State and Tribal Assumption of CWA Section 404

OWOW ALL HANDS
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Background – Assumption Authority

- What Is Assumption?
  - When a state or tribe assumes permitting authority for dredged and fill activities into certain waters of the United States
  - Clean water Act section 404(g) (CWA 404(g))
- CWA section 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 state or tribal program (as necessary)

Background

- Why assume? States and tribes have said:
  - Streamline permitting – reduce permitting timeframes and ability to coordinate with other state and tribal programs
  - Eliminate unnecessary duplication between programs
  - Knowledge of and closer to the water resources
- What states have assumed or expressed interest?
  - Only MI and NJ, but other states are pursuing or considering assumption, e.g., FL, AZ, IN
- What barriers have states and tribes noted?
  - Lack of clarity on requirements including which waters are assumable
  - Lack of clarity on how to provide protections for threatened and endangered species
  - Lack of dedicated funding

Requirements for Assumption

- A state or tribal program must be:
  - consistent with and
  - no less stringent than the CWA requirements
- The state or tribal program must have:
  - Equivalent scope of jurisdiction
  - Activities regulated ≥ federal program
  - Public participation
  - Consistency with the CWA 404(b)(1) Guidelines
  - Adequate enforcement authority*

*EPA's regulations recognize some tribes may have limitations on criminal enforcement. In such situations, EPA, the U.S. Army Corps of Engineers (USACE) and the tribe would develop a process to refer such cases to EPA or the USACE. 140 CFR 233.41(f)

Which Waters Can Be Assumed?

- States and tribes can assume administration of the Clean Water Act section 404 program only in certain waters. The USACE retains jurisdiction in:
  - 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 USACE when state or tribe assumes waters
  - Based upon 2017 recommendations from EPA federal advisory committee (FACA) on assumable waters

EPA's Role in Assumption

- Prior to assumption
  - Work with states and tribes to enhance capacity/capability and develop programs
  - Wetland Program Development Grants
- Review and approve request
- Oversight of assumed program
  - Coordinate oversight of permits – EPA cannot waive review of certain permits including:
  - Review and approve modifications of state or tribal program
  - Withdraw program approval, if needed

State/Tribal Assumption Process

- Step 1 – Initiate Effort: contact EPA RA and USACE District to indicate interest in assumption
- Step 2 – Hold Pre-Application Dialogues with EPA, USACE, NMFS USFWS
- Step 3 - Develop and Submit Application: includes Governor's letter, Attorney General statement on legal sufficiency of proposed program; program description with staffing and funding levels; MOA with EPA RA, USACE, and other agencies as needed; copies of permit applications, regulations, etc.
- Step 4 – EPA Review and Approval: includes coordinating input from other federal agencies; publishing notice of application for public comment; holding public hearing, and documenting review and decision by the EPA RA

Current EPA Activities

- Working directly with states and tribes interested in pursuing assumption
  - Most active: Florida, Arizona, Indiana
  - Other interested states : AL, AK, TX, MD, MS, NE, NH, OR, SC, VA, WI
- Conducting a rulemaking to update assumption regulations following the Agency's Action Development Process (ADP); update will:
  - Clarify which waters are assumable, considering recommendations of FACA
  - Make technical updates such as allowing electronic reporting
  - Clarify other requirements, such as ESA requirements, enforcement provisions, partial assumption
- Developing a webpage as a resource for state and tribal agencies interested in assumption or currently administering an approved program

Rulemaking Schedule

Key Milestones:

- September 2018 (completed) – Early guidance meeting with AA and RAs
  - Confirmed issues in Analytic Blueprint to be addressed in rulemaking
- October/November 2018 - Initiate state and local government outreach and Tribal Consultation
  - In-person meeting(s) as well as webinar(s)
- October 2018 – Presentation on proposed rulemaking at NCAI Conference in Denver
- September 2019 - Propose revision to regulations; public comment period with additional outreach
- September 2020 – Final action

Questions?

- For further information, contact the OWCD 404(g) team members:
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