

Clean Water Act Rulemaking Updates

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Association of Clean Water Administrators Annual Meeting

Overview

- VIDA
- Section 401 Proposed Rule
- Section 404(g) Proposed Rule
- Waters of the United States Amended Rule



VIDA Proposed Rule



Vessel Incidental Discharge Act (VIDA)

- Enacted December 4, 2018
 - Streamlines the patchwork of federal, state, and local requirements applicable to commercial vessels (generally vessels >79 feet in length).
 - Requires EPA and the USCG to develop two new federal regulations:
 - EPA to issue national technology-based discharge standards within two years,
 - USCG to develop corresponding implementing regulations two years after.
 - Once EPA and USCG regulations are in effect, VIDA preempts adoption or enforcement of other more stringent federal, state, or local regulation of these discharges.

VIDA State Provisions

- Allows Governors to petition EPA and the USCG to establish Emergency Orders for Invasive Species and Water Quality Concerns. (180-day review)
- Allows Governors to petition EPA or the USCG to modify standards or regulations. (1-year review)
- Allows states to apply to EPA for a no discharge zone (NDZ) for any discharge(s) or water(s). (90-day review)
- Establishes an enhanced Great Lakes regulatory process for Governors to develop more stringent requirements for discharges in the Lakes. (180-day review)
- Coast Guard given primary authority to enforce but EPA and States also authorized to enforce these Federal requirements (CWA Section 309).
 - State enforcement is to be consistent with new USCG inspection, monitoring, data management, and enforcement procedures.

EPA VIDA Rulemaking

**ENVIRONMENTAL PROTECTION
AGENCY**

40 CFR Part 139

**[EPA-HQ-OW-2019-0482; FRL-10015-54-
OW]**

RIN 2040-AF92

**Vessel Incidental Discharge National
Standards of Performance**

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Proposed rule.

VIDA Enacted December 6, 2018

NPRM published October 26, 2020

Supplemental Notice
Fall 2023 (planned)

Final EPA Rule
Fall 2024 (planned)

Section 401 Proposed Rule



Background: What is Clean Water Act (CWA) Section 401?

- Under CWA Section 401:
 - A federal agency may **not** issue a license or permit to conduct any activity that may result in any discharge into a “water of the United States”, **unless** the state or authorized tribe where the discharge would originate either issues a CWA Section 401 water quality certification or waives certification.
- Section 401 applies to **any** federal license or permit that may result in a discharge into a water of the United States.

Background: Previous Agency Actions on CWA Section 401

- EPA promulgated regulations for water quality certification in **1971**, prior to the CWA, which created section 401.
- On **July 13, 2020**, the “Clean Water Act Section 401 Certification Rule” (“2020 Rule”) was published. This rule went into effect on September 11, 2020.

Background: Executive Order 13990

- On **January 20, 2021**, President Biden issued Executive Order 13990, “*Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*,” which directed EPA to review and consider revising the CWA section 401 certification regulations.
- On **May 27, 2021**, Administrator Regan signed a *Federal Register* notice announcing EPA’s intention to reconsider and revise the CWA Section 401 Certification Rule found at 40 CFR 121.

Proposed CWA Section 401 Water Quality Certification Improvement Rule

- On **June 1, 2022**, Administrator Regan signed the proposed “Clean Water Act Section 401 Water Quality Certification Improvement” rule to modernize and clarify EPA’s existing regulations at 40 CFR 121 and 40 CFR 124.53-55.

Outreach and Engagement

- EPA hosted a series of listening sessions and a public hearing during the Summer 2022. Please visit <https://www.epa.gov/CWA-401> for more information on these events.
- The public comment period closed on **August 8, 2022**. EPA received over 27,000 public comments (Docket ID No. EPA-HQ-OW-2022-0128).

Additional Information

- Visit <https://www.regulations.gov> to view the docket for this rulemaking, identified by **Docket ID No. EPA-HQ-OW-2022-0128**.
- For more information on CWA section 401 and this rulemaking, please visit <https://www.epa.gov/CWA-401>.
- If you have any questions, please send an e-mail to cwa401@epa.gov.

Section 404(g) Proposed Rule



Background on CWA Section 404(g)

- Section 404(g) provides Tribes and States the authority to assume administration of the 404 program to regulate the discharge of dredged and fill material into certain "waters of the United States" (WOTUS).
- Three States, Florida, Michigan and New Jersey, have requested and been approved to administer a CWA 404(g) program.
- EPA approves and oversees Tribal and State 404(g) programs.

Feedback on 404(g) Program and Rule Input

- The regulations were last updated in 1988.
- Requests for clarity on the assumption requirements and process, program administration, and which waters are assumable.
- Input received through early engagement
 - Federal Advisory Committee – Retained waters description and process based upon FACA recommendations (2015-2017).
 - Early engagement meetings and consultation with Tribes (2018-2019).
 - Early engagement meetings with States (2018-2019).
 - Experience working with States pursuing assumption.

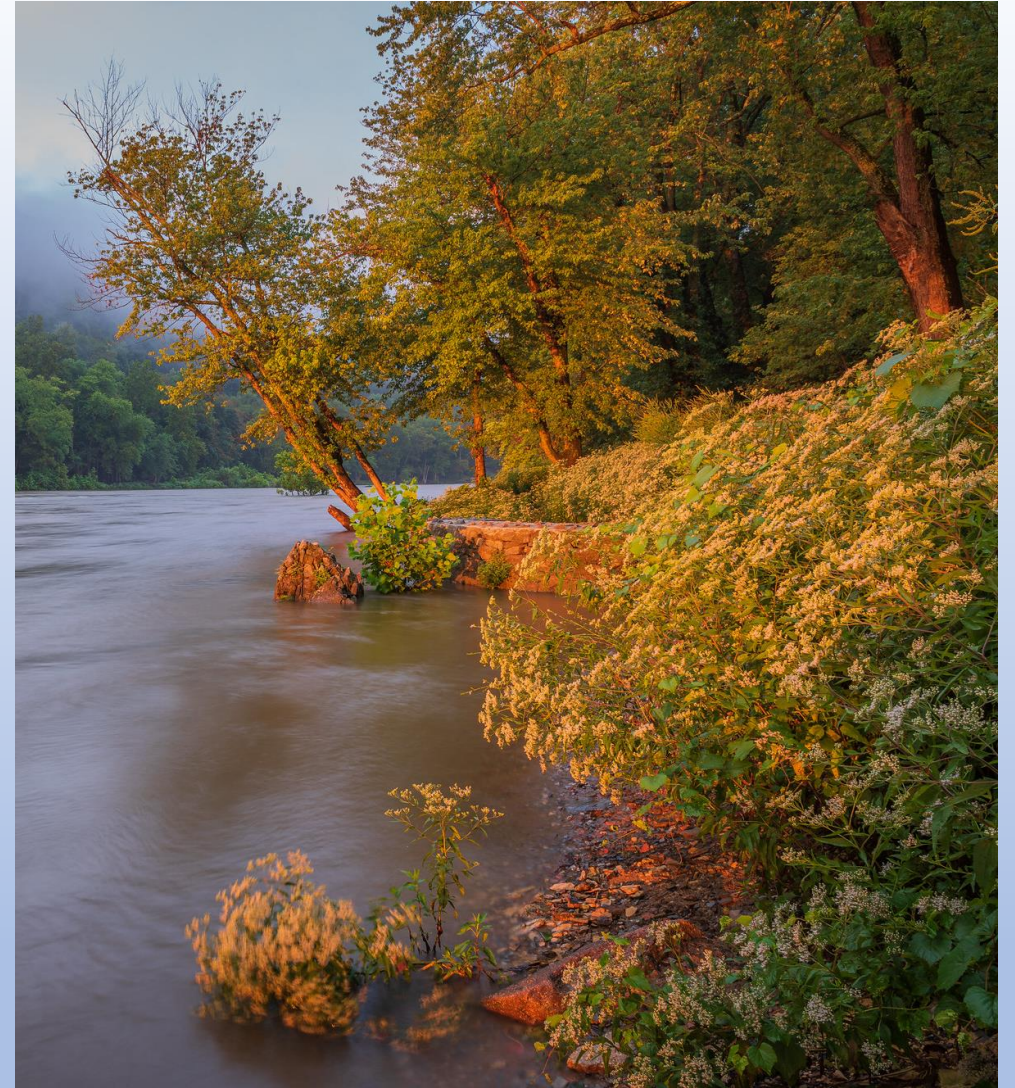
Rulemaking Effort

EPA is proposing to update the 404(g) regulations to:

- Provide clarity
- Address state-perceived “barriers” to assumption.
- Update the regulations for consistency with statutory changes, court decisions, policy updates, and advances in technology.
- Address input from Tribes and States.

Proposal Addresses

- Program approval and procedures.
- Implementation issues
- Clarification on retained waters
- Compliance and enforcement
- Tribal interests
- Other Changes
- Economic analysis



Proposal: Program Approval

- **Program Description:**

- Proposed rule updates program description requirements.
- Preamble describes how to demonstrate:
 - Program is no less stringent than federal requirements.
 - Permits issued comply with the CWA 404(b)(1) guidelines.
- Regulatory language clarifies staffing and resource requirements.

Proposal: Implementation

- **Delayed Effective Date:**

- Regulatory revision proposes a default 30-day delay between approval and program administration.

- **Mitigation:**

- The 404(b)(1) Guidelines discuss mitigation in context of Corps' permit program.
- Regulatory language would clarify Tribe and State responsibilities and requirements for compensatory mitigation.
- Proposal requires opportunity for review of mitigation instruments.
- Proposal requires inclusion of a description of the Tribe's or State's compensatory mitigation program in the Program Description.

Proposal: Implementation Cont.

- **Conflict of Interest:**
 - Preamble language added regarding increasing transparency and objectivity for permit self-issuance.
 - Regulatory revision expands conflict of interest prohibition to any person or entity that participates in agency decisions.
- **Long-term Permitting:**
 - Statute limits Tribal and State permits to 5 years in length.
 - Regulatory revision facilitates permitting of long-term projects that accounts for the 5-year limit on permit duration by providing for consideration of full scope of impacts with the first permit application.
- **Program Scope:**
 - Regulatory revision ensures that all waters of the United States are covered at all times.
 - Regulatory revision clarifies Tribe/State administers all aspects of 404 program.

Proposal: Retained Waters

- States requested clarity on which waters are assumable.
- Regulatory revision proposes a process to identify retained waters and adjacent wetlands.
 - Process is based upon FACA recommendations.
 - FACA held 2015-2017
 - Members included states, tribes, academia, industry, environmental organizations, federal agencies, and state and tribal associations.
 - Process provides flexibility to reflect Tribal and State programs and resources.
 - Process provides defaults should the Tribe or State and Corps choose to use them or cannot come to agreement.
 - Process provides for amending the retained waters description.
- Regulatory revision provides discretion to Regional Administrator whether change in retained waters is a substantial or minor program change.
- Clarifies EPA's role in process.

Proposal: Compliance and Enforcement

- **Annual Report:**

- Clarifies existing reporting requirements.
- Regulatory revision requires reporting on components of a Tribal or State program as provided for in this proposal e.g., to provide information on mitigation and compensation activities.

- **Judicial Review:**

- Regulatory revision requires that 404(g) programs must provide for judicial review of decisions to approve or deny permits.

- **Criminal Negligence Standard:**

- Some States do not have authority to prosecute violations under a simple negligence standard.
- Change regulatory language to allow Tribes and States to prosecute violations under any criminal negligence standard.
- This provision will amend the section 402 program as well as the section 404 program.

Proposal: Tribal Interests

- **Addresses Tribal concerns:**

- Expands opportunities for Tribes to comment on projects with potential impacts to their waters.
- Proposes Tribes with TAS for any CWA program be considered a “downstream State” for purposes of providing a heightened comment opportunity.
- Proposes an opportunity for Tribes to request EPA review of permits that may affect Tribal rights or interests, even if Federal review is otherwise waived.
- Regulatory revision proposes process for Tribes to obtain TAS for sole purpose of commenting on State-issued 404 permits.

Proposal: Other Changes

- **Withdrawal Process**

- The current withdrawal process is adjudicatory in nature and very resource intensive for all.
- Proposal reflects the assumption approval process, enhances transparency, and tracks the statute.
- The proposed process maintains notice to the state, public notice and comment opportunities, as well as opportunities for the Tribe or State to address identified deficiencies. This is consistent with case law and statutory requirements.

- **Dispute Resolution**

- Proposal clarifies that EPA may facilitate resolution of disputes.

- **Protection of T&E Species and Historic Properties**

- Preamble points to existing regulatory requirement in the 404(b)(1) Guidelines that Tribes and States assuming the 404(g) permits consider protection of threatened and endangered species and resources of cultural and historical value under ESA, NHPA, and EFH.

- **Technical and Minor Updates**

- Proposal addresses electronic forms, docket location, citations etc.

How to Provide Comments

- **Public Comment Period**

- The 60-day public comment (Docket ID No. EPA-HQ-OW-2020-0276) will open once it is published in the federal register.

- **Upcoming engagement opportunities:**

- Public Hearing: September 6, 2023, 3:30-7:30pm EDT
- State Input Session: August 24, 2023, 1:30-4:30pm EDT

- **Tribal Consultation**

- 60-day consultation period began on July 19, 2023, and will close on September 17, 2023.
- Tribal Input Sessions: August 15, 2023, 2:30-4:30pm EDT
August 30, 2023, 2:30-4:30pm EDT

- **For information on providing comments, please visit:**

[Proposed Revision to CWA 404\(g\) Regulations](#)

Waters of the United States Amended Rule



Rule Status and Litigation Update

- The final "Revised Definition of 'Waters of the United States'" rule was published in the Federal Register on January 18, 2023 and the rule took effect on March 20, 2023.
- However, the final rule is not currently operative in certain states and for certain parties due to litigation.
- Additionally, the agencies are in receipt of the U.S. Supreme Court's May 25, 2023 decision in the case of *Sackett v. Environmental Protection Agency*. In light of this decision, the agencies are interpreting the phrase "waters of the United States" consistent with the Supreme Court's decision in *Sackett*.
- The agencies are developing a rule to amend the 2023 Rule, consistent with the U.S. Supreme Court's May 25, 2023 decision in the case of *Sackett v. Environmental Protection Agency*. The agencies intend to issue a final rule by September 1, 2023.

<https://www.epa.gov/wotus/definition-waters-united-states-rule-status-and-litigation-update>