State Assumption: CWA §404 Permitting Program

Basic Overview for Indiana

Overview Assumption of CWA §404

- Authorities – Statute and Regulations
- EPA's role
- Requirements for Assumption of CWA §404 Program
  - Assumption Criteria
  - Assumption Request
- Approval process
- Permit process for approved programs and EPA oversight
- Additional Activities
- Contacts

* For this briefing, state refers to state or tribe

Authorities – Statute & Regulations

- CWA §404(g)
  - States may assume administration of the permit and enforcement program for certain waters
- CWA §404(h) and 40 CFR part 233 lists:
  - State requirements
  - EPA approval and oversight responsibilities
  - Requirements and process for review and modification of state program (as necessary)

Authorities – Statute & Regulations cont.

- CWA §404(h-l) and 40 CFR part 233 describe:
  - State and tribal program requirements
  - Procedures and criteria EPA applies in the approval and oversight of CWA §404(g) programs
    - includes (b)(1) guidelines, public notice and comment procedures, federal coordination
  - Process to request approval of state/tribal 404 program - 120 day process, can be extended
  - Assumption request package contents including:
    - Description of the scope and structure of the state or tribes program
    - Memorandum of Agreement with EPA – includes program administration and enforcement coordination
    - Memorandum of Agreement with USACE – includes list of waters that are not assumed by the state or tribe – the USACE retains permitting authority over these waters

EPA's Role

- Prior to assumption
  - Work with states to enhance capacity/capability and develop programs
  - Wetland Program Development Grants
- Evaluate and approve/disapprove state assumption request
- Oversight of assumed program
  - Coordinate federal oversight of permits
  - Review of modifications of state program
  - Withdraw program approval, if needed

Requirements for Assumption of CWA §404 Program

- Assumption Criteria
- Assumption Request
- Application Requirements

Assumption Criteria

- 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

* State or tribal program may have broader jurisdiction; however, the approved 404 program will have the same jurisdictional scope

Assumption Request

Governor transmits request to the Regional Administrator

- Request 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

Application Requirements - *Program Description Includes:*

- 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 state agency(ies) responsible for program administration
- Funding and staffing levels

Application Requirements - *Program Description cont.*

- Anticipated workload
- Copies of permit application forms, permit forms, and reporting forms
- Compliance evaluation and enforcement programs
- Clarification of waters under state jurisdiction and those under USACE jurisdiction
- Best Management Practices (BMPs) proposed to satisfy farm, forest, and temporary mining roads exemption provisions

Application Requirements - *Attorney General's Statement*

- Citations of specific statutes, administrative regulations and judicial reviews demonstrating adequate authority
- Legal analysis of the effect of state laws regarding private property takings
- Certification of the authority of each state agency to administer the program
- Analysis of authority over Indian lands
  - Not assuming authority over Indian lands does not constitute partial assumption

Application Requirements -
MOA with EPA Regional Administrator

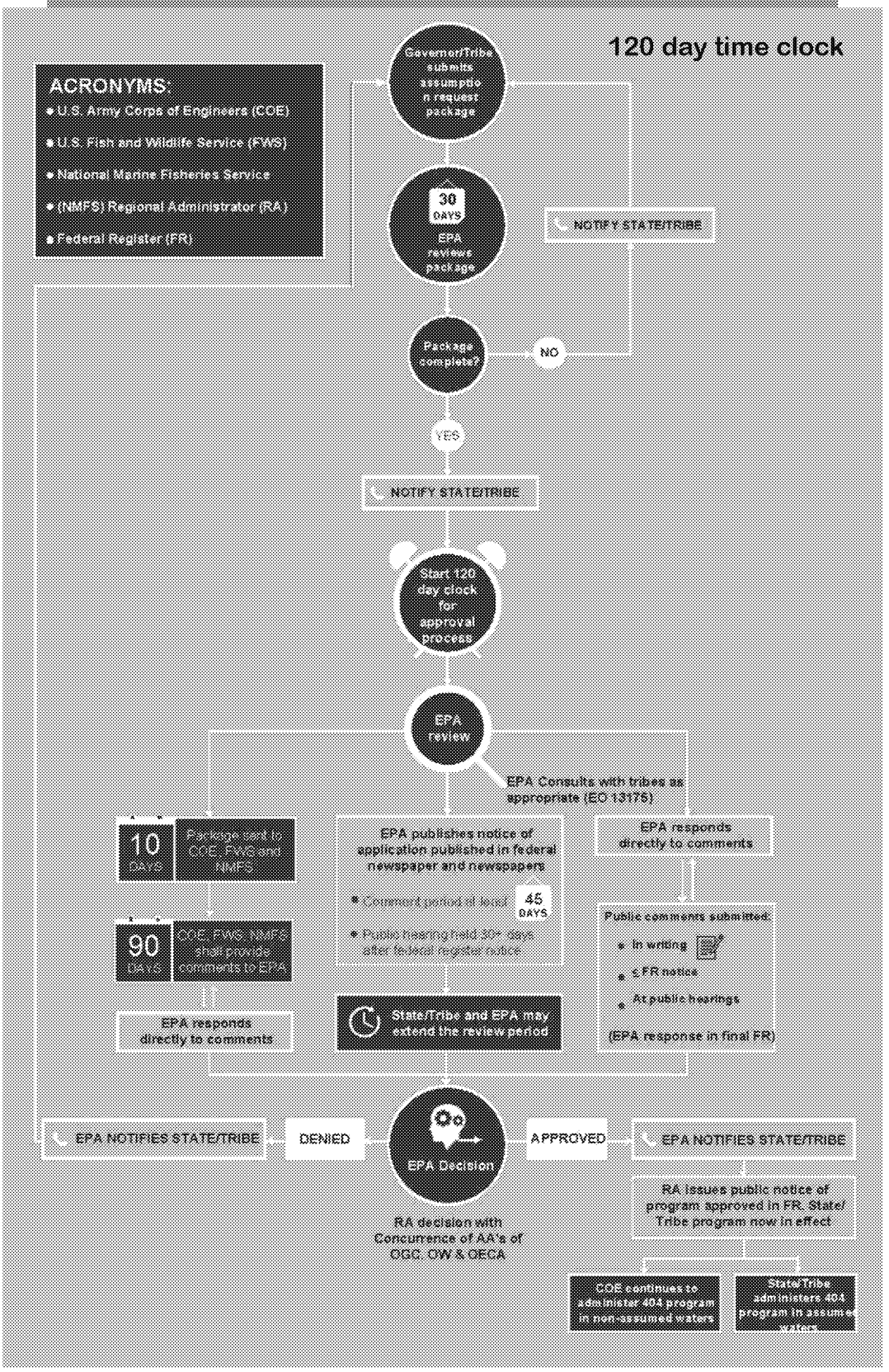
- Classes and categories of permits for which EPA waives federal review
- Provisions for state reporting on program implementation
- EPA and state roles and coordination regarding:
  - Compliance monitoring
  - Enforcement
- Provisions for modification of the MOA
  - Including transfer or withdrawal

Application Requirements - *MOA with USACE*

- Description of waters of the U.S. over which USACE retains jurisdiction which 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
  - Including a plan for transferring responsibility
  - Identification of current enforcement cases

Approval Process

Approval Process



Assumption Approval Process

- Assumption package submitted to EPA
  - 30 day EPA review for package completeness
    - Complete – state notified; Incomplete - package returned to state
  - EPA has 120 days to approve or disapprove the state request*
- Review period includes:
  - State notification that package is complete
  - Package sent to USACE, USFWS and NMFS ≤ 10 days (Comments to EPA ≤ 90 days)
  - Notice of assumption request published in Federal Register and newspapers
    - 45 day comment period
    - Public hearing 30+ days after Federal Register notice published

*State and EPA can agree to an extension.

Assumption Approval Process cont.

- EPA Region 5 reviews the request
  - Consults with tribes as appropriate (EO 13175)
  - Responds to comments in final *Federal Register* notice
  - Sends direct response to USACE, USFWS, (and NMFS)
  - Coordinates with EPA Headquarters
  - 120 day review period man be extended by the state and EPA
- Region 5 Administrator approves/disapproves assumption request
  - Approval requires EPA headquarters concurrence
    - Assistant Administrators for Water, Enforcement and General Counsel
  - Upon approval, State is notified and notice is published in the *Federal Register*
  - If program is not approved, the state is notified and provided a list of necessary revisions needed to obtain approval

Permit Process for Approved Programs and EPA oversight

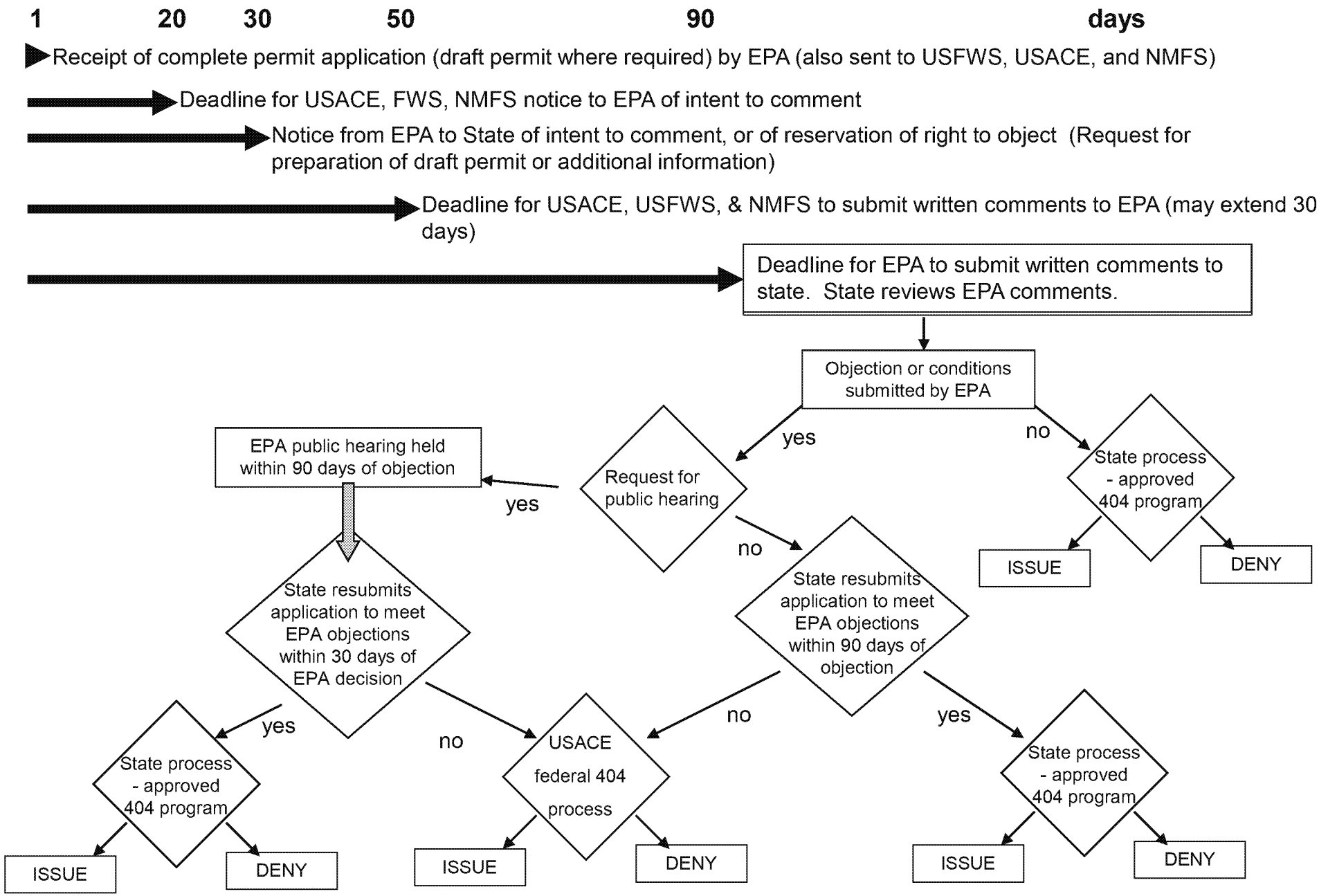
Permit Process for Approved Programs

- State transmits to EPA notice of every permit application received for which review has not been waived
- EPA reviews permits where federal review is not waived, coordinates USACE, NMFS and USFWS comments
- State shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed

Permit Process for Approved Programs 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
  - EPA may require review of additional categories or all permits

Flow Chart of State Permit Process



EPA Oversight

- Review of permits not waived
  - Comments from USACE and the Services
- Ensures State programs remain consistent with new statutory or regulatory requirements
  - Federal changes e.g., mitigation regulations, Rapanos guidance
  - State changes e.g., regulatory, general permits, statutory
- Program reporting
  - State submits draft annual reports
  - Draft annual report made available for public review
- Periodic program review and evaluation
- Withdrawal of program approval (if necessary)

Additional Activities
Assumable Waters: Federal Advisory Subcommittee

- At request of state organizations, EPA established NACEPT* subcommittee - 9/15

  Charge: ". . . to provide advice and recommendations to EPA on how to clarify for which states and tribes will assume CWA section 404 permitting responsibilities, and for which waters the USACE will retain permitting authority."

- Status: NACEPT approved the report and transmited recommendations to Administrator Pruitt
  - 2 majority and 2 minority recommendations
  - Administrator will consider these

- Webpage: http://www.epa.gov/cwa-404/assumable-waters-sub-committee

* National Advisory Council for Environmental Policy & Technology

Summary of Recommendations
NACEPT's Assumable Waters Subcommittee

- Several process recommendations were supported by all
- **Majority recommendations:**
  - *Waters to be retained* – Primary Dependence on Rivers and Harbors Act Section 10 Lists of Navigable Waters to Define USACE Retained Waters. *(Waters Alternative B)*
  - *Wetlands to be retained* -- USACE Retains All Wetlands Landward to an Administrative Boundary Established During the Development of the Memorandum of Agreement with the USACE, with a 300-foot National Administrative Boundary as a Default. (Wetlands *Alternative C3)*
- **USACE recommendations**:
  - *Waters to be retained* – Section 10 waters plus CWA (a)(1) TNW Waters as Retained Waters. *(Alternative C)*
  - *Wetlands to be retained* – USACE Retains All Adjacent Regardless of Furthest Reach. (wetlands *Alternative A)*

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EPA Contacts

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