ADMINISTRATIVE DISCRETION

Prepared for NACEPT Assumable Waters Subcommittee Meeting
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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 a 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?
Why is administrative discretion needed?

- 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)
- 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)
Examples of Administrative Discretion

- 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
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).
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.