



October 6, 2023

EPA Docket Center
Kathy Hurlid, 404(g) Staff Program Lead
Oceans, Wetlands, and Communities Division
Office of Water, U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW, Washington, DC 20460

Subject: Comments Docket ID No. EPA–HQ–OW–2020–0276, Clean Water Act Section 404 Tribal and State Program Regulation

Dear Ms. Hurlid:

Thank you for the opportunity to review and provide comments on the proposed Rule for *Clean Water Act Section 404 Tribal and State Program Regulation*, dated August 14, 2023. The Idaho Department of Environmental Quality (IDEQ) appreciates the Environmental Protection Agency's (EPA) efforts to streamline and clarify EPA's Clean Water Act (CWA) Section 404 Tribal and State Program regulations. While IDEQ generally supports revisions to the CWA Section 404 Tribal and State Program regulations, our comments and concerns are provided below.

I. Retained Waters and Adjacent Wetlands

Due to the complexity of defining retained waters and adjacent wetlands as well as jurisdictional determinations, IDEQ suggests that EPA provide further clarification regarding which waters may be assumed under CWA section 404(g) and which waters will be retained by the Army Corps of Engineers (USACE). EPA should require the USACE to make navigability determinations for all retained waters. Information on Section 10 navigable waters designations already exists, so it should not take the USACE 180 days from the receipt of request to provide a retained waters description if they have identified that they will do so. In addition, resources should be made available that help Tribes and States document and further evaluate retained waters and to clarify the extent of adjacent wetlands for decision making. Under the proposed Rule, decision making will be complicated and slowed by administrative boundary authority, inconsistent application of regulations, ecosystem fragmentation, lack of coordination, enforcement challenges, and monitoring and data sharing. To expound, conflicts may arise if multiple Tribal or State authorities claim jurisdiction over the same wetlands which can lead to legal disputes and confusion over regulatory conflicts. Different Tribal or State authorities may have varying regulations and management priorities. Inconsistencies can result in confusion for landowners. Environmental impact determination may vary by jurisdiction. Dividing management responsibilities along administrative boundaries can lead to fragmented ecosystem management, which may not adequately protect the resources.

Under the proposed Rule, the administrative boundary between retained and assumed wetlands would be set jointly by the Tribe or State and the USACE, but a 300-foot administrative boundary from the ordinary high water mark would be established as a default if no other boundary is established. Some project proposals involving jurisdictional adjacent wetlands that straddle the administrative boundary may involve a discharge into the wetland on both sides of the administrative boundary. The 300-foot administrative boundary is arbitrary and may be difficult to delineate.

II. Program Assumption Requirement

The proposed Rule would revise current requirements and specify that the transfer of an approved program to a Tribe or State would take effect 30 days after publication of the notice of EPA's program approval in the *Federal Register*, except where EPA and the Tribe or State have established a later effective date (not to exceed 120 days from the *Federal Register* publication). Idaho is one of the many states fully authorized to assume the National Pollutant Discharge Elimination System (NPDES) program which was successfully transferred using a phased-in approach. IDEQ recommends that the final Rule not default to a 30-day, with a maximum 120-day, effective date to allow Tribes or States to negotiate the flexibility to begin program administration and allow for best program implementation. A regulatory phased-in approach may be necessary for Tribes and States to provide added time to hire additional qualified staff and increase resources to implement and expand budgetary constraints required for program development and implementation. Though legislative support or proof of allocated funds may be submitted as part of the assumption process, budget cycles and/or hiring processes may not align with the timing of fund allocation or staffing availability. Therefore, an allowance for effective date flexibility is warranted and should be provided in the Memorandum of Agreement (MOA) with the Regional Administrator. Furthermore, the proposed Rule does not specify the conditions or circumstances under which a Tribe or State may request a later effective date from the date of the program assumption notice publication in the *Federal Register*.

III. Tribes as Affected Downstream States

EPA proposes any downstream Tribe that has been approved for treatment in a similar manner as a State (TAS) for any CWA provision would have an opportunity to suggest permit conditions for section 404 permits issued by upstream States and authorized Tribes that may affect the biological, chemical, or physical integrity of their reservation waters. The proposed Rule requires the Tribe receive notice and an explanation if the permit does not address their comments and EPA must be notified. This would also cause additional regulatory delays. IDEQ supports Tribes having the ability to work collaboratively with States. Though it is important for Tribes that have not been approved for TAS to engage and participate in the public comment process, suggesting permit conditions may extend their authority beyond the CWA and the requirement to provide notification if conditions are not accepted is burdensome.

IV. Compliance and Enforcement

IDEQ supports the proposed Rule clarification that Tribes and States that are authorized to administer the CWA section 402 and 404 permitting programs, or that seek authorization to do so, are required to authorize prosecution based on a criminal intent of any form of negligence, which may include gross negligence.

In closing, IDEQ supports the cooperative federalism principles central to the CWA – including Congress' recognition that it is the primary responsibility and right of Tribes and States to prevent pollution and manage their aquatic resources.

Sincerely,

A handwritten signature in blue ink that reads "Mary Anne Nelson". The signature is fluid and cursive, with the first name "Mary" and last name "Nelson" clearly legible.

Mary Anne Nelson, PhD
Surface and Wastewater Division Administrator

Attachment(s):

c: Julia Achabal, IDEQ
Beth Spelsberg, IDEQ
Tambra Phares, IDEQ