



National Association of Wetland Managers

“Dedicated to the Protection and Restoration of the Nation’s Wetlands”

October 13, 2023

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Submitted via www.regulations.gov

Re: Docket ID No. EPA–HQ–OW–2020–0276.
40 CFR Parts 123, 124, 232, and 233; revision to the regulations governing Clean Water Act (CWA) section 404 Tribal and State programs.

Dear Ms. Hurlid:

The National Association of Wetland Managers (NAWM) submits the following comments in response to the above referenced Federal Register notice EPA-HQ-OW-2020-0276 concerning the proposed revisions to regulations governing Clean Water Act (CWA) Section 404 Tribal and State programs.

NAWM (formerly The Association of State Wetland Managers) is a national 501(c)(3) professional organization established in 1983, with a mission to build capacity for state and tribal members and foster collaboration among the wetland community of practice by encouraging the application of sound science to wetland management and policy, promoting the protection and restoration of wetlands and related aquatic resources, and providing training and education for members and the general public.

NAWM supports the U.S. Environmental Protection Agency’s (EPA) efforts to update and clarify the regulations pertaining to Tribal and State assumption and administration of the CWA Section 404 permitting program for discharges of dredged or fill material. Aquatic resource protection can only be accomplished by a unified effort of Tribal, State and Federal programs. A holistic regulatory structure managed by a single governing program will result in clarity to the regulated community and provide consistency in resource management and mitigatory goals. It is also important to continue the protections for aquatic resources which maintain the quality of traditionally navigable waters, assure that the quality of aquatic resources of neighboring Tribes and States are maintained, and that

EPA provides sufficient oversight to authorized programs to provide national consistency and assure that the goals of the CWA are achieved.

NAWM appreciates EPA's efforts to clarify the minimum requirements needed for Tribal and State authorization and the attempts to make them more transparent, straightforward, and flexible. However, it is also important to recognize the significant resources required by a Tribe or State to implement the federal program. If EPA wishes to encourage Tribes and States to assume the CWA 404 program, resource support is necessary to achieve this goal and incorporate it into a larger program strategy; clarifying regulations may not be sufficient to entice Tribes and States to seek program authorization without added implementation resources.

We understand that one of the goals of this notice is to receive input from the regulated community on how best to construct elements of an authorized program to assure aquatic resource protection. To this end, EPA has proposed options and/or methods for the authorized program to coordinate issues ranging from historic preservation, endangered species, water quality of neighboring jurisdictions, and traditionally navigable waters. While we understand and support EPA's goal to provide flexibility to those Tribes and States seeking to assume the 404 program, it is also important to assure that the resulting program construct is scientifically sound and comports with the intent of Congress. It is also important that these proposed rule revisions do not create any unnecessary procedures which may affect rights which Tribes and States inherently have or ones which limit federal agencies from implementing their congressionally mandated responsibilities.

NAWM is also concerned with the rule making process undertaken by the Agency. Given the breadth of inquiries which EPA is requesting comment on, NAWM suggests that it would have been more appropriate for the EPA to have issued a Federal Register notice for proposed rulemaking and requested input from Tribes, States, and the regulated community on the suite of options prior to issuing the draft rulemaking. In its current format it is difficult to comment on EPA's reasoning for selecting one alternative over another and allows for final rule development without additional public involvement and explanation. While the EPA expresses its belief that a rigorous involvement of States and Tribes has occurred prior to the issuance of this Federal Register notice, many States and Tribes have expressed their concern with the pre-rulemaking engagement process and the lack of substantive involvement outside of the Assumable Waters Subcommittee under the auspices of the National Advisory Council for Environmental Policy and Technology (NACEPT). NAWM has heard from some of our States which expressed interest in assuming the 404 program that they would have appreciated additional coordination efforts from EPA prior to the proposed rule publication. EPA also indicated that pre-rule involvement occurred at various regional meetings. However, draft rule language and specific areas for comment were not specifically outlined at those engagements nor was any formal pre-rule notice of intent and request for comment issued.

State and Tribal representatives have also raised concerns about endangered species and historic resource impact coordination procedures and the need for EPA to assure that the federal agencies entrusted with these resources are adequately consulted with to assure their protections and compliance with federal regulations. It is also important that any selected options for final rule language are supported by data and sound science so that the physical, chemical, and biological integrity of the nation's waters are protected.

The following reflects NAWM's comments on specific sections of the proposed rule for which EPA has requested comment. Where appropriate, we have included feedback and comments received during engagement meetings with State and Tribal members. NAWM has also encouraged States and Tribes to submit comments through the public notice process which is outlined in the proposed rulemaking to address specific concerns relevant to their state or tribal regulatory and administrative construct.

Section Specific Comments:

A. Program Approval

1. Program Assumption Requirements

NAWM supports the Agency's efforts to clarify the requirements it views as essential for States and Tribes to be authorized to assume the CWA Section 404 Program. These requirements need to be consistent and transparent so that all parties, including States, Tribes, and the regulated community, understand the metrics which EPA will use to judge the adequacy of the applicant and the applicant's baseline resources which are needed to implement the Section 404 program. As is indicated in the proposed rule, these requirements must include the regulatory framework, personnel, and the resources sufficient to implement the program and to comply with the 404(b)(1) Guidelines. It is incumbent on the Regional Administrator to assure that the submitted intent and application is supported by a budget, personnel plan and commitment which indicates a good faith effort to meet the program requirement outlined in subparts C through E. These elements are also important to support the resource investment of EPA and other resource partners in the assumption application process. They are equally important to assure affected communities that their aquatic resources will be protected and project proponents that the State or Tribe have sufficient resources to review their proposals in a timely manner.

Many States and Tribes, while having interest in applying for authorization, would not have the capacity, necessary resources, nor the ability to hire and fund a program until such time as the application is approved. The final rule needs to be clear on the expectations of EPA for an approved applicant to obtain personnel and budgetary resources so that interested States and Tribes can include this into their cost estimates for program implementation and secure leadership authorization and support. States and Tribes are best suited to determine the appropriate times frames for implementation however, NAWM fully supports the identification of clear and transparent expectations for those interested in applying for authorization.

2. Retained Waters

Establishing a consistent process for identifying those waters which are retained under federal jurisdiction is an important element for States and Tribes in determining whether to apply for authorization to assume Section 404 as well as estimating the extent of their resource needs to implement the program. It is also important that this process complies with Congressional intent to protect waters used to transport commerce. This intent goes beyond the maintenance of navigational channels and includes protecting the significant and public use and reliance on the functions of these waters. This is evident by the inclusion of adjacent wetlands by Congress and not just retaining control to the ordinary high-water mark of Section 10 waters. It is therefore critical that any establishment of an administrative demarcation boundary be based on science and technical data supporting the limits of federally retained control, not just as an "administrative boundary" selected out of

convenience. It is difficult to determine how EPA selected the 300-foot administrative default since it does not seem to be supported by any data indicating that this limit is protective of Section 10 waters. States and Tribes have indicated that the identification of the administrative default needs clarification. As currently proposed, there is confusion on whether the 300-foot measurement begins at the ordinary high-water mark (OHM) or at the ordinary high tide line; if one exists. NAWM recommends that a repeatable method be used to determine the appropriate limits of retained waters to comply with Congressional intent and to provide clarity to those interested in assuming the program. It is worth noting that regardless of what method or boundary is selected there may be differences in State and Tribal jurisdictional waters and WOTUS limits. A hydrologic benchmark would seem to be appropriate and could be replicated by modeling based on inputs and flow regimes. This method should be coordinated with EPA's Office of Research and Development and the U.S. Army Corps of Engineers (Corps). It may be that a benchmark such as the active floodplain could be appropriate to provide both replicability and would be protective of the functions of retained waters. The draft rule advocates for the administrative approach to demarcation of the boundary between federal and state jurisdiction in order to provide clarity to permit applicants. However, this justification may be unwarranted since many states currently have different boundaries and activities which are regulated outside of the federal Section 404 scope and these differences have been navigated by project proponents since the inception of the federal regulations.

Comments on the timeframe for the Corps to provide retained waters analysis, dispute resolution process methods, and retained waters adjustments have been requested. NAWM agrees that when a State or Tribe has begun the application process for authorization, once criteria has been established to indicate a good faith commitment, the Corps should be able to provide an analysis of retained waters in a reasonable amount of time to the applicant. While the Corps would best be able to determine the effort needed to produce this information it does not seem unreasonable that the process of notification to EPA and subsequent Corps notice (30 days) allowing 180 days for production is unreasonable; however, some states have indicated that this is too long of a period for the Corps to provide this information. Any dispute resolution process should be chaired by the EPA Regional Administrator, and specific steps for this process should be identified in the rule and formalized in the accompanying Memorandum of Agreement (MOA). While modification to the retained waters scope may be necessary, it seems that this process should inherently be a federal responsibility. NAWM suggests that procedures be identified for a State or Tribe to petition the Corps for modification to the identified waters. Should a disagreement occur between the Corps and a State or Tribe, then the dispute resolution process, chaired by EPA, should be initiated similar to the original method during the application process; this process should be memorialized in the MOA between the applying authority, Corps District(s), and EPA Region.

3. Mitigation

The goal of mitigation is to replace functions lost and degraded through permitted activities which allow for impacts to aquatic resources. It is a key component of any wetlands permit program and essential to comply with the intent of the CWA and the 404(b)(1) Guidelines. Many tools can be used to achieve this functional replacement, and these may include in-lieu-fee and banking projects. In order for EPA to assure that an assumed State or Tribal

program is compliant with the 404(b)(1) Guidelines, subpart J, EPA should provide clear direction on what the expectation is for resource mitigation including banking and in-lieu-fee proposals. This includes what standards EPA will be using for the review of an applicant's proposed mitigation program. As part of the application process NAWM suggests that standards for mitigation prospectus review be included and reviewed during the assumption application process and memorialized in the MOA between the State or Tribe and the federal resource agencies; these standards should also be consistent with the mitigation requirements for retained waters mitigation (i.e., the 2008 Corps and EPA Mitigation Rule). EPA, in its oversight role, should screen the banking or in-lieu-fee proposal prospectuses and, should the prospectus not comply with the agreed upon elements outlined in the MOA, coordinate with the other federal resource agencies for concurrence prior to approval. The mitigation proposals should include an analysis of functions lost and diminished as a result of permit issuance, expected functional gain of replacement or uplift proposals, monitoring protocol (including measurable success criteria), and financial assurance mechanisms.

4. Effective Date for Approved Programs

In order to assure a smooth transition of the 404 program from the Corps to a State or Tribe we believe that a specific time frame for application, permit review and compliance transfer be established. This time frame could have multiple variables depending on the regulatory and resource status of the approved authority. If an approved program needs to develop a program structure, secure implementation funding, hire qualified staff, and implement a permitting program there could be a need for flexibility in the effective date of the approved program. Therefore, it would seem reasonable that a range of time be established in the proposed rule to accommodate the potential variability in the existing regulatory structure of the approved State or Tribe. The effective date should be included in the Federal Register notice of approval, and it would seem unlikely to be less than 30 days from notice and should not be greater than 120 days as indicated in the proposal. Any time frame greater than 120 days would seem to indicate that the applying authority is not yet prepared to assume the program and so notice should be withheld until such time as the applying State or Tribe can meet the time frames proposed. States and Tribes have indicated that flexibility needs to be maintained in the determination of the effective date and should be dependent upon the needs and resources of the individual applying authority.

B. Permit Requirements

1. Compliance with CWA 404(b)(1) Guidelines

The proposed rule is requesting comment on how States and Tribes can document that there is program equivalency between the 404(b)(1) Guidelines and the applying authority's regulations. While, as indicated within the rule, the simplest method would be to incorporate the Guidelines by reference, it may be that applying States or Tribes already have regulatory language which is equivalent and so would not need to amend existing regulations. It also affords flexibility to a State or Tribe to allow for the justification of program stringency equal to the federal one without simply incorporating the Guidelines verbatim. Since the Regional Administrator is the determiner of equivalency for EPA, it would seem prudent for the agency to develop a list of elements contained within the 404(b)(1) Guidelines which it will use to make this judgement and require applying

authorities to make a step-by-step comparison between their regulations and the Guidelines. This sets a clear expectation for applicants, informs the public as to how the equivalency determination was made, and establishes a “bar” for States and Tribes to plan for and make regulatory adjustments accordingly.

2. Judicial Review and Rights of Appeal

NAWM supports the inclusion of public participation in the 404 regulatory process and that any impediments to encourage this should be removed prior to application approval. Since the NPDES assumption process has developed and used language since 1996, it would be an established model for States and Tribes to transfer and we recommend inclusion of similar language into the 404(g) regulations to encourage and assure public participation. This would also set an established expectation for program equivalency determinations during the application review process.

C. Program Operation

1. Five-Year Permits and Long-term Projects

Establishing procedures for the permitting of long-term projects is helpful for the analysis of total project impacts, development of alternatives to avoid aquatic resources, and to inform the public and neighboring jurisdictions on total project plan proposals. It is important though to review and update these analyses during each 5-year permit cycle to ensure that conditions and project needs have not changed. While this proposal is informative, it should not be considered “once and done” nor should the authorized program minimize its review standards. Each subsequent permit application and analysis needs to be reviewed to assure that all opportunities for avoidance and minimization are employed and not limited by the initial project review. It is important that in EPA’s oversight role they review and respond accordingly to long-term projects and permit review to assure compliance with the 404(b)(1) Guidelines.

2. Tribes as Affected Downstream States

NAWM supports a robust dialogue between permitting authorities and neighboring jurisdictions, including tribal lands and interests. Permits issued by States or Tribes who have assumed the Section 404 program do not trigger Section 401 due to the lack of a permit issued by a federal agency. As a result, Section 401(a)(2)’s opportunity for neighboring jurisdictions to comment on implications of a proposed permit do not apply. The proposed process would help fill that gap.

The proposal preamble does not explicitly explain why the proposed process is necessary for downstream Tribes to have an opportunity to raise implications of a permit from an assumed program. This omission is likely to result in many comments asserting that the proposed neighboring jurisdiction process is duplicative of Section 401 and is unnecessary. The preamble draws an analogy to the Clean Air Act. NAWM strongly recommends the final rule preamble go beyond the Clean Air Act to CWA Section 401 water quality certification, and in so doing explicitly explain why Section 401’s neighboring jurisdiction provisions would not apply to permits issued by assumed programs.

The proposal outlines the Agencies role in review of federal actions and the coordination with neighboring jurisdictions on potential impacts to the water quality of resources under their control. The rule also sets out a process for Tribes to receive treatment in a similar manner as a State (TAS) specifically for this purpose. EPA, in its oversight authority of an authorized 404 program, must assure that all potential impacts to neighboring jurisdictional interests are addressed and coordinated by the authorized program. We suggest that the coordination procedures with neighboring jurisdictions and Tribal lands and interests be outlined in the authorization MOA with the authorized State or Tribe and should clearly identify roles and responsibilities. It is also suggested that the coordination process occur prior to the issuance of a Public Notice allowing neighboring jurisdictions to elevate concerns prior to draft permit development so conditions could be implemented to mitigate the issues raised. Having Tribes need to request EPA to intervene on their behalf would appear to be an additional procedural process than is currently the practice with the Corps as the permitting authority. Some States and Tribes have expressed concerns with the procedures outlined in the proposed rule for tribal coordination and will be providing specific concerns with their comments. The Corps Districts provide notice and engage directly with Tribes on potential project impacts to Tribal lands and interests; the expectation should be the same for any authorized 404 permit program.

D. Compliance Evaluation and Enforcement

In order for States and Tribes applying for authorization to meet the “no less stringent than” standard there should be comparable standards of compliance evaluation and enforcement to the current federal authorities. In order to ensure that this standard is achieved, and to provide clear expectations of EPA to the applying authority, it would seem best to incorporate these expectations into the regulations. NAWM supports a consistent approach between authorized authorities, the federal 404 program, and consistency among CWA programs.

E. Federal Oversight

1. No Less Stringent Than

NAWM supports the proposed rule language and agrees that trading of impacts and standards is not protective of aquatic resources nor meets the federal stringency test.

2. Withdrawal Procedures

We concur with the proposed regulatory changes and would suggest the inclusion of a probationary review period for those authorities which receive formal notification of non-compliance from the Regional Administrator and satisfactorily correct identified deficiencies.

3. Program Reporting

NAWM supports clear and transparent program metrics and reporting for all authorized Section 404 permit programs including the public availability and notice of annual reports.

F. General

1. Dispute Resolution

Concur without comment.

2. Conflict of Interest

NAWM agrees that there should be no conflict, or appearance of conflict, when States and Tribes are issuing permits under an authorized Section 404 Program. This includes permits which a State or Tribe issues to itself for work in federally regulated waters. In EPA's oversight role, it is suggested that the agency put in place safeguards to assure that permitting decisions are made within the parameters, and guided by, the Section 404(b)(1) Guidelines so as to avoid any appearance of conflict. Such safeguards should be incorporated into the MOA between EPA and the authorized State or Tribe and should include size and quality criteria for agency review.

3. Partial Assumption

NAWM understands the Agency's position on partial assumption and agrees that States and Tribes could avail themselves of the State Programmatic General Permit (SPGP) application process for specific activities or impact thresholds. Members of our community have successfully utilized this tool in-leu of applying for authorization to assume the entire program. The use of SPGPs has been effective in allowing the States to provide resource protection while giving project proponents the benefit of minimizing application costs and time frames since both State and Tribal impacts would be included in the same application for federal jurisdiction. However, the application and implementation of SPGP's is not without resources costs to States and Tribes and assistance should be provided for SPGP implementation. There are differences of opinions among NAWM members on this issue and the utility of partial assumption and benefits. We will defer to individual State and Tribes for specific concerns or support of EPA's proposed rule.

G. Potential Impacts of the Proposed Regulatory Changes on Existing State Section 404 Programs

NAWM is not aware of any significant burdens that the proposed rule changes will have on existing State 404 Programs. However, we will defer to those States to identify any impacts which the proposal may have on their programs and resources.

H. Other

1. Technical and Minor Updates

NAWM does not have any specific comments or concerns with the proposed technical and minor updates. We will note however that those items which are specifically identified in the "Request for Comment" Section are not listed as specific changes in the "What is the Agency proposing?" Section. Therefore, it is difficult to comment on what EPA is specifically proposing to change. Regarding "notice" procedures we concur that the rule should reflect current notification practices. We also believe that any edits and/or updates to notification processes should include language on expectations for reaching out to Tribes and underserved communities which may be affected by authorization and/or potential permit decisions; this may be outside the "normal" electronic media methods identified and could include presentations at community centers or places of worship and pamphlet development and distribution.

2. Part 124

No Comment

3. Incorporation by Reference

No Comment

I. Severability

No Comment

VI. Statutory and Executive Order Reviews

No Comment

In conclusion, the proposed rulemaking is an important step in providing clarity to States and Tribes wishing to assume the CWA Section 404 program. We have encouraged our members to provide EPA with individual comments as to their specific concerns and potential effects the proposed rulemaking will have on their specific circumstances. Our review and comments are overarching responses and are intended to represent opinions and comments received at two state/tribal listening sessions held by NAWM during the week of September 25, 2023, and prior discussions with State and Tribal members. NAWM's State and Tribal agency co-regulators have indicated that they also plan on submitting comments to address specific impacts/concerns related to their regulatory construct and program needs. Unanimous among all comments received from NAWM's States and Tribes, was the need for EPA to provide dedicated resources to support program implementation and to encourage interest in assuming the 404 program.

NAWM appreciates the opportunity to comment on this matter. While these comments have been prepared with input from the NAWM Board of Directors, they do not necessarily represent the individual views of all our members. Please contact me should you wish to further discuss these comments.

Sincerely,



Marla J. Stelk, Executive Director

Cc: NAWM Board of Directors
