CWA § 404(g): State and Tribal Assumption of Dredged or Fill Program

- Overview:
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  - EPA Goals
  - EPA's Roles
- Authorities and Requirements
  - Statute and Regulations
  - State and Tribal Program Requirements
- State and Tribal Permitting Process once Assumed
- Current Efforts
  - Providing Clarity on Assumable Waters - §404(g)(1) - FACA, Army Memo, Rule
  - Rule revision
  - State and Tribal Assumption Efforts
- Contacts

CWA § 404(g): Overview

- What is § 404(g): Congress amended CWA to allow states and tribes to assume administration of the dredge and fill permitting program (1977 and 1987)
  - This is not a delegated program; it is a state/tribal permit under state/tribal authority
- EPA Goals
  - Support state/tribal efforts to take lead in managing their aquatic resources; WPDGs
  - Facilitate assumption efforts - FACA (2015-2017); Wheeler Letter[1]; Ross Memo to RAs[2]
- EPA Roles
  - Prior to assumption - Work with states and tribes as requested to help them enhance capacity/capability and develop programs; Technical assistance and Wetland Program Development Grants
  - Evaluate and approve/disapprove assumption request
  - Oversight of assumed program - permit review; program changes

[1] Letter to governors. Wheeler, Andrew. September 20, 2018. https://www.epa.gov/cwa404g/letters-governors-revising-assumption-regulations-under-cwa-section-404
[2] Memo to Regional Administrators. Ross, David. May 2019.

Section 404 of the Clean Water Act requires a permit before dredged or fill material may be discharged into waters of the United States. Section 404(g) of the Clean Water Act gives states and tribes the option of assuming, or taking over, the permitting responsibility and administration of the Section 404 permit program for certain waters. Section 404 permits for those assumed waters would be issued by the state or tribe instead of the U.S. Army Corps of Engineers (Corps). The Clean Water Act provides that the Corps retains permitting authority in certain tidal waters and other specified waters currently related to the transport of interstate or foreign commerce.

CWA § 404(g): Authorities

- CWA § 404(g)
  - States may assume administration of the permit and enforcement program for navigable waters of the US except those used or susceptible to use as a means to transport interstate or foreign commerce and wetlands adjacent thereto
  - Corps retains § 404 permitting authority in non-assumed waters; Corps retains ~~all~~ Rivers and Harbors Act § 10 permitting authority in all waters.
- CWA § 404(h-l) and 40 CFR part 233 describe:
  - State and tribal program assumption requirements
  - Program administration and coordination requirements (e.g., permit review, enforcement)
  - Procedures and criteria for EPA approval and oversight of state/tribal program (e.g., 120 day approval, categories of permits EPA reviews)
  - Requirements for review and modification of state program (as necessary)

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State requirements: Part 233 subpart A (233.1 – 233.4), subpart B (233.11- 233.14)
Program approval: Subpart B (233.10, 233.15)
Revisions to state programs: 233.16
Program operation: Subpart D (233.30)
Federal oversight: subpart F (233.50-233.53)
RA approval w/ concurrence– delegation manual cpt. 2, 2-43

HW concurrence is with AA for Water, AA for OECA, and OGC

CWA § 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[1]
  - Regulate at least the same activities as federal program
  - Allow for public participation
  - Issue permits that comply with the 404(b)(1) Guidelines
  - Have adequate enforcement authority

[1] State or tribal program may have broader jurisdiction; however, the approved § 404 program and EPA oversight is limited to CWA jurisdictional scope

State/Tribal Permit Process - Once Assumed

- State/tribe transmits to EPA notice of every permit application received
- State/tribe sends permits to EPA where review is not waived, non-waived categories include:
  - 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 and EPA may agree to additional categories
- EPA may request to see an individual permit

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

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

State/Tribal Permit Process - Once Assumed cont.

- EPA has 90 days to provide comments, conditions or object to state/tribal permit
  - Within 30 days EPA indicates whether it intends to comment
  - Coordinates Corps, NMFS and USFWS comments
- State/tribe shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed
- State/tribe must either:
  - Resolve EPA conditions, concerns, or objection to a permit or
  - Deny a permit if it cannot resolve EPA's conditions/concerns/objection
- If the state/tribe neither resolves EPA's concerns or denies the permit, the permit transfers to the Corps for processing

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CWA § 404(g): Current Efforts

- Providing Clarity on Assumable Waters –
  - States and Tribes have requested EPA clarify which waters are assumable so they can:
    - Develop MOA with Corps identifying retained waters
    - Design program and determine staffing and funding levels
  - EPA convened Federal Advisory Committee to provide recommendations - 2015-2017
    - Majority recommendation was Corps was to base retained waters list on exiting RHA § 10 lists and to retain the portion of the adjacent wetlands waterward an agreed to administrative line
    - July 2018 Army memo to Corps supporting majority recommendation and directing Districts how to identify retained waters
  - EPA undertaking rulemaking to clarify the scope of retained waters as well as to clarify and modernize other sections of the regulations (proposal March 2020) - e.g., allow for electronic reporting
- Supporting state and tribal assumption efforts
  - Actively working with FL, AZ, OR, MN
  - Wetland Program Development Grants can be used to develop and pursue assumption

FACA had
10 state members, (AK, AZ,, MD, MI, MN, NJ , NH, OR, VA, WY)
2 tribal members (Fond du Lac and Midwest Alliance of Sovereign Tribes)
Industry: National Association of Home Builders , National Farmers Union,
Association of state wetland managers
National Wildlife Federation
Feds (EPA regional office, Corps, USFWS, EPA)
NACEPT Liaison (a local community official)

Assumable waters relationship to the CWR
CWR defines the jurisdictional scope of the CWA or the universe of waters subject to the CWA
Section 404(g)(1) identifies who is the permitting authority of the jurisdictional water

Contacts

- For EPA contacts in your region regarding assumption, see contacts on EPA 's website: https://www.epa.gov/cwa404g
- For information about the rulemaking effort contact:
  - Kathy Hurld (Hurld.Kathy@epa.gov) or Ruth Chemerys (Chemerys.Ruth@epa.gov)
- For information on this presentation contact:
  - Jeff Lapp (Lapp.Jeffrey@epa.gov)