Tribal Consultation: Upcoming Revision to Clean Water Act Section 404(g) Regulations

Presentation at National Congress of American Indians

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Why Are We Here?

- The EPA is consulting and coordinating with federally-recognized Indian tribes on a forthcoming proposed revision to regulations governing tribal and state assumption of the Clean Water Act section 404 program (CWA Section 404(g))
- This consultation and coordination process will be conducted in accordance with the *EPA Policy on Consultation and Coordination with Indian Tribes* (*https://www.epa.gov/tribal/forms/consultation-and-coordination-tribes*)
- This presentation will provide you with information regarding what are the CWA section 404(g) regulations and EPA's plan for modernization
- EPA is seeking your input on how the CWA section 404(g) regulations could be improved to increase interest by tribes in assuming CWA section 404 permitting authority and provide greater clarity for those pursuing or administering a CWA section 404(g) dredged and fill permitting program

Background: What Is Assumption?

- Under section 404 of the Clean Water Act (CWA), a permit is required before dredged or fill material can be discharged into waters of the US
- CWA section 404(g) enables authorized tribes and states to assume administration of the dredge and fill permitting program for certain waters
  - To date, only Michigan (1984) and New Jersey (1994) have assumed this authority
  - The U.S. Army Corps of Engineers (USACE) issues permits for all other jurisdictional waters
- CWA section 404(g) and 40 CFR Part 233 describe:
  - Tribal and state program requirements
  - EPA responsibilities: approval and oversight of assumed program
  - Requirements for review, modification, and withdrawal of assumed program (as necessary)

Background: Why Assume?

- Why assume? Tribes and states have said:
  - Streamline permitting – reduce permitting timeframes and ability to coordinate with other tribal and state water and land use programs
  - Eliminate unnecessary duplication between programs
  - Knowledge of and closer to the water resources
- What barriers have tribes and states identified?
  - Lack of clarity on assumption process and requirements including which waters are assumable
  - Lack of dedicated funding

Background: What Are the Requirements for Assumption?

A tribal or state assumed program must be consistent with and no less stringent than the CWA and regulations

- The assumed program must include, but is not limited to:
  - Permitting procedures;
  - Administrative and judicial review procedures;
  - Regulating discharges into all assumed waters within the tribe or state's jurisdiction;
  - Regulation of at least the same scope of activities as the section 404 program;
  - Provisions for public participation;
  - Meeting public notice requirements;
  - Permit issuance consistent with the environmental review criteria known as the CWA section 404(b)(1) Guidelines;
  - Compliance and enforcement authorities as specified in the regulations; * and
  - Coordination procedures with federal agencies, adjacent states and tribes.

*EPA's regulations recognize some tribes may have limitations on criminal enforcement; in such situations, EPA, the USACE and the tribe would develop a process to refer such cases to EPA or the USACE. (40 CFR 233.41(f))

EPA's Role in Assumption

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

Tribe or State's Role Once Assumed

- Tribe or state transmits to EPA notice of every permit application received
- EPA reviews permits where EPA review is not waived
  - EPA seeks comments from other agencies
- Tribe or state shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed

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Explain what not waived permit means

Where Is EPA in the Process of Revising the CWA Section 404(g) Regulations?

- Spring 2018 Regulatory Agenda – EPA announced its plan for the first comprehensive revision to the existing CWA section 404(g) regulations since 1988
- Reiterated in 2018 Fall Regulatory Agenda published October 16
- Tribal consultation and coordination - October 22 - December 21, 2018
  - Consultation letters signed October 18, 2018
    - To view consultation letter and materials, visit: https://tcots.epa.gov
  - Presentation to National Congress of American Indians
- EPA is seeking early input in the development of regulatory policies that may have tribal implications

Issue #1: Clarifying Assumable Waters

Background:

- States and tribes can assume administration of the CWA section 404 program only in certain waters. The USACE retains permitting authority for:
  - Tidal waters and their adjacent wetlands
  - Waters used as a means to transport interstate or foreign commerce and their adjacent wetlands
- Retained waters further clarified in recent US Army memo:
  - August 7, 2018, memo describes which waters are to be retained by USACE when state or tribe assumes waters
  - Based upon 2017 recommendations from EPA federal advisory committee on assumable waters (https://www.epa.gov/cwa-404/assumable-waters-sub-committee)

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But why is this confusing? Section 404(g)(1) of the CWA says "(g) State administration (1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than 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, or mean higher high water mark on the west coast, including wetlands adjacent thereto), within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact."

Issue #1: Identification of "Retained" & "Assumed" Waters

With respect to the administrative division of authority to administer the CWA section 404 program, EPA would appreciate comments and recommendations on clarifying:

- The scope of assumable and retained waters:
  - Should the EPA codify the Subcommittee majority's recommendation that USACE retain section 10 waters of the Rivers and Harbors Act?
  - If yes, how should post-assumption changes to the USACE's section 10 list be treated? What process should be used?
- Which adjacent wetlands should be retained:
  - EPA appreciates any information that might support the Subcommittee majority's "default" 300 foot administrative line - USACE retains wetlands waterward of the line.
  - Should a different "default" value be considered?
  - Should there be no default distance in light of differing wetlands characteristics among different eco-regions?
- Who (tribe/state or USACE) should have administrative permitting authority over discharges that extend across the administrative line?

Issue #2: Partial Assumption

The current regulations do not allow for partial assumption of the program. Some have suggested revisions to allow part of the program to be assumed, e.g., certain watersheds or activities:

- Would more tribes be likely to assume the program if partial assumption were allowed?
- How might partial assumption, if permissible, work in a manner that is easily understood by the regulated community and practical in its application?
- How would partial assumption differ from USACE-issued State Programmatic General Permits (SPGP)? Do these SPGPs offer the flexibility being sought under a partial assumption framework?

Issue #3: Consistent With and No Less Stringent Than

Background: CWA requires assumed programs to issue permits consistent with the CWA section 404(b)(1) Guidelines (40 CFR Part 230) which are no less stringent than federal permits (33 U.S.C. § 1370)

EPA would appreciate comments and recommendations on the following questions:

- How should tribes and states address aspects of the section 404(b)(1) guidelines that refer to other federal laws? e.g., National Historic Preservation Act
- How tribes and states could ensure their 404 permits do not adversely affect threatened and endangered species since this is not a federal action?

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Remember consultation under section 7 of the ESA applies to federal actions.

Other Potential Issues Under Consideration

- **Process for Identifying assumable and retained waters**
  - The Subcommittee laid out a process for the how the state or tribe, the USACE, and the EPA would work together during assumption.
  - Are the ways to improve this suggested process or tailor it for the individual needs of tribes?
- **What practices** should be followed when it becomes necessary for the tribe or state to issue a permit to itself? e.g., a highway project
- **Mitigation,** there are many considerations including:
  - Should establishment and composition of interagency review teams (IRTs) differ in under assumed programs? If so, how?
  - How might existing mitigation banks containing assumed waters continue operation following assumption?

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These are other issues we are thinking about and we welcome any feedback.

Questions and Discussion

- Are there any other regulatory challenges or impediments to assumption that EPA should consider?
- Are there areas of the assumption regulations you think EPA should consider revising?

Additional Engagement Opportunities

- **November 20, 2018 –** Tribes-only Information Webinar – 2:00-4:00 Eastern Time
  - To register: https://epawebconferencing.acms.com/tribes-404g-rulemaking-mid-november/event/registration.html
  - Call-in: 1-866-299-3188; Code: 202-566-1269
- **November 29, 2018 –** Tribes-only Information Webinar – 2:00-4:00 Eastern Time
  - https://epawebconferencing.acms.com/tribes-404g-rulemaking-late-november/event/registration.html
  - Call-in: 1-866-299-3188; Code: 202-566-1269
- **Individual Tribal Government Consultation Meetings,** upon request as time and resources allow. To request a meeting please contact: EPA at 404g-rulemaking@epa.gov

Submitting Comments

- How to submit Tribal Consultation comments:
  - Comments can be submitted to 404g-rulemaking@epa.gov and copied to Gude.Karen@epa.gov
- How to submit public comments:
  - EPA will open a public comment period when the Agency publishes in the Federal Register any proposed revisions to the Section 404(g) regulations
  - We anticipate this being early calendar year 2020
- For more information:
  - https://www.epa.gov/cwa404g

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