CWA § 404(g): State and Tribal Dredged and Fill Permit Program Regulatory Revision

States Pre-Proposal Early Engagement Input Meeting

December 5, 2018

Agenda

10:00 Welcome, Purpose of Meeting, David Ross, Assistant Administrator for Office of Water

10:15 Overview, Agenda, and Introductions, Patrick Field, CBI, Facilitator

10:45 Overview of 404(g) rulemaking, Office of Wetlands, Oceans and Watersheds (OWOW)

11:00 Introduction to Themed Discussions for Input for Proposed Rule
- EPA staff will give background information on four key topics for small group discussions
- Definitions of Assumed and Retained Waters and Wetlands
- Enforcement and Compliance
- Partial Assumption
- Calculating Economic Costs and Benefits of the Rule

11:30 Brief Break

11:45 Breakout Input

12:30 Lunch

1:15 Continue Breakouts

2:00 Report Outs

3:00 Facilitated Group Discussion on Other Issues, Questions and Comments
- Participants may raise any additional issues, themes, and topics that were not covered in the focused discussions above through questions, comments, and answers with EPA.

3:45 Next Steps – John Goodin, Acting Director, Office of Wetlands, Oceans and Watersheds

4:00 Adjourn

Rules of the Road for Today

- Participate actively
- Allow others time and space to speak
- Provide time for phone participation
- Cell phones and devices off (we'll provide break time for catching up)
- Keep on track with the agenda
- We're early in the process – focus on issues, interests, ideas, and options
- Summary of day will be prepared and shared

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Why Are We Here?

- Provide information on Clean Water Act Section 404 Program (CWA §404(g))
  - What is assumption?
- EPA is supporting states and tribes that wish to assume CWA §404(g) permit program
  - Acting Administrator Wheeler letter – September 20, 2018
- EPA is updating the CWA §404(g) regulations
  - Seeking input on how regulations could be updated and modernized to increase interest in CWA §404(g)
  - Fall Regulatory Agenda – Propose Rule 2020

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What Is CWA §404(g) Program Assumption?

- **CWA §404 requires a permit be issued before dredged or fill material can be discharged into waters of the US**
- CWA § 404(g) enables tribes and states to assume administration of the program for certain waters
  - Michigan (1984) & New Jersey (1994) have assumed this authority
  - Army Corps of Engineers (Corps) issues permits for all other jurisdictional waters
  - EPA oversees assumed programs
- CWA §404(g) and 40 CFR Part 233 describe:
  - State and tribal program requirements
  - EPA responsibilities: approval and oversight of assumed program
  - Requirements for review, modification, and if necessary withdrawal of assumed program

What are the Authorities For State/Tribal §404(g) Programs ?

- CWA §404(g) and 40 CFR Part 233 describe:
  - State and tribal program requirements
  - EPA responsibilities: approval and oversight of assumed program
  - Requirements for review, modification, and withdrawal of assumed program (as necessary)
- State/tribal programs are not delegated, they operate under state/tribal statutes.
  - **A tribal or state assumed program must be consistent with and <u>no less stringent</u> than the CWA and regulations.**

Why Assume the CWA § 404 Program?

States and tribes have said:

- Streamline permitting – reduce permitting timeframes and ability to coordinate with other tribal and state water and land use programs
- Eliminate unnecessary duplication
- We have more intimate knowledge of our water resources and needs
- Be consistent with other CWA programs implemented by tribes and states

What challenges have states and tribes identified?

- Lack of dedicated funding
- Lack of clarity on assumption process and requirements including which waters are assumable

What Are the Assumption Requirements?

Assumed program must include, but is not limited to:

- Permitting procedures;
- Administrative and judicial review procedures;
- Regulation of discharges into all assumed waters within the tribe or state's jurisdiction;
- Regulation of at least the same scope of activities as the §404 program;
- Provisions for public participation;
- Meeting public notice requirements;
- Permit issuance consistent with the environmental review criteria known as the CWA §404 (b)(1) Guidelines;
- Compliance and enforcement authorities as specified in the regulations; and
- Coordination procedures with federal agencies, adjacent states and tribes.

What Is 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
- CWA §106 can fund program implementation

Evaluate and approve/disapprove assumption request:

- Includes tribal consultation if appropriate

Oversight of assumed program:

- Review and comment on permits (if not waived)
- Review modifications to assumed program
- Withdraw program approval (if necessary)

Role of States/Tribes Under Assumed Program

- Issue permits
  - Process permit consistent with state/tribal approved program
  - Tribe/state transmits to EPA notice of every permit application received
  - Address comments from downstream states and tribes.
  - Address all EPA conditions and/or comments on permits reviewed.
  - State or tribe shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed.
- Conduct enforcement

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Explain what not waived permit means
corps retains permit authority on tribal lands
States and tribes need to consult with downstream states and tribes and receive comments
If state can't address comments the state needs to send the permit along with comments and why they couldn't be address

EPA Is Revising CWA §404(g) Regulations

- First comprehensive revision to the existing CWA §404(g) regulations since 1988
- EPA is seeking early input from our co-regulators on potential changes
- Pre-Proposal engagement:
  - State input
    - Comment period November 12, 2018 – January 11, 2019
    - Meeting December 5, 2018, Washington, DC
  - Tribal consultation and coordination
    - Comment period October 22 - December 21, 2018
    - Presentation to National Congress of American Indians - October 24, 2018, Denver, CO
    - Tribal webinars held on November 20 and 29, 2018

Issues for Breakout Input

- Clarifying scope of assumable waters
- Partial assumption
- Enforcement and Compliance
- *Calculating Economic Costs and Benefits of the Rule*
- Other potential issues

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We have identified these areas for today's discussions but welcome input on all sections of the 404(g) regulations.

Issue #1: Clarifying Scope of Assumable Waters

Background:

- States and tribes can assume administration of the CWA §404 program only in certain waters. The Corps 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 Corps 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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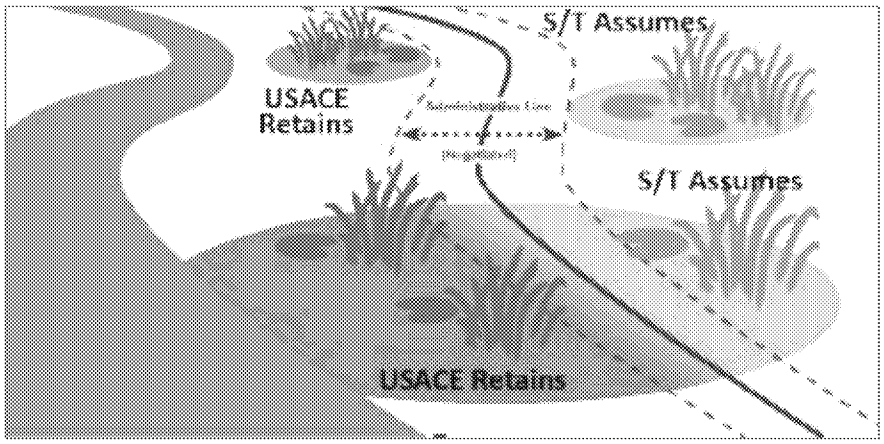
But why is this confusing? Section 404(g)(1) of the CWA says "(g) State administration (1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently 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."

Retained vs Assumed Adjacent Wetlands Graphic: of FACA Recommendation 3C



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Issue #1: Clarifying Scope of Assumable Waters

Questions:

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

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With respect to the administrative division of authority to administer the CWA section 404 program, EPA would appreciate comments and recommendations on clarifying.
EPA appreciates any information supporting the recommendation.

Issue #2: Partial Assumption

Background: States and tribes have requested the ability to assume part of the program, which is currently not an option.

Questions:

- Would partial assumption be of interest to your state?
  - Would your state be more likely to assume 404 authority?
  - What are the benefits to partial assumption?
  - What are the challenges to partial assumption?
  - Should the approach allow more than one state/tribal entity to take on different portions of the 404 program? In a phased approach?
- How would you suggest partial assumption be structured?
  - By activity? By discharge impact threshold? By geographic distribution?
  - How will a permittee know to whom they should submit a permit application?
- How is this different than a State Programmatic General Permit (SPGP)?
  - If you have experience with an SPGP, and are considering partial assumption, what additional flexibility would partial assumption provide that an SPGP does not?

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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:

Issue #3: Enforcement and Compliance

Background:

- CWA requires assumed programs to issue and enforce permits consistent with the CWA §404(b)(1) Guidelines.
- This means the state must have provisions for public participation and authorities to ensure compliance and enforce permitting requirements consistent with the regulations.

Questions: Place holder – communicating with OECA and OGC

- Are the enforcement procedures for coordination with EPA clear?
- What level of criminal enforcement liability does your state have?

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EPA would appreciate comments and recommendations on the following questions:

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

Issue #4: Calculating Economic Costs and Benefits of the Rule

Background: Awaiting input from ECON Contractor

Questions:

- What are the anticipated costs to assume the program?
- What are the costs we should consider for state/tribal administration of the program?

EPA would appreciate comments and recommendations on the following questions:

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

#5 Other Potential Issues

Self-issuance of permits:

- What practices should be followed when it becomes necessary for the tribe or state to issue a permit to itself?

Mitigation:

- Should establishment and composition of mitigation interagency review teams (IRTs) differ under assumed programs? If so, how?
- How might existing mitigation banks containing assumed waters continue operation following assumption?

Consistency with permit requirements

- How can states and tribes best ensure permits comply with the (b)(1) guidelines?
- How can they address threatened and endangered species or national historic sites?

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

Process for Breakout Groups

- We will have 5 breakout groups.
  - Randomly assigned by number on your nametag
  - Webinar only folks will be one breakout group
  - Each group will discuss each issue area
- Breakout Discussion
  - Discuss topic area for 20 min
  - Two EPA folks to support discussion
    - One topic lead; one note taker
    - EPA folks will rotate between the tables
  - Participants will help take notes on flip chart
  - We will break for lunch and reconvene in breakouts
- Group Discussion of issues
  - EPA lead will summarize issues raised in breakouts
  - Facilitation of full group discussion on what was discussed and other issues.

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Questions?

Next Steps on §404(g) Regulation Revision

- **States can submit pre-proposal comments**:
  - Submit comments by **January 11, 2019** to: 404g-rulemaking@epa.gov
- EPA will review comments and
- **States can submit comments when rule is proposed, during public comment period**:
  - EPA will open a public comment period when the Agency publishes the proposed rule in the Federal Register in 2020

Additional Information

EPA 404 assumption website:
https://www.epa.gov/cwa404g

Email and pre-rule comments:
404g-rulemaking@epa.gov

Contact Information

EPA Office of Water

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Thank you