

**EPN Comments on EPA's Proposed Rule:
Clean Water Act Section 404 Tribal and State Program Regulation**

Docket No: EPA-HQ-OW-2020-0276

October 13, 2023

The Environmental Protection Network (EPN) harnesses the expertise of more than 600 former Environmental Protection Agency (EPA) career staff and confirmation-level appointees from Democratic and Republican administrations to provide the unique perspective of former scientists and regulators with decades of historical knowledge and subject matter expertise.

EPN is pleased to comment on EPA's proposed Clean Water Act (CWA) Section 404 Tribal and State Program Regulation. EPN finds that this proposed rule improves the process for states and Tribes to apply for the assumption of the Section 404 permitting program from the U.S. Army Corps of Engineers (COE). We find that the proposed rule provides the needed specificity about the funding and expertise states and Tribes must have to successfully operate a Section 404 permitting program, is clear that the Section 404(b)(1) guidelines must be met, and streamlines the authorization process for withdrawal of authority if a state or Tribe fails to implement the program properly. We support the major elements of the proposed rule and have comments on some specific provisions in the following sections.

Tribes as Affected Downstream States and Application of Treatment as States (TAS)

EPN supports the proposed modifications that address the role of affected Tribes in reviewing proposed permits issued by authorized states or Tribes. However, EPN does have a specific comment on the terminology used in this provision regarding "downstream" states and Tribes. The term "downstream" in this section and elsewhere appears to be a shorthand expression for the broader phrase "...any state (other than the permitting state) whose waters may be affected by the issuance of a permit..." found in CWA section 404(h)(1)(E). Since some affected waters may not be "downstream" of the permit (e.g., upstream waters for which impacts downstream affect migratory aquatic species upstream), the use of the term downstream can lead to confusion interpreting this term. We suggest referring to "affected states and Tribes."

The proposal provides three important paths for Tribes to engage on such permits. First, any Tribe that has been approved for TAS for any portion of the CWA can submit comments that must be addressed by the permitting state or Tribe. This covers approximately half of federally recognized Tribes with reservations. Second, a Tribe that does not have TAS status for any part of the CWA can request TAS specifically for the purpose of commenting on a proposed section 404 permit. This narrow TAS approval can be a very streamlined process. Again, Tribal comments would have to be addressed by the permitting state or Tribe. Third, a Tribe can request that EPA review any permit that affects Tribal rights or interests. EPA would consider interests such as treaty rights that occur outside of Tribal boundaries. Taken together, these provisions substantially improve the ability of Tribes to address the potential impacts of Section 404 permit actions taken by states or Tribes authorized to implement the permitting program.

Impact of Waters of the U.S. Definitions on 404 Assumption

EPN supports the recognition that the definition of waters of the U.S. (WOTUS) is likely to change over time. In the Federal Register Notice on Page 55309, EPA discusses how changes in the scope of WOTUS need to be addressed by states and Tribes that have assumed the Section 404 program. Given the recent changes in the WOTUS definition and ongoing litigation, EPN supports identifying this issue as an important aspect of program assumption. The final rule should explain how this will be addressed, both for expansion of the scope of waters and the contraction of scope, as has occurred as a result of the recent *Sackett* decision. In addition, the final rule needs to explain how Section 404 implementation by a state or Tribe will be affected by the definition of WOTUS in that specific geographical area. Until a nationally consistent definition is established, 27 states are implementing the pre-2015 definition along with the *Sackett* decision, while 23 states are implementing the 2023 definition. States, Tribes, and the public need to understand how these varying definitions will be implemented by the Section 404 authority. The final rule also needs to explain what will happen to state and Tribal 404 programs when a nationally consistent WOTUS definition is established. How will those programs be required to respond to the new definition?

EPN also recommends that EPA and the COE consider issuing guidance on how the WOTUS definition will apply in the different geographical regions of the U.S. that have very different hydrologic features. This approach has been done in the past, and EPN encourages consideration of this approach moving forward.

Default Boundary between Corps of Engineers and State/Tribal Waters and Wetlands

EPN supports the proposed rule's approach to setting a 300-foot default boundary between COE-retained waters and the assumed program covering state/Tribal waters and wetlands but would recommend more detail be provided on how this number was selected. This boundary will be used to clarify how the program will be administered and allows for a clear demarcation for permits issued for retained and assumed waters. EPN also suggests that the proposed rule identifies a simple methodology for how this default boundary will be applied on the ground. For example, will it be measured along the entire length of the retained and assumed program waters? Or will it be applied at points along the boundary where the proximities are the closest?

Retained Waters

The proposed regulation clarifies how the state/Tribe will work with COE to determine which waters COE will retain under the assumption of the program. However, additional clarification that COE retains the 404 permitting authority on Tribal lands within states that receive 404 authority may still be needed. Historically, this determination was not always completed as the state/Tribal programs were being developed. EPN supports this clarification requiring that before the program is submitted to EPA for review, states and Tribes need to submit a request to EPA to ask the COE to identify the retained waters. This change will allow the states and Tribes to show they are taking concrete and substantial steps towards assumption and streamline the process. In previous years, there has been no guidance, and this led to confusion over how COE and the states and Tribes worked through this process.

Withdrawal of Program and Partial Assumption

Under the existing regulations, the withdrawal of the assumed program required formal adjudication, which was difficult and time consuming for all parties. EPN supports the proposed regulation that streamlines the process while protecting the rights of the states and Tribes to be part of the process.

EPN also supports the clarification in the proposed regulation that specifies that partial program assumptions are not authorized under the Section 404(g) assumption program. Other federal programs such as the National Pollutant Discharge Elimination System allow for this, and historically, this question has come up during Section 404(g) assumption discussions for the state/Tribes to seek only part of the program. This addresses the issue directly.

No Less Stringent Requirements

EPN supports the clarification of how the No Less Stringent Requirement will be implemented under the proposed regulation. The prior regulations were not clear that all aspects of the program submitted to EPA for review had to be No Less Stringent than the federal program. This led to situations where the program submission included some provisions that were less stringent while others were more stringent. This change clarifies this issue. To implement this requirement, where programs are not adopted by reference to the federal program, the State Attorney General or Tribal official should be required to certify that the approach taken by the state or Tribe is no less stringent.

Revision of Criminal Enforcement Standards

EPN supports this clarification of the Criminal Enforcement *mens rea* requirements. This change clarifies the evidentiary standard that is necessary to prove a criminal violation. The existing regulations were not consistent with the underlying statutory requirements and resulted in some state/Tribe enforcement programs having to modify their statutory requirements to meet the CWA requirements. There was a question as to how stringent they needed to be given the conflict between the statute and the regulations. Under the proposed regulations, the state/Tribal enforcement programs allow for any *mens rea* to prosecute a criminal violation.

Clarify Requirements for Demonstration of Sufficient Resources by States and Tribes.

Under the Section 404(g) assumption program, the states and Tribes need to show they have sufficient resources both in terms of staffing and funding to support all aspects of the ongoing program. The existing regulations did not clearly identify which parts of the program required this demonstration. Assumption of the Section 404 program is an expensive proposition, and it is critical that states and Tribes demonstrate they have the resources to fully implement the program. The proposed regulation makes it clear that the state/Tribe must show they have sufficient resources to implement the program properly.

Wetlands Mitigation and Coordination under the Endangered Species Act and National Historic Preservation Act

EPN has two other areas of concern. The final rule should include references to the current regulations requiring compensatory mitigation and the procedures for implementing those requirements. It should be clear that the assumed programs will have to follow the same tiered approach to compensatory mitigation set out in the current regulations.

In addition, the final rule should require coordination with the appropriate agencies to address the requirements of the Endangered Species Act and the National Historic Preservation Act.

Conclusion

EPN commends EPA for proposing a rule which answers many of the questions that have arisen over the years regarding how states and Tribes should implement the Section 404 program. The clarifications regarding resource needs, retained waters, no-less-stringent-than requirements, partial assumption, and enforcement were greatly needed. We also support the new elements that EPA has added, including the three paths for Tribes to engage on 404 permits and the streamlining of the program withdrawal process. We urge EPA to provide more detail in the final rule on how states and Tribes must respond to the changing definitions of WOTUS.