



# CWA § 404 Assumption: Background and EPA's Efforts

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# Introduction to CWA § 404 Assumption

- What is § 404 assumption?
- What are the requirements?
- What is the process?
- What are EPA's current activities?



## § 404(g): Assumption - What is it?

- Section 404 of the CWA (§ 404) requires that a permit be issued prior to the discharge of dredged or fill material into waters of the U.S.
  - Currently, the Corps issues permits in 48 states
- § 404(g) is the provision of the Act in which Congress provides for States or Tribes to assume and administer the § 404 program.
  - This is not delegation
- Why is there growing interest?



## § 404(g): History

- CWA passed by U.S. Congress in 1972
  - Section 404 requires a permit from the Corps (or state or tribe's EPA approved program) prior to placing dredged or fill material into a jurisdictional wetland or waterway
- 1977 amendments § 404(g) – States authorized to request and assume administration of the 404 permitting program for certain waters
- 1984 – EPA approved Michigan's request to assume § 404
- 1987 amendments – Tribes authorized to assume § 404
- 1994 – EPA approved New Jersey's request to assume § 404



# § 404(g): Requirements

- A state program must be:
  - consistent with and
  - no less stringent than the Act and implementing regulations
- The state program must:
  - Have equivalent scope of jurisdiction
  - Regulate at least the same activities
  - Allow for public participation
  - Be consistency with the 404(b)(1) Guidelines
  - Have adequate enforcement authority



## § 404(g): Request Package

The request package submitted to EPA shall include: \*

- Letter from Governor/Tribal Leader
- Complete program description
- Attorney General's statement
- MOA with EPA Regional Administrator
  - Includes: agency roles, categories of permits EPA shall review, reporting requirements, coordination on compliance monitoring and enforcement
- MOA with Secretary of Army (through Chief USACE)
  - Includes: description of retained waters, procedures to transfer permits applications, list of any nationwide permits assumed by state/tribe
- Copies of all applicable state/tribal statutes and regulations administering the program

\*40 C.F.R. 233.10-14 identify the package components



# § 404(g): Request Package cont.

## Program Description

- Scope and structure of program
  - Jurisdiction
  - Activities regulated
  - Anticipated coordination
  - Permit review criteria
  - Scope of permit exemptions
- Procedures for permitting, administrative review and judicial review
- Structure and organization of agency(ies) responsible for program administration
- Funding and staffing levels



# § 404(g): Request Package cont.

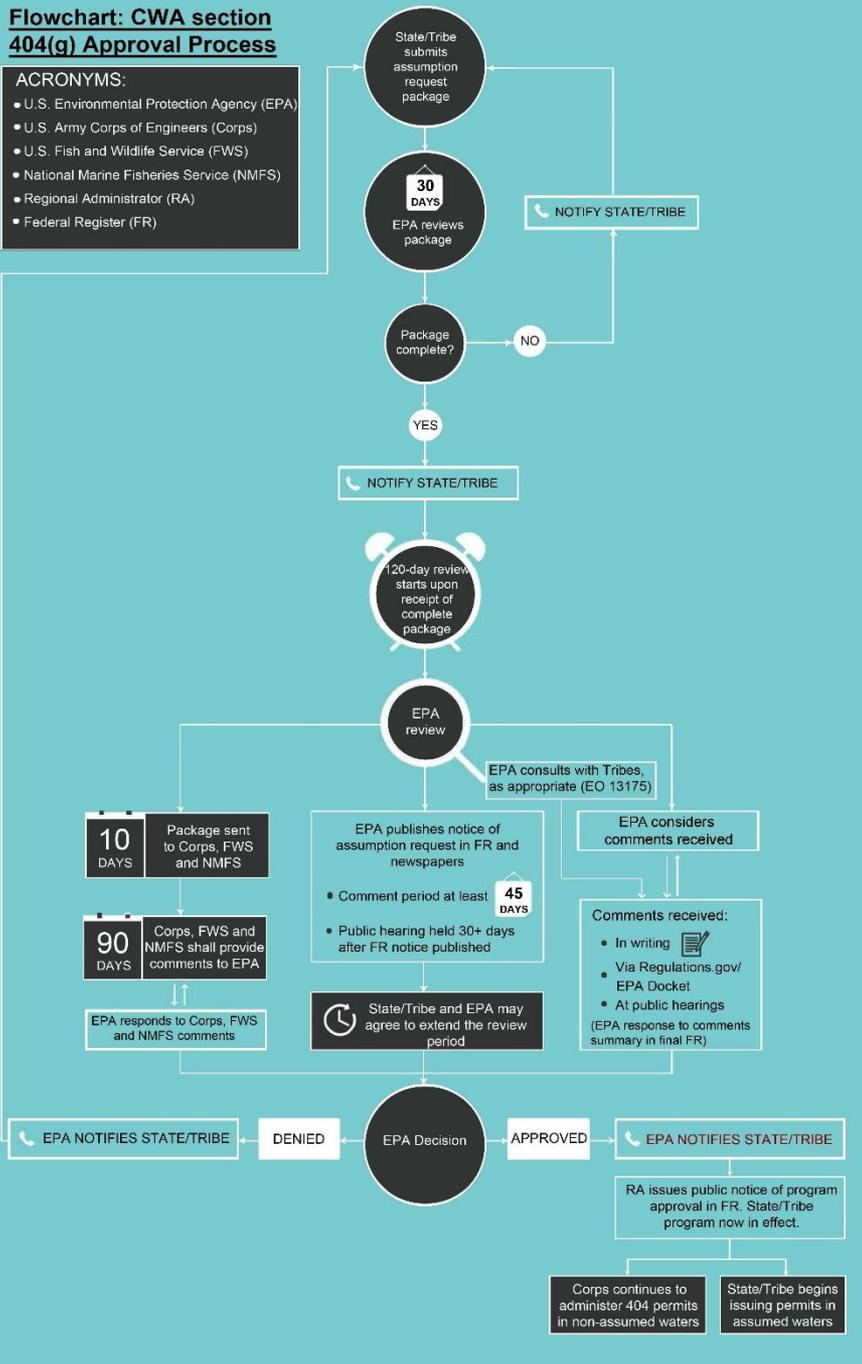
## Program Description cont.

- Anticipated workload
- Copies of permit application forms, permit forms, and reporting forms
- Compliance evaluation and enforcement programs
- Description of waters under state jurisdiction and those under Corps jurisdiction
- BMP's proposed to satisfy farm, forest, and temporary mining roads exemption provisions

**Flowchart: CWA section 404(g) Approval Process**

**ACRONYMS:**

- U.S. Environmental Protection Agency (EPA)
- U.S. Army Corps of Engineers (Corps)
- U.S. Fish and Wildlife Service (FWS)
- National Marine Fisheries Service (NMFS)
- Regional Administrator (RA)
- Federal Register (FR)



# §404 (g): Approval Process Flow Chart



120-day process:

- Includes: coordination with Corps and Services, public hearings and public comment period
- Includes: tribal consultation as appropriate
- EPA shall approve request if state or tribal program meets requirements
- EPA notifies state/tribe and Corps, Federal Register Notice

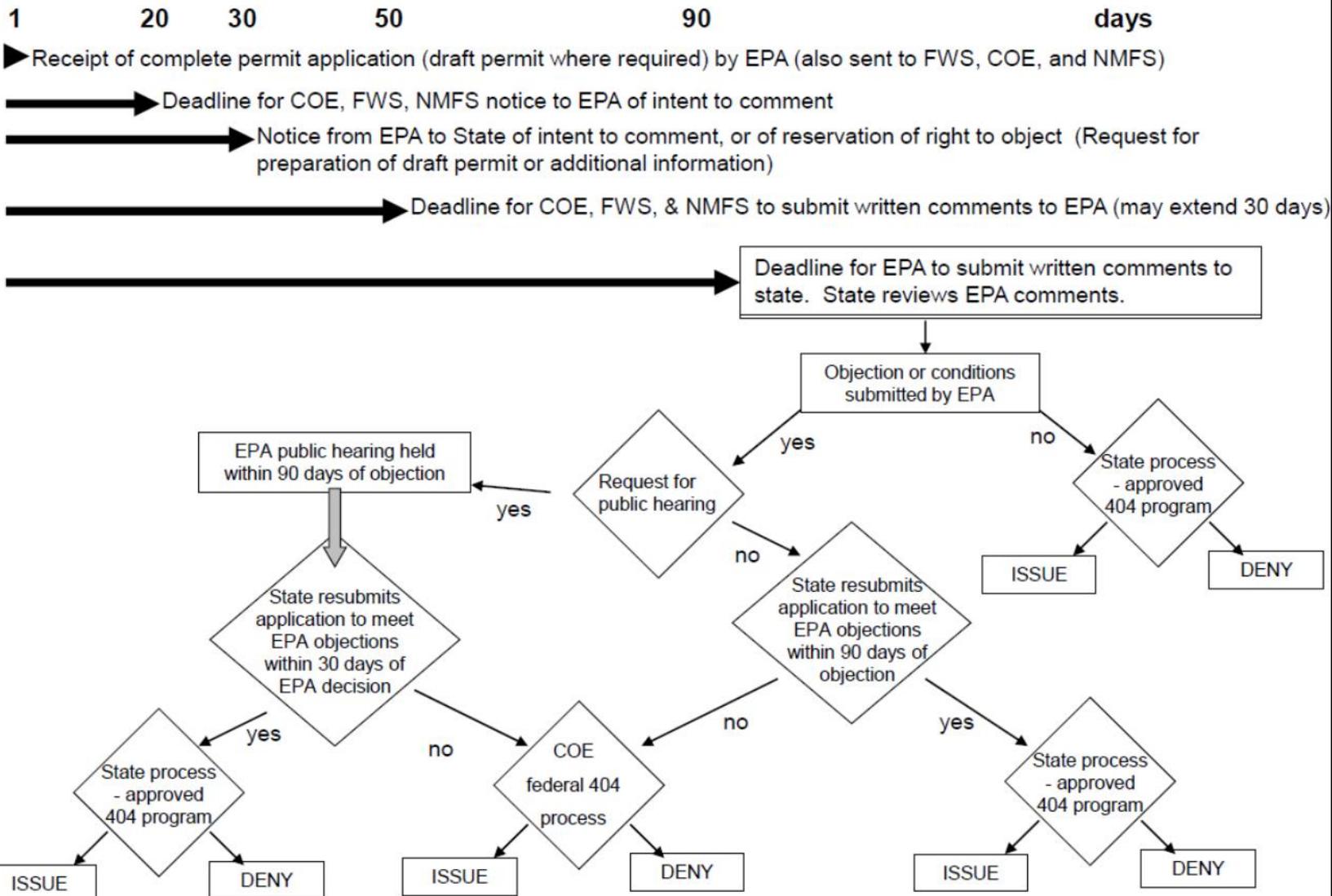


# § 404(g): State/Tribal Permit Process

- State/Tribe transmits notice of every permit application received to EPA
- EPA reviews permits for which review is not waived, coordinates Corps, NMFS and USFWS comments, including:
  - Draft general permits
  - Discharges that may impact endangered species
  - Discharges that may adversely impact waters of another state
  - Discharges with known or suspected toxic or hazardous pollutants
  - Discharges proximal to public water supply intakes
  - Discharges within critical State/Federal areas
- State/Tribe shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until conditions or objection are addressed



# Flow Chart of State Permit Process Review





# § 404(g): Assumable Waters

- What are “Assumable Waters?”
  - Waters for which state or tribe assumes § 404 permitting authority
  - Includes wetlands adjacent to these waters
- Army July 2018 memo stated
  - Support for majority recommendations by the FACA
  - Start with Rivers and Harbors Act section 10 lists to describe retained waters
  - Identification of retained adjacent wetlands will follow recommendation by FACA majority



## § 404(g): Current EPA Actions

- “Modernizing” the 404(g) Regulations
  - Provide further clarity and certainty on retained waters
  - Clarify requirements and process of assumption
  - Facilitate assumption
- Rulemaking Process:
  - Early input October 2018 – January 2019
  - Drafting stage
  - Proposal with outreach and public comment in 2020
  - Final Rule in 2021
- Ensuring consistency
  - Mitigation rule
  - WOTUS
  - Executive Orders



Thank you.  
Any questions?