Message

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Sent: 12/22/2017 7:54:58 PM
To: Goodin, John [Goodin.John@epa.gov]
Subject: FW: Interim steps to improve conistency and predictability on CWA jurisdiction and state capacity building

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Subject: Interim steps to improve conistency and predictability on CWA jurisdiction and state capacity building

John,

Thank you for finding time to meet with me last week. I know you have a very busy schedule and I greatly appreciate getting an opportunity to meet face to fact.

I'm following up on a couple items we talked about. First with respect to interim measure that could be taken on CWA jurisdiction: here are some ideas we included in our comment letter on Step 1 rulemaking:

Suggested Interim Measures to Support Use of the Post-Rapanos Guidance

We understand that, should the 2015 Clean Water Rule be revoked, or until its status is otherwise resolved by the courts, the federal agencies will rely on post-*Rapanos* guidance to define federal jurisdiction. Unfortunately, the issues that led to the 2015 rulemaking remain. The process for rendering a jurisdictional determination under the previous guidance can result in an extended delay for the permit applicant. As a result, many permit applicants have accepted federal jurisdiction without a full review simply in order to expedite the permitting process; this may potentially result in unnecessary permitting costs where jurisdiction is in fact lacking. At the same time, some important wetlands may not be protected by that guidance, such as the special ecological types included in the 2015 Rule. Reliance only on guidance has resulted in jurisdictional determination inconsistencies across the nation. Therefore, we recommend that the federal agencies consider taking steps now to improve implementation of the post-*Rapanos* rule during this interim period, using approaches that we also recommend for the "Step 2" rulemaking.

1. **Clarification through regional programmatic approaches, including guidance, state federal agreements and field methods.** As previously noted, ASWM believes that federal regulations and definitions of uniform federal criteria are essential to provide a baseline level of protection of the nation's waters, regardless of the existence of state, tribal, or local laws or rules. The Clean Water Act also defines a common direction, and provides a scientifically based framework for management of waters that cross state boundaries impacting multiple states.

   Conversely, it is technically difficult, if not impossible to use identical standards, field methods, and regulatory procedures across the nation's highly diverse geographical, climatic, and human land use patterns. The CWA recognizes this by providing an active role for state and tribal governments, in allowing for water quality standards to be defined by each state or tribe (in accordance with federal guidelines), and by allowing for development of state and regional general permitting categories and criteria (again, in compliance with foundational federal requirements). While these comments focus on §404 dredge and fill permitting, we recognize that parallel general permits are widely used in other CWA programs, e.g. regulation of common discharges associated with stormwater management, construction, and other pollution control programs under §402.

   The use of state and regional programmatic approaches may be used to authorize routine and locally essential actions that typically have minimal impacts on waters of the U.S. and that do not fit squarely under CWA exemptions, *without* eliminating overall protection of those waters. This results in regulations that make greater sense to the public – being more closely aligned with local aquatic resource conditions and use of those resources. We believe that concerns regarding such issues as agricultural irrigation and ditch networks, protection and management of combined streams/designated drains, and stormwater management can be effectively addressed through thoughtful application of existing provisions of the CWA. We also stress our belief that the proper use of state and regional permitting addresses local realities while maintaining the national level of protection of waters prescribed by the CWA.

   ASWM therefore recommends that the federal agency make full use of existing regional regulatory approaches, and consider development of regional field guidance that would be equally pertinent under the existing guidance, implementation of the 2015 Rule should that occur, or under a newly developed Scalia plurality opinion-based rule. Examples of regionalized approaches include the following.

   a. **State/Tribal and Regional conditioning of Nationwide General Permits (NWPs).** The Corps of Engineers has, for decades, made use of NWP's to efficiently authorize regulated activities that have a minimal individual or cumulative impact as defined by CWA regulations. Corps District Engineers may add regional conditions to such permits to address localized geographic, climatic, or related ecological concerns, or more localized activities. In addition, states and tribes may provide a conditional Water Quality Certification under CWA §401 or CZMA consistency review to address specific concerns.

      The benefit of this approach is that federal protection of important components of the nation's aquatic system is maintained, but without imposing a significant regulatory burden on minor activities. In some instances, an abbreviated request for authorization may be submitted, and in others, no notification of the proposed action is needed, provided that the criteria specified in the general permit are met.

   b. **Issuance of Regional General Permits or Letters of Permission.** Corps District offices may also issue Regional General Permits (RGPs) for minor activities that are specific to a given state

or states. For example, a number of specific activities in Michigan, associated with the management of Great Lakes shorelines may be authorized under a Regional General Permit issued by the Detroit District Corps, in some instances under conditions specified by the State §10/CZMA certification.[1] As with other categories of general permits, baseline CWA criteria for authorization of a project must be met, but minor actions commonly authorized in a specific state or states may be authorized expeditiously. Rather than eliminating protection for broad categories of waters of the U.S. altogether, ASWM believes that greater use may be made of RPGs, and encourages development of additional guidance for states and Corps staff to promote this approach.

c. **Issuance of State Programmatic General Permits.** Where states are willing to undertake a greater role in review of CWA §404 dredge and fill activities, the Corps and a State may agree on a State Programmatic General Permit (SPGP) to authorize defined minor activities through review and approval by the state agency. While the final authorization is made under Corps §404 authority and approval, processing of a proposed activity by the state simultaneously with review and approval under state authority, provides an efficient and typically faster permitting process.

d.

In many instances, particularly in the New England states, SPGP's have provided a more regionalized and efficient process than use of NWP's. However, some states have found the process of SPGP issuance, and re-issuance at the expiration of a mandated 5-year permit period, to be cumbersome and time consuming. We encourage the Corps and EPA to make full use of SPGP's to regionalize the regulatory program by developing additional guidance for states and Corps District offices.

e. **Encouraging Section 404 State/Tribal Program Assumption.** Assumption of the §404 Program by a state or tribe represents a fully regionalized approach for qualified states or tribes, parallel to state/tribal administration of the NPDES program. §404 assumption has been discussed in detail elsewhere.[2] ASWM encourages EPA to continue efforts to support state assumption through revisions of governing regulations at 40CFR Part 233, in accordance with the majority recommendations recently made by the Assumable Waters Subcommittee of NACEPT.[3]

2. **Development and issuance of regional field technical manuals.** The Army Corps of Engineers has already initiated development of stream identification manuals to account for regional needs, similar to regional wetland delineation supplements. We recommend that this process be continued, and include information on intermittent and ephemeral streams along with perennial streams. Additional information and field guidance for making jurisdictional determinations on channelized or otherwise altered streams used for drainage purposes would also be very useful and

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[1] See http://www.lre.usace.army.mil/Portals/69/docs/regulatory/PDFs/19902000050S16_Final%20with%20Regional%20Conditions-RMD_PN.pdf

[2] See https://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf

[3] Available at https://www.epa.gov/sites/production/files/2017-05/documents/awsubnaceptpresent5-final.pdf

address some major and long-standing concerns related to Waters of the U.S. jurisdiction. Regardless of the eventual criteria for federal jurisdiction, methods of field identification of stream headwaters in particular will be highly useful.

Additional consideration might also be given to the need for accurate identification manuals for ecologically important, but less common types of wetlands, such as vernal pools or pocosins, in the regions where such wetland types occur.

Second, as we discussed there is a real need to assist states in developing state dredge and fill programs in anticipation of a reduction in federal jurisdiction. Half the states do not have the ability currently to issues a state dredge and fill permits. Among those that do, many have limitied ability – for example Washington and Ohio can issue permits for isolated wetlands, but not for streams. It will be important to provide materials and information to states to that each state's administration can make a decision about whether to address this issue, and if so, how. If states do not choose to act, then local governments should be aware of the impact of changes in jurisdiction and determine if there is a need for new zoning or other types of actions to protect human health and property.

We have some materials that already exist such as a model statute: https://www.aswm.org/pdf_lib/model-leg-to-close-swancc-gap-02-22-01.pdf . In reality each state will need to determine what best fits their needs but there is a benefit to the regulated community if there is some consistency across state lines. Otherwise, in our experience, permit applicants will be frustrated if the process for applying for a dredge and fill permit is different in every state. So if there were consistent outreach for all states on how state dredge and fill programs could be developed, there is a greater likelihood some things will remain consistent.

State Assumption. As we discussed we do have a State Assumption handbook that was completed in 2011 and other materials that are available on our website at https://www.aswm.org/wetland-programs/s-404-assumption . In a recent conversation with Peg, she had some ideas about the parts of the handbook that should be expanded or updated – some of the work of the NACEPT subcommittee, more information on ESA issues. She is going to put together a list of her ideas and I will forward them to you so you'll have our ideas as EPA moves ahead on this topic.

Again, thank you for taking the time to meet with me. We're happy to answer questions and look forward to engaging in further discussion.

Take care,

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