CWA § 404 (g): State and Tribal Dredged and Fill Permit Programs

2018 Region 7 ESTP Wetland Symposium

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USEPA Office of Wetlands, Oceans and Watersheds

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Why Are We Here?

- EPA is encouraging States and tribes to assume the Clean Water Act Section 404 Program (CWA §404(g))
  - Acting Administrator Wheeler letter – September 20, 2018
- Provide information on CWA §404(g)
  - What is assumption?
- EPA is updating the CWA §404(g) regulations
  - Seeking input on how regulations could be updated and modernized to increase interest in CWA §40(g)
  - Spring Regulatory Agenda – Final Rule 2020/21

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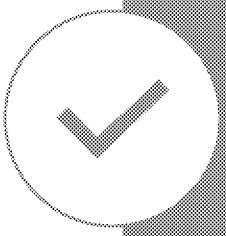
If they want to take it on
Arizona is taking it on – what does it mean for the tribes – corps retains permit authority on tribal lands
States need to consult with tribes and receive comments
If state can't address comments the state needs to send the permit along with comments and why they couldn't be address

What Is §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 dredge and fill permitting 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 withdrawal of assumed program (as necessary)

Why Assume the § 404 Program?

- Why assume? 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
  - Knowledge of and closer to the water resources
  - Consistency with other CWA programs implemented by tribes and states
- What barriers have states and tribes identified?
  - Lack of dedicated funding
  - Lack of clarity on assumption process and requirements including which waters are assumable



What Are the Assumption Requirements?

- **A tribal or state assumed program must be consistent with and <u>no less stringent</u> than the CWA and regulations.**
- Assumed **program must include**, but is not limited to:
  - Permitting procedures;
  - Administrative and judicial review procedures;
  - Regulating discharges into all assumed waters within the tribe or state's jurisdiction;
  - Regulation of at least the same scope of activities as the §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 – ESTP, technical assistance
  - Wetland Program Development Grants can fund capacity building
- **Evaluate and approve/disapprove assumption request**
  - Includes tribal consultation if appropriate
- **Oversight of assumed program**
  - Review and comment on permits – not waived
  - Review of modifications of assumed program
  - Withdraw program approval, if needed

What is the State's or Tribe's Role in Assumed Program?

- Tribe or state transmits to EPA notice of every permit application received
- EPA reviews permits where EPA review is not waived
  - Review and comment
  - EPA seeks comments from other agencies
- 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

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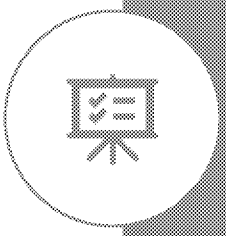
Explain what not waived permit means

Revising the 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 November 20 and 29, 2018
  - State input
    - Comment period November 12, 2018 – January 11, 2019
    - Meeting December 5, 2018, Washington, DC

Submitting Comments on §404(g) Regulation Revision

- **How to submit comments**:
  - Comments can be submitted to 404g-rulemaking@epa.gov
- **How to submit public comments**:
  - EPA will open a public comment period when the Agency publishes in the Federal Register any proposed revisions to the §404(g) regulations
  - We anticipate this being early calendar year 2020



For More Information

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EPA 404 assumption website: https://www.epa.gov/cwa404g
Email and pre-rule comments: 404g-rulemaking@epa.gov

Thank You!

Examples of Issues for Input

Issue #1: Clarifying 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."

Issue #1: Identification of "Retained" & "Assumed" Waters

- 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:
  - EPA appreciates any information that might support the Subcommittee majority's "default" 300 foot administrative line - Corps retains wetlands waterward of the line.
  - Should a different "default" value be considered?
  - Should there be no default distance in light of differing wetlands characteristics among different eco-regions?
- 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

- Would states and tribes be more likely to assume the program if partial assumption were allowed?
- How might partial assumption, if permissible, work in a manner that is easily understood by the regulated community and practical in its application?
- How would a partial assumption program differ from State Programmatic General Permits (SPGP)? Do these SPGPs offer the flexibility being sought under a partial assumption framework?

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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: Consistent With and No Less Stringent Than

Background: CWA requires assumed programs to issue permits consistent with the CWA §404(b)(1) Guidelines (40 CFR Part 230) which are no less stringent than federal permits (33 U.S.C. § 1370)

- How should tribes and states address aspects of the §404(b)(1) guidelines that refer to other federal laws? e.g., National Historic Preservation Act
- How tribes and states could ensure their §404 permits do not adversely affect threatened and endangered species since this is not a federal action?

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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.

Other Potential Issues Under Consideration

- **Process for Identifying assumable and retained waters**
  - The Subcommittee laid out a process for the how the state or tribe, the Corps, and the EPA would work together during assumption.
  - Are the ways to improve this suggested process or tailor it for the individual needs of tribes?
- **What practices** should be followed when it becomes necessary for the tribe or state to issue a permit to itself? e.g., a highway project
- **Mitigation,** there are many considerations including:
  - Should establishment and composition of interagency review teams (IRTs) differ in under assumed programs? If so, how?
  - How might existing mitigation banks containing assumed waters continue operation following assumption?

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These are other issues we are thinking about and we welcome any feedback.