



January 28, 2018

The Honorable David Ross
Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Assistant Administrator Ross:

The Association of State Wetland Managers (ASWM) and the Association of Clean Water Administrators (ACWA) thank you for the opportunity to attend as observers during the Clean Water Act 404(g) Rulemaking Pre-Proposal State Engagement Meeting held on December 6, 2019 in Washington, D.C. We look forward to similar engagement opportunities in the future as the new rulemaking is developed and proposed.

ASWM and ACWA provide the following **comments in response to the Agency's plan for the first comprehensive revision to the existing Section 404(g) regulations as posted in the [2018 Spring Regulatory Agenda](#)**.

Our research has shown that historically while at least twenty-six states have explored assumption over time, states have commonly rejected pursuing assumption of the Section 404 program due primarily to: 1) a lack of resources to effectively implement a state regulatory program that is fully consistent with Section 404 program requirements (including a lack of federal funding to assist in achieving federal CWA goals, either during a transition phase or permanently), 2) uncertainty over the extent of jurisdictional waters that can be assumed, and 3) a need to significantly modify existing state regulatory programs to ensure federal consistency.

We encourage EPA to consider these issues during the rulemaking process, as well as the following: 1) additional uncertainty about assumable waters in response to ongoing Water of the United States proposed rulemaking; 2) limited state and tribal experience with assumption for other states and tribes to build on; 3) the possibility of allowing partial assumption; and 4) the impact of assumption on consistency with federal statutes such as the Endangered Species Act, National Historical Preservation Act, etc., considerations. Most importantly, we strongly encourage EPA to continue an engaged stakeholder process with states and tribes. We have raised issues 1 through 4 several times over the last thirty-five years.

Current efforts to change the definition of Waters of the United States (WOTUS) are intended to reduce the extent of federal jurisdiction, and by extension, would reduce the extent of waters that would be assumable by states/tribes under Section 404 assumption. Such a reduction could

affect the feasibility of state Section 404 assumption. As federal jurisdiction and the extent of assumable waters contracts, the benefits of assumption in terms of overall regulatory efficiency may not be enough to outweigh the state/tribal costs of developing, administering and maintaining a program that is fully consistent with Section 404 program requirements. This aspect should be considered in potentially revising the regulations on assumable waters.

We have found peer-to-peer sharing and working examples from other state and tribal models to be a valuable tool for helping states and tribes develop new programs and capacity. However, while two states (New Jersey and Michigan) have assumed the Section 404 program, their programs alone likely cannot adequately serve as models for other states to follow. Rulemaking should be completed in conjunction with the development of technical assistance for states and tribes on all phases of the assumption process.

Additionally, many states and tribes have expressed interest in partial assumption. We support exploring partial assumption, particularly in the context of enabling states and tribes to phase in an assumption program, by allowing portions of the program to come “online” over time, rather than all at once.

We are pleased that EPA convened a national state stakeholder meeting in Washington, D.C., on December 6, 2018, which included facilitated discussion and breakout sessions designed to solicit and capture state input. We believe that any 404(g) rulemaking efforts should continue to actively engage states and tribes. The opportunity to provide regular, meaningful comments and the incorporation of state input into a revised, proposed rule has the significant likelihood of increasing implementability of a final rule at the state and tribal level, as well as achievement of the intended outcomes of Section 404(g) of the Clean Water Act.

We appreciate the opportunity to respond to the ANPRM. While these comments have been prepared with input from the ASWM and ACWA Board of Directors, they do not necessarily represent the individual views of all states and tribes; we therefore encourage your full consideration of the comments of individual states and tribes and other state associations.

We request and look forward to the opportunity to comment on any future proposals to revise the Section 404(g) Rule.

Sincerely,



Marla Stelk
Executive Director
ASWM



Julia Anastasio
Executive Director & General Counsel
ACWA