

United States Environmental Protection Agency

National Advisory Council for Environmental Policy and Technology: Assumable Waters Subcommittee

Charge to the Subcommittee, adopted October 2015

Introduction

Section 404(g) of the Clean Water Act (CWA) lays out the requirements for the assumption and implementation of state and tribal CWA section 404 permitting programs. Congress, with the addition of CWA section 404(g), made clear that states and tribes wishing to assume administration of the dredge and fill permit program, could do so for certain waters. This Subcommittee under the National Advisory Council for Environmental Policy and Technology (NACEPT) will focus on a very narrow and specific charge related to which waters a state or tribe assumes permitting responsibility for under an approved CWA section 404 program and for which waters the U.S. Army Corps of Engineers (USACE) will retain CWA section 404 permitting authority. To be known as the “Assumable Waters Subcommittee,” (Subcommittee), the Subcommittee will be asked to provide advice and develop recommendations on how the U.S. Environmental Protection Agency (EPA) can best clarify for which waters the state/tribe has CWA section 404 permit responsibilities, and for which waters the USACE retains CWA section 404 permit responsibility, under an approved state/tribal program. This effort is part of the Administrator’s priorities as it supports states and tribes seeking to assume the CWA section 404 program by providing clarity on the scope of waters for which they would be responsible for administering the CWA section 404 program. Specifically, this effort will address the states’ request to provide clarity on this issue enabling them to assess and determine the geographic scope and costs associated with implementing an approved program.

Background

The NACEPT is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), Public Law 92–463. The EPA established the NACEPT in 1988 to provide advice to the EPA Administrator on a broad range of environmental policy, management, and technology issues. The EPA is now seeking to form a subcommittee under the NACEPT, to be known as the Assumable Waters Subcommittee (Subcommittee) to provide advice on how the EPA can best clarify the waters that a state or tribe may assume permitting responsibility for under an approved CWA dredge and fill permit program. Subcommittee members, like the parent NACEPT committee, serve as representatives from academia, industry, non-governmental organizations, and federal, state, tribal, and local governments.

The Subcommittee is being formed to provide advice and recommendations concerning a focused, but critical, aspect of implementing the CWA section 404 program for the discharge of dredge and fill materials. The USACE currently evaluates CWA section 404 permit applications for activities in the majority of the nation’s waters subject to the CWA. Although states and tribes may assume the dredge and fill permit responsibilities pursuant to section 404(g) of the CWA, only two states (Michigan and

New Jersey) and no tribes have assumed such responsibility to date. When a state or tribe considers assuming such responsibilities, among the first questions that needs to be answered is for which waters will the state or tribe assume permitting responsibility and for which waters will the USACE retain permitting authority. States have raised concerns to the EPA that section 404 of the CWA and its implementing regulations lack sufficient clarity to enable states and tribes to estimate the extent of waters for which they would assume program responsibility and thus calculate associated program implementation costs.¹ The lack of clarity on these questions has been identified by the states as a challenge to pursuing assumption as envisioned under the CWA.²

The Subcommittee will have a limited duration and narrow focus. Other aspects of state or tribal assumption will not be within the scope of the deliberations for this Subcommittee. For example, the Subcommittee will not be deliberating on the merits of assumption, nor on any aspect of the larger question of which waters are “waters of the U.S.” It will focus on how the EPA can clarify the waters for which a state or tribe assumes CWA section 404 permitting responsibility and for which waters the USACE will retain this authority.

Charge to the Subcommittee

The final Subcommittee report to NACEPT should provide advice and recommendations to EPA on how to clarify for which waters states and tribes will assume CWA section 404 permitting responsibilities, and for which waters the USACE will retain permitting authority. The recommendations should reflect consideration of the following assumptions:

- 1) A CWA section 404 permit is required – meaning there is an activity regulated under section 404 that will result in a discharge of dredge or fill material to a Water of the U.S.
- 2) Any recommendation must be consistent with the CWA and in particular section 404(g)
- 3) Clarity regarding who is the permitting authority (the state/tribe or the USACE) should be easily understood and implementable in the field

Proposed Schedule

The Subcommittee will meet approximately four to six times following initiation of the group for twelve to sixteen months face-to-face or via video/teleconference. Additionally, members may be asked to participate in ad hoc workgroups to develop potential policy recommendations and reports to address specific issues.

Tentative meeting schedule (subject to change):

- September 2015 – Meeting 1
- December 2015 – Meeting 2

¹ Environmental Council of States, the Association of Clean Water Administrators, and the Association of State Wetland Managers letter. April 30, 2014. Letter can be found in the docket.

² Ibid

- Late February 2016 – Meeting 3
- April 2016 – Meeting 4
- June 2016 – Meeting 5
- September 2016 – Meeting 6 (if needed) to finalize recommendations to NACEPT