CWA §404(g): State/Tribal Programs

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Overview

- CWA § 404 Assumption, What is it?
- Requirements for assumption
- Assumption approval process
- Assumption Request Package
  - MOAs with EPA and USACE
- State permit process & EPA oversight
  - Non-waiver of review
  - Process Flow Chart of EPA Review of State Permit
- Agency roles in CWA §404 Assumption
- Current § 404(g) Activities

* For this briefing, state refers to state or tribe

CWA § 404 Assumption, What is it?

- Clean Water Act § 404(g)
  - States and Tribes may assume administration of the permit and enforcement program for certain waters
  - Not a delegation
- CWA § 404(h) and 40 CFR Part 233 describe:
  - State program requirements
  - EPA responsibilities: approval and oversight of assumed program
  - Requirements for review, modification, and withdrawal of state program (as necessary)

When states or tribes assume administration of the section 404 program, the U.S. Army Corps of Engineers no longer processes Section 404 permits in waters under state or tribal jurisdiction. The state or tribe assumes responsibility for the program, determines what areas and activities are regulated, processes individual permits for specific proposed activities, issues any general permits, and carries out enforcement activities consistent with and no less stringent than the requirements of the Act and the regulations.

Modifications to a tribal program would be necessary if the statute or federal regulatory requirements change or the tribe changes its authorities, implementing regulations or program.

Withdrawl – EPA works with the state or tribe to revise its program to ensure consistency and thus avoid potential withdrawl

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

Assumption Approval Process

- Assumption package submitted to EPA
  - 30-day EPA review for package completeness
    - State notified of completeness or package returned with insufficiencies identified
  - EPA has 120 days to approve or disapprove the assumption request
    - 120-day review period may be extended by the state and EPA
    - If EPA does not take action within 120 days, program is assumed
  - EPA notifies state of decision and if approved publishes notice in Federal Register

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

Assumption Approval Process cont

- Review Process Includes:
  - Federal Agency Comment - USACE, USFWS, NMFS
    - Package sent on Day 10; Comments due Day 90
  - Consultations
    - ESA § 7 Consultation - if EPA determines there may be affects on federally listed species
    - NHPA § 106 consultation
    - Tribal consultation (EO 13175) - as appropriate
  - Public Notice, Hearings and Comment Period
    - Notice published in Federal Register and newspapers
    - 45-day comment period
    - Public hearing 30+ days after Federal Register notice published

* 120-day review period may be extended by the state and EPA.

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

Assumption Request Package

- A Complete Package 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

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

MOA with USACE

Includes:

- Description of waters of the U.S. over which USACE retains permitting authority. These are 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 USACE general permits to be assumed by the state
- Plan for transferring responsibility and records

* 2018, Memo from ASA R.D. James to USACE

"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."

EPA convened a FACA from 2015-2017 to provide recommendations on how EPA could clarify. Majority recommendation, which is supported by RD James memo to USACE is Section 10 RHA waters and wetlands adjacent thereto up to an administrative line.

State Permit Process & EPA Oversight

- State transmits notice of every permit application received to EPA
- EPA reviews permits where federal review is not waived
  - Coordinates USACE, NMFS and USFWS comments
  - EPA may provide comment, place conditions on or object to draft permit
- State shall not issue permit if EPA has objected to or placed conditions on the permit until concerns are addressed
  - Permit transfers to USACE if EPA's concerns are not addressed

State Permit Process & EPA Oversight 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
  - Additional non-waived categories may be identified in the EPA-State MOA
  - EPA retains right to request review of any permit

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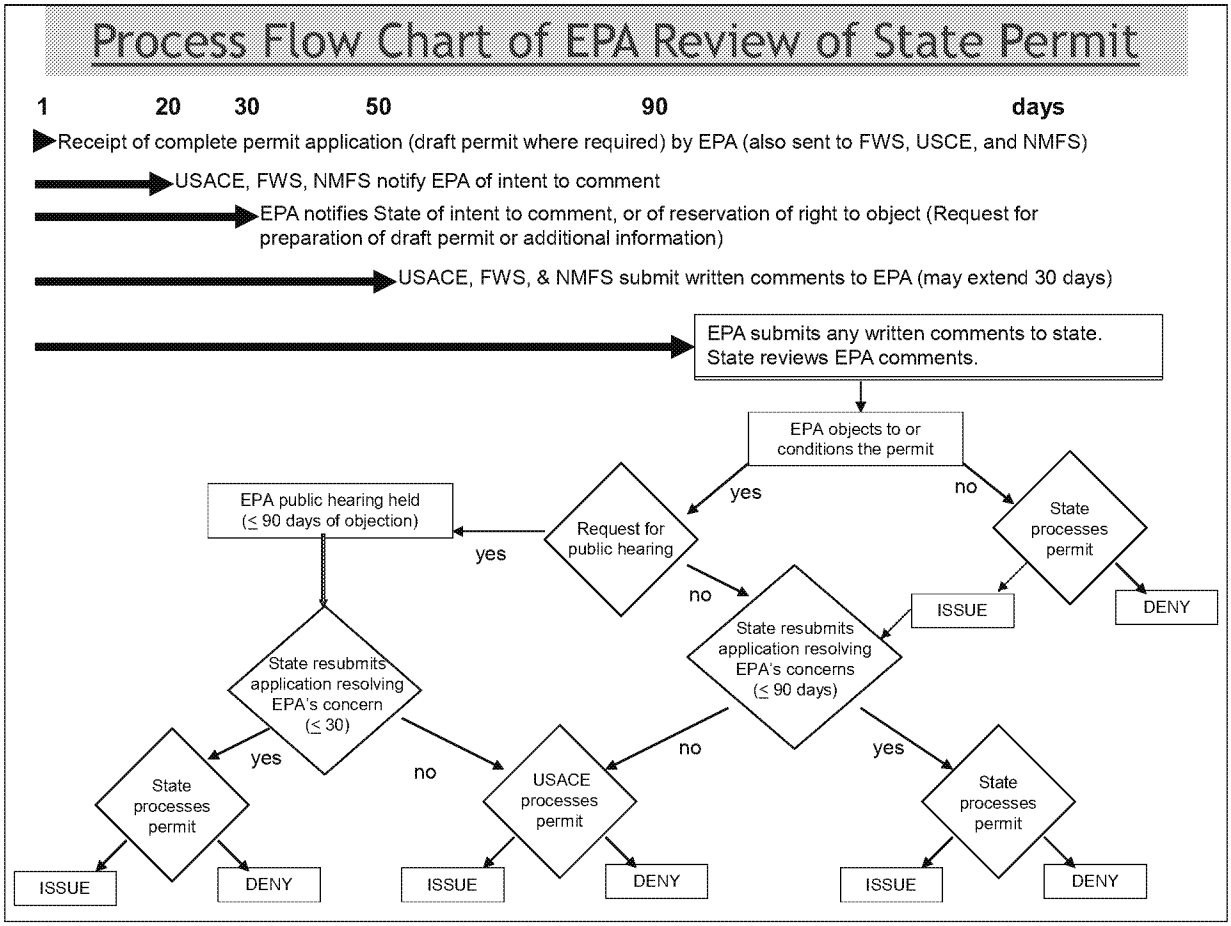
In MI EPA also reviews MI permits that
discharge into critical areas
are major discharges as defined in the MOA e.g., culverts > 100 feet, wetlands fill >10,000 yds3 of material
In NJ, EPA also reviews NJ permits that
fill >5 acres of freshwater wetlands or state open waters and/or any regulated activity 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


Process Flow Chart of EPA Review of State Permit
1
20
30
50
90
days
Receipt of complete permit application (draft permit where required) by EPA (also sent to FWS, USCE, and NMFS)
USACE, FWS, NMFS notify EPA of intent to comment
EPA notifies State of intent to comment, or of reservation of right to object (Request for preparation of draft permit or additional information)
USACE, FWS, & NMFS submit written comments to EPA (may extend 30 days)
EPA submits any written comments to state. State reviews EPA comments.
EPA objects to or conditions the permit
yes
no
Request for public hearing
State processes permit
ISSUE
DENY
EPA public hearing held (≤ 90 days of objection)
yes
no
State resubmits application resolving EPA's concerns (≤ 90 days)
State resubmits application resolving EPA's concern (≤ 30)
yes
no
no
yes
State processes permit
USACE processes permit
State processes permit
ISSUE
DENY
ISSUE
DENY
ISSUE
DENY

EPA & USACE Roles under §404(g)

- EPA
  - Work with states interested in assumption
  - Review and approve programs
  - Oversight of approved program
    - Review of permits in non-waived categories; coordinate comments
    - Enforcement
    - Ensure program remains consistent with statutory and regulatory requirements
    - Review and make available for public input state annual report
    - Periodic program review and evaluation
  - Withdrawal, if necessary
- USACE
  - Enter into MOA with state; identify retained waters
  - Review assumption request provide comments to EPA
  - Permits
    - Provide comments to EPA on permits for which review is not waived
    - Process transferred permits
    - Issue RHA permits
  - Coordinate on joint permits with State
  - Retain permitting for retained waters and in Indian country

Current 404(g) Efforts

- Regulatory Revision
  - FACA - addressing retained waters 2015-2017
  - Tribal consultation and State early input
  - Proposal – anticipate November 2020
- Working with several States
  - FL - request received 8/20/20
  - OR - ongoing
  - MN - ongoing
  - NE - ongoing

Questions?

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