DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
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30 JUL 2018

MEMORANDUM FOR COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS

SUBJECT: Clean Water Act Section 404(g) — Non-Assumable Waters

1. Congress enacted Section 404(g) of the Clean Water Act (CWA) to allow states and tribes to take an active role in the permitting of dredge and fill operations within their jurisdiction of governance, with one exception: the Corps must retain exclusive permitting authority over certain waters. The waters over which the Corps must retain permitting authority, referred to as non-assumable or "retained" waters, are "... 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 ..." 33 U.S.C. § 1344(g). The Corps provides to states and tribes that are seeking to administer a dredge and fill program under CWA Section 404 an identification of these waters over which the Corps would retain authority.

2. In 2015, the Environmental Protection Agency (EPA) established the Assumable Waters Subcommittee within the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and develop recommendations regarding the meaning of Section 404(g) and thus the scope of waters and adjacent wetlands that may be assumed by a state or tribe. The NACEPT Subcommittee issued a Final Report in May 2017.[1] Though many states have shown interest in assuming the Section 404 program, only two states have done so. The Subcommittee report cited a number of possible reasons why so few states have assumed the Section 404 program, one of which may be the difficulty in ascertaining those waters that are retained waters. The Subcommittee noted that this area of uncertainty has stifled the interests of several states in particular in recent years. Further, I have personally heard from state officials who – but for this uncertainty – would pursue Section 404(g) assumption on behalf of their state. While EPA intends to address the Subcommittee report and clarify the waters for which a state or tribe could assume responsibility as well as the procedures related to state assumption under Section 404(g) in a rulemaking process, assumption of the Section 404

[1] The Army has not previously taken any formal position on the recommendations contained in this report.

program by states and tribes is not dependent upon and need not await the completion of any such rulemaking..

3. The Subcommittee's majority – formed of all 21 members aside from a Corps technical representative – recommended a policy under which, when a state or tribe program is approved by EPA under Section 404(g), the waters retained within the Corps' permitting authority would be limited to waters regulated under Section 10 of the Rivers and Harbors Act of 1899 (RHA), less those waters that are jurisdictional under the RHA due solely to historical navigability and with the addition of wetlands adjacent to other retained waters.[2] For ease of implementation, the Subcommittee's majority recommended using existing RHA Section 10 lists of waters as a starting point, which could be amended by the Corps as appropriate following consideration of the RHA case law and relevant factors set forth in the RHA Section 10 regulations. The majority also recommended that the agencies clarify that the Corps would retain administrative authority over all wetlands adjacent to retained navigable waters landward to an administrative boundary agreed upon by the state or tribe and the Corps. The majority's discussion provides considerations that may be useful to the state or tribe and the Corps as they evaluate the appropriate administrative boundary suited to the particular circumstances of the state or tribe, including state or tribal regulatory authority, topography, and hydrology.

4. I have reviewed the Subcommittee's findings and recommendations and believe that the majority's recommendations reflect an appropriate apportionment of responsibility between the states and tribes and the Federal government for the regulation of waters under a program administered by a state or tribe pursuant to Section 404(g). In my view, implementing Section 404(g) in this manner adheres to the language of the statute and the intent of Congress when enacting this provision.

5. Therefore, subject to further proceedings by EPA and the Corps, it is appropriate for the Corps to retain the following categories of waters for permitting under Section 404(g) of the Clean Water Act:

a. waters that are jurisdictional under Section 10 of the Rivers and Harbors Act of 1899, *provided that* —

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[2] The Assumable Waters Subcommittee report noted that the scope of retained waters defined by the parenthetical of Section 404(g)(1) is similar to the scope of Section 10 waters under the RHA, except for the deletion of historical-use-only waters and the addition of adjacent wetlands.

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- retained waters include tidal waters shoreward to their mean high water mark, or mean higher high water mark on the west coast, and

- retained waters do not include those waters that qualify as "navigable" solely because they were "used in the past" to transport interstate or foreign commerce; and

b. wetlands adjacent to waters retained under a. above, landward to an administrative boundary agreed upon by the state or tribe and the Corps.

For ease of implementation and to provide transparency to states, tribes and the public, the Corps will use existing RHA Section 10 lists of waters as a starting point, which could be amended by the Corps as appropriate consistent with applicable regulations and case law.

6. Nothing in this memorandum affects the scope of "waters of the United States" under the CWA, as this memorandum addresses only the division of responsibility between the Corps and a state or tribe that assumes the Section 404(g) program. Further, this memorandum is not intended to address future decisions to be made by EPA under Sections 404(g) or 404(h). Any final decisions pertaining to a specific application for state or tribe assumption under 404(g) will be made at a later time and may be made case-by-case to take into account context-specific information. No rights are created and no obligations are imposed through this guidance memorandum.

R. D. James
Assistant Secretary of the Army
(Civil Works)

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