CWA § 404 Assumption: Background and EPA's Efforts

Kathy Hurld
Office of Wetlands, Oceans, and Watersheds
U.S. Environmental Protection Agency
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Introduction to CWA § 404 Assumption

- What is § 404 assumption?
- What are the requirements?
- What is the process?
- What are EPA's current activities?

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"Assumption" of the CWA Section 404 program describes the process whereby a state or tribe obtains approval from the EPA to administer the 404 program within their borders and consequently begins administering all aspects of the program.

the state or tribal program must be consistent with and no less stringent than that required by the CWA and implementing regulations.
For example, a state or tribe must:
have sufficient authority to regulate all waters of the US that may be assumed;
regulate at least the same activities as listed in the Act and regulations;
provide for sufficient public participation;
ensure compliance with the Section 404(b)(1) guidelines, which provide environmental criteria for permit decisions;
have adequate enforcement authority; and
comply with other applicable regulations (33 USC part 1344(h); 40 CFR part 233)
Assumption by a state or tribe does not alter CWA jurisdiction over waters of the United States.
States and tribes assume permitting authority over certain waters, but others are retained under the authority of the Corps.
The waters and wetlands that a state may not assume, and the waters the Corps must retains CWA 404 permitting authority for are described in section 404(g)(1) as:
"... 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 ..."
In accordance with the requirements of Section 404, a state or tribe may only be authorized to assume the Section 404 Program if it has authority over all assumable waters and demonstrates that it will apply legal standards consistent with the Clean Water Act (CWA) requirements in operating a permitting program.
In an assumed 404 program, the EPA retains the authority to review defined categories of permit applications and may request review of any application. Any permit for which EPA has not waived review, the EPA provides the permit to the Corps, USFWS, and NMFS for comment. EPA reviews comments provided and comments on the state permit accordingly.
In the event that the EPA objects to issuance of a 404 permit, the state or tribe cannot issue the 404 permit unless the EPA's objection is resolved and permit conditions met.

Assumption does not reduce the scope of Clean Water Act jurisdiction, but instead shifts responsibility for administering the Section 404 permitting program for certain waters of the United States from the federal government to authorized states or tribes.

For those states or tribes with mature, integrated water management programs that include the regulation of dredged or fill activities, 404 Program assumption allows a state or tribe to carry out a fully integrated and comprehensive water program addressing the full range of state, tribal, and CWA requirements. Despite the complexity of the program and potential administrative costs, states and tribes remain interested in pursuing assumption.

§ 404(g): Assumption, What is it?

- Section 404 of the CWA (§ 404) requires that a permit be issued prior to the discharge of dredged or fill material into waters of the U.S.
  - Currently, the Corps issues permits in 48 states
- § 404(g) is the provision of the Act in which Congress provides for States or Tribes to assume and administer the § 404 program.
  - This is not delegation
- Why is there growing interest?

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"Assumption" of the CWA Section 404 program describes the process whereby a state or tribe obtains approval from the EPA to administer the 404 program within their borders and consequently begins administering all aspects of the program.
Delegated programs mean that a state or tribe is issuing a permit or taking an action on behalf of the federal government, under federal authorities examples are .....
Approved or Assumed programs such as sections 402 and 404 of the CWA are not delegations as the state or tribe is issuing a state/tribal permit under state or tribal authorities.

Why is there growing interest?
Administration priority
404(g) rule revision
Clarity in assumable waters

§ 404(g): History

- CWA passed by U. S. Congress in 1972
  - Section 404 requires a permit from the Corps (or state or tribe's EPA approved program) prior to placing dredged or fill material into a jurisdictional wetland or waterway
- 1977 amendments § 404(g) – States authorized to request and assume administration of the 404 permitting program for certain waters
- 1984 – EPA approved Michigan's request to assume § 404
- 1987 amendments – Tribes authorized to assume § 404
- 1994 – EPA approved New Jersey's request to assume §404

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We'll talk towards the end of the presentation about "certain waters" or "assumable waters" but simply put Congress stated that the Corps shall remain the CWA section 404 permitting authority over some waters to maintain the transportation interests of interstate and foreign commerce.

§ 404 (g): Requirements

- 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
  - Allow for public participation
  - Be consistency with the 404(b)(1) Guidelines
  - Have adequate enforcement authority

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What does it mean to be consistent with and no less stringent than? Look at second bullet.
Approved program is for CWA jurisdictional scope only (your program can be broader, but we only approve CWA scope). Same with activities.

Consistency with the (b)(1) guidelines means:
If state/tribe issues a permit the Corps would have been able to issue the permit as written.
Note, the state/tribe could deny a permit that the Corps could have issued and that is by statute, the state/tribal program can be more protective.

§ 404 (g): Request Package

The request package submitted to EPA shall include: *

- Letter from Governor/Tribal Leader
- Complete program description
- Attorney General's statement
- MOA with EPA Regional Administrator
  - Includes: agency roles, categories of permits EPA shall review, reporting requirements, coordination on compliance monitoring and enforcement
- MOA with Secretary of Army (through Chief USACE)
  - Includes: description of retained waters, procedures to transfer permits applications, list of any nationwide permits assumed by state/tribe
- Copies of all applicable state/tribal statutes and regulations administering the program

*40 C.F.R. 233.10-14 identify the package components

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The package should make sure that it entails:
What state will do, what the permit process is, what criteria are used in the review, appeals processes, who is responsible, and lastly how, when and with whom coordination will occur.

Have to provide copies of permit forms., approval forms and any review criteria or guidance manuals. Structure of agency needs to be in and describe who does what. Funding and staffing levels. EPA can't determine that, that is on the state.

MOA with EPA will lay out roles and responsibilities, it will say

§ 404 (g): Request Package cont.

Program Description

- Scope and structure of program
  - Jurisdiction
  - Activities regulated
  - Anticipated coordination
  - Permit review criteria
  - Scope of permit exemptions
- Procedures for permitting, administrative review and judicial review
- Structure and organization of agency(ies) responsible for program administration
- Funding and staffing levels

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Program description is a large portion of the request package. This is where the state or tribe describes the program, which waters and activities are regulated, how the permits will be reviewed and criteria used for evaluation; what coordination between agencies, between counties, other states and tribes and the federal government will take place; compliance and enforcement procedures, etc.

Should be robust enough so that EPA and the interested public can understand the state processes and that it clearly articulates how the state program is consistent with and no less stringent than the CWA and these regulations.

§ 404 (g): Request Package cont.

Program Description cont.

- Anticipated workload
- Copies of permit application forms, permit forms, and reporting forms
- Compliance evaluation and enforcement programs
- Description of waters under state jurisdiction and those under Corps jurisdiction
- BMP's proposed to satisfy farm, forest, and temporary mining roads exemption provisions

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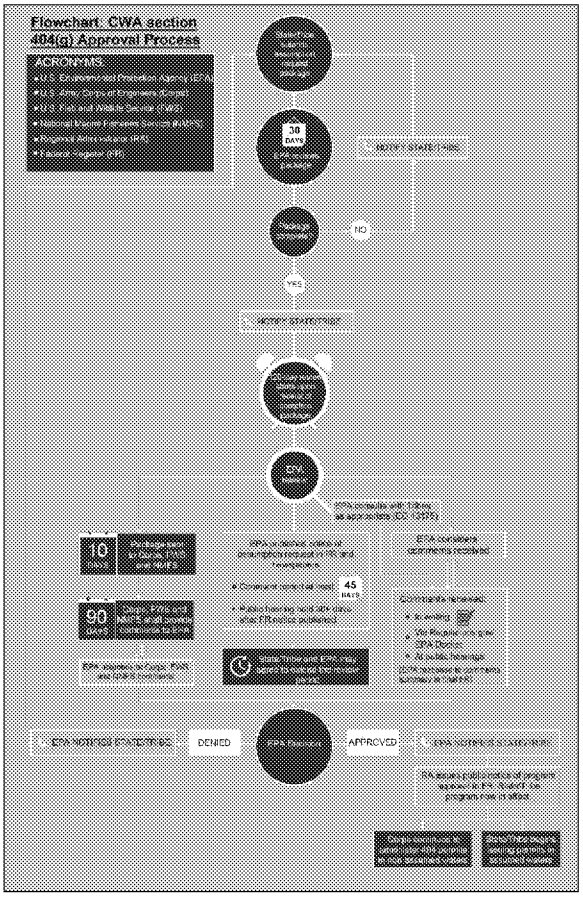
Same Talking points as the first one.

Use case study such as DOT.



§ 404 (g): Approval Process Flow Chart

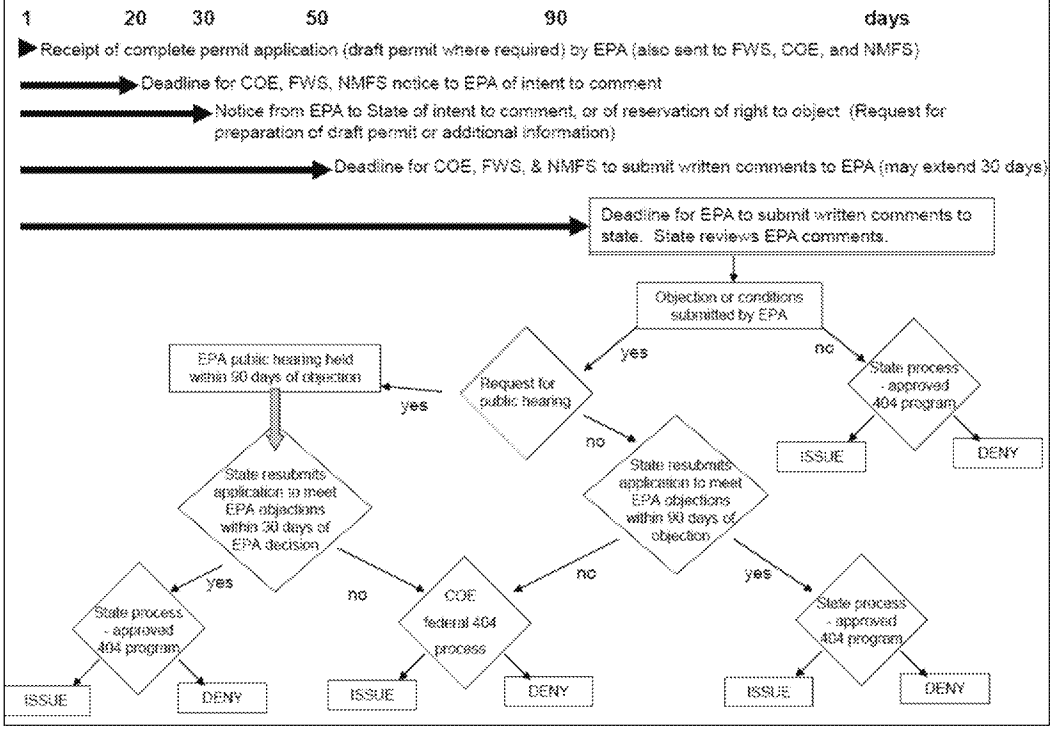
120-day process:

- Includes: coordination with Corps and Services, public hearings and public comment period
- Includes: tribal consultation as appropriate
- EPA shall approve request if state or tribal program meets requirements
- EPA notifies state/tribe and Corps, Federal Register Notice

§ 404 (g): State/Tribal Permit Process

- State/Tribe transmits notice of every permit application received to EPA
- EPA reviews permits for which review is not waived, coordinates Corps, NMFS and USFWS comments, including:
  - 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
- State/Tribe shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until conditions or objection are addressed

Flow Chart of State Permit Process Review



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§ 404 (g): Assumable Waters

- What are "Assumable Waters?"
  - Waters for which state or tribe assumes § 404 permitting authority
  - Includes wetlands adjacent to these waters
- Army July 2018 memo stated
  - Support for majority recommendations by the FACA
  - Start with Rivers and Harbors Act section 10 lists to describe retained waters
  - Identification of retained adjacent wetlands will follow recommendation by FACA majority

What are "assumable waters?"
EPA FACA – 2015-2017
Recommendations to Administrator 2017
EPA Initiated Rule Making Spring 2018
August 2018 Department of Army Memorandum to the Corps regarding how the Corps is to identify waters to be retained.
Generally follows FACA recommendation to base identification on Section 10 waters of RHA.

§ 404 (g): *Current EPA Actions*

- "Modernizing" the 404 (g) Regulations
  - Provide further clarity and certainty on retained waters
  - Clarify requirements and process of assuption
  - Facilitate assumption
- Rulemaking Process:
  - Early input October 2018 – January 2019
  - Drafting stage
  - Proposal with outreach and public comment
  - Final Rule 2021
- Ensuring consistency
  - Mitigation rule
  - WOTUS
  - Executive Orders

In the 2018 Spring Regulatory Agenda, EPA published the Agency's plan for the first comprehensive revision to the existing Section 404(g) regulations since 1988.
Working to create greater clarity on the requirements for state and tribal assumption of the Section 404 permitting program (identified as one of EPA's priorities)
EPA intends to "modernize" 404(g) regulations to assist the authorized states and tribes in assuming this authority.
EPA is currently engaged in the 404(g) rulemaking process.
EPA will continue to update it's assumption rulemaking page as the process develops, including announcing any opportunities for public engagement. There is currently no open public comment period. (https://www.epa.gov/cwa404g/current-efforts-regarding-assumption-under-cwa-section-404)

Thank you.
Any questions?