

ADMINISTRATIVE DISCRETION

Prepared for NACEPT Assumable Waters
Subcommittee Meeting

Oct 6, 2015

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- ▶ We are asking you to consider how EPA can exercise its discretion in interpreting the language and instructions of CWA 404(g) to help identify assumable waters
- ▶ States play large role in administering the Nation's current environmental laws (e.g., CWA Sect. 101(b)), an issue at the heart of this subcommittee's charge
- ▶ This topic meant to help set context for developing advice that EPA ultimately receives from NACEPT via this subcommittee
 - ❑ Help manage expectations
 - ❑ Help focus deliberations of subcommittee



CONTEXT FOR SUBCOMMITTEE DELIBERATIONS

- ▶ Many familiar with concept whether one is familiar with the term
- ▶ “refers to the power to choose between courses of conduct in the administration of an office or a duty pertaining thereto. It is the exercise of professional expertise and judgment, as opposed to strict adherence to regulations or statutes, in making a decision or performing official acts or duties.” (According to Legal.com)
- ▶ According to scholars there are different types, but all revolve around implementation and execution of law
- ▶ All types of administrative discretion hinge on judgment and interpretation by public administrators



WHAT IS ADMINISTRATIVE DISCRETION?

- ▶ Because many laws are unclear, implementation involves some degree of deference and delegation by Congress
- ▶ For complex policy topics addressed by Congress it is not uncommon to, “invest agencies with a great deal of substantive discretion.” (Eisner, *et al.*, 2000, Contemporary Regulatory Policy)
- ▶ Concept recognized by early scholars, such as Leonard White:
“... once a policy has received legislative sanction, the chief problem becomes one of administration.” (1926, Introduction to the Study of Public Administration)
- ▶ Even under clear instructions from Congress, “some incompleteness, generality, and vagueness seem inevitable.” (Koch, C., 1986, *Judicial Review of Administrative Discretion*, William & Mary Law School Scholarship Repository)
- ▶ And when applied, EPA’s exercise of discretion in filling statutory gaps must be reasonable



WHY IS ADMINISTRATIVE DISCRETION NEEDED?

- ▶ EPA is asking for NACEPT advice, for “filling in the details,” since we are confronted by unclear statutory language in the CWA
- ▶ EPA is bounded by the parameters of 404(g)(1) and by “reasonableness”
- ▶ We are asking you to consider how EPA can exercise its discretion in interpreting the language and instructions of CWA 404(g) to help identify assumable waters
 - ❑ The language is somewhat confusing on its own, and further complicated by Court cases
 - ❑ Clarifications to section 404(g)(1) were outside the scope of the recent Clean Water rule

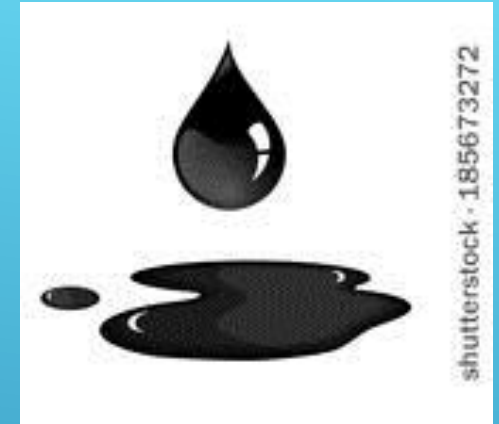
EPA DISCRETION AND CWA 404(G)(1)

▶ Implementation of Oil Pollution Control Act of 1990

- ❑ Split roles and responsibilities between U.S. Coast Guard and U.S. EPA
- ❑ Inland waters vs. coastal waters spill locations

▶ Implementation of permitting programs for dredge material under Clean Water Act Section 404 and Marine Protection, Research and Sanctuaries Act Section 103

- ❑ Potential duplicative permitting
- ❑ Found streamlined process for issuing just one permit



EXAMPLES OF ADMINISTRATIVE DISCRETION

Assumable
waters by
state or tribe

- ?
- ?

Waters
retained by
the Corps

- ?
- ?

HOW CAN WE OPERATIONALIZE 404(G)(1)
AND RESPECT CONGRESSIONAL INTENT?

- ▶ States and tribes interested in 404 assumption have stated they need to have a better idea of the extent of the CWA waters for which they would assume 404 permitting responsibility
- ▶ Such clarity would . . .
 - ❑ Facilitate state/tribal efforts to estimate costs and staffing needs, and to prepare a complete assumption package
 - ❑ Enable permitted entities greater ability to accurately predict where and when a 404-permitted project would be required by the Corps or the State/Tribe (for an assumed program)



ADMINISTRATIVE EFFICIENCY AND
CLARITY

- ▶ EPA takes seriously the need for co-regulators, such as States and Tribes, to understand the extent or reach of an assumed program
- ▶ EPA also takes seriously the need to provide clarity to the regulated public and other stakeholders
- ▶ With the ultimate advice from NACEPT to EPA, EPA hopes to use our discretion to provide that clarity



ADMINISTRATIVE EFFICIENCY AND
CLARITY (CONT.)