REPORT AND RECOMMENDATIONS
WATERS WORKGROUP

11-17-2016

INTRODUCTION

Section 404 of the Clean Water Act (CWA) authorizes the U.S. Army Corps of Engineers (the Corps) to issue permits for the discharge of dredged or fill material "into the navigable waters….".[1] Pursuant to section 404(g)(1), states, with approval from the Environmental Protection Agency (EPA), may assume authority to administer the 404 permit program in some but not all navigable waters. The waters that a state may not assume, and which the Corps must retain even after a State has assumed the program, are defined in a parenthetical phrase in Section 404 (g)(1) as:

> ***...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***…[2]

The precise extent of navigable waters that may be assumed by a state, and that must remain under the authority of the Corps, has not been totally clear based on this language. However, legislative history makes it clear that Congress intended the Corps to retain jurisdiction over those waters that they had traditionally regulated under Section 10 of the Rivers and Harbors Act of 1899 (RHA), and adjacent wetlands, with some exceptions as discussed below. **Thus, under a state or tribally-assumed program, the division of responsibility between the state or tribe and the Corps is based on Corps jurisdiction under the Rivers and Harbors Act, not CWA jurisdiction.** This is a key point in defining state/tribal assumable waters.

Decisions from the Supreme Court regarding the definition of waters of the United States under the Clean Water Act, and responses to those decisions by the regulatory agencies have raised additional questions about waters that are assumable by the states or tribes. These questions arise primarily from use of the phrases "navigable waters" and "adjacent wetlands" in two different contexts: (1) jurisdictional definition of waters of the United States, and; (2) the administrative division of responsibility over

[1] 33 U.S.C. §1344(a)
[2] *Id* §1344(g)(1)

jurisdictional waters among the Corps and a state/tribally-assumed Section 404 Program. The purpose of the language used in Section 404(g) should therefore be read in the context of the Congressional purpose of encouraging assumption of 404 responsibility by the states and tribes.

404 Program Assumption Does Not Alter the Scope of Jurisdiction over Waters of the U.S.

It is fundamental to the discussion of assumable waters that ALL of the waters we are discussing are jurisdictional under the Clean Water Act. Nothing in this paper is intended to alter the scope of jurisdictional waters in any way.

The question that we are addressing is rather which of these jurisdictional waters may be assumed under a state or tribal Section 404 Program, and which must be retained by the Corps when a state or tribe assumes the Section 404 Program in accordance with §404(g). This is an administrative question.

Background on State and Tribal 404 Program Assumption. As noted in the legislative history prepared by subcommittee members, Congress intended and expected that a large number of states would choose to assume authority over dredge and fill activities under the provisions of Section 404(g). Although to date only two states have completed the assumption process, there are a number of significant benefits associated with state/tribal program assumption. These benefits combined with the active interest of a number of states/tribes in 404 Program assumption make it imperative that the federal agencies address the issues that led to formation of the assumable waters subcommittee.

- State or tribal assumption of the Section 404 Program greatly reduces duplication of effort between state and federal agencies. For actions that impact waters administered under a state/tribal 404 Program, the applicant is required to obtain only a single permit, rather than duplicative (and potentially contradictory) state and federal permits.

- States and tribes regulate both land and waters under state police powers (as compared to federal commerce clause authority); protection of the wetland

interface between uplands and waters thus is well suited to state or tribal authority.

- State/tribal assumption can effectively integrate wetland protection not only with other water programs, but with floodplain and watershed management at the state and local level, and with state and tribal fish and game programs.

- State/tribal wetland program staff are readily accessible to the public. Decisions are typically made relatively quickly under state/tribal programs, which often have multiple local offices and staff who are highly familiar with local resources and issues.

- Many states maintain ownership of bottomlands of lakes and streams, and thus have an ownership interest in dredge and fill activities that can be addressed effectively through a state regulatory program.

- States and tribes that operate their own dredge and fill permit programs can integrate consideration of water quality standards directly, rather than going through the parallel Section 401 Water Quality Certification Program.

It is also clear that there are a number of reasons why states/tribes have not assumed in addition to uncertainty regarding the scope of assumable waters, and these reasons have also been recognized by the Subcommittee:

- A state or tribe may not be approved by EPA to assume the Section 404 Program unless the state/tribe already has regulations that are at least as stringent as all federal regulations. State or tribal regulations must apply to at least all waters of the United States (other than waters retained by the Corps); permitting requirements and standards must be at least equivalent to the federal 404(b)(1) guidelines and related requirements, and no activities may be exempted that are not exempt under the federal regulation. This is a very high bar to meet, and states or tribes may be unwilling to modify existing state/tribal laws to meet it.

- There is no specific source of federal funding to support state or tribal assumed programs, and thus state/tribal governments may be unwilling to undertake additional responsibilities associated with 404 assumption.

In general, however, federal standards are maintained under an assumed program. States and tribes that assume the Section 404 Program must comply with the 404(b)(1)

permit criteria and other applicable regulations. Moreover, the EPA retains the authority to review defined categories of permit applications, and may request review of any application. EPA in turn coordinates review with the Corps, the U.S. Fish and Wildlife Service (USFWS), and the National Marine Fisheries Service (NMFS), providing the overall federal opinion to the state or tribe. In the event that EPA objects to issuance of a 404 permit, it cannot be issued by the state/tribe over EPA's objection. These provisions of federal law provide safeguards that ensure considerations of both state and federal requirements.

If the scope of assumable waters is limited, then the overall benefit to the state is greatly reduced, and the cost and other impediments become relatively greater. Certain states that have considered assumption have been discouraged by the initial limit on assumable waters proposed by local Corps district regulatory programs.

The "Waters" Workgroup

The "waters workgroup" was tasked with the following:

> *The Waters workgroup will explore the ideas, issues, and terms around the scope of waters that must be retained by the Corps when a state assumes administration of the Section 404 permit program - including waters that are "presently used" or "susceptible to use" - for the full Subcommittee to consider. The workgroup will develop options and or recommendations regarding guidance for states, Corps districts, and EPA regions that can be implemented to provide more consistency when determining the scope of state assumable waters.*

The workgroup has considered these issues primarily from the perspective of states and tribes potentially seeking to administer the Section 404 program, the federal agencies working with those states, and the public that is impacted by the 404 permit program. Recommendations have been developed based on our understanding of the acceptable legal framework under consideration by that workgroup, and with a goal of facilitating state/tribal assumption where state or tribal capacity exists.

While the primary task of the workgroup was to consider options for the identification of assumable waters, we also considered related procedural issues and have made additional recommendations to facilitate the assumption process.

FINDINGS AND RECOMMENDATIONS

Recommendation #I

The federal agencies should provide clarity regarding the extent of Waters of the U.S. that may be assumed under Section 404(g). The generally preferred option for doing so is based on the identification of waters that must be *retained* by the Corps using primarily existing lists of waters subject to regulation by the Corps under Section 10 of the RHA, except for those waters deemed navigable based solely on historical use, and with the addition of wetlands adjacent to the Section 10-eligible waters. All other waters may be assumed by a state or tribe.

The waters workgroup discussed a number of approaches to the identification of state/tribal assumable waters. Suggestions that were inconsistent with the requirements of CWA Section 404 (i.e. that would require amendment of the CWA) were rejected without further consideration. Three options remain.

- **Option A – Generally Preferred Option: Identification of waters that must be retained by the Corps based primarily on existing state-by-state lists of navigable waters regulated by the Corps under Section 10 of the Rivers and Harbors Act (RHA), with limited modifications as needed to conform to RHA regulations and case law and CWA 404 program assumption requirements. All other waters would be assumable by a state or tribe.**

  Lists of waters regulated by the Corps under Section 10 of the Rivers and Harbors Act are maintained for each state except Hawaii. The workgroup recommends that these lists be the starting point for identification of waters that must be retained by the Corps under state/tribal assumption of CWA Section 404.

  For purposes of program assumption, a list of Corps Retained Waters would be developed by deleting waters that have been included on the §10 lists based solely on past (historical) navigational use; and by the addition of waters that the Corps finds eligible for RHA Section 10 status in accordance with existing RHA regulations and RHA case law and that the Corps adds to the existing Section 10 lists. Variations within this option have been discussed at length, all relying on use of the existing Section 10 lists as starting point. The current recommendation appears to be the most direct and practical, relies on existing regulatory language, and avoids new definitions of terms to the extent possible.

  This option is preferred by members of the workgroup other than the Corps of Engineers, which cites their regulations defining navigable waters under the authority

of both the RHA and CWA. This option is discussed in detail below.

- **Option B: Case-by-case determination of Corps-retained and state/tribal assumable waters at the time of program assumption.**

  This option was discussed, but is not preferred by any workgroup member.
  This option represents the status quo. Unfortunately, interpretation of §404(g) appears to vary among state and federal agencies, and among Corps District offices. The states have requested that EPA clarify the extent of assumable waters because uncertainty regarding the potential scope of state permitting authority under an assumed program is a barrier to serious consideration of 404 Program Assumption by the states and tribes. Without this barrier, more states/tribes might assume responsibilities under Section 404 as intended by Congress in the 1977 CWA amendments. In response to the request for clarification, the EPA formed the Assumable Water Subcommittee of NACEPT, and charged the subcommittee with providing advice and recommendations on how to clarify the extent of waters that may be assumed under Section 404.

  Because this option does not meet the charge to the subcommittee, maintaining the status quo is not an acceptable option to the states and tribes.

- **Option C: In general, a determination that "navigable waters" to be retained by the Corps under CWA Section 404(g) are equivalent to "navigable waters" as defined under the Corps regulations at 33 CFR 328.3(a)(1), "all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." Note that 404(g) does not provide for the Corps to retain "navigable waters" which were determined based solely on use in the past.**

  PROCESS:

  a) Corps District offices (with the exception of the Honolulu District) maintain lists of RHA §10 "navigable waters of the U.S." within their areas of responsibility. These include waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. Corps District offices have also made stand-alone and case-by-case determinations of Traditional Navigable Waters (TNWs), or (a)(1) waters, within their areas of responsibility. For purposes of state assumption, the list of "navigable waters" that would be retained by the Corps would include both those waters listed on the RHA §10 list, including those waters subject to the ebb and flow of the tide, minus any waters or reaches of waters based solely on use in

the past, and any waters for which TNW stand-alone determinations have been previously made. Case-by-case TNW determinations are only valid for the specific approved jurisdictional determination for which they are prepared and cannot be relied on for future use. At the time a state or tribe begins assumption discussions with a Corps District, the District may choose to evaluate their case-by-case TNW determinations to determine whether addition of that water to the retained navigable waters list is warranted under a stand-alone determination.

b) There may be times when the Corps must make a new or revised §10 or TNW determination after it has provided its "retained navigable waters" list to a state or tribe (e.g., when a District independently makes changes to determinations per our regulations at 33 CFR 329.14 or under TNW determination guidance, when a Federal court has made a determination of "navigable waters of the U.S.", or when Congress makes a determination of "non-navigable" under 33 USC Chapter 1, Subchapter II). In these cases, appropriate adjustments would be made to the retained navigable waters list to account for these revisions.

This option has been proposed by the Corps of Engineers. States and tribes do not concur with this option because it does not distinguish between waters regulated under the RHA (which must be retained by the Corps based on legislative history) and waters regulated under the CWA (which the states/tribes consider to be assumable).

Discussion of the Generally Preferred Option: Based On Section 10 RHA

The Corps definition of **navigable waters under the Rivers and Harbors Act** (33 C.F.R. §329.4, 1977), the regulatory definition of "(**a)(1)" waters**, and the CWA §404(g)(1) **parenthetical definition of waters to be retained by the Corps** under a state-assumed program all contain very similar elements, in spite of their differing uses. There are also some important differences, but they are not obvious to all readers. CWA (a)(1) has a different purpose and meaning than CWA 404(g)(1).

The workgroup has determined that use of the (a)(1) category of waters of the United States to identify Corp-retained waters is inconsistent with legislative intent and with past practice in regard to Section 404 Program Assumption. The ***purpose*** of 33 CFR 328.3 is to define the scope of jurisdiction under the CWA, while the ***purpose*** of Section 404(g) is to provide for an administrative division of responsibilities between state and federal agencies. For this reason, this option is not acceptable to the states and tribes.

Recognizing the different purposes of the term "navigable waters" to be retained by the Corps

under Section 404(g) and the term "navigable waters" as defined for purposes of CWA jurisdiction at 33 CFR 328.3(a)(1), the preamble to a rule proposed by EPA and the Corps, and published in the *Federal Register* on June 29, 2015 (pages 37059-60) includes the following statement:

"The CWA identifies the waters over which states may assume section 404 permitting jurisdiction. ... The scope of waters that are subject to state and federal permitting is a separate inquiry and must be based on the statutory language in CWA section 404. ... EPA has initiated a separate process to address how the EPA can best clarify assumable waters for dredged and fill material permit programs pursuant to the Clean Water Act 404(g)(1). "

This statement makes it clear that it was not the intention of the Corps and the EPA to utilize a revised administrative interpretation of CWA "waters of the United States" and related terms to alter the scope of assumable waters.

The Corps' 1975 description of Phase I waters incorporated the description of "navigable waters of the United States" already regulated by the Corps under Section 10 of the RHA, and included adjacent wetlands. The Corps' RHA §10 regulation at the time emphasized that "[p]recise definitions of 'navigable waters' or 'navigability' are ultimately dependent on judicial interpretation, and cannot be made conclusively by administrative agencies." 33 C.F.R. 209.260 (b)(1972). The current RHA §10 regulation states "[p]recise definitions of 'navigable waters of the United States or 'navigability' are ultimately dependent on judicial interpretation and cannot be made conclusively by administrative agencies." 33 C.F.R. 329.3 (2015)

Based on legislative history prepared by subcommittee members, we can conclude that the waters Congress intended the Corps to retain after a state assumed 404 authority are: waters identified by the Corps as Phase I waters in its 1975 regulations (that is, regulated under Section 10), *except* for those waters deemed navigable based solely on historical use, and wetlands adjacent to Section 10 waters.

Corps District Offices maintain lists of RHA §10 waters for all states (with the exception of Hawaii). These lists are the best starting point for identification of waters that are to be retained by the Corps under a state or tribal assumed program. In accordance with 33CFR 329.16, these lists "represent only those waterbodies for which determinations have been made; absence from that list should not be taken as an indication that the waterbody is not "navigable." Moreover, these lists "are to be updated as necessitated by court decisions, jurisdictional inquiries, or other changed conditions" *Id.*

However, in accordance with the CWA legislative history, waters that are included on §10 lists based only on historic (past) use may be assumed by the state or tribe. For purposes of state assumption, the Corps should identify those waters that it considers navigable only because they "have been used in the past" based on careful consideration of the relevant factors set

forth in the RHA §10 regulation, including 33 CFR 329.8 (improved or natural conditions off the waterbody), 329.9(a) (Past use), 329.9(b) (Future or potential use), and 329.10 (Existence of obstructions), and taking into account the state assumption purpose of identifying those waters (in contrast to the jurisdictional purpose of most RHA §10 determinations).

Waters that are not already on a state Section 10 list but are determined by the Corps to be "presently used, or are susceptible to use in their natural condition or by reasonable improvement" (in accordance with the §404(g) definition) may be added to the §10 list by the Corps, and then also included on the list of Retained Waters. For purposes of state assumption, the Corps may identify those waters that it considers eligible for Section 10 status based on careful consideration of the Rivers and Harbors Act case law and of relevant factors set forth in the RHA §10 regulations, including 33 CFR 329.8 (Improved or natural conditions of the waterbody), 329.9 (a) (Past use), 329.9(b) (Future or potential use), and 329.10 (Existence of obstructions). These waters should be retained by the Corps **if** they are added to the §10 list.

Whenever a state or tribe proposes assumption, the state or tribe, the Corps, and EPA should collaborate in review and modification of the existing §10 list, clarification of the scope of assumable waters, and resolution of any waters that do not clearly meet these guidelines. This process should be consistent with the Corps' RHA §10 regulation, particularly 329.14-16 pertaining to navigability and §10 lists. Inclusion of EPA in these discussions will assure careful consideration of state or tribal assumption factors and concerns in devising a list of assumable waters, including consideration of related issues (e.g. tribal waters) prior to signature of state or tribal -Corps Memorandum of Agreement (MOA). The EPA should establish a clear dispute resolution procedure to be followed if the state or tribe and the Corps district are not able to complete the list of assumable waters as part of its MOA development within a reasonable time frame.

Tribal Waters

Tribal lands defined as Indian country, including lands within reservation boundaries, dependent Indian communities, and other lands held in trust for the tribes by the federal government, may be assumed by a tribe if approved by EPA, but typically may not be assumed by a state.

Where a *state* is proposing to assume the 404 Program, tribal waters should be clearly identified in a list of *Corps-retained* waters. Note that some non-tribally owned lands may be located within federal reservations; this may lead to complex situations where a state may have its own authority for regulation, but cannot assume Section 404. On the other hand, where a *tribe* is proposing to assume the Section 404 program, the list of assumable waters will depend on the scope of waters determined to be under the control of the tribe. Most of the factors

that impact the scope of state assumption will also impact tribal assumption – that is, the identification of Corps Section 10 jurisdiction (as opposed to Section 404 jurisdiction) and wetlands adjacent to Section 10 waters; historical versus present commercial use, and so on.

RECOMMENDATION # II

The waters workgroup strongly recommends that the federal agencies develop field level guidance on state/tribal 404 Program assumption. This guidance should be developed jointly by the Corps and EPA, with input from states and tribes, with the intention that it be used by Corps District and EPA Regional offices as well as by state and tribal governments. The guidance should provide states or tribes and the appropriate Corps District staff with the information needed to distinguish between state-assumable waters and those waters where responsibility for 404 permitting is to be retained by the Corps following assumption. In doing so, the guidance should carefully differentiate between the legal definition of jurisdictional waters (i.e. waters of the United States), and the administrative distinction between state/tribally-assumed and Corps-retained waters.

The guidance should further define a process to be used for development of a Memorandum of Agreement between the state/tribe and the Corps as required prior to assumption under Section 404(g). The guidance should be clear, objective, and explicit enough so that the federal agencies and the states/tribes will reach consistent conclusions regarding the extent of assumable waters within a given state or tribe.

Following the 1977 CWA amendment to provide for Section 404 state program assumption, the EPA developed regulations (40 CFR Part 233) to direct state and federal actions. However, no detailed field level guidance has ever been provided to Corps Districts or to states that may be considering 404 assumption. Additional information is clearly needed to guide identification of assumable waters, among other issues.

Records from the State of Michigan show that even in 1983, there was some tension regarding the Corps' initial assertions regarding the extent of waters that were assumable.[3] This is hardly surprising given that simultaneously the Corps was responding to legal decisions regarding the scope of federal Section 404 jurisdiction; it was not clear how changes to combined Section 10/Section 404 jurisdiction were to be applied under state assumption. In Michigan, Brigadier General Jerome Hilmes, commander of the Corps North Central Division, ultimately clarified the Corps position in a September 1, 1983 letter to Michigan's Governor indicating that if the state

[3] Draft July 8, 1983 letter from Governor of Michigan to the Corps, and September 1, 1983 response from North Central Division Commander (*appendix or attachment)*.

pursued assumption, "*...the only waters which would be evaluated for transfer by the Corps of Engineers* ***[to the state of Michigan following approval of Michigan's 404 Program by EPA]*** *would be those currently being regulated under Section 10 of the Rivers and Harbor Act of 1899.*" In the context of the letter, this implies that the Corps considers all waters other than the prior regulated Section 10 waters to be assumable. Thus, only Corp-regulated Section 10 waters would be evaluated when developing a list of retained waters in the MOA. This is consistent with statements in the legislative history of the CWA, indicating that states would be authorized to assume "Phase II and Phase III" waters as defined by Corps interim regulations dated July 25, 1975.[4]

In more recent years as the EPA has administered both RHA and CWA 404 permitting programs, the field level distinction between Section 10 waters and Section 404 waters has become increasingly blurred. As a result, States that have inquired at the field level about assumable waters have on occasion been told by Corps District staff that there is very little assumable. These responses appear to confuse the scope of Corps *jurisdiction* under the RHA and the CWA with the *administrative* question of where the states/tribes may be authorized to assume the CWA Section 404 Program.

The waters workgroup recognizes that there are options other than field guidance to resolve uncertainty regarding the extent of state/tribal-assumable waters, including the revision of or addition to existing rules governing state program assumption. However, there are a number of issues that led us to recommend field level guidance rather than rulemaking. First and foremost, the difficulty of completing rulemaking has been made clear, and we would not expect any resolution of state concerns within a reasonable timeframe. Secondly, rulemaking might once again confuse definition of jurisdiction with identification of the scope of assumable waters; it could turn a relatively simple and non-controversial issue into a highly controversial one. We have recommended development of guidance because it seems appropriate for what is – as we have emphasized – an administrative process of dividing the responsibilities between a state or tribe and the Corps under an assumed program, without in any way altering the reach of federal jurisdiction or reducing the level of resource protection provided under Section 404.

Recommendation #III

Field guidance to clarify the scope of waters assumable by the states and tribes should provide sufficient flexibility to meet the geographically and politically diverse needs of the states and tribes while adhering to CWA 404 (g)-(l) and guiding principles that can be applied nationally.

The distribution and concentration of waters of the United States, as well as the subset of those waters that may be administered under an assumed Section 404 program differ greatly among

[4] *Federal Register*, Vol. 40, No. 144, page 31326.

coastal states, arid western regions, states that support larger interstate rivers, and other states whose boundaries encompass numerous lakes, streams, and wetlands. The extent of waters, the primary hydrologic patterns that dictate the flow and use of waters, and overall ecology vary greatly, as do the type and extent of interstate and foreign commerce supported by the waters within a state. These regional factors make it challenging to fully identify those specific waters that will be regulated under any and all state/tribal programs, and those that will remain under the jurisdiction of the Corps following state assumption.

It is, however, possible to list general principles and factors – arising from the language of Section 404, records reflecting Congressional intent, and subsequent federal regulations - that should be considered in identifying the extent of state assumable waters, and that will lead to relatively consistent decisions from state to state, and certainly within a particular state from the perspective of various agencies. The waters workgroup has developed the following list of principles that should be incorporated into national guidance.

1. **States and tribes should be able to assume administration of Section 404 permitting over all waters intended by Congress in the 1977 CWA amendments**. **In general, the federal agencies should have clarity regarding state assumption of a significant portion of the waters of the United States, consistent with Congressional intent.**

2. **State or tribal program assumption is a state/tribal-federal partnership that serves to reduce duplication of state and federal permitting and that takes full advantage of both state/tribal and federal expertise. Provisions of the program assumption regulations also ensure maintenance of an equivalent level of resource protection meeting 404 criteria, provide for federal government oversight, and maintain Corps responsibilities in Section 10 waters.**

3. **While the scope of federal jurisdiction over waters of the U.S. has been left unclear following Supreme Court decisions – and potentially clarified by federal rulemaking - the administrative procedure for dividing permitting authority between the Corps of Engineers and approved state programs has not been modified since 1977.**

4. **The final list of waters that will be assumed under an approved state or tribal program, and the waters to be retained by the Corps, should be prepared *jointly* by the state/tribe and federal agencies in accordance with current federal law and regulations.**

   EPA's Section 404 Program regulations simply state, "*States should obtain from the Secretary [of the Army] an identification of those waters of the U.S. within the State over which the Corps retains authority under Section 404(g) of the Act."*[5] The retained waters

[5] See Note following 40 CFR §233.11(h).

are to be listed in an MOA between the state or tribe and the Corps in accordance with 40 CFR §233.14. These regulations have often been taken to infer that the extent of retained waters is simply dictated by the Corps, with no opportunity for input by the state or tribe.

However, Section 404 Program assumption is broadly defined in the preamble to the state regulations as a partnership: "*The clear intent of [transfer of programs to the states] is to use the strengths of Federal and State governments in a partnership to protect public health and the nation's air, water, and land."* Clearly, a state or tribal agency and a federal agency cannot be expected to enter into a Memorandum of Agreement unless both parties do in fact agree on the primary content of the MOA – in this instance the definition of waters that will continue to be regulated by the Corps following assumption.

5. In identifying state-assumable waters, the state and Corps should have the flexibility to use the best records, data, and procedures available for a given state.

While the identification of Corps retained waters should be based initially on a list of Section 10 waters consistent with the Corps RHA Section 10 regulation, both the state and the Corps may now possess more accurate or detailed geographic information that is preferable for use by the agencies and the public. Such information may include aerial photography, digital mapping, or similar sources.

Because the availability of geographic information not only varies by state but is expected to improve over time, no single source should be mandated as the basis for documentation of retained waters. Rather, in describing the administrative division of regulatory authority over the waters within a state or tribe, the state/tribe and the Corps should provide data and procedures that are of greatest possible utility to field level regulatory staff, and that clarify to the greatest extent possible the responsible agency to members of the public.

6. To the greatest extent possible, state/tribal and federally administered waters should be identified at the signing of an MOA between the state or tribe and the Corps.

The precise location of the *jurisdictional boundaries* – such as the ordinary high water mark of a stream or the edge of wetland - depends upon field level determinations. As such, it is understood that precise boundaries cannot necessarily be accurately identified in an MOA. However, basic identification of water bodies and their assignment to state/tribal or federal authority under an assumed 404 program can be done at the time of program assumption. The upstream extent of navigable waters can also typically be defined based on landmarks (such as a dam or bridge) or geographic coordinates. In the event that it is desirable to

define the ordinary high water mark of a stream, the Corps regulatory definition[6] should be used.

Likewise, deletions from the Corps list of Section 10 waters that were considered navigable based on historic use only, and additions of waters that are not currently listed but meet the criteria to be Section 10 waters, should for the most part be made prior to signing of the MOA. It is expected that some additions or deletions to the list of Corps Retained Waters may be desired by the state/tribe and the Corps in future years; procedures for such modifications should be included in the MOA, and be mutually agreed upon.

7. **Tribal lands defined as Indian country, including lands within reservation boundaries, dependent Indian communities, and other lands held in trust for the tribes by the federal government, may be assumed by a tribe if approved by EPA, but typically may not be assumed by a state.** The complexity of this issue mandates additional consideration at the state/tribal level at the time of program assumption.

Recommendation #IV

Field level national guidance prepared by the Corps and EPA, with input from states and tribes, should include general procedures that should be followed when a state or tribe proposes to assume the Section 404 permit program, in addition to any other actions needed to comply with federal regulations.

The waters workgroup recommends that uniform national procedures be developed by the federal agencies with input from states and tribes, and included in field guidance on identification of assumable waters. Support for state/tribal assumption can be facilitated, and national consistency encouraged, by defining basic procedures for carrying out the assumption process, as recommended below. It is expected that the EPA, the Corps, and the states/tribes will also identify additional actions that are appropriate to the needs of a given state or tribe, and that will achieve the requirements of current federal regulations (40 CFR Part 233), such as means of public outreach.

The workgroup recommends that the following general steps be included in field level procedural guidance.

[6] "The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas." 33 CFR Part 328.3(e)

1. A state or tribe initiates discussion of possible 404 Program assumption with EPA and the Corps. In addition to review of other program requirements, the state or tribe will need to determine the scope of assumable waters.

2. Upon request by a state or tribe that is considering assumption, the Corps District office will provide a list and/or map of waters within state or tribal borders regulated under Section 10 RHA that would be retained by the Corps following state/tribal assumption, based on the legal considerations discussed above.

   Where a state is proposing assumption, the Corps list of retained waters will also include waters located on tribal lands in Indian country (unless such waters have already been assumed by a tribe) provided by the Corps, EPA, and/or the tribe. The states may have authority over some such areas, but EPA will generally not approve of assumption of Section 404 authority by a state in such tribal lands. Engagement with tribes will likely be needed to determine the extent of these lands.

3. Where a tribe is considering 404 Program assumption, the tribe will prepare a description (list, map) of Indian country lands over which the tribe would request Section 404 program authority. These lands include:

   - Lands within the external boundaries of a recognized Indian reservation;
   - Dependent Indian communities; and
   - Trust lands (fee-to-trust lands) outside of reservation boundaries.

   The tribe should coordinate with state regulatory authorities and state/federal tribal coordinators in the review of lands that would be under tribal authority.

4. The state or tribe will review the list(s), and may request additional information from the Corps regarding the basis of inclusion of particular waters, if needed. The Corps will make available to the state or tribe any written navigational determinations, Court orders, or similar documentation. The state or tribe and the Corps may also agree to modify the list based on more accurate, currently available geographic information.

   EPA is expected to participate in this review, to ensure that the list of assumed waters is ultimately acceptable at the time that program assumption is approved by EPA. In the event of a disagreement, the dispute resolution procedure developed by EPA will be followed.

5. The state/tribe and the Corps will include the agreed upon list of waters for which Section 404 administration must be retained by the Corps in an MOA regarding state/tribal assumption (see 40 CFR §233.14). The MOA will clarify that all other waters will be under the administration of the state or tribe in accordance with 404(g) on approval of the state or tribal program by the EPA.

   Descriptions of waters under state or tribal and federal authority may be based on any data that is available and useful to the public, including lists, maps, digital geographic information, etc.

6. The state/tribal-Corps MOA will include provisions to amend the MOA and the attached lists of state or tribal and federal authority at such time as the status of a particular water is modified due to improvements, legal decisions, or other pertinent changes. If desired, a regular period for review (e.g. annual, every fifth year) may be established.

Recommendation #V

It is highly desirable that the waters where Section 404 is administered by a state and/or tribe, and where the Corps retains administration are marked on an appropriate map or geographic information system. This will not only provide the information in a readily available format to all regulatory agencies, but to the public and other decision makers.

Under a state or tribal assumed program, it is important that both government agencies and the public be able to readily determine in advance what agency will be responsible for review of a permit application at a specific location. This information will identify the correct agency to contact for permit information, to initiate pre-discharge coordination, or to confirm the jurisdictional boundaries of the waters in question, and what regulations to consult (federal/state/tribal), among other concerns.

While descriptive lists of assumed waters may be appropriate for an MOA between the Corps and state/tribe, individual property owners are expected to need more graphic information to determine what agency is responsible for Section 404 on a specific parcel. Moreover, the geographic information must be of a scale sufficient to identify the location of a proposed activity.

Modern geographic information systems generally provide the technology needed to provide accurate information regarding state and federal jurisdiction. While printed maps showing general locations of state/tribal and federal responsibilities may be helpful, they are inherently inaccurate given that – depending upon scale – the line on a map may be many feet wide. However, with the increasing accuracy of GPS systems, highly accurate digital maps may be prepared.

For these reasons, field level guidance should encourage development or adoption of mapping and geographic information systems that are available to the public.

A state or tribe that assumes the 404 Program and the associated Corps District(s) should decide on the mapping system to use; ideally areas of state and federal jurisdiction can be readily incorporated into an existing state or federal mapping system or systems. The mapping system used should ideally have the following attributes:

- Scale that provides for determination of the appropriate Section 404 agency for an individual parcel of property;
- A format that is readily available to the public, and to other appropriate agencies;
- Clear location of the waters in question;
- Disclaimers regarding the need for ground level boundary identification for waters and wetlands.
- Location of the mean high water mark (or higher high water mark as appropriate), and of the head of tide for tidal waterways.

Although not necessary to understand the scope and location of assumable waters, agencies may also find it desirable to include other information that is important for Section 404 administration and coordination, such as the locations of overlapping state or tribal/federal jurisdiction (e.g. Corps-regulated Section 10 waters where a state/tribal permit is also required); Coastal Zone boundaries; location of habitat for listed species that requires federal coordination; and similar features.

SUMMARY OF RECOMMENDATIONS

I. The federal agencies should provide clarity regarding the extent of Waters of the U.S. that may be assumed under Section 404(g). The generally preferred option for doing so is based on the identification of waters that must be *retained* by the Corps using primarily existing lists of waters subject to regulation by the Corps under Section 10 of the RHA, except for those waters deemed navigable based solely on historical use, and with the addition of wetlands adjacent to the Section 10-eligible waters. All other waters may be assumed by a state or tribe

II. The waters workgroup strongly recommends that the federal agencies develop field level guidance on state/tribal 404 Program assumption. This guidance should be developed jointly by the Corps and EPA, with input from states and tribes, with the intention that it be used by Corps District and EPA Regional offices as well as by state and tribal governments. The guidance should provide states or tribes and the appropriate Corps District staff with the information needed to distinguish between state-assumable waters and those waters where responsibility for 404 permitting is to be retained by the Corps following assumption. In doing so, the guidance should carefully differentiate between the legal definition of jurisdictional waters (i.e. waters of the United States), and the administrative distinction between state/tribally-assumed and Corps-retained waters.

The guidance should further define a process to be used for development of a Memorandum of Agreement between the state/tribe and the Corps as required prior to assumption under Section 404(g). The guidance should be clear, objective, and explicit enough so that the federal agencies and the states/tribes will reach consistent conclusions regarding the extent of assumable waters within a given state or tribe.

III. Field guidance to clarify the scope of waters assumable by the states and tribes should provide sufficient flexibility to meet the geographically and politically diverse needs of the states and tribes while adhering to CWA 404 (g)-(l) and guiding principles that can be applied nationally.

IV. Field level national guidance prepared by the Corps and EPA, with input from states and tribes, should include general procedures that should be followed when a state or tribe proposes to assume the Section 404 permit program, in addition to any other actions needed to comply with federal regulations.

V. It is highly desirable that the waters where Section 404 is administered by a state and/or tribe, and where the Corps retains administration are marked on an appropriate map or geographic information system. This will not only provide the information in a readily available format to all regulatory agencies, but to the public and other decision makers.

For deliberation purposes only as background information for the Assumable Waters Subcommittee. Prepared by Peg Bostwick.