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DEPT. OF ENVIRONMENT AND ENERGY

Jim Pillen, Governor

October 13, 2023

Submitted via www.regulations.gov

U.S. Environmental Protection Agency
Office of Wetlands, Oceans, and Watersheds
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Attention: Brian Frazer, Director
EPA Office of Wetlands, Oceans, and Watersheds

RE: Nebraska Department of Environment and Energy Comments
Docket No. EPA-HQ-OW-2020-0276

Dear Director Frazer:

Thank you for the opportunity to submit comments on the proposed Clean Water Act Section 404 Tribal and State Program Regulation (404(g)) Rule Revisions. The Nebraska Department of Environment and Energy (Department) offers the following comments to enhance the clarity and effectiveness of the proposed rule.

Proposed changes that may impede program assumption

Judicial Review and Rights of Appeal

- The Proposed Rule would clarify that States seeking approval to administer a State 404 program must provide for judicial review of decisions to approve or deny State 404 permits equivalent to the judicial review provided for federal 402 permits.
    - Requiring a heightened level of judicial review for State issued permits does not facilitate State implementation of a 404 permit program and is not consistent with the Clean Water Act (CWA). Section 101(b) of the CWA States "It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act." The proposed rule would run contrary to section 101(b) of the CWA by creating an additional hurdle to States seeking program approval. Additionally, section 509(b)(1) of the CWA provides for judicial review by any interested person for the Administrator's action in issuing or denying 402 permits and is silent on 404 permits. Long-established principles of statutory interpretation say that because the Act is silent on 404 permits while addressing 402 permits, Congress was intentional in not requiring a heightened level of judicial review for 404 permits. Requiring States to provide a level of judicial review which does not exist for federal 404 permits, and is not required under the CWA, is inconsistent with CWA section 101(b) and

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would require States to implement State 404 programs which are not consistent with the structure of 404 permitting programs Congress intended under CWA section 509(b)(1).

- EPA's assertions that heightened judicial review is necessary to facilitate public participation or that a State agency will give less weight to commenters without judicial review[1] is purely speculative, challenges the integrity of the State agencies, and does not recognize the efforts made by States to secure meaningful public engagement. EPA relies on a Fourth Circuit Court of Appeals decision[2] as confirmation that judicial review is necessary to ensure that the public comment period serves its proper purpose.[3] However, the decision, on which EPA relies on, is addressing section 502(b)(6) of the Clean Air Act, which specifically directs EPA to promulgate regulations which require State Title V programs to provide for judicial review of permit decisions by any person with Article III standing[4] who participates in the State public comment process. Section 101(e) of the CWA differs from the Clean Air Act because it does not specifically require judicial review. Section 101(e) only requires that public participation be provided for in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program. EPA's determination that States need to implement a heightened level of judicial review in order to provide for meaningful public participation is flawed and discredits the hard work of its partner States.
- The public has the opportunity to comment on State issued 404 permits within a public comment period and at a hearing if so requested.[5] The State must consider all comments received and make those comments part of the official record.[6] EPA ignores the fact that EPA retains oversight of all permits issued by a State under Section 404.[7] States must forward permits to EPA for review prior to issuance, and if EPA determines that a State did not adequately consider the comments of a citizen, then EPA can require the State to correct the deficiency before the permit can be issued. Requiring that a State implement a heightened level of judicial review for permit decisions is an unnecessary impediment to States seeking approval of a State 404 program because EPA retains oversight.
- Section 101(e) of the CWA directs the Administrator to develop the regulations which specify the minimum guidelines for public participation in cooperation with the States.
    - The Department suggests EPA remove the proposed section § 233.24 from the 404(g) rule.

Proposed changes that make program assumption more difficult

Tribes as Affected Downstream States

- Under the proposed rule, any downstream tribe that has been approved for TAS for any CWA provision would have an opportunity to suggest permit conditions for section 404 permits issued by upstream States, and tribes would be allowed to apply for TAS solely for the purpose of commenting on 404 permits.

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[1] 88 Fed. Reg. 55298-55299 (Aug. 14, 2023)
[2] Com. of Va. v. Browner, 80 F.3d 869 (4th Cir. 1996), *amended* (Apr. 17, 1996), *amended* (May 9, 1996)
[3] 88 Fed. Reg. 55299 (Aug. 14, 2023)
[4] Com. of Va. v. Browner, at 877
[5] 40 C.F.R. §§ 233.32 and 233.33
[6] 40 C.F.R. § 233.34
[7] 40 C.F.R. § 233.50

- The coordination requirements of 40 C.F.R. § 233.31 should be limited to tribes which have received TAS for section 303 of the CWA and have federally approved water quality standards (WQS). Permit conditions requested by tribes under § 233.31 should be protective of the biological, chemical, or physical integrity of the waters as expressed by tribal WQS. The relationship between the federal government and tribes is that of sovereign to sovereign. There is the potential for unnecessary conflict if States are tasked with evaluating requested permit conditions which are based on rights or interest derived through treaties and trust relationships between tribes and the federal government. States have the ability to work with tribes who have not received TAS for section 303 throughout the permitting process to ensure that the tribes are well informed and given the opportunity to provide feedback.

    - The Department suggests conditions formally requested by tribes should be limited to requests made by tribes which have been approved for TAS for section 303 of the CWA and promulgated their own WQS. Any request for conditions to protect tribal rights or interests which are derived through treaty between tribes, the federal government, or because lands are being held in trust on behalf of the tribe by the federal government should go through EPA.

Requirement to Demonstrate Ability to Implement Assumed Programs

- EPA is seeking comments on making revisions for requiring the submittal of additional evidence of commitment, job descriptions and position qualifications for assumed program implementation and is requesting comments for additional types of information that should be provided to EPA for assumption such as metrics to determine funding and staffing needs based on Corps 404 programs.
    - The current required program elements for an application to EPA already require a complete program description including sustainable funding, staffing descriptions, estimated workloads, approved State regulations and letters from both the Governor and Attorney General. This appears to be adding unnecessary and duplicative burdens on States. The Corps data has shown to be incomplete and inconsistent between Corps Districts and among staff within the same District making using their data to estimate assumed program needs difficult.
        - The Department suggests leaving the required program elements from the previous rule as is. Information as to how each of these elements may be developed should be provided in guidance and EPA should work with the Corps to streamline their data entry to provide consistently among Corps Districts.

Retained Waters List Request from EPA to the Corps instead of from States Directly

- The proposed rule has added another step that must be completed through EPA instead of States working directly with the Corps to get the retained waters list and start working on the administrative line. The proposal is outlining 180 days for the Corps to provide the list.
    - This will delay assumption and coordination with the Corps on developing the MOA and administrative line as no communication between the State and Corps would begin until after this official request is satisfied through EPA.
        - The Department suggest EPA continue to support States and facilitate productive working relationships between State 404 programs and regional and State Corps programs by allowing States and the Corps to work together on MOAs and the premise behind the administrative line while the Corps is reviewing their section 10 and tribal waters for the development of the retain waters list.

Funding for Assumed Programs

- Within the preamble of the proposed rule EPA States, "EPA funding programs can also be used by Tribes and States to build capacity to assume the section 404 program or to implement assumed programs (e.g., CWA Section 106 funds).". EPA goes on to State that a lack of funding is outside of the scope of this rulemaking.
    - Clarification is needed from EPA if they are taking into account assumed programs in their calculations for 106 fund allocations or if States and tribes are supposed to prioritize 106 funds for assumed program over other eligible activities.
        - The Department would like EPA to clarify if they are accounting for assumed programs in the calculation for 106 fund allocations.

Proposed Changes that Streamline Program Assumption:

Effective Date Delay

- Approved program effective date delay of up to 120 with an automatic delay of 30 days once EPA approves the program application.
    - Delaying the effective date allows for additional training of new program staff and potential applicants and gives the Corps and those with permits already in the review process time to either complete them or prepare to begin a new application for a State 404 permit. This will help alleviate the Corps transferring a larger workload than necessary as many permits being reviewed can be completed and new permittees can be notified of the program effective date and can plan accordingly.

Long Term Projects that Exceed 5 Years

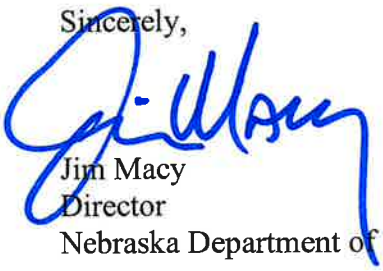
- The proposed rules allows for long term projects to submit an analysis showing how the entire project will comply with the 404(b)(1) guidelines during the first 5-year permit. This is intended to streamline the permitting process for the second 5-year permit. EPA is proposing applicants apply for the second 5-year permit at least 180 days prior to the expiration of the current permit.
    - This will streamline the permitting process to allow for continued construction and timely completion of the project while also planning for all necessary controls and mitigation of unavoidable impacts.

Criminal Negligence Standard

- The proposed rule amends the criminal enforcement requirement to provide that assumed States must authorize prosecution based on any form of negligence.
    - This lessens the burden on States that would have had to pass legislation for simple negligence standards.

The Department supports EPA's efforts to clarify the requirements and processes for assumption and administration of a CWA Section 404 program by States and tribes and appreciates the EPA considering stakeholder comments on the proposed 404(g) rule.

Sincerely,



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