ALASKA MEETING ON CWA §404 ASSUMPTION

August 31, 2021

2:30 pm– 4:00 pm Pacific Time

CWA §404 ASSUMPTION: WHAT AND HOW

Yvonne Vallette-EPA

CWA §404 ASSUMPTION: WHAT & HOW

- CWA § 404 and Assumption Authority
- States Views on Benefits and Challenges to Assumption*
- EPA's role
- CWA § 404 vs § 402
- Requirements for CWA §404 Assumption
  - Assumption package
  - The Assumption approval process

*2007 EPA survey http://www.aswm.org/pdf_lib/hurld.pdf, and updated with EPA efforts

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CWA §404 ASSUMPTION AUTHORITY

- CWA §404
  - A permit is required before dredged or fill material may be discharged into waters of the United States.
- CWA §404(g)
  - States and tribes may assume, or take over, the permitting responsibility and administration of the CWA §404 permit and enforcement program for certain waters.
  - States and tribes administer the program under their statutes and regulations.
- CWA §404(h) and 40 CFR part 233 lists:
    - State/tribal requirements to assume and administer program
    - EPA responsibilities: approval and oversight
    - Requirements for review and modification of state program
- Program approval
  - The EPA Regional Administrator (RA) approves state program with HQ concurrence.

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STATE VIEWS ON BENEFITS*

- State programs can have broader jurisdiction and authorities
  - Scope of waters
  - Activities regulated
  - Incorporation of other authorities
- States are generally more familiar with
  - The resource
  - Local concerns, issues and needs
- State has better information on the resources
  - Monitoring, data collection
- Share responsibility with federal government
  - Adding staff and resources
- State can streamline permitting
  - E.g., with other permit processes

*2007 EPA survey http://www.aswm.org/pdf_lib/hurld.pdf

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STATE VIEWS ON CHALLENGES

- Scope of assumed waters
  - Definition of retained waters – Federal Advisory Committee – 2015-2017
  - Jurisdiction – impact on viability of state and tribal program e.g., the 2020 Navigable Water Protection Rule (less CWA jurisdiction)
  - No partial or phased assumption
- Costs – funding and staffing
  - Lack of dedicated implementation funds – EPA cooperative agreement identifying state funding mechanisms
  - No additional 106 funding
- Inconsistencies between state and federal programs - definitions, elements
  - EPA undertaking rulemaking to provide clarity on requirements and help ensure state programs are consistent
- Protection of regarding threatened and endangered species.
  - ESA consultation – 2010 letter to ECOS and ASWM; 2020 Policy Memo
  - State funding and capacity to implement program

Note: blue text is an action EPA has undertaken to address challenges

EPA'S ROLE IN CWA §404 ASSUMPTION

- Prior to assumption
  - Work to enhance state capacity
  - Wetland Program Development Grants
  - Provide technical advice
- Review and approve/disapprove state assumption request
- Oversight of assumed program
  - Coordinate federal review of non-waived permits
  - Review annual report and coordinate with state on enforcement
  - Review and approve modifications of state program
  - Withdraw program approval, if needed

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CWA §404 VS §402

- Scope:
  - Currently no partial program approval or phasing in CWA §404 assumption (allowed in §402)
  - Corps still retains CWA §404 permitting for some waters of the U.S. like some Section 10 (RHA) waters/navigable waters
- Approval:
  - MOA with EPA and MOA with Corps
  - Corps, USFWS, and NMFS comment on request
- Oversight:
  - Includes coordinating Corps, USFWS and NMFS input
  - If EPA maintains an objection to a permit, permit processing and decision transferred to Corps

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REQUIREMENTS FOR ASSUMPTION

- A state program must be:
  - Consistent with and
  - No less stringent than the Act and implementing regulations

- The approved state program must have:
  - Equivalent scope of jurisdiction (NWPR/WOTUS/New Rule?)
  - Activities regulated are those that are subject to CWA §404
  - Public participation process
  - Consistency with the §404(b)(1) Guidelines
  - Adequate enforcement authority

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REQUIREMENTS FOR ASSUMPTION: ASSUMPTION PACKAGE

- Includes:
  - Letter from Governor
  - Complete program description
  - Attorney General's statement
  - MOA with EPA Regional Administrator
  - MOA with Secretary of USACE
  - All applicable state statutes and regulations administering the program

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REQUIREMENTS FOR ASSUMPTION: PROGRAM DESCRIPTION

- Scope and structure of program
  - Jurisdiction
  - Activities regulated
  - Anticipated coordination
  - Permit review criteria
  - Scope of permit exemptions
- Procedures for permitting, administrative and judicial review
- Structure and organization of state agencies administering the program
- Funding and staffing levels

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REQUIREMENTS FOR ASSUMPTION: PROGRAM DESCRIPTION (CONT.)

- Anticipated workload
- Copies of permit application forms, permit forms and reporting forms
- Compliance evaluation and enforcement programs
- Clarification of waters under the state and those under the Corps' jurisdiction
- BMPs proposed to satisfy exemption provisions

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REQUIREMENTS FOR ASSUMPTION: ATTORNEY GENERAL'S STATEMENT

- Citations of 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
- If applicable, an analysis of authority over Tribal lands e.g., lands owned by the Alaska Native Villages/Corporations
  - Not seeking such authority does not constitute partial assumption

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REQUIREMENTS FOR MOA WITH EPA

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

REQUIREMENTS FOR MOA WITH CORPS

- Description of waters of the United States over which Corps retains permitting responsibility:*
  - Tidal waters and their adjacent wetlands (adjacent wetlands waterward of agreed to administrative line)
  - Waters presently (or with reasonable improvements) used to transport interstate or foreign commerce and their adjacent wetlands – (AKA-some Navigable or Section 10 waters under the Rivers and Harbor Act)
- Procedures for transfer of pending permit applications to the state/tribe
- Identification of Corps general permits to be assumed by the state/tribe
  - Including a transfer plan

* ASA(CW) Guidance to Corps of Engineers - Assumable Waters outlines how retained waters are to be identified.

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ASSUMPTION APPROVAL PROCESS

- Assumption Package submitted to EPA
  - EPA has 120 days to approve or disapprove the state/tribe request*
  - 30-day EPA review for package completeness
    - Complete; state/tribe is notified
    - Incomplete; package is returned

- Review period includes:
  - Review for completeness and notification package is complete
  - Corps, USFWS and NMFS review
    - Comments due to EPA within 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
  - Tribal consultation if appropriate (E.O. 13175)
  - ESA, NHPA and other consultations as appropriate

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ASSUMPTION APPROVAL PROCESS (CONT.)

- RA approves/disapproves request <120 days*
  - If approved: RA notifies the State/Tribe and Corps publishes notice in the Federal Register
  - If not approved: RA notifies the state/tribe and lists revisions needed to obtain approval
- Upon approval
  - RA publishes notice in the Federal Register
  - Makes response to comments document publically available through final FR notice or docket
  - Direct response to Corps, USFWS and NMFS
  - Concludes any consultations

* State/Tribe and EPA can agree to an extension of the 120-day statutory timeframe for program review and approval.

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STATE/TRIBE ASSUMED CWA §404 PROGRAM & EPA OVERSIGHT

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STATE 404 PERMIT PROCESS

- State transmits notice of every permit application received to EPA
  - But EPA primarily reviews permits identified per the MOA
- State shall not issue a CWA §404 permit to which EPA has objected or placed permit conditions
  - Until all of EPA's concerns are addressed
- All permits must be consistent with the environmental review criteria (i.e., 404(b)(1) guidelines)
- State shall maintain a compliance and enforcement program

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EPA OVERSIGHT OF ASSUMED PROGRAM

- Review of permits not waived in MOA
  - EPA, Corps, USFWS and NMFS provided opportunity to review public notice
  - EPA has final decision to comment, object or require conditions on a state permit
    - <30 days EPA notifies state of EPA's intent to comment, or retain right to comment
    - <90 days EPA provides comments
- Program Review and Evaluation
  - Ensure program consistency
  - Review annual reports
    - Make available for public review
- Enforcement

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EPA OVERSIGHT: PERMIT REVIEW

- MOA with EPA identifies categories of projects for which EPA review is waived.
  - EPA cannot waive review of:
    - Draft general permits
    - Discharges with reasonable potential to affect threatened or 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

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EPA OVERSIGHT: PERMIT REVIEW (CONT.)

- EPA may require review of additional categories or all permits. Some examples include:
  - In NJ, EPA reviews permits for filling >5 acres of freshwater wetlands
  - In FL, EPA reviews permits for discharges impacting compensatory mitigation sites ; and impacting sites that are owned or managed by federal entities, and activities by an applicant that is a federal entity.

- EPA's review, and any objection, shall be based on:
  - CWA
  - CWA 404 implementing regulations
  - 404(b)(1) Guidelines

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EPA OVERSIGHT: PERMIT REVIEW (CONT.)

- If EPA objects to a permit, or requires permit conditions, the state shall either:
  - Request a public hearing*;
  - Issue a revised permit satisfying EPA's objection or permit conditions < 90 days; or
  - Notify EPA of intent to deny the permit < 30 days

- If the state neither satisfies EPA's concerns nor denies the permit, the Corps shall process the application

* EPA shall conduct a public hearing when requested by the state or if warranted by significant public interest.

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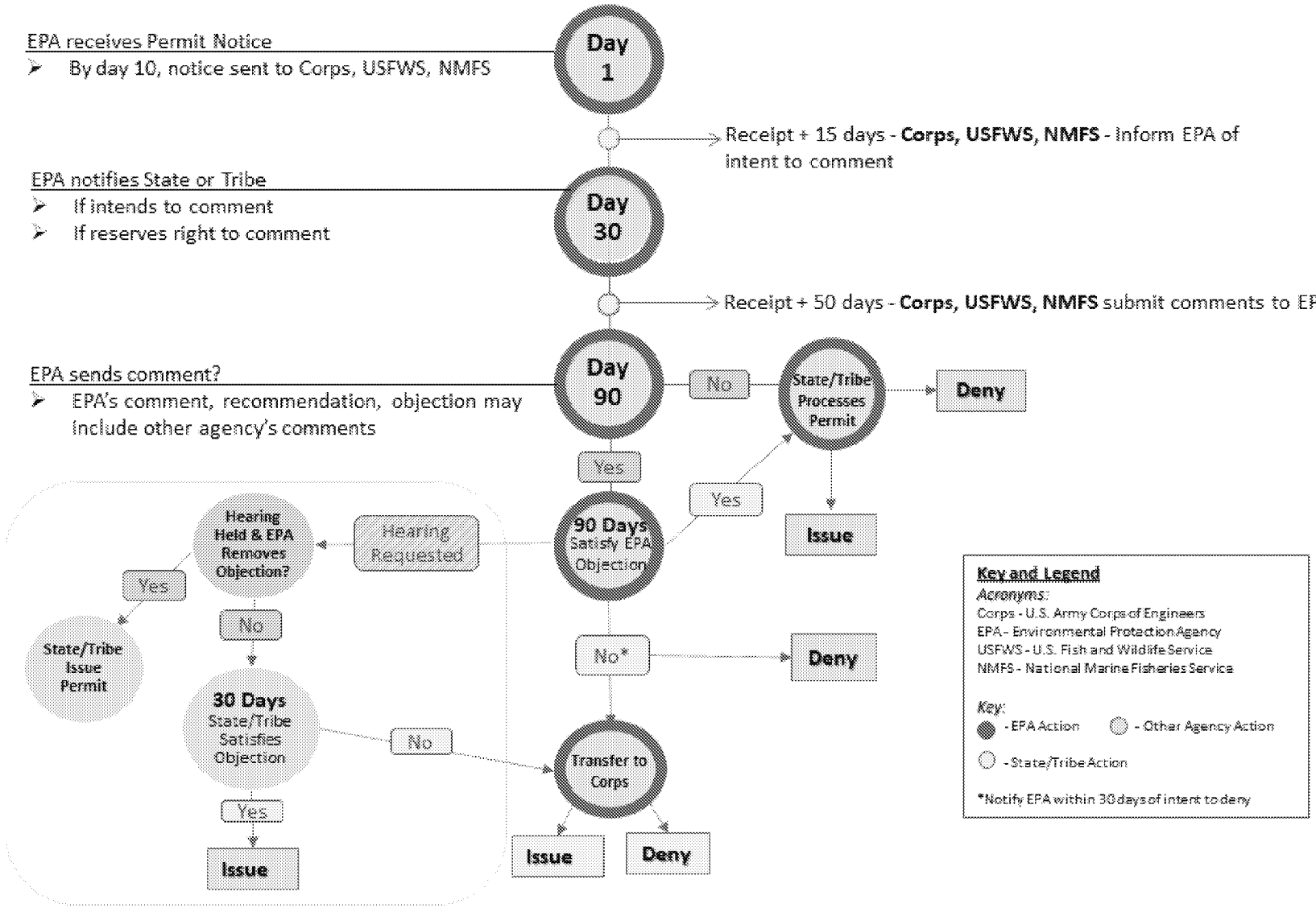
EPA Review of State/Tribe Permit Flow Chart



EPA OVERSIGHT: ANNUAL REPORTS

- Program reporting
  - State submits draft annual reports:
    - EPA evaluates state's administration of program
    - Identifies concerns
    - Recommends resolutions
  - Draft annual report made available for public review by EPA
  - EPA publishes notice of availability of final report

EPA OVERSIGHT: ENFORCEMENT

- State is the lead for enforcement and compliance
  - EPA takes collaborative approach
- CWA §309 authorizes EPA to take separate actions for penalties
  - State penalties must be comparable to what EPA would have sought
- CWA §404(n) states that nothing in §404 (including assumption) limits EPA's authority to take action pursuant to CWA §319
  - Includes orders, administrative actions, civil actions and criminal actions

CWA §404 RULEMAKING UPDATE

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CWA §404 ASSUMPTION REGULATION

- CWA §404(g): Recent Activities
  - In 2018, the EPA conducted tribal consultation and held pre-proposal input meetings and webinars with tribes and states.
  - States and tribes provided written pre-proposal input in early 2019 for the EPA's consideration.

- Status and schedule for the §404(g) rulemaking:
  - The EPA is currently developing options for the rulemaking.
  - The EPA plans to issue a proposed rule in spring of 2022, and a final rule in 2023.

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EPA POINTS OF CONTACT

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