6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2020-0008; FRL–10008-96-OW]

Request for Comment on whether EPA's approval of a Clean Water Act Section 404 program is non-discretionary for purposes of Endangered Species Act Section 7 Consultation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice and request for comment.

SUMMARY: The Environmental Protection Agency (EPA) requests comment on whether the EPA should reconsider its current position that consultation under Endangered Species Act (ESA) section 7 is not required when the EPA approves a state or tribe's request to assume the Clean Water Act (CWA) section 404 dredged and fill permit program under the CWA. Comments in response to this document will be considered as the EPA reviews this position. If the EPA changes its current position, then the EPA would take the position that the Agency's decision as to whether to approve or disapprove a state's or tribe's request to assume the CWA section 404 permit program involves an exercise of discretion warranting consultation under ESA section 7. Section 7 consultation under the ESA would consequently apply to state and tribal requests to assume the CWA section 404 program and potentially subsequent program revisions, and the EPA would consult on its actions with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (hereafter referred to as "the Services") under the ESA as appropriate.

DATES: Comments may be submitted on or before [**insert date 45 days after date of publication in the Federal Register**].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. **EPA-HQ-OW-OW-2020-0008.** All documents in the docket are listed on the https://www.regulations.gov website. Although listed in the index, some information may not be publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, may not be placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through [HYPERLINK "https://www.regulations.gov"].

Instructions: All submissions received must include the Docket ID No. for this document. Comments received may be posted without change to [HYPERLINK "https://www.regulations.gov/"], including any personal information provided. Out of an abundance of caution for members of the public and our staff, the EPA Docket Center and Reading Room was closed to public visitors on March 31, 2020, to reduce the risk of transmitting COVID-19. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via https://[HYPERLINK "http://www.regulations.gov"] or email, as there is a temporary suspension of mail delivery to the EPA, and no hand deliveries are currently accepted. For further information on the EPA Docket Center services and the current status, please visit us online at [HYPERLINK "https://www.epa.gov/dockets"].

FOR FURTHER INFORMATION CONTACT: Kathy Hurld, Oceans, Wetlands, and Communities Division, Office of Water (4504-T), Environmental Protection Agency, 1200

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Pennsylvania Avenue, NW, Washington, DC 20460; telephone number: 202-564-5700; email address: [HYPERLINK "mailto:404gESAconsultation@epa.gov"].

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I. General Information

A. Does this action apply to me?

States and tribes that have assumed or are considering assuming the administration of the CWA section 404 dredged or fill permitting program, as well as regulated entities and members of the public may be interested in providing input on the issue described in this document.

B. What should I consider as I prepare my comments?

Submit your comments, identified by Docket ID No. EPA-HQ-OW-2020-0008, at [HYPERLINK "https://www.regulations.gov"] (our preferred method), or the other methods identified in the **ADDRESSES** section. Once submitted, comments cannot be edited or removed from the

docket. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be CBI or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (e.g., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit [HYPERLINK "https://www.epa.gov/dockets/commenting-epa-dockets"].

The EPA is temporarily suspending its Docket Center and Reading Room for public visitors to reduce the risk of transmitting COVID-19. Written comments submitted by mail are temporarily suspended and no hand deliveries will be accepted. Our Docket Center staff will continue to provide remote customer service via email, phone, and webform. We encourage the public to submit comments via https://[HYPERLINK "http://www.regulations.gov"]. For further information and updates on EPA Docket Center services, please visit us online at [HYPERLINK "https://www.epa.gov/dockets"].

The EPA continues to carefully and continuously monitor information from the Centers for Disease Control and Prevention (CDC), local area health departments, and our federal partners so that we can respond rapidly as conditions change regarding COVID-19.

II. Background

A. CWA Section 404 Dredged and Fill Material Permit Program

Section 404 of the CWA establishes a program to regulate the discharge of dredged or fill material into waters of the United States, which includes wetlands. Activities in waters of the United States regulated under this program include, for example, fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports), natural resource extraction projects, and wetland restoration efforts. CWA section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from regulation under CWA 404(f). The substantive and procedural requirements applicable to CWA section 404 are detailed in the EPA's regulations at 40 CFR parts 230 through 233 and the regulations of the U.S. Army Corps of Engineers at 33 CFR parts 323 through 338. Proposed discharges are regulated through a permit process implemented by the U.S. Army Corps of Engineers or authorized states and tribes.

B. State and Tribal Assumption of CWA Section 404

In amendments to the CWA in 1977 and 1987, Congress gave states and tribes the ability to assume responsibility for part of the CWA section 404 permit program. The amendments require the EPA to approve or deny a state's or tribe's request to assume the permit program in lieu of the U.S. Army Corps of Engineers, to oversee operation of the assumed program, and to coordinate federal review of state or tribal permit actions. 33 U.S.C. 1344(g)-(i). To assume the CWA section 404 program, states or tribes must develop a dredged and fill material discharge permit program consistent with the requirements of the CWA and implementing regulations at 40 CFR part 233 and submit a request to assume the program to the EPA. States or tribes must have a program that is consistent with and no less stringent than the requirements of the CWA and implementing regulations. 40 CFR 233.1(d). The assumed program must include, but is not limited to, the following provisions laid out in the statute and program regulations: regulation of

discharges into all assumed waters within the state or tribe's jurisdiction; regulation of at least the same scope of activities as the CWA section 404 program; permitting procedures; permit issuance consistent with the environmental review criteria known as the CWA section 404(b)(1) Guidelines, applicable CWA section 303 water quality standards, and applicable CWA section 307 effluent standards and prohibitions; administrative and judicial review procedures; public notice and participation requirements; compliance and enforcement authorities as specified in the regulations; information collection requirements; and coordination procedures with Federal agencies and adjacent states and tribes. 40 CFR part 233, subparts C through F; *see* 33 U.S.C. 1344(h).

Section 404(h)(2) of the CWA states that if the Administrator of the EPA determines that a state or tribe that has submitted a program under section 404(g)(1) has the authority set forth in section 404(h)(1) of the CWA, then the Administrator "shall approve" the state or tribe's program request to transfer the section 404 permitting program. Under CWA section 404(h)(3), if the Administrator fails to make a determination with respect to any program request submitted by a state or tribe within 120 days after date of receipt of the request, the program shall be deemed approved.

C. Consultation under the ESA and State and Tribal Assumption under CWA Section 404

The ESA section 7 directs each Federal agency to ensure, in consultation with the Services, that "any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of" listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. 1536(a)(2). If the Federal agency determines that an action will not affect listed species or designated critical habitat, ESA section 7 consultation is not

required. In addition, the ESA regulations at 50 CFR 402.03 state that section 7 applies to "all actions in which there is discretionary Federal involvement or control."

In *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007), the United States Supreme Court held that because the transfer of CWA National Pollutant Discharge Elimination System (NPDES) permitting authority to a state "is not discretionary, but rather is mandated once a State has met the criteria set forth in section 402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger section 7(a)(2)'s consultation and no-jeopardy requirements." 551 U.S. at 673. The Supreme Court held that "[w]hile EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out section 402(b)'s enumerated statutory criteria, the statute clearly does not grant it the discretion to add an entirely separate prerequisite to the list. Nothing in the text of section 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application." *Id.* at 671.

The EPA has previously taken the position that the Supreme Court's rationale in *National Association of Home Builders* applies to approval of a state's or tribe's dredged and fill permit programs under section 404(h) of the CWA. On December 6, 2010, the Environmental Council of the States (ECOS) and the Association of State Wetland Managers, Inc. (ASWM), sent a letter to the EPA asking whether the EPA must conduct an ESA section 7 consultation prior to approving or disapproving a state or tribe's section 404 program request. *See* Docket ID No. EPA-HQ-OW-2020-0008. The Agency responded to ECOS and ASWM in a December 27, 2010 letter ("Letter to ECOS and ASWM"), *see* Docket ID No. EPA-HQ-OW-2020-0008, stating that, as in the CWA section 402(b) context, when considering a state or tribal CWA section 404 program request, the EPA is only permitted to evaluate the specified criteria in CWA section 404(h) and does not have

discretion to add requirements to the list in CWA section 404(h), including considerations of endangered and threatened species through ESA section 7 consultation with the Services.

The EPA stated in the 2010 letter that although there are some differences between CWA sections 402 and 404, the EPA's position was that the Supreme Court's reasoning in the *National Association of Home Builders* case applies to the EPA's approval of a CWA section 404(g) permitting program. Section 404(h)(2) of the CWA states that if the Administrator determines that a state program submitted under CWA section 404(g)(1) has the authority set forth in section 404(h)(1) of the CWA, then the Administrator "shall approve" the state's application to transfer the CWA section 404 permitting program. The 2010 letter thus concluded that this action is non-discretionary and ESA consultation is not required. The EPA further noted that although ESA section 7 consultation is not required, a number of important safeguards exist in the CWA and the EPA's regulations which work to ensure that concerns about listed species and designated critical habitat are addressed in approved CWA section 404(g) programs. State and tribal programs must issue permits that comply with the CWA section 404(b)(1) Guidelines (40 CFR 233.20(a)) which include the requirement that a permit may not be issued that "[j]eopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of … critical habitat …." 40 CFR 230.10(b)(3). Additionally, permits which have "[d]ischarges with reasonable potential for affecting endangered or threatened species as determined by the Fish and Wildlife Service" must be sent to the EPA for review. The EPA shares these permits with the U.S. Army Corps of Engineers and the Services during this review.

In July 2019, the EPA received a request from the Florida Department of Environmental Protection (FDEP) asking the EPA to engage in an ESA section 7 consultation with the Services

in connection with the EPA's initial review of a Florida's request to assume the CWA section 404 program. FDEP provided a white paper contending that ESA section 7 consultation is required in the CWA section 404 assumption context because of the unique statutory text and legislative history found in CWA section 404, which, in the FDEP's view, differ in critical respects from other state delegation programs administered by the EPA where ESA section 7 does not apply.

FDEP made a number of points in its white paper. *See* Docket ID No. EPA-HQ-OW-2020-0008. FDEP noted that, as a preliminary matter, the EPA's approval or disapproval of state assumption of the CWA section 404 program is an "action" for purposes of ESA section 7(a)(2). The Services' regulations governing ESA consultations expressly define "action" to include "the promulgation of regulations," 50 CFR 402.02, and the EPA's approval of state assumption is undertaken through rulemaking. FDEP then emphasized that the key question for ESA section 7 purposes is, as explained in *National Association of Home Builders*, whether the action is "discretionary" with the agency. To trigger Section 7 consultation, the statute must give the agency authority to "consider the protection of threatened or endangered species as an end in itself" in making the relevant decision. *National Association of Home Builders*, 551 U.S. at 671. In contrast to CWA section 402(b), FDEP noted that CWA sections 404(g)(2) and (3) expressly require that, when a state or tribe applies for assumption, the EPA must provide "the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service" an opportunity to comment on a state application for assumption of the CWA section 404 program. Relatedly, CWA section 404(h)(1) requires the EPA, in making a determination of whether to approve the state or tribal program, to "tak[e] into account any comments submitted by … the Secretary of the Interior, acting through the Director of [FWS]" under CWA section 404(g). The

FWS is responsible for the implementation of the ESA and its consultation requirements. Thus, FDEP concluded that CWA section 404(g) requires the EPA to receive and consider input specifically focused on the protection of threatened and endangered species.

Second, FDEP noted that CWA section 404(h)(1) requires the EPA, in deciding whether to approve state or tribal assumption of the CWA section 404 program, to determine whether the state has authority "[t]o issue permits which, …apply, and assure compliance with, any applicable requirement of this section, including, but not limited to, the guidelines established under section (b)(1) of this section …." The CWA section 404(b)(1) Guidelines, codified at 40 CFR part 230, provide that: "No discharge of dredged or fill material shall be permitted if it … [j]eopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of [critical] habitat." 40 CFR 230.10(b)(3) (emphasis added). By requiring the EPA to take into account the views of the Services and by incorporating consideration of "jeopardy" to species and "adverse modification" of critical habitat via the CWA section 404(b)(1) Guidelines, FDEP concluded that CWA sections 404(g) and (h) expressly require the EPA to determine whether the state or tribe has adequate authority to apply and assure compliance with the substantive requirements of the ESA. FDEP pointed out that neither requirement is part of the EPA's CWA section 402(b) delegation decision.

Unlike under CWA section 402(b), FDEP viewed the EPA as possessing discretion under CWA sections 404(g) and (h) to "consider the protection of threatened and endangered species as an end in itself," *National Association of Home Builders*, 551 U.S. at 671, in determining whether to approve a state's application to assume the CWA section 404 program. FDEP in its

white paper cited excerpts from the legislative history and case law that it viewed as supporting its position that the EPA's decision as to whether to approve or disapprove state CWA section 404 programs is "discretionary" within the meaning of 40 CFR part 402.

III. Request for Comment

The EPA is seeking public comment regarding whether to reconsider its position that it lacks discretionary involvement or control within the meaning of 50 CFR 402.03 when acting on a state or tribal application to administer the CWA section 404 program to trigger the requirements of section 7 of the ESA, based on the positions articulated in the FDEP white paper, as well as any other considerations that may be relevant to this issue, and consequently whether the EPA can and should engage in one-time ESA section 7 consultation with the Services in connection with the EPA's initial review of a state or tribal request to assume the CWA section 404 program.

To aid in its consideration of this issue, the EPA is taking comment as to whether, and on what basis, the EPA's approval of a state or tribe's program under CWA section 404(h) is a discretionary agency action for the purpose of ESA compliance. Specifically, the EPA seeks comment on whether the EPA should reconsider the position articulated in its 2010 Letter to ECOS and ASWM that in deciding whether to approve or disapprove a state's or tribe's CWA section 404 program, the EPA lacks discretion to consider the protection of threatened or endangered species, and therefore that this decision does not trigger ESA section 7 consultation. The EPA seeks comment on the question as to whether the Agency should, alternatively, adopt the position articulated in the FDEP white paper that the EPA's decision as to whether to approve or disapprove a state or tribe's CWA section 404 program provides the EPA with

discretion warranting consultation under ESA section 7. The EPA requests commenters' views as to the legal viability of this potential interpretation as well as the programmatic implications of this interpretation, including its implications for existing state CWA section 404 programs and for permit applicants and permittees.

The EPA's docket for this document includes a number of background documents, including the 2010 Letter to ECOS and ASWM, the FDEP white paper, excerpts from the legislative history of CWA sections 404(g) and (h), and other documents to assist commenters as they consider the EPA's request for comment.

David P. Ross,
Assistant Administrator,
Office of Water.

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