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

2018 Tribal Consultation Webinar

November 20, 2018

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Agenda

2:00 Welcome and Introductory remarks - David Ross, Assistant Administrator for Office of Water, John Goodin, Acting Director, Office of Wetlands, Oceans and Watersheds (OWOW)

2:05 Agenda - Kathy Hurld, OWOW

2:10 Presentation on CWA 404(g) Program and Proposed Rulemaking Revision, Kathy Hurld, OWOW

- Background
- Revising CWA 404(g) Regulations
- Issues for Input

2:40 **Q&A,** *Tribal Participants (Moderators: John Goodin and Kathy Hurld, OWOW)*

- Potential issues for input:
  - Scope of assumable waters
  - Partial assumption
  - Costs and additional challenges
  - Mitigation
  - Self-issuance of permits
- Other questions or issues

3:45 Next Steps – John Goodin, Acting Director, OWOW

4:00 Adjourn

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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 tribes and states 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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Arizona is taking it on – what does it mean for the tribes – corps retains permit authority on tribal lands
States need to consult with 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

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

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What are the Authorities For State/Tribal CWA §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 if necessary) withdrawal of assumed program
  - State/tribal programs are not delegated, they operate under state/tribal statutes.
  - A tribal or state assumed program must be consistent with and no less stringent than the CWA and regulations.

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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

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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 CWA § 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.

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What Is EPA's Role in Assumption?

Prior to assumption:

- Work with tribes and states to enhance capacity/capability and develop programs
- Suggest potential funding sources such as grants and fees

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)

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Roles of Tribes/States Under Assumed Programs

- 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

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:
  - 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
  - State input
    - Comment period November 12, 2018 – January 11, 2019
    - Meeting December 5, 2018, Washington, DC

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Issues for Input

- Clarifying Scope of Assumable Waters
- Partial Assumption
- 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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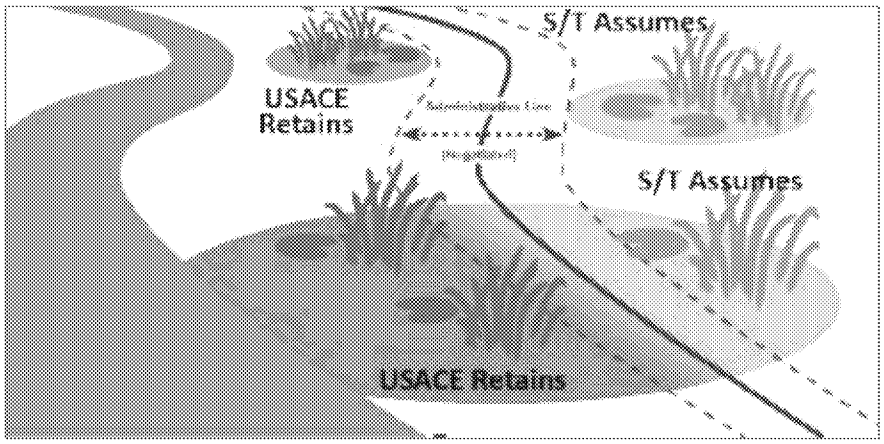
But why is this confusing? Section 404(g)(1) of the CWA says "(g) State administration (1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently 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 extend across 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.

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 tribe?
  - Would your tribe 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? Other?
  - 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: Calculating Economic Costs and Benefits of the Rule

Background: EPA will conduct an economic analysis as part of the rulemaking

Questions:

- What are the anticipated costs and benefits to states/tribes and federal agencies (e.g., staffing, administrative costs)?
  - Cost and benefits of full and partial assumption.
- Are there other limitations and barriers (e.g., interagency coordination, expertise)?

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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.

#4 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 tribes and states 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.

Questions?

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Next Steps on CWA §404(g) Regulation Revision

- **Tribes can submit pre-proposal comments**:
  - Comments can be submitted by **December 21, 2018** to: 404g-rulemaking@epa.gov
- **EPA will review input and craft proposed regulatory language**
  - Will engage other agencies during OMB review
  - Will likely host another webinar prior to publishing proposal
- **How to submit public comments**:
  - EPA will open a public comment period when the Agency publishes the proposed rule in the Federal Register in 2020

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Additional Information

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

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

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Thank you

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