



FLORIDA DEPARTMENT OF Environmental Protection

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April 23, 2021

Mr. Jason Watts
Director, Office of Environmental Management
Florida Department of Transportation
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Dear Mr. Watts,

In correspondence from Ms. Thu-Huong Clark dated January 28, 2021, the Department of Transportation (FDOT) provided the Department with information about efforts to develop two new programmatic approaches to satisfy the Endangered Species Act for transportation related actions. We appreciate the opportunity to review the drafts sent to us: *FDOT Programmatic Approach for Minor Transportation Activities* and *Programmatic Biological Assessment, A Programmatic Approach for Transportation Work Activities with the Panama City Crayfish Range, Bay County, Florida*.

In a teleconference with Ms. Clark and Ms. Cornwell on February 22, 2021, the FDOT's programmatic approach and these recent initiatives with the U.S Fish and Wildlife Service (USFWS) were discussed with the Department. Because Florida recently assumed the administration of portions of the Clean Water Act, they inquired about using programmatic approaches with the State's newly approved State 404 Program. Once approved by USFWS, the FDOT intends to use these new programmatic tools during their project development and include the species assessment information as part of their submittal of State 404 Program permit applications to the Department.

The State 404 Program rule prohibits the issuance of a permit that jeopardizes the continued existence of an endangered or threatened species, or results in the likelihood of destruction or adverse modification of designated critical habitat (Chapter 62-331.053(3)4, F.A.C.). As you are probably aware, the USFWS issued a programmatic *Biological Opinion for the U.S. Environmental Protection Agency's approval of the Department's assumption of the administration of the dredge and Fill Permitting Program under Section 404 of the Clean Water Act (dated 11/17/2020)*. This biological opinion establishes the State's assumption processes with regards to federally listed species for the State's 404 Program, now administered by the Department. With this

Mr. Jason Watts

April 23, 2021

Page 2

opinion, the USFWS programmatically assessed and established the processes and procedures used to address potential adverse effects to federally listed species during the State's permit review process. Through technical assistance with the USFWS, the Department will be informed when a proposed project and its activities is anticipated to jeopardize the continued existence of the species or if critical habitat is destroyed or adversely modified. In addition, this USFWS programmatic biological opinion for the State's Assumption includes an Incidental Take Statement, exempting State 404 permits issued through the processes described in the opinion from Section 9 and Section 4(d) prohibitions. If the USFWS finds that incidental take of federally-listed species is reasonably certain to occur during the State's permitting process, the amount and extent of incidental take anticipated will be quantified, evaluated and monitored on a project-specific basis through the technical assistance process conducted between the USFWS and the State.

During the State 404 permit application review process, the Florida Fish and Wildlife Conservation Commission (FWC) typically acts as the State's lead for species coordination with USFWS, particularly for individual permit applications. On a project by project basis, the FWC will provide (and/or validate the applicant's submittal of) identification of project areas, a list of federally and state-listed potentially affected species, preliminary determinations of impact/effects to federally listed species, and potential impact avoidance and minimization (protection) measures to the USFWS and the Department. After coordinating with USFWS, the FWC will provide final consolidated comments to the Department that will address an application's issues regarding federally listed and state-listed endangered and threatened species, species proposed to be listed, and their critical habitats.

In this preliminary review of federally listed species, the FWC currently uses existing USFWS-approved decision tools to facilitate the USFWS's review of the State 404 permit applications. The USFWS programmatic biological opinion for the State 404 Program discusses the use of Federal decision tools, such as programmatic consultations as well as guidelines, consultation/dichotomous keys, Species Assessment Guides (SAGs) or Standard Local Operating Procedures for Endangered Species (SLOPEs). These tools are recognized in the biological opinion for the State 404 Program as useful to identify, avoid, and minimize adverse effects to federally listed species as well as a way to provide consistent criteria to reach impact/effect determinations.

If FDOT is the holder of a valid and active biological opinion with an incidental take statement issued by the USFWS and the species and activities in a permit application are covered by that particular biological opinion, it is our understanding that the USFWS will not require additional avoidance and minimization measures during the permitting process. For specific projects, the DEP, FWC and USFWS will confirm the applicability of biological opinions, decision tool assessments and other binding agreements. The Department will incorporate, as permit conditions, all recommended protection measures that have been coordinated with, and agreed upon by, the USFWS.

Mr. Jason Watts

April 23, 2021

Page 3

While the FDOT's programmatic approach is a separate process from the State 404 program, your effort is expected to make the State 404 Program process (as well as the ERP Program process) more efficient. We support your approach and encourage the development of new programmatic consultations and/or decision tools to address federally listed species. Please keep us and the FWC updated on the progress of your initiatives with the USFWS, particularly when the USFWS provides final approval.

We appreciate the opportunity to coordinate with you to ensure that FDOT's mission is achieved efficiently and consistently within the Department's permitting purview. We welcome opportunities to improve our associated processes and procedures, when needed.

Sincerely,



Timothy Rach

Program Administrator

Submerged Lands & Environmental Resources Coordination

cc: Jennifer Goff, FWC
Thu-Huong Clark, FDOT
Mark Cantrell, USFWS