



October 13, 2023

U.S. Environmental Protection Agency
EPA Docket Center – Water Docket, Mail Code 28221T
1200 Pennsylvania Avenue NW
Washington D.C. 20460

Submitted via Regulations.gov

RE: EPA’s Revision of the CWA §404 Tribal and State Program Regulations – Docket ID No. EPA-HQ-OW-2020-0276

To Whom It May Concern:

The National Tribal Water Council (NTWC/Council) was formed by EPA to provide technical input from Indian Country to EPA to strengthen EPA’s coordination with tribes and allow EPA to better understand issues and challenges faced by tribal governments and Alaska Native Villages, as they relate to EPA programs dealing with water. The NTWC members take this role seriously and the Council has provided input to EPA on a myriad of water issues since its inception. Please note that this letter does not constitute government-to-government consultation as provided for under the EPA Policy on Consultation and Coordination with Indian Tribes.

We are taking this opportunity to reiterate many of the concerns and recommendations we raised in our early comments on EPA’s proposal to revise the Clean Water Act (CWA) §404 regulations, which EPA stated is intended to provide clarity on the requirements for state and tribal assumption of the §404(g) permitting program, as well as to foster greater interest by authorized tribes and states in assuming the authority.

The NTWC will be submitting two comment letters. One comment letter will be jointly signed and submitted by the Region 10 Regional Tribal Operations Committee (RTOC) Tribal Caucus, and the other is this brief letter primarily to reiterate several of the points that were outlined in NTWC’s comments during early engagement. The co-signed letter by Region 10 RTOC and NTWC reiterates most of the concerns we brought to EPA’s attention during the early input process and our co-signing conveys solidarity with the Region 10 tribes. We are attaching the comment letter we submitted in 2018 during early input. The Council raised very similar concerns that are expressed in the Region 10 RTOC comment letter. Unfortunately, it appears some of our concerns were not adequately addressed. For example, concerns for protection of tribally significant resources, lack of opportunities or obligations for consultation, vagueness about which waters the regulatory authorities apply, lack of funding for tribal capacity to administer a §404 program, etc.

Furthermore, at the time that we submitted these early-input comments, Kathie Brosemer (former NTWC at-large representative from the Sault Ste. Marie Tribe in Michigan) helped draft a section (starts on p. 4) that specifically called out the fundamental flaws in Michigan's assumption process that EPA is promoting, in one of the few (3) states that have §404 authority, and there is an actual track record of how that has impacted tribes. It does not appear that EPA's current "modification of procedures" does anything to meaningfully address or correct the very real problems experienced by the Michigan tribes we specifically flagged for EPA to consider. The Michigan tribes have seen degradation of tribally important resources and constraints around their abilities to address obvious adverse impacts from a poorly implemented state wetland regulatory program.

The NTWC has always valued our opportunities to provide early input and tribal perspectives to EPA on rulemaking and implementation of the CWA, through informal Q & A at our monthly meetings, and in formal submitted comments. But when clearly articulated concerns for the protection of tribally significant resources and specific recommendations for improved policy do not result in demonstrable changes from draft to proposed rule, it is discouraging. The current administration's emphasis on improving tribal relations, honoring tribal sovereignty and fulfilling trust responsibility should be reflected in clear and unambiguous expectations for states who seek to implement §404 programs to consult with potentially affected tribes, fully consider tribal impacts of these regulated activities, and then to avoid, minimize or mitigate those impacts. Further, if EPA genuinely seeks to encourage tribes to seek TAS for CWA §404 authority, there needs to be a concerted effort to identify and secure adequate financial and technical support for tribal programs.

We appreciate the opportunity to reiterate our comments. Should you have questions or comments regarding our letter, please contact me at KenPNorton@gmail.com, or you may contact Elaine Wilson, NTWC Project Manager, at Elaine.Wilson@nau.edu for any questions.

Sincerely,



Ken Norton, Chair
National Tribal Water Council

Cc: Karen Gude, EPA Office of Water

Attachment: NTWC's 2018 comment letter submitted in 2018