



December 20, 2018

David P. Ross
Office of Water, Assistant Administrator
United States Environmental Protection Agency
Washington D.C. 20460

Submitted via 404g-rulemaking@epa.gov

RE: National Tribal Water Council's Early Comments to EPA's Pre-proposal for the CWA § 404(g) State and Tribal Dredge and Fill Permit Regulatory Revision

Dear Mr. Ross:

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 members of the NTWC take this role seriously and have provided input to EPA on a myriad of water issues since the Council's inception. We appreciate the opportunity to provide you with early comments on EPA's forthcoming proposal to revise the Clean Water Act (CWA) § 404(g) regulations, which EPA has 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. 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*.

Introduction

The NTWC embraces Congress' delegation to tribes to develop and implement CWA programs for their reservations. CWA § 518(e), 33 U.S.C. § 1377(e); 81 Fed. Reg. 30183 (2016) (EPA Revised Interpretation of Clean Water Act Tribal Provision). There is no doubt that tribes, the aboriginal managers of their waters, are the ones most familiar with their aquatic resources, issues and needs. EPA's support for tribal assumption of the CWA § 404 dredge and fill permit program addresses one aspect of this congressional delegation and is welcomed by NTWC.



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However, although many tribes have the desire to take on this program, most tribes do not have the resources to do so. The need for resources is a major issue that must be addressed in order for tribes to take responsibility for a CWA § 404 program. In addition, tribes have significant concerns regarding the impacts that a state's assumption of the CWA § 404 program may have on tribal waters in that state. These two areas of concern are discussed below, and we hope that EPA will devote thought and attention to addressing them as part of its CWA § 404 rulemaking initiative.

A. Tribes' Need for Resources to Develop and Run a CWA § 404 Program

A tribally run CWA § 404 program can reduce delays and save money for permit applicants. It can allow the tribe to streamline the process, reduce unnecessary paperwork and, by providing opportunities for early input and discussion, avoid potential conflicts between tribes, states and the federal government regarding permit decisions. More importantly it puts the tribe in charge of protecting its own valued aquatic ecosystems as well as the traditional services that those systems provide. Tribes also having the most knowledge about their own water resources, are better able than the federal government to foresee potential adverse effects from a proposed dredge and fill project and to propose mitigation measures. The current permit process does not afford tribes adequate review and does not provide compensation adequate for loss or for mitigation efforts. It also often does nothing more than identify concerns with a proposed permit, without actually resolving them. For these reasons, if the need for resources were not a consideration, many tribes would be interested in developing their own CWA § 404 programs.

However, resources are a major consideration: CWA § 404 programs require substantial resources to develop and implement, in terms of both the staff required and the dollars needed to develop and administer an extensive and complex permit program. Indeed, this may be the primary reason why only two states have assumed responsibility for the program to date. The resource burden is even greater on tribes than on states, since tribes in general lack a tax base and have significantly fewer industries within their jurisdictions that would be available to share some of the costs, for example, through the assessment of permit fees.

Presumably EPA is aware of the cost and effort that its staff expends in an oversight role of an assumed program. It is unfortunate that EPA does not seem to recognize the need to fund tribes to take over this permitting program. It is summarily inadequate to suggest that the competitive wetlands program development grants or CWA § 106 funding are a viable means to fund such a program. Wetland program development grants could certainly be used to start a permitting program, but not to sustain it, and CWA § 106 grants are intended to fund tribal water quality monitoring programs. For tribes to begin down this arduous process requires a significant commitment on their part, one which they cannot responsibly take on without having at least some certainty in long-term funding streams.

If EPA truly wants to increase tribes' interest in assuming a CWA § 404 program, it must provide specific funding for tribes to build the capacity needed to receive assumed authority. Further, it must continue to fund tribes to administer the program once it is delegated. Perhaps the DITCA (Direct Implementation Tribal Cooperative Agreement) framework could serve as a model for how EPA could support a sustainable tribal wetland permitting program. Alternatively, there

could be an EPA-funded group or groups formed to assist tribes in developing CWA § 404 programs. The group could be based on EPA Regions, and would also support tribes in each region by providing the essential skills and expertise needed both to assess whether to assume authority for the program and to develop and manage it.

Moreover, the effort involved in seeking and obtaining CWA § 404(g) authority is itself very labor intensive, from a technical, legal and policy standpoint. The NTWC suggests that EPA consider streamlining the process, in terms of time commitment as well as paperwork. Training and support from EPA will be needed to educate the tribes on how to fill out the packet. In addition, such an effort not only costs tribes money but also requires tribes to take time away from other important efforts. Tribes are concerned that states are in a much better position than tribes staff-wise, as well as financially, to assume authority to manage the CWA § 404(g) program, which could lead to the additional problems discussed below.

B. Tribal Concerns with State Assumption of the CWA § 404 Program

1. States do not have the same trust responsibility as the federal government to consider tribal interests.

If states take over the CWA § 404 program from EPA and the Army Corp of Engineers (ACE), ideally states would interact with tribes regarding impacts from state permits on downstream tribal waters, the way EPA and ACE should do. States are not subject to the same trust responsibility to tribes as the federal government, however, and may not accord the same weight to tribal concerns as the federal government would.

As EPA knows, the federal government owes a trust responsibility to tribes that requires the federal government to recognize and protect tribal interests. Tribal rights to consultation stem from this responsibility. Tribes also have a unique government-to-government relationship with the federal government. Although, more often than not, tribes would prefer managing their own affairs, including with regard to natural resources, when tribes lack the capacity to do so it is the federal government's responsibility to protect tribal interests.

In contrast, when federal authority is delegated to a state, tribes are not always consulted and tribal interests tend to be summarily dismissed in the face of conflicting state interests. This situation is of particular concern in the context of CWA § 404(g), since it is much more likely that states will assume authority for the wetlands permit program than tribes, for all the reasons discussed above. The end result puts tribes at a great disadvantage, since it leaves tribes to deal directly with their state counterparts, without the federal safeguards for tribal interests.

2. States are not required to comply with NHPA or ESA when issuing permits.

The consultation requirements of the National Historic Preservation Act (NHPA) and Endangered Species Act (ESA) are triggered by "federal action." If states take over the issuance of CWA § 404 permits, the federal action requirement is not triggered by the permit issuance itself. Yet the permitted discharges may nevertheless impact tribal waters, and tribal natural and cultural resources are still at risk of being degraded or destroyed. Recently EPA representatives assured

the NTWC that EPA will continue to exercise its responsibilities under these statutes. The NTWC strongly supports this position. In fact, for example, on beds and banks, held in trust by the United States for the Coeur d'Alene Tribe, the United States Supreme Court held that the State of Idaho has no right title or interest in the Tribe's waters. This is illustrative of how the federal government must maintain authority of this program on tribal waters, if tribes do not assume this role.

3. The experience of tribes in Michigan illustrates problems that have arisen when a state assumes responsibility for the CWA § 404 program.

Michigan assumed responsibility for wetland dredge and fill permitting in 1984, the first of only two states to do so. A Memorandum of Agreement (MoA) between Michigan and EPA set out the responsibilities of the state and the federal government. The MoA was revised in 2011, and at that time language was inserted that the state would consult affected tribes as well as neighboring states when making CWA § 404 permitting decisions.

Michigan has had issues with the No Less Stringent requirement, due to providing various exemptions from wetland permitting (for example for agricultural uses, agricultural drains, and road maintenance) that were not allowed under the federal rules. A detailed timeline of the development of Michigan's program and its struggles with compliance with federal law is found at <http://www.fraserlawfirm.com/blog/2013/08/2013-public-act-98-significantly-changes-michigans-wetlands-protection-program/>. The state has faced public scrutiny, internal investigation, and EPA communication about these issues since at least 1997. PA 98, passed into law in summer 2013, was an attempt to rectify these issues; however, it introduced 22 new inconsistencies with federal law (listed at the above website). To date there is no certainty in the regulated community about which wetlands fall under the provisions of the law, especially when farming activities are involved.

Most recently, State Rep. Tom Casperson introduced SB 1211 during the lame duck session of November 2018. If enacted it would gut wetlands protections by redefining what constitutes a protected wetland, excluding wetlands smaller than 10 acres and wetlands not adjacent to a navigable water. About half of the wetlands of Michigan, or about a half million acres, would suddenly not be protected if this bill becomes law. It seems certain that if this bill becomes law, that would be the "last straw" after more than 20 years of Michigan's noncompliance, and environmental organizations will petition EPA to withdraw Michigan's assumption of wetland regulation. The uncertainties created by Michigan's failure to comply with the law, its efforts to change the law outside of the regulatory process, and the likely ensuing litigation will only result in more delays for developers in the state.

Given the lengthy and protracted attempts by Michigan lawmakers (and in some cases state agency staff) to thwart the intent of CWA § 404, it is unclear why the EPA is looking to encourage other states to take on this authority. If other states follow Michigan's lead and behave in a similar

manner, it would require significant staff and legal resources for EPA to monitor and manage this obstruction and live up to its duty to faithfully implement the law.

To provide more detail from a tribal perspective on Michigan's assumption of the CWA § 404 program, the experiences of eight Michigan tribes with state wetland permitting actions were collected through phone or in-person interviews. Tribes in both peninsulas are represented in the stories collected. All respondents were interested in providing this information and willing to share their tribe's experiences. Some referred to others within the tribal government who knew more about the incident(s), but due to time limitations those others were not contacted.

Several recurring themes emerged. One recurring issue was surprising, and that is that Michigan routinely overstepped its authority by issuing permitting decisions on tribal trust lands and reservations. On these lands, state laws simply do not apply; rather, the Army Corps of Engineers (ACE) is the wetland dredge/fill permitting authority. Unfortunately, in some cases the tribal staff were unaware of this division in jurisdictional authority, and conceded to state permits because of the joint permitting process the Michigan Department of Environmental Quality (MDEQ) has in place with ACE.

The MDEQ/ACE joint permit process provides for a single application form for multiple purposes, including dredge/fill, installations of pilings, and similar activities. MDEQ and ACE share a single application and the attachments filed with it, and this procedure, when applied routinely and regularly for hundreds of applicants from across the state, creates a process flow routine that is difficult to modify for the few permit applications for which ACE retains authority, such as on tribal lands. Examples of the jurisdictional problem that has arisen, perhaps as a result of this process, include:

- An exploration geologist built a road through a wetland on tribal trust land, in the mid-2000s, which MDEQ approved.
- Restoration work on the Lake Superior shoreline required a "joint permit" which involved MDEQ and ACE discussions of where each had jurisdiction, around a high water mark, but this was on reservation land.
- A recent letter from ACE to MDEQ, informing them of federal jurisdiction for environmental law on tribal trust land, surprised tribal staff because of the implication that MDEQ did not already know this.

Other experiences included cases of MDEQ asserting authority over permitting in wetlands immediately adjacent to a Great Lake, which is also subject to ACE jurisdiction.

- A tribal fee land proposal to redevelop a fishing harbor faced a year's delay over MDEQ's

asserted permitting of minor wetland fill (to slightly widen an access road) in coastal wetland adjacent to Lake Michigan.

- A proposal from a pipeline company to lay mats in a wetland adjacent to Lake Michigan to stage its geotechnical studies at the Straits, has been permitted by MDEQ.

Several tribes related numerous instances of MDEQ permitting wetland destruction in ceded territories without consideration of impacts on treaty-retained rights to hunt, fish, and gather in those areas. Wetlands are a significant ecotype with great importance for tribal lifeways, including being one of the most important sources for medicinal plants and the only source of wild rice. Destruction of wetlands within ceded territories harms tribes' access to these plants, is in violation of treaties with the United States, and is in essence a form of genocide. Treaty-retained rights are part and parcel of the treaty terms with the federal government, and state law does not supersede them.

Finally, tribes reported several instances when MDEQ wetland permitting processes prevented a tribe from carrying out important conservation initiatives.

- A wild rice lake in ceded territory had nontribal lakeshore residents wanting to treat wild rice with herbicides to remove an impediment to motor boating. The state approved this herbicide treatment. The tribe offered to relocate the wild rice to another appropriate waterway before the herbicide was applied, but the wetland permit process that MDEQ required of them was so onerous it introduced significant delays, and the herbicide treatment was carried out in the meantime. Wild rice is a culturally significant traditional and subsistence resource that is dramatically diminished from its historic range, and its restoration is a critical conservation initiative for many tribes. To have a state environmental law impede a tribal conservation initiative that was made necessary by the approvals given under a different state environmental law is outrageous. This violates the spirit of every conservation rule ever enacted.
- A brownfield restoration within a wetland in ceded territory resulted in removal of contaminated soil and subsequent fencing to protect a portion of the wetland. Subsequent efforts to control invasive species in the area were thwarted by lack of access to the fenced-in area due to institutional controls placed on the site. That area became a continuous vector of seed and rhizomes from invasive plants to the region, as MDEQ would not allow tribal staff to enter and control those plants.

C. Other Issues for Consideration in Developing the CWA § 404 Regulations

1. Partial assumption of program.

The concept of allowing an assumption of authority for administering the program for *certain waters* may seem at first glance a reasonable means to reduce the burden on already stretched staff and financial resources in Indian country. The fact of the matter, however, is a tribe would still need to implement the entirety of the program. Therefore, this proposal probably would not significantly change the workload required to fulfill the requirements of assumption, but would reduce the number of waters for which tribes could issue permits. This outcome does not seem of any benefit to tribes.

In contrast, the NTWC is intrigued by the concept that Kathy Hurd (EPA, Office of Wetlands, Oceans and Watersheds) presented to the NTWC on October 24, 2018, which suggested that tribes might assume “certain activities” of the program, but for all tribal waters. This proposal might actually streamline the requirements of full assumption while allowing for more tribal oversight and input into the permitting process, and therefore we think that this concept merits consideration.

2. Other Issues.

We have not addressed here all the issues raised by EPA in various meetings and presentations on possible revisions to the CWA § 404 program and regulations. Two important issues involve clarification of assumable waters and wetlands boundaries. NTWC intends to discuss these issues further and address them in comments on any forthcoming proposal.

D. NTWC Recommendations

The tribes within Michigan’s borders have had 34 years of experience with a state dredge and fill permitting authority, and this experience should be used to inform all assumptions of that permitting authority going forward. In light of lessons learned, as summarized above, whenever EPA develops MoAs with states in connection with assumption of the CWA § 404 program, each MoA should include specific terms that protect tribal interests, tribal jurisdiction and treaty and subsistence rights. In particular, the survey findings summarized in this letter lead us to make the following recommendations to EPA as it seeks to expand assumption of this authority to additional states:

- It is imperative that before any further approvals of state CWA § 404 programs are made, EPA and US ACE must clearly define the extent of the state’s permit authority, including by specifying which wetlands are subject to a state permit when there is a coast, a navigable waterway used for interstate commerce, or similar waters subject to ACE jurisdiction.
- EPA must make clear to each state that its assumption of authority does not extend to Indian country. Tribes themselves, or the federal government by way of ACE, determine what activities may take place on trust or reservation lands or other areas of Indian country, and state laws do not apply there.
- “Joint” permitting processes such as the MDEQ/ACE process muddy the waters regarding proper jurisdiction. The officials involved become accustomed to their customary practices and neglect to adjust them for different circumstances. In future

- assumptions of authority, tribes strongly recommend against such joint permitting processes to avoid inappropriate treatment of tribal lands and waters.
- Future EPA/State MoAs should explicitly require consultation and coordination with Tribes in treaty-affected lands, not just adjacent to trust lands but throughout ceded territory where there are retained treaty and subsistence rights. Permit processes must explicitly consider impacts to treaty-protected resources. A treaty with the federal government is constitutionally the highest law of the land, and therefore treaty protections supersede state permit guidelines.
 - All EPA/state MoAs must explicitly require that permit processes within ceded territory not present an onerous burden on tribes' exercise of treaty-protected rights, including activities designed to conserve and protect those rights.
 - For each state that assumes authority under CWA § 404(g), EPA must conduct a periodic review of that state's implementation of its authority. To facilitate this review, EPA should lay out the criteria that will be used to judge a state's efforts and should provide standards and procedures for revoking a state's authority when it has not exercised its CWA § 404 authority properly.

The NTWC appreciates the opportunity to provide these comments during early engagement and intends to provide additional input once EPA publishes proposed revisions to the § 404(g) regulations in the Federal Register. If you should have any questions concerning this letter, please contact me at (530) 625-5515.

Sincerely,

A handwritten signature in cursive script that reads "Ken Norton".

Ken Norton, Chairman

National Tribal Water Council