

EPA Issues Proposed Rule Updating CWA 404(g) Regulations Governing State and Tribal Assumption

On August 14, 2023, the EPA published a proposed rule, [Clean Water Act Section 404 Tribal and State Program Regulation](#) (Proposed Rule), “to respond to longstanding requests from Tribes and States to clarify the requirements and processes for assumption and administration of a CWA section 404 permitting program for discharges of dredged and fill material.” The Proposed Rule represents a comprehensive update to the regulations governing tribal and state assumption of permitting authority under CWA section 404(g). The major provisions of the Proposed Rule provide clarity and changes over several aspects of state and tribal assumption, including: (i) program assumption requirements; (ii) retained waters, including adjacent wetlands; (iii) mitigation; (iv) the effective date of assumption; (v) judicial review and rights of appeal; (vi) permitting for long-term projects; (vi) tribes affected as downstream states; (vii) compliance evaluation and enforcement; and (viii) withdrawal procedures.

In its announcement, EPA has expressed that it is accepting public comments addressing various aspects of the Proposed Rule. Comments must be received on or before **October 13, 2023**. Public comments are available at EPA Docket ID No. [EPA-HQ-OW-2020-0276](#). Additionally, EPA has announced that it will hold a virtual public hearing on **September 6, 2023, at 3:30 pm (ET)**.

Summary of Proposed Rule Provisions

- **Program Assumption Requirements:** The Proposed Rule would revise current requirements for the program descriptions that states and tribes must submit to EPA when requesting approval for section 404 assumption. Specifically, the Proposed Rule would clarify that:
 1. The description of funding and staff devoted to program administration, compliance evaluation, and enforcement must demonstrate that the tribe or state is able to carry out the regulatory requirements of 40 CFR 233 subparts C through E.
 2. The state or tribe must provide staff position descriptions and qualifications, program budget and funding mechanisms, and other information a tribe, state, or EPA considers relevant.
 3. Program descriptions must include *all* criteria listed in 40 CFR 233.11 – “the extent of the state’s jurisdiction; scope of activities regulated; anticipated coordination; scope of permit exemptions, if any; and permit review criteria.”
 4. If more than one tribal or state agency will be administering the program, the program description must address inter-agency coordination.

In its announcement, EPA requests comments on all aspects of the proposed revisions. Specifically, the agency requests comments addressing:

- Whether to make clarifying revisions to other provisions in 40 CFR 233.11 to ensure that EPA can verify that tribes and states are equipped to administer the program;
- What additional types of information in sec. 233.11 should be provided; and

- Examples of particular metrics that tribes and states could use to determine funding and staff sufficiency and whether to specify any such metrics in the Proposed Rule.
- **Retained Waters:** EPA’s announcement recognizes that tribes and states have expressed to EPA the need for further clarification regarding which waters may be assumed under sec. 404(g) and which waters are retained by USACE. The announcement discusses a 2014 letter from state associations – including ACWA – which “asked EPA to clarify the scope of assumable waters, citing uncertainty on this issue as a barrier to assuming the Program.”

Under the Proposed Rule, before a tribe or state can submit an assumption request to EPA, they must first submit a request to EPA that USACE identify the subset of waters that would be retained following assumption. Additionally, the Proposed Rule would require that the tribe or state submit specific information to demonstrate that it has taken “concrete and substantial steps toward program assumption.” EPA would then review and respond to the request. If the request includes all required information, EPA will forward the request to USACE for analysis.

If USACE notifies the tribe or state and EPA within 30 days of receiving the request from EPA that it will provide the tribe or state with a description of retained waters, USACE will then have 180 days from receipt of the request to provide the tribe or state with a description of retained waters. If USACE does not notify the tribe or state and EPA within 30 days of receiving the request from EPA, the tribe or state “would prepare a retained waters description.”

EPA is requesting comments addressing:

- Whether the term “retained waters description” should be used when referring to how retained waters are identified in a tribal or state program description or if the term “retained waters list” or some other term should be used instead;
- The appropriate information that should be included the letter from tribe or state demonstrating the tribe’s or state’s commitment to pursuing assumption, including whether the tribe or state should submit additional documentation or evidence of that commitment;
- Alternative periods of time within which USACE may inform the tribe or state whether it intends to prepare the description of retained waters;
- Ways to shorten or simplify the process for determining the extent of retained waters;
- Whether to allow for an extension of the default time period for USACE to prepare the description of retained waters; and
- Ways to increase public transparency regarding the development of retained waters descriptions, including public notice requirements.
- **Adjacent Wetlands:** The Proposed Rule would specify that USACE retains jurisdiction over all jurisdictional wetlands “adjacent” to retained waters, except where limited by an agreed upon “administrative boundary.” USACE would retain administrative authority over adjacent wetlands waterward of the administrative boundary, while the tribe or state would assume authority over landward wetlands. Administrative boundaries would be established by USACE and the tribe or

state, but a 300-foot administrative boundary would be established as a default where no other measurement is established.

EPA is requesting comments addressing all aspects of the proposed approach to determining the extent of retained adjacent wetlands, as well as alternative approaches, including whether the proposed 300-foot administrative default should be codified in regulatory text.

- **Modifications to Retained Waters:** The Proposed Rule would revise existing regulations requiring that all modifications to the extent of the retained waters description always constitute “substantial revisions” to a tribal or state program.

EPA is requesting comments addressing modifications to retained waters, including whether these modifications should be substantial or non-substantial and whether to modify or specify any other procedures - including public notifications – for such modifications. EPA is also requesting comments addressing:

- Specific ways EPA could be involved in resolving any disagreements regarding the extent of retained waters;
 - Whether regulations should provide a procedure through which EPA could provide input on the retained waters description while it is being developed; and
 - Whether to require that retained water descriptions be revisited at certain intervals (*e.g.*, annually, biennially) to allow for necessary modifications.
- **Mitigation:** The Proposed Rule would require that program descriptions include a description of the tribe’s or state’s proposed approach to ensuring that all permits comply with the substantive criteria for compensatory mitigation in 40 CFR part 230, subpart J. If the tribe or state establishes third party compensation mechanisms as part of their section 404 program (*e.g.*, banks or in-lieu-fee programs), associated instruments must be reviewed and approved by EPA, USACE, FWS, NMFS.

EPA requests comments addressing:

- Whether EPA should provide additional specificity as to whether or how particular provisions of subpart J should or should not apply to tribal or state programs;
 - Whether tribal or state agencies should be required to provide draft instruments only to EPA, USACE, FWS, and NMFS, or if such instruments should be provided to applicable state and tribal agencies, as well; and
 - Whether the time frames listed are appropriate, whether they should be shorter or longer, or if regulations should be silent regarding the timeframes and simply provide that specific review procedures for draft instruments should be addressed in an MOA between the tribe/state and EPA.
- **Effective Date for Approved Programs:** The Proposed Rule would revise current requirements and specify that the transfer of an approved program to a tribe or state would take effect 30

days after publication of the notice of EPA's program approval in the Federal Register, except where EPA and the tribe/state have established a later effective date (not to exceed 120 days from Federal Register publication).

EPA requests comments addressing:

- Whether the proposed 30-day delay in effective date and proposed 120-day extension are appropriate or whether to retain the current regulations that specify that "transfer of the program shall not be considered effective until such notice appears in the Federal Register";
 - Whether particular information should be provided by the tribe or state when requesting more than 30 days before assumption becomes effective;
 - Circumstances under which EPA might disapprove a tribe or state's submission; and
 - Whether a proposed effective date may be modified after program approval is published in the Federal Register, and if so, the circumstances and procedural mechanisms for doing so.
- **Judicial Review and Rights of Appeal:** The Proposed Rule would clarify that states seeking section 404 assumption must provide for judicial review of decisions to approve or deny permits. State requirements that provide for the losing party in a challenge to pay all attorneys fees, regardless of the merit of their position, are prohibited. This proposed change does not apply to tribal programs.

EPA requests comments addressing all aspects of the judicial review provisions, including whether to provide any greater specificity with respect to standards of judicial review that states are expected to provide, as well as whether this requirement should apply to tribal section 404 programs.

- **Five-Year Permits and Long-Term Projects:** The Proposed Rule would allow for projects with a planned construction schedule that may exceed the five-year permitting limit to submit an analysis showing how the project complies with environmental review criteria set in the CWA 404(b)(1) Guidelines for the full project when they submit their application for the first five-year permit. EPA is also proposing that an applicant seeking a new five-year permit should apply for the new permit at least 180 days prior to the expiration of the current permit. EPA seeks comments on all aspects of these proposed changes.
- **Tribes as Affected Downstream States:** The Proposed Rule includes three changes to comment and review provisions as they relate to tribal interests:
 1. Any downstream tribe that has been approved for TAS for any CWA provision would have an opportunity to suggest permit conditions for section 404 permits issued by upstream states and tribes that may affect their reservation waters.
 2. Tribes that have not yet been approved for TAS for any CWA provision would be allowed to apply for TAS solely for the purpose of commenting as a downstream Tribe on section 404 permits proposed by states and tribes.

3. Tribes would be given an opportunity to request that EPA review permits that may affect tribal rights or interests, even if federal review has been waived.

EPA requests comments regarding these proposed approaches and solicits suggestions of other approaches for providing additional appropriate opportunities for involvement by tribes whose waters and interest (both on and off reservation) may be affected by a proposed state permit.

- **Compliance Evaluation and Enforcement:** The Proposed Rule would amend criminal enforcement requirements to provide that tribes and states seeking assumption of section 404 authority (as well as section 402 permitting authority) must authorize prosecution based on a *mens rea*, or criminal intent, of any form of negligence, which may include gross negligence. EPA requests comments on all aspects of this proposed change.
- **No Less Stringent Than:** Under the Proposed Rule, EPA seeks to codify its longstanding principle that tribes and states may not compensate for making one requirement more lenient than required under the regulations by making another requirement more stringent than required. The Proposed Rule also clarifies that tribes and states are not required to incorporate EPA or USACE interpretive guidance into their programs. Additionally, EPA has proposed adding regulatory language to codify that the assuming tribe or state is required to administer all portions of a CWA 404(g) program. EPA requests comments on each of these proposed changes.
- **Withdrawal Procedures:** The Proposed Rule would provide that if the Regional Administrator finds that a tribe or state is not administering the assumed program consistent with CWA and regulatory requirements, they shall inform the tribe or state of non-compliance and provide 30 days for the tribe/state to demonstrate compliance. If the tribe/state fails to adequately demonstrate compliance within 30 days, EPA will hold a public hearing to discuss withdrawal of the tribal/state program. If EPA determines that the tribe/state is not in compliance, EPA will notify the tribe/state of the specific deficiencies and the necessary remedial actions. The tribe/state will have 90 days to take the required remedial actions or program approval will be withdrawn. Decisions of withdrawal must be published in the Federal Register, and in such instances, USACE will resume section 404 permitting authority.

EPA requests comments on all aspects of this proposed revision, including recommendations to modify the proposed withdrawal process (such as suggestions to extend or shorten deadlines for compliance, or limitations to the proposed remediation period).

State and Tribal Engagement in the Rulemaking Process

To varying degrees, EPA engaged with state and tribal governments during the development of the Proposed Rule. EPA's Rulemaking Docket includes a [Tribal Engagement Summary Report](#), as well as a [State Engagement Summary Report](#). In terms of engagement with the states and state agencies, EPA's announcement notes that the agency "does not view this rulemaking as having Federalism implications as defined in Executive Order 13132" but that it did seek "pre-proposal input from States on plans to modernize the Agency's existing section 404 Tribal and State program regulations." In describing its outreach and engagement with states on the Proposed Rule, EPA "invited written input from state agencies" from Nov. 12, 2018, through Jan. 11, 2019, and "hosted an in-person meeting with State officials" on Dec. 6, 2018. At the in-person meeting, EPA "provided an overview of the rulemaking effort and the section 404(g) program and led themed discussions for input for the proposed rule, including

clarifying assumed and retained waters and adjacent wetlands, enforcement and compliance, and calculating economic costs and benefits of the rule.”

EPA’s efforts to engage with and consult tribal governments in the development of the Proposed Rule was more robust. In its announcement, EPA states that it initiated formal consultation efforts under E.O. 13175 on Consultation and Coordination with Indian Tribal Governments regarding provisions that require clarification within existing section 404 Tribal and State program regulations. Tribal consultation ran from October 22 through December 21, 2018. Additionally, EPA hosted tribal information webinars on November 20 and November 29. EPA participated in in-person meetings with tribal associations, including a presentation for the National Tribal Water Council on October 24, 2018, and an informational session at the National Congress of American Indians’ 75th Annual Convention. EPA also attended the EPA Region 9 Regional Tribal Operations Committee (RTOC) meeting on October 31, 2018, the EPA Region 6 RTOC meeting on November 28, 2018; and the EPA Region 7 Enhancing State and Tribal Programs Wetland Symposium on November 9, 2018.

Additionally, in January 2023, EPA hosted an informational webinar for states on January 24 and webinars for tribes on January 25th and 31st. In these sessions, EPA “provided tribes and states with an update on the rulemaking effort and reminded tribes and states of the input they had previously provided to EPA. EPA did not seek additional input from tribes or states at these 2023 webinars.

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