State/Tribal Assumption of the CWA §404 Program

OVERVIEW FOR FLORIDA

U.S. EPA

EPA is always here and willing to assist those states interested in Assuming the CWA 404 program.
Really appreciate that you are talking to us in the beginning stages Early engagement helps ensure any request we receive is accompanied by a complete package and that EPA understands your program as we undertake any review.
Assumption is one of the best example of cooperative federalism, something Administrator Pruitt speaks of often.
EPA has always believed a strong working relationship with the states and tribes is the most efficient way to manage the nations aquatic resources.

I understand that Florida has looked into assumption before so you all are probably well on your way in putting together a package. However, those efforts were some time ago and Florida laws have changed and there are additional CWA regulations (such as the mitigation rule) so I encourage you to work with my staff as you move forward with this effort.

I have a brief PPT with the basics of the assumption requirements, process and EPA role in state CWA 404 programs I thought I'd go through if you are amenable.

I also want to cover an additional effort we are undertaking at State's requests to facilitate assumption – and that is to help clarify for which waters a state may assume 404 permitting authority and for which waters the USACE retains.

Overview*

* For this presentation: state refers to state or tribe

- Clean Water Act (CWA) §404 Assumption Authority - Statute and Regulations
- EPA's role in CWA §404 Assumption
- CWA §404 Assumption Criteria
- Assumption Request
- Assumption Approval Process
- EPA oversight
  - State Permit Process Once Assumed
  - Annual Reporting and Consistency
- Additional Activities: Assumable Waters Federal Advisory subcommittee
- Contact Information
- Additional Information

Assumption Authority

- CWA §404(g)
  - States may assume administration of the permit and enforcement program for certain waters
    - Assumable Waters subcommittee sending recommendations on how to clarify these waters to Administrator Pruitt
- CWA §404(h) and 40 CFR part 233
  - Lists state requirements for assumption
  - Lists EPA responsibilities: approval and oversight of assumed program
  - Lists requirements and process for review and modification of state program (as necessary)

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

CWA §404 Assumption Authority cont.

- CWA §404(h-l) and 40 CFR part 233 describe:
  - State and tribal program requirements
  - Procedures EPA follows 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

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EPA administers the 404(g) program, EPA is responsible for approving, and oversight of state and tribal programs.

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

MTDEQ has two WPDG grants:

96804601-2 MT DEQ FY14 WPDG Strategic Framework $254,264

96804701-2 MT DEQ FY14 WDPG Voluntary Restoration $254,264

Others:
968153-2 – MTNHP (MSU) $253,959
968154-2 – MTNHP (MSU) $254,258
968155 -2 – University of MT $126,716

CWA §404 Assumption Criteria

- State or Tribal programs must be:
  - consistent with and
  - no less stringent than the Act and implementing regulations
- State or Tribal programs must:
  - Have equivalent scope of jurisdiction*
  - Regulate at least the same activities
  - Provide for sufficient public notice and allow public participation
  - Ensure compliance with the CWA 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 to the Regional Administrator
- Complete assumption request package must 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

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

*FL and EPA can agree to an extension of the 120-day statutory timeframe for program review and approval

Assumption Approval Process cont.

- EPA Region 4 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
    - EPA headquarters concurrence -- Water, Enforcement and General Counsel
  - 120-day review period may be extended by the state and EPA
- Region 4 Administrator will approve or disapprove assumption request
  - 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

Concurrence: is with AA water, AA OECA and General Counsel

EPA Oversight

State Permit Process Once Assumed

- State transmits to EPA notice of every permit application received
- EPA reviews permits, where federal review is not waived
  - EPA coordinates USACE, USFWS, & NMFS 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
- If EPA's objection is not resolved, permit is transferred to USACE

EPA Oversight cont.

State Permit Process Once Assumed cont.

Waiver of review:

- MOA with EPA identifies categories of projects for which EPA review is waived
- EPA cannot 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 Oversight cont.

State Permit Process Once Assumed cont.

- Review of permits not waived.
  - EPA may require review of additional categories or all permits e.g.,
    - 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 ≥5 acres of freshwater wetlands or state open waters
      - are culvert enclosures of >100 feet with >200 cubic yards of fill
      - channelize >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 yds^3 of material

EPA reviews approximately the same percentage of state permits in MI and NJ as we review of USACE permits.

EPA Oversight cont.

Annual reports and consistency

- Program Annual Reporting
  - State submits draft annual reports
  - Draft annual report made available for public review
- Ensures state program remains consistent with the CWA and implementing regulations
  - Ensure new statutory or regulatory requirements adopted by the state e.g., Mitigation regulations
  - Review of any changes to the state program
- 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 is transmitting 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

Contacts

- Contact information:
  - EPA Region 4: Thomas McGill, E-mail:
  - EPA Headquarters: Kathy Hurld, E-mail: Hurld.Kathy@epa.gov
  - FACA on Assumable Waters:
    - DFO: Jake Strickler, E-mail: Strickler.Jacob@epa.gov
    - Technical: Kathy Hurld, E-mail: Hurld.Kathy@epa.gov

Additional Information

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)*

Complete Assumption Request Package

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

Complete Assumption Request Package

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 proposed to satisfy farm, forest and temporary mining roads exemption provisions

Complete Assumption Request Package

Attorney General's Statement Includes:

- 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
  - Note, not assuming authority over Indian lands does not constitute partial assumption

Complete Assumption Request Package

MOA with EPA Region 4 Administrator would include:

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

Complete Assumption Request Package

MOA with USACE would include:

- Description of waters of the U.S. over which USACE retains jurisdiction which are:
  - 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.
  - *Tidal waters and their adjacent wetlands*
- Procedures for transfer of pending permit applications upon program approval
- Identification of any USACE general permits to be assumed by FL
  - Including a plan for transferring responsibility
  - Identification of current enforcement cases

Navigable waters – defined 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 including wetlands adjacent thereto.