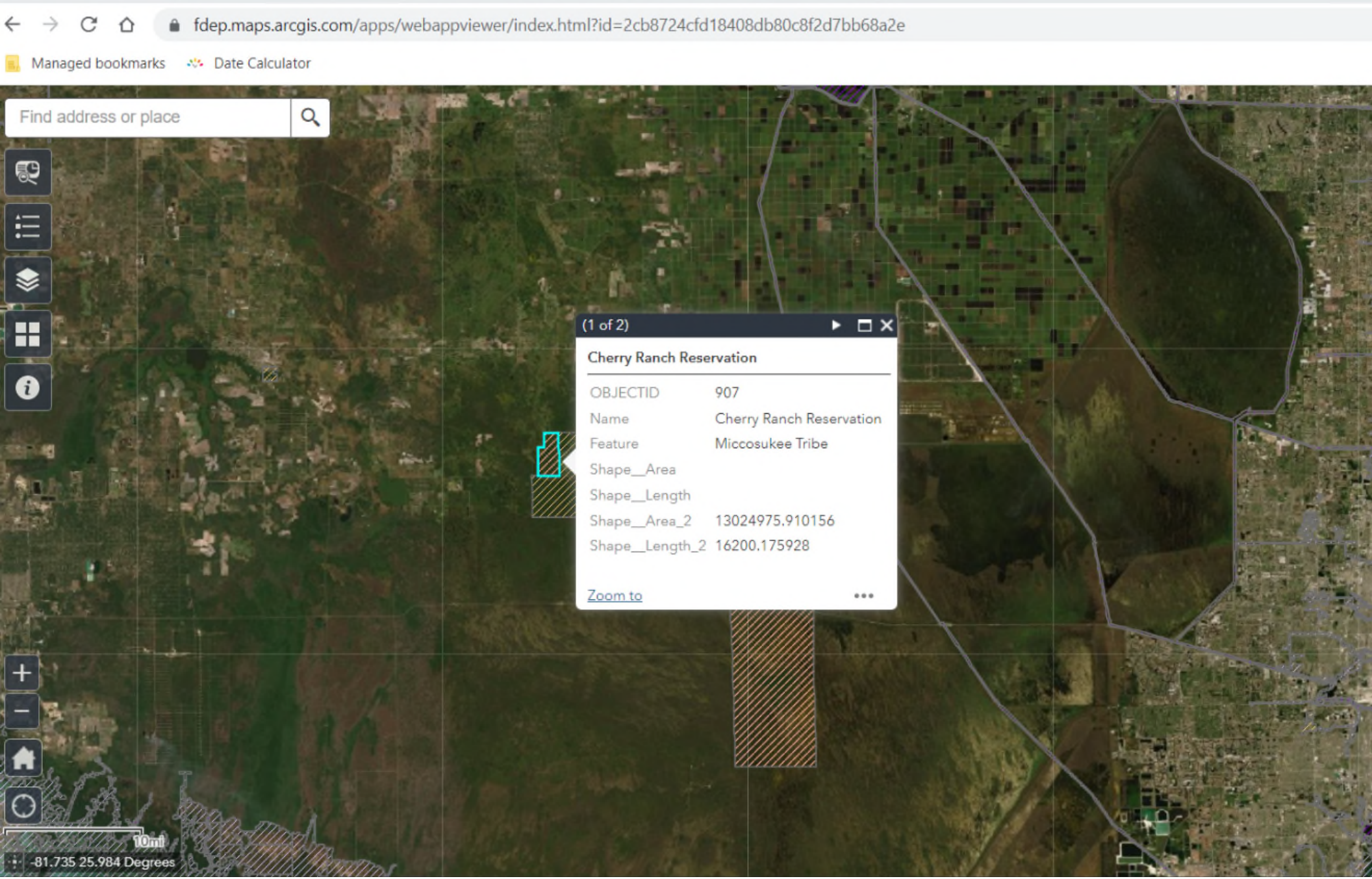
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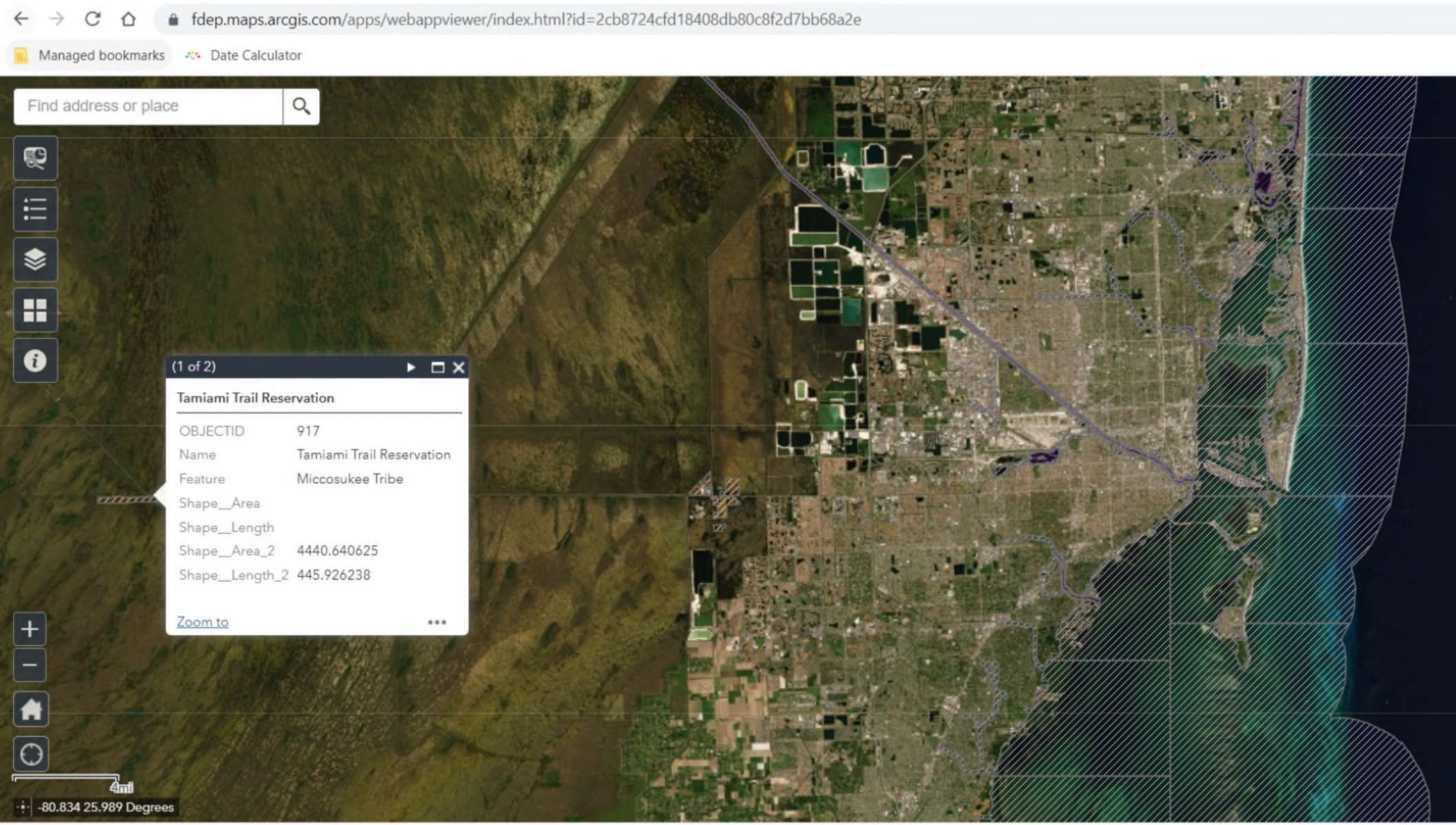
# EXHIBIT 6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(1 of 2)
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OBJECTID 917
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Zoom to
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# EXHIBIT 7

UNITED STATES OF AMERICA

# Congressional Record

PROCEEDINGS AND DEBATES OF THE 97th CONGRESS
SECOND SESSION

## VOLUME 128—PART 23

DEC. 15, 1982 TO DEC. 17, 1982

(PAGES 30907 TO 32113)



UNITED STATES GOVERNMENT PRINTING OFFICE, WASHINGTON, 1982

In the form passed by the House Committee, this bill will be of great benefit to millions of hearing-impaired Americans who depend on access to our telecommunications system. Although it does not require universal compatibility of all telephone equipment with hearing aids, its provisions will allow hearing-impaired and other disabled telephone consumers to have access to essential telephone service. The bill appears to balance the needs of disabled consumers with the competing demands of the telephone industry.

We thank you for your support and interest in this legislation, and we urge you to support its immediate passage by the Senate.

Very truly yours,

SARAH GEER,
*Staff Attorney.*

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CENTEL CORP.,
*Washington, D.C., October 14, 1982.*

Hon. HOWARD W. CANNON,
*Russell Senate Office Building, Washington, D.C.*

DEAR SENATOR CANNON: This letter concerns S. 2355, the Telecommunications for the Disabled Act of 1982.

As you know, Centel Corporation operates the fourth largest independent telephone system in the United States, serving 1.1 million telephones in ten states. We are also a major CATV operator and are moving into other emerging telecommunications fields to augment our business systems, communications products and related activities.

We support this legislation, which was first addressed by the Senate Commerce Committee on a bipartisan basis. We appreciated the opportunity to work with your staff in reviewing the technical problems and regulatory implications of this bill.

We believe that the bill is a responsible and balanced piece of legislation. There has always been concern among our independent telephone companies, the Bell System companies and your own staff that the many recent advances in technology be made available to *all* Americans. This bill addresses that concern in one very useful way. Pay telephones and a very limited number of other telephones (described as "essential telephones") can become compatible with hearing aids at minimal cost. The benefits are significant and the financial and regulatory costs are low. Once again, we appreciate your work and that of the other members of the Senate Commerce Committee in initiating and completing action on this bill.

Very truly yours,

MARTIN T. MCCUE.

Mr. STEVENS. Mr. President, I move that the Senate concur in the House amendments with a further Senate amendment which I send to the desk on behalf of Senator PACKWOOD.

UP AMENDMENT 1534

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Alaska (Mr. STEVENS), on behalf of Mr. PACKWOOD, proposes an unprinted amendment numbered 1534.

Mr. STEVENS. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

At the end of the bill, add the following new sections:

SEC. . Subparagraph (B) of paragraph (2) of section 1225(a) of the Public Broadcasting Amendments Act of 1981 is amended to read as follows:

"(B) Notwithstanding the provisions of subsection (c) of section 396 of the Communications Act of 1934, in the case of the offices of director the terms of which expired March 1982, persons appointed to fill two of such vacancies existing as of December 13, 1982, shall be appointed for terms which shall expire on March 1, 1984 and shall not be representative of the political party having a majority of the directors of the Board on December 13, 1982. Persons appointed for a term beginning March 1, 1984, to fill the vacancies occurring in such offices the terms of which, by reason of the preceding sentence, expire on March 1, 1984, shall not be filled by persons representing the political party having a majority of the directors of the Board on March 1, 1984. Persons appointed on or after March 1, 1984, to fill vacancies in the two such offices shall be appointed for terms of five years. On March 1, 1984, there are abolished those five offices of director the terms of which, without application of the preceding provisions of this paragraph, expire on such date. In administering the provisions of this paragraph a director is a minority member of the Board if he is not a member of the political party to which the majority of the directors of the Board are members.".

SEC. . The Communications Satellite Act of 1962, as amended (47 U.S.C. 701 et seq.), is amended by deleting the second sentence of section 304(b)(2) of such Act.

The motion to concur in the House amendments with the Senate amendment (UP No. 1534) was agreed to.

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## FLORIDA INDIAN LAND CLAIMS SETTLEMENT ACT

Mr. STEVENS. Mr. President, I ask unanimous consent that the Committee on Indian Affairs be discharged from further consideration of H.R. 7155, the Florida Indian Land Claims Settlement Act of 1982, and I ask for its immediate consideration.

The PRESIDING OFFICER. Is there objection? The Chair hears none, and it is so ordered.

The bill will be stated by title.

The legislative clerk read as follows:

A bill (H.R. 7155) to settle certain Indian land claims within the State of Florida, and for other purposes.

The Senate proceeded to consider the bill.

Mr. COHEN. Mr. President, I rise in support of H.R. 7155 and urge that the Senate act favorably upon this measure. H.R. 7155 was introduced in the House by Congressman FASCELL of Florida in September 1982. A companion bill, S. 2893, was introduced in the Senate by Senator CHILES for himself and Senator HAWKINS on September 10, 1982, and was referred to the Select Committee on Indian Affairs.

H.R. 7155 was reported out of the House Committee on Interior and Insular Affairs without benefit of a hearing. It was acted upon by the full House on December 6 without opposition. On December 7, the Select Committee on Indian Affairs held hearings on H.R. 7155 and received testimony from witnesses from the Department of the Interior, the State of Florida, and the Miccosukee Tribe. The legislation was supported by all of the parties and has the support of the Florida congressional delegation.

Mr. President, H.R. 7155 is the culmination of many years of hard negotiation between the State of Florida and the Miccosukee Tribe. It resolves a substantial claim of the tribe against the State of Florida for the flooding by the State of a major portion of the tribe's State-recognized reservation, as a result of a public works project to control flooding and store water in the Everglades. it also resolves a claim for the loss or taking of the Miccosukee's rights in a 5-million-acre Executive order reservation in the southern part of the State which the tribe contends was set aside by order of President Tyler in 1839. The State has never conceded that such reservation was established.

In major outline, the agreement provides for settlement funds from the State for Florida to the tribe in the amount of $975,000; the Miccosukee State Indian Reservation and three parcels of land along the Tamiami Trail will be taken into trust by the Secretary of the Interior; and a perpetual lease to approximately 189,000 acres of Everglades land will be granted by the State. These lands will remain available for use by hunters and fishermen with some restrictions.

The "State reservation" lands will become a Federal Indian reservation. The "lease lands will be treated as a Federal reservation for purposes of eligibilty for Federal programs. The State of Florida has assumed jurisdiction over the tribes in that State under the provisions of Public Law 83-280. This jurisdictional scheme is continued in effect under the provisions of section 7 and 8(b) of H.R. 7155.

At the hearing before the Select Committee on Indian Affairs on December 7, the administration recommended three technical amendments relating to time limitation for payment of funds to the tribe by the State of Florida, clarification with respect to the fund from which payment is to be made, and clarification of the status of lands to be taken into trust by the Secretary.

I would note that the Florida State Legislature has already appropriated the necessary settlement funds and payment can be made immediately. For this reason the first two technical amendments appear unnecessary. As

to the status of land taken into trust, I believe the language of the bill is clear that these trust lands are to be treated in the same manner as tribal trust lands are treated under the Federal laws generally applicable to tribal trust lands, including immunity from taxation. It is my understanding that this is the intent of the parties to this agreement, and certainly it is the intent of this legislation.

Under the provisions of section 177 of title 25, United States Code, any transaction involving an Indian tribe's land, or any claim to title, is void without the consent of the United States. H.R. 7155 provides the necessary consent to two underlying agreements of the State and the tribe: A "settlement agreement" and a "lease agreement." In addition, H.R. 7155 provides certain clarification of jurisdiction and application of Federal, State, and tribal laws within the Miccosukee Reservation and lease area.

In conclusion, I would stress one point: H.R. 7155 requires the relinquishment and waiver of the Miccosukee Tribe of any further claim of the tribe against the State of Florida for past land transactions or loss of lands within that State. The Seminole Tribe of Florida has similar claims against the State of Florida which are presently in litigation or are the subject of ongoing negotiation. Nothing in this act is intended to either enhance or diminish or in any way affects the claims of the Seminole Tribe, and this is understood by all parties concerned.

Mr. President, at this time there is no printed record in either the House or the Senate of the underlying agreements we are here ratifying. For this reason I ask, unanimous consent that the "settlement agreement" and the "lease agreement" between the State of Florida and the Miccosukee Tribe be printed in full at the conclusion of these remarks.

I urge my colleagues to support this bill.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION

CASE NO. 79-253-CIV-JWK

*Miccosukee Tribe of Indians of Florida*, Plaintiff, vs. *State of Florida, et al.*, Defendants.

SETTLEMENT AGREEMENT

It is hereby stipulated and agreed between the parties that the above-entitled case shall be finally settled in accordance with the terms of this Settlement Agreement (hereafter referred to as the "Agreement") and upon its approval by the Court. No appeal or review is to be sought by any of the parties. For the purpose of this Agreement, the parties shall be named and defined as follows:

Plaintiff, the Miccosukee Tribe of Indians of Florida (hereafter referred to as the ("Miccosukee Tribe") is recognized by the State of Florida, pursuant to Chapter 285, Florida Statutes, and is an Indian tribe recognized by the United States and organized under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, with a constitution and bylaws approved by the Secretary of the Interior pursuant to that Act. The Miccosukee Tribe approves this Agreement through its duly recognized and authorized Tribal Council, and its approval of this Agreement will bind the Miccosukee Tribe and any predecessor or successor in interest and all members thereof.

Defendants, the State of Florida, its agencies, political subdivisions, constitutional officers, officials of its agencies and subdivisions, and the South Florida Water Management District will be referred to hereafter in the Agreement as the "State of Florida," unless the language of this Agreement otherwise refers to a specific agency, official, or entity of the State of Florida. The State of Florida approves this Agreement through the Governor and Cabinet as the Executive Board of the Trustees of the Internal Improvement Trust Fund and as head of the Department of Natural Resources, the members of the Game and Fresh Water Fish Commission, the governing board of the South Florida Water Management District, and the Secretary of the Department of Transportation, and its approval shall bind the State of Florida and its above mentioned agencies.

The term "lands or natural resources", as used in this Agreement, shall mean any real property or natural resources, or any interest in or right involving any real property or natural resource, including but not limited to minerals and mineral rights, timber and timber rights, water and water rights, and rights to hunt and fish.

WITNESSETH

Whereas, the parties recognize that a settlement of this litigation could not have been reached unless the Agreement included an extinguishment of any and all outstanding or potential claims the Miccosukee Tribe might have against the State of Florida, which may have arisen at any time prior to the effective date of this Agreement; and

Whereas, the parties also recognize that a settlement of this litigation could not have been reached unless the Agreement included a grant of a leasehold interest in certain lands to the Miccosukee Tribe; and

Whereas, the parties further recognize that implementation of this settlement will require action by both the Congress of the United States and the Legislature of the State of Florida; and

Whereas, it is the intent of this Agreement to resolve all outstanding disputes and differences between the State of Florida and the Miccosukee Tribe, and, in particular, to extinguish all claims presently in existence or arising out of any previous actions, inactions, or duties of the State of Florida, as well as to satisfy the need of the Miccosukee Tribe for additional lands, so that the future relations between the State of Florida, its citizens and the Miccosukee Tribe will be one of harmony, cooperation, friendship and peace.

Now therefore, the Miccosukee Tribe and the State of Florida stipulate and agree as follows:

1. Effective Date. This Agreement shall not become final and shall be without any binding force or effect until:

a. The United States Congress enacts appropriate legislation, which: (1) approves the conveyances to be made or recognized by the Miccosukee Tribe pursuant to this Agreement; (2) provides for the extinguishment of the claims of the Miccosukee Tribe to lands or natural resources in Florida, as specified in this Agreement; (3) declares that the leasehold interest of the Miccosukee Tribe under the Lease Agreement attached hereto as Exhibit A shall be exempt from all State and local taxes; (4) confirms that the area leased to the Miccosukee Tribe pursuant to said Lease Agreement (hereafter referred to as the "Leased Area") shall qualify as if it were an Indian reservation solely for purposes of determining the eligibility of the Miccosukee Tribe and its members for any Federal health, education, employment, economic assistance, revenue-sharing, law enforcement over Indians, or social welfare programs, or any other similar Federal program for which Indians are eligible because of their status as Indians and residence on an Indian reservation; and (5) provides that any diminution or taking by the State of Florida of any interest granted to the Miccosukee Tribe in the Leased Area shall be made only for a public purpose and upon payment of just compensation, and that such diminution or taking shall not require approval of the United States Congress or Federal executive officer; and

b. The State of Florida enacts appropriate legislation, which provides: (1) that the Miccosukee Tribe shall have the right to exercise within the Leased Area the same governmental jurisdiction over Indians that the Miccosukee Tribe exercises in its reservation established under the provisions of Chapter 285, Florida Statutes; Provided, however, that such jurisdiction shall not be exercised in any manner inconsistent with the limitations upon the Miccosukee Tribe's rights under the Lease Agreement; and (2) that during the term of the Lease Agreement, members of the Miccosukee Tribe shall have the right in such Leased Area and such reservation to hunt and fish for subsistence purposes and to take frogs for consumption as food and for commercial purposes without restriction as to season and without payment of any license or permit fees; Provided, however, such laws may restrict the exercise of such hunting, fishing and frogging rights in the Leased Area in order to manage game and wildlife so long as prior to placing restrictions upon subsistence hunting, fishing and frogging, the Game and Fresh Water Fish Commission shall totally restrict any taking of that particular species for non-subsistence purposes.

This Agreement shall become effective upon the effective date of the above-described Federal legislation, the effective date of the above-described State legislation, or the date of its approval by the Court, whichever last occurs.

2. Cooperation of Parties. The parties agree to cooperate fully in requesting and supporting passage by the United States Congress and the Florida Legislature of the statutes described in paragraph 1. Drafts of such legislation, which reflect the understanding and agreement of the parties, are attached hereto as Exhibits B and C, respectively. The parties agree that failure by the United States Congress to enact the first sentence in Section 8 of the attached Federal legislation (Exhibit B) shall not void the Settlement Agreement.

The parties also agree that further proceedings in this suit shall be stayed while such legislation is pending; Provided, however, that this stay shall terminate on December 31, 1982, or earlier if the Court determines that favorable action by either Con-

gress or the Legislature within a reasonable time does not seem likely.

3. Commitments of the Miccosukee Tribe. The Miccosukee Tribe agrees:

a. That the South Florida Water Management District shall be entitled to exercise all rights conveyed by the Dedication from the Board of Commissioners of State Institutions of the State of Florida on August 8, 1950, and the validity of such Dedication is hereby expressly recognized by the parties hereto;

b. That the Department of Transportation shall be entitled to exercise all rights conveyed by the Board of Trustees of the Internal Improvement Trust Fund to the Department of Transportation of Florida (or between their predecessor agencies) for a perpetual easement for road right-of-way and utility purposes over that strip of land, consisting of approximately 461.17 acres, which passes through the Miccosukee Reservation, and which is within the lands described in the Alligator Alley (State Road 84) easements, recorded in 1964, as more specifically described in Exhibit D attached hereto. It is agreed, that reasonable access shall be provided the Miccosukee Tribe and its members from Alligator Alley into the Miccosukee Reservation and also across or under Alligator Alley for the purpose of connecting the portions of said reservation lying north and south of the highway; Provided, however, the Miccosukee Tribe agrees to approve conveyances of additional lands necessary for the construction of said access and connections as well as the grant of an easement along the highway for drainage purposes within said reservation, without additional monetary compensation. In exchange for the conveyances of right-of-way and easement, the Department of Transportation agrees that simultaneously with the construction of the proposed access interchange within the Miccosukee Reservation the Department of Transportation will fill and compact an area of not less than five (5) acres at a location specified by the Tribe and acceptable to the Department, which acceptance shall not unreasonably be withheld, to an elevatioin of not less than seventeen (17) feet above sea level, which land shall be adjacent to and accessible from the interchange and suitable for commercial development for the use and benefit of the Tribe; Provided, however, that nothing herein shall constitute Federal, State, or local approval of such development, and further provided that the provisions of this paragraph relating to access to the Miccosukee Reservation, conveyances of additional lands and easements, and the providing of five (5) acres of fast land shall be contingent upon the completion of Alligator Alley as part of the Interstate system or other four (4) lane limited access highway. In the event that Alligator Alley is not completed, or substantially completed, as part of the Interstate system or other four (4) lane limited access highway within the Miccosukee Reservation within two (2) years after the effective date of this Agreement, the Tribe shall be entitled to construct, operate and maintain commercial facilities and related improvements wholly or partially within the easement for a road right-of-way described in Exhibit D, and in case such facilities and related improvements are constructed and their removal should become necessary in order to permit the completion of Alligator Alley as part of the Interstate or other highway system, the Department of Transportation agrees to pay to the Tribe at least six (6) months before such removal an amount equal to either (1) the replacement cost of the facilities and related improvements without depreciation, or (2) if relocation of the facilities and related improvements can be effected, the relocation cost together with damages for the loss of business, if any, during the relocation period, whichever is less;

c. To the extinguishment of any right, title, interest, or claim the Miccosukee Tribe may now possess in any public or private lands or natural resources in Florida, excluding hunting, fishing and trapping rights conferred by State law, and other than certain "excepted interests" consisting of: (1) the State Reservation established under the provisions of Chapter 285, Florida Statutes; (2) the lands described in Dedication Deed No. 23228, dated November 20, 1962, from the Trustees of the Internal Improvement Fund of the State of Florida, as modified on October 6, 1981; (3) rights granted the Miccosukee Tribe by special use permits issued by the Secretary of the Interior in the Everglades National Park; (4) rights recognized in the Miccosukee Tribe in the Big Cypress Preserve pursuant to 16 U.S.C. §§ 410(b) and 689(j) and in the Big Cypress Area pursuant to Section 380.055, Florida Statutes; and (5) rights granted the Miccosukee Tribe under the Lease Agreement. The Miccosukee Tribe also agrees to the extinguishment of any and all claims which the Miccosukee Tribe may have other than the foregoing "expected interests" involving lands or natural resources in the State of Florida arising at any time prior to the effective date of this Agreement; Provided, however, that nothing in this Agreement or otherwise shall be construed, as waiving or relinquishing any right, title, interest, or claim to lands or natural resources in the State of Florida based on use and occupancy or acquired under Federal or State law by any individual member of the Miccosukee Tribe or any predecessor in interest thereof. The rights, titles, interests and claims outside the "excepted interests" which are being extinguished or waived by the Miccosukee Tribe, include:

(i) any and all claims the Miccosukee Tribe might have to any public or private lands of natural resources in Florida which are based upon claims of aboriginal title;

(ii) any and all other claims the Miccosukee Tribe might have to any public or private lands or natural resources in Florida, such as claims or rights based on recognized title, including but not limited to: (1) any claims the Miccosukee Tribe might have to the whole or any part of the approximately five million (5,000,000) acres of lands allegedly set aside in Florida for use and benefit of the Seminole Indian Nation, including the Miccosukee Tribe, during the period 1839–1845, or at any other date, by Executive Order of the United States Government commonly known as the "Macomb" or Polk" Reservation Area; (2) any claim based upon the grant and withdrawal of title to the State Indian Reservation in Monroe County, specifically returned to the State of Florida by Section 285.06, Florida Statutes and (3) any claim based upon the alleged grant of a license to Seminole Indians residing in Florida by the Board of Commissioners of State Institutions on April 5, 1960;

d. To the extinguishment of any and all other claims, without regard to the "excepted interests" specified above in paragraph 3c, related to the following matters:

(i) any and all claims arising out of any alleged breach of fiduciary relationship between the Miccosukee Tribe and the State of Florida, acting in a capacity as Trustee for the Miccosukee Tribe, arising out of any actions or inactions by the State of Florida prior to the date this Agreement is executed by the parties;

(ii) any and all claims for trespass damages or use and occupancy of any lands or natural resources in the State of Florida occurring prior to the date this Agreement is executed by the parties, including but not limited to claims for compensation for any road right-of-way and toll collections for State Road 84, also known as Alligator Alley. The Miccosukee Tribe also agrees to waive any and all claims arising between the execution and the effective date of this Agreement for trespass or use and occupancy of any lands or natural resources, including claims for compensation or collection of tolls, within any road or utility right-of-way or easement in existence at the date this Agreement is executed;

(iii) any and all other claims against the State of Florida, especially the South Florida Water Management District, or its predecessor, the Central and Southern Florida Flood Control District, arising out of any actions or inactions by the State of Florida in regulating the use, management, or storage of water, including the construction of canals and levees, at any time prior to the date this Agreement is executed by the parties. The Miccosukee Tribe also agrees to waive any and all claims arising between the execution and effective date of this Agreement for the regulation, management and use of the water flowage and storage easements of the South Florida Water Management District, pursuant to its lawful rights and authority within the easement as expressly recognized by the Miccosukee Tribe in paragraph 3a;

(iv) any and all other claims by the Miccosukee Tribe against the State of Florida related to any of the matters listed in this paragraph 3d and in paragraphs 3c (i) and (ii) or arising out of any actions or inactions whatsoever by the State of Florida, including but not limited to tort, tax, contract, or constitutional claims prior to the date this Agreement is executed by the parties.

4. Commitments of the State of Florida. The State of Florida agrees:

a. To grant the Miccosukee Tribe a perpetual leasehold interest in certain lands under the control of the State of Florida, as provided in the Lease Agreement attached hereto as Exhibit A;

b. To pay the Miccosukee Tribe the sum of nine hundred seventy-five thousand dollars ($975,000);

c. To carry out its commitments under paragraph 3b; and

d. To waive any and all claims for offsets, including but not limited to tort or contract claims, which were or could have been asserted against the Miccosukee Tribe by the Department of Transportation, the South Florida Water Management District, or the Trustees of the Internal Improvement Trust Fund prior to the date this Agreement is executed by the parties.

5. Condition for Invalidating Settlement. The parties understand and agree that the grant to the Miccosukee Tribe of the Lease Agreement attached hereto as Exhibit A is a vital element of the settlement for the Miccosukee Tribe. This Agreement, therefore, shall no longer have any binding force and effect if at any time, the Lease Agreement or any essential provision thereof which materially benefits the Miccosukee Tribe is judicially determined to be void ab initio by a court of competent jurisdiction or is admin-

stratively determined to be void or otherwise invalid by any officer of the State of Florida having authority to make that determination. In either of such event, the Miccosukee Tribe shall have the right to reinstate this litigation within a reasonable time—which period shall be defined for purposes of this Agreement as six (6) months after the Miccosukee Tribe receives written notice of such determination—and, if the suit is reinstated within that time, the parties agree that no defense, such as laches, statute of limitations, law of the case, res judicata, or prior disposition shall be asserted solely on the basis of the passage of time between the dismissal of this suit and commencement of the resumed litigation; Provided, however, that if any such suit is reinstated, the Miccosukee Tribe agrees that any defense which would have been available to the State of Florida at the time this suit was dismissed may be asserted, and is not waived by anything in this Agreement or by subsequent events occurring between the dismissal of this suit and commencement of the resumed litigation. Any taking by the State of Florida for a public purpose of interests granted to the Miccosukee Tribe in the Lease Agreement shall not be construed as voiding this Agreement.

If the Miccosukee Tribe reinstitutes suit, the State of Florida shall be able to offset or counterclaim for all compensation and the value of other benefits received by the Tribe under the Settlement and Lease Agreements and the Miccosukee Tribe shall be able to offset our counterclaim for all benefits received by the State. As an alternative to rescission and the reinstitution of litigation pursuant to this paragraph 5, the Miccosukee Tribe shall have whatever remedies are provided by law.

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EXHIBIT A

LEASE AGREEMENT

Whereas, the Governor and Cabinet as the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (hereafter the "Board") are authorized and empowered, pursuant to Section 253.03, Florida Statutes, to lease lands owned by the Board; and

Whereas, the Florida Game and Fresh Water Fish Commission (hereinafter the "Commission") under the Constitution and laws of the State of Florida has general supervision of fresh water aquatic life and wild animal life management within the State of Florida; and

Whereas, pursuant to Chapter 373, Florida Statutes, the South Florida Water Management District (hereafter the "SFWMD"), formerly the Central and Southern Florida Flood Control District, has the statutory responsiblity for flood control and water resources management in the lands described in paragraph 1 hereof and has acquired rights by virtue of easements of said lands from the State of Florida; and is authorized and empowered to lease lands owned by the SFWMD; and

Whereas, pursuant to a certain Agreement, dated January 18, 1952, between the Commission and the Governing Board of the SFWMD, the Commission has further undertaken the fresh water aquatic life, wild animal life and recreation management within geographical areas including Water Conservation Area 3A lying in Broward and Dade Counties, Florida; and

Whereas, the Miccosukee Tribe of Indians of Florida (hereafter the "Miccosukee Tribe" or the "Tribe") is an American Indian tribe recognized by the United States, and the State of Florida pursuant to Chapter 285, Florida Statutes, and organized pursuant to the provisions of Section 16 of the Federal Indian Reorganization Act, 25 U.S.C. § 476; and

Whereas, a portion of the reservation of the Miccosukee Tribe created under Chapter 285, Florida Statutes, lies within the geographical boundaries of Water Conservation Area 3A, which portion contains approximately 49,280 acres and is delineated in red on the map attached hereto as Exhibit I (such portion being hereafter described as the "Original Reservation Tract"); and

Whereas, the Commission has for a substantial period of time engaged in fresh water aquatic life and wildlife management within the Original Reservation Tract and relations between the Commission and the Miccosukee Tribe with respect to fresh water aquatic life and wild animal life management within such tract have been both amicable and successful; and

Whereas, the Board of Commissioners of State Institutions, on April 5, 1960, purported to set aside approximately 143,000 acres in Dade and Broward Counties as a license area for the use, occupancy and enjoyment of the Seminole Indians residing in Florida, including members of the Miccosukee Tribe, subject to certain conditions and limitations; and

Whereas, the Attorney General of the State of Florida has advised the Board that certain aspects of the action taken on April 5, 1960, described above need clarification due to incomplete documentation thereof and that the respective rights of the State and the Indians in the license area should be more precisely defined in the interest of both parties; and

Whereas, the Board, the Commission, the SFWMD and the Miccosukee Tribe desire to describe more particularly their mutual rights and duties within a tract of lands in Dade and Broward Counties, as further described in paragraph 1 (hereafter the "Leased Area"), and, in part, also within the Original Reservation Tract, and to act cooperatively to protect, conserve and manage fresh water aquatic life and wildlife and manage and control recreational resources within the Original Reservation Tract and the Leased Area; and

Whereas, the Board, the Commission, the SFWMD and the Miccosukee Tribe further desire to continue and expand these cooperative efforts in the future; and

Whereas, the parties intend to preserve the integrity of the State School Fund of Florida, recognizing that portions of the foregoing properties are "Section 16 Lands" whose income and principal shall be used only in accordance with Article IX, Section 6, Florida Constitution; and

Whereas, the Miccosukee Tribe has requested assurance that its rights shall not be subject to unilateral revocation by the State so that members of the Tribe and their descendants may be assured of the continued use of their traditional homeland; and

Whereas, the SFWMD and the Board have agreed to lease the Leased Area to the Miccosukee Tribe for the uses and benefits established by this Agreement, and in settlement, inter alia, of claims asserted by the Tribe in *Miccosukee Tribe of Indians of Florida* v. *State of Florida, et al.*, Case No. 79-253-Civ-JWK in the United States District Court for the Southern District of Florida; and

Whereas, the following agencies have title to all or part of the lands described in paragraph 1 or such lands are under their jurisdiction, management and control:

(i) The South Florida Water Management District, and

(ii) The Trustees of the Internal Improvement Trust Fund of the State of Florida;

Whereas, the Miccosukee Tribe has agreed to accept the terms and conditions of this Agreement by executing same.

Now, therefore, in consideration of their mutual promises and for other good and valuable consideration, the parties hereto agree:

1. The Board, with the concurrence of the SFWMD, and the SFWMD grant to the Miccosukee Tribe a perpetual lease of the following described lands constituting the Leased Area as depicted on Exhibit 1 for the uses and purposes hereafter stated:

All those lands lying within the following described area:

Begin at the intersection of the Westerly right of way line of South Florida Water Management District's Levee 67A (Drawing Number L-67A-1) and the Northerly right of way line of South Florida Water Management District's Levee 29 Section 2 (Drawing Number L-29-1);

Thence, Westerly along the Northerly right of way line of said Levee 29 Section 2 and Northwesterly along the Northerly right of way line of South Florida Water Management District's Levee 29 Section 1 (Drawing Number L-29-3) to the intersection thereof with the Easterly right of way line of South Florida Water Management District's Levee 28 (Drawing Number L-28-1);

Thence, Northerly along said right of way line to the intersection thereof with the North line of Section 29, Township 53 South, Range 35 East;

Thence, Easterly along the North line of said Section 29 to the Northwest (NW) corner of Section 28, Township 53 South, Range 35 East;

Thence, Southerly along the West line of Sections 28 and 33, Township 53 South, Range 35 East to the Southwest (SW) corner of said Section 33;

Thence, Easterly along the South line of Sections 33, 34, 35, and 36, Township 53 South, Range 35 East to the Southeast (SE) corner of said Section 36;

Thence, Northerly along the East line of Sections 36, 25, 24, 13, 12 and 1, Township 53 South, Range 35 East, and the East line of Sections 36 and 25, Township 52 South, Range 35 East to the Northeast (NE) corner of said Section 25;

Thence, Westerly along the North line of Sections 25, 26, 27 and 28, Township 52 South, Range 35 East to the intersection thereof with the East right of way line of South Florida Water Management District's Levee 28 (Drawing Number L-28-1);

Thence, Northerly along said right of way line to the intersection thereof with the Dade/Broward County line; said line also being the township line between Townships 51 South and 52 South and the Southerly boundary line of the Miccosukee Indian Reservation;

Thence, Easterly along said county line to the Southwest (SW) corner of Township 51 South, Range 36 East;

Thence, Northerly along the range line between Ranges 35 East and 36 East to the intersection thereof with the Southerly right of way line of State Road 838 (Alligator Alley or Everglades Parkway);

Thence, Easterly along said right of way line to the intersection thereof with a line that is 200 feet Westerly of, parallel and as

measured at right angles to the centerline of South Florida Water Management District's Canal 123;

Thence, Southeasterly along said line to the intersection thereof with the North line of Section 3, Township 50 South, Range 37 East;

Thence, Westerly along the North line of Sections 3, 4 and 5, Township 50 South, Range 37 East to the Northwest (NW) corner of said Section 5;

Thence, Southerly along the West line of said Section 5 to the Southwest (SW) corner of said Section 5;

Thence, Easterly along the South line of said Section 5 to the Northwest (NW) corner of Section 9, Township 50 South, Range 37 East;

Thence, Southerly along the West line of said Section 9 to the Southwest (SW) corner of said Section 9;

Thence, Easterly along the South line of said Section 9 to the Northwest (NW) corner of Section 15, Township 50 South, Range 37 East;

Thence, Southerly along the West line of said Section 15 to the Southwest (SW) corner of said Section 15;

Thence, Easterly along the South line of said Section 15 to the Northwest (NW) corner of Section 23, Township 50 South, Range 37 East;

Thence, Southerly along the West line of said Section 23 to the Southwest (SW) corner of said Section 23;

Thence, Easterly along the South line of said Section 23 to the Northwest (NW) corner of Section 25, Township 50 South, Range 37 East;

Thence, South along the West line of Sections 25 and 36, Township 50 South, Range 37 East to the Southwest (SW) corner of said Section 36;

Thence, Easterly along the South line of said Section 36 to the Southeast (SE) corner of said Section 36;

Thence, Northerly along the East line of Sections 36 and 25, Township 50 South, Range 37 East to the intersection thereof with the North line of the South one-half (S ½) of Section 30, Township 50 South, Range 38 East;

Thence, Easterly along said line to the intersection thereof with a line that is 200 feet Westerly of, parallel and as measured at right angles to the centerline of Miami Canal;

Thence, Southeasterly along said line to the intersection thereof with the North line of the South one-half (S ½) of Section 10, Township 51 South, Range 38 East;

Thence, Westerly along the North line of the South one-half (S ½) of Sections 10, 9, 8 and 7, Township 51 South, Range 38 East to the Northwest (NW) corner of the South one-half (S ½) of said Section 7;

Thence, Southerly along the West line of Sections 7, 18, 19 and 30, Township 51 South, Range 38 East to the Southwest (SW) corner of the North one-half (N ½) of said Section 30; Thence Easterly along the South line of the North one-half (N ½) of Sections 30, 29 and 28, Township 51 South, Range 38 East to the intersection thereof with the Northwesterly right of way line of said Levee 67A;

Thence, Southwesterly along said right of way line to the intersection thereof with the North line of Section 24, Township 52 South, Range 37 East;

Thence, Westerly along the North line of Sections 24, 23, 22, 21, 20 and 19, Township 52 South, Range 37 East to the Northwest (NW) corner of said Section 19;

Thence, Southerly along the West line of Sections 19, 30 and 31, Township 52 South, Range 37 East to the Southwest (SW) corner of said Section 31;

Thence, Easterly along the South line of Sections 31, 32, 33 and 34, Township 52 South, Range 37 East to the intersection thereof with the Northwesterly right of way line of said Levee 67A;

Thence, Southwesterly and Southerly along said right of way line to the point of beginning:

Also, the following described parcels of land: The West one-half of the Southwest one-quarter (W ½ of SW ¼) of Section 27 and the East one-half of the Northeast one-quarter (E ½ of NE ¼) of Section 36, all in Township 52 South, Range 35 East;

The Southwest one-quarter of the Southeast one-quarter of the Northeast one-quarter (SW ¼ of SE ¼ of NE ¼) and the West one-half of the Southwest one-quarter (W ½ of SW ¼) of Section 3; the East one-half of the Northwest one-quarter (E ½ of NW ¼) of Section 11; the Northeast one-quarter of the Northeast one-quarter (NE ¼ of NE ¼) of Section 12; all of Section 16; the West one-half of the Northwest one-quarter (W ½ of NW ¼) of Section 22; the West one-half of the Northwest one-quarter (W ½ of NW ¼) of Section 24; the West one-half of the Northeast one-quarter (W ½ of NE ¼) of Section 26; The East one-half of the Northwest one-quarter (E ½ of NW ¼) of Section 33; all being in Township 53 South, Range 35 East.

Less, however, the following Tracts of The Everglades Land Company's Subdivision, as recorded in Plat Book 2, Page 1, Dade County, Florida, public records:

Tracts 111 and 112 in Section 29, and Tracts 57 and 58 in Section 31, all in Township 50 South, Range 38 East;

Tracts 79 and 80, and Tracts 109 through 112 in Section 3, Tracts 11 through 14 in Section 4, and Tracts 33 and 64 in Section 32, all in Township 51 South, Range 38 East;

Tract 56 in Section 5, and Tracts 3, 4, 45, 46, 51, 52, 57, and 58 in Section 7, all in Township 52 South, Range 38 East.

Also, less the North seven-eights of the East one-quarter (N ⅞ of ¼) of Section 16, Township 54 South, Range 36 East.

The above described parcels of land, being situated in Broward County and Dade County, Florida, were estimated to contain approximately 189,000 Acres.

The Board, the Commission and the District represent and the Tribe acknowledges that access to certain parcels of Board-owned or District-owned lands within the Leased Area may be severed by lands title to which is not vested in whole or in part in the Board or the District. The Tribe agrees that the Board, the Commission and the District shall not be responsible for perfecting or guaranteeing access across lands not owned by the Board or the District located outside the Leased Area.

2. Fresh Water Aquatic Life and Wildlife Management. The Commission shall continue freshwater aquatic life and wildlife management programs within the Leased Area and the Original Reservation Tract. The Commission shall discuss and coordinate with the Miccosukee Tribe in developing freshwater aquatic life and wildlife management practices within the Leased Area and the Original Reservation Tract, and the Commission and the Miccosukee Tribe shall cooperate in the enforcement of the regulations of the Commission. Representatives of the Commission, the SFWMD and the Miccosukee Tribe shall meet at least annually (more frequently, if necessary or requested) to discuss regulations of the Commission with respect to hunting, fishing and public recreational utilization of the Leased Area. Nothing in this Lease Agreement shall grant to the general public any right of access to, or use of, the Original Reservation Tract for hunting, fishing, recreation, or any other purpose.

The activities of the Commission in freshwater aquatic life and wildlife management practices shall not interfere with or close any part of the leased Area to any tribal use or activity, including hunting, fishing and frogging, except as provided in this paragraph. The Commission may restrict hunting, fishing, or frogging within the Leased Area when necessary in order properly to manage freshwater aquatic life and wildlife; *Provided,* That no such restriction shall be greater than the restrictions imposed in surrounding areas. In addition, before any such restrictions are enacted, the Commission shall consult with and discuss same with the Miccosukee Tribe. If the Commission deems it necessary to place restrictions upon the Tribe's right to hunt, fish, or frog for subsistence purposes, it will do so only after a total restriction for the taking of a particular species has been placed upon all nonsubsistence users and the need for further restriction on the taking of that species continues to exist.

3. Rights of the Miccosukee Tribe. The Miccosukee Tribe shall have the following rights:

a. Subject to the provisions of paragraph 2 of this Lease Agreement and the approval of appropriate legislation to such effect by the Florida Legislature as required in the Settlement Agreement described in paragraph 8 below, the members of the Miccosukee Tribe shall have the right during the term of this Lease Agreement to hunt and fish for subsistence purposes and to take frogs for consumption as food and for commercial purposes without restriction as to season in the Leased Area and the Miccosukee Reservation and shall not be required to purchase any license or permit from the Commission in order to exercise such rights.

In addition, the Miccosukee Tribe shall be compensated by the Commission for public hunting and fishing on the Leased Area in accordance with the formula used statewide by the Commission to determine compensation to private owners for the right to manage wild animal life and for public hunting and fishing on private lands. The Miccosukee Tribe shall have the option of accepting the annual cash amount derived from the public use payment or directing the Commission to provide other goods and services which are within the authority of the Commission and which are agreed to be of equal monetary value by both parties.

b. The Miccosukee Tribe and its members shall have the right to engage in traditional subsistence agricultural activities in the Leased Area. It is understood that revenue-producing agricultural activities on the Leased Area at this time are inconsistent with the proper use of the area as a water flowage and storage area by the SFWMD. However, should conditions change, the Tribe may seek permission from the SFWMD to engage in revenue-producing agricultural activities if such activities will not interfere with the rights and uses of the SFWMD. Approval by the SFWMD shall be pursuant to the permit procedures applicable to any private citizen.

c. The Miccosukee Tribe, and members of the Miccosukee Tribe under regulations the

Tribe may adopt, shall have the right: (1) to reside in the Leased Area, including the construction of traditional homes, subject to the provisions of paragraph 6; (2) to use the Leased Area for tribal religious purposes; and (3) to take and use native materials from the Leased Area for tribal purposes, fabrication into artifacts, utensils, handicrafts and/or souvenirs for sale, subject to the provisions of subparagraph 3e below.

d. The Miccosukee Tribe shall have the right to receive fifty percent (50%) of the net revenue derived from such sale, lease, exploration, or other revenue-producing utilization of the mineral rights and interests in the Leased Area as may be allowed by the Board (except for the revenue derived from school lands pursuant to Article IX, Section 6, Florida Constitution), and the further right to require that any such mineral exploration, extraction, or other development and utilization be performed in accordance with any reasonable and acceptable method and technology which best protects the natural state and beauty of the Leased Area and which is least disruptive of the tribal uses permitted by this Agreement. The "Section 16" lands subject to the provisions of Article IX, Section 6, Florida Constitution, are identified as follows:

Township 52 South, Range 35 East:
All of Sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 22, 23 and 24.
All of Sections 4, 9, 16 and 21 East of the Easterly Right-of-Way of Levee 28.
Township 50 South, Range 36 East:
All of Section 16.
Township 51 South, Range 36 East:
All of Section 16.
Township 52 South, Range 36 East:
All of Sections 6, 7, 16, 18, and 19.
Township 53 South, Range 36 East:
All of Section 16.
Township 50 South, Range 37 East:
All of Section 16.
Township 53 South, Range 37 East:
All of Section 16 West of the Westerly Right-of-Way of Levee 67A.
Totaling 14,800 acres, more or less.

e. The purpose of this Agreement is also: (1) to preserve the Leased Area in its natural state for the use and enjoyment of the Miccosukee Tribe and the general public, as herein specified; (2) to preserve fresh water aquatic life, wildlife, and their habitat; and (3) to assure proper management of water resources.

4. Revenue-Producing Services and Facilities. The Board, the Commission and the SFWMD agree not to erect or permit construction on lands which they own of any additional revenue-producing facilities within the Leased Area or within one-half mile of the Leased Area and the Original Reservation Tract without the prior written consent of the Miccosukee Tribe. The Miccosukee Tribe, or individual Indians licensed by the Miccosukee Tribe, shall have the exclusive right to offer airboat rides, guide services, or other tourist services, in the Leased Area. None of these exclusive rights shall prohibit reasonable entry into the Leased Area by airboat or otherwise by members of the public for the purpose of engaging in non-commercial recreational activities; provided that such activities shall be in compliance with the provisions of this Lease Agreement and shall not interfere with the rights guaranteed to the Miccosukee Tribe and its members herein; and provided further that entry into the Leased Area by members of the public engaged in commercial recreational activities shall be subject to the consent of the Miccosukee Tribe, except commercial recreational activities ongoing upon the effective date of this Lease Agreement and registered with the Game and Fresh Water Fish Commission within one (1) year of the effective date hereof, which shall be permitted to continue at the option of the Commission and if not in conflict with the rights of the Tribe and its members under this Lease Agreement. Commercial recreational activities ongoing upon the effective date of this Lease Agreement shall be defined as those recreational activities for profit which are occurring no less frequently than once each month or twelve (12) times for the twelve (12) month period preceding the effective date hereof.

5. Limitations on Tribal Use. Subject to the provisions of paragraph 6, use of the Leased Area by the Miccosukee Tribe shall comply with all applicable laws and regulations in effect on the effective date of this Lease Agreement (including but not limited to Chapter 373, Florida Statutes), with the lawfully enacted rules and regulations of the SFWMD, both presently existing and those which may be promulgated in the future, and with all future laws and regulations not inconsistent with the rights granted the Miccosukee Tribe under this Lease Agreement. The Miccosukee Tribe shall possess no exclusive or private rights of access to and from Alligator Alley in the Leased Area, and highway access by the Tribe shall be subject to regulation by the State of Florida and the United States.

6. Rights of South Florida Water Management District. The Leased Area has for many years comprised a portion of a large reservoir utilized for the flowage and storage of water servicing the area of Broward, Dade, Monroe and Collier Counties and designated as Water Conservation Area 3 as part of the federally authorized project of flood control and water management for central and southern Florida. The Commission and the Miccosukee Tribe agree that all of the rights set forth in paragraphs 1 through 5 and 7 are subject to and shall not interfere with the rights, duties and obligations of the SFWMD or the United States Army Corps of Engineers, pursuant to the requirements of the aforesaid federally authorized project, conveyances, easements, grants, rules, statutes, or any other present or future lawful authority to manage, regulate, raise, or lower the water levels within the Leased Area or Water Conservation Area 3, including but not limited to the Dedication from the Board of Commissioners of State Institutions of the State of Florida dated August 8, 1950.

7. Limitations on Access. The Miccosukee Tribe shall have the right to survey and mark the boundaries of the Leased Area; Provided that such boundary markers shall consist of small monuments and shall in no way limit access to the Leased Area. Upon prior written approval of the Commission, the Miccosukee Tribe shall have the right to close to public access certain areas of the Leased Area used for traditional dwelling, agricultural and religious purposes. Employees or agents of the Board, the SFWMD, the Corps of Engineers and the Commission, in the performance of their official duties, shall be exempt from any limitation on access to the Leased Area. Such Board, SFWMD, Commission and Corps of Engineers' employees or agents shall likewise be exempt from the duty to pay any fees which may be imposed under this Agreement.

The right of the public access to the Leased Area shall be regulated by the Commission and shall be limited to recreational uses, including but not limited to hunting, fishing, hiking and bird watching. Such public recreational uses shall be subject to the rights expressly granted to the Tribe by this Agreement. The Miccosukee Tribe shall retain the right to exercise remedies authorized by law against trespassers.

8. Duration. This Lease Agreement shall become effective upon the effective date of a Settlement Agreement between the Miccosukee Tribe and the State of Florida, filed with and approved by the Court, in *Miccosukee Tribe of Indians of Florida* v. *State of Florida, et al.*, Case No. 79-253-Civ-JWK in the United States District Court for the Southern District of Florida. The Miccosukee Tribe shall have no rights or interests to the Leased Area other than those expressly stated herein and in such Settlement Agreement. It is understood that the Board and the SFWMD shall retain their respective ownership of the Leased Area for all purposes including but not limited to oil, gas, water and mineral exploration and extraction, subject to provisions of paragraph 3d. The Lease Agreement shall not be terminated by the Board or the SFWMD without consent of the Miccosukee Tribe, or with respect to any portion of the Leased Area, unless for a public purpose upon payment of just compensation to the Tribe for the termination of the rights granted herein. The rights and privileges conferred upon the Miccosukee Tribe shall remain in perpetuity unless abandoned by the Tribe, but the rights and privileges granted to the Tribe by this Agreement shall not be assigned or subleased without the express permission of the Board.

9. *Revocation of License.* This Lease Agreement supersedes and replaces any rights, privileges, or interests the Miccosukee Tribe and its members may have possessed in the license area by reason of the action of the Board of Commissioners of State Institutions on April 5, 1960.

10. *Rights of Other Indians in Lease.* The Miccosukee Tribe recognizes and agrees that persons of Miccosukee Indian blood, who are not now members of the Tribe but are eligible for membership, may become entitled to share in the rights and interests granted to tribal members under this Lease Agreement pursuant to claims filed under section 5.(b)(4) of the "Florida Indian Claims Settlement Act of 1982" attached as Exhibit B to the Settlement Agreement described in paragraph 8 of this Lease Agreement.

In witness whereof, the Governor and Cabinet as the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida and the Chairman of the Governing Board of the South Florida Water Management District have executed the foregoing Lease Agreement and the Florida Game and Fresh Water Fish Commission, and the Miccosukee Tribe of Indians of Florida have caused the approval of the foregoing Lease Agreement to be executed by their respective officers thereunto duly authorized.

Mrs. HAWKINS. Mr. President, I rise in support of the Florida Indian Land Claims Settlement Act. This legislation represents the culmination of over 7 years of negotiation among the State of Florida, the Miccosukee Tribe of Indians, and the Federal Government. What this legislation does, simply, is to ratify an agreement reached by the State of Florida and

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the Miccosukee Tribe that settles a pending land claim the tribe has filed against the State. There is a great sense of urgency in this matter. Unless the measure becomes law before December 31, 1982, the settlement agreement—and all the benefits to both the State and the tribe—will become null and void.

I would like to thank Senator COHEN for his cooperation in this matter, his assistance in moving the legislation through his committee, and his help in securing timely action by bringing this bill to the floor. Once again, Senator COHEN has demonstrated his interest and sincere commitment to carrying out the charge of the Select Committee and resolving the many outstanding Indian land claims with equity and justice. I also want to thank Senator GORTON for his help in moving this legislation through and for considering it during hearings held earlier in this special session.

I want to make it clear that although the Florida Indian Land Claims Settlement Act has moved quickly, it has been, nevertheless, carefully conceived and constructed. Essentially, the Miccosukee Tribe will, for the first time, have a federally recognized home. The home consists of a new 76,000-acre Federal Indian reservation as well as an adjoining 189,000 acres held in perpetual lease for the tribe by the State. Florida's non-Indian people will continue to enjoy the rights to hunt and fish in the leased area, and the State of Florida will maintain authority and responsibility for flood control activities in the area.

Another important benefit of this settlement is the provision to preserve almost all the Everglades land involved in its natural state. The Miccosukee have emphasized their desire to pursue their traditional lifestyle on this land and to share its use with the non-Indian people of Florida. The State has emphasized the importance of protecting these wetlands as well. People familiar with Florida are well aware of how important this region is to the water supply of the southern portion of our State. Although the primary reason for enacting this bill is to provide equitably for the Miccosukee people, we should not overlook how important the protection of the Everglades is to the entire population of south Florida.

We are all aware that this is a time to very carefully control Federal expenditures. This measure does not include any new budget authority and does not require any Federal expenditures to compensate the tribe. In fact, the administration gave this measure its support during the hearings on December 7.

In sum, Mr. President, this measure ratifies an agreement that is well considered and fairly constructed. It brings to a close the long dispute between the State of Florida and the Miccosukee people. It opens a new era of cooperation between the tribe and the State that should significantly benefit all Floridians. And it does this at no cost to the Federal Government. It is my hope the Senate will accept this measure. I urge my colleagues to support this bill.

Mr. CHILES. Mr. President, I want to voice my strong support of H.R. 7155, a bill designed to settle certain Indian land claims within the State of Florida. H.R. 7155 is the House companion to S. 2893, the bill Senator HAWKINS and I introduced at the request of the Miccosukee Indian Tribe and the State of Florida.

I wish to thank the Senator from Maine for his superb handling of the Miccosukee Indian Land Claims Settlement Act. I also want to thank the Senator from Washington for conducting the hearing on S. 2893 and express my gratitude to the staff of the Select Committee on Indian Affairs for their cooperation and assistance.

Like most bills, this legislation is the end product of considerable work and effort by the affected parties. The Miccosukee land claims involve over 20 years of negotiation and over 150 years of history. The Miccosukee Tribe are descendants of the Seminole Nation which occupied all of Florida when the United States acquired it from Spain in 1819. Relations between the Miccosukee and the United States began formally with a treaty in 1823. Those relations deteriorated when the Armed Forces of the United States drove the Miccosukee Indians from their home in northern central Florida to the Everglades country of south Florida where they now live. Many years later, Presidents Tyler and Polk established a 5-million-acre Indian reservation by Executive order in southwest Florida, which now includes the cities of Naples and Fort Myers. Until the 20th century, the Indians were left undisturbed in the unsettled Everglades almost entirely unaffected by the white man. The State of Florida set aside a portion of the Everglades as a reservation for them in 1917. The State reservation, however, was abolished in 1935 to make way for the Everglades National Park. Another State reservation was provided but the Miccosukees understandably did not want to leave their traditional homeland. They did not leave, and in 1964 the National Park Service agreed to let them live in a strip 500 feet wide at the northern edge of the park and the State agreed to let them live temporarily on State-owned lands north of the park. These State lands are involved in the present settlement. Since before 1960 the tribe has negotiated with the State of Florida for the right to permanently occupy State lands. A settlement agreeable to both the tribe and the State was reached in 1978 but the Governor asked the Miccosukees to waive any legal claims they had against the State of Florida. The Miccosukees discovered that the Executive order issued by Presidents Tyler and Polk gave them a land claim. They also had a claim based on the flooding of more than half of the State Miccosukee Reservation without the permission of the tribe. Further negotiations took place and a final settlement was approved by the Governor and the cabinet of the State of Florida on October 6, 1981, by the Miccosukee Tribe on March 8, 1982 and was approved by the U.S. District Court for the Southern District of Florida in which the suit by the tribe is pending, on July 2, 1982.

The Florida Indian Land Claims Settlement Act authorizes no Federal expenditure in settlement of the tribe's claims. The monetary compensation to be paid to the tribe under the terms of the settlement will be paid entirely by the State. Nevertheless, Federal approval of the settlement as provided in the bill is necessary for three reasons:

First, in the settlement agreement the Miccosukee Tribe waives all its existing claims against the State. In view of the existing Federal legislation which prohibits conveyances of land by Indian tribes without Federal approval (25 U.S.C. S177), the State has wisely insisted that the tribe's waiver of claims should be confirmed by the Congress.

Second, the Miccosukee Tribe requested as a condition to the settlement that an existing Miccosukee State Indian Reservation be conveyed by the State to the Federal Government to be held in trust for the benefit of the Miccosukees. The Florida cabinet has approved this conveyance and the bill provides for the acceptance of these lands by the Secretary of the Interior as a Federal Indian reservation. Third, finally, the settlement agreement provides to the tribe approximately 189,000 acres of Everglades land under a perpetual lease. These lands and waters will be preserved in their natural state and will be available for public recreational use but the Miccosukee Indians will be guaranteed permanent rights to live, hunt, and fish in the area, which has been their traditional homeland for more than a century. While the legal title to the leased area will be held by the State, the State has agreed that the area may be treated for certain purposes as a Federal Indian reservation. The bill implements this agreement of the parties.

The terms of this agreement will terminate unless congressional approval is given by December 31, 1982.

I want to congratulate the State of Florida and the Miccosukee Indian Tribe for reaching this settlement

after so many years of negotiation. I also compliment them for settling this matter without burden on the Federal Government or its budget. The State of Florida has recognized its obligation to the Miccosukee Indians, the Miccosukee tribal leaders have recognized their obligation to their people, the House of Representatives has recognized its obligation by passing the bill before us and I hope the Senate will feel the same sense of obligation to finalize this settlement to provide a permanent home for the Miccosukee Indians. I urge the Senate to pass H.R. 7155 so this bill can be sent to the President for his signature before the end of the year.

The PRESIDING OFFICER. The bill is open to amendment. If there be no amendment to be proposed, the question is on the third reading and passage of the bill.

The bill (H.R. 7155) was ordered to a third reading, was read the third time, and passed.

## SYCUAND BAND OF INDIANS TRUST LAND ACT

Mr. STEVENS. Mr. President, I ask unanimous consent that the Committee on Indian Affairs be discharged from further consideration of H.R. 5204, Sycuand Band of Indians Trust Land Act, and I ask for its immediate consideration.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill will be stated by title.

The legislative clerk read as follows:

A bill (H.R. 5204) to authorize and direct the Secretary of the Interior to accept certain lands for the benefit of the Sycuand Band of Mission Indians.

The PRESIDING OFFICER. The bill is before the Senate and open to amendment. If there be no amendment to be offered, the question is on the third reading and passage of the bill.

The bill (H.R. 5204) was ordered to a third reading, was read the third time, and passed.

## COW CREEK RESTORATION AND RECOGNITION ACT

Mr. STEVENS. Mr. President, I ask unanimous consent that the Indian Affairs Committee by discharged from further donsideration of H.R. 6588, Cow Creek Restoration and Recognition Act, and I ask for its immediate consideration.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill will be stated by title.

The legislative clerk read as follows:

A bill (H.R. 6588) to provide for Federal recognition of the Cow Creek Band of Umpqua Tribe of Indians.

The Senate proceeded to consider the bill.

Mr. HATFIELD. Mr. President, a resourceful, proud band of Indians in Canyonville, Oreg., have waited patiently for the Senate to do what it is about to do today. In 1954, Congress passed the Western Oregon Termination Act and stripped the Cow Creeks and 61 other tribes of Federal recognition. By passing H.R. 6588, the Members of the body will right a wrong done over 28 years ago to the Cow Creek Band of Umpqua Tribe of Indians. No longer will the Cow Creek Indians be second-class native American citizens and no longer will the Cow Creek Indians be denied the whole panoply of Indian programs ranging from health services to educational benefits.

Mr. President, one of the most impressive aspects of the Cow Creek's attempt to gain Federal recognition is the extent to which the local communities who live and work with Cow Creeks have rallied behind the tribe. I have received letters from merchants in Roseburg, Myrtle Creek, and Canyonville, and have heard from church and civic leaders in those same cities, as well as in Riddle and Glendale, Oreg. All of these letters attest to the wonderful character of the Cow Creek Tribe. The Governor of the State of Oregon, Victor Atiyeh, has also expressed his support of H.R. 6588.

In fact, I have yet to receive one negative letter concerning the Cow Creeks, and judging from the representatives of the tribe who came to Washington, this is no surprise. I would like to thank Senator COHEN and his staff on the Select Committee on Indian Affairs for their diligence and competence. Congressman JIM WEAVER is also to be commended for having his bill on the Cow Creeks, H.R. 6588, passed in the House on December 7. Notwithstanding these contributions, the credit for the passage of H.R. 6588 rests with the Cow Creek Indians. They are to be congratulated for their tireless efforts and perseverance during the difficult times that followed the Termination Act in 1954. Justice has been done, and for the Cow Creek Indians, it finally has come in the form of Federal recognition.

The PRESIDING OFFICER. The bill is before the Senate and open to amendment. If there be no amendment to be offered, the question is on the third reading and passage of the bill.

The bill (H.R. 6588) was ordered to a third reading, was read the third time, and passed.

## INTERGOVERNMENTAL RELATIONS ADVISORY COMMISSION

Mr. STEVENS. Mr. President, I ask unanimous consent that the Governmental Affairs Committee be discharged from further consideration of H.R. 7173, Intergovernmental Relations Advisory Commission, and I ask for its immediate consideration.

The PRESIDING OFFICER. Without objection, it is so ordered.

The bill will be stated by title.

The legislative clerk read as follows:

A bill (H.R. 7173) to make certain changes in the membership and operations of the Advisory Commission on Intergovernmental Relations.

The Senate proceeded to consider the bill.

Mr. ROBERT C. BYRD. Mr. President, there is no objection to the immediate consideration of the measure.

Mr. STEVENS. I thank the Senator.

UP AMENDMENT NO. 1535

Mr. STEVENS. Mr. President, I send to the desk an amendment by Senator DURENBERGER and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows:

The Senator from Alaska (Mr. STEVENS), on behalf of Mr. DURENBERGER, proposes an unprinted amendment numbered 1535.

Mr. STEVENS. Mr. President, I ask unanimous consent that further reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 3(a) of the Act of September 24, 1959, entitled "An Act to establish an Advisory Commission on Intergovernmental Relations", is amended—

(1) by striking out "twenty-six members" in the matter preceding paragraph (1) and inserting in lieu thereof thirty members;

(2) by striking out "Governors' Conference" in paragraph (4) and inserting in lieu thereof "National Governors' Association";

(3) by striking out "board of managers of the Council of State Governments" in paragraph (5) and inserting in lieu thereof "National Conference of State Legislatures";

(4) by striking out "and" at the end of paragraph (6) and by striking out the period at the end of paragraph (7) and inserting in lieu thereof a semicolon; and

(5) by inserting after paragraph (7) the following new paragraphs:

"(8) One appointed by the President from a panel of at least two elected officers of a township submitted by the National Association of Towns and Townships;

"(9) One appointed by the President from a panel of at least two elected school board members submitted by the National School Boards Association;

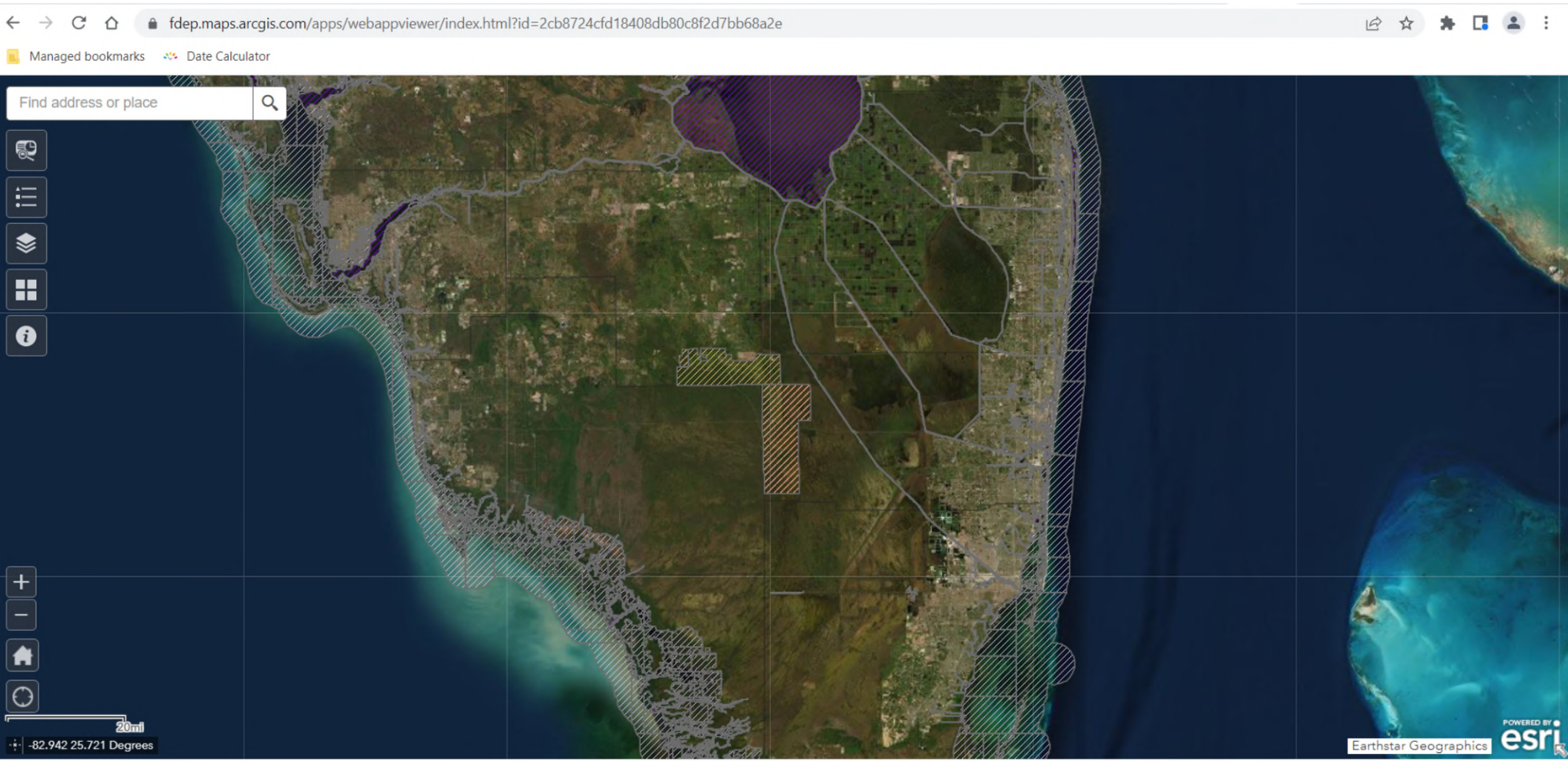
"(10) One appointed by the Chief Justice of the United States, who shall be a judge of a United States court of appeals or district court; and

(11) One appointed by the Chief Justice of the United States from a panel of two or more chief justices or judges of a State court of last resort submitted by the Conference of Chief Justices.".

(b) Section 4(e) of such Act is amended by striking out "Thirteen" and inserting in lieu thereof "A majority of the".

(c) Section 3 of such Act is amended by adding at the end thereof the following new subsection:

# EXHIBIT 8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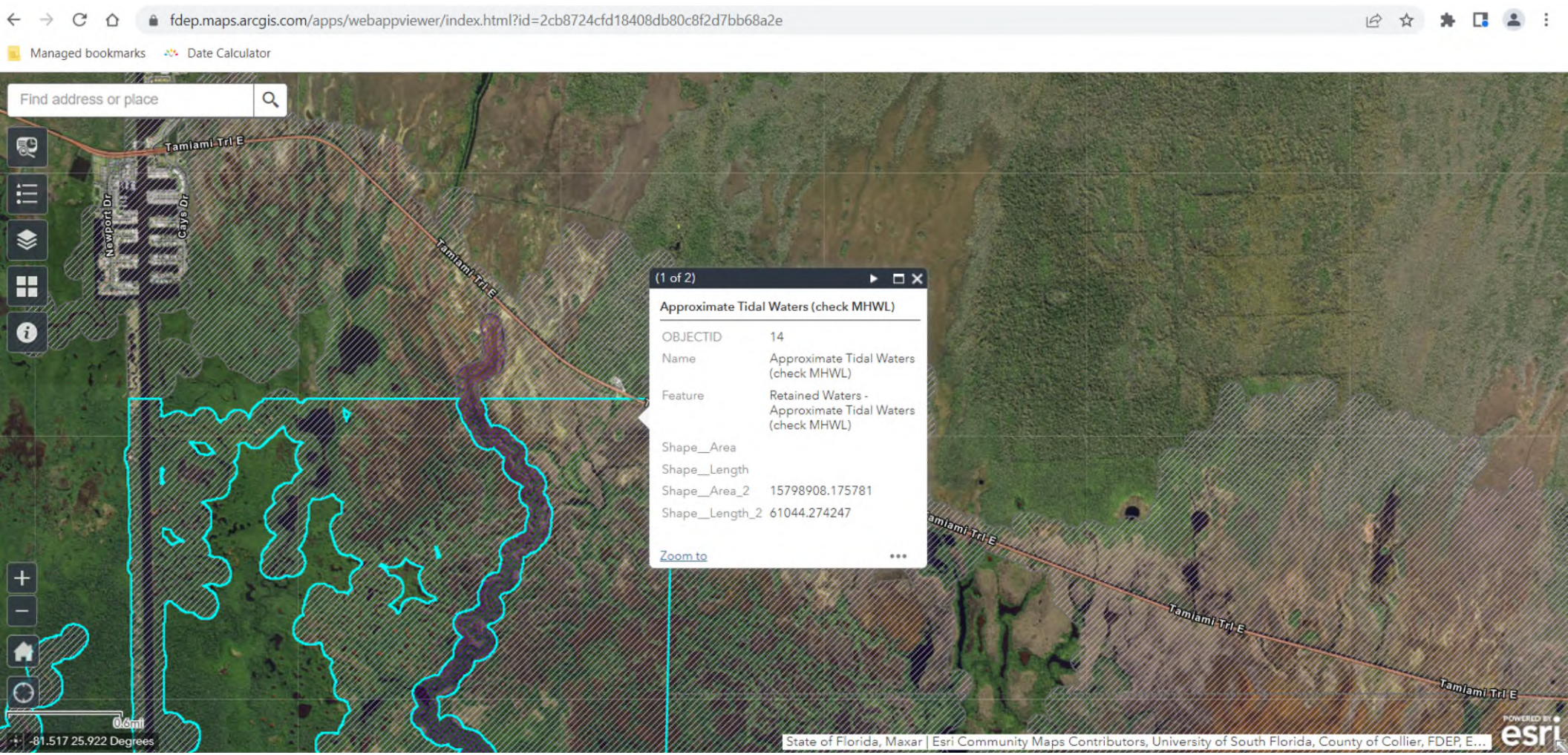
# EXHIBIT 9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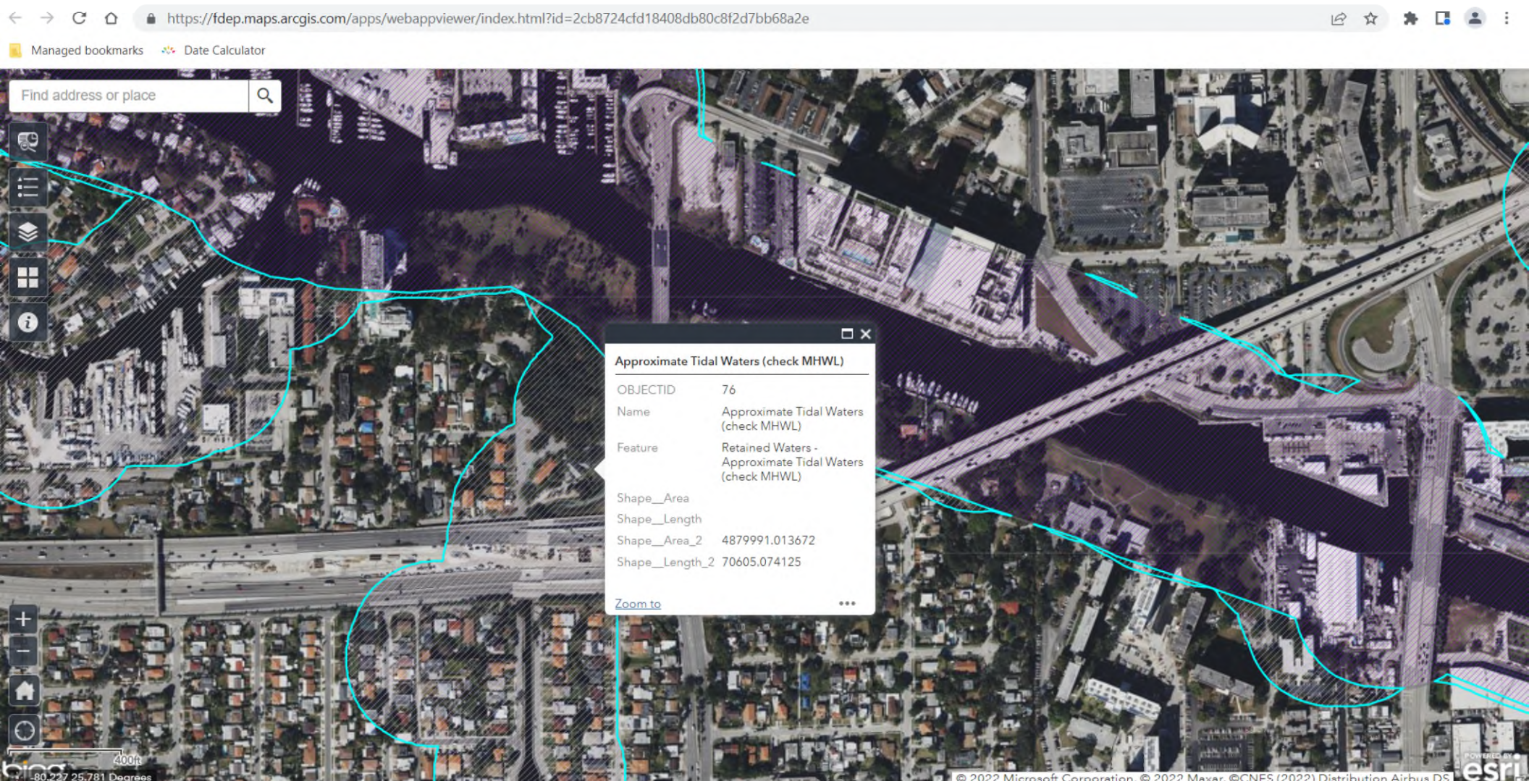
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# EXHIBIT 10

Federal Register

Monday
June 6, 1988

Part V

# Environmental Protection Agency

40 CFR Parts 232 and 233
Clean Water Section 404 Program Definition and Permit Exemptions; Section 404 State Program Regulations; Final Rule

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 232 and 233**

**[FRL-3214-1]**

## Clean Water Act Section 404 Program Definitions and Permit Exemptions; Section 404 State Program Regulations

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** We are hereby issuing final rules containing 404 program definitions and 404(f)(1) exemptions and the procedures and criteria used in approving, reviewing and withdrawing approval of State 404 programs. Part 232 contains definitions and exemptions related to both the Federal and State-run 404 program and Part 233 deals with State programs only. The revisions in these rules will provide the States more flexibility in program design and administration while still meeting the requirements and objectives of the Clean Water Act (the Act).

**EFFECTIVE DATES:** This final rule is effective on July 6, 1988. In accordance with 40 CFR 23.2, this regulation shall be considered issued for purposes of judicial review at 1:00 p.m., Eastern time on June 20, 1988.

**FOR FURTHER INFORMATION CONTACT:** Lori Williams, Office of Wetlands Protection (A–104F), U.S. Environmental Protection Agency, Washington, DC 20460, (202) 382–5043.

**SUPPLEMENTARY INFORMATION:** This final rule contains the 404 program definitions and 404(f)(1) permit exemptions in addition to the procedures and criteria used in approving, reviewing and withdrawing approval of 404 State programs. Part 232 basically recodifies the existing 404 program definitions and 404(f)(1) permit exemptions in a new, separate part of eliminate any confusion about their applicability. Part 232 applies to both the Federal and State programs. Part 233 revises the procedures and criteria used in approving, reviewing and withdrawing approval of 404 State programs. These final rules provide the States more flexibility in program design and administration while still meeting the requirements and objectives of the Act.

This rule was proposed on October 2, 1984 at 49 FR 39012. The notice invited public comments for a 60-day period ending December 3, 1984. On December 10, 1984 (49 FR 48064), the comment period was extended to January 2, 1985. Thirty-eight comments were received—15 State agencies, 10 environmental groups, 6 industry groups, 4 Federal agencies, and 3 others.

The comments covered the full range of views, ranging from those which indicated that more streamlining is required to those which indicated that the proposed regulations increased flexibility at the expense of environmental protection.

In addition to the more significant revisions described in the preamble, we have made minor editorial and content changes from the proposal. We have also renumbered the sections in Part 233 to close the large gaps in numbering in the proposal.

It is the agency's intent that 40 CFR Part 124 no longer applies to 404 State programs. We will be publishing technical, conforming regulations in the near future.

The following summarizes the major comments and EPA's response to them.

### Response to Comments and Explanation of Changes

*Part 232—404 Program Definitions, Exempt Activities Not Requiring 404 Permits*

*Section 232.2(b):* In response to comment, we have revised the proposed definition of "application" for clarity.

*Section 232.2 (e) and (f):* The definition of "discharge of dredged material" and "discharge of fill material" were modified for consistency with the Corps regulations (33 CFR 323.2 (d) and (f)).

*Section 232.2(j):* We received comment that our definition of "general permit" is different from the Corps' definition (33 CFR 323.2(n)). The proposed definition was taken from the Act (404(e)(1)) and, therefore, has been retained in the final regulation.

*Section 232.2(i):* Under Section 404 of the Act, the Corps (and States approved by EPA) issue permits for discharges of dredged and fill material into waters of the U.S. Under Section 402, EPA (and States approved by EPA) issue permits for discharges of all other pollutants into waters of the U.S. In January 1986 the Corps and EPA entered into a Memorandum of Agreement (MOA) to resolve a longstanding difference over the appropriate Clean Water Act program to regulate certain discharges of solid wastes into waters of the U.S. The Corps issued its definition of "fill material" in 1977, which provided that only those solid wastes discharged with the primary purpose of replacing an aquatic area or of changing the bottom elevation of a waterbody are regulated under the Corps' 404 program. These discharges include discharges of pollutants intended to fill a regulated wetland to create fast land for development. The Corps' definition excludes pollutants discharged with the primary purpose to dispose of wastes which, under the Corps' definition, would be regulated under Section 402. Under EPA's definition of "fill material," all such solid waste discharges would be regulated under Section 404, regardless of the primary purpose of the discharger. The difference complicated the regulatory program for some solid wastes discharged into waters of the U.S.

The MOA provides an interim arrangement between the agencies for controlling these discharges. In the longer term EPA and Army agree that consideration given to the control of discharges of solid waste both in waters of the U.S. and upland should take into account the results of studies being implemented under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act (RCRA). The main focus of the interim arrangement is to ensure an effective enforcement program under Section 309 of the Act of controlling discharges of solid and semi-solid wastes into waters of the U.S. for the purpose of dispoal of waste. When warranted, EPA will normally initiate section 309 action to control such unauthorized discharges. If it becomes necessary to determine whether Section 402 or 404 applies to an ongoing or proposed discharge, the determination will be based upon criteria in the agreement, which provide, *inter alia*, for certain homogeneous wastes to be regulated under the Section 402 Program and certain heterogeneous wastes to be regulated under the Section 404 Program, subject to certain criteria. This agreement does not affect the regulatory requirements for materials discharged into waters of the U.S. for the primary purpose of replacing an aquatic area or of changing the bottom elevation of a water body. Discharges listed in the Corps definition of "discharge of fill material" (33 CFR 323.2(1)) remain subject to Section 404 even if they occur in association with discharges of waste meeting the criteria in the agreement for Section 402 discharges.

Unless extended by mutual agreement, the MOA will expire at such time as EPA has accomplished specified steps in its implementation of RCRA. In the meantime, these regulations simply repromulgate EPA's existing definition of fill material.

*Section 232.2 (q) and (r):* Several comments were directed toward the

definitions of "waters of the United States" and wetlands." The commentors suggested that these definitions exceed the original intent of Congress.

The legislative history of the Act, from both 1972 and 1977, emphasizes Congress' intent that the jurisdiction of the Act over waters of the United States reflect the maximum extent permissible under the Commerce Clause of the Constitution. The specific definition of wetlands used in these regulations was originally promulgated in 1977 (prior to the 1977 Amendments to the Act) and has been approved in numerous courts, most recently by the Supreme Court in *U.S.* v. *Riverside Bayview Homes Inc.* (106 S.Ct. 455 (Dec. 4, 1985)). The overall definition of waters of the United States has also been approved by the courts, both in its current articulation and in earlier versions. Therefore, we see no need to change these definitions to narrow their coverage.

Several questions have arisen about this application of this definition to isolated waters which are or could be used by migratory birds and endangered species. As the Agency explained in an opinion by the General Counsel dated September 12, 1985, if evidence reasonably indicates that isolated waters are or would be used by migratory birds or endangered species, they are covered by EPA's regulation. Of course, the clearest evidence would be evidence showing actual use in at least a portion of the waterbody. In adition, if a particular waterbody shares the characteristics of other waterbodies whose use by and value to migratory birds as well established, and those characteristics make it likely that the waterbody in question would also be used by migratory birds, it would also seem to fall clearly within the definition (unless, of course, there is other information that indicates the particular waterbody would not in fact be so used). Endangered species are, almost by definition, rare. Therefore, in the case of endangered species, if there is no evidence of actual use of the waterbody (or similar waters in the area) by the species in question, one could actually assume that the waterbody was not susceptible to use by such species, notwithstanding the particular characteristics of the waterbody. However, in each case a specific determination of jurisdiction would have to be made, and would turn on the particular facts.

For clarity and consistency, we are adding the following language from the preamble to the Corps' regulations published on November 13, 1986 (51 FR 41217). This language clarifies some cases that typically are or are not considered "waters of the United States."

"Waters of the United States" typically include the following waters:

- Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
- Which are or would be used as habitat by other migratory birds which cross State lines; or
- Which are or would be used as habitat for endangered species; or
- Used to irrigate crops sold in interstate commerce.

For clarification it should be noted that we generally do not consider the following waters to be "waters of the United States." However, EPA reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States. Pursuant to agreements with EPA, the permitting authority also has the right to determine on a case-by-case basis if any of these waters are "waters of the United States."

Non-tidal drainage and irrigation ditches excavated on dry land.

- Artificially irrigated areas which would revert to upland if the irrigation ceased.
- Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
- Artificial reflecting or swimming pools or other small ornamental bodies of water created by excavating and/or diking dry land to retain water for primarily aesthetic reasons.
- Waterfilled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction or excavation operation is abandoned and the resulting body of water meets the definition of waters of the United States.

*Section 232.3*: The 1977 Clean Water Act provided for specific exemptions (404(f)(1)) from permitting requirements. EPA's 1980 Consolidated Permit Regulations promulgated regulations spelling out the scope of the exempted activities. The October 2, 1984, publication proposed several substantive revisions to the 404(f)(1) exemptions, as well as organizational changes. This rulemaking finalizes the organizational changes, but finalizes only one of the proposed substantive revisions. That revision substitutes "one year from discovery" for the previous "one year from formation" in § 232.2(d)(3)(i)(D), which exempts as minor drainage certain discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages. This rule also includes the revised irrigation ditch provision which was the subject of a separate rulemaking (40 CFR 233.35(a)(3), December 20, 1984). Additionally, we have made the note following § 232.3(b) more explicit to clarify that a conversion of wetlands to non-wetlands is (and has been) considered a "change in use." Apart from these changes, it appears, based on the comments received, that the regulated sector is familiar with the existing language and that no additional clarification or improvement is now needed.

One commenter suggested that the Best Management Practices (BMPs) for the exemption from permitting for construction or maintenance of farm roads, forest roads or temporary roads for moving mining equipment are complex and difficult to administer and should be left to negotiation between the State and EPA for inclusion in the Memorandum of Agreement (§ 233.13). These BMPs are the same BMPs that are required for exemption from Federal permitting requirements. These BMPs were promulgated in 1980 and have not been the subject of significant comment or complaint since then. A discharger under an approved State program should meet the same requirements as under the Federal program.

*Part 233—State Section 404 Program Assumption Regulations*

We received several comments expressing concern that the proposed regulations would weaken Federal responsibilities, such as those in the Fish and Wildlife Coordination Act, Endangered Species Act, and National Environmental Policy Act. When a State assumes the 404 permitting responsibility, these statutes usually no longer apply, since these statutes only apply to Federal actions. When a State assumes the program, the permit decision is a State action, not a Federal action. However, a Federal oversight role is clearly established by section 404(j) of the Act. Therefore, the altered Federal role after program approval is a function of the statutory scheme, not these regulations.

*Section 233.1:* Several comments were received on partial State programs, ranging from the view that partial programs should not be allowed to the

view that it is desirable to approve partial programs. The commentors identified partial programs in terms of geographic extent or scope of activities regulated. EPA interprets the Act as requiring State programs to have full geographic and activities jurisdiction (subject to the limitation in section 404(g)). While specific authorization for partial programs under section 402 was enacted in the Water Quality Act of 1987, no similar provision was added for section 404. Accordingly, partial 404 programs are not approvable. Because of the special status of Indians, a lack of State authority to regulate activities on Indian lands will not cause the State's program to be considered a partial program.

We encourage States to begin working with the Federal land-owning agencies (i.e., Forest Service, Bureau of Land Management, and National Park Service to name a few) early in the program development stage. This should eliminate or reduce any confusion that may develop, since subsequent to program approval, the State will assume 404 permitting responsibility in these lands.

In response to comments, we have clarified that States may have a program that is more stringent or extensive than what is required for an approvable program. Under State law, and not as part of its approved program, States may also regulate discharges into those waters over which the Corps retains jurisdiction. Those parts of the State's program that go beyond the scope of Federal requirements for an approvable program are not subject to Federal oversight or federally enforceable. Of course, while States may impose more stringent requirements they may not compensate for making one requirement more lenient than required under these regulations by making another requirement more stringent than required.

*Section 233.3:* One commentor requested that we limit confidentiality only to that information that does not relate to adverse effects on the aquatic environment. As these regulations conform to EPA's general regulations on confidentiality of information (40 CFR Part 2), we did not make the requested change.

*Section 233.4:* In the preamble to the proposed rulemaking, we specifically sought comment on the conflict of interest section. Several comments were received on this topic, the vast majority of which supported the need for a conflict of interest provision. However, several commentors did suggest that some flexibility should be added into this section.

The current language is derived from the requirements for an approvable NPDES program. However, State 404 programs should not be held to the same conflict of interest standards as State NPDES programs because of factual differences between the two programs. NPDES discharges are usually long term discharges, often from certain specific types of industrial or municipal dischargers. Discharges authorized by section 404 typically tend to be one time, of shorter duration, and by a wider range of dischargers than NPDES, ranging from private citizens to large corporations, from small fills for boat docks or erosion prevention to major development projects. Therefore, an absolute ban on anyone with a financial interest in a permit from serving on a board that approves permits is likely to be more difficult to comply with under the 404 program than under the NPDES program because under the NPDES criteria, so many people would be considered to be financially interested in 404 permits that the pool of potential 404 board members would be unreasonably small. In addition, because of the nature and size of the discharge, 404 dischargers will often have less at stake financially than 402 dischargers.

Therefore, we have simplified the conflict of interest section from what was proposed. The final rule does not prohibit a person with an interest in a 404 permit decision from generally participating on a board which makes decisions on permit issuance or denial. However, anyone with a direct personal or pecuniary interest in a particular permit decision *must* make such interest known and must *not* participate in that permit decision. This new language allows more latitude in who may serve on a board, but still provides that there not be a conflict of interest or appearance of conflict of interest in any particular permit decision. This language effectuates the basic intent of the NPDES criteria, by ensuring that board members are disinterested decisionmakers.

*Section 233.10:* In response to comment, we have clarified our original intent that copies of State statutes and regulations submitted as part of a State's submission include statutes and regulations concerning the State's applicable administrative procedures.

*Section 233.11:* Several comments addressed the need for additional information in the program description. These commentors were concerned that there may be insufficient information available to determine a program's adequacy. These regulations reflect EPA's view that a complete program description is essential for determining the adequacy of a State's program. A State's program must be at least as stringent and extensive as the Federal program. In response to these comments, we have specified certain information that must be included in the scope and structure of the State's program. The description of the scope and structure of the State's program must include a detailed description of the extent of the State's jurisdiction, scope of the activities regulated as well as the scope of permit exemptions (if any), anticipated coordination, and the environmental permit review criteria.

Section 233.11(h) clarifies the requirements for a description of the State's jurisdiction. As part of the program description, the State must describe separately the waters it will assume after program approval and the waters retained by the Corps. This should make it easier for the public to understand the split jurisdiction between the State and the Corps.

We do not concur with the comment that, in addition to a description of funding and manpower available for program administration, the program description should include formal assurance from the Governor that the level of funding is sufficient to provide for an effective program. However, we have reinstated the existing requirement that the State provide an estimate of the anticipated workload. This should provide the information needed to determine if the State has sufficient manpower to adequately administer a good program. If there is insufficient funding or manpower for an adequate program, this will become evident either in review of the program submission or in the annual review of an approved program.

*Section 233.13:* In response to comment, we have specified that, if more than one State agency has responsibility for program administration, all the involved State agencies must be parties to the Memorandum of Agreement (MOA) between the State and EPA's Regional Administrator. This requirement is in the existing regulations, but had been eliminated in the proposal. Restoring this requirement ensures that all State agencies responsible for program implementation are fully aware of their responsibilities.

One commenter suggested we use the MOA to establish procedures to withdraw a permit from State processing prior to any State action on the application. We do not agree with this suggestion. Except for one situation provided for in Section 404(j), only the

State may issue a permit for discharges in State regulated waters.

We do not agree with the comment that the proposal fails to ensure adequate coordination of EPA and State enforcement activities, as it requires the MOA to address State and EPA roles and coordination on compliance monitoring and enforcement activities. The purpose of formalizing this aspect of the State's program in an MOA is to assure adequate coordination on compliance monitoring and enforcement activities. As part of the State's program submission, this MOA is subject to public comment. If there is any question on the adequacy of a particular program, it should become apparent during Federal agency and public review.

Many commentors expressed concern about the provision for waiver of Federal review. Many were concerned that the waiver provision would be abused and that environmental protection of the resources would suffer. Several commentors were concerned that inappropriate categories would be waived. We feel that use of this waiver provision will reduce workload and paperwork and focus Federal resources where they are most needed and appropriate. Specific waivers will be available for public review and comment prior to program approval.

This final regulation eliminates a separate section on sharing of information (former 40 CFR 233.29), since the MOA with the Regional Administrator is already required to address State submittal of information to EPA and EPA access to State records, reports and files relevant to the program. We feel this adequately serves the purpose of 40 CFR 233.29.

*Section 233.14:* In response to comments, we have, as in the previous section, now specified that all State agencies responsible for program administration must be parties to the Memorandum of Agreement between the State and the Secretary.

EPA has also added a note encouraging States to use this MOA to establish procedures for joint processing of Federal and State permits. Several comments requested that joint processing be made mandatory. While we agree that joint permit processing may be very beneficial to the regulated public, we cannot make this a condition to an approvable program. However, we will continue to strongly encourage States to look into the possibility of joint processing.

In response to comment, we have retained the existing requirement that, if States plan to assume existing Corps general permits, this MOA must include procedures for transferring the support files for these general permits from the Corps to the State. This will facilitate State oversight of such general permits.

One commentor was concerned that the regulations eliminated a provision for procedures to ensure the State did not approve permits on the basis of incomplete applications transferred by the Corps. This provision was deleted as unnecessary. Once a State assumes the program, it is responsible for fulfilling all permitting requirements, including public notice. The regulation requires that sufficient information be available to meet the information requirements for public notice and for assessing the impacts of the discharge. Therefore, the State must either deny incomplete applications or take steps to get the complete information.

*Section 233.15:* The Act establishes a 120-day time clock for EPA decision on a State's request for program approval. The final regulation clarifies that this statutorily mandated time period starts on EPA's receipt of a complete program submission. If the State significantly changes its submission during the review period, the time clocks starts over upon EPA's receipt of the revised submission. The review period may be extended upon agreement of the State and EPA.

We cannot agree to the suggestion that the regulation lengthen the public comment period and notice of public hearing for decision on a State program. The Act is very specific on the timeframe for this decision. If a decision is not made within the 120 days timeframe, the State's program is automatically approved. EPA cannot make a decision within the mandated 120 days of receipt if these time frames are extended. Of course, as noted earlier, a State may agree to extend the time period for program approval; in that event, additional time could be provided for public participation within that State.

EPA will make its decision to approve or disapprove the State's program within the statutorily mandated timeframe. However, if approved, the State's program will not be effective until the notice of approval is published in the **Federal Register.**

Many comments were received on the delegation of authority to the Regional Administrator to approve/disapprove State programs. Most commentors were concerned about national consistency among the States' programs. The Delegation Manual, which formalizes this delegation of authority, requires that the Regional Administrator approving a State program must obtain the concurrence of two EPA headquarters offices—Office of Water and Office of General Counsel. This should ensure the desired national consistency.

EPA has added language to make it explicit that programs shall be approved or disapproved based on whether the State's program fulfills the requirements of this regulation and the Act.

This rule also clarifies that EPA will use existing State, Corps, FWS and NMFS mailing lists as the basis for mailing notices about the State's request for program approval.

A summary of significant comments received and response to these comments will be prepared by the Regional Administrator prior to decision on a State's program. Since there are already specific requirements for public notice and public hearing, there is no need for (and we have deleted the requirement for) the responsiveness summary itself to describe the public participation activities or matters presented to the public.

*Section 233.16:* This rule clarifies that it is the State's obligation to keep the Regional Administrator informed of any proposed or actual changes to the State's approved program.

We rejected the suggestion that if a State must amend or enact new legislation to comply with any modification in Federal regulation, the change must be promulgated within one year of the modification. A two year time period was chosen because many State legislatures do not meet every year. A one-year deadline for these States would be impossible to meet.

We also do not agree with the suggestion that minor revisions to an approved State program should undergo as much review and/or coordination as substantial program revisions. As the name (minor revision) implies, these program changes will not have a significant impact on the program or the environment. Of course, if there is question in EPA's mind about whether a proposed revision is minor or substantial, the revision shall be considered substantial and undergo full review specified for an original application.

*Section 233.21:* Several commentors questioned the legality of State issued general permits. Sections 404 (g), (h) and (j) of the Act authorize this type of State permit.

Many commenters were received on general permits. States have the option of assuming administration of Corps' existing general permits. If they choose to exercise this option, the State is responsible for ensuring discharges comply with any existing permit conditions and any reporting, monitoring

or predischarge requirements. The Corps shall provide the State copies of the support files for any general permits assumed by the State.

One commentor questioned the advisability of EPA approving transfer of some existing Corps general permits to a State. EPA cannot ignore Sections 404 (g)(1) and (h)(5) which provide for a State to assume existing general permits. If a State with an approved State program proposes renewal of any permits that have not worked well, EPA will comment/object to these proposed permits, as appropriate.

Several commentors expressed satisfaction with the Corps' existing general permits. These commentors expressed concern about the States not assuming such existing general permits and about their opportunity for participation in such a decision. It is the State's prerogative not to assume any of the existing general permits. However, if, at the time of initial program assumption, the State does not intend to assume existing Corps general permits, this will be noted within the program submission and will be subject to public comment and public hearing as part of the approval process. Failure to assume existing Corps general permits does not constitute a partial program, since the State will process individual permit applications for those discharges previously authorized by general permit. Any Corps general permit not assumed by the State will remain in effect, for purposes of the Clean Water Act, until its normal expiration date, unless revoked or modified sooner by the Corps under its procedures. If subsequent to program approval the State decides to revoke or modify a general permit it has assumed, the normal revocation procedures will apply.

Many comments were received on predischarge notification requirements for general permits. Some commenters agreed that notification should be determined on a permit-by-permit basis; others felt that such notification should be required on all general permits. This rule adopts the proposal that notification requirements be established on a permit-by-permit basis. For instance, prenotification or reporting may be required in areas where there is a likelihood for individual or cumulative adverse effect on the environment because of discharges conducted under a general permit. All draft general permits will be reviewed by EPA and the other Federal review agencies as well as the general public. If during the review of a particular draft general permit, EPA determines that notification provisions are appropriate to ensure compliance with the 404(b)(1) Guidelines, we will so state in the Federal comments to the State. This ensures that notification requirements will be included where in fact appropriate.

The Department of the Interior requested that we require a 30-day prenotification requirement on any discharge pursuant to a general permit that may impact units of the National Park System, National Wildlife Refuge System, National Fish Hatchery, Reclamation project lands, Indian Reservation and Trust lands, and public lands under the jurisdiction of the Bureau of Land Management. We do not feel at this time that there is a basis for automatically requiring such prenotification. If there is a need for prenotification for a particular permit, it may be specified through the Federal comment on the draft permits and will therefore be included in the issued general permit, in accordance with § 233.50.

Several commentors requested that we retain limits on any single operation conducted under a general permit. We agree that this is appropriate. Subsection 233.21(c) (1) and (2) require each general permit to have limits on the size and location and type of fill for any single operation, sufficient to ensure minimal adverse environmental effects when performed separately and minimal cumulative adverse effects, as required by Section 404(e).

One commentor was concerned that we had deleted all the standard permit conditions (§ 233.23) for general permits. Section 233.21(c) (1) and (2) recapture the main items of § 233.23(c)(1) such as specific description of activities authorized including limitations for any single operation and precise description of geographic area to which the general permit applies including any limitations where operations may be conducted. The only part of § 233.23 (Permit conditions) that does not apply for general permits is § 233.23(c)(1), which is not applicable because it refers to items that are pertinent only to individual permits (e.g. name and address of permittee).

Several commentors suggested that the Director should show cause for invoking discretionary authority to require an individual permit. This regulation specifies that discretionary authority may be based on concerns for the aquatic environment including compliance with these regulations and the 404(b)(1) Guidelines. Section 510 of the Act preserves the Director's right to impose more stringent requirements, i.e., to invoke discretionary authority for other reasons under State law. Once the Director notifies a discharger that he will exercise discretionary authority to require an individual permit, the activity is no longer authorized under the general permit. If the activity continues after notification, the discharger is subject to enforcement action.

*Section 233.22:* In response to comments requesting more specific permit conditions, we have clarified that emergency permits, to the extent possible, should incorporate all applicable permit conditions (§ 233.23), including restoration of the site. We have also retained the provision that emergency permits shall be limited to duration of time needed to complete the authorized emergency action.

We do not agree with the comment that the Regional Administrator must show cause to terminate an emergency permit. The Regional Administrator never terminates permits. The Director may terminate an emergency permit if he determines such an action is necessary to protect human health or the environment.

*Section 233.23:* Each permit shall have conditions which assure compliance with all applicable statutory and regulatory requirements. If any of these requirements change, the permit conditions must be modified as needed to assure compliance with the revised requirements.

In response to comments, we have added a requirement that the permit contain conditions which assure that the discharge will be conducted in a manner which minimizes adverse impacts on the physical, chemical and biological integrity of the waters of the United States. This is a reiteration of the requirements in the 404(b)(1) Guidelines (§ 230.10(a)). Restoration and mitigation may be considered as mechanisms for reducing adverse impacts in appropriate circumstances.

One commentor expressed concern about the proposed deletion of the permit condition referring to BMP's approved by a Statewide 208(b)(4) agency. If a State has an approved 208 program, these requirements would be covered by § 233.23(a), which requires the Director to establish conditions which assure compliance with all applicable statutory and regulatory requirements, so there is no need for a separate reference to the BMP's.

In response to comment, we have retained the requirement for a permit condition explaining that a permit violation is a violation of the Act as well as of State statutes or regulations, as this reminder may enhance compliance.

We also have expanded § 233.23(c)(6) to require the permittee to provide the Director information to determine whether cause exists for permit revocation or termination as well as modification.

We concur with the comment that the Director or his authorized representative should have proper identification before they can enter the premises or inspect any records. We believe this is reasonable and have added this to the final regulation.

One commentor requested that the regulation require more specific identification of the disposal site. We feel that between the existing requirements for permit application, public notice and permit conditions, the disposal site will be adequately identified. However, as a safeguard, we have added that the description of the project on the issued permit must include a description of the purpose of the discharge.

*Section 233.24 (Effect of a permit).* This section has been deleted as unnecessary. The statements in this section were simply facts which do not need to be included in regulations to be in effect.

*Section 233.30:* Many comments were received on the State application form. A number expressed concern that there would not be enough information available to evaluate the potential impacts of the discharge activity. We have accordingly revised this section to generally reflect the same application information requirements contained in the Corps' current regulations (33 CFR Part 325). Under this approach, State assumption of the program should not result in any change in either the kind of information available for review or the burden upon the applicant to supply the information. In addition, a requirement for certification that all information contained in the application is true and accurate has been added to § 233.30(b)(4).

Several commentors requested that we include the publicity and pre-application consultation requirements in the regulations. As noted in the preamble to the proposed rule, we agree that publicity and preapplication consultation are beneficial; however, they are not required for an approvable program. We will continue to encourage States to include them in their programs.

*Section 233.31:* In response to comment, this section has been simplified from proposed § 233.61; it now simply requires coordination with other States whose waters may be impacted by the discharge and coordination with Federal and Federal-State water related planning and review processes, without attempting to list such processes. These planning and review processes may include, but are not limited to, coastal zone management plans, 208 areawide plans, Continuing Planning Process (§ 303(e)), and advanced identification (40 CFR 230.80). The coordination procedures will likely vary from State to State. The State's anticipated coordination shall be included in the program description. EPA will carefully scrutinize the anticipated coordination to assure it is adequate.

Comments were received suggesting that we require States to incorporate into their programs information developed by FWS' National Wetlands Inventory (NWI). While we agree that this information would be very useful in administering a State's program and encourage States to take advantage of it, it should not be mandatory for States to incorporate this information in their programs. The NWI was not developed for regulatory purposes. Additionally, the FWS did not use EPA's definition of wetlands in the NWI; therefore, the "NWI wetlands" and the "404 wetlands" may not always coincide.

Several commentors were concerned that the lack of specificity of coordination requirements would weaken State programs. While these regulations do not list specific entities (agencies) that must be coordinated with, we will carefully evaluate the coordination aspects of each State's program prior to decision on approval/disapproval. While we anticipate that the State's permitting agency will coordinate with State fish and game agencies, this is not required by the Fish and Wildlife Coordination Act (FWCA). Once a State assumes the 404 permitting responsibility, that Act no longer applies in the permitting process since permitting becomes a State (not Federal) action. The FWCA will still require coordination with FWS whenever a State-issued permit is issued to a Federal agency or facility. However, it must also be remembered that States must assure compliance with the 404(b)(1) Guidelines which provide for protection of fish and wildlife resources. EPA is responsible for soliciting comments from the Corps, FWS, and NMFS, and commenting to the States.

*Section 233.32:* Many comments were received on proposed § 233.62 (public notice), some in support of and others opposed to shortening the public comment period. The final rule provides for a public comment period at least comparable to that under the Federal program. The existing Corps' regulations (33 CFR Part 325.3) specify a public notice period of "A reasonable period of time, normally thirty days but not less than fifteen days from date of mailing." Today's rules specify "* * * a reasonable period of time, normally 30 days," and allows approving a program that allows less than a 30 day public comment period if the Regional Administrator determines that "sufficient public notice is provided for." The Regional Administrator must carefully consider all aspects of a State's program in regard to public involvement, including how extensive the State's mailing list is, whether notice is published in area newspapers, what the actual length of the comment period is, whether the shorter time period is for all projects or just certain categories of discharge. We anticipate that comment periods would not be shorter than 20 days, and we will carefully scrutinize any that are less than 30 days.

Several comments on the content of the public notices were also received. These comments objected to the lack of specificity of the information required to be included in the public notice. In response to these comments, the information requirements for public notice have been changed. These regulations incorporate much of the language in the Corps' existing regulations (33 CFR 325.3.) Therefore, there should be no net change in the information available to evaluate a proposed discharge from the existing Federal program to an approved State program.

We have modified the requirement on who must automatically be mailed notice of a permit application. While the notification may vary depending on the type and location of the project, certain notifications, such as the local governmental agency, should be routine. Other notifications that may be useful include historic preservation and coastal zone management offices.

In response to comments, we have also clarified that anyone may request to be put on a mailing list to receive copies of public notices.

One commentor suggested that we make it clear that information obtained in response to the public notice will be taken into consideration as part of the environmental assessment to determine if an environmental impact statement (EIS) should be prepared. We have not included this language since, once a State assumes the permitting responsibility, the National Environmental Policy Act (NEPA) no longer applies. NEPA applies to Federal actions. When a State assumes the program, the permit decision is a State action, not a Federal action. While many States have a State law equivalent to

NEPA, it is not the function of these regulations to address EIS requirements under such State laws.

*Section 233.33:* This provision has been rewritten to clarify how the transcript of public hearings will be made available to the public.

*Section 233.34:* Several commentors expressed concern that requiring the State to prepare a written determination for each permit is excessive paperwork. We do not concur with this view; we feel that a written determination is needed for each permit decision to ensure proper evaluation and to facilitate subsequent review. Therefore, these regulations contain the requirement that the Director must prepare a written determination for each permit application outlining the decision and the rationale for the decision. Of course, in accordance with § 230.6 of the Guidelines, the level of detail may be tailored to the circumstances.

Any State environmental review criteria must be at least equivalent to the 404(b)(1) Guidelines for an approvable program. The 404(b)(1) Guidelines were the subject of an Advanced Notice of Proposed Rulemaking (ANPRM) (47 FR 36798) published August 23, 1982, to solicit comments and examples of alleged problems with these Guidelines. At this time, EPA has not found sufficient basis for revising the Guidelines. Therefore, States must assure compliance with the current Guidelines, as required in section 404(h)(1)(A)(i).

We do not concur with the suggestion that we establish specific deadlines for State decision on an application. The only deadlines in this regulation are those which relate to the statutorily mandated timeframes for Federal review of an application.

*Section 233.35:* The final regulation simply requires signature by both the applicant and the Director, and does not specify the sequence in which they sign. However, EPA anticipates that, if the project is controversial or if the permit conditions are restrictive, the Director may wish to require the applicant to sign the permit to indicate acceptance of its terms prior to the Director's signature.

*Section 233.36:* These regulations simplify the procedures for modification, suspension and revocation of permits. State procedures to handle these situations shall be approved if there is opportunity for public comment, coordination with the Federal review agencies, and opportunity for public hearing. Language has been added (§ 233.36(b)) specifying that permit modification must be in compliance with § 233.20 (Prohibitions).

The 402 State program regulations handle modifications differently than these 404 State Program Regulations. 40 CFR 122.62 provides an exclusive list of grounds which justify the modification of a 402 State permit. Section 233.36 does not. This difference between the two programs is appropriate for the following reasons. First, the 402 program has a long history of litigation concerning reopener and the five year maximum permit term; the 404 program does not. Second, the 402 program generally regulates continuous discharges; consequently, there is great concern with balancing the permittee's need for certainty and continuity against the program's need to impose more stringent standards. The 404 program, however, tends to regulate short-term discharges, and thus the permittee's need for continuity is much less than it is in the 402 program. Consequently, the 404 programs may facilitate permit modification by States where the 402 program can not.

One commenter expressed concern about use of abbreviated review procedures for modification of permits for minor modification of project plans that do not "significantly" change the character, scope and/or purpose of the project or result in significant change in environmental impact. The commenter was concerned that the use of the word "significant" was too vague and allowed a procedural loophole to avoid public and agency review. The key word in this sentence is "*minor*" modification. Things that will be evaluated in making the decision on whether the project modification is minor are whether there is any change in project purpose, or any change that increases the amount of dredged or fill material, or any change that enlarges the scope of the project. We anticipate that, if there is any question about the need for public and agency review of a project modification, the State will initiate full review procedures.

*Section 233.37:* In the preamble to the proposed regulation (49 FR 39015) we noted that the requirements concerning who must sign may not necessarily be appropriate for the 404 program. The language in the proposal was the result of a settlement agreement (*NRDC* v. *EPA*, and consolidated cases [No. 80–1607 (D.C. Circuit)]). All the comments received on this subject agreed that the proposed signature requirements are appropriate for NPDES discharges, but are too inflexible and are not really appropriate for 404 discharges, since most 404 discharges are a one time discharge and on a relatively small scale. We concur with these comments. Therefore, this final regulation incorporates the signatory requirements contained in the Corps' current regulations (33 CFR 325.1). Thus, there will be no change from the existing Section 404 requirements when a State assumes the program.

The certification that all statements contained in the application or other documents are true and accurate and that there are penalties for submitting false information has been removed from this section to § 233.30 (Application for a permit). Section 233.41(a)(3)(iii) also addresses this certification in that it provides for authority to seek criminal fines against any person who knowingly makes false statements in any application, record, report, plan or other document filed or required to be maintained under the Act, these regulations or the approved State program.

*Section 233.38:* One commentor requested that if a State permit application has been submitted in a timely manner, an existing Federal permit should be continued beyond its expiration date until a State permit is issued. The provision in the Administrative Procedures Act for continuing Federal permits does not apply in this setting. Therefore, such continuation may be accomplished only through State law. These regulations allow but do not require the State to have such authority. We cannot mandate that this be a requirement for an approvable program.

*Section 233.40:* The compliance evaluation provision has been rewritten from the existing regulation to simplify it and to provide additional flexibility. We continue to believe that compliance evaluation is an important component of an effective Section 404 program. Therefore, the previous provisions (40 CFR 233.27 (1984)) should be considered as guidance in interpreting the new streamlined language.

We do not agree with the comment that State agency authority to "* * * enter any site or premises subject to regulation" is excessive or may violate civil rights. This provision does not override applicable warrant requirements or other safeguards. Of course, if State requirements so constrain the State's right of entry that the State lacks meaningful authority to inspect, the program would not be approvable. (We are not presently aware of any States where there would be this problem, however.)

*Section 233.41:* Many comments were received on the proposed alternative requirements for authority to assess civil and criminal fines of a specific amount. The comments ranged from approval of

the alternative concept to concern about weakening State enforcement capability. This regulation promulgates the proposed subsection allowing approval of a State program without the specific monetary penalty authority if it has a demonstrably effective alternative enforcement mechanism.

We are interested in ensuring that State programs have strong enforcement capability, since it is not desirable for EPA to constantly overfile in State enforcement actions. Because the Act does not specify that a State must have penalties equal to the Federal penalties or at any other particular level for an approvable program, EPA has substantial discretion in deciding what is sufficient State enforcement authority. These regulations establish monetary penalties for which the State must have the authority to assess; they need not be assessed by the State for every violation. These amounts are approximately half those EPA is authorized to assess.

If a State cannot fulfill these monetary penalty requirements, it can still have an approved program if EPA is satisfied that it has "an alternate, demonstrably effective method of ensuring compliance." However, even under the alternative enforcement program provision, States must still have the authority to assess both civil and criminal penalties, although the amounts may not equal those required by § 233.41(a)(i)–(iii).

Before approving any alternate enforcement mechanism, the Regional Administrator (RA) will carefully evaluate the State's proposed alternative enforcement mechanism to ascertain the effectiveness of the proposed alternative. The State's program must have a clear history of demonstrated effective deterrence, while also having direct punitive value. Programs will have to be in effect for at least one year prior to formal application for program approval in order to have a sufficient track record for evaluating effectiveness.

An effective, strong restoration program is the type of enforcement program that would be given serious consideration as an alternative under this provision. Being of a solid nature, 404 discharges tend to stay where originally placed, making restoration of illegally filled areas more feasible for 404 discharges as compared to 402 discharges. Most 404 discharges are a one time discharge, of relatively short duration, and on a relatively small scale. This lends more credence to restoration working as an alternative enforcement mechanism which can serve to protect the environment, deter future violations, and penalize the violator.

A key aspect that the RA must consider in determining effectiveness is whether the alternative program has an equivalent deterrence effect as would assessment of monetary penalties. The alternative approach must be strong enough to cause a violator to cease any and all illegal activities. It must also deter others from violating the State's permit program. How effective the alternative mechanism will be in preventing and restoring any environmental damage will also be considered by the RA in making a decision on approval/denial of a State's alternative enforcement program.

The enforcement authority which a State must have in order for a Section 404 program to be approved is essentially the same enforcement authority it must have to administer an NPDES program under the Act. If a State lacks authority to recover penalties of the levels required under § 233.41(a)(3)(i)–(iii), EPA will review a State's authority to assess penalties in light of the State's ability to provide other incentives to compliance and deterrence to noncompliance. EPA intends that penalties for violations of Section 404 programs will provide general and specific deterrence. Penalties assessed in State administered programs should persuade the violator to take precautions against falling into noncompliance again, deter violations by others, and restore economic equity to regulated parties who have complied with Section 404 requirements. Penalties assessed in a State program should, at a minimum, recapture the economic benefit that a violator has wrongfully obtained. In support of its application for program approval, a State may provide information regarding its authority to obtain money judgments from Section 404 violators under equitable theories such as restitution and unjust enrichment.

Any proposed alternative enforcement mechanism will be available for public comment as part of the State's program submission. We are concerned about national consistency in administration and effectiveness of State programs. Therefore, we must stress that approval of an alternate enforcement mechanism will not be undertaken lightly. States should continue to try to meet the existing monetary penalty requirements.

In these regulations we have added a reporting requirement for States using the alternative enforcement authority. Under final § 233.41(d) the State must keep the Regional Administrator informed of all enforcement actions carried out under the alternative provision. The manner of reporting will be established as part of the State's submission in the Memorandum of Agreement with the Regional Administrator. This reporting requirement will enable EPA to closely monitor the effectiveness of the State's enforcement program and to determine any need for EPA overfiling in State enforcement cases and/or action under Section 309.

In response to comment, we have retained the requirement that the burden of proof for State enforcement cases shall be no greater than the burden of proof required of EPA.

One commentor suggested that any intervention in a State enforcement action must include some showing of justification. This regulation adopts the proposal which allows intervention "* * * by any citizen having an interest which is or may be adversely affected." We feel this adequately answers the suggestion.

One commentor requested that EPA prescribe procedures for any affected person to initiate legal action in State or Federal court against the Director, the permittee, or anyone operating in noncompliance with a State program. This would be comparable to the citizen suit provision in Section 505 of the Act. While such a provision might strengthen a State program, there is no such statutory requirement for an approvable program. However, we do anticipate that many States will have some form of citizen suit provisions.

**Subpart F—Oversight Policy**

Many Federal environmental programs were designed by Congress to be administered at the State level wherever possible. EPA's policy has been to transfer the administration of national programs to State governments to the fullest extent possible, consistent with statutory intent and good management practice. The clear intent of this design is to use the strengths of Federal and State governments in a partnership to protect public health and the nation's air, water, and land. State governments are expected to assume primary responsibility, while EPA is to provide consistent environmental leadership at the national level, develop general program frameworks, establish standards as required by the legislation, assist States in preparing to assume responsibility for program operation, provide technical support to States in maintaining high quality programs, and ensure national compliance with environmental quality standards.

The relationship between EPA and the States under assumption of the Section 404 Program is intended to be a partnership. Both EPA and the States have continuing roles and responsibilities under assumed State 404 programs. EPA remains responsible to the President, the Congress and the public for progress toward meeting national environmental goals and for ensuring that the Clean Water Act is adequately enforced. Thus, EPA's policy to transfer management responsibilities for environmental programs to State governments carriers with it a corresponding EPA responsibility to assure the objectives of the Federal law are achieved.

Evaluation of approved State 404 programs will generally focus on overall program performance and identifying patterns of problems. However, there will be some cases where EPA (and other Federal agency) participation in an individual State permit decision will be appropriate. Section 404(j) specifically provides for Federal comment on individual permit applications.

However, based on our general policy and our specific experience with Michigan's Section 404 program, the provision for waiver of Federal review (§ 404(k)) will be exercised to focus permit-specific oversight primarily on proposed discharges with potentially serious adverse environmental impacts. Review of Michigan's assumed program clearly illustrates that Federal review was waived in the vast majority of cases. In 1985, approximately 1% of the permit applications received Federal review; in 1986, approximately 1.5%.

We expect to issue guidance on Federal oversight of approved State programs under these regulations. This will include guidance on identifying and describing categories of activities eligible and appropriate for waiver of Federal review, emphasizing reasonable waiver initially, followed by increasing waiver over time based on experience with the State 404 Program. Thus, as experience demonstrates that a State is effectively administering its approved program, so as to comply with all national requirements, it is expected that additional waivers will be developed, replacing more individual permit review with periodic programmatic review. This periodic review will usually be conducted on an annual basis, but may be more frequent, as necessary or appropriate. EPA intends that other Federal agencies with responsibility under Section 404 will have an opportunity to participate in State program review activities and in the determination of what changes to such review would be appropriate.

*Section 233.50:* Several commentors expressed concern that too much time is allowed for Federal review of State permit applications. The final regulations retain the proposed time frames because they are based on Section 404(j) of the Act. However, the regulations do allow for the times to be shortened by mutual agreement of the Federal agencies and the State.

Several commentors questioned why EPA receives the public notice from the State and distributes the notice to the Federal agencies. The Act establishes EPA as the Federal focus of contact with the State. However, if the State, with the goal of streamlining, wants to provide copies of the public notice directly to all the Federal agencies, this can be accommodated within the Memorandum of Agreement with the Regional Administrator (§ 233.13). In either case, the comments from the Federal review agencies will be forwarded to EPA to consolidate the Federal comment to the State.

In addition to the public notice and draft general permit, the Regional Administrator shall forward to the Corps, FWS, and NMFS any other information pertinent to making an informed comment that the States makes available to him.

This regulation eliminates the requirement that States prepare draft individual permits. Draft general permits must be prepared (§ 404(j) refers to a copy of each proposed general permit) but there is no comparable statutory requirement for draft individual permits. Moreover, draft permits are not prepared as part of the current Federal program. Public review of individual permit applications is currently based on the public notice; public review subsequent to State assumption will also be based on public notice. Therefore, there will be no substantial change from existing procedures.

One commentor questioned why the public notice was circulated to EPA for Federal review instead of the permit application (§ 404(j)). The public notice usually contains all the pertinent information in the permit application (§ 233.32(d)). Under the Corps administered program, public and Federal review is normally based on the public notice; therefore, there will be no significant change from current practice. In addition, under either the Federal and State programs, EPA can request a copy of a particular application if it has a need for it.

In response to comment, we have reinstated the provision that if the Regional Administrator notified the Director within 30 days of receipt of the public notice that there is no comment, he may reserve the right to object within 90 days of receipt of the notice based on new information brought out by the public during the comment period or at a hearing.

Contrary to several comments received, the regulation already provides that the State shall provide a copy of every issued permit to the Regional Administrator (§ 233.50(a)(4)). These issued permits will be reviewed for compliance with the requirements for an approvable program, as part of EPA's overall oversight.

One commentor suggested that our provision for the Regional Administrator to consolidate comments for the Federal agencies conflicted with Section 404(h)(1)(H). However, Section 404(j) specifically assigns this coordination/consolidation role to EPA's Regional Administrator. This section clearly establishes EPA's Regional Administrator as the Federal focus for approved State programs. After "full consideration" of the comments of the Federal review agencies, EPA will prepare and transmit the Federal comment on a permit application to the State. If appropriate and/or useful, EPA may transmit copies of the other Federal agencies' comment to the State as part of the official Federal comment. Those agencies are, of course, also free to furnish information copies of their comments to the State at the same time they submit them to EPA.

*Section 233.51:* This section received many comments, which range from the view that Federal review has been waived far too much to one that Federal review has not been waived for enough categories of discharge. Other than the few categories never eligible for waiver, waivers will be developed on a State-by-State basis. Each State has unique resources that must be considered in developing categories or discharge eligible for waiver. These categories will be developed in consultation with the Federal review agencies and will be open to public comment. We anticipate that use of this waiver mechanism will reduce unnecessary paperwork and direct the Federal presence to where it is most needed and appropriate.

The proposed rule specified that general permits are not eligible for waiver of Federal review. The proposal intended that *draft* general permits are not eligible for waiver of review. This has been clarified in the final rule.

In response to comment, we have reinstated the provision that discharges into National and historical monuments

are not eligible for waiver of Federal review, in light of the special Federal interest in them.

We anticipate that existing Corps nationwide permits will be used as a basis for developing categories to discharge eligible for waiver of Federal review. Previous Federal agencies' comments (or no comment) can also be used in determining activities eligible for waiver of Federal review. Where EPA has used the advanced identification procedure with the Corps or the State under 40 CFR 230.80, or on its own initiative under Section 404(c) (40 CFR Part 231), the results of that process will be used to determine those areas and categories of discharge that should be, and/or those that should not be, considered for waiver of Federal review.

Categories of activities eligible for waiver of Federal review in a particular State will be developed after consultation with the Corps, FWS, and NMFS. These categories will be described in the State's submission for program approval and therefore will be subject to public comment. Activities for which Federal review is waived are also subject to annual review. If, at any time, any of these categories of activities are deemed inappropriate for continued waiver, they can (and will) be withdrawn from the waiver provision and become subject to individual review.

*Section 233.52:* In response to comments, we have added a requirement that the State's draft annual report to be made available for public inspection.

The annual report is a mandatory, not a discretionary, requirement for an approved program. In response to comment, we have added to the information that shall be included in the annual report the number of suspected unauthorized activities reported to the State and the nature of the State's action on these reported activities; added that the State shall report the number of violations identified as well as the number and nature of enforcement actions taken; and the number of permit applications received but not yet processed.

Contrary to comment on the annual reporting requirements, the regulation does require the Director to respond, in the final report, to the Regional Administrator's comments and questions about the draft report.

*Section 233.53:* One commentor suggested that program withdrawal should be initiated only where a State's program, on the whole, has repeatedly failed to comply with the requirements for an approvable program. This commentor suggested that continued problems with any one of the criteria specified in § 233.53(b) (2) and (3) is not sufficient grounds for program withdrawal. We cannot concur with this suggestion. While we do agree that program withdrawal will not be taken lightly and that program approval will not be withdrawn for minor reasons, continued non-performance of any of the criteria specified can be grounds for initiating program withdrawal. Each of the criteria listed is a vital part of an approved program and continued non-performance of any of these would result in a program that no longer fulfills the requirements for an approved program.

These regulations provide that the Administrator shall respond in writing to any petition to commence withdrawal proceedings. One commentor suggested that this exceeded the public involvement requirements. We believe that such written response is nonetheless good policy and publish the rule as proposed.

### Executive Order 12291

Since these rules are revisions which provide regulatory relief by, for the most part, increasing flexibility in State program design and administration, we have determined that they are not a major rule requiring a Regulatory Impact Analysis under Executive Order 12291. This rule has been reviewed by the Office of Management and Budget in accordance with the requirements of Executive Order 12291.

### Regulatory Flexibility Act

This final rule was reviewed under the Regulatory Flexibility Act of 1980, Pub. L. 96–354, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities. Since this revision to 40 CFR Part 233 will reduce paperwork, reporting requirements and application information requirements, this final rule will be beneficial to small entities. Thus, no Regulatory Flexibility Analysis is needed.

### Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this final rule under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and has assigned OMB control numbers:

2090–011.
2090–012.
2090–013.
2090–015.

### List of Subjects in 40 CFR Parts 232 and 233

Administrative practice and procedure, Reporting and recordkeeping requirements, Confidential business information, Water pollution control, Indian lands, Intergovernmental relations, Water supply, Waterways, Navigation, Penalties, Wetlands.

Dated: May 27, 1988.

**Lee M. Thomas,**

*Administrator, Environmental Protection Agency.*

For the reasons set out in the preamble, 40 CFR Part 232 is amended as set forth below.

1. Part 232 is added to read as follows:

## PART 232—404 PROGRAM DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

Sec.
232.1 Purpose and scope of this part.
232.2 Definitions.
232.3 Activities not requiring permits.

Authority: 33 U.S.C. 1344.

### § 232.1 Purpose and scope of this part.

Part 232 contains definitions applicable to the Section 404 program for discharges of dredged or fill material. These definitions apply to both the Federally operated program and State administered programs after program approval. This part also describes those activities which are exempted from regulation. Regulations prescribing the substantive environmental criteria for issuance of Section 404 permits appear at 40 CFR Part 230. Regulations establishing procedures to be followed by the EPA in denying or restricting a disposal site appear at 40 CFR Part 231. Regulations containing the procedures and policies used by the Corps in administering the 404 program appear at 33 CFR Parts 320–330. Regulations specifying the procedures EPA will follow, and the criteria EPA will apply in approving, monitoring, and withdrawing approval of Section 404 State programs appear at 40 CFR Part 233.

### § 232.2 Definitions.

(a) *Administrator* means the Administrator of the Environmental Protection Agency or an authorized representative.

(b) *Application* means a form for applying for a permit to discharge dredged or fill material into waters of the United States.

(c) *Approved program* means a State program which has been approved by the Regional Administrator under Part 233 of this chapter or which is deemed

approved under Section 404(h)(3), 33 U.S.C. 1344(h)(3).

(d) *Best management practices* (BMPs) means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of waters of the United States from discharges of dredged or fill material. BMPs include methods, measures, practices, or design and performance standards which facilitate compliance with the Section 404(b)(1) Guidelines (40 CFR Part 230), effluent limitations or prohibitions under Section 307(a), and applicable water quality standards.

(e) *Discharge of dredged material* means any addition of dredged material into waters of the United States. The term includes, without limitation, the addition of dredged material to a specified discharge site located in waters of the United States and the runoff or overflow from a contained land or water disposal site. Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill) are not included within this term and are subject to Section 402 of the Act even though the extraction and deposit of such material may require a permit from the Corps or the State Section 404 program. The term does not include *de minimus*, incidental soil movement occurring during normal dredging operations.

(f) *Discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure; the building of any structure or impoundment requiring rock, sand, dirt, or other materials for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses, causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

(g) *Dredged material* means material that is excavated or dredged from waters of the United States.

(h) *Effluent* means dredged material or fill material, including return flow from confined sites.

(i) *Fill material* means any "pollutant" which replaces portions of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose.

(j) *General permit* means a permit authorizing a category of discharges of dredged or fill material under the Act. General permits are permits for categories of discharge which are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.

(k) *Owner or operator* means the owner or operator of any activity subject to regulation under the 404 program.

(l) *Permit* means a written authorization issued by an approved State to implement the requirements of Part 233, or by the Corps under 33 CFR Parts 320–330. When used in these regulations, "permit" includes "general permit" as well as individual permit.

(m) *Person* means an individual, association, partnership, corporation, municipality, State or Federal agency, or an agent or employee thereof.

(n) *Regional Administrator* means the Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.

(o) *Secretary* means the Secretary of the Army acting through the Chief of Engineers.

(p) *State regulated waters* means those waters of the United States in which the Corps suspends the issuance of Section 404 permits upon approval of a State's Section 404 permit program by the Administrator under Section 404(h). The program cannot be transferred 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 the high tide line, including wetlands adjacent thereto. All other waters of the United States in a State with an approved program shall be under jurisdiction of the State program, and shall be identified in the program description as required by Part 233.

(q) *Waters of the United States* means:

(1) All waters which are currently used, were used in the past, or may be susceptible to us in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

(2) All interstate waters including interstate wetlands.

(3) All other waters, such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation, or destruction of which would or could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purposes by industries in interstate commerce.

(4) All impoundments of waters otherwise defined as waters of the United States under this definition;

(5) Tributaries of waters identified in paragraphs (g)(1)-(4) of this section;

(6) The territorial sea; and

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (q)(1)–(6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of the Act (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

(r) *Wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

### § 232.3 Activities not requiring permits.

Except as specified in paragraphs (a) and (b) of this section, any discharge of dredged or fill material that may result from any of the activities described in paragraph (c) of this section is not prohibited by or otherwise subject to regulation under this Part.

(a) If any discharge of dredged or fill material resulting from the activities listed in paragraph (c) of this section contains any toxic polutant listed under Section 307 of the Act, such discharge shall be subject to any applicable toxic effluent standard or prohibition, and shall require a Section 404 permit.

(b) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraph (c) of this section

must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernable alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.

[Note.—For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with constuction of dikes, drainage ditches or other works or structures used to effect such conversion. A conversion of Section 404 wetland to a non-wetland is a change in use of an area of waters of the U.S. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.]

(c) The following activities are exempt from Section 404 permit requirements, except as specified in paragraphs (a) and (b) of this section:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (d) of this section.

(ii)(A) To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (i.e., ongong) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

(B) Activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a Section 404 permit whether or not it was part of an established farming, silviculture or ranching operation.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance (but not construction) of drainage ditches. Discharge associated with siphons, pumps, headgates, wingwalls, wiers, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the United States. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a State has an approved program under Section 208(b)(4) of the Act which meets the requirements of Section 208(b)(4)(B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. The BMPs which must be applied to satisfy this provision include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the United States shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the United States;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained to prevent erosion during and following construction;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within the waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;

(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the United States shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic River System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(d) For purpose of paragraph (c)(1) of this section, cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:

(1) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or

forest crops to aid and improve their growth, quality, or yield.

(2) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(3)(i) Minor drainage means:

(A) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a Section 404 permit;

(B) The discharge of dredged or fill material for the purpose of installing ditching or other water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;

(C) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of the Act, and which are in established use for the production or rice, cranberries, or other wetland crop species.

[Note.—The provisions of paragraphs (d)(3)(i) (B) and (C) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.]

(D) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year after such blockages are discovered in order to be eligible for exemption.

(ii) Minor drainage in waters of the United States is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adequate to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming).

In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(4) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing, as described above, will never involve a discharge of dredged or fill material.

(5) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.

(e) Federal projects which qualify under the criteria contained in Section 404(r) of the Act are exempt from Section 404 permit requirements, but may be subject to other State or Federal requirements.

2. Authority citation for Part 233 continues to read as follows:

**Authority:** 33 U.S.C. 1344.

3. Part 233 is amended by revising Subparts A, B, C, E, and F and by redesignating Subpart D as G and the section number is changed from "233.42" to "233.60" and by adding a new Subpart D to read as follows:

## PART 233–404 STATE PROGRAM REGULATIONS

### Subpart A—General



### Subpart B—Program Approval



### Subpart C—Permit Requirements



### Subpart D—Program Operation



### Subpart E—Compliance Evaluation and Enforcement



### Subpart F—Federal Oversight



* * * * *

### Subpart A—General

#### § 233.1 Purpose and scope.

(a) This Part specifies the procedures EPA will follow, and the criteria EPA

will apply, in approving, reviewing, and withdrawing approval of State programs under Section 404 of the Act.

(b) Except as provided in § 232.3, the State program must regulate all discharges of dredged or fill material into State regulated waters. Partial State programs are not approvable under Section 404. A State's decision not to assume existing Corps general permits does not constitute a partial program. The discharges previously authorized by general permit will be regulated by State individual permits. However, in many cases States will lack authority to regulate activities on Indian lands. This lack of authority does not impair a State's ability to obtain full program approval in accordance with this Part, i.e., inability of a State to regulate activities on Indian lands does not constitute a partial program. The Secretary will administer the program on Indian lands if the State does not have authority to regulate activities on Indian lands.

(c) Nothing in this Part precludes a State from adopting or enforcing requirements which are more stringent or from operating a program with greater scope, than required under this Part. Where an approved State program has a greater scope than required by Federal law, the additional coverage is not part of the Federally approved program and is not subject to Federal oversight or enforcement.

**Note.**—State assumption of the Section 404 program is limited to certain waters, as provided in section 404(g)(1). The Federal program operated by the Corps of Engineers continues to apply to the remaining waters in the State even after program approval. However, this does not restrict States from regulating discharges of dredged or fill material into those waters over which the Secretary retains Section 404 jurisdiction.

(d) Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this Part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.

### § 233.2 Definitions.

The definitions in Parts 230 and 232 as well as the following definitions apply to this Part.

(a) *Act* means the Clean Water Act (33 U.S.C. 1251 et seq.).

(b) *Corps* means the U.S. Army Corps of Engineers.

(c) *FWS* means the U.S. Fish and Wildlife Service.

(d) *Interstate agency* means an agency of two or more States established by or under an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining to the control of pollution.

(e) *NMFS* means the National Marine Fisheries Service.

(f) *State* means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands. For purposes of this regulation, the word State also includes any interstate agency requesting program approval or administering an approved program.

(g) *State Director* (*Director*) means the chief administrative officer of any State or interstate agency operating an approved program, or the delegated representative of the Director. If responsibility is divided among two or more State or interstate agencies, Director means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.

(h) *State 404 program* or *State program* means a State program which has been approved by EPA under Section 404 of the Act to regulate the discharge of dredged or fill material into certain waters as defined in § 232.2(p).

### § 233.3 Confidentiality of information.

(a) Any information submitted to EPA pursuant to these regulations may be claimed as confidential by the submitter at the time of submittal and a final determination as to that claim will be made in accordance with the procedures of 40 CFR Part 2 and paragraph (c) of this section.

(b) Any information submitted to the Director may be claimed as confidential in accordance with State law, subject to paragraphs (a) and (c) of this section.

(c) Claims of confidentiality for the following information will be denied:

(1) The name and address of any permit applicant or permittee,

(2) Effluent data,

(3) Permit application, and

(4) Issued permit.

### § 233.4 Conflict of interest.

Any public officer or employee who has a direct personal or pecuniary interest in any matter that is subject to decision by the agency shall make known such interest in the official records of the agency and shall refrain from participating in any manner in such decision.

## Subpart B—Program Approval

### § 233.10 Elements of a program submission.

Any State that seeks to administer a 404 program under this Part shall submit to the Regional Administrator at least three copies of the following:

(a) A letter from the Governor of the State requesting program approval.

(b) A complete program description, as set forth in § 233.11.

(c) An Attorney General's statement, as set forth in § 233.12.

(d) A Memorandum of Agreement with the Regional Administrator, as set forth in § 233.13.

(e) A Memorandum of Agreement with the Secretary, as set forth in § 233.14.

(f) Copies of all applicable State statutes and regulations, including those governing applicable State administrative procedures.

### § 233.11 Program description.

The program description as required under § 233.10 shall include:

(a) A description of the scope and structure of the State's program. The description should include extent of State's jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, and permit review criteria;

(b) A description of the State's permitting, administrative, judicial review, and other applicable procedures;

(c) A description of the basic organization and structure of the State agency (agencies) which will have responsibility for administering the program. If more than one State agency is responsible for the administration of the program, the description shall address the responsibilities of each agency and how the agencies intend to coordinate administration and evaluation of the program;

(d) A description of the funding and manpower which will be available for program administration;

(e) An estimate of the anticipated workload, e.g., number of discharges.

(f) Copies of permit application forms, permit forms, and reporting forms;

(g) A description of the State's compliance evaluation and enforcement programs, including a description of how the State will coordinate its enforcement strategy with that of the Corps and EPA;

(h) A description of the waters of the United States within a State over which the State assumes jurisdiction under the approved program; a description of the waters of the United States within a State over which the Secretary retains

jurisdiction subsequent to program approval; and a comparison of the State and Federal definitions of wetlands.

Note.—States should obtain from the Secretary an identification of those waters of the U.S. within the State over which the Corps retains authority under Section 404(g) of the Act.

(i) A description of the specific best management practices proposed to be used to satisfy the exemption provisions of Section 404(f)(1)(E) of the Act for construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment.

**§ 233.12 Attorney General's statement.**

(a) Any State that seeks to administer a program under this Part shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independence legal counsel), that the laws and regulations of the State, or an interstate compact, provide adequate authority to carry out the program and meet the applicable requirements of this Part. This statement shall cite specific statutes and administrative regulations which are lawfully adopted at the time the statement is signed and which shall be fully effective by the time the program is approved, and, where appropriate, judicial decisions which demonstrate adequate authority. The attorney signing the statement required by this section must have authority to represent the State agency in court on all matters pertaining to the State program.

(b) If a State seeks approval of a program covering activities on Indian lands, the statement shall contain an analysis of the State's authority over such activities.

(c) The State Attorney General's statement shall contain a legal analysis of the effect of State law regarding the prohibition on taking private property without just compensation on the successful implementation of the State's program.

(d) In those States where more than one agency has responsibility for administering the State program, the statement must include certification that each agency has full authority to administer the program within its category of jurisdiction and that the State, as a whole, has full authority to administer a complete State Section 404 program.

**§ 233.13 Memorandum of Agreement with Regional Administrator.**

(a) Any State that seeks to administer a program under this Part shall submit a Memorandum of Agreement executed by the Director and the Regional Administrator. The Memorandum of Agreement shall become effective upon approval of the State program. When more than one agency within a State has responsibility for administering the State program, Directors of each of the responsible State agencies shall be parties to the Memorandum of Agreement.

(b) The Memorandum of Agreement shall set out the State and Federal responsibilities for program administration and enforcement. These shall include, but not be limited to:

(1) Provisions specifying classes and categories of permit applications for which EPA will waive Federal review (as specified in § 233.51).

(2) Provisions specifying the frequency and content of reports, documents and other information which the State may be required to submit to EPA in addition to the annual report, as well as a provision establishing the submission date for the annual report. The State shall also allow EPA routinely to review State records, reports and files relevant to the administration and enforcement of the approved program.

(3) Provisions addressing EPA and State roles and coordination with respect to compliance monitoring and enforcement activities.

(4) Provisions addressing modification of the Memorandum of Agreement.

**§ 233.14 Memorandum of Agreement with the Secretary.**

(a) Before a State program is approved under this Part, the Director shall enter into a Memorandum of Agreement with the Secretary. When more than one agency within a State has responsibility for administering the State program, Directors of each of the responsible agencies shall be parties of the Memorandum of Agreement.

(b) The Memorandum of Agreement shall include:

(1) A description of waters of the United States within the State over which the Secretary retains jurisdiction, as identified by the Secretary.

(2) Procedures whereby the Secretary will, upon program approval, transfer to the State pending 404 permit applications for discharges in State regulated waters and other relevant information not already in the possession of the Director.

Note.—Where a State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue Section 404 permits, the State is encouraged to establish in this MOA procedures for joint processing of Federal and State permits, including joint public notices and public hearings.

(3) An identification of all general permits issued by the Secretary the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program, and a plan for transferring responsibility for these general permits to the State, including procedures for the prompt transmission from the Secretary to the Director of relevant information not already in the possession of the Director, including support files for permit issuance, compliance reports and records of enforcement actions.

**§ 233.15 Procedures for approving State programs.**

(a) The 120 day statutory review period shall commence on the date of receipt of a complete State program submission as set out in § 233.10 of this Part. EPA shall determine whether the submission is complete within 30 days of receipt of the submission and shall notify the State of its determination. If EPA finds that a State's submission is incomplete, the statutory review period shall not begin until all the necessary information is received by EPA.

(b) If EPA determines the State significantly changes its submission during the review period, the statutory review period shall begin again upon the receipt of a revised submission.

(c) The State and EPA may extend the statutory review period by agreement.

(d) Within 10 days of receipt of a complete State Section 404 program submission, the Regional Administrator shall provide copies of the State's submission to the Corps, FWS, and NMFS (both Headquarters and appropriate Regional organizations.)

(e) After determining that a State program submission is complete, the Regional Administrator shall publish notice of the State's application in the Federal Register and in enough of the largest newspapers in the State to attract statewide attention. The Regional Administrator shall also mail notice to persons known to be interested in such matters. Existing State, EPA, Corps, FWS, and NMFS mailing lists shall be used as a basis for this mailing. However, failure to mail all such notices shall not be grounds for invalidating approval (or disapproval) of an otherwise acceptable (or unacceptable) program. This notice shall:

(1) Provide for a comment period of not less than 45 days during which interested members of the public may express their views on the State program.

(2) Provide for a public hearing within the State to be held not less than 30

days after notice of hearing is published in the **Federal Register**;

(3) Indicate where and when the State's submission may be reviewed by the public;

(4) Indicate whom an interested member of the public with questions should contact; and

(5) Briefly outline the fundamental aspects of the State's proposed program and the process for EPA review and decision.

(f) Within 90 days of EPA's receipt of a complete program submission, the Corps, FWS, and NMFS shall submit to EPA any comments on the State's program.

(g) Within 120 days of receipt of a complete program submission (unless an extension is agreed to by the State), the Regional Administrator shall approve or disapprove the program based on whether the State's program fulfills the requirements of this Part and the Act, taking into consideration all comments received. The Regional Administrator shall prepare a responsiveness summary of significant comments received and his response to these comments. The Regional Administrator shall respond individually to comments received from the Corps, FWS, and NMFS.

(h) If the Regional Administrator approves the State's Section 404 program, he shall notify the State and the Secretary of the decision and publish notice in the **Federal Register**. Transfer of the program to the State shall not be considered effective until such notice appears in the **Federal Register**. The Secretary shall suspend the issuance by the Corps of Section 404 permits in State regulated waters on such effective date.

(i) If the Regional Administrator disapproves the State's program based on the State not meeting the requirements of the Act and this Part, the Regional Administrator shall notify the State of the reasons for the disapproval and of any revisions or modifications to the State's program which are necessary to obtain approval. If the State resubmits a program submission remedying the identified problem areas, the approval procedure and statutory review period shall begin upon receipt of the revised submission.

**§ 233.16 Procedures for revision of State programs.**

(a) The State shall keep the Regional Administrator fully informed of any proposed or actual changes to the State's statutory or regulatory authority or any other modifications which are significant to administration of the program.

(b) Any approved program which requires revision because of a modification to this Part or to any other applicable Federal statute or regulation shall be revised within one year of the date of promulgation of such regulation, except that if a State must amend or enact a statute in order to make the required revision, the revision shall take place within two years.

(c) States with approved programs shall notify the Regional Administrator whenever they propose to transfer all or part of any program from the approved State agency to any other State agency. The new agency is not authorized to administer the program until approved by the Regional Administrator under paragraph (d) of this section.

(d) Approval of revision of a State program shall be accomplished as follows:

(1) The Director shall submit a modified program description or other documents which the Regional Administrator determines to be necessary to evaluate whether the program complies with the requirements of the Act and this Part.

(2) Notice of approval of program changes which are not substantial revisions may be given by letter from the Regional Administrator to the Governor or his designee.

(3) Whenever the Regional Administrator determines that the proposed revision is substantial, he shall publish and circulate notice to those persons known to be interested in such matters, provide opportunity for a public hearing, and consult with the Corps, FWS, and NMFS. The Regional Administrator shall approve or disapprove program revisions based on whether the program fulfills the requirements of the Act and this Part, and shall publish notice of his decision in the **Federal Register**. For purposes of this paragraph, substantial revisions include, but are not limited to, revisions that affect the area of jurisdiction, scope of activities regulated, criteria for review of permits, public participation, or enforcement capability.

(4) Substantial program changes shall become effective upon approval by the Regional Administrator and publication of notice in the **Federal Register**.

(e) Whenever the Regional Administrator has reason to believe that circumstances have changed with respect to a State's program, he may request and the State shall provide a supplemental Attorney General's statement, program description, or such other documents or information as are necessary to evaluate the program's compliance with the requirements of the Act and this Part.

## Subpart C—Permit Requirements

**§ 233.20 Prohibitions.**

No permit shall be issued by the Director in the following circumstances:

(a) When permit does not comply with the requirements of the Act or regulations thereunder, including the Section 404(b)(1) Guidelines (Part 230 of this Chapter).

(b) When the Regional Administrator has objected to issuance of the permit under § 233.50 and the objection has not been resolved.

(c) When the proposed discharges would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the Administrator under Section 404(c) of the Act, or when the discharge would fail to comply with a restriction imposed thereunder.

(d) If the Secretary determines, after consultation with the Secretary of the Department in which the Coast Guard is operating, that anchorage and navigation of any of the navigable waters would be substantially impaired.

**§ 233.21 General permits.**

(a) Under Section 404(h)(5) of the Act, States may, after program approval, administer and enforce general permits previously issued by the Secretary in State regulated waters.

**Note:** If States intend to assume existing general permits, they must be able to ensure compliance with existing permit conditions an any reporting monitoring, or prenotification requirements.

(b) The Director may issue a general permit for categories of similar activities if he determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. Any general permit issued shall be in compliance with the Section 404(b)(1) Guidelines.

(c) In addition to the conditions specified in § 233.23, each general permit shall contain:

(1) A specific description of the type(s) of activities which are authorized, including limitations for any single operation. The description shall be detailed enough to ensure that the requirements of paragraph (b) of this section are met. (This paragraph supercedes § 233.23(c)(1) for general permits.)

(2) A precise description of the geographic area to which the general permit applies, including limitations on the type(s) of water where operations may be conducted sufficient to ensure that the requirements of paragraph (b) of this section are met.

(d) Predischarge notification or other reporting requirements may be required by the Director on a permit-by-permit basis as appropriate to ensure that the general permit will comply with the requirement (section 404(e) of the Act) that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.

(e) The Director may, without revoking the general permit, require any person authorized under a general permit to apply for an individual permit. This discretionary authority will be based on concerns for the aquatic environment including compliance with paragraph (b) of this section and the 404(b)(1) Guidelines (40 CFR Part 230.)

(1) This provision in no way affects the legality of activities undertaken pursuant to the general permit prior to notification by the Director of such requirement.

(2) Once the Director notifies the discharger of his decision to exercise discretionary authority to require an individual permit, the discharger's activity is no longer authorized by the general permit.

**§ 233.22 Emergency permits.**

(a) Notwithstanding any other provision of this Part, the Director may issue a temporary emergency permit for a discharge of dredged or fill material if unacceptable harm to life or severe loss of physical property is likely to occur before a permit could be issued or modified under procedures normally required.

(b) Emergency permits shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of § 233.23.

(1) Any emergency permit shall be limited to the duration of time (typically no more than 90 days) required to complete the authorized emergency action.

(2) The emergency permit shall have a condition requiring appropriate restoration of the site.

(c) The emergency permit may be terminated at any time without process (§ 233.36) if the Director determines that termination is necessary to protect human health or the environment.

(d) The Director shall consult in an expeditious manner, such as by telephone, with the Regional Administrator, the Corps, FWS, and NMFS about issuance of an emergency permit.

(e) The emergency permit may be oral or written. If oral, it must be followed within 5 days by a written emergency permit. A copy of the written permit shall be sent to the Regional Administrator.

(f) Notice of the emergency permit shall be published and public comments solicited in accordance with § 233.32 as soon as possible but no later than 10 days after the issuance date.

**§ 233.23 Permit conditions.**

(a) For each permit the Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines, applicable Section 303 water quality standards, and applicable Section 307 effluent standards and prohibitions.

(b) Section 404 permits shall be effective for a fixed term not to exceed 5 years.

(c) Each 404 permit shall include conditions meeting or implementing the following requirements:

(1) A specific identification and complete description of the authorized activity including name and address of permittee, location and purpose of discharge, type and quantity of material to be discharged. (This subsection is not applicable to general permits).

(2) Only the activities specifically described in the permit are authorized.

(3) The permittee shall comply with all conditions of the permit even if that requires halting or reducing the permitted activity to maintain compliance. Any permit violation constitutes a violation of the Act as well as of State statute and/or regulation.

(4) The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit.

(5) The permittee shall inform the Director of any expected or known actual noncompliance.

(6) The permittee shall provide such information to the Director, as the Director requests, to determine compliance status, or whether cause exists for permit modification, revocation or termination.

(7) Monitoring, reporting and recordkeeping requirements as needed to safeguard the aquatic environment. (Such requirements will be determined on a case-by-case basis, but at a minimum shall include monitoring and reporting of any expected leachates, reporting of noncompliance, planned changes or transfer of the permit.)

(8) Inspection and entry. The permittee shall allow the Director, or his authorized representative, upon presentation of proper identification, at reasonable times to:

(i) Enter upon the permittee's premises where a regulated activity is located or where records must be kept under the conditions of the permit,

(ii) Have access to and copy any records that must be kept under the conditions of the permit,

(iii) Inspect operations regulated or required under the permit, and

(iv) Sample or monitor, for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

(9) Conditions assuring that the discharge will be conducted in a manner which minimizes adverse impacts upon the physical, chemical and biological integrity of the waters of the United States, such as requirements for restoration or mitigation.

## Subpart D—Program Operation

**§ 233.30 Application for a permit.**

(a) Except when an activity is authorized by a general permit issued pursuant to § 233.21 or is exempt from the requirements to obtain a permit under § 232.3, any person who proposes to discharge dredged or fill material into State regulated waters shall complete, sign and submit a permit application to the Director. Persons proposing to discharge dredged or fill material under the authorization of a general permit must comply with any reporting requirements of the general permit.

(b) A complete application shall include:

(1) Name, address, telephone number of the applicant and name(s) and address(es) of adjoining property owners.

(2) A complete description of the proposed activity including necessary drawings, sketches or plans sufficient for public notice (the applicant is not generally expected to submit detailed engineering plans and specifications); the location, purpose and intended use of the proposed activity; scheduling of the activity; the location and dimensions of adjacent structures; and a list of authorizations required by other Federal, interstate, State or local agencies for the work, including all approvals received or denials already made.

(3) The application must include a description of the type, composition, source and quantity of the material to be discharged, the method of discharge, and the site and plans for disposal of the dredged or fill material.

(4) A certification that all information contained in the application is true and accurate and acknowledging awareness of penalties for submitting false information.

(5) All activities which the applicant plans to undertake which are reasonably related to the same project should be included in the same permit application.

(c) In addition to the information indicated in § 233.30(b), the applicant will be required to furnish such additional information as the Director deems appropriate to assist in the evaluation of the application. Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.

(d) The level of detail shall be reasonably commensurate with the type and size of discharge, proximity to critical areas, likelihood of long-lived toxic chemical substances, and potential level of environmental degradation.

**Note:** EPA encourages States to provide permit applicants guidance regarding the level of detail of information and documentation required under this subsection. This guidance can be provided either through the application form or on an individual basis. EPA also encourages the State to maintain a program to inform potential applicants for permits of the requirements of the State program and of the steps required to obtain permits for activities in State regulated waters.

### § 233.31 Coordination requirements.

(a) If a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any State(s) other than the State in which the discharge occurs, the Director shall provide an opportunity for such State(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted by the Director, he shall notify the affected State and the Regional Administrator prior to permit issuance in writing of his failure to accept these recommendations, together with his reasons for so doing. The Regional Administrator shall then have the time provided for in § 233.50(d) to comment upon, object to, or make recommendations.

(b) State Section 404 permits shall be coordinated with Federal and Federal-State water related planning and review processes.

### § 233.32 Public notice.

(a) Applicability.

(1) The Director shall give public notice of the following actions:

(i) Receipt of a permit application.

(ii) Preparation of a draft general permit.

(iii) Consideration of a major modification to an issued permit.

(iv) Scheduling of a public hearing.

(v) Issuance of an emergency permit.

(2) Public notices may describe more than one permit or action.

(b) Timing.

(1) The public notice shall provide a reasonable period of time, normally at least 30 days, within which interested parties may express their views concerning the permit application.

(2) Public notice of a public hearing shall be given at least 30 days before the hearing.

(3) The Regional Administrator may approve a program with shorter public notice timing if the Regional Administrator determines that sufficient public notice is provided for.

(c) The Director shall give public notice by each of the following methods:

(1) By mailing a copy of the notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his rights to receive notice for any classes or categories of permits):

(i) The applicant.

(ii) Any agency with jurisdiction over the activity or the disposal site, whether or not the agency issues a permit.

(iii) Owners of property adjoining the property where the regulated activity will occur.

(iv) All persons who have specifically requested copies of public notices. (The Director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Director may delete from the list the name of any person who fails to respond to such a request.)

(v) Any State whose waters may be affected by the proposed discharge.

(2) In addition, by providing notice in at least one other way (such as advertisement in a newspaper of sufficient circulation) reasonably calculated to cover the area affected by the activity.

(d) All public notices shall contain at least the following information:

(1) The name and address of the applicant and, if different, the address or location of the activity(ies) regulated by the permit.

(2) The name, address, and telephone number of a person to contact for further information.

(3) A brief description of the comment procedures and procedures to request a public hearing, including deadlines.

(4) A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills, and a description of the type, composition and quantity of materials to be discharged.

(5) A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area.

(6) A paragraph describing the various evaluation factors, including the 404(b)(1) Guidelines or State-equivalent criteria, on which decisions are based.

(7) Any other information which would significantly assist interested parties in evaluating the likely impact of the proposed activity.

(e) Notice of public hearing shall also contain the following information:

(1) Time, date, and place of hearing.

(2) Reference to the date of any previous public notices relating to the permit.

(3) Brief description of the nature and purpose of the hearing.

### § 233.33 Public hearing.

(a) Any interested person may request a public hearing during the public comment period as specified in § 233.32. Requests shall be in writing and shall state the nature of the issues proposed to be raised at the hearing.

(b) The Director shall hold a public hearing whenever he determines there is a significant degree of public interest in a permit application or a draft general permit. He may also hold a hearing, at his discretion, whenever he determines a hearing may be useful to a decision on the permit application.

(c) At a hearing, any person may submit oral or written statements or data concerning the permit application or draft general permit. The public comment period shall automatically be extended to the close of any public hearing under this section. The presiding officer may also extend the comment period at the hearing.

(d) All public hearings shall be reported verbatim. Copies of the record of proceedings may be purchased by any person from the Director or the reporter of such hearing. A copy of the transcript (or if none is prepared, a tape of the proceedings) shall be made available for public inspection at an appropriate State office.

### § 233.34 Making a decision on the permit application.

(a) The Director will review all applications for compliance with the 404(b)(1) Guidelines and/or equivalent State environmental criteria as well as any other applicable State laws or regulations.

(b) The Director shall consider all comments received in response to the public notice, and public hearing if a hearing is held. All comments, as well as the record of any public hearing, shall be made part of the official record on the application.

(c) After the Director has completed his review of the application and consideration of comments, the Director will determine, in accordance with the record and all applicable regulations, whether or not the permit should be issued. No permit shall be issued by the Director under the circumstances described in § 233.20. The Director shall prepare a written determination on each application outlining his decision and rationale for his decision. The determination shall be dated, signed and included in the official record prior to final action on the application. The official record shall be open to the public.

**§ 233.35 Issuance and effective date of permit.**

(a) If the Regional Administrator comments on a permit application or draft general permit under § 233.50, the Director shall follow the procedures specified in that section in issuing the permit.

(b) If the Regional Administrator does not comment on a permit application or draft general permit, the Director shall make a final permit decision after the close of the public comment period and shall notify the applicant.

(1) If the decision is to issue a permit, the permit becomes effective when it is signed by the Director and the applicant.

(2) If the decision is to deny the permit, the Director will notify the applicant in writing of the reason(s) for denial.

**§ 233.36 Modification, suspension or revocation of permits.**

(a) *General.* The Director may reevaluate the circumstances and conditions of a permit either on his own motion or at the request of the permittee or of a third party and initiate action to modify, suspend, or revoke a permit if he determines that sufficient cause exists. Among the factors to be considered are:

(1) Permittee's noncompliance with any of the terms or conditions of the permit;

(2) Permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at the time;

(3) Information that activities authorized by a general permit are having more than minimal individual or cumulative adverse effect on the environment, or that the permitted activities are more appropriately regulated by individual permits;

(4) Circumstances relating to the authorized activity have changed since the permit was issued and justify changed permit conditions or temporary or permanent cessation of any discharge controlled by the permit;

(5) Any significant information relating to the activity authorized by the permit if such information was not available at the time the permit was issued and would have justified the imposition of different permit conditions or denial at the time of issuance;

(6) Revisions to applicable statutory or regulatory authority, including toxic effluent standards or prohibitions or water quality standards.

(b) *Limitations.* Permit modifications shall be in compliance with § 233.20.

(c) *Procedures.* (1) The Director shall develop procedures to modify, suspend or revoke permits if he determines cause exists for such action (§ 233.36(a)). Such procedures shall provide opportunity for public comment (§ 233.32), coordination with the Federal review agencies (§ 233.50), and opportunity for public hearing (§ 233.33) following notification of the permittee. When permit modification is proposed, only the conditions subject to modification need be reopened.

(2) Minor modification of permits. The Director may, upon the consent of the permittee, use abbreviated procedures to modify a permit to make the following corrections or allowance for changes in the permitted activity:

(i) Correct typographical errors;

(ii) Require more frequent monitoring or reporting by permittee;

(iii) Allow for a change in ownership or operational control of a project or activity where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director;

(iv) Provide for minor modification of project plans that do not significantly change the character, scope, and/or purpose of the project or result in significant change in environmental impact;

(v) Extend the term of a permit, so long as the modification does not extend the term of the permit beyond 5 years from its original effective date and does not result in any increase in the amount of dredged or fill material allowed to be discharged.

**§ 233.37 Signatures on permit applications and reports.**

The application and any required reports must be signed by the person who desires to undertake the proposed activity or by that person's duly authorized agent if accompanied by a statement by that person designating the agent. In either case, the signature of the applicant or the agent will be understood to be an affirmation that he possesses or represents the person who possesses the requisite property interest to undertake the activity proposed in the application.

**§ 233.38 Continuation of expiring permits.**

A Corps 404 permit does not continue in force beyond its expiration date under Federal law if, at that time, a State is the permitting authority. States authorized to administer the 404 Program may continue Corps or State-issued permits until the effective date of the new permits, if State law allows. Otherwise, the discharge is being conducted without a permit from the time of expiration of the old permit to the effective date of a new State-issued permit, if any.

## Subpart E—Compliance Evaluation and Enforcement

**§ 233.40 Requirements for compliance evaluation programs.**

(a) In order to abate violations of the permit program, the State shall maintain a program designed to identify persons subject to regulation who have failed to obtain a permit or to comply with permit conditions.

(b) The Director and State officers engaged in compliance evaluation, upon presentation of proper identification, shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program.

(c) The State program shall provide for inspections to be conducted, samples to be taken and other information to be gathered in a manner that will produce evidence admissible in an enforcement proceeding.

(d) The State shall maintain a program for receiving and ensuring proper consideration of information submitted by the public about violations.

**§ 233.41 Requirements for enforcement authority.**

(a) Any State agency administering a program shall have authority:

(1) To restrain immediately and effectively any person from engaging in any unauthorized activity;

(2) To sue to enjoin any threatened or continuing violation of any program requirement;

(3) To assess or sue to recover civil penalties and to seek criminal remedies, as follows:

(i) The agency shall have the authority to assess or recover civil penalties for discharges of dredged or fill material without a required permit or in violation of any Section 404 permit condition in an amount of at least $5,000 per day of such violation.

(ii) The agency shall have the authority to seek criminal fines against any person who willfully or with criminal negligence discharges dredged or fill material without a required permit or violates any permit condition issued under Section 404 in the amount of at least $10,000 per day of such violation.

(iii) The agency shall have the authority to seek criminal fines against any person who knowingly makes false statements, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act, these regulations or the approved State program, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under the permit, in an amount of at least $5,000 for each instance of violation.

(b)(1) The approved maximum civil penalty or criminal fine shall be assessable for each violation and, if the violation is continuous, shall be assessable in that maximum amount for each day of violation.

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must bear when it brings an action under the Act.

(c) The civil penalty assessed, sought, or agreed upon by the Director under paragraph (a)(3) of this section shall be appropriate to the violation.

Note.—To the extent that State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA may, when authorized by Section 309 of the Act, commence separate action for penalties.

(d)(1) The Regional Administrator may approve a State program where the State lacks authority to recover penalties of the levels required under paragraphs (a)(3)(i)–(iii) of this section only if the Regional Administrator determines, after evaluating a record of at least one year for an alternative enforcement program, that the State has an alternate, demonstrably effective method of ensuring compliance which has both punitive and deterrence effects.

(2) States whose programs were approved via waiver of monetary penalties shall keep the Regional Administrator informed of all enforcement actions taken under any alternative method approved pursuant to paragraph (d)(1) of this section. The manner of reporting will be established in the Memorandum of Agreement with the Regional Administrator (§ 233.13).

(e) Any State administering a program shall provide for public participation in the State enforcement process by providing either:

(1) Authority which allows intervention of right in any civil or administrative action to obtain remedies specified in paragraph (a)(3) of this section by any citizen having an interest which is or may be adversely affected, or

(2) Assurance that the State agency or enforcement authority will:

(i) Investigate and provide written responses to all citizen complaints submitted pursuant to State procedures;

(ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and

(iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.

## Subpart F—Federal Oversight

### § 233.50 Review of and objection to State permits.

(a) The Director shall promptly transmit to the Regional Administrator:

(1) A copy of the public notice for any complete permit applications received by the Director, except those for which permit review has been waived under § 233.51. The State shall supply the Regional Administrator with copies of public notices for permit applications for which permit review has been waived whenever requested by EPA.

(2) A copy of a draft general permit whenever the State intends to issue a general permit.

(3) Notice of every significant action taken by the State agency related to the consideration of any permit application except those for which Federal review has been waived or draft general permit.

(4) A copy of every issued permit.

(5) A copy of the Director's response to another State's comments/recommendations, if the Director does not accept these recommendations (§ 233.32(a)).

(b) Unless review has been waived under § 233.51, the Regional Administrator shall provide a copy of each public notice, each draft general permit, and other information needed for review of the application to the Corps, FWS, and NMFS, within 10 days of receipt. These agencies shall notify the Regional Administrator within 45 days of their receipt if they wish to comment on the public notice or draft general permit. Such agencies should submit their evaluation and comments to the Regional Administrator within 50 days of such receipt. The final decision to comment, object or to require permit conditions shall be made by the Regional Administrator. (These times may be shortened by mutual agreement of the affected Federal agencies and the State.)

(c) If the information provided is inadequate to determine whether the permit application or draft general permit meets the requirements of the Act, these regulations, and the 404(b)(1) Guidelines, the Regional Administrator may, within 30 days of receipt, request the Director to transmit to the Regional Administrator the complete record of the permit proceedings before the State, or any portions of the record, or other information, including a supplemental application, that the Regional Administrator determines necessary for review.

(d) If the Regional Administrator intends to comment upon, object to, or make recommendations with respect to a permit application, draft general permit, or the Director's failure to accept the recommendations of an affected State submitted pursuant to § 233.31(a), he shall notify the Director of his intent within 30 days of receipt. If the Director has been so notified, the permit shall not be issued until after the receipt of such comments or 90 days of the Regional Administrator's receipt of the public notice, draft general permit or Director's response (§ 233.31(a)), whichever comes first. The Regional Administrator may notify the Director within 30 days of receipt that there is no comment but that he reserves the right to object within 90 days of receipt, based on any new information brought out by the public during the comment period or at a hearing.

(e) If the Regional Administrator has given notice to the Director under paragraph (d) of this section, he shall submit to the Director, within 90 days of receipt of the public notice, draft general permit, or Director's response (§ 233.31(a)), a written statement of his

comments, objections, or recommendations; the reasons for the comments, objections, or recommendations; and the actions that must be taken by the Director in order to eliminate any objections. Any such objection shall be based on the Regional Administrator's determination that the proposed permit is (1) the subject of an interstate dispute under § 233.31(a) and/or (2) outside requirements of the Act, these regulations, or the 404(b)(1) Guidelines. The Regional Administrator shall make available upon request a copy of any comment, objection, or recommendation on a permit application or draft general permit to the permit applicant or to the public.

(f) When the Director has received an EPA objection or requirement for a permit condition to a permit application or draft general permit under this section, he shall not issue the permit unless he has taken the steps required by the Regional Administrator to eliminate the objection.

(g) Within 90 days of receipt by the Director of an objection or requirement for a permit condition by the Regional Administrator, the State or any interested person may request that the Regional Administrator hold a public hearing on the objection or requirement.

The Regional Administrator shall conduct a public hearing whenever requested by the State proposing to issue the permit, or if warranted by significant public interest based on requests received.

(h) If a public hearing is held under paragraph (g) of this section, the Regional Administrator shall, following that hearing, reaffirm, modify or withdraw the objection or requirement for a permit condition, and notify the Director of this decision.

(1) If the Regional Administrator withdraws his objection or requirement for a permit condition, the Director may issue the permit.

(2) If the Regional Administrator does not withdraw the objection or requirement for a permit condition, the Director must issue a permit revised to satisfy the Regional Administrator's objection or requirement for a permit condition or notify EPA of its intent to deny the permit within 30 days of receipt of the Regional Administrator's notification.

(i) If no public hearing is held under paragraph (g) of this section, the Director within 90 days of receipt of the objection or requirement for a permit condition shall either issue the permit revised to satisfy EPA's objections or notify EPA of its intent to deny the permit.

(j) In the event that the Director neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Secretary shall process the permit application.

### § 233.51 Waiver of review.

(a) The MOA with the Regional Administrator shall specify the categories of discharge for which EPA will waive Federal review of State permit applications. After program approval, the MOA may be modified to reflect any additions or deletions of categories of discharge for which EPA will waive review. The Regional Administrator shall consult with the Corps, FWS, and NMFS prior to specifying or modifying such categories.

(b) With the following exceptions, any category of discharge is eligible for consideration for waiver:

(1) Draft general permits;

(2) Discharges with reasonable potential for affecting endangered or threatened species as determined by FWS;

(3) Discharges with reasonable potential for adverse impacts on waters of another State;

(4) Discharges known or suspected to contain toxic pollutants in toxic amounts (Section 101(a)(3) of the Act) or hazardous substances in reportable quantities (Section 311 of the Act);

(5) Discharges located in proximity of a public water supply intake;

(6) Discharges within critical areas established under State or Federal law, including but not limited to National and State parks, fish and wildlife sanctuaries and refuges, National and historical monuments, wilderness areas and preserves, sites identified or proposed under the National Historic Preservation Act, and components of the National Wild and Scenic Rivers System.

(c) The Regional Administrator retains the right to terminate a waiver as to future permit actions at any time by sending the Director written notice of termination.

### § 233.52 Program reporting

(a) The starting date for the annual period to be covered by reports shall be established in the Memorandum of Agreement with the Regional Administrator (§ 233.13.)

(b) The Director shall submit to the Regional Administrator within 90 days after completion of the annual period, a draft annual report evaluating the State's administration of its program identifying problems the State has encountered in the administration of its program and recommendations for resolving these problems. Items that shall be addressed in the annual report include an assessment of the cumulative impacts of the State's permit program on the integrity of the State regulated waters; identification of areas of particular concern and/or interest within the State; the number and nature of individual and general permits issued, modified, and denied; number of violations identified and number and nature of enforcement actions taken; number of suspected unauthorized activities reported and nature of action taken; an estimate of extent of activities regulated by general permits; and the number of permit applications received but not yet processed.

(c) The State shall make the draft annual report available for public inspection.

(d) Within 60 days of receipt of the draft annual report, the Regional Administrator will complete review of the draft report and transmit comments, questions, and/or requests for additional evaluation and/or information to the Director.

(e) Within 30 days of receipt of the Regional Administrator's comments, the Director will finalize the annual report, incorporating and/or responding to the Regional Administrator's comments, and transmit the final report to the Regional Administrator.

(f) Upon acceptance of the annual report, the Regional Administrator shall publish notice of availability of the final annual report.

### § 233.53 Withdrawal of program approval.

(a) A State with a program approved under this Part may voluntarily transfer program responsibilities required by Federal law to the Secretary by taking the following actions, or in such other manner as may be agreed upon with the Administrator.

(1) The State shall give the Administrator and the Secretary 180 days notice of the proposed transfer. The State shall also submit a plan for the orderly transfer of all relevant program information not in the possession of the Secretary (such as permits, permit files, reports, permit applications) which are necessary for the Secretary to administer the program.

(2) Within 60 days of receiving the notice and transfer plan, the Administrator and the Secretary shall evaluate the State's transfer plan and shall identify for the State any additional information needed by the Federal government for program administration.

(3) At least 30 days before the transfer is to occur the Administrator shall publish notice of transfer in the Federal

Register and in a sufficient number of the largest newspapers in the State to provide statewide coverage, and shall mail notice to all permit holders, permit applicants, other regulated persons and other interested persons on appropriate EPA, Corps and State mailing lists.

(b) The Administrator may withdraw program approval when a State program no longer complies with the requirements of this Part, and the State fails to take corrective action. Such circumstances include the following:

(1) When the State's legal authority no longer meets the requirements of this Part, including:

(i) Failure of the State to promulgate or enact new authorities when necessary; or

(ii) Action by a State legislature or court striking down or limiting State authorities.

(2) When the operation of the State program fails to comply with the requirements of this Part, including:

(i) Failure to exercise control over activities required to be regulated under this Part, including failure to issue permits;

(ii) Issuance of permits which do not conform to the requirements of this Part; or

(iii) Failure to comply with the public participation requirements of this Part.

(3) When the State's enforcement program fails to comply with the requirements of this Part, including:

(i) Failure to act on violations of permits or other program requirements;

(ii) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed, or to implement alternative enforcement methods approved by the Administrator; or

(iii) Failure to inspect and monitor activities subject to regulation.

(4) When the State program fails to comply with the terms of the Memorandum of Agreement required under § 233.13.

(c) The following procedures apply when the Administrator orders the commencement of proceedings to determine whether to withdraw approval of a State program:

(1) *Order.* The Administrator may order the commencement of withdrawal proceedings on the Administrator's initiative or in response to a petition from an interested person alleging failure of the State to comply with the requirements of this Part as set forth in subsection (b) of this section. The Administrator shall respond in writing to any petition to commence withdrawal proceedings. He may conduct an informal review of the allegations in the petition to determine whether cause exists to commence proceedings under this paragraph. The Administrator's order commencing proceedings under this paragraph shall fix a time and place for the commencement of the hearing, shall specify the allegations against the State which are to be considered at the hearing, and shall be published in the **Federal Register**. Within 30 days after publication of the Administrator's order in the **Federal Register**, the State shall admit or deny these allegations in a written answer.

The party seeking withdrawal of the State's program shall have the burden of coming forward with the evidence in a hearing under this paragraph.

(2) *Definitions.* For purposes of this paragraph the definition of "Administrative Law Judge," "Hearing Clerk," and "Presiding Officer" in 40 CFR 22.03 apply in addition to the following:

(i) "Party" means the petitioner, the State, the Agency, and any other person whose request to participate as a party is granted.

(ii) "Person" means the Agency, the State and any individual or organization having an interest in the subject matter of the proceedings.

(iii) "Petitioner" means any person whose petition for commencement of withdrawal proceedings has been granted by the Administrator.

(3) *Procedures.*

(i) The following provisions of 40 CFR Part 22 [Consolidated Rules of Practice] are applicable to proceedings under this paragraph:

(A) Section 22.02—(use of number/gender);

(B) Section 22.04—(authorities of Presiding Officer);

(C) Section 22.06—(filing/service of rulings and orders);

(D) Section 22.09—(examination of filed documents);

(E) Section 22.19 (a), (b) and (c)—(prehearing conference);

(F) Section 22.22—(evidence);

(G) Section 22.23—(objections/offers of proof);

(H) Section 22.25—(filing the transcript; and

(I) Section 22.26—(findings/conclusions).

(ii) The following provisions are also applicable:

(A) Computation and extension of time.

(*1*) *Computation.* In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or Federal legal holiday, the stated time period shall be extended to include the next business day.

(*2*) *Extensions of time.* The Administrator, Regional Administrator, or Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion (*i*) upon timely motion of a party to the proceeding, for good cause shown and after consideration of prejudice to other parties, or (*ii*) upon his own motion. Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(*3*) The time for commencement of the hearing shall not be extended beyond the date set in the Administrator's order without approval of the Administrator.

(B) Ex parte discussion of proceeding. At no time after the issuance of the order commencing proceedings shall the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, Presiding Officer, or any other person who is likely to advise these officials in the decisions on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

(C) Intervention.

(*1*) *Motion.* A motion for leave to intervene in any proceeding conducted under these rules of practice must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. Any person already a party to the proceeding may file an answer to a motion to intervene, making specific reference to the factors set forth in the

foregoing sentence and paragraph (b)(3)(ii)(C)(*3*) of this section, within ten (10) days after service of the motion for leave to intervene.

(*2*) However, motions to intervene must be filed within 15 days from the date the notice of the Administrator's order is published in the **Federal Register.**

(*3*) *Disposition.* Leave to intervene may be granted only if the movant demonstrates that (*i*) his presence in the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (*ii*) the movant will be adversely affected by a final order; and (*iii*) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(*4*) *Amicus curiae.* Persons not parties to the proceeding who wish to file briefs may so move. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

(D) Motions. (1) *General.* All motions, except those made orally on the record during a hearing, shall (*i*) be in writing; (*ii*) state the grounds therefore with particularity; (*iii*) set forth the relief or order sought; and (*iv*) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by paragraph (b)(4) of this section.

(*2*) *Response to motions.* A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, Regional Administrator, or Administrator, as appropriate, may set a shorter time for response, or make such other orders concerning the disposition of motions as they deem appropriate.

(*3*) *Decision.* The Administrator shall rule on all motions filed or made after service of the recommended decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, Regional Administrator, or the Administrator considers it necessary or desirable.

(*4*) *Record of proceedings.* (*i*) The hearing shall be either stenographically reported verbatim or tape recorded, and thereupon transcribed by an official reporter designated by the Presiding Officer;

(*ii*) All orders issued by the Presiding Officer, transcripts of testimony, written statements of position, stipulations, exhibits, motions, briefs, and other written material of any kind submitted in the hearing shall be a part of the record and shall be available for inspection or copying in the Office of the Hearing Clerk, upon payment of costs. Inquiries may be made at the Office of the Administrative Law Judges, Hearing Clerk, 401 M Street SW., Washington, DC 20460;

(*iii*) Upon notice to all parties the Presiding Officer may authorize corrections to the transcript which involve matters of substance;

(*iv*) An original and two (2) copies of all written submissions to the hearing shall be filed with the Hearing Clerk;

(*v*) A copy of each such submission shall be served by the person making the submission upon the Presiding Officer and each party of record. Service under this paragraph shall take place by mail or personal delivery;

(*vi*) Every submission shall be accompanied by acknowledgement of service by the person served or proof of service in the form of a statement of the date, time, and manner of service and the names of the persons served, certified by the person who made service; and

(*vii*) The Hearing Clerk shall maintain and furnish to any person upon request, a list containing the name, service address, and telephone number of all parties and their attorneys or duly authorized representatives.

(*5*) *Participation by a person not a party.* A person who is not a party may, in the discretion of the Presiding Officer, be permitted to make a limited appearance by making an oral or written statement of his/her position on the issues within such limits and on such conditions as may be fixed by the Presiding Officer, but he/she may not otherwise participate in the proceeding.

(*6*) *Rights of parties.* (i) All parties to the proceeding may:

(A) Appear by counsel or other representative in all hearing and prehearing proceedings;

(B) Agree to stipulations of facts which shall be made a part of the record.

(7) *Recommended decision.* (i) Within 30 days after the filing of proposed findings and conclusions and reply briefs, the Presiding Officer shall evaluate the record before him/her, the proposed findings and conclusions and any briefs filed by the parties, and shall prepare a recommended decision, and shall certify the entire record, including the recommended decision, to the Administrator.

(ii) Copies of the recommended decision shall be served upon all parties.

(iii) Within 20 days after the certification and filing of the record and recommended decision, all parties may file with the Administrator exceptions to the recommended decision and a supporting brief.

(8) *Decision by Administrator.* (i) Within 60 days after certification of the record and filing of the Presiding Officer's recommended decision, the Administrator shall review the record before him and issue his own decision.

(ii) If the Administrator concludes that the State has administered the program in conformity with the Act and this Part, his decision shall constitute "final agency action" within the meaning of 5 U.S.C. 704.

(iii) If the Administrator concludes that the State has not administered the program in conformity with the Act and regulations, he shall list the deficiencies in the program and provide the State a reasonable time, not to exceed 90 days, to take such appropriate corrective action as the Administrator determines necessary.

(iv) Within the time prescribed by the Administrator the State shall take such appropriate corrective action as required by the Administrator and shall file with the Administrator and all parties a statement certified by the State Director that appropriate corrective action has been taken.

(v) The Administrator may require a further showing in addition to the certified statement that corrective action has been taken.

(vi) If the state fails to take appropriate corrective action and file a certified statement thereof within the time prescribed by the Administrator, the Administrator shall issue a supplementary order withdrawing approval of the State program. If the State takes appropriate corrective action, the Administrator shall issue a supplementary order stating that approval of authority is not withdrawn.

(vii) The Administrator's supplementary order shall constitute final Agency action within the meaning of 5 U.S. 704.

(d) Withdrawal of authorization under this section and the Act does not relieve any person from complying with the requirements of State law, nor does it affect the validity of actions taken by the State prior to withdrawal.

* * * * *

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# EXHIBIT 11

(h) Description of the Waters of the United States within a State over which the State Assumes Jurisdiction Under the Approved Program
(Required by 40 C.F.R. § 233.11(h))

## Purpose of Section (h)

The purpose of Section (h) is to provide the information required in 40 C.F.R. § 233.11(h), which states: *"The program description as required under §233.10 shall include: (h) A description of the waters of the United States within a State over which the State assumes jurisdiction under the approved program; a description of the waters of the United States within a State over which the Secretary retains jurisdiction subsequent to program approval; and a comparison of the State and Federal definitions of wetlands."*

## Description of State-Assumed Waters

Section 404 of the Clean Water Act (CWA) provides that the U.S. Army Corps of Engineers (USACE) is the agency authorized to issue CWA section 404 dredge and fill program permits for activities within waters of the United States. However, the CWA includes provisions that allow a state to assume administration of a 404 program in certain waters (state-assumed waters). The CWA does not define state-assumed waters; rather, it describes waters that a state cannot assume and for which jurisdiction remains with the USACE (retained waters). State-assumed waters then are all waters of the United States that are not retained waters. Retained waters are defined below, and in section 2.0 of the State 404 Program Applicant's Handbook and listed in Appendix A of the Handbook. Activities within retained waters will generally still require a state ERP authorization and a separate federal authorization from the USACE. To provide certainty, streamlining, and efficiency, the State will consider that any wetlands or other surface waters delineated in accordance with Chapter 62-340, F.A.C., that are regulated under Part IV of Chapter 373, F.S. could be considered Waters of the United States, and will treat them as if they are, unless the applicant clearly demonstrates otherwise.

## Description of Retained Waters

"Retained Waters" means 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. The USACE will retain responsibility for permitting for the discharge of dredged or fill material in those waters identified in the Retained Waters List (Appendix A of the State 404 Program Applicant's Handbook), 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. The administrative boundary demarcating the adjacent wetlands over which jurisdiction is retained by the USACE 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 USACE will retain jurisdiction to the landward boundary of the project for the purposes of that project only.

# Comparison of Florida's Wetland Delineation Methodology to the Federal Methodology

For regulatory purposes since July 1, 1994, all state and local governments must delineate uplands, wetlands, and other surface waters using Chapter 62-340 F.A.C. pursuant to Florida Statutes 373.019(22) and 373.4211. For regulatory purposes since November1, 2010, the United States Army Core of Engineers (ACOE) and the United States Environmental Protection Agency (EPA) use the 1987 Wetland Delineation Manual (87 Manual) combined with the Atlantic and Gulf Coastal Plain Region Supplement Version 2.0 to delineate wetlands in the state of Florida. While utilizing different methodologies to delineate areas meeting the wetland definition, both the 87 Manual and Chapter 62-340 F.A.C. use the identical operational sentence and nearly identical diagnostic environmental characteristics in their definitions of wetlands, leading to consistent determinations. Florida statute 373.019(22), Florida Chapter 62-340.200(19) F.A.C., EPA 1980 Federal Registry, and the 87 Manual, define wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." In addition to this core operational sentence are three diagnostic environmental characteristics describing vegetation, soils, and hydrology generally found in wetlands. Both the State and Federal definitions of wetlands share these three diagnostic environmental characteristics. Below are the Federal and State definitions of wetlands, hydric soils, and wetland hydrologic indicators for regulatory purposes in the state of Florida.

## Wetland definition per 1987 ACOE Wetland Delineation Manual:

*a. Definition.* The CE (*Federal Register* 1982) and the EPA (*Federal Register* 1980) jointly define wetlands as: Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

*b. Diagnostic environmental characteristics.* Wetlands have the following general diagnostic environmental characteristics:

(1) *Vegetation.* The prevalent vegetation consists of macrophytes that are typically adapted to areas having hydrologic and soil conditions described in *a* above. Hydrophytic species, due to morphological, physiological, and/or reproductive adaptation(s), have the ability to grow, effectively compete, reproduce, and/or persist in anaerobic soil conditions.

(2) *Soil.* Soils are present and have been classified as hydric, or they possess characteristics that are associated with reducing soil conditions.

(3) *Hydrology.* The area is inundated either permanently or periodically at mean water depths: 6.6 ft., or the soil is saturated to the surface at some time during the growing season of the prevalent vegetation.

## Wetland definition per Florida Statute 373.019(22) and Chapter 62-340.200(19) F.A.C.:

"Wetlands", means those areas that are inundated or saturated by surface water or ground water at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow, reproduce or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by saw palmetto.

## Hydric Soils per 1987 ACOE Wetland Delineation Manual Federal:

"Hydric Soils" means soils that are saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part of the soil profile.

## Hydric soils per Florida Statute 373.4211 and Chapter 62-340.200(8) F.A.C.:

"Hydric Soils" means soils that are saturated, flooded, or ponded long enough during the growing season to develop anaerobic conditions in the upper part of the soil profile.

## Hydrologic indicators per 1987 ACOE Wetland Delineation Manual and Regional Supplement:

Indicator A1: Surface water / Category: Primary / General Description: This indicator consists of the direct, visual observation of surface water (flooding or ponding) during a site visit.

Indicator A2: High water table / Category: Primary / General Description: This indicator consists of the direct, visual observation of the water table 12 in. (30 cm) or less below the surface in a soil pit, auger hole, or shallow monitoring well. This indicator includes water tables derived from perched water, throughflow, and discharging groundwater (e.g., in seeps) that may be moving laterally near the soil surface.

Indicator A3: Saturation / Category: Primary / General Description: Visual observation of saturated soil conditions 12 in. (30 cm) or less from the soil surface as indicated by water glistening on the surfaces and broken interior faces of soil samples removed from the pit or auger hole. This indicator must be associated with an existing water table located immediately below the saturated zone; however, this requirement is waived under episaturated conditions if there is a restrictive soil layer or bedrock within 12 in. (30 cm) of the surface.

Indicator B1: Water marks / Category: Primary / General Description: Water marks are discolorations or stains on the bark of woody vegetation, rocks, bridge supports, buildings, fences, or other fixed objects as a result of inundation.

Indicator B2: Sediment deposits / Category: Primary / General Description: Sediment deposits are thin layers or coatings of fine-grained mineral material (e.g., silt or clay) or organic matter (e.g., pollen), sometimes mixed with other detritus, remaining on tree bark, plant stems or leaves, rocks, and other objects after surface water recedes.

Indicator B3: Drift deposits / Category: Primary / General Description: Drift deposits consist of rafted debris that has been deposited on the ground surface or entangled in vegetation or other fixed objects. Debris consists of remnants of vegetation (e.g., branches, stems, and leaves), man-made litter, or other waterborne materials. Drift material may be deposited at or near the high water line in ponded or flooded areas, piled against the upstream side of trees, rocks, and other fixed objects, or widely distributed within the dewatered area.

Indicator B4: Algal mat or crust / Category: Primary / General Description: This indicator consists of a mat or dried crust of algae, perhaps mixed with other detritus, left on or near the soil surface after dewatering.

Indicator B5: Iron deposits / Category: Primary / General Description: This indicator consists of a thin orange or yellow crust or gel of oxidized iron on the soil surface or on objects near the surface.

Indicator B6: Surface soil cracks / Category: Secondary / General Description: Surface soil cracks consist of shallow cracks that form when fine-grained mineral or organic sediments dry and shrink, often creating a network of cracks or small polygons.

Indicator B7: Inundation visible on aerial imagery / Category: Primary / General Description: One or more recent aerial photographs or satellite images show the site to be inundated.

Indicator B8: Sparsely vegetated concave surface / Category: Secondary / General Description: On concave land surfaces (e.g., depressions and swales), the ground surface is either unvegetated or sparsely vegetated (less than 5 percent ground cover) due to long-duration ponding or flooding during the growing season.

Indicator B9: Water-stained leaves / Category: Primary / General Description: Water-stained leaves are fallen or recumbent dead leaves that have turned grayish or blackish in color due to inundation for long periods.

Indicator B10: Drainage patterns / Category: Secondary / General Description: This indicator consists of flow patterns visible on the soil surface or eroded into the soil, low vegetation bent over in the direction of flow, absence of leaf litter or small woody debris due to flowing water, and similar evidence that water flowed across the ground surface.

Indicator B13: Aquatic fauna / Category: Primary / General Description: Presence of live individuals, diapausing insect eggs or crustacean cysts, or dead remains of aquatic fauna, such as, but not limited to, sponges, bivalves, aquatic snails, aquatic insects, ostracods, shrimp, other

crustaceans, tadpoles, or fish, either on the soil surface or clinging to plants or other emergent objects.

Indicator B15: Marl deposits / Category: Primary / General Description: This indicator consists of the presence of marl on the soil surface.

Indicator B16: Moss trim lines / Category: Secondary / General Description: Presence of moss trim lines on trees or other upright objects in seasonally inundated areas.

Indicator C1: Hydrogen sulfide odor / Category: Primary / General Description: A hydrogen sulfide (rotten egg) odor within 12 in. (30 cm) of the soil surface.

Indicator C2: Dry-season water table / Category: Secondary / General Description: Visual observation of the water table between 12 and 24 in. (30 and 60 cm) below the surface during the normal dry season or during a drier-than-normal year.

Indicator C3: Oxidized rhizospheres along living roots / Category: Primary / General Description: Presence of a layer containing 2 percent or more iron-oxide coatings or plaques on the surfaces of living roots and/or iron-oxide coatings or linings on soil pores immediately surrounding living roots within 12 in. (30 cm) of the soil surface.

Indicator C4: Presence of reduced iron / Category: Primary / General Description: Presence of a layer containing reduced (ferrous) iron in the upper 12 in. (30 cm) of the soil profile, as indicated by a ferrous iron test or by the presence of a soil that changes color upon exposure to the air.

Indicator C6: Recent iron reduction in tilled soils / Category: Primary / General Description: Presence of a layer containing 2 percent or more redox concentrations as pore linings or soft masses in the tilled surface layer of soils cultivated within the last two years. The layer containing redox concentrations must be within the tilled zone or within 12 in. (30 cm) of the soil surface, whichever is shallower.

Indicator C7: Thin muck surface / Category: Primary / General Description: This indicator consists of a layer of muck 1 in. (2.5 cm) or less thick on the soil surface.

Indicator C8: Crayfish burrows / Category: Secondary / General Description: Presence of crayfish burrows, as indicated by openings in soft ground up to 2 in. (5 cm) in diameter, often surrounded by chimney-like mounds of excavated mud.

Indicator C9: Saturation visible on aerial imagery / Category: Secondary / General Description: One or more recent aerial photographs or satellite images indicate soil saturation. Saturated soil signatures must correspond to field-verified hydric soils, depressions or drainage patterns, differential crop management, or other evidence of a seasonal high water table.

Indicator D2: Geomorphic position / Category: Secondary / General Description: This indicator is present if the area in question is located in a depression, drainageway, concave position within a floodplain, at the toe of a slope, on an extensive flat, on the low-elevation fringe of a pond or other water body, or in an area where groundwater discharges.

Indicator D3: Shallow aquitard / Category: Secondary / General Description: This indicator occurs in and around the margins of depressions and in flat landscapes, and consists of the presence of an aquitard within the soil profile that is potentially capable of perching water within 12 in. (30 cm) of the surface.

Indicator D5: FAC-neutral test / Category: Secondary / General Description: The plant community passes the FAC-neutral test.

Indicator D8: Sphagnum moss / Category: Secondary / General Description: Presence of peat mosses (Sphagnum spp.).

## Hydrologic indicators per Florida Statute 373.4211 and Chapter 62-340.500 F.A.C.:

(1) Algal mats. The presence or remains of nonvascular plant material which develops during periods of inundation and persists after the surface water has receded.

(2) Aquatic mosses or liverworts on trees or substrates. The presence of those species of mosses or liverworts tolerant of or dependent on surface water inundation.

(3) Aquatic plants. Defined in subsection 62-340.200(1), F.A.C.

(4) Aufwuchs. The presence or remains of the assemblage of sessile, attached or free-living, nonvascular plants and invertebrate animals (including protozoans) which develop a community on inundated surfaces.

(5) Drift lines and rafted debris. Vegetation, litter, and other natural or manmade material deposited in discrete lines or locations on the ground or against fixed objects, or entangled above the ground within or on fixed objects in a form and manner which indicates that the material was waterborne. This indicator should be used with caution to ensure that the drift lines or rafted debris represent usual and recurring events typical of inundation or saturation at a frequency and duration sufficient to meet the wetland definition of subsection 62-340.200(19), F.A.C.

(6) Elevated lichen lines. A distinct line, typically on trees, formed by the water-induced limitation on the growth of lichens.

(7) Evidence of aquatic fauna. The presence or indications of the presence of animals which spend all or portions of their life cycle in water. Only those life stages which depend on being in or on water for daily survival are included in this indicator.

(8) Hydrologic data. Reports, measurements, or direct observation of inundation or saturation which support the presence of water to an extent consistent with the provisions of the definition of wetlands and the criteria within this rule, including evidence of a seasonal high water table at or above the surface according to methodologies set forth in Soil and Water Relationships of Florida's Ecological Communities (Florida Soil Conservation Staff 1992).

(9) Morphological plant adaptations. Specialized structures or tissues produced by certain plants in response to inundation or saturation which normally are not observed when the plant has not been subject to conditions of inundation or saturation.

(10) Secondary flow channels. Discrete and obvious natural pathways of water flow landward of the primary bank of a stream watercourse and typically parallel to the main channel.

(11) Sediment deposition. Mineral or organic matter deposited in or shifted to positions indicating water transport.

(12) Vegetated tussocks or hummocks. Areas where vegetation is elevated above the natural grade on a mound built up of plant debris, roots, and soils so that the growing vegetation is not subject to the prolonged effects of soil anoxia.

(13) Water marks. A distinct line created on fixed objects, including vegetation, by a sustained water elevation.

Both methodologies utilize the same three field categories of wetland indicators to delineate wetlands: plant species percentages, hydric soils as defined by the Natural Resource and Conservation Service (NRCS), and hydrologic indicators of wetland saturation or inundation. While differences in plant percentage requirements or plant indicator classification exist between the two methodologies, the similarity between hydrologic indicators and hydric soil indicators leads to the same wetland boundary. This is due to a shared definition of wetlands and how the two methodologies evaluate the three categories of field indicators being absent or present under normal circumstances.

Five delineation methods are authorized to delineate wetlands using Chapter 62-340 F.A.C. under normal circumstances: direct application of the “wetland definition”, "A" test, "B" test, "C" test, and "D" test. None of the Chapter 62-340 F.A.C. methods require all three categories of wetland field indicators to be present at the same location before delineating an area as a wetland but rather two out of three. Unlike Chapter 62-340 F.A.C., the 87 Manual methodology requires all three indicators be present at the same location before delineation as a wetland is possible under normal circumstances. Thus, for any area delineated as a wetland by the 87 Manual, it will automatically qualify as having a hydric soil for Chapter 62-340 F.A.C., and therefore, will require only one additional indicator in plants or hydrology to qualify as a wetland. If the hydrologic indicator the 87 Manual identified within a wetland area also has a Chapter 62-340 F.A.C. hydrologic indicator present, then the wetland boundary is the same regardless of any plant differences. This 2/3 requirement vs. 3/3 requirement is a critical alignment consideration between the two methodologies. Areas identified as wetlands by the 87 Manual which may fail plant criteria per Chapter 62-340 F.A.C. will still qualify as wetlands with the presence of a Chapter 62-340 F.A.C. hydrologic indicator and soil. For example, any hydric pine flatwood identified as a wetland by the 87 Manual, and failing plant percentage ratios for Chapter 62-340 F.A.C., would still be identified as a wetland per the “D” test (i.e. two of three field indicators are meet, hydric soils and hydrologic indicators).

Since the 2010 adoption by the ACOE of the NRCS Hydric Soil Definition and NRCS Hydric Soils Field Indicators, pre-2010 delineation differences between Chapter 62-340 F.A.C. and 87 Manual methodologies no longer exists within the state of Florida. Pragmatically, given normal expression of indicators, the two methodologies now yield the same wetland extent throughout Florida's landscapes despite different plant indicator statuses such as Slash Pine (*Pinus elliottii*)

and Gallberry (*Ilex glabra*) between the two methodologies. Conversely, any sites in "atypical" or "altered" conditions should also be equivalent since both methodologies strive to delineate wetlands in these conditions as they would occur under normal or typical circumstances.

Chapter 62-340 F.A.C. has provided a rapid and specifically tailored delineation methodology for Florida's landscape which accurately delineates Florida's surface water resources with clarity, statewide consistency, and legally defensible certainty for the past 24 years. The USACOE uses a Wetland Data Form within its methodology and Florida Department of Environmental Protection has developed a similar Chapter 62-340 Data Form which is analogous in form and function. Adoption of the 62-340 Data Form into statewide ERP phase III rule revisions will further align the standardization of field procedures and documentation.

## Comparison of State vs. Federal Hydrologic Indicators

Wetland hydrologic indicator comparison for the Atlantic and Gulf Coastal Plain Region and Florida Chapter 62-340.500 F.A.C. Federal hydrologic indicators must meet "typical year hydrology" standards before satisfying wetland hydrology criteria. Federal rules require one "primary" indicatory or two "secondary" indicators to satisfy wetland hydrology criteria. State rules do not have typical year restrictions or primary vs. secondary requirements on wetland hydrologic indicators.

### Table Legend

Same: Identical indicator, application, or equivalent result with similar State indicator.

Partial: Similar State indicator but may have more limited applications or results.

No: Same or similar indicator does not exist in State rule as an indicator of wetland hydrology.

+: Positive symbols indicate a greater application or result may be authorized in State rule usually due to typical year restrictions placed upon Federal inundation indicators or the lack of primary indicator requirements in State rules.

**-:** Negative symbols indicate a lesser application or result may be required in State rule.

### Comparison Table

| Federal Hydrologic Indicator | Category | | Chapter 62-340.500 F.A.C. |
|---|---|---|---|
| | Primary | Secondary | Florida Hydrologic Indicator |
| Group A – Observation of Surface Water or Saturated Soils | | | State indicator comparison:<br>Same/Partial/No/+/- |
| A1 – Surface water | X | | Same + (8) Hydrologic data |
| A2 – High water table | X | | Partial (8) Hydrologic data |
| A3 – Saturation | X | | Partial (8) Hydrologic data |
| Group B – Evidence of Recent Inundation | | | |
| B1 – Water marks | X | | Same + (13) Water marks |
| B2 – Sediment deposits | X | | Same + (11) Sediment deposition |

| | | | |
|---|---|---|---|
| B3 – Drift deposits | X | | Same + (5) Drift lines or rafted debris |
| B4 – Algal mat or crust | X | | Same + (1) Algal mats |
| B5 – Iron deposits | X | | Same + (8) Hydrologic data |
| B7 – Inundation visible on aerial imagery | X | | Same + (8) Hydrologic data |
| B9 – Water-stained leaves | X | | No |
| B13 – Aquatic fauna | X | | Same (7) Evidence of aquatic fauna |
| B15 – Marl deposits | X | | Same (8) Hydrologic data |
| B6 – Surface soil cracks | | X | Same + (8) Hydrologic data |
| B8 – Sparsely vegetated concave surface | | X | No |
| B10 – Drainage patterns | | X | Same + (10) Secondary flow channels |
| B16 – Moss trim lines | | X | Same + (2) Aquatic mosses or liverworts |
| Group C – Evidence of Current or Recent Soil Saturation | | | |
| C1 – Hydrogen sulfide odor | X | | Same (8) Hydrologic data |
| C3 – Oxidized rhizospheres along living | X | | Partial - (8) Hydrologic data |
| C4 – Presence of reduced iron | X | | Partial - (8) Hydrologic data |
| C6 – Recent iron reduction in tilled soils | X | | Partial - (8) Hydrologic data |
| C7 – Thin muck surface | X | | Same (8) Hydrologic data |
| C2 – Dry-season water table | | X | No |
| C8 – Crayfish burrows | | X | Same + (7) Evidence of aquatic fauna |
| C9 – Saturation visible on aerial imagery | | X | No |
| Group D – Evidence from Other Site Conditions or Data | | | |
| D2 – Geomorphic position | | X | No |
| D3 – Shallow aquitard | | X | No |
| D5 – FAC-neutral test | | X | No |
| D8 – Sphagnum moss | | X | Same + (2) Aquatic mosses or liverworts |
| Group E - Florida Chapter 62-340.500 hydrologic indicators not included in Federal hydrologic indicators categories | | | Chapter 62-340.500 F.A.C.<br><br>Hydrologic Indicators |
| | | | (3) – Aquatic plants |
| | | | (4) - Aufwuchs |
| | | | (6) - Elevated lichen lines |
| | | | (7) - Evidence of aquatic fauna |
| | | | (8) - Hydrologic data |
| | | | (9) - Morphologic plant adaptations |
| | | | (12) - Vegetated tussocks or hummocks |

# EXHIBIT 12

(a) Description of the Scope and Structure of the State's Program
(Required by 40 C.F.R. § 233.11(a))

## Purpose of Section (a)

The purpose of Section (a) is to provide the information required in 40 C.F.R. § 233.11(a), which states: *"The program description as required under §233.10 shall include: (a) A description of the scope and structure of the State's program. The description should include extent of State's jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, and permit review criteria;"*

## State 404 Program Jurisdiction

In accordance with section 373.4146, Florida Statutes (F.S.), the State 404 Program governs all dredging and filling ("activity") in waters of the United States regulated by the State under section 404(g)-(l) of the Clean Water Act (CWA), 33 U.S.C. §§ 1344(g)-(l). The State will administer the CWA section 404 dredge and fill permitting program within assumed waters. The Army Corps of Engineers (USACE) will retain administration of the CWA section 404 dredge and fill permitting program within retained waters. The state defines the preceding terms in rule or statute as:

"Activity", for the purposes of the State 404 Program only, means "discharge of dredged material" and/or "discharge of fill material" as those terms are defined in 40 C.F.R. § 232.2. The terms "dredge", "fill", "dredging", and "filling" when used within Chapter 62-331, Florida Administrative Code (F.A.C.), or this handbook shall be interchangeable with "activity" as defined herein. [State 404 Program Applicant's Handbook section 2.0 (b) 1.]

"Material," when used in the context of "filling," means matter of any kind, such as, sand, clay, silt, rock, dredged material, construction debris, solid waste, pilings or other structures, ash, and residue from industrial and domestic processes. The term does not include the temporary use and placement of lobster pots, crab traps, or similar devices or the placement of oyster cultch pursuant to Section 597.010, F.S. [Applicant's Handbook Volume I section 2.0 (a) 60.]

"State assumed waters" means waters of the United States that the state assumes permitting authority over pursuant to s. 404 of the Clean Water Act, Pub. L. No. 92-500, as amended, 33 U.S.C. ss. 1251 et seq., and rules promulgated thereunder, for the purposes of permitting the discharge of dredge or fill material. [State 404 Program Applicant's Handbook section 2.0 (b) 47. and Section 373.4146(1), F.S.]

"Retained waters" means 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. The USACE will retain responsibility for permitting for the discharge of dredged or fill material in those waters identified in the Retained Waters List, 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. The administrative boundary of adjacent retained waters will be

the landward project boundary of each project that proposes discharges of dredged or fill material waterward of a 300-foot guide line established from the ordinary high water mark or mean high tide line of the retained water. [State 404 Program Applicant's Handbook section 2.0 (b) 41.]

"Surface water" means water upon the surface of the earth, whether contained in bounds created naturally or artificially or diffused. Water from natural springs shall be classified as surface water when it exits from the spring onto the earth's surface. [373.019(21),F.S.]

"Wetlands" means those areas that are inundated or saturated by surface water or ground water at a frequency and a duration sufficient to support, and under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soils. Soils present in wetlands generally are classified as hydric or alluvial, or possess characteristics that are associated with reducing soil conditions. The prevalent vegetation in wetlands generally consists of facultative or obligate hydrophytic macrophytes that are typically adapted to areas having soil conditions described above. These species, due to morphological, physiological, or reproductive adaptations, have the ability to grow reproduce or persist in aquatic environments or anaerobic soil conditions. Florida wetlands generally include swamps, marshes, bayheads, bogs, cypress domes and strands, sloughs, wet prairies, riverine swamps and marshes, hydric seepage slopes, tidal marshes, mangrove swamps and other similar areas. Florida wetlands generally do not include longleaf or slash pine flatwoods with an understory dominated by saw palmetto.[Section 373.019(27), F.S.]

The Department will determine the landward extent of wetlands and other surface waters in accordance with Florida's methodology in Chapter 62-340, F.A.C. Detailed information regarding Florida's method can be found in section (h) of this program description.

The State 404 Program applies to state-assumed waters of the United States (WOTUS) as defined at 40 C.F.R. Part 120. To provide certainty, streamlining, and efficiency, the Department will consider that any wetlands or other surface waters delineated in accordance with Chapter 62-340, F.A.C., that are regulated under Part IV of Chapter 373, F.S. could be considered waters of the United States, and will treat them as if they are, unless the applicant requests a WOTUS jurisdictional determination, and provides documentation that clearly demonstrates a water is not a WOTUS, subject to Department verification and agreement.

## Anticipated Coordination

### Coordination with Florida's Five Water Management Districts

The Department will implement the State 404 Program through its six district offices, the Mining and Mitigation Program (MMP), and Mitigation Banking Program (MBP) with oversight from the Tallahassee headquarters office in Leon County. The district offices, MMP, and MBP will process all State 404 Program authorizations and compliance actions. Each district will process the applications for projects within their respective administrative boundaries (Figure (a)-1), except authorizations for mining projects will be processed by MMP, and dredge and fill permits

for mitigation banks will be processed by the MBP. More information about each of the Department's district offices may be found at https://floridadep.gov/districts.

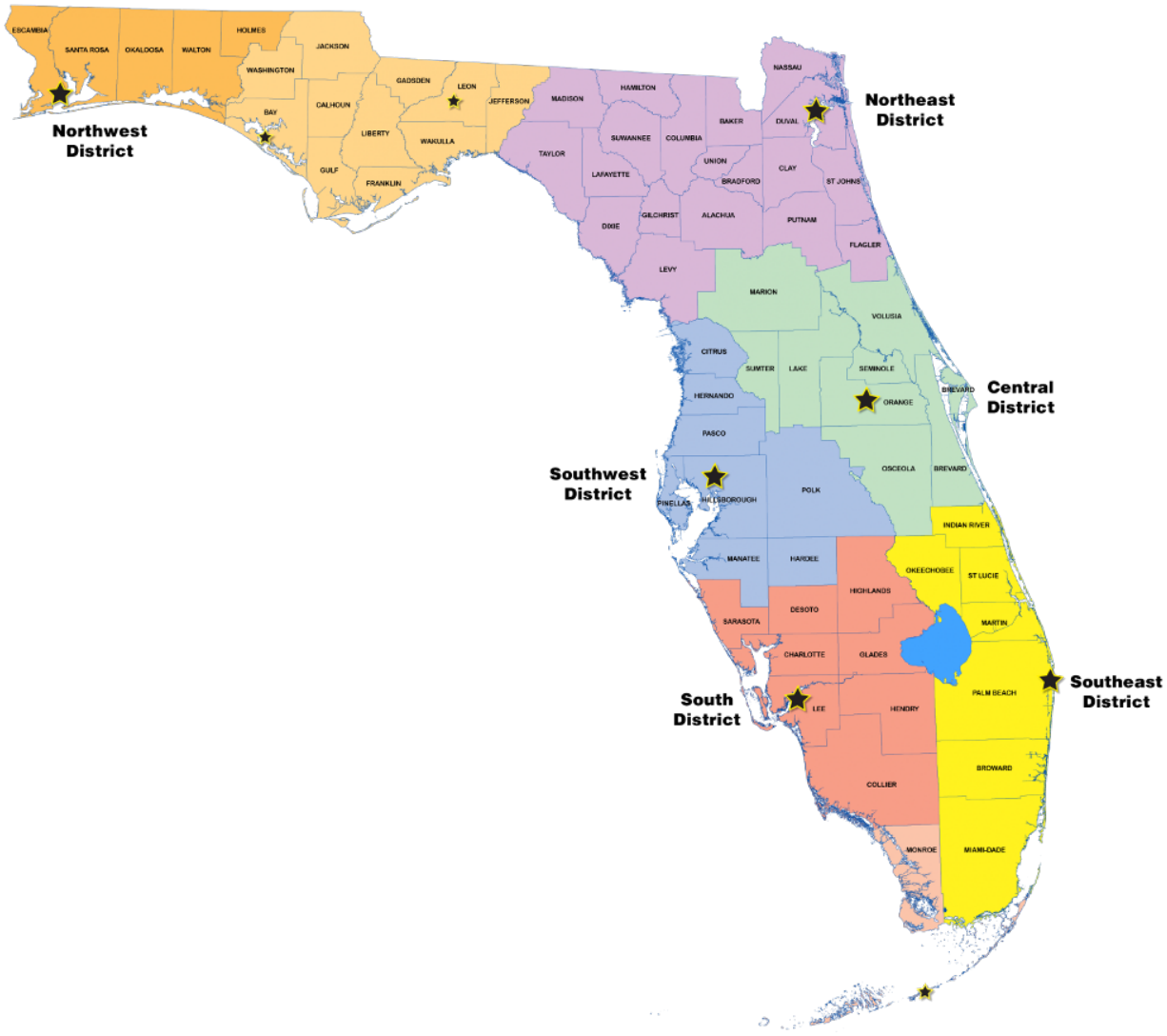


*Figure (a)-1: Florida Department of Environmental Protection District Office Boundaries*

Florida's existing Environmental Resource Permitting program (ERP, Chapter 62-330, F.A.C.) will continue to be implemented in conjunction with the State 404 Program. ERP regulates the construction, alteration, operation, maintenance, repair, abandonment, and removal of stormwater management systems, dams, impoundments, reservoirs, appurtenant works, and works (including docks, piers, structures, dredging, and filling located in, on or over wetlands or other surface waters). The ERP program is implemented by the Department's six district offices and the five Water Management Districts (WMDs) (Figure (a)-2). More information about the WMDs may be found at https://floridadep.gov/water-policy/water-policy/content/water-management-districts.

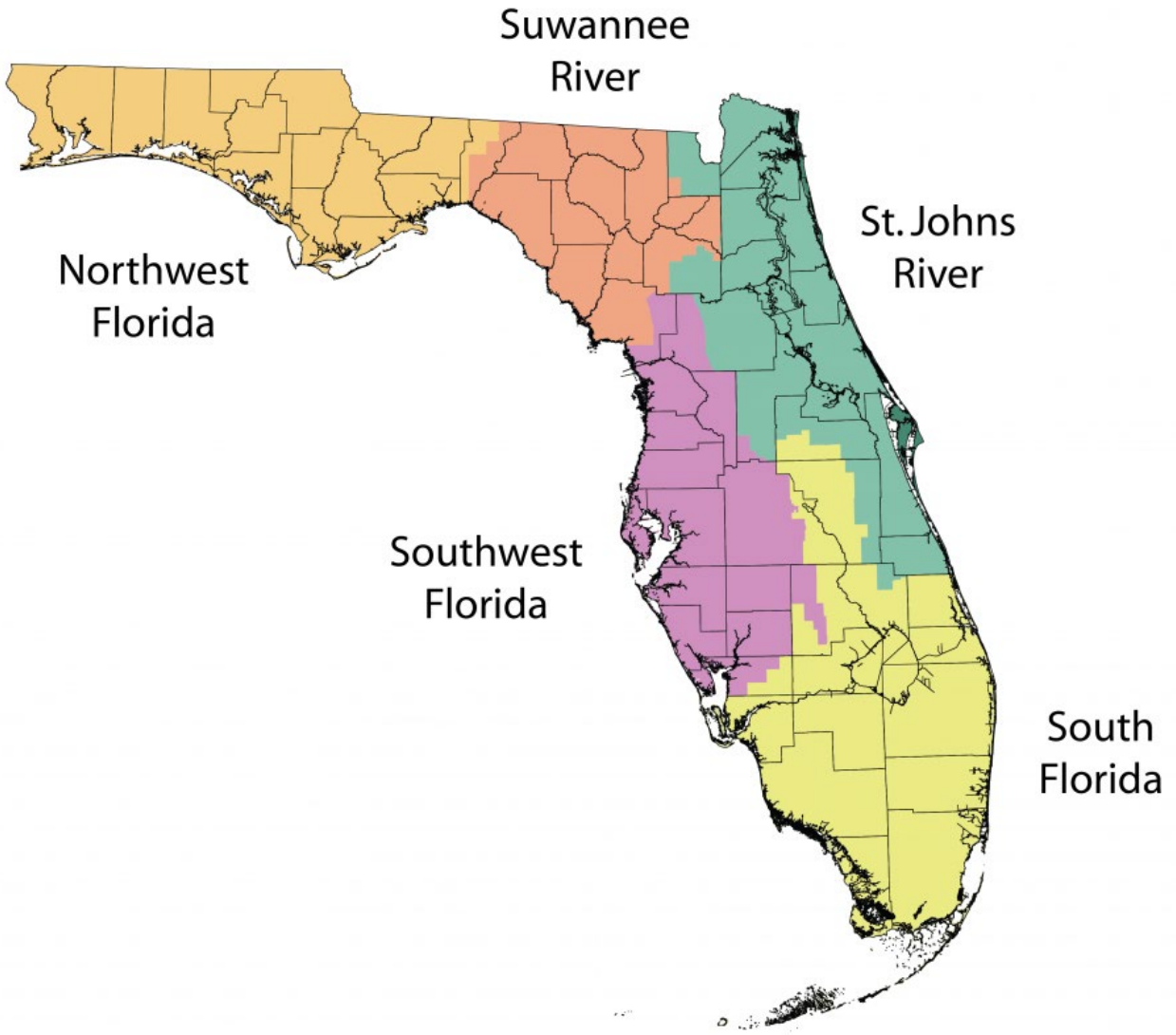


*Figure (a)-2: Florida's Five Water Management Districts*

The Department will coordinate with the WMDs for those projects where the ERP permit is processed by the WMD in accordance with the division of responsibilities outlined in Operating Agreements between the Department and each WMD, which can be viewed at https://floridadep.gov/ogc/ogc/content/operating-agreements. The Department has general supervisory authority over the WMDs' implementation of ERP in accordance with Section 373.026(7), F.S., which ensures consistency in the application of the ERP rule statewide.

The Department estimates that approximately 85% of ERP and State 404 Program requirements overlap. Coordination with the WMDs for those overlapping requirements will serve to eliminate

duplication of review, streamline the State 404 Program and ERP permitting processes, and provide consistency between the ERP and State 404 Program authorization.

Most projects that require State 404 Program authorization will also require ERP authorization. Where both ERP and State 404 Program authorization are required, an applicant must receive both authorizations prior to commencing the activity. An applicant may choose to have both authorizations issued concurrently to avoid the need for subsequent modification of the project that may occur if one authorization is issued before the other (subsection 62-331.010(10), F.A.C.).

If the WMD receives an application for a project that requires authorization under the State 404 Program, the WMD will immediately forward a copy of the application file to the Department. The Department and WMD processing staff will do a joint site visit to review site conditions and verify the landward extent of wetlands and other surface waters in accordance with Chapter 62-340, F.A.C. If requested, the Department will also review the wetlands and other surface waters to determine if they are Waters of the United States (WOTUS). To facilitate streamlining and efficiency of application reviews, the Department will assume that all wetlands and other surface waters that are jurisdictional under Chapter 62-340, F.A.C. are also WOTUS unless specifically requested by the applicant in accordance with the State 404 Program Applicant's Handbook, section 1.1.

The Department and WMD processing staff will maintain frequent communication about the project and will share any determinations or requests for additional information received from commenting agencies and any additional information received by the applicant during the review process. The staff will discuss any suggested or required modifications to the project and any mitigation that will be required to ensure that any authorizations issued are not in conflict, to the greatest extent practicable. If the WMD authorizes an ERP that is in conflict with any State 404 Program permit issued by the Department, the applicant will be responsible for obtaining an appropriate permit modification prior to conducting the activity.

## Coordination with Delegated Local Programs

The Department has delegated all or portions of the ERP program to two local governments in accordance with Section 373.441, F.S., and Chapter 62-344, F.A.C. Currently, Broward and Hillsborough Counties process ERP permits in accordance with delegation agreements which may be viewed at: https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/erp-local-program-delegation. The Department may coordinate with the delegated local governments in a similar manner as with the WMDs, described above. If the local government authorizes an ERP that is in conflict with any State 404 Program permit issued by the Department, the applicant will be responsible for obtaining an appropriate permit modification prior to conducting the activity.

## Coordination with Other Entities

The Department shall coordinate with other entities as described in the State 404 Program Applicant's Handbook, section 5.2, and in any EPA-approved Memoranda of Agreement, Understanding, or Operating Agreement. The Department may enter into Memoranda of

Agreement, Understanding, or Operating Agreements with other entities regarding coordination for the State 404 Program if those memoranda or agreements are approved by EPA prior to being implemented. The Department has or will enter into such agreements with the USACE, EPA, State Historic Preservation Office (SHPO), and the US Fish and Wildlife Service (USFWS)/Florida Fish and Wildlife Conservation Commission (FWC). Copies of the USACE and EPA MOAs are located in Sections D and E of this package. Copies of the SHPO OA and USFWS/FWC MOU may be found in section (j) of the program description. Other entities that may coordinate with the Department include:

- Federally Recognized Tribes
- Adjacent States (Alabama and Georgia), when a State 404 Program activity may affect the water resources of that adjacent state.

## Scope of Activities Regulated by the State 404 Program

Subsection 62-331.020(2), F.A.C. requires that an applicant receive a State 404 Program permit prior to conducting any dredge or fill activities in, on, or over state-assumed waters unless the activity qualifies for an exemption. The State 404 Program provides three types of authorizations: verifications of exemption, general permits, and individual permits. Where required, applicants must submit the appropriate application with supporting documentation to the Department for review and authorization prior to commencing any regulated activity. A matrix to assist applicants in determining the appropriate application form based on the type of ERP and/or State 404 Program authorization required is located in the State 404 Program Applicant's Handbook, section 4.3.

Typical dredge and fill activities in Florida include, but are not limited to:

- Dredging
- Filling
- Ecological restoration
- Excavation
- Conversion of waters type
- Commercial developments
- Residential developments
- Single-family residences
- Agriculture
- Aquaculture
- Utilities
- Transmission lines
- Roadways
- Airports
- Marinas
- Docks
- Piers
- Boat ramps
- Dams
- Levees
- Mining activities
- Mitigation

### State 404 Program Permit Exemptions

Pursuant to section 62-331.020(1), F.A.C., a State 404 Program is not required for the activities described in 40 C.F.R. §232.3. Notice to the Department is not required to conduct an exempt activity unless the activity also requires notification or authorization under ERP.

## State 404 Program General Permits

Projects that do not qualify for an exemption may meet the requirements of a general permit. General permits authorize activities that, if conducted consistent with permit requirements, will cause only minimal individual and cumulative adverse environmental effects. The State 404 Program provides 48 general permits. The general permits described in Rules 62-331.201-.248, F.A.C., were modelled on the existing USACE nationwide permits (NWP) and an existing regional general permit (SAJ 92). This approach was taken to provide consistency between the federal and State 404 Programs. References and requirements for use in tidal waters were removed from the general permit language because tidal waters are not assumable. Those NWPs authorized only under Section 10 of the Rivers and Harbors Act were not included in the State 404 Program rules. An application, where required, will be submitted to the Department or forwarded to the Department by a WMD where the WMD reviews the ERP permit. The Department will review the application following the procedures described in 62-331.200(3), F.A.C.

The Department believes the general permits in Chapter 62-331, F.A.C. meet the requirements of 40 C.F.R. § 233.21(b), which states "The Director may issue a general permit for categories of similar activities if he determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. Any general permit issued shall be in compliance with the section 404(b)(1) Guidelines." The Department is relying on the USACE analysis of the nationwide or regional general permits on which the State 404 Program general permits were modeled for the first five years of the program. Those analysis are not included with this submission.

General permits must be reevaluated every five years. At the end of five years, the Department shall reassess the effects of the State 404 Program general permits by evaluating permitting data gathered during the first five years of program implementation. The Department believes this approach is consistent with the intent of the provision in 40 C.F.R. § 233.21(a), which allows a state to administer and enforce general permits previously issued by the USACE in State assumed waters and will provide the State greater control over assumed waters because the Department can reassess the effects of each general permit on state-assumed waters every five years.

In addition to the general permits adopted in state rule as described above, and in accordance with 40 C.F.R. § 233.21(a) and paragraph 62-331.200(7), F.A.C., the Department intends to assume administration of several existing regional general permits issued by the USACE within state-assumed waters. These include 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). These existing general permits may be viewed in the USACE Jacksonville District Regulatory Division Sourcebook at https://www.saj.usace.army.mil/Missions/Regulatory/Source-Book/. The Department may choose to enter rulemaking to create similar general permits prior to expiration of the USACE regional general permit.

Any new general permits created by the state must be reviewed by EPA in accordance with 40 C.F.R. § 233.50.

### State 404 Program Individual Permits

An individual permit is required for any activity that does not qualify for an exemption or meet the requirements of a general permit. Applications for individual permits will be prepared in accordance with Rule 62-331.050, F.A.C., and submitted to the Department or forwarded to the Department by a WMD where the WMD reviews the ERP application. The Department will review the application following the procedures described in 62-331.052 -.053, F.A.C. Public Notice of individual permit applications shall be in accordance with section 62-331.060, F.A.C. The permitting decision will be documented in accordance with section 8.2 of the State 404 Program Applicant's Handbook using a Technical Staff Report (see template in section (f) of this program description).

## More Information

A detailed and holistic view of Florida's wetland programs and how they all work together may be found in the "Overview of the Wetland and Other Surface Water Regulatory and Proprietary Programs in Florida" (Appendix (a)-1).

# EXHIBIT 13

# STATE 404 PROGRAM APPLICANT'S HANDBOOK

**This Handbook, including Appendices A and B only is incorporated by reference in subsection 62-331.010(5), F.A.C.**

**The effective date of the rule will be the effective date of assumption, which is the date identified by EPA as published in the Federal Register (§ 373.4146, F.S.)**

## Effective: December 22, 2020

**FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION**



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## 1.0 Introduction

The Florida Department of Environmental Protection ("Department" or "DEP") developed this Applicant's Handbook to help persons understand the rules, procedures, standards, and criteria that apply to the State 404 Program under Part IV of Chapter 373 of the Florida Statutes (F.S.).

The Department administers and implements the State 404 Program. In the event the Department seeks and receives approval from EPA pursuant to 40 CFR 233.16 to modify the program to delegate implementation of the State 404 Program to Florida's five Water Management Districts ("Districts"), the Districts may then implement the program with Department oversight. The State 404 Program Applicant's Handbook refers to these entities collectively as "Agencies" and also refers to one or more water management districts as "District" or "Districts" (capitalized), respectively. The term "district" (lower case) generally refers to the main or field offices of either the Department or District.

The Districts are:

- Northwest Florida Water Management District (NWFWMD)
- Suwannee River Water Management District (SRWMD)
- St. Johns River Water Management District (SJRWMD)
- Southwest Florida Water Management District (SWFWMD)
- South Florida Water Management District (SFWMD)

The primary State 404 Program rules are adopted by DEP as Chapter 62-331 of the Florida Administrative Code (F.A.C.). This Applicant's Handbook is incorporated by reference in subsection 62-331.010(5), F.A.C., and therefore operates as a rule of the Agencies.

If the Department delegates implementation of the State 404 Program to the Districts, the responsibilities of those Agencies will be divided in accordance with Operating and Delegation Agreements incorporated by reference in Chapter 62-113, F.A.C., accessible at: https://floridadep.gov/ogc/ogc/content/operating-agreements. Until such delegation occurs, the Department will be responsible for reviewing and acting upon requests for verification of exemption from, and notices and applications for, State 404 Program permits.

The State 404 Program is a separate permitting program from the Environmental Resource Permitting program (ERP) under Chapter 62-330, F.A.C., and agency action for State 404 Program verifications, notices, or permits shall be taken independently from ERP agency action. The applicant may choose to have the State 404 Program and ERP agency actions issued concurrently to help ensure consistency and reduce the need for project modifications that may occur when the agency actions are issued at different times.

Chapter 62-331, F.A.C., references Chapter 62-330, F.A.C., ERP Applicant's Handbook Volume I ("Volume I"), and Chapter 62-345, F.A.C., where requirements under Section 404 of the Clean Water Act (CWA) overlap with existing ERP requirements. State 404 Program rules, which include Chapter 62-331, F.A.C., and the 404 Handbook, will control where there is conflict between these and the referenced ERP rules, including Volume I, and other state laws.

## 1.1 State-assumed Waters

Section 404 of the CWA provides that the U.S. Army Corps of Engineers (Corps) is the agency authorized to issue CWA section 404 dredge and fill program permits for activities within waters of the United States. However, the CWA includes provisions that allow a state to assume administration of a 404 program in certain waters (state-assumed waters). The CWA does not define state-assumed



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waters; rather, it describes waters that a state cannot assume and for which jurisdiction remains with the Corps (retained waters). State-assumed waters then are all waters of the United States that are not retained waters. Retained waters are defined in section 2.0 of this Handbook and listed in Appendix A. Activities within retained waters will generally still require a state ERP authorization and a separate federal authorization from the Corps. To provide certainty, streamlining, and efficiency, the State will consider that any wetlands or other surface waters delineated in accordance with Chapter 62-340, F.A.C., that are regulated under Part IV of Chapter 373, F.S. could be considered Waters of the United States, and will treat them as if they are, unless the applicant clearly demonstrates otherwise.

See section 4.1 of this Handbook for examples showing how to determine whether a project is in state-assumed or retained waters.

## 1.2 Using this Handbook

Requirements of section 404 of the CWA overlap significantly with the ERP program. To eliminate redundancy and streamline reviews, the State 404 Program rules and this Handbook reference existing ERP rules and Handbook sections wherever possible. Projects within state-assumed waters that are not otherwise exempt from permitting will require both a State 404 Program authorization and an ERP authorization. Processing of both authorizations will begin concurrently upon receipt of an application for a project, except where the activities requiring a State 404 permit are proposed to occur in a later phase of a project that will take more than the maximum permit duration allowed under federal law to complete. In such cases an applicant may apply for the State 404 permit at a later date. Activities that require both an ERP and a State 404 permit shall not commence before both permits are obtained.

This Handbook will assist applicants and staff in conducting the concurrent reviews, outlines the different timeframes for review, and encourages applicants to waive ERP timeframes in favor of State 404 Program timeframes, where applicable, to ensure consistency (see section 5.0). This Handbook also outlines any requirements in addition to those required under the ERP program and identifies those ERP rules that do not apply to State 404 Program permits.

## 1.3 Other Authorizations and Relationship to Other Governmental Entities

Issuance of a permit or verification of qualification for an exemption or general permit under Chapter 62-331, F.A.C., does not:

- Convey or create to the person any property right, or any interest in the real property;
- Authorize any entrance or activities on property that is not owned or controlled by the person; or
- Relieve persons from obtaining all other required licenses, permits, and authorizations under applicable state, federal, or local statute, rule, or ordinance. Persons are advised to obtain all required authorizations prior to commencement of activities required under the State 404 program.

Additional information on the distribution of public notice to, and coordination with, other governmental agencies is discussed in section 5.2 of this Handbook.

### 1.3.1 Additional Authorizations from the Corps of Engineers

Some projects may require an additional authorization from the Corps. More information about these authorizations, briefly described below, may be found online in the Jacksonville District Regulatory Division Sourcebook, or by contacting your local Corps office.



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#### 1.3.1.1 Section 408 Authorization

The Corps has many civil works projects within the state of Florida. Examples include dams, levies, navigation, and flood control projects. Some of these projects are located within or in proximity to state-assumed waters. Many such projects are located within residential communities. Parties other than the Corps may need to alter or occupy the projects and their associated lands. Reasons for alteration may include project improvements, relocation of part of the project, or installing utilities or other non-project features. In accordance with Section 14 of the Rivers and Harbors Act (RHA) (33 U.S.C. Part 408) (Section 408), the Corps must review requests for modification of federal projects by non-federal interests. If Section 408 authorization is needed, such authorization must be obtained from the Corps prior to project commencement.

#### 1.3.1.2 Authorization Under Section 10 of the Rivers and Harbors Act

In accordance with Section 10 of the Rivers and Harbors Act (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 based solely on historic use (Section 10 historic waters). While the Corps retains authority over Section 10 historic waters, upon the effective date of the State 404 Program, the State assumes authority over Section 404 permitting within Section 10 historic waters. Therefore, discharges of dredged or fill material in Section 10 historic waters may require a separate Section 10 permit from the Corps in addition to the State 404 permit.

Some projects within Section 10 waters may qualify for authorization under the State Programmatic General Permit (SPGP). More information about SPGP is available in the Jacksonville District Regulatory Division Sourcebook or on the Agency website.

### 1.3.2 Other Authorizations

Additional authorizations may be required from the Department, Water Management District, or other federal, state, and local agencies. These include, but are not limited to:

- Environmental Resource Permit (ERP)
- State-owned Submerged Lands Authorization
- National Pollutant Discharge Elimination System (NPDES) Authorization
- Well Construction Permit
- Consumptive Use or Water Use Permit
- Works of the District Permit
- Generic Permit for Discharge of Produced Groundwater
- Coastal Construction Permit
- Local building permits

### 1.3.3 Endangered Species Authorizations

Compliance shall be required, as applicable, with any requirements resulting from consultation with, or technical assistance by, the Florida Fish & Wildlife Conservation Commission (FWC), the US Fish & Wildlife Service, and the National Marine Fisheries Services (NMFS) for permits reviewed under the State 404 Program.



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### 1.4 Use of Regulatory Guidance Letters

Regulatory Guidance Letters (RGLs) issued by the Corps and/or EPA to assist with implementation of Section 404 of the CWA may be also be used by the state to assist with implementation of the State 404 Program, when current and applicable. Regulatory Guidance Letters, or sections of letters, that conflict with other applicable state rules, statutes, agreements, or processes shall not be used. Current RGLs can be found in the Corps' Jacksonville District Regulatory Division Sourcebook.

## 2.0 Definitions and Terms

(a) Where the definitions in Chapters 62-330 and 62-345, F.A.C., do not conflict with this section, those definitions shall be used.

(b) The following additional definitions and terms below are used solely for purposes of Chapter 62-331, F.A.C., and this Handbook.

1. "Act" or "CWA" means the Clean Water Act (also known as the Federal Water Pollution Control Act or FWPCA) Pub. L. 92–500, as amended by Pub. L. 95–217, 33 U.S.C. 1251, *et seq.*
2. "Activity" for the purposes of the State 404 Program only, means "discharge of dredged material" and/or "discharge of fill material" as those terms are defined in 40 CFR § 232.2 (see Appendix B). The terms "dredge", "fill", "dredging", and "filling", when used within Chapter 62-331, F.A.C., or this Handbook shall be interchangeable with "activity" as defined herein.
3. "Adaptive Management" means the development of a management strategy that anticipates likely challenges associated with compensatory mitigation projects and provides for the implementation of actions to address those challenges, as well as unforeseen changes to those projects. It requires consideration of the risk, uncertainty, and dynamic nature of compensatory mitigation projects and guides modification of those projects to optimize performance. It includes the selection of appropriate measures that will ensure that the aquatic resource functions are provided and involves analysis of monitoring results to identify potential problems of a compensatory mitigation project and the identification and implementation of measures to rectify those problems.
4. "Adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other state-assumed waters by man-made dikes or barriers, natural river berms, beach dunes, and the like are considered adjacent wetlands.
5. "Administratively complete" means an application that contains all the items required under the public noticing requirements of Rule 62-331.060, F.A.C.
6. "Agency" means the Department of Environmental Protection ("Department"), or the water management districts ("Districts"), where the Districts are delegated authority to implement the State 404 Program by the Department, and such delegation has been approved by EPA in accordance with 40 CFR Part 233.
7. "Aquatic environment" and "aquatic ecosystem" mean state-assumed waters, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals. (Also see "Natural systems" definition in Volume I, section 2.0)
8. "Best management practices" (BMPs) means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of wetlands and other surface waters from permitted activities. BMPs include methods, measures, practices, or design and performance standards which facilitate compliance with Chapter 62-331, F.A.C., and prevent violation of state water quality standards. Examples include, but are not limited to, placement of turbidity curtains or silt fence, stabilizing slopes, limiting work to appropriate weather and light conditions, and clearly marking work and staging areas in the field.



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9. "Buffer" means an upland, wetland, and/or riparian area that protects and/or enhances aquatic resource functions associated with wetlands, rivers, streams, lakes, marine, and estuarine systems from disturbances associated with adjacent land uses.
10. "Burial Resources" means human remains, meaning all physical remains of a human body of a person of American Indian ancestry, even if in fragmentary form unless it is determined that the human remain had been freely given or naturally shed by the individual from whose body it was obtained, such as hair made into ropes or nets or individual teeth. For the purposes of determining cultural affiliation, human remains incorporated into a funerary object, sacred object, or object of cultural patrimony, are considered as part of that item and as a cultural resource item.
11. "Compensatory Mitigation" means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.
12. "Compensatory Mitigation Project" means compensatory mitigation implemented by the permittee as a requirement of a permit (i.e., permittee-responsible mitigation), or by a mitigation bank or in-lieu fee program.
13. "Condition," as it is used in the mitigation section of this Handbook, means the relative ability of an aquatic resource to support and maintain a community of organisms having a species composition, diversity, and functional organization comparable to reference aquatic resources in the region.
14. "Contaminant" means a chemical or biological substance in a form that can be incorporated into, onto or be ingested by and that harms aquatic organisms, consumers of aquatic organisms, or users of the aquatic environment, and includes but is not limited to the substances on the 307(a)(1) list of toxic pollutants. The list of toxic pollutants is incorporated in paragraph 62-620.100(3)(k), F.A.C., and reproduced in Appendix D of this Handbook.
15. "Functions," as used in the mitigation section of this Handbook, means the physical, chemical, and biological processes that occur in ecosystems.
16. "Historical Resources Assessment Survey" or "Cultural Resources Assessment Survey" means a survey of the project site which meets the requirements set forth in Chapter 1A-46, F.A.C., Archaeological and Historical Report Standards and Guidelines.
17. "Historic Resource," "Historic Property," or "Cultural Resource" means any prehistoric or historic district, site, building, object, or other real or personal property of historical, architectural, or archeological value, and folklife resources. These properties or resources may include, but are not limited to, monuments, memorials, Indian habitations, ceremonial sites, abandoned settlements, sunken or abandoned ships, engineering works, treasure trove, artifacts, or other objects with intrinsic historical or archeological value, or any part thereof, relating to the history, government and culture of the state. (Source Section 267.021(3), F.S.).
18. "Impact" or "Adverse impact", as those terms relate to compensatory mitigation review, means adverse effect.
19. "In-kind" means a resource of a similar structural and functional type to the impacted resource.
20. "In-lieu fee program" means a program involving the restoration, creation, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for 404 permits. Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu fee program sponsor. The operation and use of an in-lieu fee program are governed by an in-lieu fee program instrument.
21. "Interagency Review Team" (IRT) means an interagency group of federal, tribal, state, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the Corps district engineer on, the establishment and management of a mitigation bank or an in-lieu fee program.



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22. "Material permit modification" and "material changes in the scope of the project" mean, for the purposes of applying Section 373.4146(5), F.S., only those modifications or changes, including changes to any long-term planning document appended to a permit pursuant to section 5.3.2., that result in a significant increase in the total project environmental impact, including but not limited to wildlife impacts, or a significant increase in the impact to state-assumed or retained waters.
23. "Mean high tide line," for purposes of identifying retained waters, means the line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.
24. "Mitigation Bank," for the purposes of the State 404 Program only, means a site, or suite of sites, where resources (e.g., wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by State 404 Program permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument.
25. "Mixing zone" means a limited volume of water serving as a zone of initial dilution in the immediate vicinity of a dredge or fill activity where receiving water quality may not meet quality standards or other requirements otherwise applicable to the receiving water.
26. "Off-site," for purposes of the mitigation section of this Handbook, means an area that is neither located on the same parcel of land as the impact site, or on a parcel of land contiguous to the parcel containing the impact site.
27. "On-site," for purposes of the mitigation section of this Handbook, means an area located on the same parcel of land as the impact site, or on a parcel of land contiguous to the impact site.
28. "Ordinary high water mark," for purposes of identifying retained waters, means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.
29. "Out-of-kind" means a resource of a different structural and functional type from the impacted resource.
30. "Performance standards" are observable or measurable physical (including hydrological), chemical and/or biological attributes that are used to determine if a compensatory mitigation project meets its objectives.
31. "Permittee-responsible mitigation" means an aquatic resource restoration, creation, enhancement, and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to provide compensatory mitigation for which the permittee retains full responsibility.
32. "Pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials not covered by the Atomic Energy Act, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. The legislative history of the CWA reflects that ''radioactive materials'' as included within the definition of ''pollutant'' in section 502 of the CWA means only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated under the Atomic Energy Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant", are radium



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and accelerator produced isotopes. See Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976).

33. "Practicable" means available and capable of being done after taking into consideration cost, existing technology, and logistics considering overall project purposes.
34. "Practicable alternative" means other choices available and capable of being carried out after taking into consideration cost, existing technology, and logistics considering overall project purposes, and may require an area not owned by the applicant which could reasonably have been obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity.
35. "Project" means all activities which the applicant plans to undertake pursuant to the entire scope of the project and includes all avoidance, minimization, and mitigation measures proposed by the applicant. To provide for a holistic review of projects that will take more than the maximum permit duration allowed under federal law to complete, the term includes all phases thereof, which phases may be temporal or geographic.
36. "Project area" or "Project site" means that portion of the state-assumed waters where specific dredging or filling activities are permitted and consist of a bottom surface area, any overlying volume of water, and any mixing zones. In the case of wetlands on which surface water is not present, the project area consists of the wetland surface area.
37. "Re-establishment" means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions. (see "Restoration")
38. "Reference aquatic resources" or "Reference site" are a set of aquatic resources that represent the full range of variability exhibited by a regional class of aquatic resources as a result of natural processes and anthropogenic disturbances.
39. "Rehabilitation" means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function but does not result in a gain in aquatic resource area. (see "Restoration")
40. "Restoration," for the purposes of the State 404 Program, means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.
41. "Retained Waters" means 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. The Corps will retain responsibility for permitting for the discharge of dredged or fill material in those waters identified in the Retained Waters List (Appendix 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. 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.
42. "Riparian areas" are lands adjacent to streams, rivers, lakes, and estuarine-marine shorelines. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality.



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43. "Service Area" means the geographic area within which impacts can be mitigated at a specific mitigation bank or an in-lieu fee program, as designated in its instrument.
44. "Services" mean the benefits that human populations receive from functions that occur in ecosystems.
45. "Special aquatic sites" means sanctuaries and refuges under state and federal laws or local ordinances, wetlands, mud flats, vegetated shallows, coral reefs, and riffle and pool complexes. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region.
46. "Sponsor" means any public or private entity responsible for establishing, and in most circumstances, operating a mitigation bank or in-lieu fee program.
47. "State-assumed Waters" or "Assumed Waters" means those waters as defined in Section 373.4146(1), F.S.
48. "Technically complete" means an application where each application item is adequate to allow the Agency to determine if the proposed project complies with Chapter 62-331, F.A.C. If a project requires both an ERP and a State 404 Program authorization, the State 404 Program review shall not be considered complete until the ERP review is complete. This is to satisfy the requirement for reasonable assurance that State water quality standards and coastal zone consistency requirements will be met.
49. "Temporal loss" or "time lag" is the time that passes between the loss of aquatic resource functions caused by the permitted impacts and the replacement of aquatic resource functions at the compensatory mitigation site.
50. "Tribe" means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a federal Indian reservation.
51. "Watershed approach" means an analytical process for making mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed. It involves consideration of watershed needs, and how locations and types of compensatory mitigation projects address those needs. A landscape perspective is used to identify the types and locations of mitigation projects that will benefit the watershed and offset losses of aquatic resource functions and services caused by activities authorized by Section 404 permits. The watershed approach may involve consideration of landscape scale, historic and potential aquatic resource conditions, past and projected aquatic resource impacts in the watershed, and terrestrial connections between aquatic resources when determining mitigation requirements for Section 404 permits.
52. "Watershed plan" means a plan developed by federal, tribal, state, and/or local government agencies or appropriate non-governmental organizations, in consultation with relevant stakeholders, for the specific goal of aquatic resource restoration, creation, enhancement, and preservation. A watershed plan addresses aquatic resource conditions in the watershed, multiple stakeholder interests, and land uses. Watershed plans may also identify priority sites for aquatic resource restoration and protection. Examples of watershed plans include special area management plans, advance identification programs, and wetland management plans.

## 3.0 Regulated Activities

### 3.1 Exemptions

A permit is not required under Chapter 62-331, F.A.C., for activities listed under 40 CFR § 232.3 (Appendix B), subject to the limitations described therein. Notice to the Agency is not required to conduct an exempt activity, except where the activity also requires an ERP authorization. Activities that qualify for an exemption pursuant to 40 CFR § 232.3 and an ERP exemption that does not require prior notice to the Agency may be conducted without notice.



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If a person desires verification that an activity qualifies for an exemption the request shall be submitted in accordance with Rule 62-331.040, F.A.C.

### 3.1.1 Agriculture and Forestry Exemptions

The exemptions applying to agriculture and forestry activities under 40 CFR § 232.3 are different from the exemptions available under ERP. The exemptions for agriculture in Section 373.406(2), F.S., Rules 62-330.051, and 62-330.0511, F.A.C., allow new activities within wetlands and other surface waters, while the State 404 Program exemption under 40 CFR § 232.3 may require a permit for such activities. Please read the requirements of both program's exemptions carefully when deciding if an activity is exempt or needs a permit. If you are unsure, contact your local Agency office or apply for a verification of exemption.

## 3.2 Permits Required

Rule 62-331.020, F.A.C., describes activities that require a permit. The types of permits available are general permits and individual permits. These are described below.

### 3.2.1 General Permits

General permits authorize activities specified in Rules 62-331.200 and subsequently numbered rules in Chapter 62-331, F.A.C.

General permits are available for categories of similar activities which have been determined to cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.

State 404 Program general permits are reviewed by DEP and EPA for re-authorization every five years. This means that general permits are only valid during that five-year period beginning at the time they are authorized (or re-authorized). If a permittee cannot perform the work in the time before the general permit expires, a new general permit or, if the general permit is not re-authorized, an individual permit will be required.

The Agency reserves the right to require an individual permit for any activity covered by a general permit if the Agency determines that the activity will have more than a minimal adverse effect, either individually or cumulatively, on the environment.

The Agency may administer, upon agreement with the Corps, Corps regional general permits that are still effective upon the date of assumption for projects within assumed waters, where appropriate, until the date that they expire. The Department shall keep a list of any regional general permits administered by the state after the date of assumption.

The same general permit cannot be used more than once for the same "single and complete" project, unless specifically stated within the general permit. "Single and complete", for the purposes of the general permits under Chapter 62-331, F.A.C., is defined below.

**Single and complete linear project:** A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term "single and complete project" is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all



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crossings of a single state-assumed water (i.e., a single waterbody) at a specific location. For linear projects crossing single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of general permit authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately. If the Agency determines that multiple "single and complete" projects will cause significant adverse cumulative impacts, an individual permit shall be required for the project(s).

**Single and complete non-linear project:** For non-linear projects, the term ''single and complete project'' is defined as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see below).

**Independent utility:** A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate, single and complete projects with independent utility.

#### 3.2.1.1 General Permits Not Requiring Notice of Intent to use a General Permit

Notice to the Agency is not required for those activities covered under a general permit where notice is not specifically required in the language of the general permit, or by Rule 62-331.200, F.A.C. Special attention should be made by the permittee to ensure that all of the conditions for the general permit are met, including any requirements for coordination with other agencies or tribes.

If you are unsure whether your project requires submittal of a notice of intent, it is recommended that you contact your local Agency office for assistance or submit a notice for review in accordance with Rule 62-331.200, F.A.C.

#### 3.2.1.2 General Permits Requiring a Notice of Intent to Use a General Permit

General permits requiring notice of intent shall be submitted to the Agency as described in section 4.2 of this Handbook and processed by the Agency in accordance with section 5.3, below.

#### 3.2.1.3 Frac-out Plan

A frac-out plan is required for projects involving horizontal directional drilling or jack-and-bore activities under the general permit in Rule 62-331.215, F.A.C. The purpose of the plan is to minimize adverse, unauthorized, impacts to state-assumed waters in case of a drilling fracture. The plan shall contain, at a minimum, the following information:

- Proposed methods to prevent violations of water quality standards (BMPs)
- Measures used to prevent and detect frac-out during the drilling operation
- Release procedures
- A drilling mud containment plan
- Agency notification contact information



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### 3.2.2 Individual Permits

Regulated activities that are not exempt under subsection 62-331.020(1), F.A.C., (40 CFR § 232.3, Appendix B) and that do not qualify for a State 404 Program general permit will require an individual permit. Individual permits are so named because they require individual, case-by-case review by the Agency. Individual permits are subject to the public notice requirements of Rule 62-331.060, F.A.C., and will be processed in accordance with Rule 62-331.052, F.A.C., and section 5.0 of this Handbook.

## 4.0 Preparation and Submittal of Applications and Notices

Applications and notices shall be prepared and submitted as described below.

### 4.1 Determining if a Project is within State-Assumed or Retained Waters

Projects within retained waters go to the Corps for processing, and projects within state-assumed waters go to the State Agency for processing.

The definition of retained waters, as stated in section 2.0, above, is:

"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. The Corps will retain responsibility for permitting for the discharge of dredged or fill material in those waters identified in the Retained Waters List (Appendix 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. 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.

The Corps also retains permitting authority for projects within "Indian country" as that term is defined at 18 U.S.C. § 1151 (provided below):

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means

(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 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.



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A list of "Indian country" can be found online in the Corps' Jacksonville District Regulatory Division Sourcebook.

For the purposes of determining retained or state-assumed waters, the boundary of a mitigation bank, excluding the service area, shall be considered the project boundary, even if only a portion of the bank requires a dredge and fill permit under Section 404 of the CWA.

The following illustrations demonstrate how to determine the administrative boundary of retained waters:



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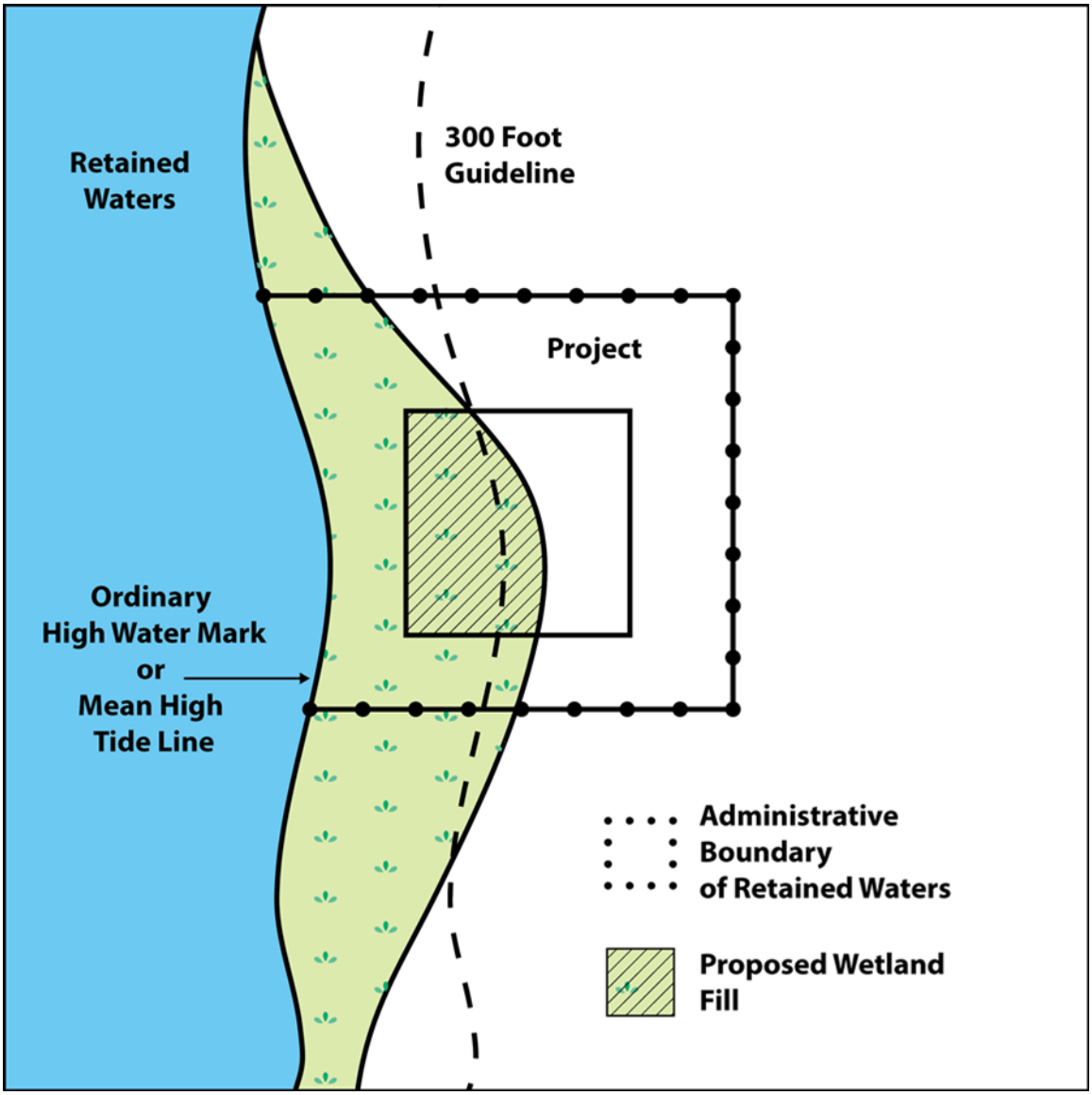
Example 1: Project with dredge and fill activity both waterward and landward of the 300-foot guide line. The 404 permit application would be processed by the Corps.



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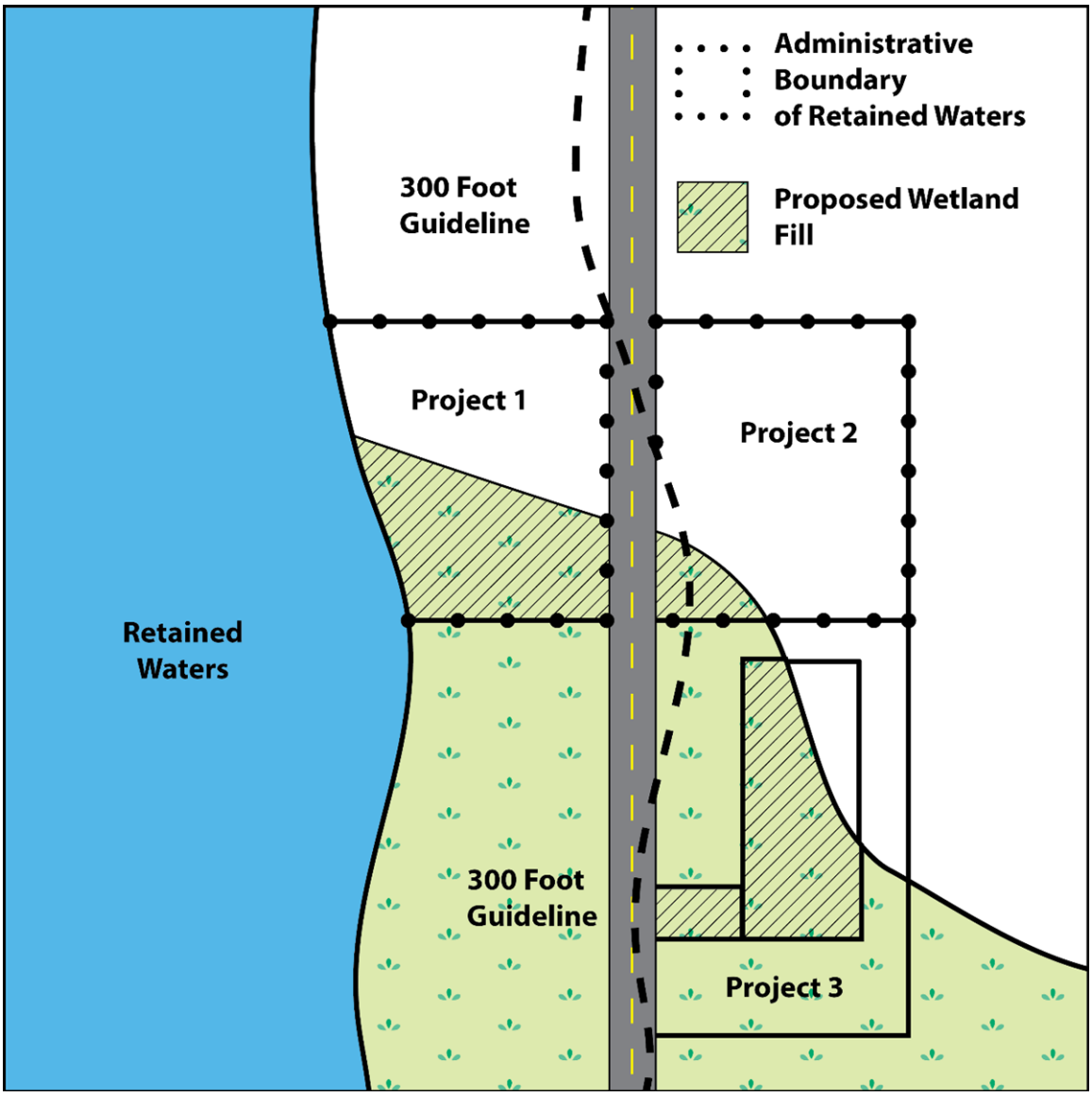
Example 2: Projects with dredge and fill activity and project boundaries waterward and/or landward of the 300-foot guide line. Projects 1 and 2 are retained and the 404 application will be processed by the Corps. Project 3 does not include any dredge or fill activities waterward of the 300 foot guide line, and therefore is not retained by the Corps, and the 404 application will be processed by the state Agency.



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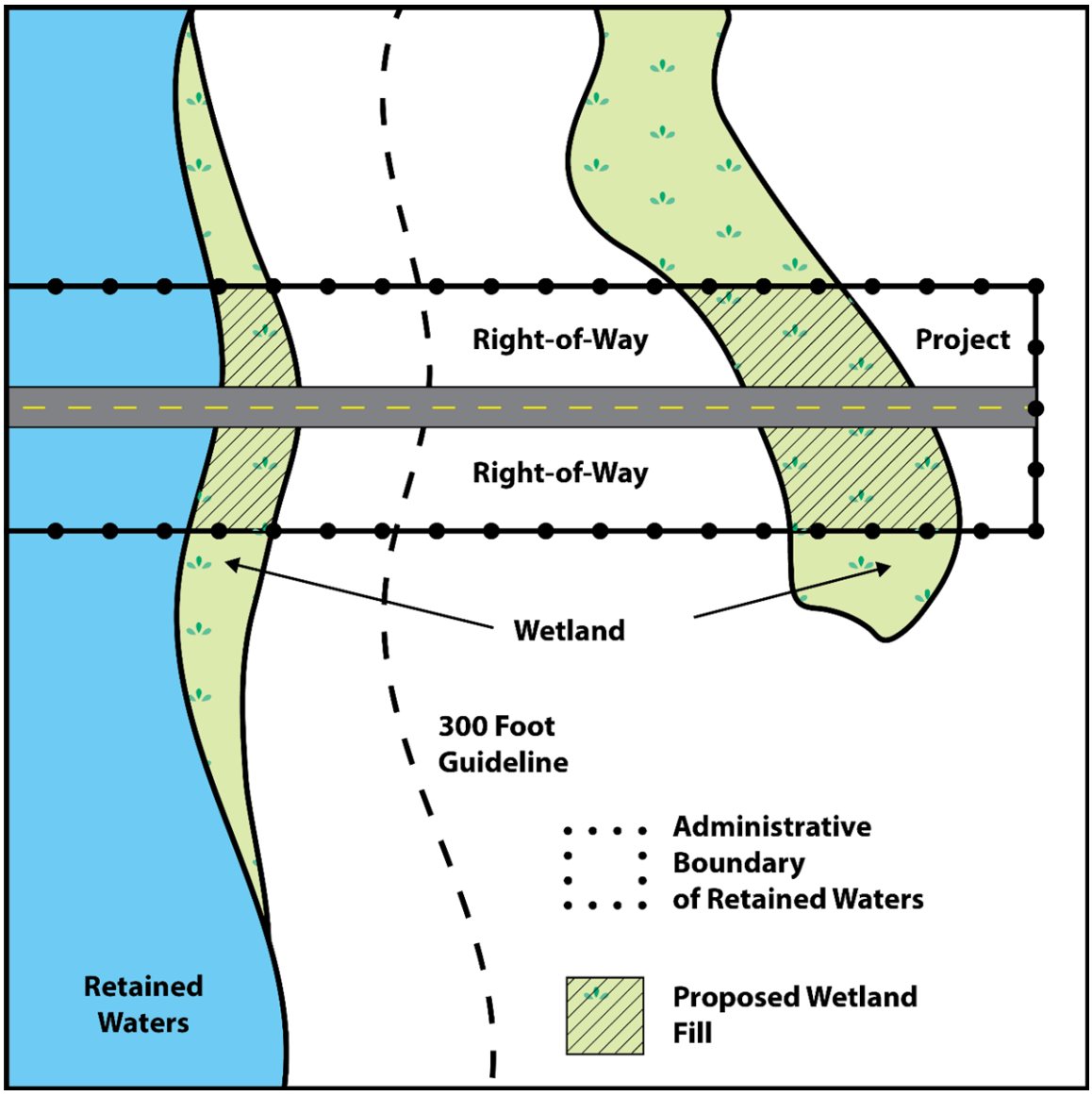
Example 3: A linear project including dredge and fill activities waterward of the 300 foot guide line. Linear projects may sometimes be miles long, but if there are dredge or fill activities waterward of the 300-foot guide line within the project boundary, the project is within retained waters, and the 404 application will be processed by the Corps.




## 4.2 Pre-application Conferences

Applicants are encouraged to have a pre-application phone call, meeting (on-site or in the office), or other conference with the applicable Agency staff, prior to submitting an application or notice. Pre-application conferences may help streamline processing steps and potential time delays by assisting the applicant to understand such things as:

(a) The need for a permit or potential qualification for an exemption or general permit, including a determination of what combination of ERP/State 404 Program authorizations will be required;

(b) Which Agency or Agencies will be responsible for the review of the application or notice;



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(c) How to prepare the application or notice, including availability of on-line tools that may assist in completing it, and how to use the long-term conceptual planning process in section 5.3.2 of this Handbook;

(d) Information required by the Agency to evaluate an application or notice, including such things as wetland delineations, resources that may be affected, alternatives analysis, surface water data, and other hydrologic, environmental, or water quality data;

(e) Application processing, public notice, and evaluation procedures;

(f) The need for a pre-application on-site meeting;

(g) Avoiding adverse impacts that may prevent the proposed activity from meeting applicable permitting or review standards and criteria;

(h) The existence of available project alternatives;

(i) Measures that can be taken to reduce or eliminate adverse impacts, and the appropriateness of compensatory mitigation to offset any remaining adverse impacts; and

(j) The potential for the project to impact tribal waters or tribal cultural resources (see section 5.2.6 for more information about tribal resources and coordination).

See Appendix A of Volume I for Agency contact information.

## 4.3 Forms and Submittal Instructions

Applicants are encouraged to use the e-Permitting and electronic portals of the Agencies to submit most applications and notices as discussed below. Appendix A of Volume I contains the internet addresses of the Agencies.

Application and notice forms available:

- Form 62-330.050 – Request for Verification of an Exemption
- Form 62-330.402(1) – Notice of Intent to Use an Environmental Resource and/or State 404 Program General Permit
- Form 62-330.060 – Application for Individual and Conceptual Approval Environmental Resource Permit, State 404 Program Permit, and Authorization to Use State-Owned Submerged Lands

Table 4.3, below, is a matrix identifying which application form should be submitted to the Agency depending on what combination of ERP and State 404 Program authorizations are needed.



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| Authorizations Needed | 404 Exemption | 404 General Permit | 404 Individual Permit |
|---|---|---|---|
| **No ERP** | Use form 62-330.050 | Use form 62-330.402(1) | Use form 62-330.060 |
| **ERP Exemption** | Use form 62-330.050 | Use form 62-330.402(1) | Use form 62-330.060 |
| **ERP General Permit** | Use form 62-330.402(1) | Use form 62-330.402(1) | Use form 62-330.060 |
| **ERP Individual Permit** | Use form 62-330.060 | Use form 62-330.060 | Use form 62-330.060 |
| **ERP Conceptual Approval Permit** | Use form 62-330.060 | Use form 62-330.060 | Use form 62-330.060 |

*Table 4.3 – Application form matrix.*

## 4.4 Processing Fees

There shall be no processing fees for State 404 Program verifications, notices, applications, or permits.

## 5.0 Processing of, and Agency Action on, Applications and Notices

Where the processing timeframes and agency action procedures in Chapter 62-330, F.A.C., Applicant's Handbook Volume I, and Chapter 120, F.S., do not conflict with the requirements of the State 404 Program, those processing timeframes shall be used, as outlined in this Handbook. Several procedures and rules for agency action are required by Section 404 of the CWA, but not by ERP, causing conflict between some State 404 Program and ERP program processes and timeframes.

For example, when a project requires both an ERP and a State 404 Program permit, some portions of the ERP review are likely to be completed faster than the State 404 Program review because of public notice, EPA review requirements, or the need to coordinate with other state and federal agencies. This means that a project may be permittable under Chapter 62-330, F.A.C., (ERP) after the ERP review, but as a result of comments received during the 404 public notice or other aspects of the 404 review, the project may require modifications under the State 404 Program.

It is the intent of the Agencies to process the State 404 Program and ERP authorizations concurrently as much as possible. For this reason, the applicant is given the choice, in the application form, to waive the timeframes for issuance pertaining to ERP review when the State 404 Program review may take longer to complete. The Agencies **highly recommend** that applicants make this choice for the following reasons:

- **Potential ERP modification fee savings.** If the ERP is issued before the State 404 Program authorization, and during the State 404 Program review process, it is found that modifications to the project are required for a project to be permittable under the State 404 Program, the applicant will be required to apply for, and pay the fee for, a modification of



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the issued ERP permit. If the ERP issuance timeframes are waived, the ERP would still be considered in review, and modifications could be made without an additional application or fee.

- **Less paperwork.** Fewer permit documents for staff to draft and fewer for the permittee to track.
- **More consistency.** The Agency or Agencies will be better able to ensure that the conditions of each authorization do not conflict.
- **Streamlined review.** The Agency or Agencies are able to work on the review process until both authorizations are issued. Additional reviews for modification, if needed, and the time required to draft two or more separate agency action documents, would be lessened resulting in a cleaner, simpler process for everyone.

If a project requires both an ERP and a State 404 Program authorization, the State 404 Program review shall not be considered complete until the ERP review is complete, unless the activity is exempt under Chapter 62-330, F.A.C., or qualifies for a general permit under Chapter 62-330, F.A.C. This is to satisfy the requirement for reasonable assurance that State water quality standards and coastal zone consistency requirements will be met.

## 5.1 General Procedures

The Agencies are required to follow procedural statutes and rules to review and act on applications and notices, and to provide rights to the public to object to Agency decisions. These statutes and rules include: Chapter 120, F.S., (Florida Administrative Procedures Act), Chapters 28-101 through 28-110, F.A.C., (Uniform Rules of Procedure), and each Agency's adopted Exceptions to the Uniform Rules of Procedure.

In acknowledgement that procedures required under Section 404 of the CWA may conflict with the above state procedural statutes and rules, Section 373.4146, F.S., provides the following:

- The Department may adopt any federal requirements, criteria, or regulations necessary to obtain assumption;
- Provisions of state law which conflict with the federal requirements do not apply to state administered section 404 permits;
- The Department must grant or deny an application for a state administered section 404 permit within the time allowed for permit review under 40 CFR Part 233, subparts D and F.
- The Department is specifically exempted from the time limitations provided in Sections 120.60 and 373.4141, F.S., for state administered section 404 permits [default provisions and processing timeframes];
- The decision by the Department to approve the reissuance (i.e, the issuance of a new permit) of any state administered section 404 permit issued pursuant to this section is subject to Sections 120.569 and 120.57, F.S., only with respect to any material permit modification or material changes in the scope of the project as originally permitted.

Additional specific provisions for processing applications and notices under Chapter 62-331, F.A.C., are summarized in the sections below.



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## 5.2 Coordination with Other Agencies, States, and Tribes

Coordination with other State or federal agencies, other states, and tribes may be required during review of a notice or application for a State 404 Program authorization. These coordination requirements are described in the sections below.

### 5.2.1 Water Management Districts

When a proposed activity includes agricultural activities and the State 404 Program permit or verification of qualification for an exemption is processed by the Department, the Department shall consult with the District within whose boundaries the project lies to determine whether the proposed activity may be considered "normal farming, silviculture or ranching" activities, and whether the activity may be considered "ongoing" for the purposes of the exemption in 40 CFR Part 232.3(c)(1).
Until such time the Department delegates, upon EPA approval, the State 404 Program to the Districts, Department and District staff shall coordinate review of the ERP and State 404 permits to the greatest extent practicable. Such coordination shall include:

- When an application or notice that contains activities within state-assumed waters is received by the District, the District shall forward a copy of the application or notice to the appropriate local office of the Department.
- Department staff shall accompany District staff on the initial site visit to verify the delineation of wetlands and other surface waters for the State 404 Program permit.
- The Department and District shall communicate frequently to streamline the permit reviews and ensure consistency between the ERP and State 404 authorization.

### 5.2.2 Florida Division of Historical Resources/State Historic Preservation Office

The State Historic Preservation Office (SHPO) shall review proposed projects to determine whether the project is likely to have an adverse effect on properties listed, or eligible for listing on the National Register of Historic Places. If the Agency or SHPO determine that the project as proposed may have adverse effects to properties listed or eligible to be listed in the National Register of Historic Places, the Agency, applicant, and SHPO shall consult to resolve the adverse effects prior to the final determination by SHPO. SHPO may provide any of the following determinations for the project:

- Request for additional information, and/or a request for a Cultural Resources Assessment Survey (CRAS);
- No effect to historic properties;
- No adverse effect to historic properties;
- Conditional no adverse effect to historic properties (recommended project modifications and/or special conditions for the permit);
- Adverse effect to historic properties; or
- (For general permit applications) Request that the project be evaluated as an individual permit because of potential historical resources concerns.

If SHPO sends a request for additional information or a CRAS, or recommends project modifications, the information shall be included in an Agency request for additional information. Once the additional information is received by the Agency, the additional information shall be immediately forwarded to SHPO for review and additional determination.



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(a) General Permits – Pre-coordination with SHPO is required for those activities that may qualify for a general permit without notice to the Agency (no-notice general permit). Pre-coordination shall be the responsibility of the prospective permittee, and shall be conducted in accordance with paragraph 62-331.200(3)(j~~i~~), F.A.C.

If use of a general permit requires notice to the Agency, the Agency shall forward a copy of the notice to SHPO for review. A prospective permittee may choose to pre-coordinate with SHPO, in which case the prospective permittee shall submit a copy of the outcome of such review with the notice.

(b) Individual permits that also require an ERP individual permit – The Agency shall send a copy of the application to SHPO upon receipt and shall include a notice to SHPO that the project also requires a State 404 Program permit. At such time that the Agency publishes the public notice for the project in accordance with Rule 62-331.060, F.A.C., a copy of the public notice shall be sent to SHPO. The notice shall contain the ERP application and/or permit number. SHPO may have additional comments pertaining to the State 404 authorization, or may state that any information sent to the Agency during the ERP review period shall also apply to the State 404 Program review.

(c) Individual permits that do not require an ERP individual permit – The agency shall send SHPO a copy of the public notice in accordance with Rule 62-331.060, F.A.C.

If an agency, such as FDOT, is the applicant and has previously coordinated with SHPO on the project, and there have been no changes to the project following coordination, the agency may submit proof of concurrence or a determination by SHPO for the proposed project with the application for a State 404 permit.

### 5.2.3 Florida Fish and Wildlife Conservation Commission, U.S. Fish and Wildlife Service, and National Marine Fisheries Service

The Florida Fish and Wildlife Conservation Commission (FWC), the U.S. Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS) will be provided an opportunity to review all applications for projects with reasonable potential for affecting endangered or threatened species. Consultation with, or technical assistance by, FWC, FWS, or NMFS shall be required when the Agency determines that the project may have the potential to affect listed species.

To determine whether a project may have the potential to affect listed species, the Agency may use available resources such as scientific literature, species keys, and habitat maps, or it may observe signs that the site is used by listed species during the site visit. If the Agency determines that a listed species may be affected, the Agency shall seek consultation with or technical assistance by FWC, FWS, and NMFS, as applicable, regarding the proposed project. The Agency shall incorporate as permit conditions all recommended impact avoidance and minimization measures (protection measures) provided by the FWC, FWS, or NMFS under their respective authorities, to avoid jeopardizing listed species or adversely modifying designated or proposed critical habitat. For individual permits, the Agency shall send a copy of the public notice required by Rule 62-331.060, F.A.C., to EPA for review and comment. If the FWC, FWS, or NMFS concludes that a permit application is likely to jeopardize or adversely modify designated critical habitat and no protection measures are available to reduce the risk to an acceptable level,



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the Agency shall deny the permit or shall take no action and notify EPA and the applicant of the decision in accordance with sub-subparagraph 62-331.052(3)(b)6.b., F.A.C.

If the applicant for a State 404 permit is the holder of a valid and active biological opinion, or Habitat Conservation Plan Incidental Take Permit (HCP/ITP), or a similar binding agreement that is issued by the FWS or NMFS and the species and activities described in the State 404 permit application are covered in the Biological Opinion, HCP/ITP or similar agreement, then no additional avoidance and minimization measures pertaining to federal listed species shall be required. Upon receipt of such documentation, the Agency shall provide the document to FWS or NMFS for review.

Federal agency applicants that have pre-coordinated with FWS or NMFS, as appropriate, through a National Environmental Policy Act (NEPA) process shall submit the outcome of such coordination as part of the application for a State 404 permit.

### 5.2.4 United States Army Corps of Engineers

The Agency shall coordinate with the Corps as follows:

(a) Pending Corps Section 404 permit applications upon the date of assumption – on the effective date of the State program, the Corps will transfer all pending applications for permits under section 404 of the CWA within state-assumed waters to the Department for processing.

(b) Application screening – When an application is received by either the Corps or the Agency, the application will be screened using the Retained Waters List (Appendix A) and corresponding GIS layer to determine if the proposed activity will occur within retained waters. When a proposed activity falls within retained waters, the Agency 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 the Agency.

(c) Projects requiring Section 408 authorization (see section 1.3.1.1, above) – If a project is likely to affect a Corps Civil Works project, the Agency will, within 5 days of receipt of the application, inform the Corps and instruct the applicant to contact the appropriate Corps Section 408 contact person for information about how to obtain a Section 408 authorization separately from the Corps. The Corps will notify the Agency within 14 days of receipt of the notification about whether the project requires Section 408 authorization. The Agency shall include a special condition in the permit requiring that the permittee obtain Section 408 permission prior to construction.

(d) Emergency permits – The Agencies shall consult with the Corps as soon as possible after receipt of a request for an emergency permit in state-assumed waters. The purpose of this consultation is to determine whether an emergency project may affect Corps civil works projects, Section 10 waters, navigation, Indian lands, or other Corps concerns.

(e) Unsatisfied EPA objection or requirement – If the Agency has received an EPA objection or requirement for a permit condition during the public comment period in Rule 62-331.060, F.A.C., and the Agency neither satisfies EPA's objections or requirement for a permit condition, nor denies the permit, the Corps shall process the permit application. In such cases,



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the Agency shall provide a copy of the application file to the Corps to facilitate the Corps' review.

### 5.2.5 United States Environmental Protection Agency

The Agency shall coordinate with EPA as follows:

(a) Waiver of review – EPA has oversight authority over the State 404 Program and may review individual permit applications and draft general permits. Federal law provides that EPA may waive review of certain categories of permits. EPA has waived review of all but the following categories of permits:

1. Draft general permits. These are drafts of any general permit that the State intends to add to Chapter 62-331, F.A.C. The term "draft general permit" does not mean each project subsequently authorized under an approved general permit.
2. Projects with reasonable potential for affecting endangered or threatened species as determined by the USFWS/NMFS;
3. Projects with reasonable potential for adverse impacts on waters of another state or tribe;
4. Projects that include discharges of dredged or fill material known or suspected to contain toxic pollutants in toxic amounts or hazardous substances in reportable quantities;
5. Projects located in proximity of a public water supply intake. For the purpose of the State 404 Program, proximity means 1000 feet from the intake;
6. Projects within critical areas established under state or federal law, including but not limited to national and state parks; fish and wildlife sanctuaries or refuges; national and historical monuments; wilderness areas and preserves; sites identified or proposed under the National Historic Preservation Act; and components of the National Wild and Scenic Rivers System;
7. Projects impacting compensatory mitigation sites, including mitigation banks, in lieu fee program sites, and permittee responsible mitigation sites;
8. Projects impacting sites that are owned or managed by federal entities, and activities by an applicant that is a federal entity;

In addition, the following projects shall be reviewed by EPA, even if they would otherwise not require EPA review under 1. Through 8., above:

1. Any project that EPA requests to review within 30 days of receipt of the public notice under Rule 62-331.060, F.A.C.;
2. Any project that the Agency requests EPA to review, at the Agency's discretion; and
3. Any project where the Agency fails to accept the recommendations of an affected state or tribe received during the public comment period.

Review of the above projects occurs upon receipt of the public notice by EPA. EPA may comment on, provide notice to the Agency of its intent to comment on, object to, make recommendations with respect to, or notify the Agency that it is reserving its right to object to, a permit application as described in Rule 62-331.052(3), F.A.C.



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### 5.2.6 Federally Recognized Tribes

The Agency shall send a copy of the public notice required in Rule 62-331.060, F.A.C., to a potentially affected tribe for any individual permit applications where the project has the potential to affect tribal waters or resources. The tribes may submit public comments or suggest project modifications or permit conditions to prevent adverse effects to tribal waters and resources. If the Agency chooses not to accept the recommendations of the tribe, the Agency shall submit the recommendations to EPA with an explanation of the Agency's reasons for not accepting the recommendations. EPA shall then review the project in accordance with paragraph 62-331.052(3)(b), F.A.C.

The Agency shall consult with the tribes as necessary for notices of intent to use general permits within tribal areas of concern. The tribes may provide information to assist the Agency in determining whether the project is likely to have more than minimal adverse effect on tribal waters or resources. If the Agency determines, based on information from the tribe, or information from the State Historic Preservation Office or Tribal Historic Preservation Office, that the project is likely to have more than minimal adverse effects on tribal waters or resources, the Agency shall require the applicant to apply for an individual permit for the project.

### 5.2.7 Adjacent States – Alabama and Georgia

The Agency shall send a copy of the public notice required in Rule 62-331.060, F.A.C., for any project that has the potential to affect the waters of an adjacent state. Typically, this would include projects within waters that straddle the border of the adjacent state, where the project is in close proximity to the border. The adjacent state may submit public comments or suggest project modifications or permit conditions to prevent adverse effects to that state's waters. If the Agency chooses not to accept the recommendations of the adjacent state, the Agency shall submit the recommendations to EPA with an explanation of the Agency's reasons for not accepting the recommendations. EPA shall then review the project in accordance with paragraph 62-331.052(3)(b), F.A.C.

## 5.3 Processing Individual Permit Applications

Applications for individual permits shall be processed in accordance with Rule 62-331.052, F.A.C., this section, and section 8.0 of this Handbook.

### 5.3.1 Public Notice

Public notice shall be conducted in accordance with Rule 62-331.060, F.A.C.

(a) Public notices shall be prepared by the Agency and shall contain:

1. The name and address of the applicant and, if different, the address or location of the activity(ies) regulated by the permit.
2. The name, address, and telephone number of a person to contact for further information.
3. A brief description of the comment procedures and procedures to request a public meeting, including deadlines.
4. A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a



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description of the type of structures, if any, to be erected on fills, and a description of the type, composition and quantity of materials to be used as fill.

5. A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area.
6. A paragraph describing the various evaluation factors on which decisions are based.
7. Any other information which would significantly assist interested parties in evaluating the likely impact of the proposed activity.

(b) Notice of public meeting shall also contain the information in (a)1. through 7., above, and the following information:

1. Time, date, and place of meeting.
2. Reference to the date of any previous public notices relating to the permit.
3. Brief description of the nature and purpose of the meeting.

### 5.3.2 Long-Term Conceptual Planning for Projects that will Take More Than One Phase to Complete

State 404 permits are limited in duration under federal law. Larger projects may need to be completed in phases so as not to exceed the maximum per-permit duration. Such projects may include, but are not limited to, residential, governmental, or commercial developments, linear transportation, and mining activities. To provide some regulatory certainty to applicants of these larger projects, subsection 62-331.051(2), F.A.C., provides that all activities reasonably related to the project shall be included in the same permit application, which means that the applicant should provide sufficient information for the Agency to review the entire scope of the project. This will enable the Agency to assess whether the project as a whole meets the requirements of Chapter 62-331, F.A.C., and this Handbook.

The following steps shall be taken to facilitate efficient permitting and planning for larger projects that are expected to be completed in phases:

(a) Pre-application meeting

The applicant shall schedule a pre-application meeting with agency staff to discuss the entire scope of the project. The agency shall provide information and guidance to the applicant, including, but not limited to, such topics as project purpose and description, project alternatives and the alternatives analysis (see Appendix C), methods to avoid and minimize impacts to state-assumed waters, cumulative impacts, mitigation information, permitting strategy, and materials that should be included with the applications. The agency may provide a non-binding “pre-review” for any material that the applicant has prepared at this stage. The most helpful element to have ready for “pre-review” is the alternatives analysis required by Rule 62-331.053, F.A.C. The alternatives analysis shall be prepared for the entire project and shall be attached as an appendix to the long-term planning document in (b), below.



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(b) Phasing the project

The applicant shall divide the project into phases. Each phase shall contain activities that can reasonably be expected to be completed within no more than the maximum permit duration allowed under federal law. The applicant shall create a long-term planning document that explains how the project is phased, what activities are expected to be completed within each phase, an expected permitting timeframe for each phase, and an assessment of cumulative impacts. The long-term planning document shall be made part of the project file that goes out on public notice and federal review if required under 40 CFR § 233.51. The agency shall provide the applicant with information and guidance, as needed.

(c) Permitting

The applicant shall apply for one phase at a time. Permits issued under this section shall be for a fixed term not to exceed the maximum permit duration allowed under federal law. During its review of the first phase of the project, the Agency shall analyze and review the entire project, as proposed in the long-term planning document, under all 404 requirements. This analysis and review shall become part of the project file and be a basis of the agency action on the first phase, and the long-term planning document shall be incorporated into the permit.

The Agency shall depend on this analysis and review for subsequent phases of the same project except to the extent:

1. There are changes to state water quality standards that would be affected by activities described in the long-term planning document that have not already been authorized for construction or operation;
2. There have been amendments to Florida law governing special basin criteria that would affect future activities described in the long-term planning document that have not already been authorized for construction;
3. There are substantive changes in the site characteristics that would affect whether the design concepts described in the long-term planning document can continue to be reasonably expected to meet the conditions for authorizing construction of future phases. This shall include such things as changes in the designation of listed species, and changes to nesting, denning, and critical designation status of listed species that exist within the lands served by the project area; and
4. There have been material changes in the scope of the project, as defined in section 2.0 of this Handbook.

Subsequent review by the Agency shall be limited to those changes enumerated above. In order for the Agency to determine whether there have been any changes in the scope of the project, any changes to the most up-to-date version of the long-term planning document shall be included with the permit application for each subsequent phase with a summary of any changes made to the document since the previous phase was permitted. The most recent version of the long-term planning document shall be attached as an appendix to all subsequent permits issued for the project. The permit shall be clearly labeled with the following caveat:

> "This permit authorizes one phase of a multi-phase project. The long term planning document, attached as Appendix [X], does not reflect the scope of activities authorized by this permit. Authorized activities are described in the body of the permit document and depicted in



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Appendix [X] (drawings). It is a violation of Part IV of Chapter 373, F.S., and the Clean Water Act to conduct unauthorized dredge and fill activities."

Immediately prior to conclusion of each permit, the Department shall conduct a site inspection to verify site conditions and impacts are as anticipated and permitted. It is highly recommended that the applicant apply for the next phase one year before the permit for the previous phase expires or is projected to be completed – whichever is sooner. This will give the Agency time to process the application for the next phase, including putting the project out on public notice and potential federal agency review. While the Agency shall follow the expedited review procedures in subsection 62-331.052(1) and subparagraph 62-331.060(3)(b)5., F.A.C., allowing one year for processing will help prevent project delays and will help provide a seamless transition between phases. Activities identified in a permit may be administratively continued as described in Section 5.3.3.

### 5.3.3 Continuation of Permits and Review for a New Permit for an Existing Project

State 404 Permits cannot be extended beyond the duration allowed under federal law or renewed. Large projects that are expected to take more than the maximum duration allowed under federal law to complete shall follow the long-term planning provisions in section 5.3.2. However, occasionally projects will take more than the maximum duration allowed under federal law to complete because of unexpected project delays. Unexpected project delays can occur for many reasons such as discreet storm events, labor or supply shortages, unanticipated number of inclement weather days, etc. If this occurs, the permittee shall apply for a new permit. If applicable, the permittee may request that the Agency use the original application for a new permit as described in (a), below.

If the permittee applies for a new permit at least 180 days before expiration of the original permit, the original permit may be administratively continued until the new permit is issued (i.e. the permittee may continue work under the original permit until the new permit is issued).

If the permittee does not apply for a new permit at least 180 days before expiration of the original permit, the permittee shall stop work on or before the original expiration date. A new permit must be obtained prior to commencement of work.

(a) An applicant may request that the Agency use the original application form and materials for a new permit when:

1. There have been no material changes to site conditions, including use of the site by listed species, since the original permit was issued other than activities authorized in the original permit;
2. Where the project is in compliance with the original permit; and
3. State 404 Program rules applicable to the project have not changed.

Upon receipt of a request to use the original application for a new permit, the Agency shall conduct a site visit to verify that 1. and 2., above, have been met.

(b) If there are any changes in site conditions, State 404 program rules, proposed modifications, or if the project is found to be out of compliance with the original permit, the applicant shall submit a new application.



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(c) Any application for a new permit for an existing project shall provide the following additional information:

1. A description of work already completed under the original permit;
2. A description of work that has not yet been completed (if requested pursuant to (a), above, the description should be limited to work that was authorized in the original permit);
3. The reason for the unexpected delay;
4. The amount of time needed to finish the project (no more than the maximum duration allowed under federal law).

An application for a new permit will be processed as a new individual permit, including all public notice requirements. An application that includes unfinished activities authorized in a previously issued State 404 Program permit, where the application is received prior to expiration of the original permit for the activities, shall be subject to the provisions of Subsection 373.4146(5), F.S., as applicable.

## 6.0 Duration, Modification, and Transfer of Permits

(a) Duration of permits shall be in accordance with Rule 62-331.090, F.A.C.

(b) Individual permits become effective when they are signed by the Agency and the applicant. Each State 404 Individual permit, when issued, shall contain a signature page with signature blocks for the person who has authority to sign permits for the district where the permit is issued and for the applicant. The applicant shall sign the page and send it back to the Agency for Agency signature.

(c) Individual permits cannot be extended beyond the duration allowed under federal law but may be administratively continued while an application for a new permit is under review in accordance with section 5.3.3 of this Handbook when unexpected project delays cause a project to require more time to complete.

## 7.0 Determination and Review of the Landward Extent of State-Assumed Waters

Determination and review of the landward extent of state-assumed waters shall be conducted in accordance with subsection 62-331.010(3), F.A.C., and section 7.1 of Volume I.

## 7.1 Use of ERP Formal Determinations

Valid formal determinations conducted in accordance with subsection 62-330.201(2), F.A.C., and section 7.2 of Volume I shall be accepted for State 404 Program permits.

## 7.2 Informal Determinations

Informal determinations may be requested by the applicant in accordance with section 7.3 of Volume I.



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## 8.0 Criteria for Review of State 404 Program Individual Permits

State 404 Program permits are processed using ERP criteria, the additional criteria in Chapter 62-331, F.A.C., Volume I, and this Handbook. The ERP review covers most criteria. Those are described in Volume I. Any additional criteria not described in Volume I, as well as those ERP criteria that conflict with the State 404 Program, are described in this section.

## 8.1 Administratively and Technically Complete Applications

There are two types of "completeness" for applications for a State 404 Program individual permit.

(a) Administratively complete is defined in section 2.0. Administratively complete means the project is complete enough to go out on public notice but may not have all details worked out. To be complete enough for public notice, the project design should be nearly finalized, and environmental information submitted with the application should be detailed enough to provide a good description of project environmental impacts in the notice. A project shall not be administratively complete if the alternatives analysis required by subsection 62-331.053(1), F.A.C., has not been submitted.

(b) Technically complete is defined in section 2.0. A technically complete application includes all information required for the Agency to commence review as described in section 8.2, below.

Applicants should strive to submit applications that are as technically complete as possible. Pre-application meetings as described in section 5.0 are important and can assist an applicant in submitting a complete application.

## 8.2 Sequence of Review

Upon receipt of a technically complete application, the Agency will follow the sequence of review for processing applications summarized below. The sequence is simplified for purposes of illustration. The actual process followed may be iterative, with the results of one step leading to a re-examination of the previous steps. The Agency must address all the applicable State 404 Program permitting conditions in reaching a permitting decision for a project.

(a) Determine whether the activity qualifies for a State 404 Program exemption or general permit. If it is not covered by an exemption or general permit, then:

(b) Review practicable alternatives to the proposed activity. Alternatives may include not dredging or filling in state-assumed waters (avoidance) or dredging or filling in an alternative aquatic site with potentially less damaging environmental consequences. The applicant shall submit an alternatives analysis as required by Rule 62-331.053, F.A.C. Guidance for completing the alternatives analysis can be found in Appendix C.

(c) Review the proposed project area boundaries. For the purposes of the State 404 Program only, the project area includes all areas of dredging or filling in state-assumed waters, and any proposed mixing zones, where applicable. Mixing zones shall be reviewed in accordance with Chapter 62-331, F.A.C., and as provided in Rule 62-4.242, and subsection 62-4.244(5), F.A.C.



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(d) Evaluate the various physical and chemical components which characterize the non-living environment of the proposed site, the substrate and the water including its dynamic characteristics consistent with Rules 62-330.301, 62-330.302, and 62-331.053, F.A.C.

(e) Identify and evaluate any special or critical characteristics of the proposed project site and surrounding areas which might be affected by use of such site, related to their living communities or human uses consistent with Rules 62-330.301, 62-330.302, and 62-331.053, F.A.C.

(f) Review the information submitted with the application to determine whether the information provided by the applicant is sufficient to provide reasonable assurance that the applicable provisions of Rules 62-330.301, 62-330.302, and 62-331.053, F.A.C., will be met.

(g) Evaluate the material to be dredged or used as fill to determine the possibility of the presence of contaminants, including chemical contamination, that may violate state water quality standards listed in paragraph 62-330.301(1)(e), F.A.C., or any toxic effluent standard or prohibition under section 307 of the CWA. Check for physical incompatibility of the material to be used as fill (examples – 1) muck should not be used as structural fill but may be appropriate for use in a wetland restoration project; 2) if a certain ecological community type is expected to colonize the fill, the fill should be appropriate for the desired species).

(h) If there is a reasonable probability that contaminants are present, including chemical contamination, the Agency shall require the applicant to conduct appropriate sediment, elutriate, and/or water quality tests, as applicable.

(i) Identify appropriate and practicable changes to the project plan to avoid or minimize the environmental impact of the activity, as described in Volume I, section 10.2.1, except 10.2.1.2, which is not applicable to the State 404 Program. Avoidance should be considered first, and then minimization only if avoidance is not practicable.

(j) Complete a Technical Staff Report to document how the project addresses the requirements of Rules 62-330.301, 62-330.302, and 62-331.053, F.A.C.

(k) Make and document a finding of either compliance or noncompliance with the requirements of Rules 62-330.301, 62-330.302, and 62-331.053, F.A.C. This is a determination of whether the project, including any mitigation, is permittable under the State 404 Program.

(l) Prepare a written determination on each application outlining the permitting decision and the rationale for the decision. The determination shall be dated, signed, and included in the official record prior to final action on the application. The Technical Staff Report from step 10 (subsection (j)), above, shall be included in or attached to the determination.

### 8.3 Review Criteria Unique to State 404 Program Permits

The following criteria are unique to the State 404 Program and will need to be considered in addition to the criteria for an ERP in Chapter 62-330, F.A.C., to meet the requirements of the State 404 Program. This list is a summary provided for convenience:



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### 8.3.1 Alternatives Analysis

Some aspects of the alternatives analysis are similar to the requirements in Volume I, section 10.2.1 regarding elimination and reduction of impacts. The State 404 Program differs from ERP in that it requires more documentation (see subsection 62-331.053(1), F.A.C.), and allows the "No project alternative" (or "No action alternative") to be considered.

### 8.3.2 Aesthetics Review

Aesthetics shall be considered as part of the evaluation of potential adverse effects on human-use characteristics that may occur as a result of the proposed activities.

Aesthetics associated with the aquatic ecosystem consist of the perception of beauty by one or a combination of the senses of sight, hearing, touch, and smell. Aesthetics of aquatic ecosystems apply to the quality of life enjoyed by the general public and property owners.

Possible loss of values (adverse effects) include: The dredge or fill projects can mar the beauty of natural aquatic ecosystems by degrading water quality, creating distracting project areas, inducing inappropriate development, encouraging unplanned and incompatible human access, and by destroying vital elements that contribute to the compositional harmony or unity, visual distinctiveness, or diversity of an area. Dredging or filling can adversely affect the particular features, traits, or characteristics of an aquatic area which make it valuable to property owners. Activities which degrade water quality, disrupt natural substrate and vegetational characteristics, deny access to or visibility of the resource, or result in changes in odor, air quality, or noise levels may reduce the value of an aquatic area to private property owners.

The Agency shall also consider any comments received during the public comment period that apply to aesthetics.

### 8.3.3 Mitigation hierarchy

Mitigation for State 404 Program permits is generally evaluated in accordance with Volume I, section 10.3, like ERP. However, in addition to those requirements, the federal mitigation hierarchy described in section 8.5.1 of this Handbook, shall apply to any mitigation for State 404 Program permits.

### 8.3.4 Permit signatures

The Permittee, as well as the Agency, must sign an individual permit before it is considered effective.

After making a permitting decision, The Agency will draft the permit, and will send the draft permit to the applicant for review. If the applicant accepts the permit and conditions, the applicant shall sign the signature page and send the document back to the Agency using regular mail services or electronically. The Agency will then sign the permit and send the signed permit to the Permittee. The date that the Agency signs the permit will be the effective date of the permit. The Permittee must receive the fully executed permit before conducting any activity authorized in the permit.



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### 8.3.5 Cumulative Effects

Unlike ERP reviews, the CWA does not limit analysis of cumulative effects to the resources within the impacted drainage basin. However, the drainage basin is a good starting point for review and will often be found to be the appropriate scale. Some projects will require cumulative effects reviewed on a larger or smaller scale depending on the size, project purpose, and resources proposed for impact. When reviewing cumulative effects, the Agency shall identify resources of concern and determine the potentially effected resource area(s). Compensatory mitigation for cumulative impacts shall comply with Volume I, section 10.2.8.

Cumulative impacts are the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual dredge or fill activities. Although the impact of a particular activity may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems.

Cumulative effects attributable to dredge or fill activities in wetlands and other surface waters should be predicted to the extent reasonable and practical. The Agency shall collect information and solicit information from other sources, such as other permitting agencies, governmental agencies, or the public, about the cumulative impacts on the aquatic ecosystem. This information shall be documented and considered during the decision-making process concerning the evaluation of individual permit applications and monitoring and enforcement of existing permits.

### 8.3.6 Secondary Effects

Secondary effects are effects on an aquatic ecosystem that are associated with a dredge or fill activity, but do not result from the actual placement of the dredged or fill material. Information about secondary effects on aquatic ecosystems shall be considered and documented during the decision-making process concerning the evaluation of individual permit applications.

Some examples of secondary effects on an aquatic ecosystem are fluctuating water levels in an impoundment and downstream associated with the operation of a dam, septic tank leaching and surface runoff from residential or commercial developments on fill, and growth induced by improved access. Activities to be conducted on uplands created by fill activities in wetlands or other surface waters may have secondary impacts within those waters which should be considered in evaluating the impact of creating those uplands.

In addition to the secondary impact analysis categories identified in Volume I, section 10.2.7, the CWA requires secondary impact analysis on the following categories:

(a) Sanctuaries and refuges
Sanctuaries and refuges consist of areas designated under state and federal laws or local ordinances to be managed principally for the preservation and use of fish and wildlife resources. Sanctuaries and refuges may be affected by dredge or fill activities which will: Disrupt the breeding, spawning, migratory movements or other critical life requirements of resident or transient fish and wildlife resources;

1. Create unplanned, easy and incompatible human access to remote aquatic areas;
2. Create the need for frequent maintenance activity;
3. Result in the establishment of undesirable competitive species of plants and animals; or



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4. Change the balance of water and land areas needed to provide cover, food, and other fish and wildlife habitat requirements in a way that modifies sanctuary or refuge management practices;

(b) Human use characteristics
Categories include:

1. Municipal and private water supplies. Activities can affect the quality of water supplies with respect to color, taste, odor, chemical content and suspended particulate concentration, in such a way as to reduce the fitness of the water for consumption. Water can be rendered unpalatable or unhealthy by the addition of suspended particulates, viruses and pathogenic organisms, and dissolved materials. The expense of removing such substances before the water is delivered for consumption can be high. Activities may also affect the quantity of water available for municipal and private water supplies. In addition, certain commonly used water treatment chemicals have the potential for combining with some suspended or dissolved substances from dredged or fill material to form other products that can have a toxic effect on consumers.

2. Recreational and commercial fisheries. Activities can affect the suitability of recreational and commercial fishing grounds as habitat for populations of consumable aquatic organisms. Activities can result in the chemical contamination of recreational or commercial fisheries. They may also interfere with the reproductive success of recreational and commercially important aquatic species through disruption of migration and spawning areas. The introduction of pollutants at critical times in their life cycle may directly reduce populations of commercially important aquatic organisms or indirectly reduce them by reducing organisms upon which they depend for food. Any of these impacts can be of short duration or prolonged, depending upon the physical and chemical impacts of the discharge and the biological availability of contaminants to aquatic organisms.

3. Water-related recreation. Water-related recreation encompasses activities undertaken for amusement and relaxation. Recreational activities encompass two broad categories of use: consumptive, such as harvesting resources by hunting and fishing; and non-consumptive, such as canoeing and sight-seeing. Activities may adversely modify or destroy water use for recreation by changing turbidity, suspended particulates, temperature, dissolved oxygen, dissolved materials, toxic materials, pathogenic organisms, quality of habitat, and the aesthetic qualities of sight, taste, odor, and color.

4. Aesthetics. Aesthetics associated with the aquatic ecosystem consist of the perception of beauty by one or a combination of the senses of sight, hearing, touch, and smell. Aesthetics of aquatic ecosystems apply to the quality of life enjoyed by the general public and property owners. Dredge or fill activities can mar the beauty of natural aquatic ecosystems by degrading water quality, creating distracting disposal sites, inducing inappropriate development, encouraging unplanned and incompatible human access, and by destroying vital elements that contribute to the compositional harmony or unity, visual distinctiveness, or diversity of an area. Dredge or fill activities can adversely affect the particular features, traits, or characteristics of an aquatic area which make it valuable to property owners. Activities which degrade water quality, disrupt natural substrate and vegetational characteristics, deny access to or visibility of the resource, or result in changes in odor, air quality, or noise levels may reduce the value of an aquatic area to private property owners.



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5. Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar preserves. These preserves consist of areas designated under federal and state laws or local ordinances to be managed for their aesthetic, educational, historical, recreational, or scientific value. Dredge or fill activities in such areas may modify the aesthetic, educational, historical, recreational and/or scientific qualities thereby reducing or eliminating the uses for which such sites are set aside and managed.

## 8.4 ERP Criteria Not Applicable to State 404 Program Permits

Section 373.4146, F.S., provides that provisions of state law that conflict with federal requirements pertaining to Section 404 permits do not apply to state administered section 404 permits (State 404 Program permits). The following rules and statutes applicable to ERP are not applicable to State 404 Program Permits. This list may not be exhaustive.

Statutes:

- Section 120.60, F.S., pertaining to default of processing timeframes;
- Section 373.4141, F.S., containing timeframes for review of ERP permits;
- Certain provisions of Section 373.414, F.S., pertaining to mining mitigation;
- Any provision of Chapter 378, F.S., pertaining to "life-of-the-mine" permits;
- Sections 378.212(1)(g), and 378.404(9), F.S., pertaining to variances for certain mining reclamation activities;
- Subsection 378.403(19), F.S., containing a definition of "Wetlands" with special provisions for certain areas included in an approved conceptual reclamation plan or modification application;
- Section 252.363(1)(a)3., F.S., pertaining to the tolling and extension of permits pursuant to part IV of Chapter 373, F.S., when the Governor declares a state of emergency, if the State 404 permit would be extended beyond the duration allowed under federal law.

Rules:

- Paragraph 62-345.600(1)(b), F.A.C., pertaining to time lag for phosphate and heavy minerals mines;
- Volume I, Section 10.2.1.2 providing certain exceptions for reduction or elimination of impacts;
- Rule 62-348.600, F.A.C., pertaining to mitigation for high fiber peat mines.

## 8.5 Compensatory Mitigation

Compensatory mitigation for State 404 Program permits shall be conducted in accordance with Rule 62-331.130, F.A.C., and this section.

### 8.5.1 Compensatory Mitigation Hierarchy

When considering options for successfully providing the required compensatory mitigation, the Agency shall consider the type and location options in the order presented in paragraphs (a) through (e) of this section. It is recognized that flexibility may be needed to address watershed



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needs and allow for the consideration of mitigation projects that are environmentally preferable based on a watershed approach, if such projects are consistent with this section.

Subject to the provisions in paragraphs (a) through (e), below, and section 8.5.2 of this Handbook, the required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses. When compensating for impacts to marine resources, the location of the compensatory mitigation site should be chosen to replace lost functions and services within the same marine ecological system (e.g., reef complex, littoral drift cell). Compensation for impacts to aquatic resources in coastal watersheds (watersheds that include a tidal water body) should also be located in a coastal watershed where practicable. Compensatory mitigation projects should not be located where they will increase risks to aviation by attracting wildlife to areas where aircraft-wildlife strikes may occur (e.g., near airports).

(a) Mitigation bank credits. When permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by the purchase of mitigation bank credits.

Since an approved instrument (including an approved mitigation plan and appropriate real estate and financial assurances) for a mitigation bank is required to be in place before its credits can begin to be used to compensate for authorized impacts, use of a mitigation bank can help reduce risk and uncertainty, as well as temporal loss of resource functions and services. Mitigation bank credits are not released for debiting until specific milestones associated with the mitigation bank site's protection and development are achieved, thus use of mitigation bank credits can also help reduce risk that mitigation will not be fully successful.

Mitigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. Also, development of a mitigation bank requires site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu fee programs. For these reasons, the Agency shall give preference to the use of mitigation bank credits when these considerations are applicable. However, these same considerations may also be used to override this preference, where appropriate, as, for example, where an in-lieu fee program has released credits available from a specific approved in-lieu fee project, or a permittee-responsible project will restore an outstanding resource based on rigorous scientific and technical analysis.

(b) Corps authorized in-lieu fee program credits. Where permitted impacts are located within the service area of a Corps authorized in-lieu fee program, and the in-lieu fee program has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the in-lieu fee program.

In-lieu fee projects typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. They also devote significant resources to identifying and addressing high-



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priority resource needs on a watershed scale, as reflected in their compensation planning framework. For these reasons, the Agency shall give preference to in- lieu fee program credits over permittee-responsible mitigation, where these considerations are applicable. However, as with the preference for mitigation bank credits, these same considerations may be used to override this preference where appropriate. Additionally, in cases where permittee-responsible mitigation is likely to successfully meet performance standards before advance credits secured from an in-lieu fee program are fulfilled, the Agency shall also consider this factor in deciding between in-lieu fee mitigation and permittee-responsible mitigation.

(c) Permittee-responsible mitigation under a watershed approach. Where permitted impacts are not in the service area of an approved mitigation bank or in-lieu fee program that has the appropriate number and resource type of credits available, permittee-responsible mitigation is the only option. Where practicable and likely to be successful and sustainable, the resource type and location for the required permittee-responsible compensatory mitigation shall be determined using the principles of a watershed approach as outlined in section 8.5 of the 404 Handbook.

(d) Permittee-responsible mitigation through on-site and in-kind mitigation. In cases where a watershed approach is not practicable, the Agency shall consider opportunities to offset anticipated aquatic resource impacts by requiring on-site and in-kind compensatory mitigation. The Agency shall also consider the practicability of on-site compensatory mitigation and its compatibility with the proposed project.

(e) Permittee-responsible mitigation through off-site and/or out-of-kind mitigation. If, after considering opportunities for on-site, in-kind compensatory mitigation as provided in paragraph (d), above, the Agency determines that these compensatory mitigation opportunities are not practicable, are unlikely to compensate for the permitted impacts, or will be incompatible with the proposed project, and an alternative, practicable off-site and/or out-of-kind mitigation opportunity is identified that has a greater likelihood of offsetting the permitted impacts or is environmentally preferable to on-site or in-kind mitigation, the Agency shall require that this alternative compensatory mitigation be provided.

### 8.5.2 Watershed approach

The Agency shall use a watershed approach to establish compensatory mitigation requirements in State 404 Program permits to the extent appropriate and practicable. Where a watershed plan is available, the Agency will determine whether the plan is appropriate for use in the watershed approach for mitigation. In cases where the Agency determines that an appropriate watershed plan is available, the watershed approach shall be based on that plan. Where no such plan is available, the watershed approach shall be based on information provided by the applicant or available from other sources. The ultimate goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of mitigation sites.

(a) Considerations

1. A watershed approach to mitigation considers the importance of landscape position and resource type of mitigation projects for the sustainability of aquatic resource functions within the watershed. Such an approach considers how the types and locations of mitigation projects will provide the desired aquatic resource functions and will continue



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to function over time in a changing landscape. It also considers the habitat requirements of important species, habitat loss or conversion trends, sources of watershed impairment, and current development trends, as well as the requirements of other regulatory and non-regulatory programs that affect the watershed, such as storm water management or habitat conservation programs. It includes the protection and maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, when those resources contribute to or improve the overall ecological functioning of aquatic resources in the watershed. Mitigation requirements determined through the watershed approach shall not focus exclusively on specific functions (e.g., water quality or habitat for certain species), but shall provide, where practicable, the suite of functions typically provided by the affected aquatic resource.

2. Locational factors (e.g., hydrology, surrounding land use) are important to the success of mitigation for impacted habitat functions and may lead to siting of such mitigation away from the project area. However, consideration shall also be given to functions and services (e.g., water quality, flood control, shoreline protection) that will likely need to be addressed at or near the impacted areas.

3. A watershed approach may include on-site mitigation, off-site mitigation (including mitigation banks or in-lieu fee programs), or a combination of on-site and off-site mitigation.

4. A watershed approach to mitigation shall include, to the extent practicable, inventories of historical and existing aquatic resources, including identification of degraded aquatic resources, and identification of immediate and long-term aquatic resource needs within watersheds that can be met through permittee-responsible mitigation projects, mitigation banks, or in-lieu fee programs. Planning efforts shall identify and prioritize aquatic resource restoration, creation, and enhancement activities, and preservation of existing aquatic resources that are important for maintaining or improving ecological functions of the watershed. The identification and prioritization of resource needs shall be as specific as possible, to enhance the usefulness of the approach in determining mitigation requirements.

(b) Information Needs

1. In the absence of a watershed plan determined by the Agency to be appropriate for use in the watershed approach, the Agency shall use a watershed approach based on analysis of information regarding watershed conditions and needs, including potential sites for aquatic resource restoration activities and priorities for aquatic resource restoration and preservation. Such information includes: Current trends in habitat loss or conversion; cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species; site conditions that favor or hinder the success of mitigation projects; and chronic environmental problems such as flooding or poor water quality.

2. This information may be available from sources such as wetland maps; soil surveys; U.S. Geological Survey topographic and hydrologic maps; aerial photographs; information on rare, endangered and threatened species and critical habitat; local ecological reports or studies; and other information sources that could be used to identify locations for suitable mitigation projects in the watershed.



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(c) Watershed Scale

The cumulative impact basins described in Volume I, section 10.2.8 shall be used when considering watershed scale in mitigation for State 404 Program permits.

### 8.5.3 Permit Specific Conditions for Compensatory Mitigation

(a) The compensatory mitigation requirements for a permit, including the amount and type of compensatory mitigation, shall be clearly stated in the specific conditions of the individual or general permit verification. The specific conditions must be enforceable.

(b) For an individual permit that requires permittee-responsible mitigation, the specific conditions shall:

1. Identify the party responsible for providing the compensatory mitigation;
2. Incorporate the final mitigation plan approved by the Agency;
3. State the objectives, performance standards, and monitoring required for the compensatory mitigation project, unless they are provided in the approved final mitigation plan; and
4. Describe any required financial assurances or long-term management provisions for the compensatory mitigation project, unless they are specified in the approved final mitigation plan.

(c) For a general permit activity that requires permittee-responsible mitigation, the specific conditions shall describe the compensatory mitigation proposal, which may be either conceptual or detailed. The general permit verification shall also include a specific condition that states that the permittee cannot commence work until the Agency approves the final mitigation plan, unless the Agency determines that such a specific condition is not practicable and not necessary to ensure timely completion of the required compensatory mitigation. To the extent appropriate and practicable, specific conditions of the general permit verification shall also address the requirements of paragraph (b), above.

(d) If a mitigation bank or in-lieu fee program is used to provide the required compensatory mitigation, the specific conditions shall indicate whether a mitigation bank or in-lieu fee program will be used and specify the number and resource type of credits the permittee is required to purchase. In the case of an individual permit, the specific condition shall also identify the specific mitigation bank or in-lieu fee program that will be used. For general permit verifications, the specific conditions shall either identify the specific mitigation bank or in-lieu fee program, or state that the specific mitigation bank or in-lieu fee program used to provide the required credits shall be approved by the Agency prior to purchasing credits.

### 8.5.4 Timing of Compensatory Mitigation

Implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the authorized impacts. Temporal loss shall be compensated for in accordance with appropriate calculations for time lag in accordance with Rule 62-345.600, F.A.C., except paragraph 62-345.600(1)(b), F.A.C., which is not applicable to the State 404 Program.



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### 8.5.5 Use of Preservation as Compensatory Mitigation

(a) Preservation may be used to provide compensatory mitigation when all the following criteria are met:

1. The resources to be preserved provide important physical, chemical, or biological functions for the watershed;

2. The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the Agency shall use appropriate quantitative assessment tools, where available;

3. Preservation is determined by the Agency to be appropriate and practicable;

4. The resources are under threat of destruction or adverse modifications; and

5. The preserved site will be permanently protected through an appropriate real estate or other legal instrument as described in Volume I, section 10.3.8.

(b) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the Agency where preservation has been identified as a high priority using a watershed approach described in section 8.5.2 of this Handbook, but compensation ratios shall be higher.

### 8.5.6 Additional Considerations for Permittee-Responsible Compensatory Mitigation Projects

#### 8.5.6.1 Monitoring

The compensatory mitigation plan shall provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period shall be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs). Following project implementation, the Agency shall reduce or waive the remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. The Agency may also extend the original monitoring period upon a determination that performance standards have not been met or the compensatory mitigation project is not on track to meet them. The Agency shall revise monitoring requirements when remediation or adaptive management is required.

#### 8.5.6.2 Adaptive Management

(a) If the compensatory mitigation project cannot be constructed in accordance with the approved mitigation plans, the permittee shall notify the Agency. Any significant modification of the compensatory mitigation project requires approval from the Agency.

(b) If monitoring or other information indicates that the compensatory mitigation project is not progressing towards meeting its performance standards as anticipated, the responsible party shall notify the Agency as soon as possible. The Agency shall evaluate and pursue measures to address deficiencies in the compensatory mitigation project. The Agency shall consider



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whether the compensatory mitigation project is providing ecological benefits comparable to the original objectives of the compensatory mitigation project.

(c) The Agency, in consultation with the responsible party (and other state, federal, tribal, and local agencies, as appropriate), will determine the appropriate measures. The measures may include, but are not limited to, site modifications, design changes, revisions to maintenance requirements, and revised monitoring requirements. The measures shall be designed to ensure that the modified compensatory mitigation project provides aquatic resource functions comparable to those described in the mitigation plan objectives.

(d) Performance standards shall be revised in accordance with adaptive management to account for measures taken to address deficiencies in the compensatory mitigation project. Performance standards shall also be revised to reflect changes in management strategies and objectives if the new standards provide for ecological benefits that are comparable or superior to the approved compensatory mitigation project. No other revisions to performance standards shall be allowed except in the case of natural disasters.

#### 8.5.6.3 Long-term Protection and Management

(a) The real estate instrument, management plan, or other long-term protection mechanism must contain a provision requiring 60-day advance notification to the Agency before any action is taken to void or modify the instrument, management plan, or long-term protection mechanism, including transfer of title to, or establishment of any other legal claims over, the compensatory mitigation site.

(b) The permit conditions shall identify the party responsible for ownership and all long-term management of the compensatory mitigation project. The permit conditions shall, where applicable, contain provisions allowing the permittee to transfer the long-term management responsibilities of the compensatory mitigation project site to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager, after review and approval by the Agency. The land stewardship entity need not be identified in the original permit, as long as the future transfer of long-term management responsibility is approved by the Agency.

(c) A long-term management plan shall include a description of long-term management needs, annual cost estimates for these needs, and identify the funding mechanism that will be used to meet those needs.

(d) Any provisions necessary for long-term financing shall be addressed in the original permit. The Agency shall require provisions to address inflationary adjustments and other contingencies, as appropriate. Appropriate long-term financing mechanisms include non-wasting endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments. In cases where the long-term management entity is a public authority or government agency, that entity shall provide a plan for the long-term financing of the site.

(e) Any long-term financing mechanisms shall be approved by the Agency in advance of the authorized impacts.



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## APPENDIX A

### Retained Waters List

### August 23, 2019

The Corps will retain responsibility for permitting for the discharge of dredged or fill material in those waters identified in the Retained Waters List (below), 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.

## Rivers and Creeks

Acosta Creek
Alafia River
Alaqua Creek
Alexander Springs Creek
Alligator Creek (Sarasota County)
Alligator Lake-Lake Gentry Canal
Amelia River
Anclote River (Upstream to 7 Springs Blvd)
Apalachicola River
Arlington River
Aucilla River
Axle Creek
Banana River
Barrentine Creek
Barron River
Basin Creek
Bayou Marcus
Bear Creek (Bay County)
Bear Creek (Putnam County)
Belcher Canal
Bells River
Bessy Creek
Big Coldwater Creek (Also East Fork and West Fork)
Big Davis Creek
Big Fishweir Creek
Big Juniper Creek
Big Marco River
Big Muddy Creek
Big Mulberry Branch
Billy Creek
Black Creek
Black Creek (Walton County)
Black Water Creek
Blackwater River (Santa Rosa and Okaloosa Counties)
Blind Creek
Blockhouse Creek
Blounts Branch
Blue Creek (Lake County)
Blue Hole Creek
Blue Springs Run
Bluff Branch
Boathouse Creek
Bogey Branch
Boggy Creek (Orange and Osceola Counties)
Bonnet Creek (Seminole County)
Botts Creek
Bowlees Creek
Box Branch (Duval County)
Boynton Canal
Braden River (Downstream of Ward Lake Dam (Bill Evers Reservoir))
Bradley Creek
Bray Creek
Brick-Alligator Lake Canal
Britt Creek (Martin and St Lucie Counties)
Broad River
Brothers River
Broward Creek
Broward River
Browns Creek
Buck Creek (Charlotte County)
Buckhorn Creek (Hillsborough County)
Bull Creek (Flagler County)
Bulow Creek
Bumblebee Creek
Burnt Mill Creek (Bay County)
Butcher Pen Creek
Butler Creek
C-15 Canal
C-17 Canal
C-18 Canal
C-23 Canal
C-24 Canal
C-51 Canal / West Palm Beach Canal
Cabbage Creek (St Johns County)
Callaway Creek
Caloosahatchee River
Camp Branch (Putnam County)
Caney Branch (Duval County)
Canoe Creek (Osceola County)
Capo Creek
Carpenter Creek
Carrabelle River
Casa Cola Creek
Cat Creek (Franklin County)
Cedar Creek (Putnam County)
Cedar Point Creek (Duval County)
Cedar River
Cemetery Creek
Chassahowitzka River
Chatham River
Chattahoochee River
Chicopit Bay
Chipola River
Choctawhatchee River
Christopher Creek (Duval County)
Clapboard Creek
Clark Creek (Gulf County)
Clarkes Creek
Clear Creek (Escambia County)
Cocohatchee River
Coon Lake-Lake Lizzie Canal
Coral Gables Waterway
Cormorant Branch
Cow Creek (Putnam County)
Cowhead Creek (Duval County)
Cracker Branch (St Johns County, St Johns River)
Cradle Creek
Craig Creek
Crane Creek (Brevard County, Melbourne)
Crooked Creek (Bay County)
Crooked Creek (Martin County)
Crooked River (Franklin County)
Crooked River (Lake County)
Cross Creek (Alachua County)
Cross Florida Barge Canal
Crystal River
Cunningham Creek
Cut Creek
Cypress Creek (Lee County)
Danforth Creek
Dania Cut-off canal



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Days Creek
Dead River (Kissimmee River)
Dead River (Lake County, Florida)
Dead River (Wakulla County)
Dean Dead River
DeBlieu Creek
Deep Bottom Creek
Deep Creek (St Johns County)
Deer Creek (Duval County)
Depot Creek
Dillaberry Branch
Dog Branch
Drummond Creek
Dunns Creek
Durbin Creek
East Bay River
East Creek (St Johns County)
East River (Washington and Bay Counties)
Eau Gallie River
Econfina River
Econlockhatchee River
Egans Creek
Eightmile Creek (Escambia County)
Elbow Branch (Putnam County)
Elbow Creek
Elevenmile Creek
Eph Creek
Escambia River
Estero River
Etonia Creek
Fakahatchee River
Fenholloway River
Fish Creek (Putnam County)
Fisheating Creek (Downstream of Fort Center)
Fishing Creek
Fitzpatrick Creek
Fivemile Creek (St Lucie County)
Flora Branch
Forked Creek
Fort George River
Fourmile Creek (Walton County)
Fox Cut
Frazier Creek
Garden Creek
Get Out Creek
Ginhouse Creek (Duval County)
Goodbys Creek
Governors Creek
Graham Creek
Grog Branch
Guana River
Gulley Creek
Haines Creek (a.k.a. Haynes Creek)
Half Creek
Halifax River
Hannah Mills Creek
Harney River
Harrison Creek (Nassau County)
Harrys Creek
Hatchett Creek
Hatchineha Canal
Haulover Creek
Haw Creek (Flagler County)
Henderson Creek
Highland Park Run
Hillsboro Canal
Hillsboro River
Hillsborough River (Downstream of Tampa Water Development Dam)
Hitchens Creek
Hog Creek (Martin County)
Hogan Creek
Hogpen Creek (Duval County)
Holiday Harbor (Duval County)
Holmes Creek (Jackson County)
Hominy Branch
Homosassa River
Honey Creek (Volusia County)
Hontoon Dead River
Hopkins Creek
Horseshoe Creek (Bay and Gulf Counties)
Hospital Creek
Howard Creek (St Lucie County)
Hudson Bayou
Hulett Branch
Huston River
Imperial River
Inconstantion Creek
Indian Creek (Hernando County)
Indian Creek (St Johns County)
Indian River
Indian River North
Istokpoga Creek
Jackson Canal
Jackson Creek (Nassau County)
Jackson River
Joe River
Johnson Creek (Dixie County)
Johnson Creek (Gulf County)
Johnson Slough (Clay County)
Jolly River
Jones Creek (Duval County)
Jones Swamp Creek
Julington Creek
Juniper Creek (Lake County)
Karen Canal
Kendall Creek
Kentucky Branch
Kestner Creek
Kissimmee River
Krueger Creek
L-40 Canal
L-8 Canal
Lafayette Creek
Lake Ajay-Fells Cove Canal
Lake Apopka-Beauclerc Canal
Lake Ashby Canal (and Deep Creek)
Lake Center-Coon Lake Canal
Lake Griffin-Yale Canal
Lake Hart-Ajay Canal
Lake Joel-Myrtle Canal
Lake Joel-Trout Canal
Lake Lizzie-Alligator Canal
Lake Marion Creek
Lake Mary Jane-Hart Canal
Lake Myrtle-Mary Jane Canal
Lake Okeechobee Rim Canal
Lake Okeechobee Waterway
Lake Preston-Myrtle Canal
Lake Worth
Lanceford Creek
Lehigh Canal
Leitner Creek
Little Black Creek (Clay County)
Little Cedar Creek (Duval County)
Little Clapboard Creek
Little Double Creek
Little Econlockhatchee River
Little Fishweir Creek
Little Juniper Creek (Lake County)
Little Manatee River
Little Mud Creek (St Lucie County)
Little Pottsburg Creek
Little River (Biscayne Bay)
Little Rocky Creek (Walton and Okaloosa Counties)
Little Saint Marys River
Little Trout River
Little Wekiva River
Lofton Creek
Lolly Creek
Long Branch (Duval County)
Long Creek (Flagler County)
Lopez River
Lostmans River
Lower Sister Creek
Loxahatchee River
Lumber Creek
Mainard Branch
Manatee Creek
Manatee River (Downstream of Lake Manatee Dam)
Marshall Creek (St Johns County)
Mason Branch (St Johns County)
Matanzas River
McCoy Creek
McCullough Creek (St Johns County)
McGirts Creek
McQueen Creek
Miami Canal
Miami River



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Middle River
Middle River (South and North Fork)
Mill Branch (Putnam County)
Mill Log Creek
Mills Creek (Nassau County)
Moccasin Branch (St Johns County)
Moccasin Slough
Moncrief Creek
Monroe Canal (Seminole County)
Moore's Creek (St Lucie County)
Morrison Creek
Moses Creek
Moultrie Creek
Mud Creek (Putnam County)
Murphy Creek
Myakka River
Myakkahatchee Creek (Sarasota County)
Nassau River
New River (Broward County)
New River (Collier County)
New River (Franklin County)
New Rose Creek
Newcastle Creek
Nichols Creek
Ninemile Creek (Duval County)
NN Creek (Brevard County)
Norris Dead River
North Fork Saint Lucie River
North New River Canal
Ochlockonee River (Portion downstream starting 500 feet south of the ramp at Jack Langston Drive, Sopchoppy, FL.)
Ocklawaha River
Old Channel
Oldfield Creek
Oleta River
Open Creek (Duval County)
Orange Creek
Orange Grove Branch
Orange River
Ortega River
Pablo Creek
Paines Branch
Palatlakaha River
Palm River
Pancho Creek
Pea River
Peace River (Upstream to 0.64 river miles north of old railroad bridge at SW River Street, Ft Ogden, FL)
Pecks Branch
Pellicer Creek
Perdido River
Peters Branch (Clay County)
Peters Creek
Phelps Creek
Philippe Creek
Pine Barren Creek
Pine Log Creek (Bay and Washington Counties)
Pinhook River
Pithlachascotee River (Upstream to the private road bridge that is approximately 2,200 feet upstream of Rowan Road)
Plummer Creek
Polly Creek
Pond Creek (Santa Rosa County)
Poppolton Creek
Porpoise Creek (Dixie County)
Pottsburg Creek
Puckett Creek
Pumpkin Hill Creek
Red House Branch
Reedy Creek (Osceola and Orange Counties)
Ribault River
Rice Creek (Putnam County)(One directly off the St Johns River)
Robinson Creek (St Johns County)
Rock Springs Run
Rocky Creek (Hillsborough County)
Rocky Creek (Okaloosa/Walton)
Rodgers River
Rosalie Creek
Rushing Branch
Saint Francis Dead River
Saint Johns River
Saint Lucie Canal
Saint Lucie River
Saint Marks River (Wakulla, Leon and Jefferson Counties)
Saint Marys River
Saint Sebastian River
Salt Creek (Dixie County)
Salt Creek (Flagler County)
Salt Run
Salt Springs Run (Marion County)
San Carlos Creek
San Julian Creek
San Sebastian River
Sand Beach Branch
Sandy Creek (Bay County)
Sandy Run
Saul Creek (Downstream of Sauls Creek Road)
Sawpit Creek
Scipio Creek
Scoggin Creek
Shad Creek (Brevard County)
Shark River
Shell Creek (Charlotte County) (Downstream of dam for Shell Creek Reservoir)
Shingle Creek (Osceola and Orange Counties)
Shipyard Creek
Shired Creek
Shoal River
Short Canal
Silver Glen Springs Run
Silversmith Creek
Simms Creek
Simpson Creek
Sink Creek (Dixie County)
Sisters Creek
Sixmile Creek
Sixteenmile Creek
Smith Creek (Flagler)
Smith Creek (St. Johns)
Snake Creek (Lake County)
Snell Creek
Soap Creek
Soldier Creek (Escambia County)
Soldier Creek (Seminole County)
Sombrero Creek
Sopchoppy River
South Amelia River
South Fork Black Creek
South Fork Saint Lucie River
South Port Canal
Spring Creek (Wakulla County)
Spring Garden Creek
Spring Warrior Creek
Spruce Creek
St. Cloud Canal
Steinhatchee River
Stokes Creek
Stranahan River
Strawberry Creek
Styles Creek
Summer Haven River (St Johns County)
Suwannee River (Downstream of Purvis Landing and Boat Ramp)
Sweetwater Creek (Hillsborough County)
Swimming Pen Creek
Tarpon River
Taylor Creek (Okeechobee County)
Tenmile Creek (St Lucie County)
Terrapin Creek
Thomas Creek (Nassau and Duval Counties)
Thomas Mill Run
Three Otter Creek
Tiger Creek (Polk County)
Tocoi Creek
Tolomato River
Tomoka River



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Trout -Coon Lake Canal
Trout Creek (St Johns County)
Trout River
Turkey Creek (Brevard County)
Turkey Creek (Okaloosa County)
Turner River
Upper Sister Creek
Waccasassa River
Wacissa River
Wakulla River (Up to and including Wakulla Springs)
Walker Creek (Nassau County)
Wares Creek (Downstream of Bridge for 12th Ave W Bradenton FL)
Warner Creek
Weeki Wachee River
Wekiva River (Seminole and Lake Counties)
Weohyakapka Creek
West Branch Blockhouse Creek
West Palm Beach Canal
West Run Cracker Branch
Wetappo Creek
Wharf Creek
Whitney River
Whittenhorse Creek
Williamson Creek
Willoughby Creek
Wills Branch
Withlacoochee River (Downstream of the Inglis Dam and the Inglis Bypass Spillway in Citrus County)
Woodruff Creek
Wrights Creek (Homes County)
Ximanies Creek
Yellow River
Zeigler Dead River

## Lakes

Adams Lake (Volusia County)
Ajay Lake
Alligator Lake (Osceola County)
Blue Cypress Lake
Blue Lagoon
Brick Lake
Cherry Lake (Lake County)
Clark Lake (Volusia County)
Clear Lake (Orange County)
Coon Lake
Crescent Lake (Putnam-Flagler Counties)
Cypress Lake (Osceola County)
Dead Lakes
Deer Point Lake
Doctors Lake
Dumfoundling Bay
East Lake Tohopekaliga
Fells Cove
Horseshoe Mud Lake
Kimball Lake
Lake Apopka
Lake Ashby
Lake Beauclair
Lake Beresford
Lake Carlton
Lake Center
Lake Cone
Lake Dexter (Volusia County)
Lake Dora
Lake Emma (Lake County)
Lake Eustis
Lake Florence (Brevard County)
Lake Gentry
Lake George (Putnam-Volusia Counties)
Lake Griffin (Lake County)
Lake Harney
Lake Harris (Lake County)
Lake Hart (Orange County)
Lake Hatchineha
Lake Hellen Blazes
Lake Ida (Palm Beach County)
Lake Istokpoga
Lake Jackson (Osceola County)
Lake Jesup
Lake Joel
Lake Kissimmee
Lake Lizzie
Lake Louisa (Lake County)
Lake Lucy (Lake County)
Lake Mangonia
Lake Marion (Polk County)
Lake Mary Jane
Lake Minnehaha (Lake County)
Lake Minneola
Lake Monroe
Lake Myrtle (Osceola County)
Lake Nellie
Lake Okeechobee
Lake Ola
Lake Osborne
Lake Poinsett
Lake Preston
Lake Rosalie
Lake Seminole (Gadsden, Jackson Counties)
Lake Seminole (Pinellas County)
Lake Susan (Lake County)
Lake Tarpon
Lake Tohopekaliga
Lake Washington (Brevard County)
Lake Weohyakapka
Lake Wimico
Lake Winder
Lake Woodruff
Lake Yale
Little Lake George
Little Lake Harris (Lake County)
Little Sawgrass Lake
Lochloosa Lake
Loughman Lake
Marco Lake
Maule Lake
Mud Lake (Lake County)
Orange Lake (Alachua County)
Powell Lake (Bay and Walton Counties)
Puzzle Lake (Seminole and Volusia Counties)
Rodman Reservoir
Ruth Lake
Salt Lake (Pinellas County)
Sawgrass Lake (Brevard County)
Silver Lake (Brevard County)
Spring Garden Lake
Stagger Mud Lake
Tick Island Mud Lake
Tiger Lake
Trout Lake (Osceola County)



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## APPENDIX B

### Excerpts from 40 CFR Part 232

### Select Definitions from 40 CFR § 232.2

***Discharge of dredged material.***

(1) Except as provided below in paragraph (2), the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following:

(i) The addition of dredged material to a specified discharge site located in waters of the United States;

(ii) The runoff or overflow, associated with a dredging operation, from a contained land or water disposal area; and

(iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity, including mechanized landclearing, ditching, channelization, or other excavation.

(2) The term discharge of dredged material does not include the following:

(i) Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable state.

(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material.

(iii) Incidental fallback.

(3) Section 404 authorization is not required for the following:

(i) Any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the U.S. as defined in paragraphs (4) and (5) of this definition; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (4) and (5) of this definition. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States.

(ii) Incidental movement of dredged material occurring during normal dredging operations, defined as dredging for navigation in navigable waters of the United States, as that term is defined in 33 CFR part 329, with proper authorization from the Congress or the Corps pursuant



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to 33 CFR part 322; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at §232.2(r) of this chapter.

(iii) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under Section 404. See 40 CFR 232.3 for discharges that do not require permits.

(4) For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States.

Note: Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.

(5) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a de minimis (i.e., inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.

***Discharge of fill material.***

(1) The term discharge of fill material means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials;" after the words "utility lines; and artificial reefs.

(2) In addition, placement of pilings in waters of the United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions.

(i) Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in waters of the United States for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material. All pilings, however, placed in the navigable



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waters of the United States, as that term is defined in 33 CFR part 329, require authorization under section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR part 322).

**40 CFR § 232.3 Activities not requiring permits.**

Except as specified in paragraphs (a) and (b) of this section, any discharge of dredged or fill material that may result from any of the activities described in paragraph (c) of this section is not prohibited by or otherwise subject to regulation under this part.

(a) If any discharge of dredged or fill material resulting from the activities listed in paragraph (c) of this section contains any toxic pollutant listed under section 307 of the Act, such discharge shall be subject to any applicable toxic effluent standard or prohibition and shall require a section 404 permit.

(b) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraph (c) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernable alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration.

Note: For example, a permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from silvicultural to agricultural use when there is a discharge of dredged or fill material into waters of the United States in conjunction with construction of dikes, drainage ditches or other works or structures used to affect such conversion. A conversion of section 404 wetland to a non-wetland is a change in use of an area of waters of the U.S. A discharge which elevates the bottom of waters of the United States without converting it to dry land does not thereby reduce the reach of, but may alter the flow or circulation of, waters of the United States.

(c) The following activities are exempt from section 404 permit requirements, except as specified in paragraphs (a) and (b) of this section:

(1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (d) of this section.

(ii)(A) To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (*i.e.*, ongoing) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation.

(B) Activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching operation.

(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge



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abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption.

(3) Construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance (but not construction) of drainage ditches. Discharge associated with siphons, pumps, headgates, wingwalls, wiers, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption.

(4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the United States. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins.

(5) Any activity with respect to which a State has an approved program under section 208(b)(4) of the Act which meets the requirements of section 208(b)(4)(B) and (C).

(6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. The BMPs which must be applied to satisfy this provision include the following baseline provisions:

(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the United States shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;

(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize discharges of dredged or fill material into waters of the United States;

(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;

(iv) The fill shall be properly stabilized and maintained to prevent erosion during and following construction;

(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within the waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;



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(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the United States shall be kept to a minimum;

(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;

(viii) Borrow material shall be taken from upland sources whenever feasible;

(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;

(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;

(xi) The discharge shall not be located in the proximity of a public water supply intake;

(xii) The discharge shall not occur in areas of concentrated shellfish production;

(xiii) The discharge shall not occur in a component of the National Wild and Scenic Rivers System;

(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and

(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.

(d) For purpose of paragraph (c)(1) of this section, cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:

(1) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality, or yield.

(2) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.

(3)(i) Minor drainage means:

(A) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit;

(B) The discharge of dredged or fill material for the purpose of installing ditching or other water control facilities incidental to planting, cultivating, protecting, or harvesting of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;



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(C) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of the Act, and which are in established use for the production or rice, cranberries, or other wetland crop species.

Note: The provisions of paragraphs (d)(3)(i) (B) and (C) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas.

(D) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway as it existed prior to the formation of the blockage. Removal must be accomplished within one year after such blockages are discovered in order to be eligible for exemption.

(ii) Minor drainage in waters of the United States is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adequate to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming).

In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.

(4) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland. For example, the redistribution of surface materials by blading, grading, or other means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing, as described above, will never involve a discharge of dredged or fill material.

(5) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.



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(e) Federal projects which qualify under the criteria contained in section 404(r) of the Act are exempt from section 404 permit requirements, but may be subject to other State or Federal requirements.



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## APPENDIX C

### Guidance for Conducting an Alternatives Analysis

*(Based on guidance issued by the Corps of Engineers Jacksonville District – "Information for Preparing an Alternatives Analysis Under Section 404", June 2014)*

As part of the individual permit application review process, proposed projects undergo an alternatives analysis using Rule 62-331.053, F.A.C., and this section. A permit cannot be issued if there is a practicable alternative to the proposed activity which would have less adverse impact on the aquatic ecosystem, as long as the alternative does not have other significant adverse environmental consequences.

The level of detail in an alternatives analysis shall be commensurate with the scale of the adverse environmental effects of the project. Analysis of projects proposing greater adverse environmental effects shall be more detailed and explore a wider range of alternatives than projects proposing lesser effects.

Below are suggested steps to follow in providing the necessary information for the Agency to consider in the alternatives analysis:

Step 1: Define Purpose and Need

At the beginning of an alternatives analysis, the applicant shall clearly state the overall project purpose and need (examples are below). Significant thought shall be applied when developing the project purpose as it will drive much of the alternatives analysis. The overall project purpose must be specific enough to define a permit applicant's needs, but not so restrictive to preclude other alternatives. It shall also not be too wide-ranging without consideration for the applicant's real needs, as the geographic boundaries in the purpose define the scope of the analysis. For example:

1) *To develop a 225-lot single-family residential development at the southeast intersection of Interstate 10 and Toledo Blade Boulevard.*

   This example is too restrictive because there are no alternative sites to consider. It also unnecessarily details the exact number of lots, which can reduce the number of reasonable or practicable alternatives.

2) *To develop a residential development in Northwest Florida.*

   This example is too wide in scope if the applicant is actually focusing on a certain portion of a certain city or county to locate the project. This would also create an unmanageable number of alternatives.

3) *To develop a single-family residential subdivision near Interstate 10 in Crestview, Florida, to meet local demand for this type of housing.*

   This is an appropriate overall project purpose as it narrows the geographic scope to a reasonable and manageable size. It clearly defines what the project involves (single-family residences rather than "housing" that could also mean townhouses or apartments), the actual target market area (near Interstate 10 in Crestview), and the need for the project (local demand).

The applicant's proposed overall project purpose will be carefully considered, but if the Agency cannot concur with it as submitted, the Agency is required to modify it. Once the Agency has placed the project on public notice, the applicant must use the overall project purpose as stated in that public notice or the overall project purpose as provided back to the applicant if the Agency has modified their original project

purpose. If the applicant has already performed an alternatives analysis using a project purpose the Agency cannot concur with, (e.g., it is too restrictive or too broad in geographic scope), the analysis may need to be revised to accurately include reasonable and practicable alternatives.

Additional information about the proposed overall project purpose shall also be provided, including details about the relevant market conditions and area, location, history, and other factors that influence or constrain the intended nature, size, level of quality, price class, or other characteristics of the project. Information that further describes why particular geographic boundaries were chosen also will assist the Agency in its review.

Step 2: Identify Alternatives

The applicant must list and briefly describe alternatives that could meet the overall project purpose. This list, at a minimum, must include the following information:

1) The applicant's preferred alternative (the project proposed in the permit application)

2) Alternatives that would involve no dredging or filling in state-assumed waters. This "No-Action" alternative comprises one or more alternatives that would not involve a dredging or filling in state-assumed waters, which could involve reconfiguring the project to avoid all state-assumed waters on the site, siting the project entirely in uplands offsite, or no-action, i.e. not implementing the project. Although the "No-Action" alternative might not seem reasonable initially, it must always be included in the analysis. The no-action alternative can serve several purposes. First, it may be a reasonable alternative, especially for situations where the impacts are great, and the need is relatively minor. Second, it can serve as a benchmark, enabling decision makers to compare the magnitude of the environmental effects of the action alternatives.

3) Alternative offsite locations, including those that might involve less adverse impact to state-assumed waters.

4) Onsite alternatives that would involve less adverse impact to state-assumed waters. These include modifications to the alignments, site layouts, or design options in the physical layout and operation of the project to reduce the amount of impacts to state-assumed waters.

5) Alternatives that would involve greater adverse impact to state-assumed waters but avoid or minimize other significant adverse environmental consequences including offsite and onsite options (Alternatives that meet these criteria are uncommon).

Alternatives that are clearly unreasonable shall be identified and eliminated (not evaluated further). For example, alternative sites that are far too small to accommodate the project or that lie outside the geographic boundaries identified in the overall project purpose can be eliminated. This step of the analysis is not intended to rule out alternatives that are "unreasonable" according to the applicant, but those that would be considered "unreasonable" to an objective third-party. The Agency will verify that the criteria used for screening alternatives are objective and not so restrictive that they eliminate actual reasonable alternatives. The applicant must list the alternatives that were initially considered then eliminated from further study because the applicant feels they failed to pass this first round of screening. The Agency will review this list and determine if elimination of these alternatives is appropriate.

The maximum number of reasonable alternatives to study further will vary and depends on the nature and scope of the proposed project; however, there typically should be multiple alternatives to consider. The number of alternatives listed should be greater for projects involving greater impacts. This is the

preliminary list of reasonable alternatives; alternatives that are not practicable will be eliminated from further consideration in the later stages of the analysis.

In many instances, there will be alternatives determined to be both unreasonable and impracticable, as these terms can be nearly synonymous when used in these analyses. Regardless of whether the applicant identifies an alternative as unreasonable or as impracticable, it is imperative the applicant describe, in the context of the overall project purpose and need for the project, why each non-selected alternative should be eliminated from further analysis. The Agency must be able to independently review and verify this information and each step in the applicant's alternative analysis.

Step 3: Describe and Analyze Alternatives for Practicability

This step also addresses onsite and offsite alternatives and determines which are practicable and which are not. Practicable is defined here as meaning the alternative is available, is able to achieve the overall project purpose, and is feasible considering cost, existing technology, and/or logistics in light of the overall project purpose.

Alternatives shall be clearly listed and numbered for ease of reference and comparison. *At a minimum,* the following information for each alternative site examined shall be provided:

1) *General site information:*

   a) specific parcel information including, but not limited to; parcel ID numbers, aerial photos, location maps, FLUCCS codes and GPS coordinates;

   b) presence, quantity and quality of state-assumed waters;

   c) County/City zoning designation;

   d) the presence of any federally-listed threatened or endangered species or their critical habitat, and/or the presence of any historical properties or resources; and,

   e) site infrastructure (Will the site require new access roads/infrastructure? What are the potential impacts associated with these improvements?).

2) *The practicability of each alternative:*

   a) Practicability: alternatives that are practicable are those that are available and capable of being done by the applicant after considering the following (in light of the project purpose):

      i) Cost (For example, the costs associated with various infrastructure components such as roadways or utilities, including upgrades to existing infrastructure components or the need to establish new infrastructure components, may affect the viability of a particular alternative. A location far from all existing infrastructure (roads, water, sewer, and/or electricity) might not be practicable considering the costs associated with upgrading/establishing the infrastructure necessary to use that site. However, just because one alternative costs more than another, this does not mean that the more expensive alternative is entirely impracticable. Cost is analyzed in the context of the overall cost of the project and whether it is unreasonably expensive or exorbitant. In addition, cost is an objective, industry-neutral inquiry that does not consider an individual applicant's financial standing. The data used for any cost or financial feasibility analysis must be current with respect to the time of the alternatives analysis.);

ii) Existing Technology (The alternatives examined shall consider the limitations of existing technology yet incorporate the most efficient/least-impacting construction methods currently available. For example, alternatives to mining limestone or other minerals may not be practicable considering a lack of technology to allow replacement of that mineral resource in the mass-production of concrete; however, engineered retaining walls can be incorporated into an alternative that substantially minimizes wetland impacts by eliminating fill slopes.); and,

iii) Logistics (The alternatives examined may incorporate an examination of various logistics associated with the project, i.e., placement of facilities within a required distance, utilization of existing storage or staging areas, and/or safety concerns. Examples of alternatives that may not be practicable considering logistics are a land-locked parcel that cannot be accessed by public roads or a site that is too small to meet the overall project purpose).

b) Availability: If it is otherwise a practicable alternative, an area not presently owned by the applicant that could reasonably be obtained, utilized, expanded, or managed in order to fulfill the overall purpose of the proposed activity can still be considered a practicable alternative. In other words, if an applicant does not own an alternative parcel, that does not rule that parcel out as a practicable alternative. The applicant shall consider and anticipate alternatives available during the timeframe that the Agency conducts its alternatives analysis. An evaluation of availability for purchase and projected cost of such a purchase may be incorporated into this discussion.

c) Other information: any other information that conveys the practicability of the alternatives reviewed in consideration of the overall project purpose shall be included.

An alternatives comparison matrix (see example below) is an effective way to present and compare the main parameters that were considered during the evaluation.

To allow for an objective evaluation, the comparison of the plan(s) for the proposed and alternative sites shall be framed for “yes” or “no” answers. A narrative shall accompany the matrix defining the practicability factors chosen and further explaining any “no” answers with objective and verifiable data. Practicability of the “no-action” alternative also must be addressed in this narrative and, if applicable, also included in the matrix. The information shall explain the consequences on the applicant and the public if the project is not implemented. Any remaining alternatives that are found to be practicable will move on to the next and final step.

If an alternative can be easily documented to be a more environmentally damaging alternative and this can be clearly described within the narrative and matrix, then this step and the following step can be combined. This will save the applicant time and expense; however, it is only appropriate for alternatives where this distinction is clear.

Example Alternative Comparison Matrix for Practicability

| Category | Practicability Factor | Alternative 1 Applicant's Preferred Alternative | Alternative 2 | Alternative 3 | Alternative 4 | Alternative 5 |
|---|---|---|---|---|---|---|
| **Availability - Zoning** | Existing Zoning Appropriate or Potential for Zoning Change? | YES<br>Zoned for this project type | YES<br>Zoned for this project type | YES<br>Zoned for this project type | YES<br>Zoned for agriculture but County has expressed support for the project | YES<br>Zoned for this project type |
| **Availability - Acquisition** | Available for Acquisition? | YES<br>Applicant owns the parcel | YES | YES | YES | YES |
| **Cost – Acquisition** | Reasonable Acquisition Costs? | YES<br>Applicant owns the parcel | YES | YES | YES | NO<br>Seller will only sell all 350 acres without subdividing |
| **Cost – Historic or Cultural Resource Mitigation** | Costs feasible for mitigating impacts to historic and cultural resources found onsite? | YES<br>No historic or cultural resources found onsite | YES<br>No historic or cultural resources found onsite | YES<br>No historic or cultural resources found onsite | NO<br>If impacts to historic resources onsite allowed, costs to mitigate those impacts will increase project costs from $xxxx to $xxxx | YES<br>No historical or cultural resources found onsite |
| **Cost – Other** | Other Costs Feasible? | YES | YES<br>Additional costs for extensive retaining walls | YES | NO<br>Costs to connect to utilities will increase project costs from $xxxx to $xxxx | NO<br>Extensive use of retaining walls and construction of two bridges increase project costs from $xxxx to $xxxx |
| **Existing Technology** | Topography and other Site Conditions Feasible for Construction of Project? | YES | YES<br>With extensive use of engineered retaining walls and drainage systems | YES | YES | YES<br>With extensive use of retaining walls and bridges over Clear Creek |
| **Logistics – Parcel Size** | Sufficient Parcel Size? | YES<br>40 acres | YES<br>48 acres | NO<br>21 acres | NO<br>17 acres | YES<br>350 acres |
| **Logistics – Utilities** | Availability of Utilities? | YES | YES | YES | NO<br>6 miles to existing water, sewer, and power | YES |
| **Logistics – Access** | Availability for Access? | YES<br>County right-of-way on east property boundary | YES<br>County right-of-way to northwest property corner | NO<br>Landlocked by private parcels and request for an easement was denied | NO<br>Landlocked by private parcels and request for an easement was denied | YES<br>County right-of-way to west side of property |

Step 4: Identify the Least Environmentally Damaging Practicable Alternative

1) The Least Environmentally Damaging Practicable Alternative (LEDPA) must be selected. Therefore, using the same numbering system from the step above, identify the environmental impacts for each remaining practicable alternate site. For each remaining site:

   a) describe the impacts (beneficial or adverse) to the aquatic ecosystem associated with each of the remaining alternatives

   b) describe the overall (beneficial or adverse) environmental impacts associated with each of the remaining alternatives

   c) be specific and quantitative in the identification of impacts (Rather than "Alternative A would result in a large impact to low quality wetlands and ditches that are sparsely vegetated and impact some wildlife." use "Alternative A would result in filling over 2.1 acres of fire-suppressed wet pine flatwoods wetland and 1.2 acres of wet ditches that contain scattered emergent wetland vegetation. Using the Uniform Mitigation Assessment Method, the function and value of the flatwoods wetland and ditch system have been calculated at 0.6 and 0.2, respectively. Work affecting 0.7-acre of potential flatwoods salamander habitat would also result from siting the project at this location."

2) If multiple practicable alternatives remain, and/or many environmental/relevant factors are involved, another matrix that contains only environmental/relevant parameters (e.g., wetland functional units, listed species, high value upland habitat, historic properties) can be used to assist in illustrating the proposed LEDPA. Emphasis shall be placed on impacts to the aquatic environment through functional unit loss of wetlands or other state-assumed waters that would be affected or eliminated by each alternative. An example matrix is below.

**Example Environmental Factor Matrix**

| **Environmental Factors** | **Alternative 1 Applicant's Preferred Alternative** | **Alternative 2** |
|---|---|---|
| **Wetland Impacts (Acres)** | 2.0 | 6.0 |
| **Loss in Wetland Function (UMAM Functional Units)** | 1.4 | 3.9 |
| **Impacts to Federally Listed Threatened or Endangered Species** | No | No |
| **LEDPA** | Yes | No |

3) Conclude the alternatives analysis with a description of the alternative proposed to be the LEDPA, reiterating the rationale for this determination. Additionally, the rationale shall include statements clearly demonstrating how the following presumptions have been rebutted:

   a) If a project does not need to be in a specific aquatic site, such as a wetland, to meets its basic purpose (i.e., the project is not "water-dependent"), it is presumed that alternatives that do not affect special aquatic sites are available.

b) If a project involves dredging or filling in a special aquatic site, a practicable alternative located in uplands is presumed to have less adverse impact on the aquatic ecosystem.

## APPENDIX D

### 307(a)(1) List of Toxic Pollutants (Codified in 40 CFR § 401.15)

**§ 401.15 Toxic pollutants.** The following comprise the list of toxic pollutants designated pursuant to section 307(a)(1) of the Act:

1. Acenaphthene
2. Acrolein
3. Acrylonitrile
4. Aldrin/dieldrin [1] ([1] effluent standard promulgated (40 CFR Part 129).)
5. Antimony and compounds [2] ([2] the term compounds shall include organic and inorganic compounds.)
6. Arsenic and compounds
7. Asbestos
8. Benzene
9. Benzidine
10. Beryllium and compounds
11. Cadmium and compounds
12. Carbon tetrachloride
13. Chlordane (technical mixture and metabolites)
14. Chlorinated benzenes (other than di-chlorobenzenes)
15. Chlorinated ethanes (including 1,2-di-chloroethane, 1,1,1-trichloroethane, and hexachloroethane)
16. Chloroalkyl ethers (chloroethyl and mixed ethers)
17. Chlorinated naphthalene
18. Chlorinated phenols (other than those listed elsewhere; includes trichlorophenols and chlorinated cresols)
19. Chloroform
20. 2-chlorophenol
21. Chromium and compounds
22. Copper and compounds
23. Cyanides
24. Ddt and metabolites [1]
25. Dichlorobenzenes (1,2-, 1,3-, and 1,4-di-chlorobenzenes)
26. Dichlorobenzidine
27. Dichloroethylenes (1,1-, and 1,2-dichloroethylene)
28. 2,4-dichlorophenol
29. Dichloropropane and dichloropropene
30. 2,4-dimethylphenol
31. Dinitrotoluene
32. Diphenylhydrazine
33. Endosulfan and metabolites
34. Endrin and metabolites [1]
35. Ethylbenzene
36. Fluoranthene
37. Haloethers (other than those listed elsewhere; includes chlorophenylphenyl ethers, bromophenylphenyl ether, bis(dichloroisopropyl) ether, bis-(chloroethoxy) methane and polychlorinated diphenyl ethers)
38. Halomethanes (other than those listed elsewhere; includes methylene chloride, methylchloride, methylbromide, bromoform, dichlorobromomethane
39. Heptachlor and metabolites
40. Hexachlorobutadiene
41. Hexachlorocyclohexane
42. Hexachlorocyclopentadiene
43. Isophorone

44. Lead and compounds
45. Mercury and compounds
46. Naphthalene
47. Nickel and compounds
48. Nitrobenzene
49. Nitrophenols (including 2,4-dinitrophenol, dinitrocresol)
50. Nitrosamines
51. Pentachlorophenol
52. Phenol
53. Phthalate esters
54. Polychlorinated biphenyls (pcbs) [1]
55. Polynuclear aromatic hydrocarbons (including benzanthracenes, benzopyrenes, benzofluoranthene, chrysenes, dibenz-anthracenes, and indenopyrenes)
56. Selenium and compounds
57. Silver and compounds
58. 2,3,7,8-tetrachlorodibenzo-p-dioxin (tcdd)
59. Tetrachloroethylene
60. Thallium and compounds
61. Toluene
62. Toxaphene [1]
63. Trichloroethylene
64. Vinyl chloride
65. Zinc and compounds

# EXHIBIT 14


# Advisory Legal Opinion - AGO 94-45

Print Icon Print Version

Number: AGO 94-45
Date: May 10, 1994
Subject: Jurisdiction of state over Indian reservations

The Honorable Thomas W. Vaughan
Hendry County Sheriff
Post Office Box 579
LaBelle, Florida 33935

RE: INDIANS--SHERIFFS--CRIMINAL LAWS--LAW ENFORCEMENT-jurisdiction of state over Indian reservations. ss. 285.16 and 285.18, Fla. Stat. (1993).

Dear Sheriff Vaughan:

You ask substantially the following question:

Does the state have any jurisdiction on the Seminole Indian reservation?

In sum:

The state has assumed jurisdiction over criminal offenses committed by or against Indians and other persons on the reservation, and such laws are effective and may be enforced on Indian reservations in the same manner as elsewhere throughout the state so long as they are not in conflict with federal law. While civil jurisdiction has also been assumed by the state, such jurisdiction has been construed as jurisdiction over private civil litigation involving reservation Indians in state courts rather than a grant of civil regulatory authority.

According to your letter, as Sheriff of Hendry County you have been asked by several persons if your agency may respond to calls or complaints on the reservation. You do not, however, specify the nature of such complaints or the type of jurisdiction you wish to exercise. Accordingly, my comments must be general in nature.

It is generally recognized that state laws do not apply to tribal Indians on Indian reservations unless Congress has granted such authority.[1] However, as the courts have recognized, "notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians."[2] Thus, the courts have upheld the assertion of state sovereignty to subject non-Indians and non-Indian property located on Indian reservations to regulation provided that Indians, Indian activities, or Indian property are not unduly burdened or tribal self-rule is not frustrated and such regulation is not prohibited by federal law.[3]

When only the on-reservation activities of Indians are involved, however, state law is generally inapplicable in the absence of the federal government granting such authority. With the enactment of Public Law 83-280 (hereafter Public Law 280),[4] Congress provided a method for the states to assume civil and criminal jurisdiction over reservation Indians. Sections 2 and 4 of Public Law 280 granted certain states the right to exercise criminal jurisdiction and limited civil jurisdiction over Indian tribes.[5] Section 7 of Public Law 280, which authorized the remaining states to assume certain civil and criminal jurisdiction by affirmative legislative action, provided:

"The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State in assumption thereof."

Pursuant to the above authority, the Florida Legislature enacted section 285.16, Florida Statutes, which provides:

"(1) The State of Florida hereby assumes jurisdiction over criminal offenses committed by or against Indians or other persons within Indians reservations and over civil causes of actions between Indians or other persons or to which Indians or other persons are parties rising within Indian reservations.
(2) The civil and criminal laws of Florida shall obtain on all Indian reservations in this state and shall be enforced in the same manner as elsewhere throughout the state."[6]

Although section 7 of Public Law 280 was repealed in 1968,[7] any cessions of jurisdiction made pursuant to section 7 prior to its repeal were not affected.

In *Bryan v. Itasca County, Minnesota*,[8] the United States Supreme Court held that the extension of the state's civil jurisdiction to Indian reservations was intended primarily to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians and between Indians and other private citizens. The Court construed section 4 of Public Law 280 as a grant only of

jurisdiction over private civil litigation involving reservation Indians in state courts but did not extend to general civil regulatory authority. As the Court stated, "if Congress in enacting Pub.L. 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians, it would have expressly said so."[9]

After *Bryan,* the courts examined the nature of the statute sought to be enforced to determine whether a state's enforcement power was properly exercised. In *Seminole Tribe of Florida v. Butterworth*,[10] the Seminole Indian Tribe of Florida sued to enjoin the enforcement of a state statute restricting bingo operations to charitable organizations. The district court held that by adopting section 285.16, Florida Statutes, "Florida could assume no more jurisdiction than was ceded to it by Public Law 280."[11] Citing *Bryan*, the court declared section 849.093, Florida Statutes (1979), to be civil/regulatory in nature rather than criminal/prohibitory and thus unenforceable against the Seminoles. The Fifth Circuit, on appeal, affirmed the lower court, holding that "the mandate from the Supreme Court is that states do not have general regulatory powers over the Indian tribes."[12] Adopting the analysis in *Butterworth*, the Supreme Court in *California v. Cabazon Band of Mission Indians*,[13] stated:

"[I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation. The shorthand test is whether the conduct at issue violates the State's public policy."

Accordingly, barring any retrocession by the Florida Legislature to the federal government pursuant to 25 U.S.C. section 1323, the laws of the state govern criminal offenses committed by or against Indians on the reservation as they do elsewhere in Florida to the extent not in conflict with federal law. Although the state has been granted civil jurisdiction, such authority relates to private civil litigation in the state courts and not to civil regulatory authority.

Thus, while the state and, accordingly, the sheriff do not have jurisdiction on Indian reservations except to the extent that such jurisdiction has been granted by federal law, the state has been granted criminal jurisdiction over criminal offenses committed by or against Indians or other persons within the Indian reservation. Such jurisdiction "shall be enforced in the same manner as elsewhere throughout the state."[14] Pursuant to section 30.15, Florida Statutes, the sheriff is the conservator of the peace in the county. This office has previously stated that the jurisdiction of the sheriff is countywide and overlaps that of municipal police within a municipality.[15]

Section 285.17, Florida Statutes, creates a special improvement district for each of the areas contained within the reservations set aside for the Seminole and Miccosukee Tribes. Section 285.18, Florida Statutes, designates the respective governing bodies of the Seminole Tribe of Florida and the Miccosukee Tribe as the governing bodies of the special districts created by section 285.17.

Among the powers that may be exercised by the governing bodies of such special improvement districts is the power to employ personnel to exercise law enforcement powers, including the investigation of violations of any of the criminal laws of the state occurring on the reservations over which the state has assumed jurisdiction pursuant to section 285.16.[16] Such law enforcement personnel are considered to be peace officers and

"shall have the authority to bear arms, make arrests, and apply for, serve, and execute search warrants, arrest warrants, capias, and other process of the court, and to enforce criminal and noncriminal traffic offenses, within their respective special improvement districts."[17]

While section 285.18(2)(c), Florida Statutes, provides for the employment of law enforcement personnel by the special improvement district to exercise law enforcement functions, including the investigation of violations of the criminal laws of this state, I cannot conclude that such provisions grant such law enforcement personnel exclusive jurisdiction. Rather the sheriff and the special improvement district law enforcement personnel would appear to have concurrent jurisdiction, similar to that exercised by the sheriff and municipal law enforcement agencies within the incorporated municipality, over the enforcement of the state's criminal laws that may be enforced on the reservation by virtue of federal law and section 285.16, Florida Statutes.

Sincerely,

Robert A. Butterworth
Attorney General

RAB/tjw

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[1] *See, e.g., McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973).

[2] 411 U.S. at 171.

[3] For a discussion of caselaw on this issue, *see* Op. Att'y Gen. Fla. 87-49 (1987). Based upon a consideration of the cases cited therein, this office concluded that a private, non-Indian corporation seeking to construct a hospital on the Indian trust land to provide care to

Indians and non-Indians must obtain a certificate of need and, to the extent that it provides care to non-Indians, must be licensed and regulated by the state pursuant to chapter 395, Florida Statutes, and the rules promulgated thereunder.

[4] Act of August 15, 1953, chapter 505, 67 Stat. 588-590.

[5] Sections 2 and 4 of Public Law 280 were respectively codified at 18 U.S.C. section 1162 and 28 U.S.C. section 1360.

[6] *See* Op. Att'y Gen. Fla. 77-29 (1977) (section 285.16, Florida Statutes, does not include local ordinances within the assumption of jurisdiction contained in section 285.16, Florida Statutes, which is limited to civil and criminal laws of statewide application).

[7] *See* section 403(b) of Public Law 90-284; Title IV, 82 Stat. 79 (1968), 25 U.S.C. s. 1323(b).

[8] 426 U.S. 373 (1976).

[9] *Id.* at 390. *And see Houghtaling v. Seminole Tribe of Florida*, 611 So. 2d 1235 (Fla. 1993), in which the court held that although the state has jurisdiction over suits between Indians and other persons, it does not have jurisdiction in suits by other persons against an Indian Tribe, absent express waiver of tribal sovereign immunity. *Accord Askew v. Seminole Tribe*, 474 So. 2d 877 (Fla. 4th DCA 1985) (circuit court lacked subject matter jurisdiction in cases involving taxability of Indian ventures on Indian land), and *Seminole Police Department v. Casadella*, 478 So. 2d 470 (Fla. 4th DCA 1985) (state courts lack subject matter jurisdiction in case involving wrongful arrest by tribal police). In both cases the court held that Public Law 280 and section 285.16, Florida Statutes, did not waive the Tribe's sovereign immunity.

[10] 491 F. Supp. 1015 (S.D. Fla. 1980), *affirmed*, 658 F.2d 310 (5th Cir. 1981), cert. denied, 455 U.S. 1020 (1982).

[11] 491 F. Supp. at 1020.

[12] 658 F.2d at 313. *Cf. Serian v. State*, 588 So. 2d 251 (Fla. 4th DCA 1991) (non-Indian optometrist subject to prosecution for practicing optometry without a license even though practice located on Indian reservation since optometry requirements do not merely regulate conduct and produce revenue but rather serve to protect the public; therefore, statute is criminal/prohibitory and may be enforced).

[13] 480 U.S. 202, 209 (1987).

[14] Section 285.16(2), Fla. Stat. (1993).

[15] *See* Op. Att'y Gen. Fla. 71-195 (1971) (respective rights, responsibilities, legal jurisdiction and limitations of a county

**sheriff and a municipal police department located in the same county have concurrent jurisdiction); and Op. Att'y Gen. Fla. 71-195A (1971) (each agency is authorized to conduct investigations without unnecessary intrusion from the other but two agencies should cooperate with each other, not because they are required to, but because it is a necessary condition to proper performance of each's duty to provide police protection).**

**[16] Section 285.18(2)(c), Florida Statutes.**

**[17] Section 285.18(2)(c)1., Fla. Stat. (1993). *And see*, s. 285.18(2)(c)2., Fla. Stat. (1993) (such law enforcement personnel are entitled to the privileges, protection, and benefits of ss. 112.19 and 870.05).**

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# EXHIBIT 15

# *General Counsel's Statement*

**July 31, 2020**

## Introduction

The Clean Water Act (CWA), in accordance with 40 C.F.R. Part 233, 33 U.S.C §§ 1344(g)-(h), provides states the ability to assume the Section 404 dredge and fill program in certain waters, subject to Environmental Protection Agency (EPA) approval of a state's program submission. In part, a state's program submission must include a statement signed by the state Attorney General or the attorney for the state agency (General Counsel) which has independent legal counsel with the authority to represent the agency in court on all matters pertaining to the state program. 40 C.F.R. § 233.12(a), and 40 C.F.R. § 233.10. More specifically:

- A state that seeks to administer a 404 program must submit to the EPA's Regional Administrator a statement that the laws and regulations of the state provide adequate authority to carry out the program and meet applicable requirements of 40 C.F.R. Part 233; 40 C.F.R. § 233.10(c); and 40 C.F.R. § 233.12.
- The statement must cite specific statutes and administrative regulations which are lawfully adopted at the time the statement is signed and which shall be fully effective by the time the program is approved, and where appropriate, judicial decisions which demonstrate adequate authority. 40 C.F.R. § 233.12(a).
- Where more than one agency has responsibility for administering the state program, the statement must include certification that each agency has full authority to administer the program within its category of jurisdiction and that the state, as a whole, has full authority to administer a complete state Section 404 program. 40 C.F.R. § 233.12(d).
- The statement must contain a legal analysis of the effect of state law regarding the prohibition on taking private property without just compensation on the successful implementation of the state's program. 40 C.F.R. § 233.12(c).

The summaries set forth below identify the federal requirements which Florida must meet and the statutes and rules which provide the State of Florida with adequate authority to carry out the program and meet applicable requirements. Unless otherwise provided, the applicable statutory and regulatory authorities for Florida to assume and implement the federal 404 program are found in: Part IV, Chapter 373, F.S.; Chapters 62-330 (Environmental Resource Permitting), 62-340 (Delineation of the Landward Extent of Wetlands and Surface Waters), and 62-331 (State 404 Program), F.A.C.; the Applicant's Handbook Volume I (incorporated by reference in paragraph 62-330.010(4)(a), F.A.C.) and the State 404 Program Applicant's Handbook (incorporated by reference in subsection 62-331.010(5), F.A.C.). Additional authorities applicable to the State 404 Program include Chapters 120 (Administrative Procedures Act) and 403 (Environmental Control), F.S., and Chapters 62-4 (Permits), and 62-110 (Exceptions to the Uniform Rules of Procedure).

Chapter 62-331, F.A.C., the State 404 Applicant's Handbook, the amendments to Chapter 62-330, F.A.C., and Applicant's Handbook Volume I are adopted and shall become fully effective upon EPA's publication of state program approval via Federal Register notice.

Purpose and Scope of Program

40 C.F.R. § 233.1: A state program must regulate all discharges of dredged or fill material into waters regulated by the State under Section 404*(g)-(1*), except as provided in Section 404(f) and 40 C.F.R. § 232.3 (which exempt specified activities from permitting requirements). Nothing precludes a state from operating or enforcing requirements which are more stringent or from operating a program with greater scope, than required under 40 C.F.R. Part 233. Where an approved state program has a greater scope than required by federal law, the additional coverage is not part of the EPA-approved program and is not subject to EPA oversight or enforcement. While the state may impose more stringent requirements, it may not impose any less stringent requirements for any purpose. The approved state program shall, at all times, be conducted in accordance with the requirements of the CWA and 40 C.F.R. Part 233.

FLORIDA AUTHORITY: Florida has authority to regulate all waters in the state, subject to the specified exemptions set forth in Sections 373.406, 373.4145, and 403.813, F.S. *See* § 373.023, F.S. This authority includes the regulation of dredging and filling in surface waters or wetlands, as delineated in Section 373.421(1), F.S., through its statewide environmental resource permitting (ERP) program. *See generally* §§ 373.4131; 373.414; 373.4143; and 373.4144, F.S. "Surface waters," "waters in the state" and "wetlands" are defined by statute in Section 373.019, F.S., and are more expansive than those waters regulated by the CWA.

Pursuant to the authority granted in Section 373.4146, F.S., Florida is seeking to assume the CWA Section 404 dredge and fill program for implementation in waters of the United States, as defined in 40 C.F.R. Part 120, that the state assumes pursuant to Section 404 of the CWA. This authority includes adopting any federal requirements, criteria, or regulations necessary to obtain assumption, including, but not limited to, the guidelines specified in 40 C.F.R. Part 230 and the public interest review criteria in 33 C.F.R. § 320.4(a), and to implement the 404 dredge and fill permitting program in conjunction with the environmental resource permitting program established in Chapter 373, F.S., and Chapter 62-330, F.A.C.

Provisions of state law that conflict with federal requirements do not apply to state 404 permits. § 373.4146(3), F.S. As such, the exemptions to ERP permitting established in Sections 373.406, 373.4145, and 404.813, F.S., do not apply to state 404 permits. § 373.4146(4), F.S. Rather, the state has the authority to regulate all discharges of dredged or fill material into waters regulated by the state under Sections 404 *(g)-(l),* subject only to the exemptions provided in 33 U.S.C. § 404(f) and 40 C.F.R. § 232.3.

The State has promulgated Chapter 62-331, F.A.C., to bridge the gap between existing state and federal law, thus ensuring that the State 404 Program is at least as stringent as, and meets the requirements of, the CWA and 40 C.F.R. Part 230.

Indian Country, as defined in 18 U.S.C. § 1151, is not included in Florida's 404 program.

Permit Prohibitions

40 C.F.R. § 233.20: This regulation provides that no permit shall be issued by the state unless in compliance with the requirements of the CWA and its implementing regulations, including the 404(b)(1) guidelines; when there is an unresolved objection by the Regional Administrator; when the discharge would be in an unpermitted disposal site or would fail to comply with a restriction imposed under Section 404(c) of the CWA; or if issuance of the permit will impede navigation.

FLORIDA AUTHORITY: Subsection 62-331.053(3)(a), F.A.C., implements the prohibition in 40 C.F.R. § 233.20(a) by providing that "No permit shall be issued … When the project is inconsistent with the requirements of [Chapter 62-331] and the 404 Handbook." The state has prepared a regulatory crosswalk that demonstrates each specific provision in state rule that implement the criteria set forth in the CWA, and 40 C.F.R. Parts 230 through 233. Paragraph 62-331.053(3)(d), F.A.C., implements the prohibition in 40 C.F.R. § 233.20(b) by providing that "[n]o permit shall be issued . . . "[w]hen the EPA has objected to issuance of the permit and the objection has not been resolved." Paragraph 62-331.053(3)(e), F.A.C., implements the prohibition in § 233.20(c) by providing that "[n]o permit shall be issued . . . [w]hen the proposed dredge or fill activity would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the EPA under Section 404(c) of the CWA, or when the activity would fail to comply with a restriction imposed thereunder." Paragraph 62-331.053(3)(f), F.A.C., implements the prohibition in § 233.20(d), by providing that "[n]o permit shall be issued . . . [i]f the Corps determines, after consultation with the Secretary of the Department in which the Coast Guard is operating, that anchorage and navigation of any of the navigable waters would be substantially impaired."

General Permits

40 C.F.R. § 233.21: A state may administer and enforce general permits previously issued by the Corps. Additionally, a state may issue general permits for categories of similar activities that will cause only minimal adverse environmental effects when performed separately and only minimal cumulative adverse effects. Any general permit shall comply with the federal guidelines; contain the conditions specified in 40 C.F.R. § 233.23; describe the specific activity authorized; describe the precise area of the authorized activity; contain predischarge notification requirements as appropriate; and if necessary allow an individual permit to be required after a general permit is issued.

FLORIDA AUTHORITY: The state intends to administer and enforce a limited number of regional general permits issued by the Corps until they expire. Pursuant to 40 C.F.R. § 233.14(b)(3), these general permits, and the procedures whereby the Department and Corps will exchange relevant information, are identified in the Memorandum of Agreement (MOA) between the State of Florida Department of Environmental Protection (DEP) and the U.S. Army Corps of Engineers (Corps).

In addition, the state has promulgated a series of general permits in Chapter 62-331, F.A.C., which authorize activities that meet the conditions specified in 40 C.F.R. § 233.21. They comply with the federal guidelines, describe the authorized activity and area, contain any appropriate predischarge notification requirements, and allow for the issuance of an individual permit after the issuance of

a general permit. The permit conditions for general permits are provided in Rule 62-330.405, except subsections (7) and (10), and Rule 62-331.201, F.A.C. The conditions in Chapter 62-331 are specific to the 404(b)(1) Guidelines, applicable Section 303 water quality standards, applicable Section 307 effluent standards and prohibitions, and the criteria set forth in 40 C.F.R. 233.23. Subsection 62-331.200(6), F.A.C., provides the circumstances under which an individual permit may be required after a general permit is issued.

Emergency Permits

40 C.F.R. § 233.22: A state may issue temporary emergency permits in instances where unacceptable harm to life or severe loss of physical property is otherwise likely to result, so long as such permits are limited to 90 days duration, contain appropriate restoration as a condition, can be terminated at any time to protect human health or the environment, and are the subject of public notice ten days after issuance, as well as expeditious federal agency consultation.

FLORIDA AUTHORITY: Rule 62-331.110, F.A.C. implements the requirements for the issuance of emergency authorizations. Subsection (3) of this rule limits the duration of emergency authorizations to 90 days and subsection (6) provides for circumstances where the emergency permit holder must apply for a permit within the 90-day authorization period. Subsection (4) provides for the termination of an emergency authorization without process any time DEP determines it necessary to protect human health or the environment. Subsection (5) provides for notice and an opportunity to comment as soon as possible but no later than 10 days after issuance, and subsection (7) provides for consultation with EPA, the Corps, U.S. Fish and Wildlife Service (FWS), the tribes, and the National Marine Fisheries Service (NMFS), as applicable.

Permit Conditions

40 C.F.R. § 233.23: Each state issued 404 permit must include specified conditions which assure compliance with federal guidelines, water quality standards and effluent standards and prohibitions; be of a fixed term as limited under the CWA; identify the specifics and scope of the authorized activity; and identify the purpose, type and quantity of discharge. The regulations also include requirements that the permittee stop work if necessary for compliance, take reasonable steps to minimize or prevent violations, inform the agency when non-compliance occurs, provide information requested by the agency, monitor and report as appropriate and keep records, allow the agency to inspect and enter its premises, and minimize the impacts of its discharges.

FLORIDA AUTHORITY: Rules 62-330.350, 62-331.053, and 62-331.054, F.A.C. implement the general permit conditions for individual permits. The conditions in Chapter 62-331.053 are specific to the 404(b)(1) guidelines, applicable Section 303 water quality standards, and applicable Section 307 effluent standards and prohibitions. The state has prepared a regulatory crosswalk that demonstrates each specific state rule that implements the criteria set forth in the 404(b)(1) guidelines. Rule 62-330.054 implements the criteria set forth in 40 C.F.R. § 233.23(c). In addition, Rule 62-331.090, F.A.C., limits the duration of permits to the maximum timeframe allowable under federal law.

Permit Application Process

40 C.F.R. § 233.30: The permit application process contains procedures that must be followed to apply for an individual permit. These procedures require applicants provide their name, address and telephone number, and the addresses of adjacent property owners, § 233.30(b)(1); to describe the proposed activity, including its location, purpose and intended use, to describe the scheduling of the activity, the location and dimension of adjacent structures, and all other needed approvals, § 233.30(b)(2); to describe the type, composition, source and quantity of materials to be discharged, the method of discharge, and the site and plans for disposal of dredged or fill material, § 233.30(b)(3); and to certify that all information provided is accurate and that the applicant is aware of the penalties for providing false information. § 233.30(b)(4). All activities reasonably related to the proposed project should be included in the application. § 233.30(b)(5). In addition, the applicant will be required to furnish additional information the State deems appropriate to evaluate the application, and to provide a detailed analysis of environmental considerations. § 233.30(c)&(d).

FLORIDA AUTHORITY: Paragraph 62-331.060(1), F.A.C., implements the application requirements in 40 C.F.R. §§ 233.30(b)(1) – (4). Paragraph 62-331.051(2), F.A.C., implements the application requirement in § 233.30(b)(5). Paragraph 62-331.052(1), F.A.C., implements the application requirement in § 233.30(c). The state provides permit applicants guidance regarding the level of detail needed when analyzing the environmental considerations required under Section 233.30(d) in its applicant's handbooks.

Coordination Requirements

40 C.F.R. § 233.31: A state must give any other state which may be affected by a permit action the opportunity to submit written comments on and object to a proposed permit. The regulation also requires a state to coordinate its permitting activity with federal and state water planning and review processes.

FLORIDA AUTHORITY: Rule 62-331.060(5), F.A.C., implements the coordination requirements in 40 C.F.R. § 233.31 by providing a process by which any state whose waters may be affected by a proposed activity may submit written comments and suggest permit conditions within the public notice comment period. The rule provides for EPA review should the State not accept the recommendations.

Public Notice

40 C.F.R. § 233.32: This regulation specifies the circumstances and manner in which the public must be notified of and given the opportunity to comment on certain agency actions. The regulation also specifies information required to be included in the public notices, and the procedures required to give notice of any public hearing.

FLORIDA AUTHORITY: Subsections 62-331.060(2) – (3), F.A.C., fully implement the public notice requirements of 40 C.F.R. § 233.32(a) – (c) and (e) for individual permits, emergency permits, major modifications and the scheduling of a public hearing. Draft general permits that are promulgated through the rulemaking process are open to public notice and comment pursuant to

Section 120.54, F.S. Subsection 62-331.060(2), F.A.C., and Section 5.3.1 of the 404 Applicant's Handbook require that all notices, including those for applications noticed pursuant to subsection 62-331.060(8), F.A.C., must contain the information required by 40 C.F.R. § 233.32(d).

Public Hearing

40 C.F.R. § 233.33: This regulation identifies the circumstances under which a public hearing must be held on a permit action and contains the procedures applicable to such a hearing. Any interested person may request a public hearing, in writing, during the public comment period. The state shall hold a hearing whenever it determines there is a significant degree of public interest in an application or draft general permit and may hold a hearing when it determines a hearing would be useful to making a decision on an application or draft general permit. Any person may submit oral or written comments or information concerning the application. The public comment period shall automatically be extended at the close of the hearing or as determined by the presiding officer. All public hearings shall be recorded and the record of proceedings shall be made available to the public.

FLORIDA AUTHORITY: Section 62-331.060(4), F.A.C., implements the standards and procedures for public meetings required by 40 C.F.R. § 233.33(a)-(d). Paragraph 62-331.060(3)(c), F.A.C., implements the provisions of 40 C.F.R. § 233.33(c), regarding the extension of the public comment period. Hearings on draft general permits that are promulgated through the rulemaking process are subject to procedures set forth in Section 120.54, F.S., and are mandatory when requested by a member of the public.

Decision on Permit Application

40 C.F.R. § 233.34: The permit decision-making process contains requirements for making permit decisions, including requirements that permit applications be reviewed for compliance with the 404(b)(1) guidelines and/or equivalent state environmental criteria as well as any other applicable State laws or regulations; that no permit may be issued unless compliance with 40 C.F.R. § 233.20 is achieved; and that the State's determination must be available to the public before becoming final. In addition, all comments received in response to the public notice, and public hearing if one is held, must be considered and all comments and the record of any public hearing shall be made part of the official record on the application.

FLORIDA AUTHORITY: The issuance of all individual permits is conditioned on compliance with Rules 62-330.301, 62-330.302, F.A.C., as well as Rule 62-331.053, F.A.C., which collectively contain the state environmental criteria equivalent to the 404(b)(1) guidelines. The state has prepared a regulatory crosswalk that demonstrates each specific state rule that implements the criteria set forth in the 404(b)(1) guidelines. Additionally, pursuant to Rule 62-331.070, F.A.C., no permit may be issued without compliance with state water quality standards, the Coastal Zone Management Program, and as detailed above, the prohibitions set forth in 40 C.F.R. § 233.20. The state's determination is available to the public prior to it becoming final via Rule 62-331.060, F.A.C., and the official record is available to the public through Florida's public records laws (e.g., Chapter 119, F.S.).

Permit Issuance and Effective Date

40 C.F.R. § 233.35: These regulations set forth the procedures for finalizing an application following EPA review. In instances where EPA comments on a permit, the state issues the permit under the procedures set forth in 40 C.F.R. § 233.50. In instances where EPA does not comment on a permit, permit decisions shall be made after the close of the public comment period, with notice to the applicant, and the reasons for any denial shall be set forth in writing. The regulation also provides that a permit shall become effective upon signature by the appropriate state official and the applicant.

FLORIDA AUTHORITY: Rule 62-331.052(3), F.A.C., implements the provisions of 40 C.F.R. § 233.35, including the process set forth in 40 C.F.R. § 233.50.

Permit Modification, Suspension, or Revocation

40 C.F.R. § 233.36: This regulation specifies certain circumstances under which permits may be modified, suspended, or revoked. These circumstances include instances of non-compliance; misrepresentation during the application process; the issuance of a general permit when an individual permit would have been appropriate; changes in circumstances since permit issuance; the presence of significant, previously unavailable information; and revised regulations. The regulation further provides that, with the exception of minor modifications, permit modifications must be subject to public notice and comment and to coordinate with federal review agencies. Minor modifications may use abbreviated procedures and are available to: correct typographical errors; increase the frequency of monitoring or reporting; allow for a change in ownership or operational control over a project; provide for minor modification of project plans that do not significantly change the character, scope and/or purpose of the project; or extend the term of a permit so long as the modification does not extend the term of the permit beyond the maximum timeframe allowable under federal law and does not result in any increase in the amount of dredged or fill material allowed to be discharged.

FLORIDA AUTHORITY: The suspension or revocation of permits shall be conducted in accordance with Section 373.429, F.S. The state will process applications for modifications in accordance with Rule 62-330.315(1) through (3), F.A.C., and Section 6.2 of Applicant's Handbook Volume I, as applicable. The state will reevaluate the circumstances and conditions of a permit considering the factors set forth in Rule 62-331.080(2), F.A.C., which implements the criteria set forth in 40 C.F.R. § 233.36(a). Rule 62-330.315(2), F.A.C., sets forth the types of requests that will qualify for minor modifications, and provides that minor modifications are not subject to public notice and comment. Pursuant to paragraph 62-331.080(4), major modifications and the suspension or revocation of permits are subject to the public notice requirements set forth in Rule 62-331.060, F.A.C.

Signature on Application

40 C.F.R. § 233.37: This regulation requires a permit application to be signed by the applicant, or an authorized agent if accompanied by a statement by that person designating the agent. The signature of the applicant or agent will be understood to be an affirmation that he possesses or

represents the person who possesses the requisite property interest to undertake the activity proposed in the application.

FLORIDA AUTHORITY: Rule 62-331.051(1), F.A.C., implements the requirements of 40 C.F.R. § 233.37, by requiring an applicant use Form 62-330.060(1) – "Application for Individual and Conceptual Approval Environmental Resource Permit, State 404 Program Permit, and Authorization to Use State-Owned Submerged Lands." Part 4, Section A of this Form requires the signature of the applicant or the applicant's agent; Section B requires the certification of real property interest; and Section C requires the Designation of Authorized Agent (if applicable). Noticed general permits require the use of Form 62-330.402(1), which requires substantially the same information and certification.

Continuation of Expiring Permits

40 C.F.R. § 233.38: This regulation prohibits the continuation of any Corps 404 permit beyond its expiration date under federal law after assumption. States authorized to administer the 404 Program may continue Corps or State issued permits until the effective date of the new permits, if State law allows. Otherwise, the discharge is being conducted without a permit from the time of expiration of the old permit to the effective date of a new State-issued permit, if any.

FLORIDA AUTHORITY: Rule 62-331.090, F.A.C., implements the requirements of 40 C.F.R. § 233.38 by providing that the duration of individual permits will be specified in the permit but shall not exceed the maximum timeframe allowable under federal law and reasonably necessary to complete the project. In addition, Section 6 of the 404 Handbook provides that individual permits may be administratively continued while an application for a new permit is under review when unexpected project delays cause a project to require more time to complete.

Electronic Reporting

40 C.F.R. § 233.39: This regulation requires states to satisfy the requirements for electronic reporting in 40 C.F.R. Part 3 in its state program if the state chooses to receive electronic documents.

FLORIDA AUTHORITY: The Department receives electronic documents through its ESSA (Electronic Self-Service Application Portal) and EzDMR (Electronic Discharge Monitoring Report) applications, which have been compliant with CROMERR (EPAs Cross Media Electronic Reporting Rule) since January 2012.

Requirements for Compliance Evaluation Programs

40 C.F.R. § 233.40: This regulation requires a state maintain a program designed to identify violators, to have authority to enter and inspect a violator's property, including the ability to copy records, take samples, and otherwise to investigate compliance with the state program, and to have a method for receiving information from the public on violations.

FLORIDA AUTHORITY: The State has authority to enforce rules and regulations promulgated under Part IV of Chapter 373, F.S., including the Environmental Resource Permit (ERP) program and the State 404 Program. Such regulatory violations include failure to obtain a required permit

or failure to comply with permit conditions. *See* §§ 373.129(1) and (7); 373.430(1), F.S. Several state statutes grant the Department the authority to access and inspect sites, take samples and gather information and evidence. §§ 373.423, 403.091, F.S. Other sources of site access authority include permits, consent orders, other administrative orders, permission forms, easements and licenses, inspection warrants, and court orders. *See generally* Chapters 373 and 403, F.S., and more specifically §§ 403.091, 403.121(2), F.S. *See also* Rules 62-331.054(1), 62-330.350(1)(m), 62-331.201(1), 62-330.405(8), and Applicant's Handbook Volume I, Section 1.7. Florida has procedures for receiving and considering information from the public on violations contained in Section 403.412(2), F.S.

Enforcement Authority Requirements

40 C.F.R. § 233.41: This regulation requires a state have authority to restrain unauthorized activity, to sue to enjoin violations, and to assess or to sue to recover civil penalties of at least $5,000 per day for each civil violation, and of at least $10,000 per day of each criminal violation. In addition, a state must be able to seek criminal fines of at least $5,000 for providing false information or tampering with a monitoring device and must be able to assess a civil or criminal violation for each day during which a violation continues.

FLORIDA AUTHORITY: Florida law is consistent with and no less stringent than the specified enforcement provisions. *See* §§ 373.129 and 373.430, F.S. DEP has the authority to restrain unauthorized activity, §§ 373.129(1) and 373.430(1); to enjoin and abate violations of statutes, rules, and orders adopted pursuant to Chapter 373 F.S., § 373.129(2); and to recover civil penalties up to $15,000 per violation, § 373.129(5).

DEP can seek criminal remedies against someone who willfully, or with criminal negligence (with reckless indifference or gross careless disregard), discharges dredged or fill material without the required permit or in violation of any permit condition, in the amount of $10,000. §§ 373.430(5) and (6); and knowingly makes false statements, representation or certification in any application, record, report, plan, or other document filed or required to be maintained part IV, Chapter 373, or falsifies tampers with or knowingly renders inaccurate any monitoring device or method required to be maintained under the permit in an amount of $10,000. § 373.430(5), F.S.

Each date during which a violation occurs constitutes a separate offense. §§ 373.129(5); 373.430(3), F.S. *See also* §§ 373.129(7), 403.121(1) and (2), 403.131, 403.141, and 403.161, F.S. Additionally, the EPA may overfile pursuant to Section 309 of the CWA.

Public Participation

40 C.F.R. § 233.41(e): This regulation requires a state to assure public participation in enforcement proceedings by either authorizing citizens to intervene in civil or administrative proceedings as of right, or by investigating and giving written responses to citizen complaints; not opposing permissive intervention; and giving the public a 30-day comment period on any proposed settlement of an enforcement action.

FLORIDA AUTHORITY: Florida has adequate legal authority to comply with 40 C.F.R. § 233.41(e)(2) and has provided assurance that it will comply with 40 C.F.R. § 233.41(e)(2) in its MOA with the EPA.

Program Reporting

40 C.F.R. § 233.52: This regulation requires the State to report annually to the EPA an evaluation of the State's administration of the program identifying problems the State has encountered and recommendations for resolving them. The draft report should be submitted within 90 days of the completion of the annual period (as identified in the MOA) and made available for public inspection. EPA will review the report and transmit any comments, after which the State has 30 days to finalize the annual report.

FLORIDA AUTHORITY: Florida has adequate legal authority to comply with 40 C.F.R. § 233.52 and has provided assurance that it will comply with 40 C.F.R. § 233.52 in its MOA with the EPA.

Effect of State Takings Law on Successful Implementation of Program

40 C.F.R. § 233.12: A state seeking authority to administer the federal 404 program must analyze the effect its takings law will have on successful implementation of the state 404 program. Under the Takings Clause in the Fifth Amendment to the United States Constitution, a state must compensate owners when the adoption or application of a law impinges on an owner's property interests, a scenario commonly described as a "regulatory taking." As interpreted, courts may require compensation for regulatory takings under a variety of circumstances, including: where the government's action removes all economically viable use of property; when a government action is deemed to have caused a physical invasion of property; when an "ad hoc" analysis (referred to as the *Penn Central* test) triggers a compensation requirement; and where a government unreasonably requires an exaction (e.g., a conservation easement) of property as a condition to a permit, without an appropriate nexus to the adverse effects that the permitted activity would cause.

Procedurally, until very recent times, federal courts required property owners to seek compensation in state courts before proceeding to federal court for compensation under a Fifth Amendment claim (at least, where state law allowed for an appropriate state remedy). In June 2019, the United States Supreme Court (in the *Knick* decision) departed from the line of cases requiring the exhaustion of state remedies. Presently, if an owner were to make a claim against the State of Florida for compensation as a result of an alleged taking, the owner could proceed directly to federal court against the Department, in which case the Department would be similarly situated to the Corps in the same scenario.

Long before *Knick*, Florida courts recognized a claim for inverse condemnation to provide remedies for alleged regulatory takings. Presumably, notwithstanding the *Knick* decision, Florida courts will continue to allow those claims – leading to the theoretical possibility that Florida courts could expand state liability for compensation. For the reasons discussed below, this process will not interfere with the state's successful implementation of the program.

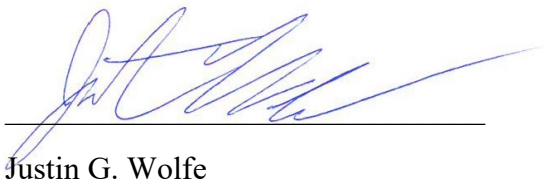
FLORIDA AUTHORITY: Article 10, Section 6, of the Florida Constitution prohibits the taking of private property for public use without just compensation, the same as Amendment 5 of the Bill of Rights. One Florida Court has held that the standard for a "taking" under the Florida Constitution is identical to the standard under the Fifth Amendment (at least for res judicata purposes), and it is unlikely that Florida courts would expand liability for regulatory takings under the Florida Constitution, beyond the federal standard. Likewise, given the potential for review of a decision by the Florida Supreme Court to the United States Supreme Court, there is no reason to suppose that Florida courts would interpret the Fifth Amendment beyond the standards presently imposed by federal courts.

Most importantly, Florida courts have recognized the distinction between an invalid agency action and an agency action that will require compensation as a regulatory taking. Under *Key Haven* and other Florida cases, an owner must either accept that agency action is valid, and then proceed in inverse condemnation, or pursue all administrative remedies to challenge the validity of agency action before seeking compensation in an inverse condemnation action. For many reasons, a potential taking does not mean that agency action is invalid under Florida law. As a result, even where a Florida agency is faced with an allegation that its position will lead to a taking, it may still successfully implement the regulation without regard to the question of a taking. For that reason alone, takings law will not inhibit the successful implementation of Florida's program.

Signing Authority for General Counsel's Statement

40 C.F.R. § 233.12: Where more than one agency has responsibility for administering the state program, the statement must include certification that each agency has full authority to administer the program within its category of jurisdiction. The attorney signing the statement must be the state Attorney General, or the attorney for the state agencies which have independent legal counsel and must have the authority to represent the state agency in court on all matters pertaining to the state program.

FLORIDA AUTHORITY: DEP has responsibility for administering Florida's 404 program. *See* §§ 373.473, 373.4146 and 403.061, F.S. The attorney signing this statement is the independent legal counsel for DEP and has the duty and authority to represent DEP in court on all matters pertaining to the state 404 program. *See* §§ 20.255(2)(c) and 403.805(1), F.S.



Justin G. Wolfe
General Counsel, Florida Department of Environmental Protection

# EXHIBIT 16

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Parts 232 and 233**

**[FRL–4121–2]**

**RIN 2040–AB69**

## Clean Water Act; Section 404 Tribal Regulations

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This rule amends the Section 404 State Program Regulations by adding the procedures by which an Indian Tribe may qualify for treatment as a State in order to be eligible to subsequently apply for assumption of the dredge and fill permit program under section 404 of the Clean Water Act, and the Clean Water Act Section 404 Program Definitions and Permit Exemptions by adding new definitions for "Federal Indian reservation", "Indian Tribe", and "States". This regulation satisfies the statutory provisions in section 518 of the Clean Water Act with respect to the 404 program and, in part, sections 308 of 309 of the Clean Water Act.

**EFFECTIVE DATE:** The rule shall be effective March 15, 1993.

**ADDRESSES:** The administrative record for this rule may be inspected at 499 South Capitol Street, SW., room 711, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Lori Williams, Wetlands Division (A104F), Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, 202–260–5043.

**SUPPLEMENTARY INFORMATION:** Information in this preamble is organized as follows:



### A. Background

The over-all objective of the Clean Water Act (CWA) as amended is to restore and maintain the chemical, physical and biological integrity of the Nation's water. The two national goals the Act established in 1972 include: (1) Eliminating the discharge of pollutants into navigable waters and (2) achieving an interim water quality level that would protect fish, shellfish, and wildlife while providing for recreation in and on the water wherever attainable.

Since 1972, section 101(b) of the CWA makes it national policy to recognize and preserve the States' primary responsibility to meet these goals. Over the past 20 years, the Agency has focused on developing standard operating relationships with the States and localities.

In 1972, Congress established the 404 permit program to regulate discharges of dredged or fill material into waters of the United States. Congress, in the 1977 Amendments to the Federal Water Pollution Control Act (the Clean Water Act), gave States the option of assuming the 404 permit program in certain waters of the State, subject to EPA approval. If a State assumes this responsibility, its jurisdiction includes all waters within its border except: (1) Those which are subject to the ebb and flow of the tide plus adjacent wetlands and (2) waters which are presently used or may be susceptible to use (through reasonable improvement) to transport interstate or foreign commerce plus adjacent wetlands. The Corps of Engineers retains jurisdiction over all waters which States cannot assume.

The Act prescribes minimum requirements which States must meet before exercising their option to assume the program and assigned program approval and oversight responsibility to EPA. On May 19, 1980, EPA promulgated regulations to establish procedures and criteria for approval/disapproval of 404 State programs and for monitoring a State program after program approval. In response to State concerns about rigid mandatory requirements, excessive paperwork burdens, intrusive Federal oversight, and general lack of flexibility, EPA promulgated revised regulations on June 6, 1988. These revisions provide the States more flexibility in program design and administration while still meeting the requirements and objectives of the Act. Once a Tribe is determined to be qualified to be treated as a State, the Tribe must meet the requirements for an approvable program specified in 40 CFR Part 233.

Congress, through amendments to both CWA in 1987 and the Safe Drinking Water Act (SDWA) in 1986, has authorized EPA to treat Indian Tribes as States under various provisions of these Acts. Amendments to both statutes required the Agency to promulgate regulations that would establish exactly how Tribes would be treated as States. Specifically, the February 4, 1987 Amendments to CWA added a new section 518, which requires EPA to promulgate regulations specifying how the Agency will treat qualified Indian Tribes as States for the purposes of, among others, the section 404 Dredge and Fill Program described above, to the extent that EPA determines such regulations are necessary to implement section 518.

On November 29, 1989, EPA proposed amendments to the Section 404 State Program Regulations in response to CWA section 518 requirements (see 54 FR 49180). The proposal included an amendment that would add procedures by which an Indian Tribe could qualify for treatment as a State for the purpose of the Section 404 dredge and fill permit program (and, as discussed below, for purposes of sections 308 and 309 of the CWA as they relate to section 404). The proposal also included an amendment to the section 404(b)(1) Guidelines for specification of Disposal Sites for Dredged or Fill Material by adding new definitions for "Federal Indian reservation", "Indian Tribe" and "States". The public comment period closed on January 29, 1990. EPA received a total of 20 comments on the proposed rule.

Pursuant to CWA section 518, the proposal was prepared in consultation with States and Indian Tribes. The proposal was developed with the assistance of an informal work group composed of representatives from Indian Tribes, States, and EPA. In addition, a national consultation meeting involving States and Tribes was held in Denver, Colorado in June of 1988 for the purpose of obtaining additional comments. Finally, EPA distributed a number of drafts of the proposal to all States and tribes (following a mailing list of federally recognized Tribes obtained by the Office of Water) for review and comment prior to issuing the proposed rule.

EPA believes that many of the difficult issues were resolved during the consultation period prior to proposal, and that this explains why relatively few comments were received on the proposal and why relatively few changes to the proposal were required in preparing today's final rule. Another reason is that EPA had previously published similar procedures under CWA section 518 for the section 106 water quality management and planning program (54 FR 14354; Apr. 11, 1989).

Additional background information was included in the preamble to the proposed rulemaking.

Finally, EPA issued very similar regulations treating Tribes as States for purposes of sections 303 and 401 of the

CWA (Water Quality Standards program), which were also proposed on September 22, 1989. EPA received similar comments on most issues. Today's responses to comments echo EPA's responses in that final rule. EPA incorporates all of those responses into today's administrative record by reference, and has not repeated all of them here.

**B. Response to Public Comments**

The response to public comments is organized into two sections: (1) Treatment of Tribes as States, and (2) other comments. Comments discussed within each of these sections has been further categorized by topic.

*1 Treatment of Tribes as States*

Comments on the Authority Requirements

*a. The Scope of Inherent Tribal Authority*

*Comment:* The issue of whether and how EPA should require Tribes to demonstrate that they meet the requirements of section 518(e)(2) of the CWA, i.e., that they can demonstrate authority to regulate the discharge of dredged or fill material within the boundaries of their reservations, attracted significant comment. Numerous commenters remarked on the significance of the Supreme Court's decision in *Brendale* versus *Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 109 S.Ct. 2994 (1989) for EPA's programs and today's regulations, although there were widely differing views of how to read the decision. Several commenters asserted that *Brendale* clearly indicates that an Indian Tribe may not enforce the section 404 permit program against non-members of the Tribe on non-Indian-owned fee lands within the boundaries of the reservation or that, at the very least, the Tribe must include detailed factual information that describes the non-Indian lands the Tribe proposes to regulate and the reasons supporting its jurisdictional assertions.

By contrast, other commenters asserted that Tribes invariably possess inherent authority to regulate all reservation waters, and that EPA should presume the existence of such authority and not require Tribes to make any specific factual showing. These commenters asserted that such authority over environmental matters was recognized in *Montana* versus *United States*, 450 U.S. 544 (1981), and not diminished by *Brendale*.

*Response:* EPA does not read the holding in *Brendale* as preventing EPA from recognizing Tribes as States for purposes of regulating the discharge of dredged or fill material on fee lands within the reservation, even if section 518 is not an express delegation of authority (an issue discussed in detail below). In *Brendale*, both the State of Washington and the Yakima Nation asserted authority to zone non-Indian real estate developments on two parcels within the Yakima reservation, one in an area that was primarily Tribal, the other in an area where much of the land was owned in fee by non-members. Although the Court analyzed the issues and the appropriate interpretation of *Montana* at considerable length the nine members split 4:2:3 in reaching the decision that the Tribe should have exclusive zoning authority over property in the Tribal area and the State should have exclusive zoning authority over non-Indian owned property in the fee area. The decision reflects some difficult issues in this area of the law and, as the comments indicated, has generated considerable controversy over the extent of Tribal authority.

Given the lack of a majority rationale, the primary significance of *Brendale* is in its result, which was fully consistent with *Montana* versus *United States*, which previously had held that:

> To be sure, Indian Tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate * * * the activities of non-members who enter consensual relationships with the Tribe or its members through commercial dealing, contracts, leases or other arrangements * * * A Tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe.

*Montana*, 450 U.S. at 565–566 (citations omitted).

In *Brendale*, the Court applied this test, finding Tribal authority over activities that would threaten the health and welfare of the Tribe, 492 U.S. at 443–44 (Stevens, J., writing for the Court); *id.* at 449–50 (Blackmun, J. concurring). Conversely, the Court found no Tribal jurisdiction where the proposed activities "would not threaten the Tribe's * * * health or welfare." *Id.* at 432 (White, J., writing for the Court). The Agency therefore disagrees with commenters who argue that *Brendale* somehow overrules *Montana*.

As further discussed below, EPA agrees with certain commenters that pending further judicial or Congressional guidance on the extent to which section 518 delegates additional authority to Tribes, the ultimate decision regarding Tribal authority must be made on a Tribe-by-Tribe basis and has finalized the proposed process for making those determinations. Thus, EPA rejects the suggestion of other commenters that EPA make a conclusive statement regarding the extent of Tribal jurisdiction over fee lands for all Tribes and all waters or even a statement regarding any particular reservation, except in the context of an actual treatment as a State application. This is consistent with the approach the Agency adopted under the Safe Drinking Water Act, when it determined that it would not "automatically assume," or adopt, in the first instance, a rebuttable presumption of Tribal authority over all water within a reservation that would operate even in the absence of any factual evidence. See 53 FR 37396, 37399 (September 26, 1988). Nonetheless, EPA sees no reason in light of *Brendale* to assume that Tribes would be *per se* unable to demonstrate authority over water quality management on fee lands within reservation borders. Rather, as discussed below, EPA believes that as a general matter there are substantial legal and factual reasons to assume that Tribes ordinarily have the legal authority to regulate surface water quality within a reservation.

In evaluating whether a Tribe has authority to regulate a particular activity on land owned in fee by non-members but located within a reservation, EPA will examine the Tribe's authority in light of the language of section 518 and evolving case law as reflected in *Montana* and *Brendale*. The extent of such Tribal authority depends on the effect of that activity on the Tribe. As discussed above, in the absence of contrary statutory policy, a Tribe may regulate the activities of non-Indians on fee lands within its reservation when those activities threaten or have a direct effect on the political integrity, the economic security, or the health or welfare of the Tribe. *Montana*, 450 U.S. at 565–66. However, in *Brendale* several justices argued that for a Tribe to have "a protectable interest" in an activity, the activity's effect should be "demonstrably serious." *Brendale*, 492 U.S. at 431 (White, J.). In addition, in a more recent case involving Tribal criminal jurisdiction, a majority of the Court indicated in *dicta* that a Tribe may exercise civil authority "where the exercise of Tribal authority is vital to the maintenance of Tribal integrity and self-determination." *Duro* v. *Reina*, 110 S.Ct. 2053, 2061 (1990). See also *Brendale*, 492 U.S. at 450 (Blackmun, J.) (test for inherent Tribal authority

whether activities "implicate a significant Tribal interest"); *id* at 462 (Blackmun, J.) (test for inherent Tribal authority whether exercise of authority "fundamental to the political and economic security of the Tribe").

As discussed above, the Supreme Court, in recent cases, has explored several options to assure that the impacts upon Tribes of the activities of non-Indians on fee land, under the *Montana* test, are more than *de minimis*, although to date the Court has not agreed, in a case on point, on any one reformulation of the test. In response to this uncertainty, the Agency will apply, as an interim operating rule, a formulation of the standard that will require a showing that the potential impacts of regulated activities on the Tribe are serious and substantial.

The choice of an Agency operating rule containing this standard is taken solely as a matter of prudence in light of judicial uncertainty and does not reflect an Agency endorsement of this standard *per se*. Moreover, as discussed below, the Agency believes that the activities regulated under the various environmental statutes generally have serious and substantial impacts on human health and welfare. As a result, the Agency believes that Tribes will usually be able to meet the Agency's operating rule, and that use of such a rule by the Agency should not create an improper burden of proof on Tribes or create the administratively undesirable result of checkerboarding reservations.

Whether a Tribe has jurisdiction over activities by non-members will be determined case-by-case, based on factual findings. The determinations as to whether the required effect is present in a particular case depends on the circumstances.

Nonetheless, the Agency may also take into account the provisions of environmental statutes, and any legislative findings that the effects of the activity are serious in making a generalized finding that Tribes are likely to possess sufficient inherent authority to control reservation environmental quality. See e.g. *Keystone Bituminous Coal Assoc.* v. *DeBenedictis*, 480 U.S. 470, 476–77 and notes 6, 7 (1987). As a result, in making the required factual findings as to the impact of a water-related activity on a particular Tribe, it may not be necessary to develop an extensive and detailed record in each case. The Agency may also rely on its special expertise and practical experience regarding the importance of water management, recognizing that clean water including important habitats (e.g., wetlands, bottom sediments, spawning beds, etc.), is absolutely crucial to the survival of many Indian reservations.

The Agency believes that Congressional enactment of the Clean Water Act establishes a strong Federal interest in effective management of water quality. Indeed, the primary objective of the CWA "is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (section 101(a)) and, to achieve that objective, the Act establishes the goal of eliminating all discharges of pollutants, into the navigable waters of the U.S. and attaining a level of water quality which is fishable and swimmable (section 101(a)(1)–(2)). Thus the statute itself constitutes, in effect, a legislative determination that activities which affect surface water and important habitat quality may have serious and substantial impacts.

EPA also notes that, because of the mobile nature of pollutants in surface waters and the relatively small length/size stream segments or other water bodies on reservations, in would be practically very difficult to separate out the effects of water quality impairment on non-Indian fee land within a reservation from those on Tribal portions. In other words, any impairment that occurs on, or as a result of, activities on non-Indian fee lands is very likely to impair the water quality of the Tribal lands. This also suggests that the serious and substantial effects of water quality impairment within the non-Indian portions of a reservation are very likely to affect the Tribal interest in water quality. EPA believes that a "checkerboard" system of regulation, whereby the Tribe and State split up regulation of surface water quality on the reservation, would ignore the difficulties of assuring compliance with the section 404 permit program when two different sovereign entities are regulating the same small stream segments.

EPA also believes that Congress has expressed a preference for Tribal regulation of surface water quality to assure compliance with the goals of the CWA. This is confirmed by the text and legislative history of section 518 itself. The CWA establishes a policy of recognizing, preserving, and protecting the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, and to plan the development and use (including restoration, preservation, and enhancement) of land and water resources (section 101(b)). By extension, the treatment of Indian Tribes as States means that Tribes are to be primarily responsible for the protection of reservation water resources. As Senator Burdick, floor manager of the 1987 CWA Amendments, explained, the purpose of section 518 was to "provide clean water for the people of this Nation." 133 Cong. Rec. S1018 (daily ed. Jan. 21, 1987). This goal was to be accomplished, he asserted, by giving Tribes the primary authority to regulate practices which may affect water quality on Indian lands. *Id.*

In light of the Agency's statutory responsibility for implementing the environmental statutes, its interpretations of the intent of Congress in allowing for Tribal management of the section 404 permit program within the reservation are entitled to substantial deference. *Washington Dept. of Ecology* v. *EPA*, 752 F.2d 1465, 1469 (9th Cir. 1985); see generally *Chevron, USA* v. *NRDC*, 467 U.S. 837, 843–45 (1984).

The Agency also believes that the effects of Tribal health and welfare necessary to support Tribal regulation of non-Indian activities on the reservation may be easier to establish in the context of water quality management than with regard to zoning, which was at issue in *Brendale*. There is a significant distinction between land use planning and water quality management. The Supreme Court has explicitly recognized such a distinction: "Land use planning in essence chooses particular uses for the land; environmental regulation * * * does not mandate particular uses of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *California Coastal Commission* v. *Granite Rock Co.*, 480 U.S. 572, 587 (1987). The Court has relied on this distinction to support a finding that States retain authority to carry out environmental regulation even in cases where their ability to carry out general land use regulation is preempted by Federal law. *Id.* at 587–89.

Further, water quality management serves the purpose of protecting public health and safety, which is a core governmental function, whose exercise is critical to self-government. The special status of governmental actions to protect public health and safety is well established.[1] By contrast, the power to zone can be exercised to achieve purposes which have little or no direct nexus to public health and safety. See e.g. *Brendale*, 492 U.S. at 420 n.5 (White, J.) (listing broad range of consequences of State zoning decision).

[1] This special status has been reaffirmed by all nine justices in the context of Fifth Amendment takings law. See *Keystone Bituminous Coal Association* v. *DeBenedictis*, 480 U.S. 470, 491 n.20 (1987); *Id.* at 512, (Rehnquist, C.J., dissenting).

Moreover, water pollution is by nature highly mobile, freely migrating from one local jurisdiction to another, sometimes over large distances. By contrast, zoning regulates the uses of particular properties with impacts that are much more likely to be contained within a given local jurisdiction.

Operationally, EPA's generalized findings regarding the relationship of water quality to Tribal health and welfare will affect the legal analysis of a Tribal submission by, in effect, supplementing the factual showing a Tribe makes in applying for treatment as a State. Thus a Tribal submission meeting the requirements of § 233.61(c) of this regulation will also need to make a relatively simple showing of facts that there are waters within the reservation used by the Tribe or Tribal members, (and thus that the Tribe or Tribal members could be subject to exposure to pollutants present in, or introduced into, those waters) and that the waters are subject to protection under the Clean Water Act. The Tribe must also explicitly assert that impairment of such waters by the activities of non-Indians, would have a serious and substantial effect on health and welfare of the Tribe. Once the Tribe meets this initial burden, EPA will, in light of the facts presented by the Tribe and the generalized statutory and factual findings regarding the importance of reservation water quality discussed above, presume that there has been an adequate showing of Tribal jurisdiction on fee lands, unless an appropriate governmental entity (e.g., and adjacent Tribe or State) demonstrates a lack of jurisdiction on the part of the Tribe.

The Agency recognizes that jurisdictional disputes between Tribes and States can be complex and difficult and that it will, in some circumstances, be forced to address such disputes. However, EPA's ultimate responsibility is protection of the environment. In view of the mobility of environmental problems, and the interdependence of various jurisdictions, it is imperative that all affected sovereigns work cooperatively for environmental protection, rather than engage in confrontations over jurisdiction.

*b. The Effect of Section 518 on Tribal Authority Over Non-Indian Activities*

*Comment*: EPA has received letters from three members of Congress, Senator Simpson, Senator Baucus, and Representative Morrison, regarding the impact of *Brendale* on EPA's Indian Policy and the development of "treatment as a State" regulations for EPA water programs in light of the legislative history of section 518. All three commenters asserted that Congress did not intend to expand the scope of Tribal authority over non-Indians on the reservation by the passage of section 518.

Rep. Morrison asserted that he inserted into the Congressional Record a memorandum written by staff on the House Committee on Interior and Insular Affairs regarding section 518 (also inserted into the Congressional Record by Senator Adams at 133 Cong. Rec. S753–54 (daily ed. Jan. 14, 1987)) solely to demonstrate that section 518 was not intended to expand Tribal water quantity rights. 133 Cong. Rec. H184–85 (daily ed. Jan 8, 1987). Rep. Morrison disavowed other statements from that memorandum which might support the proposition that Congress intended to authorize Tribal jurisdiction over non-members on reservations. ("Indian Tribes have the right to regulate lands and other natural resources within the reservation, *including non-Indian owned fee lands or resources.*" *Id.* (emphasis added)). Rep. Morrison stated his belief that Congress did not, by the passage of section 518, expand the scope of Tribal authority over non-Indians. In light of this legislative history, Rep. Morrison asserted that, consistent with *Brendale*, EPA should not allow Tribal regulation of non-members on so-called "open" reservations.

Senators Baucus and Simpson also recommended that EPA consider the legislative history of section 518(e) and the *Brendale* decision and determine not to allow Tribal regulation over non-members on the reservation.

Finally, all three of these Congressional commenters asserted that the legislative history of section 518 clearly shows that it was not intended to affect rights to water quantity under State law. The concerns raised by these Members of Congress echo other comments discussed elsewhere in today's notice. Several commenters asserted that section 518(e)(2) should not be read as an express grant of Congressional authority to Indian Tribes to regulate such fee lands, despite indications in *Brendale* to the contrary.

By contrast, Senators McCain, Burdick, and Inouye, expressed a view that section 518(e) delegates Tribes authority to regulate all waters within reservation boundaries including those on non-Indian fee lands. Some commenters cited *Brendale* for this proposition. The latter argument of these commenters is based upon the opinion of Justice White in *Brendale*. Justice White indicates that certain statutes may delegate Federal authority to Tribes, thereby providing a basis for authority over all lands within a reservation. As Justice White explained, on the record in *Brendale* there could be—

> "no contention * * * that Congress has expressly delegated to the Yakima Nation the power to zone fee lands of nonmembers of the Tribe. *Compare 18 U.S.C. 1151, 1161 (1982 ed., and Supp. V); 33 U.S.C. 1377 (e) and (h)(1) (1982 ed., Supp. V)* [i.e., sections 518(e) and 518(h)(1) of the CWA]."

492 U.S. at 428 (1989) (White, J.) (emphasis added). This language clearly categorizes the two cited statutory schemes as express delegations of Federal authority. Thus, Justice White, *inter alia*, cites the Clean Water Act as an example of an explicit delegation of authority over non-Indian activities to Indian Tribes.

*Response:* EPA has fully considered the Congressional comments and their interpretation of the legislative history of section 518. EPA must, of course, consider contemporaneous legislative history as it is written, and has been cautioned not to rely on subsequent Statements by Members of Congress. *Hazardous Waste Treatment Council* v. *EPA*, 886 F.2d 355 (DC Cir. 1989), *cert. denied*, 111 S.Ct. 139 (1990).

EPA differs with the Congressional commenters to the extent that they suggest the legislative history of section 518 is clear and expresses an intent to limit the scope of Tribal authority. EPA notes that other legislative history might be interpreted as evincing Congressional intent to confer expanded Tribal authority over non-Indians within the reservation.

In particular, the following colloquy between Senators Inouye and Burdick on this issue is very relevant:

> *Mr. Inouye:* * * * I am concerned about section 518(e)(2). As I read that provision, it enables qualified Indian Tribes to exercise the same water quality regulation jurisdiction *with respect to water that traverses, borders, or is otherwise located within their reservations* [paraphrasing section 518(h)(1) and 18 U.S.C. 1151(a)] that States have for regulation of water outside Indian reservations. Is my understanding of section 518(e) correct?
>
> *Mr. Burdick:* Yes. The intent of the conferees was to assure that Indian Tribes would be able to exercise the same regulatory jurisdiction over water quality matters *with regard to waters within Indian jurisdiction* that States have been exercising over their water.

133 Cong. Rec. S1018 (daily ed. Jan. 21, 1987) (emphasis added). Senator Inouye's statement could arguably support a reading that Congress intended to recognize Tribal authority over all waters within the reservation, including those managed by non-Indians. Mr. Burdick, a member of the

Conference Committee, agrees with Senator Inouye's statement.

However, in EPA's view this colloquy is ambiguous and inconclusive. Senator Burdick, in responding to Senator Inouye, agrees that under section 518 Tribes may regulate waters only if they are already "within Indian jurisdiction." However, Senator Burdick was only recognizing the status quo, i.e., whatever is within Indian jurisdiction may be regulated via section 518. Senator Burdick's statement does not clearly show that he—or the Congress as a whole—intended to legislate that all waters within the reservation are in fact "within Indian jurisdiction." Thus, the colloquy is circular: Indians have jurisdiction if, but only if, they have jurisdiction from some source other than section 518. It does not clearly indicate whether Congress intended to expand what lies "within Indian jurisdiction."

Further, if this colloquy were to be construed as supporting an expansion of Tribal authority, it would arguably conflict with a statement Senator Burdick had made earlier in response to an inquiry from Senator Baucus. In that discussion, Senator Burdick reiterated that section 518 was not intended to affect existing water quantity rights, and added that "*[p]rivate lands* and water rights owners within boundaries of Indian reservations are not to be *additionally* affected by this act." 133 Cong. Rec. S753 (daily ed. Jan. 14, 1987) (emphasis added). This could suggest that the Act was not intended to alter the status quo regarding regulatory authority over these lands.

The legislative history in the House is also unclear as to whether Congress intended to expand Tribal power over non-Indians. The statement in the House staff memorandum cited above supports a view that under current case law Tribes already possess regulatory authority over non-Indians within reservation boundaries; thus it would be unnecessary to delegate such authority to Tribes. Insertion of this memorandum into the Congressional Record could suggest that the House agreed with that view; however, this aspect of the memorandum was never the subject of House discussions, which focused almost exclusively on issues relating to water rights.

EPA believes that if Congress had intended to make a change as important as an expansion of Indian authority to regulate non-members, it probably would have done so through statutory language and discussed the change in the committee reports. Given that the legislative history ultimately is ambiguous and inconclusive, EPA believes that it should not find that the statute expands or limits the scope of Tribal authority beyond that inherent in the Tribe absent an express indication of Congressional intent to do so. See *Montana*, 450 U.S. at 564. Therefore, EPA has decided that it will, as discussed above, continue to recognize inherent Tribal civil regulatory authority to the full extent permitted under Federal Indian law, in light of *Montana*, *Brendale*, and other applicable case law.

EPA believes that Congress only manifested an explicit intent to authorize EPA to treat Indian Tribes as States over any activities within the scope of Tribal authority in light of the relevant principles of Federal Indian law. EPA believes that this approach will best effectuate the overall purposes of the statute.

EPA agrees with those commenters who Stated that Justice White's opinion in *Brendale* can be read to suggest a contrary conclusion, and to indicate that at least four justices of the Supreme Court would apparently interpret section 518(e) as expressly delegating to Tribes the authority to regulate water quality on reservations, including those affected by activities on non-Indian fee lands. Nonetheless, EPA recognizes that Justice White's opinion was not a majority opinion of the Court and was not necessary to the decision even of the plurality that joined it, since the issue was not before the Court in *Brendale*. Nor is there any discussion in the opinion about the somewhat confusing legislative history of section 518. The passing reference in that opinion does not finally resolve the question of whether section 518(e) is a delegation of authority, and, as discussed above, EPA does not believe that it can make an absolute determination that Congress in fact expressed a clear intent on the issue.

EPA agrees with the Congressional commenters that section 518 does not affect existing water quantity rights. This has been the Agency's consistent position, based on the language of Sections 101(g) and 518(a).

*C. Procedural Requirements for Demonstrating Inherent Tribal Authority*

*Comment*: Numerous comments submitted before and after the proposed rule was published have suggested that the provisions (see §§ 233.61(b)(3) and 233.61(c)) requiring that Tribes submit a copy of all documents which support the Tribe's assertion of authority is unnecessary, inappropriate, and flows from a misunderstanding of Indian law. These commenters argued that Tribes have inherent authority unless Congress rescinds that authority. In addition, these commenters stated, since section 518 specifically authorizes Tribal authority, no such demonstration and supporting documentation is needed.

*Response:* As discussed in detail above, the Agency assumes that, in general, Tribes are likely to possess the authority to regulate activities affecting water quality on the reservation. The Agency does not believe, however, that it would be appropriate to recognize Tribal authority and approve treatment as a State requests in the absence of verifying documentation. In addition, in light of the legislative history of section 518, the question of whether section 518(e) is an explicit delegation of authority over non-Indians is not resolved. Therefore, EPA does not believe it is currently appropriate to eliminate the requirement that Tribes make an affirmative demonstration of their regulatory authority. EPA will authorize Tribes to exercise responsibility for the section 404 permit program once the Tribe shows that, in light of the factual circumstances and the generalized findings EPA has made regarding reservation water quality, it possesses the requisite authority.

EPA would advise Tribes, in their Attorney-General Statements, to outline all bases for concluding that the Tribe has adequate authority. This can only help EPA to make a proper determination to treat the Tribe as a State.

As stated in the preamble to the proposal, where the Regional Administrator concludes that a Tribe has not adequately demonstrated its authority with respect to an area in dispute, then Tribal assumption of the section 404 permit program would be restricted accordingly. If the authority in dispute were focused on a limited area, this would not necessarily delay the Agency's decision to treat the Tribe as a State for the non-disputed areas.

*Comment:* Numerous commenters suggested that § 233.61(c), which requires the Tribe to submit a map or legal description of the area over which the Indian Tribe asserts authority to regulate water, should be amended to require that fee lands and lands owned by non-members and non-Indians be shown on the map.

*Response:* No such amendment was made to the regulation. EPA believes that, in some cases, both States and Tribes may want to identify the location of fee lands on reservations. However, EPA does not believe it is appropriate to specifically require Tribes to submit such information in all cases. EPA also believes that in some cases States are

more likely to have ready access to such information than are Tribes. EPA further believes that the regulation clearly requires Tribes to identify the area over which the Tribe asserts authority to regulate water quality, and that requiring an identification of fee lands and lands owned by non-Indians in all cases is unnecessary and unduly burdensome. Finally, EPA notes that § 233.61(e) gives the Regional Administrator the discretion to require whatever additional information is necessary to support a Tribal application on a case-by-case basis.

*d. Treatment as a State for Off-Reservation Waters Within Inherent Tribal Authority*

*Comment:* Several comments were received regarding the geographic scope of programs authorized under section 518(e)(2). The provision authorizes EPA to treat a Tribe as a State for water resources which are held by an Indian Tribe, held in trust for Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction on alienation, or *otherwise within the borders of an Indian reservation.*
(emphasis added)

EPA has consistently read the phrase "or otherwise within * * *" as a separate category of water resources and also as a modifier of the preceding three categories of water resources, thus limiting the Tribe to acquiring treatment as a State status for the four specified categories of water resources within the borders of the reservation.

Comments received suggested that EPA should alter its reading of this provision to allow Tribes to qualify for treatment as a State over all water resources within its jurisdiction. These comments asserted that limiting Tribes to water resources within the reservation would prevent a Tribe from obtaining treatment as a State status over water resources outside the reservation to which it has legitimate jurisdictional claim. Examples cited included traditional resources areas (known as "usual and accustomed" areas) outside reservation borders, and all lands held in trust for Tribes by the U.S. Government or held by individual Indians that lie outside reservation borders, lands in "Indian Country" (as defined in 18 U.S.C. 1151) that lie outside reservation borders and, in general, all water resources within the territorial jurisdiction of the Tribe that lie outside reservation borders.

One commenter pointed out that often such lands are subject to Tribal or Federal jurisdiction and are thus beyond the police power and regulatory authority of the State in which they are located. This comment concluded that failure to provide Tribes with an opportunity to obtain treatment as a State status over such lands would create "regulatory voids" in which neither States nor Tribes have clear authority. Several comments suggested that resolving this issue could be accomplished simply by revising the definition of Federal Indian Reservation included in § 233.2.

In contrast, other commenters asserted that EPA is correct in reading the phrase "or otherwise within the borders * * *" as a modifier of the preceding three categories of water resources. These commenters pointed out that failure to do so would render the statute nonsensical and contradict Congressional intent. However, these commenters also asserted that EPA is not correct in reading the phrase "or otherwise within the borders * * *" as a fourth category of water resources, because to do so would render the three previous clauses superfluous. These commenters therefore conclude that section 518(e)(2) should not be read as authorizing Tribes to regulate non-Indian owned lands within the boundaries of the reservation.

*Response:* Under today's rule, Tribes are limited to obtaining treatment as a State status for only water resources within the borders of the reservation over which they possess authority to regulate the discharge of dredged or fill material. The meaning of the term "reservation" must, of course, be determined in light of statutory law and with reference to relevant case law. EPA considers trust lands formally set apart for the use of Indians to be "within a reservation" for purposes of section 518(e)(2), even if they have not been formally designated as "reservations." *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905, 910 (1991). This means it is the status and use of the land that determines if it is to be considered "within the reservation" rather than the label attached to it. EPA believes that it was the intent of Congress to limit Tribes to obtaining treatment as a State status to lands within the reservation. EPA bases this conclusion, in part, on the definition of "Indian Tribe" found in CWA section 518(h)(2). As discussed above, EPA also does not believe that section 518(e)(2) prevents EPA from recognizing Tribal authority over non-Indian water resources located within the reservation if the Tribe can demonstrate the requisite authority over such water resources.

*Comments on the Capability Requirements*

*Comment:* A variety of comments were received concerning the general issue of Tribal capability (§§ 233.60(d) and 233.61(d)). Comments on this question ranged from suggesting that EPA should require no demonstration of capability at all to making the capability requirements stronger. Several comments asserted that rejecting Tribes based on capability will only heighten unevenness of experience between States and Tribes.

*Response:* EPA made no change in the regulation. The provision is not unduly burdensome and EPA intends to apply similar procedures for Tribes qualifying as States in all CWA programs. The Clean Water Act establishes basic requirements for a Tribe to meet in order to qualify for treatment as a State. Eliminating the requirement to demonstrate capability would fail to meet these statutory requirements. On the other hand, EPA does recognize the fact that for many Tribes the assumption of various Clean Water Act programs is new. Information necessary for EPA to make determinations of capability must be balanced against the need to allow Tribes to gain experience in CWA programs. EPA believes that today's rule provides that balance.

*Comment:* Comments were received asserting that the rule should require, as part of the demonstration of capability, a demonstration of separation of powers for executive, legislative, and judicial functions, or at least describe how bifurcation of Tribal regulatory and proprietary roles will occur.

*Response:* EPA has not required Tribes to demonstrate separation of powers for purposes of treating Tribes as States because such a demonstration is not required by the Clean Water Act. EPA will, however, in the context of deciding to authorize Tribal 404 permit programs, consider potential conflicts of interest where the Tribe would be in the position of issuing a permit to a Tribal entity.

*Comment:* Several comments were received requesting that EPA clarify how the Agency will evaluate whether the Tribe has a history of successful managerial performance of public health or environmental programs, and clarify how much detail is required in describing a Tribe's history of managerial experience (see § 233.61(d)(1)).

*Response:* In evaluating Tribal experience in public health and environmental programs, EPA will look for indications that the Tribe has participated in such programs, whether

the programs be those administered by EPA, other Federal Agencies, or of Tribal origin. For example, several Tribes are known to have participated in developing area-wide water management plans or Tribal water quality standards. EPA will also look for evidence of historical budget allocations dealing with public health or environmental programs along with any experience in monitoring in related programs. In general, EPA will look favorably on Tribes which have experience in managing environmental programs, because such experience is an indicator of existing capability and commitment to environmental protection. In most cases, EPA anticipates that submission of a brief narrative statement on this topic will be sufficient.

Comments on the Procedure for Reviewing Tribal Applications

*Comment:* Several comments were received on the opportunity provided to States to review Tribal assertions of authority (see § 233.62(c). Various commenters believed this provision to be inappropriate because, for example, Tribes do not review State applications for primacy, States have already established their authority in their primacy applications, and the review is inconsistent with EPA's Indian policy. Other comments suggested that States comment along with everyone else during a general public comment period.

*Response:* The provision allowing participation by other governmental entities in EPA's review of Tribal authority does not imply that States or Federal agencies (other than EPA) have veto power over Tribal applications for treatment as a State. Rather, the procedure is simply intended to identify any competing jurisdictional claim and thereby ensure that the Tribe has the necessary authority to administer the section 404 permit program. The Agency will not rely solely on the assertions of a commenter who challenges the Tribe's assertion of authority; EPA will make an independent evaluation of the Tribal showing and all available information.

In addition, the provision allowing appropriate governmental entities to comment on Tribal assertions of authority is not intended as a barrier to Tribal program assumption. As stated in the preamble to the proposed rulemaking, where disputes regarding Tribal authority are focused on a limited area this will not necessarily delay the Agency's decision to treat the Tribe as a State for the non-disputed areas.

*Comment:* Several commenters suggested that EPA should provide more definition regarding the "governmental entities" which will be provided notice and an opportunity to comment on the Tribe's assertion of authority (see § 233.62(b). One commenter specifically recommended that EPA notify the Army Corps of Engineers of any Tribal applications received.

*Response:* EPA defines the phrase "governmental entities" as States, Tribes, and other Federal entities administering land located contiguous to the reservation of the Tribe which is applying for treatment as a State. Such "governmental entities" will be provided up to 30 days to comment on Tribal assertions of authority. Neighboring Tribes will be treated as "governmental entities" regardless of whether the neighboring Tribe is treated as a State for purposes of section 404. Where such governmental entities are States, EPA intends to provide notice and an opportunity to comment to the most appropriate State contacts which may include, for example, the Governor, Attorney General, or the appropriate environmental agency head. The rule limits the Agency to only considering comments from such "governmental entities."

EPA recognizes that city and county governments which may be subject to or affected by a Tribal section 404 permit program may also want to comment on the Tribe's assertion of authority. Although EPA believes that the responsibility to coordinate with local governments falls primarily upon the State, the Agency will make an effort to provide notice to local governments by placing an announcement in appropriate newspapers. Since the rule limits EPA to considering comments from governmental entities, such newspaper announcements will advise interested parties to direct comments on Tribal authority to appropriate State governments.

The process of notifying States and Tribes and consulting with the Department of the Interior, as delineated in this and other EPA regulations implementing the Clean Water Act and the Safe Drinking Water Act, was and is intended merely to assist the Agency in making its determination whether a Tribe has adequate authority to justify treatment as a State by EPA. Such notification and consultation procedures were not and are not intended to establish any form of adjudication or arbitration process to resolve differences between State and Tribal governments. Rather, EPA has a duty to determine whether a Tribe has adequate authority, as defined by Federal law and EPA policy, to carry out the grant or program under consideration. The notification and consultation procedures assist EPA in making this determination by providing information and perspectives from the points of view of neighboring Tribal and State governments and the Federal agency having extensive expertise in Federal Indian law. For these same reasons, EPA believes that formal consultation with the Corps of Engineers on treatment as State applications is probably unnecessary.

However, once the Tribe qualifies for treatment as a State under this regulation and subsequently applies for assumption of the section 404 dredge and fill permit program EPA will consult with the Corps of Engineers as prescribed by regulations (See subpart B—Program Approval).

Finally, EPA wishes to emphasize that the procedure for commenting on Tribal authority is only for the purposes of determining whether the Tribe meets the statutory criteria for treatment as a State, not whether a Tribal 404 permit program should be approved. The existing procedures outlined in 40 CFR 233.15 will be followed. This will ensure full public participation and evaluation of Tribal authority before the Tribe issues 404 permits in lieu of the Corps.

*Comment:* It is unlawful to limit public comment to just the Tribal demonstration of authority. Section 233.62(c) should allow public review of all four statutory criteria. Furthermore, formal adjudicatory hearings should be held to determine the scope of Tribal jurisdiction before treating the Tribe as a State.

*Response:* CWA section 518 provides EPA with the authority to determine whether Indian Tribes are qualified to be treated as States. The CWA does not require EPA to provide for public comment to Tribal applications. For three of the criteria which Tribes must meet, EPA believes that the Agency will be able to make appropriate determinations absent any public comment. EPA believes that providing for public comment on these three criteria would unnecessarily complicate and potentially delay the process. For the authority criterion, EPA has provided for a 30 day comment period by appropriate governmental entities because the Agency believes that it will be important to gather all available information regarding Tribal authority prior to making a determination. EPA believes that providing for comment on the authority criterion is appropriate because this is the only criterion which outside comments might help to

address. Furthermore, as noted above, this is only a preliminary determination and does not eliminate the public process that will occur before approval of the Tribal 404 permit program. Thus, EPA believes that formal hearings are unnecessary and would only delay the process with no benefit.

*Comment:* Several comments pointed out that the proposal did not specify in any detail the procedure by which EPA will consult with the Secretary of the Interior in making a determination concerning challenges to a Tribe's assertion of authority (see § 233.62(d). It was suggested that the consultation process should provide for notice and opportunities for input (e.g., a hearing) to affected Tribes and States.

*Response:* EPA did not make changes to the proposed rule in response to these comments. However, subsequent to publishing the proposed rule EPA did reach agreement with the Department of the Interior regarding the procedures for conducting such consultations. The procedure established as the Secretary of the Interior's designees the Associate Solicitor, Division of Indian Affairs and the Deputy to the Assistant Secretary—Indian Affairs (Trust and Economic Development). EPA will forward a copy of the application and any documents asserting a competing or conflicting claim of authority to such designees as soon as possible. For most applications, an EPA–DOI conference will be scheduled from one to three weeks after the date the Associate Solicitor receives the application. Comments from the Interior Department will be primarily a discussion of the law applicable to the issue to assist EPA in its own deliberations.

Responsibility for legal advice to the EPA Administrator or the other EPA decision makers will remain with the EPA General Counsel. EPA does not believe that the consultation process with the Department of Interior should involve notice and opportunities for input by States and Tribes because such parties are elsewhere provided appropriate opportunities to participate in EPA's review of Tribal authority.

*Comment:* Several comments suggested that once EPA makes a determination regarding a Tribal application, EPA should provide notice of its decision to State, Tribal, and local governments and all commenters on the Tribal assertion of authority, and should publish a list of Tribes treated as States in the **Federal Register**.

*Response:* EPA will take all reasonable means to advise interested parties of the decision reached regarding challenges to Tribal assertions of authority. At a minimum, written notice will be provided to State(s) and other governmental entities that were sent notice of the Tribal application.

*Comment:* One commenter requested that EPA provide a mechanism for States or other entities to extend the 30-day comment period in § 233.62(c).

*Response:* EPA interprets this section as giving the Regional Administrator discretion to grant such a request. Nonetheless, given the preliminary nature of the approval of a Tribal application for treatment as a State, EPA will generally not favor significant extensions of time.

*Comment:* A number of comments suggested that EPA specify a timeframe or change the timeframe associated with the various steps in the application review procedure (§ 233.62).

With regard to the review of the Tribe's assertion of authority (see § 233.62(c)), various comments supported shortening the review period, lengthening the review period, and also adding a provision allowing an extension to the review period.

With regard to final determinations (see § 233.62(d)), several comments suggested that EPA should complete its review and respond to Tribes within 60 days after receipt of an application. Other comments suggested that EPA should conduct a completeness review within 30 days of receipt of a Tribal application. In general, a number of comments advocated some time limit within which EPA would be required to complete the review process.

*Response:* No timeframes in the review procedure were changed in the regulation in response to comments. The timeframes assigned are consistent with regulations promulgated for other EPA water programs. Because EPA has no reasonable way to predetermine how complete initial applications for treatment as a State might be, what challenges might arise or how numerous or complex the issues might be, the Agency deems it inappropriate to attempt to establish timeframes that may not allow sufficient time for resolution. Also, several of the comments appear to be based on early experience with the "treatment as a State" process. EPA believes that as Tribes, States, and EPA become more familiar with working together on "treatment as a State" procedures, the delays associated with approval of early applications will cease. Thus, EPA believes it unnecessary to establish additional deadlines in the regulation.

*Other Comments on Treatment of Tribes as States*

*Comments:* Several commenters suggested that as part of the treatment as a State process, EPA require Indian Tribes to describe how they will protect constitutional rights of non-Tribal members in issuance and enforcement of 404 permits, that Tribes waive their sovereign immunity, and provide for voting rights for non-members.

*Response:* EPA notes that constitutional rights of both Indians and non-Indians exist without explicit recognition in a Federal regulation. The regulation provides a mechanism for a Tribe to demonstrate that it meets the criteria of CWA section 518(e). EPA believes it is inappropriate to consider any other factors in light of the preliminary nature of the approval of a Tribe for treatment as a State. EPA may consider such issues when reviewing an application for Tribal program assumption, although the Agency notes that it generally would lack the authority to mandate changes in the structure of a Tribal government in such a situation.

*Comment:* EPA should make clear that qualification for treatment as a State under one program is not dispositive for applications under other programs.

*Response:* That is the correct interpretation of this rule. As discussed previously, however, EPA expects that once a Tribe has qualified for one program, the key step toward assumption of other programs, in most cases, will be demonstrating appropriate capability.

*Comment:* A variety of comments were received concerning the general issue of the Tribe's criminal enforcement authority. Comments ranged from strong objection to the proposed regulation without an amendment to the CWA, to specifically State that criminal enforcement can be waived, to support for the proposed regulation as written.

*Response:* EPA provided a detailed rationale for the proposed enforcement provision (§ 233.63) in the preamble to the proposed regulation (See 54 FR 49181,2).

Since the comments raised no significant new issues, much of that discussion is merely repeated here.

As is the case for States, an Indian Tribe must have its own legal authorities to administer a program under the CWA; EPA cannot delegate its own authority. However, the Agency considered whether the lack of comprehensive criminal enforcement authority would preclude Tribes from applying for the National Pollution Discharge Elimination System (section 401) and the Dredge and Fill Permit programs (section 404) that currently require such authority for an approvable State program.

Section 1451 of SDWA specifically states that Indian Tribes are not required to exercise criminal enforcement jurisdiction for primary enforcement responsibility. The CWA amendments, however, do not include similar language indicating criminal enforcement authority over all individuals on the reservation as a State where such authority is currently required for State program assumption.

The Agency realizes that a comprehensive criminal enforcement requirement could raise substantial impediments to Tribal assumption of those CWA programs that require such authorities of States. Federal law bars Indian Tribes from criminally trying or punishing non-Indians in the absence of a treaty or other agreement to the contrary. *Oliphant* v. *Suquamish Indian Tribe* 435 U.S. 191 (1978). In addition, the Federal Indian Civil Rights Act prohibits any Indian court or tribunal from imposing any criminal fine greater than $5,000 (25 U.S.C. 1302(7)).

The Agency believes that even though Congress did not explicitly waive the requirement under CWA, as under SDWA, Congress nonetheless intended Tribes to be able to obtain primacy without demonstrating comprehensive criminal enforcement authority. If EPA were to infer that Congress, by failing to insert language similar to that contained in section 1451 of SDWA, intended not to waive the criminal enforcement requirement, EPA's reading would make part of section 518 of CWA a nullity, since absent further legislative action, no Tribe would be able to assume a program under 402 or 404 CWA. This reading would contradict the apparent intent of section 518 to allow Tribes to assume all specified CWA programs where they meet the 518(e) criteria.

Section 233.41 of the 404 State Program Regulations (SPR) requires that a State have criminal enforcement authority to have an approvable 404 State program. This notice proposes to amend the existing regulations so that Tribes will not be required to exercise comprehensive criminal enforcement jurisdiction as a condition to assuming the 404 program. Tribes would instead be required to provide for the referral of criminal enforcement matters when Tribal enforcement authority does not exist (e.g., non-Indians or fines over $5,000) to EPA and/or the Corps as the parties agree, in an appropriate and timely manner. Such procedures must be established in a formal Memorandum of Agreement (MOA) with the Regional Administrator and/or the appropriate District Engineer(s) of the Corps. There may be a single MOA among the Tribe, EPA and the Corps; separate MOA's between the Tribe and EPA and the Tribe and the Corps; or only one MOA, between the Tribe and EPA or the Corps, if the parties so agree. The MOA(s) used to satisfy this agreement may, but do not have to be, the same as those required in 40 CFR 233.13 and 233.14.

Thus, the lack of comprehensive Tribal criminal enforcement authority should not prevent a Tribe from having an approvable 404 State program.

Therefore we have made no change in the regulation as proposed. However, we did move the provision for Tribal criminal enforcement authority from Subpart G Treatment of Indian Tribes as States, (233.63) to Subpart E Compliance Evaluation and Enforcement and redesignated it "233.41(f) Provision for Tribal criminal enforcement authority."

*Other Comments*

Comments on Trust Responsibility

*Comment:* EPA received several comments regarding its assertion that the "Federal trust responsibility" owed to Indian Tribes, as it applies to EPA actions under the CWA, is defined by the terms of the CWA.

Certain comments asserted that EPA should explicitly clarify whether the CWA defines any trust obligations to Tribes and, if so, where and how that obligation will be expressed. Other commenters not only asked for clarification, but asserted that EPA must State that the Federal-Tribal trust relationship "exists independently of and informs EPA decision making" concerning the CWA and State-Tribal disputes. Still another comment asked EPA to clarify that the proposed regulations are not to be read as modifying or abrogating EPA's trust responsibility.

*Response*: EPA recognizes the responsibility owed by the Federal government as trustees for the affairs of Indian Tribes. However, the Agency does not believe the trust responsibility precludes EPA from playing an impartial role in the dispute resolution process.

Comments on Definitions Proposed for Sections 230.3 and 233.2

*Comment*: EPA should change the proposed definition of a Tribe in §§ 230.3 and 233.2 to mean any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental powers and functions over a Federal Indian Reservation.

*Response*: No change was made. The rule reflects the statutory definition. However, we moved the definitions of "Federal Indian reservation," "Indian Tribe," and "State" proposed for § 230.3 to § 232.2 Definitions—for consistency with the placement of other section 404 program definitions.

Comments on Dispute Resolution

*Comment*: EPA should add a mechanism for resolving disputes over Tribal 404 permits similar to that proposed for the section 303 program.

*Response*: Section 518(e) requires EPA to provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of different water quality standards that may be set by States and Indian Tribes located on common bodies of water. Congress directed EPA to develop a mechanism to resolve the consequences of States and Tribes setting different water quality standards. Hence, EPA included such a mechanism with the regulations treating Tribes as States for the water quality standards program. The statute does not, however, require issuance of a similar mechanism when Tribes are treated as States for purposes of any other CWA program, including the permit programs under sections 402 and 404. Nor does the legislative history of section 518 suggest that Congress thought such a dispute resolution mechanism would be necessary outside of the water quality standards context.

Treating an Indian Tribe as a State for purposes of the 404 program is somewhat different than treating a Tribe as a State for purposes of setting water quality standards. Once a Tribe is treated as a State for purposes of 404, the Tribe must still apply for authorization to issue 404 permits in lieu of the Corps of Engineers on the reservation, following the procedures of 40 CFR 233.15. Those procedures allow for public comment on the proposed Tribal permit program approval, which will allow States to raise any disputes regarding Tribal authority or other concerns. Thus, a separate dispute resolution mechanism would be unnecessary. Once a Tribe is treated as a State and subsequently submits its standards for approval, EPA will not solicit public comment on, nor re-evaluate whether the Tribe has the authority to adopt such standards.

In addition, if a Tribe subsequently assumes the 404 permit program, approval of a Tribal 404 permit is unlikely to cause "disputes" between a Tribe and a State which need to be resolved beyond those disputes which cannot be resolved by existing mechanisms. If EPA determines that the Tribe has an approvable permit program under part 233, then, by definition,

neither the Corps of Engineers nor the State will be issuing 404 permits in assumable waters in that reservation. (Note that the Corps of Engineers does retain the permitting authority in non-assumable waters.) Thus, there is no direct conflict with State authority to issue permits off the reservation. Furthermore, the decision of who will issue 404 permits on the reservation does not affect what water quality standards must be met under that permit. In other words, any water quality standards set by either a Tribe or a State adjacent to or downstream of the reservation must be met in the 404 permit, whether that permit is issued by the Tribe, the Corps of Engineers, or the State. Any dispute over the terms of that permit are reflected in a dispute over the underlying water quality standards, which can be resolved by the existing mechanism. In simplest terms, the Indian 404 rule affects who is the permitting authority, not the substance of the permits.

For the above reasons a separate dispute resolution mechanism is therefore unnecessary.

### C. Changes in the Proposed Rule

As stated above, the only changes to the proposed regulations were (1) to move the provision for Tribal criminal enforcement Part G, Treatment of Indian Tribes as States, § 233.63 to Part E, Compliance Evaluation and Enforcement, and redesignated § 233.41(f) and (2) to move, without change the definitions of "Federal Indian reservation," "Indian Tribe," and "State" proposed for 230.3 to § 232.2 Definitions. Moving the provision for Tribal criminal enforcement is appropriate because a Tribe's criminal enforcement authority and how to handle criminal enforcement matters will be determined when and if a Tribe applies for assumption of the section 404 dredge and fill permit program once EPA has determined that the Tribe is eligible to be treated as a State for the section 404 permit program. The definitions were moved for consistency with the placement of other section 404 definitions.

### D. State 404 Permit Program Approval Requirements

In response to comments, EPA wishes to emphasize that Tribes which obtain treatment as a state for purposes of section 404 pursuant to today's rule must further comply with the provisions of part 233 to obtain authorization of its 404 permit program. EPA has made no changes to these requirements with respect to Tribes. Thus, a Tribe must submit an application which satisfies the requirements of § 233.10, including submission of Memoranda of Agreement with the EPA Administrator and the Secretary of the Army (§ 233.13–.14), and submission of a Statement of the Attorney General (or the Tribal equivalent) which, *inter alia*, discusses the basis for asserting jurisdiction on Indian lands (§ 233.12(b)). EPA will process these applications pursuant to the procedures in § 233.15.

On August 9, 1991, the Administration announced a comprehensive plan for the protection of the Nation's wetlands. Included were a number of actions to improve the workability of the Clean Water Act section 404 regulatory program, which regulates the discharge of dredged or fill material into wetlands. Among these changes will be support for measures to increase the role of States in the wetlands permitting process. When such changes have been identified, amendments to the section 404 State Program Regulations (See 40 CFR 232–233) and other applicable legal authorities will be implemented, where appropriate. The section 404 State Program Regulations, modified in accordance with the Administration's wetlands protection program, will apply to Indian Tribes qualifying for treatment as a State under today's rule.

EPA wishes to clarify that under today's final rule any Tribe which is approved to be treated as a State for purposes of section 404 will automatically be eligible to be treated as a State for purposes of section 309(a)(1), which addresses Federal enforcement of CWA permits issued by authorized States. As discussed above, a Tribe treated as a State for purposes of section 404 would subsequently be eligible to apply to administer the 404 permit program under the applicable provisions of 40 CFR part 233. EPA would assert the authority to enforce any 404 permit issued by an Indian Tribe treated as a State which had obtained authorization under part 233. The same is true for enforcement of a permit issued by a Tribe treated as a State for purposes of the NPDES permit program. Thus, EPA does not need to and does not plan to issue separate regulations dealing with treatment as a State for section 309.

In addition, any Tribe treated as a State for purposes of the section 404 program will also automatically be eligible to be treated as a State for purposes of section 308 (inspection authority) with respect to 404 permits issued by the Tribe. The Agency has adopted this approach for similar reasons as section 309. Pursuant to the requirements of section 404(h)(1)(B), the existence of State inspection authority is part of the 404 State permit program authorization requirements, for which a Tribe may apply once it is treated as a State under section 404. See 40 CFR 233.40. EPA also does not plan to issue separate regulations for treatment as a State under section 308.

### E. Regulatory Impact Analysis

*Compliance With Executive Order 12291*

Executive Order 12291 (46 FR 13193, February 9, 1981) requires that a regulatory agency determine whether a new regulation will be "major" and, if so, that a Regulatory Impact Analysis be conducted. A major rule is defined as a regulation which is likely to result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers; individual industries; Federal, State and local government agencies; or geographic regions; or

(3) Significant adverse effect on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

As discussed earlier the purpose of this rule is to amend the existing State Program Regulations (part 233) by adding the procedures by which an Indian Tribe, if it chooses to apply, may qualify for Treatment as a State in order to be eligible to subsequently apply for assumption of the section 404 permit program administered jointly by the Corps of Engineers and EPA. The provisions of part 233 for assumption are not changed by this rule. Therefore, the economic impact of this rule on Indian Tribes is the cost associated with the preparation of requests for a determination of treatment as a State under section 518(e) of the Clean Water Act. The proposed rule was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291. Any written comments for OMB to EPA and any response to these comments will be available for public inspection from the person listed at the beginning of this notice. Since the rule has only minor economic impacts it does not meet the definition of a major rule. The Agency, therefore, is not conducting a Regulatory Impact Analysis.

### F. Simplification of EPA Process for Implementing Statutory Authority To Treat Tribes as States

As discussed earlier, this rule was originally proposed in November 1989.

The Agency had already completed all of its internal reviews of this rule when, on November 10, 1992, EPA's Deputy Administrator signed a memorandum entitled "Simplification of EPA's Process for Treating Tribes as States." By that memorandum, the Agency formally adopted a new policy for simplifying the process for treating Indian Tribes in the same manner in which it treats States under several statutes, including the Clean Water Act.

EPA has decided to issue this rule as final so that there will be no further delays in allowing interested Tribes to seek approval to operate the 404 permit program. EPA recognizes, however, that some changes to today's rule may be necessary to implement fully its new policy on treatment as a State simplification. EPA plans to make necessary changes to its treatment as a State regulations across all of its programs in the near future; it will make any necessary changes to this regulation at that time. In the interim, EPA will continue to work with Tribes to ensure that the existing regulations do not pose an unreasonable burden on Tribes wishing to assume authority for the 404 permit program.

### G. Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 2040–0140.

Public reporting burden for this collection of information is estimated to be an average of 100 hours per respondent, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM–223Y, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA."

### H. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, EPA must prepare a Regulatory Flexibility Analysis for all regulations that have a significant impact on a substantial number of small entities. The RFA recognizes three kinds of small entities and defines them as follows:

—Small governmental jurisdictions—any government of a district with a population of less than 50,000.
—Small business—any business which is independently owned and operated and not dominant in its field as defined by Small Business Administration regulations under section 3 of the Small Business Act.
—Small organization—any not-for-profit enterprise that is independently owned and operated and not dominant in its field (e.g., private hospitals and educational institutions).

Using the above definition of small entity, EPA has concluded that the final regulation, as promulgated, will not have a significant impact on a substantial number of small entities, and that a Regulatory Flexibility Analysis is unnecessary. EPA has reached this conclusion based on the following considerations.

The final regulation will not have a significant impact on a substantial number of small governmental organizations. Approximately 275 Indian Tribes are potentially eligible for treatment as a State under the wetlands program. While most Indian Tribes meet the definition of small governmental organizations provided above, EPA believes the number of Tribes subject to significant impacts as a result of this proposed regulation will be a very small fraction of the total that apply. EPA considers the information required by this rule to be the minimum necessary to effectively treat Indian Tribes as States for the purpose of the 404 permit program.

The regulation will not have a significant impact on a substantial number of small businesses. Although it is conceivable that an Indian Tribe could impose additional requirements upon a permit applicant than the Corps, EPA believes that these situations will be rare. Any additional economic impact on the public resulting from implementation of this regulation is expected to be negligible, since Tribal regulation of these activities is limited to areas within Tribal jurisdiction.

The regulation will not have a significant impact on a substantial number of small organizations for the same reasons that the regulation will not have a significant impact on a substantial number of small businesses.

Accordingly, I certify that this final regulation, as promulgated, will not have a significant economic impact on a substantial number of small entities.

### List of Subjects

*40 CFR part 232*

Intergovernmental relations, Water pollution control

*40 CFR part 233*

Administrative practice and procedure, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

Dated: January 13, 1993.

**William K. Reilly,**

*Administrator.*

For the reasons set forth in the preamble, parts 232 and 233 of title 40 of the Code of Federal Regulations are amended as follows:

## PART 232—404 PROGRAM DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS

1. The authority citation for part 232 continues to read as follows:

**Authority:** 33 U.S.C. 1344.

2. Section 232.2 is amended by removing the paragraph designations and adding, in alphabetical order, new definitions for "Federal Indian reservation," "Indian Tribe" and "State" to read as follows:

**§ 232.2 Definitions.**

* * * * *

*Federal Indian reservation* means 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.

* * * * *

*Indian Tribe* means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

* * * * *

*State* means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe as defined in this part, which meet the requirements of § 233.60.

## PART 233—404 STATE PROGRAM REGULATIONS

1. The authority citation for part 233 continues to read as follows:

**Authority:** Clean Water Act, 33 U.S.C. 1251 *et seq.*

**Subpart A—General**

2. Section 233.1 as amended by revising paragraph (b) to read as follows:

**§ 233.1 Purpose and scope.**

* * * * *

(b) Except as provided in § 232.3, a State program must regulate all discharges of dredged or fill material into waters regulated by the State under section 404(g)–(1). Partial State programs are not approvable under section 404. A State's decision not to assume existing Corps' general permits does not constitute a partial program. The discharges previously authorized by general permit will be regulated by State individual permits. However, in many cases, States other than Indian Tribes will lack authority to regulate activities on Indian lands. This lack of authority does not impair that State's ability to obtain full program approval in accordance with this part, i.e., inability of a State which is not an Indian Tribe to regulate activities on Indian lands does not constitute a partial program. The Secretary of the Army acting through the Corps of Engineers will continue to administer the program on Indian lands if a State which is not an Indian Tribe does not seek and have authority to regulate activities on Indian lands.

* * * * *

3. Section 233.2 is amended by removing the paragraph designations and adding, in alphabetical order, new definitions for "Federal Indian reservation," and "Indian Tribe" and by revising the definition of "State" to read as follows:

**§ 233.2 Definitions.**

* * * * *

*Federal Indian reservation* means 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.

* * * * *

*Indian Tribe* means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

* * * * *

*State* means any of the 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territory of the Pacific Islands, or an Indian Tribe, as defined in this part, which meet the requirements of § 233.60. For purposes of this part, the word State also includes any interstate agency requesting program approval or administering an approved program.

4. Section 233.41 is amended by adding paragraph (f) to read as follows:

**§ 233.41 Requirements for enforcement authority.**

* * * * *

(f) *Provision for Tribal criminal enforcement authority.* To the extent that an Indian Tribe does not assert or is precluded from asserting criminal enforcement authority (§ 233.41(a)(3) (ii) and (iii)), the Federal government will continue to exercise primary criminal enforcement responsibility. The Tribe, with the EPA Region and Corps District(s) with jurisdiction, shall develop a system where the Tribal agency will refer such a violation to the Regional Administrator or the District Engineer(s), as agreed to by the parties, in an appropriate and timely manner. This agreement shall be incorporated into joint or separate Memorandum of Agreement with the EPA Region and the Corps District(s), as appropriate.

5. Part 233 is amended by redesignating subpart G as subpart H, redesignating § 233.60 as § 233.70; and by adding a new subpart G consisting of §§ 233.60 through 233.62 to read as follows:

**Subpart G—Treatment of Indian Tribes as States**

Sec.



**Subpart G—Treatment of Indian Tribes as States**

**§ 233.60 Requirements for treatment as a State.**

Section 518(e) of the CWA, 33 U.S.C. 1378(e), authorizes the Administrator to treat an Indian Tribe as a State for purposes of making the Tribe eligible to apply for the 404 permit program under section 404(g)(1) if it meets the following criteria:

(a) The Indian Tribe is recognized by the Secretary of the Interior.

(b) The Indian Tribe has a governing body carrying out substantial governmental duties and powers.

(c) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the Untied States in trust for the Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction an alienation, or otherwise within the borders of the Indian reservation.

(d) The Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised, in a manner consistent with the terms and purposes of the Act and applicable regulations, of an effective section 404 dredge and fill permit program.

**§ 233.61 Request by an Indian Tribe for a determination of treatment as a State.**

An Indian Tribe may apply to the Regional Administrator for a determination that it qualifies for treatment as a State pursuant to section 518 of the Act, for purposes of the section 404 program. The application shall be concise and describe how the Indian Tribe will meet each of the requirements of § 233.60. The application shall include the following information:

(a) A statement that the Tribe is recognized by the Secretary of the Interior.

(b) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. This Statement shall:

(1) Describe the form of the Tribal government.

(2) Describe the types of governmental functions currently performed by the Tribal governing body, such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain; and

(3) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.

(c)(1) A map or legal description of the area over which the Indian Tribe asserts regulatory authority pursuant to section 518(e)(2) of the CWA and § 233.60(c);

(2) A statement by the Tribal Attorney General (or equivalent official) which describes the basis for the Tribe's assertion under section 518(e)(2) (including the nature or subject matter of the asserted regulatory authority);

(3) A copy of all documents such as Tribal constitutions, laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of regulatory authority;

(d) A narrative statement describing the capability of the Indian Tribe to administer an effective 404 permit program. The Statement shall include:

(1) A description of the Indian Tribe's previous management experience including, but not limited to, the administration of programs and services authorized by the Indian Self Determination & Education Act (25 U.S.C. 450 *et seq.*), The Indian Mineral Development Act (25 U.S.C. 2101 *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a).

(2) A list of existing environmental or public health programs administered by the Tribal governing body, and a copy of related Tribal laws, regulations, and policies;

(3) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government.

(4) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing and administering a section 404 dredge and fill permit program or plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.

(5) A description of the technical and administrative abilities of the staff to administer and manage an effective, environmentally sound 404 dredge and fill permit program.

(e) The Administrator may, at his discretion, request further documentation necessary to support a Tribal request for treatment as a State.

(f) If the Administrator has previously determined that a Tribe has met the requirements for "treatment as a State" for programs authorized under the Safe Drinking Water Act or the Clean Water Act, then that Tribe need only provide additional information unique to the particular statute or program for which the Tribe is seeking additional authorization.

(Approved by the Office of Management and Budget under control number 2040–0140)

**§ 233.62 Procedures for processing an Indian Tribe's application for treatment as a State.**

(a) The Regional Administrator shall process an application of an Indian Tribe for treatment as a State submitted pursuant to § 233.61 in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.

(b) Within 30 days after receipt of the Indian Tribe's complete application for treatment as a State, the Regional Administrator shall notify all appropriate governmental entities. Notice shall include information on the substance and basis for the Tribe's assertion that it meets the requirements of § 233.60(c).

(c) Each governmental entity so notified by the Regional Administrator shall have 30 days to comment upon the Tribe's assertion under § 233.60(c). Comments by governmental entities shall be limited to the Tribe's assertion under § 233.60(c).

(d) If a Tribe's assertion under § 233.60(c) is subject to a competing or conflicting claim, the Regional Administrator, after consultation with the Secretary of the Interior, or his designee, and in consideration of other comments received, shall determine whether the Tribe has adequately demonstrated that it meets the requirements of § 233.60(c) for the dredge and fill permit program.

(e) If the Regional Administrator determines that a Tribe meets the requirements of § 233.61, the Indian Tribe is then eligible to apply for 404 program assumption.

(f) The Regional Administrator shall follow the procedures described in § 233.15 in processing a Tribe's request to assume the 404 dredge and fill permit program.

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