

# Clean Water Act Section 404(g):

- What does it say?
- Why are we here?

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# Overview

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- Clean Water Act (CWA) §404 Assumption Requirements
  - Statute and Regulations
  - CWA §404 Assumption Criteria
- State and Tribal Assumption Efforts
- Why Are We Here?
- CWA §404(g)(1)
- Why is Clarity Important?
- Relationship to the Clean Water Rule (CWR)
- EPA's Objective

# CWA §404 Assumption Requirements

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- CWA §404(g) – states and tribes may assume administration of the CWA dredge and fill permitting program
- CWA §404(h-l) and 40 CFR part 233 describe:
  - State and tribal program requirements
  - Procedures EPA follows and criteria EPA applies in the approval and oversight of CWA §404(g) programs
    - includes (b)(1) guidelines, public notice and comment procedures, federal coordination
  - Process to request approval of state/tribal 404 program - 120 day process, can be extended
  - Assumption request package contents including:
    - Description of the scope and structure of the state or tribes program
    - Memorandum of Agreement with EPA – includes program administration and enforcement coordination
    - Memorandum of Agreement with USACE – includes **list of waters that are not assumed by the state or tribe** – the USACE retains permitting authority over these waters

# CWA §404 Assumption Criteria

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- State or Tribal programs must be:
  - consistent with and
  - no less stringent than the Act and implementing regulations
  
- State or Tribal programs must:
  - **Have equivalent scope of jurisdiction\***
  - Regulate at least the same activities
  - Provide for sufficient public notice
  - Ensure compliance with the (b)(1) guidelines
  - Have adequate enforcement authority

\* State or tribal program may have broader jurisdiction; however, the approved 404 program will have the same jurisdictional scope

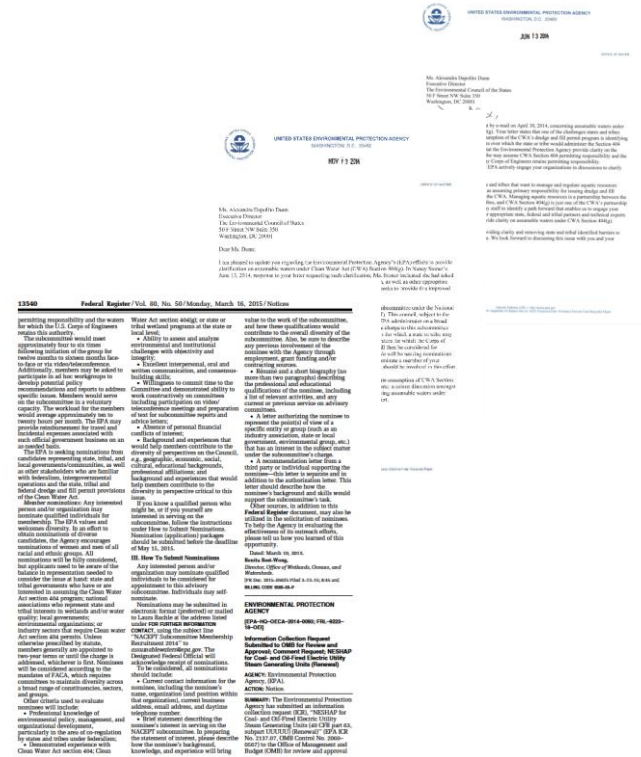
# State and Tribal Assumption Efforts to Date

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- Two states have assumed administration of CWA §404 of the CWA – MI (1984) and NJ (1994)
- EPA has worked with 24 other states and tribes over the past 38 years
- States and tribes have identified several challenges
  - How to address threatened and endangered species
    - Applicability of section 7 ESA consultation to EPA approval of CWA §404(g) programs – December 2010
  - Lack of implementation funds
  - Lack of partial or phased assumption options
  - Application process is perceived as both ambiguous & inflexible
  - **Need to clarify scope of waters for which a state/tribe assumes permitting responsibility**

# Why Are We Here?

- Request from state associations – April 2014
  - EPA commitment – responses to request 6/2014 and 11/2014
  - Clean Water Rule (CWR) preamble:
    - EPA would seek to clarify CWA §404(g)(1) through another process
- Establishment of Assumable Waters Sub-committee
  - Solicitation for members – March 2015
  - Formal appointment – August 2015
  - First meeting – October 2015



# CWA §404(g)(1)

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## **(g) State administration**

(1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto), within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.

# Why is Clarity Important?

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- Assumption request requirements
  - Description of waters regulated by the state or tribe
  - Memorandum of Agreement with USACE describing waters not assumed by the state or tribe
    - the USACE retains permitting authority over these waters
  - Description of funding and staffing levels
- Designing a state or tribal program



# Relationship to the CWR

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- CWR defines the jurisdictional scope of the CWA or the universe of waters subject to the CWA
- Section 404(g)(1) identifies who is the permitting authority of the jurisdictional water

# EPA's Objective and Next Steps

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- NACEPT provides advice via the subcommittee that provides clarity that:
  - meets the needs of states and tribes
  - is easily understood by those implementing the program and the regulated community
  - is implementable and
  - is consistent with the CWA
- After EPA receives advice from NACEPT, what steps might EPA take to provide clarity?
  - Depends partly upon the advice and recommendations EPA receives
  - Clarity could be provided ultimately by various mechanisms: informally by memorandum of understanding or guidance, or formally by rulemaking

