State/Tribal Assumption of the CWA §404 Program

Basic Overview

Overview

- Authorities for state/tribe
- EPA's role in CWA §404 Assumption
- Requirements for assumption of CWA §404 program
- Assumption approval process
- Permit process once program approved
- EPA oversight of assumed programs

* For this briefing, state refers to state or tribe

Assumption Authority

- **CWA §404(g)**
  - States may assume administration of the permit and enforcement program for certain waters
    - Assumable Waters subcommittee sending recommendations on how to clarify these waters to Administrator Pruitt
- **CWA §404(h) and 40 CFR part 233**
  - Lists state requirements
  - Lists EPA responsibilities: approval and oversight of assumed program
  - Requirements for review and modification of state program (as necessary)

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State requirements: Part 233 subpart A (233.1 – 233.4), subpart B (233.11- 233.14)
Program approval: Subpart B (233.10, 233.15)
Revisions to state programs: 233.16
Program operation: Subpart D (233.30)
Federal oversight: subpart F (233.50-233.53)
RA approval w/ concurrence– delegation manual cpt. 2, 2-43

HW concurrence is with AA for Water, AA for OECA, and OGC

EPA's Role in Assumption

- Prior to assumption
  - Work with states to enhance capacity/capability and develop programs
  - Wetland Program Development Grants
- Evaluate and approve/disapprove state assumption request
- Oversight of assumed program
  - Coordinate federal oversight of permits
  - Review of modifications of state program
  - Withdraw program approval, if needed

Requirements for Assumption of CWA §404 Program

Statutory and Regulatory Requirements

Requirements for Assumption

- A state program must be:
  - consistent with and
  - no less stringent than the Act and implementing regulations
- The state program must:
  - Have equivalent scope of jurisdiction
  - Regulate at least the same activities as federal program
  - Allow for public participation
  - Be consistency with the 404(b)(1) Guidelines
  - Have adequate enforcement authority

Complete Assumption Application

- Shall Include:
  - Letter from Governor
  - Complete program description
  - Attorney General's statement
  - MOA with EPA Regional Administrator
  - MOA with Secretary of Army (through Chief USACE)
  - All applicable state statutes and regulations administering the program

Complete Assumption Application

Program Description Includes:

- Scope and structure of program
  - Jurisdiction
  - Activities regulated
  - Anticipated coordination
  - Permit review criteria
  - Scope of permit exemptions
- Procedures for permitting, administrative review and judicial review
- Structure and organization of state agency(ies) responsible for program administration
- Funding and staffing levels

Complete Assumption Application

Program Description cont.

- Anticipated workload
- Copies of permit application forms, permit forms, and reporting forms
- Compliance evaluation and enforcement programs
- Clarification of waters under state jurisdiction and those under COE jurisdiction
- BMP's proposed to satisfy farm, forest, and temporary mining roads exemption provisions

Complete Assumption Application

Attorney General's Statement Includes:

- Citations of specific statutes, administrative regulations and judicial reviews demonstrating adequate authority
- Legal analysis of the effect of state laws regarding private property takings
- Certification of the authority of each state agency to administer the program
- Analysis of authority over Indian lands
  - Not assuming authority over Indian lands does not constitute partial assumption

Complete Assumption Application

MOA with EPA Regional Administrator Includes:

- Classes and categories of permits for which EPA waives federal review
- Provisions for state reporting on program implementation
- EPA and state roles and coordination regarding:
  - Compliance monitoring
  - Enforcement
- Provisions for modification of the MOA
  - Including transfer or withdrawal

Complete Assumption Application

MOA with USACE Includes:

- Description of waters of the U.S. over which COE retains jurisdiction which are:
  - Tidal waters and their adjacent wetlands
  - Waters presently used, or susceptible to use (either in natural condition or with reasonable improvement) as a means to transport interstate or foreign commerce and their adjacent wetlands.
- Procedures for transfer of pending permit applications upon program approval
- Identification of COE general permits to be assumed by the state
  - Including a plan for transferring responsibility
  - Identification of current enforcement cases

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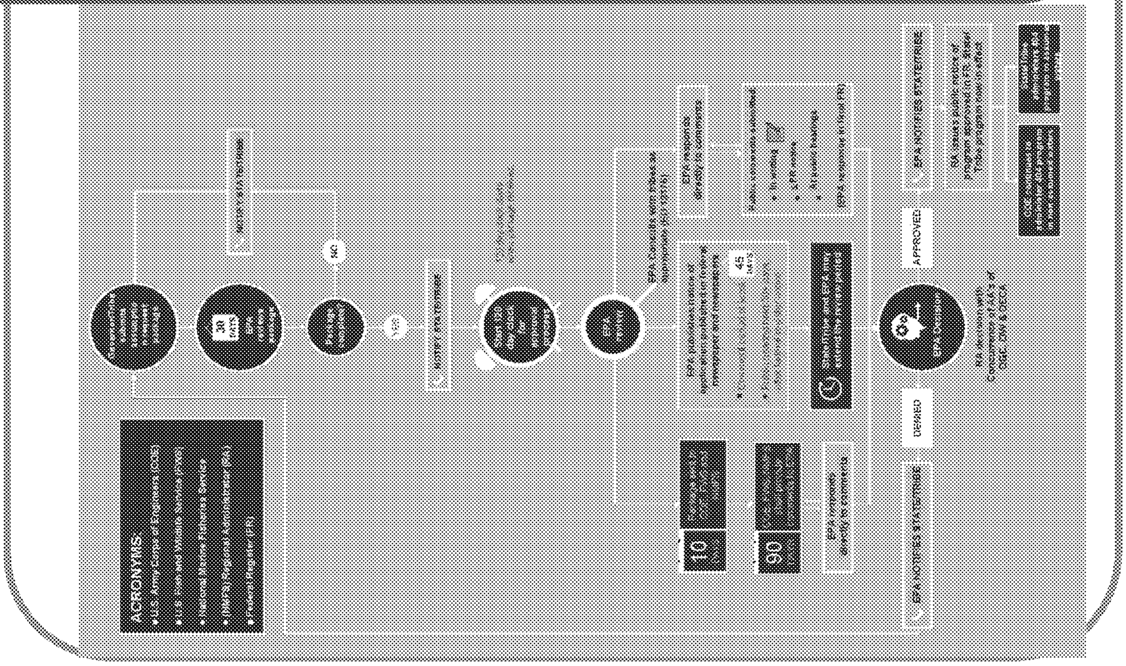
"Waters presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or including wetlands adjacent thereto."

CWA §404 Program Assumption Approval Process

Statutory and Regulatory Requirements

Part 233 subpart A (233.1 – 233.4), subpart B (233.11- 233.14)

Approval Process



Assumption Approval Process

- Assumption package submitted to EPA
  - 30 day EPA review for package completeness
    - Complete – state notified
    - Incomplete - package returned to state
  - EPA has 120 days to approve or disapprove the state request*

*State and EPA can agree to an extension of the 120 statutory timeframe for program review and approval.

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State and EPA can agree to extending the 120 statutory timeframe for approval.

Assumption Approval Process cont.

- Review period includes:
  - State notification that package is complete
  - Package sent to COE, FWS and NMFS ≤ 10 days
    - Comments due to EPA within 90 days
  - Notice of assumption request published in Federal Register and newspapers
    - 45 day comment period
    - Public hearing 30+ days after Federal Register notice published

Assumption Approval Process cont.

- EPA Region reviews the request
  - Consults with Tribes as appropriate (EO 13175)
  - Responds to comments in final FR notice
  - Sends direct response to COE, USFWS, and NMFS
  - Coordinates with EPA Headquarters
  - 120 day review period man be extended by the state and EPA
- Regional Administrator approves or disapproves assumption request
  - Approval requires EPA headquarters concurrence
  - Upon approval, State is notified and notice is published in the Federal Register
  - If program is not approved, the state is notified and provided a list of necessary revisions needed to obtain approval

Permit Process for State Assumed CWA §404 Programs and EPA Oversight

Permit Process Once Assumed

- State transmits notice of every permit application received to EPA
- EPA reviews permits where federal review is not waived, coordinates Corps, NMFS and USFWS comments
- State shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed

Permit Process Once Assumed cont.

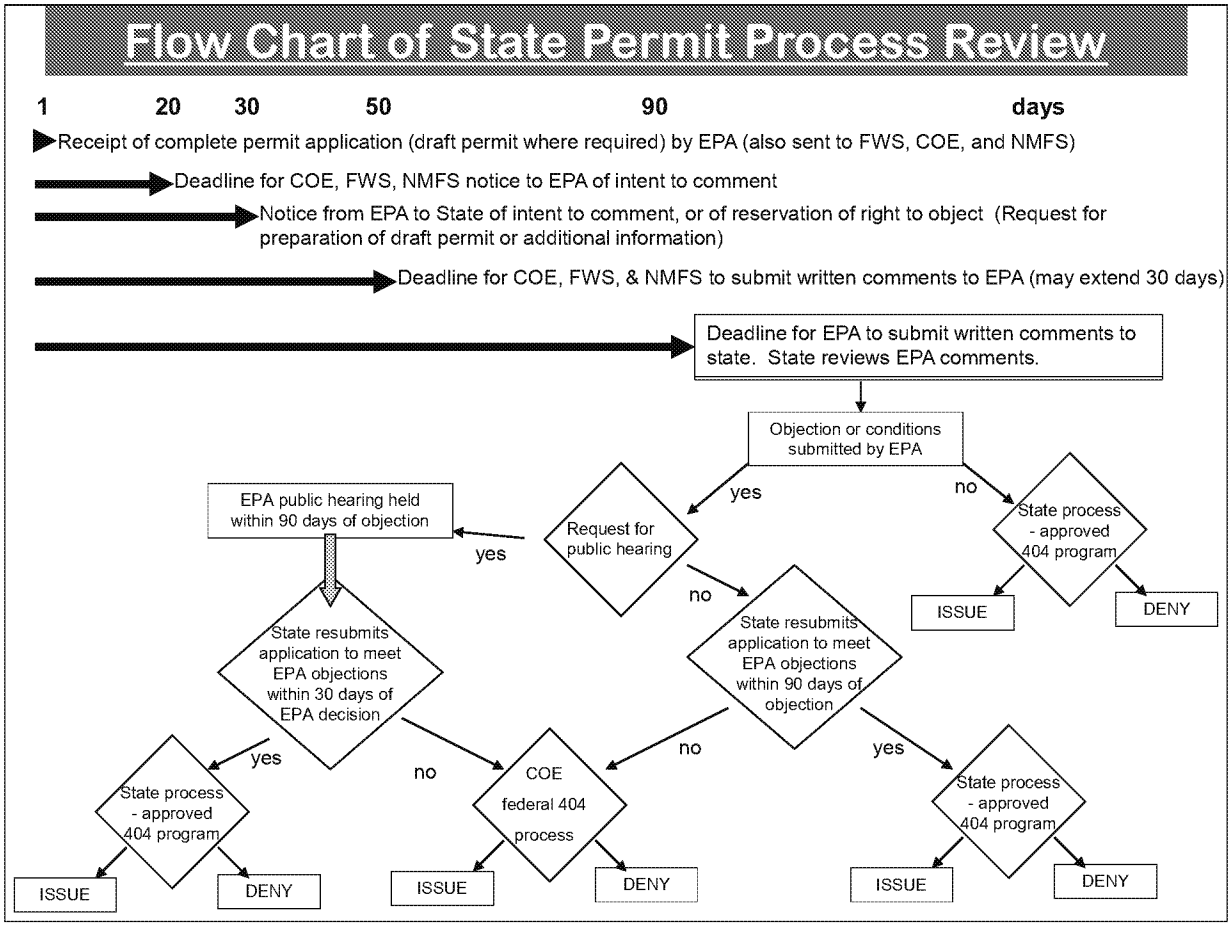
- Waiver of review:
  - MOA with EPA identifies categories of projects for which EPA review is waived
  - EPA can not waive review of:
    - Draft general permits
    - Discharges that may impact endangered species
    - Discharges that may adversely impact waters of another state
    - Discharges with known or suspected toxic or hazardous pollutants
    - Discharges proximal to public water supply intakes
    - Discharges within critical State/Federal areas

EPA Oversight

- Review of permits not waived. EPA may require review of additional categories or all permits e.g.,
  - In NJ, EPA also reviews NJ permits that
    - fill ≥5 acres of freshwater wetlands or state open waters and/or any regulated activity which results in significant reductions in the ecological, commercial, or recreational values of ≥ five acres of freshwater wetlands or state open waters
    - are for culvert enclosures of more than 100 feet with more than 200 cubic yards of fill
    - channelizing more than 500 feet of a river or stream
  - In MI EPA also reviews MI permits that
    - discharge into critical areas
    - are major discharges as defined in the MOA e.g., culverts > 100 feet, wetlands fill >10,000 yds^3 of material

EPA Oversight cont.

- Ensures State programs remain consistent with new statutory or regulatory requirements
  - e.g., Mitigation regulations, Rapanos guidance
- Program reporting
  - State submits draft annual reports
  - Draft annual report made available for public review
- Periodic program review and evaluation


Flow Chart of State Permit Process Review
1
20
30
50
90
days
Receipt of complete permit application (draft permit where required) by EPA (also sent to FWS, COE, and NMFS)
Deadline for COE, FWS, NMFS notice to EPA of intent to comment
Notice from EPA to State of intent to comment, or of reservation of right to object (Request for preparation of draft permit or additional information)
Deadline for COE, FWS, & NMFS to submit written comments to EPA (may extend 30 days)
Deadline for EPA to submit written comments to state. State reviews EPA comments.
Objection or conditions submitted by EPA
yes
no
Request for public hearing
State process - approved 404 program
ISSUE
DENY
EPA public hearing held within 90 days of objection
yes
no
State resubmits application to meet EPA objections within 30 days of EPA decision
State resubmits application to meet EPA objections within 90 days of objection
yes
no
no
yes
State process - approved 404 program
COE federal 404 process
State process - approved 404 program
ISSUE
DENY
ISSUE
DENY
ISSUE
DENY