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**Assumption of the CWA Section 404 Mitigation
Banking Program – Legal Considerations**

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Legal Considerations Overview

1. On-going commitment – “The Knowns”
2. Section 7 vs. Section 10 ESA Consultations
3. Application Review Timelines
4. Mitigation Banking Instrument
5. Challenges to State Issued Federal Banking Authorizations

On-Going Commitment

- “Known Knowns”
 - FA, CE, access, encumbrances, engineering, lift determinations, success criteria, credit releases, enforcement, bank failure, etc.
- “Known Unknowns”
 - New federal rule and future RGLs coming.
- “Unknown Unknowns”
 - Litigation/caselaw, changes in the industry, changes in rule interpretation and policies.

Example – FL Mit Bank Regulatory Agencies



- Corps – 33 CFR Part 332
- State – Section 373, F.S. and Section 62-342, F.A.C.





ESA Consultations



- Section 7 Consultation
 - Applies to federal agency actions that may affect a listed species.
- Section 10 Consultation
 - Applies to non-federal actions (e.g. state agency or private landowner action with no federal nexus).
- EPA Memorandum – August 27, 2020
 - EPA should consult with FWS and NMFS under Section 7 of the ESA regarding approval of a state or tribal CWA Section 404 program.



Application Review Timelines

- Waiving of permit review and issuance deadlines required under state rules and statutes.
- Need buy-in from banking community.



Mitigation Banking Instrument

- What is an MBI:
 - Permit?
 - Contract?
 - “Formal agreement”?
 - “A regulatory instrument”?
- Does it matter for the purposes of states or tribes assuming the federal banking program?



Authorization Challenges

- New venue to challenge authorizations granted pursuant to federal regulations at the state level.
- Issue one or two authorizations?
- E.g. Florida Division of Administrative Hearings



Questions

