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## **DRAFT REPORT AND RECOMMENDATIONS WATERS WORKGROUP**

**3-12-2016 DRAFT**

### **INTRODUCTION**

Section 404 of the Clean Water Act (CWA) authorizes the U.S. Army Corps of Engineers (the Corps) to issue permits for the discharge of dredged or fill material “into the navigable waters....”<sup>1</sup> The statute defines “navigable waters” to mean “the waters of the United States, including the territorial seas.”<sup>2</sup> Pursuant to section 404(g)(1), States, with approval from the Environmental Protection Agency (EPA), may assume authority to administer the permit program for discharges of dredged and fill material to some but not all navigable waters. The waters that a State<sup>3</sup> may **not** assume, and which the Corps must retain even after a State has assumed the program, are defined in a parenthetical phrase in Section 404 (g)(1) as:

...those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto...<sup>4</sup>

The precise extent of navigable waters that may be assumed by a state, and that must remain under the authority of the Corps, has not been totally clear based on this language. However, legislative history indicates that Congress intended the Corps to retain jurisdiction over those waters that they had traditionally regulated under Section 10 of the Rivers and Harbors Act, and adjacent wetlands, with some exceptions as discussed below. **Thus, under a state-assumed program, the division of responsibility between the state and the Corps is based on Corps jurisdiction under the River and Harbors Act, not CWA jurisdiction.** This is a key point in defining state-assumable waters.

Decisions from the Supreme Court regarding the definition of waters of the United States under the Clean Water Act, and responses to those decisions by the regulatory agencies, have resulted in additional confusion regarding waters that are assumable by the states or tribes. These questions arise primarily from use of the phrases “navigable waters” and “adjacent wetlands” in two different contexts: (1) jurisdictional definition of waters of the United States under the CWA, and; (2) the administrative division of responsibility over jurisdictional waters among the Corps and a state- assumed Section 404 Program.

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<sup>1</sup> 33 U.S.C. §1344(a)

<sup>2</sup> *Id.* § 1362(7)

<sup>3</sup> Please note that throughout this document, the term “State” also includes Tribes

<sup>4</sup> *Id.* § 1344(g)(1)

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The “waters workgroup” was tasked with the following:

*The Waters workgroup will explore the ideas, issues, and terms around the scope of waters that must be retained by the USACE when a state assumes administration of the Section 404 permit program - including waters that are “presently used” or “susceptible to use” - for the full Subcommittee to consider. The workgroup will develop options and or recommendations regarding guidance for states, USACE districts, and EPA regions that can be implemented to provide more consistency when determining the scope of state assumable waters.*

The workgroup has considered these issues primarily from the perspective of states and tribes seeking to administer the Section 404 program in a particular state, the federal agencies working with those states, and the public that is impacted by the 404 permit program. Recommendations have prepared based on our understanding of the acceptable legal framework under consideration by that workgroup, and with a goal of facilitating state assumption where desired.

#### **SUMMARY OF RECOMMENDATIONS**

- I. The waters workgroup strongly recommends development by the federal agencies of field level guidance on state 404 Program assumption.**
- II. A state or tribe may assume administration of the Section 404 permit program in all waters of the United States except those navigable waters traditionally regulated by the Corps of Engineers under Section 10 of the Rivers and Harbors Act – minus waters regulated on the basis of historical use only – and wetlands adjacent to the Section 10 waters. The administrative identification of these waters is distinct from the definition of jurisdictional waters.**
- III. State and federal agencies should be afforded a degree of flexibility in defining the scope of waters to be assumed by the state (and retained by the Corps) to account for distinct state needs. However, guiding principles regarding the extent of assumable waters that can be applied nationally should be included in and serve as the basis for field level guidance.**
- IV. The waters workgroup recommends that a uniform national procedure for identification of state-assumable waters be included in field guidance.**
- V. In order to provide information for the regulated public as well as regulatory agencies, graphic means (e.g. maps, Geographic Information Systems) should be used to the extent possible in addition to lists of waters to clarify the location of state and federal authority for purposes of Section 404 permitting.**

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## FINDINGS AND DISCUSSION OF RECOMMENDATIONS

### **I. There is a definite need for field level guidance regarding Section 404 Program assumption. Guidance should be prepared by the federal agencies with input from states and tribes, for use by the federal agencies and states/tribes.**

**Discussion:** Following amendment of the Clean Water Act in 1977 which provided for Section 404 state program assumption, the USEPA developed regulations (40 CFR Part 233) to direct state and federal actions. However, no detailed field level guidance has ever been provided to Corps Districts or to states that may be considering 404 assumption. Additional information is clearly needed to guide identification of assumable waters, among other issues.

Records from the State of Michigan show that even in 1983, there was some tension regarding the Corps' initial assertions regarding the extent of waters that were assumable.<sup>5</sup> This is hardly surprising given that simultaneously the Corps was responding to legal decisions regarding the scope of federal Section 404 jurisdiction; it was not clear how changes to combined Section 10/Section 404 jurisdiction were to be applied under state assumption. In Michigan, Brigadier General Jerome Hilmes, commander of the Corps North Central Division, ultimately clarified the Corps position in a September 1, 1983 letter to Michigan's Governor indicating that if the state pursued assumption, "...the only waters which would be evaluated for transfer by the Corps of Engineers would be those currently being regulated under Section 10 of the Rivers and Harbor Act of 1899." This is consistent with statements in the legislative history of the CWA, indicating that states would be authorized to assume "Phase II and Phase III" waters as defined by Corps interim regulations dated July 25, 1975.<sup>6</sup>

In more recent years, the Corps and the EPA have continued to modify the definition of "waters of the United States" for purposes of defining the limits of federal jurisdiction following Supreme Court decisions, and the field level distinction between Section 10 waters and Section 404 waters has become increasingly blurred. States that have inquired about assumable waters have received inconsistent responses from different Corps districts, but the scope of assumable waters has typically been interpreted somewhat more narrowly than in the past in Michigan and New Jersey 404 Programs. Some states have even been informed initially by Corps District staff that there is very little that is assumable. These responses appear to confuse the scope of Corps *jurisdiction* under Section 10 and Section 404 with the *administrative* question of where the states may be authorized to assume the Section 404 Program.

The waters workgroup recognizes that there are other options to resolve uncertainty regarding the extent of state-assumable waters, including the revision of or addition to existing rules governing state program assumption. However, there are a number of issues that led us to recommend field level guidance rather than rulemaking. First and foremost, the difficulty of completing rulemaking has been made clear, and we would not expect any resolution of state concerns within a reasonable timeframe. Secondly, rulemaking might once again confuse definition of jurisdiction with identification of the scope of assumable waters; it could turn a

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<sup>5</sup> See draft July 8, 1983 letter from Governor of Michigan to the Corps, and September 1, 1983 response from North Central Division Commander.

<sup>6</sup> *Federal Register*, Vol. 40, No. 144, page 31326.

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relatively simple and non-controversial issue into a highly controversial one. We have recommended development of guidance because it seems appropriate for what is – as we have emphasized – an administrative process of dividing the responsibilities between a state or tribe and the Corps under an assumed program, without in any way altering the reach of federal jurisdiction or federal jurisdiction or reducing the level of resource protection provided under Section 404.

**Findings and Recommendations:**

**The waters workgroup strongly recommends that the federal agencies develop field level guidance on state/tribal 404 Program assumption. This guidance should be developed jointly by the Corps and EPA, with input from states and tribes, with the intention that it be used by Corps District and EPA Regional offices as well as by state and tribal governments. The guidance should provide states or tribes and the appropriate Corps District staff with the information needed to distinguish between assumable waters and those waters where responsibility for Section 10/404 permitting is to be retained by the Corps following assumption. In doing so, the guidance should carefully distinguish between jurisdictional waters (i.e. waters of the United States), and the administrative distinction between state-assumed and Corps-retained waters. The guidance should further define a process to be used for development of a Memorandum of Agreement between the state and the Corps as required prior to assumption by Section 404(g). The guidance should be clear, objective, and explicit enough so that the federal agencies and the states/tribes will reach consistent conclusions regarding the extent of assumable waters within a given state.**

**II. The federal agencies should clearly identify the extent of navigable waters – as recommended by the workgroup below - that may be assumed by a state or tribe under Section 404(g) to encourage assumption by a significant area of waters within a state, as follows.**

**Discussion:** Section 404(g) of the CWA provides that a state may be approved to administer its own permit program for the discharge of dredged or fill material into “the navigable waters” [meaning waters of the United States] “other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide...”. Given the use of parallel terminology to define both the extent of federal jurisdiction, and the scope of waters that may be administered under a state program, field level guidance for use by Corps Districts, states, and tribes in the consideration of state assumption is clearly necessary.

The workgroup relied initially on legislative history to clarify that Congress intended to allow state assumption of all waters *except* those that had traditionally been regulated by the Corps under Section 10 of the Rivers and Harbors Act of 1899, and adjacent wetlands. Congress also provided for state assumption of waters that had been considered navigable based only on historic use. It is important to note that the scope of federal jurisdiction under the Rivers and Harbors Act is much narrower than federal regulation under the Clean Water Act. Thus, the scope of waters which must be retained by the Corps under Section 404(g) is much narrower than the scope of waters defined under the CWA Section 404(a).

Corps Districts currently maintain lists of waters that are regulated under Section

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*10 which can be used as a starting point in identifying waters where Section 404 permitting authority must be retained by the Corps.*

**Findings and recommendations:**

**Section 404(g) of the Clean Water Act provides that states may be approved to administer a permit program in the navigable waters – meaning waters of the United States – other than waters presently used or susceptible to use as a means to transport interstate and foreign commerce, and adjacent wetlands.**

**Based on legislative history of the Clean Water Act, previous decisions made by the federal agencies in approving Section 404 programs in Michigan and New Jersey, and the needs of the states and tribes, the workgroup understands that Section 404 permitting in the following waters must be retained by the Corps when a state assumes administration of the Section 404 permit program.**

- 1. Waters regulated by the Corps under Section 10 of the Rivers and Harbors Act of 1899 prior to passage of the Clean Water Act, and generally defined as “Phase I” waters by Corps of Engineers Regulations promulgated in 1975, except for any such waters that were considered navigable based on historic use only (e.g. floating of logs, fur trapping).**
- 2. Additional waters that are presently used or susceptible to use to transport interstate and foreign commerce, as identified by the procedures discussed below.**
- 3. Adjacent wetlands as defined [... placeholder for adjacent workgroup findings].**

**Administration of the Section 404 Permit Program may be assumed in all other waters of the United States where the Corps cannot clearly demonstrate the basis for retention by authorized states and tribes.**

**III. Field level guidance for identification of state-assumable waters should be based on national principles to encourage understanding and consistency; however, a degree of flexibility should be provided to meet state needs.**

**Discussion:** The distribution and concentration of waters of the United States, as well as the subset of those waters that may be administered under a state-assumed Section 404 program differ greatly among coastal states, arid western regions, states that support larger interstate rivers, and other states whose boundaries encompass numerous lakes, streams, and wetlands.

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The extent of waters, the primary hydrologic patterns that dictate the flow and use of waters, and overall ecology vary greatly, as do the type and extent of interstate and foreign commerce supported by the waters within a state. These state specific factors make it challenging to identify those specific waters that will be regulated under any state program, and those that will remain under the jurisdiction of the Corps following state assumption.

It is, however, possible to list general principles and factors – arising from the language of Section 404, records reflecting Congressional intent, and subsequent federal regulations - that should be considered in identifying the extent of state assumable waters, and that will lead to relatively consistent decisions from state to state, and certainly within a particular state from the perspective of various agencies. The waters workgroup has developed the following recommendations to be incorporated into national guidance.

#### ***Findings and Recommendations:***

**Field guidance to be developed by the federal agencies should further clarify the scope of waters assumable by the states (and to be retained by the Corps). Guidance should provide sufficient flexibility to meet the needs of the diverse states and tribes while adhering to guiding principles that can be applied nationally. The principles that should be included in field guidance include the following.**

- 1. States and tribes must be able to assume administration Section 404 permitting over all waters intended by Congress in the 1977 CWA amendments. In general, the federal agencies should encourage state assumption of a significant portion of the waters of the United States, consistent with Congressional intent.**

Congress clearly intended states to play a significant role in the administration of the Section 404 permit program. The Corps of Engineers was to retain its permitting authority in waters that had long been under their control under Section 10 of the Rivers and Harbors Act, with the exception of those waters that had been listed as traditionally navigable based only on historic use. In addition, the Corps would be responsible for Section 10/Section 404 permitting in waters “susceptible to use” for interstate and foreign commerce given reasonable improvement, and also for wetlands adjacent to these waters, as that term was used in 1977. Administration of the Section 404 permitting program should be available to a state or tribe in all other navigable waters.

- 2. State or tribal program assumption is a state-federal partnership that serves to reduce duplication or state and federal permitting and take full advantage of both state and federal expertise. Provisions of the assumption requirements also ensure maintenance of an equivalent level of resource protection meeting 404 criteria, provide for federal government oversight, and maintain Corps responsibilities in Section 10 waters.**
- 3. While the scope of federal jurisdiction over waters of the United States has been altered by Supreme Court decisions – and potentially clarified by federal rulemaking - the administrative procedure for dividing permitting authority between the Corps of Engineers and approved state programs has not been modified since 1977.**

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The 2015 rule proposed by the federal agencies to clarify the scope of federal jurisdiction (currently stayed) specifically indicates in the preamble that modification of the definition of waters of the U.S. would not modify the scope of assumable waters under Section 404(g). Waters to be retained by the Corps under a state assumed program should be identified based on the extent of waters regulated under Section 10 of the Rivers and Harbors Act. prior to the CWA, not based on the scope of jurisdiction under the CWA 404(a).

During the 1980's, Corps staff were directed to carry out additional navigability studies, in part in response to increased authority over waters of the U.S. under Section 404 for reasons other than the protection of navigation. In Michigan, where the state had already indicated its intent to assume the 404 Program, such studies were held in abeyance, and did not influence the extent of waters retained by the Corps. In other states, the extent of waters retained by the Corps should likewise be based on regulation by the Corps under the Rivers and Harbors Act only, and not expanded by jurisdiction asserted in part on Section 404.

**4. Waters that were determined to be navigable based only on historic use are to be deleted from the list of Section 10 waters that are retained by the Corps under a state- assume 404 Program.**

During the development of the 1977 Clean Water Act amendments, those waters that were determined to be regulated under Section 10 based solely on historic use – e.g. in fur trading or to provide access to rail transport – were deleted from the waters to be retained by the Corps under a state-assumed program. In a draft MOA between the State of Oregon and the Corps of Engineers (provided to Michigan by the Corps as a model), a provision for exclusion of historically navigable waters was specifically included, and a list of such waters was attached to the draft MOA. While this MOA was clearly used as a model by the State of Michigan, the Michigan MOA did not address historically navigable waters because the Corps had not carried out studies to define such waters in Michigan.

**5. Additional waterbodies that are determined by the Corps to be presently used, or susceptible to use for the support of interstate and foreign commerce, may be added to the list of waters retained by the Corps.**

For purposes of 404 Program assumption under Section 404(g), minor recreational use and intrastate commerce (e.g. use or rental of small boats within a state and not crossing state lines) is not considered "interstate and foreign commerce" when assigning state and federal responsibilities. *[We may need help from the legal workgroup to defend this, or to state it more clearly.]* Where waters are to be added to the list of Section 10 waters, the Corps should provide navigational studies to support such additions to the state, which may challenge additions that are not based on the need to maintain "highways of commerce" on an interstate or international basis.

**6. The final list of waters that will be assumed under an approved state or tribal program, and the waters to be retained by the Corps, should be prepared jointly by the state and federal agencies in accordance with current federal law and regulations.**

EPA's Section 404 Program regulations simply state, "States should obtain from the Secretary [of the Army] an identification of those waters of the U.S. within the State over

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*which the Corps retains authority under Section 404(g) of the Act.”<sup>7</sup>* The retained waters are to be listed in MOA between the state and the Corps in accordance with 40 CFR §233.14. These regulations have often been taken to infer that the extent of retained waters is simply dictated by the Corps, with no opportunity for input by the state.

However, Section 404 Program assumption is broadly defined as a partnership in the preamble to the state regulations: “*The clear intent of [transfer of programs to the states] is to use the strengths of Federal and State governments in a partnership to protect public health and the nation’s air, water, and land.*” Clearly, a state agency and a federal agency cannot be expected to enter into a Memorandum of Agreement unless both parties do in fact agree on the primary content of the MOA – in this instance including the definition of waters that will continue to be regulated by the Corps following assumption.

**7. In defining state-assumable waters, the state and Corps should have the flexibility to make use of the best records, data, and procedures available for a given state.**

While the identification of Corps retained waters should be based initially on a list of Section 10 waters consistent with Corps regulation circa 1977, both the state and the Corps may now possess more accurate or detailed geographic information that is preferable for use by the agencies and the public. Such information may include aerial photography, digital mapping, or similar sources.

Because the availability of geographic information not only varies by state but is expected to improve over time, no single source should be mandated as the basis for documentation of state-assumed waters. Rather, in describing the administrative division of regulatory authority over the waters within a state or tribe, the state and the Corps should provide data and procedures that are of greatest possible utility to field level regulatory staff, and that clarify to the greatest extent possible the responsible agency to members of the public.

**8. To the greatest extent possible, state and federally administered waters should be identified at the signing of an MOA between the state and the Corps, rather than making such a determination on a case by case basis (e.g. at the time of a permit application).**

The precise location of the *jurisdictional boundaries* – such as the ordinary high water mark of a stream or the edge of wetland - depend upon field level determinations. As such, it is understood that precise boundaries cannot necessarily be accurately identified in an MOA. However, identification of water bodies and their assignment to state or federal authority under a state-assumed 404 program can be done at the time of program assumption. The upstream extent of navigable waters can also typically be defined based on landmarks (such as a dam or bridge) or geographic coordinates. In the event that it is desirable to define the

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<sup>7</sup> See Note following 40 CFR §233.11(h).



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ordinary high water mark of a stream, the Corps regulatory definition<sup>8</sup> should be used.

Likewise, deletions from the Corps list of Section 10 waters that were considered navigable based on historic use only, and additions of waters currently used or susceptible to use to support interstate and foreign commerce, should for the most part be done prior to signing of the MOA. It is expected that some additions or deletions to the list of Corps retained waters may be desired by the state and the Corps in future years; procedures for such modifications should be included in the state-Corps MOA, and be mutually agreed upon.

**8. [Additional principles that should be added that are specific to tribal assumption. Scope of tribal authority – reservation lands, non-reservation lands? Other?]**

**III. Field level guidance should include general procedures to guide preparation of a state-Corps MOA definite state-assumable and Corps retained waters.**

**Discussion.** The waters workgroup recommends that uniform national procedures be developed by the federal agencies with input from states and tribes, and included in field guidance on identification of state-assumable waters. Support for state assumption can be facilitated, and national consistency encouraged, by defining basic procedures for carrying out the assumption process. It is expected that the EPA, the Corps, and the states will also identify additional actions that are appropriate to the needs of a given state or tribe, and that will achieve the requirements of current federal regulations (40 CFR Part 233), such as means of public outreach.

**Findings and recommendations.**

Field level national guidance prepared by the Corps and EPA, with input from states and tribes, should include general procedures that should be followed when a state or tribe proposes to assume the Section 404 permit program, in addition to any other actions needed to comply with federal regulations. In carrying out these procedures, the state and federal agencies should refer to the **[definitions developed by legal workgroup?]** to correctly understand terminology used in Section 404(g) for purposes of distinguishing between state and federal administrative responsibilities.

**It is recommended that the following general procedures be followed in defining assumable and retained waters.**

<sup>8</sup>“The term ordinary high water mark means that line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” 33 CFR Part 328.3(e).

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1. Upon request by a state or tribe that is considering assumption, the Corps District office will provide a list and/or map of waters within state or tribal borders over which the Corps proposes to retain authority under Section 404(g).<sup>9</sup>
2. The state or tribe will review the list(s), and may request additional information from the Corps regarding the basis of inclusion of particular waters, if needed. The Corps will make any navigational determinations, Court orders, or similar documentation available to the state or tribe. The state and the Corps may also agree to modify the list based on more accurate, currently available information.
3. The list of waters to be retained by the Corps will not include waters determined to be navigable based on historic uses only, such as trading of furs or floating of logs. Such waters continue to be regulated under Section 10/Section 404, but this authority may be assumed by the states. A historically navigable water may not be presently be used to support commerce due either to a change in the condition of the water (an obstruction), or due to a change in commercial transportation practices (modern use of rail, truck or air). In making decisions regarding historically used navigable waters for purposes of state assumption, the Corps and the state should:
  - Review existing navigation studies;
  - Determine whether commercial transport has been obstructed, e.g., by currently impassable locks, dams, tide gates or other impediments, which have obstructed navigation for a sustained period. Such waters are state-assumable.
  - Determine whether the water body is unobstructed, but the historical function of the water for transporting goods and services has been replaced by alternative modes of transportation, or no longer exists. Such waters are state-assumable.
4. The state and Corps may add waters that are currently used, or susceptible to use, for supporting interstate and foreign commerce based on navigation studies. Copies of documents that support such additions should be provided to the state or tribe. In determining whether waters are presently used or susceptible to use for transporting interstate and foreign commerce, the meaning of these terms as defined for use in determining state and federal authorities under a state-assume §404 Program should be used; that is, definitions applied when defining *jurisdiction* are not appropriate.
5. *[Any additional procedures specific to tribal assumption?]*
6. Generally, speaking, unless the Corps clearly demonstrates the basis for jurisdiction under S10 based on present use or susceptible use, waters may be assumed by a state or tribe.
7. The state and the Corps will include the agreed upon list of waters for which Section 404 administration must be retained by the Corps in an MOA regarding state assumption (see 40 CFR §233.14). The MOA will clarify that all other waters will be under the administration of the state or tribe in accordance with 404(g) on approval of the state program by the EPA. Descriptions of waters under state and federal authority may be based on any data that is available and useful to the public, including lists, maps, digital geographic information, etc.

8. In the event that the state and Corps disagree regarding the scope of waters that may be assumed by the state, the parties will consult:
  - Option A: Consult with the EPA region, which shall make the final decision.
  - Option B: Consult with the Corps Division and the EPA region, who shall make the final decision.
  - Option C: Identify a final decisionmaker.
9. The state-Corps MOA will include provisions to amend the MOA and the attached lists of state/federal authority at such time as the status of a particular water is modified due to improvements, legal decisions, or other pertinent changes over time. For example, removal of a dam, repair of a lock, or other such changes may allow initiation or resumption of commercial transport.

**IV. It is desirable that mapping or other accurate means to provide public information regarding the division between state and federal permitting responsibilities be developed in assumed 404 Programs.**

**Discussion:** Under a state assumed program, it is important that both government agencies and the public be able to readily determine in advance what agency will be responsible for review of a permit application at a specific location. This information will identify the correct agency to contact for permit information, to initiation pre-discharge coordination, or to confirm the jurisdictional boundaries of the waters in question; and what regulations to consult (federal/state/tribal), among other concerns.

While descriptive lists of state-assumed waters may be appropriate for a Corps/State MOA, individual property owners are expected to need more graphic information to determine what agency is responsible for Section 404 on a specific parcel. Moreover, the geographic information must be of a scale sufficient to identify the location of a proposed activity.

Modern geographic information systems generally provide the technology needed to provide accurate information regarding state and federal jurisdiction. While printed maps showing general locations of state and federal responsibilities may be helpful, they are inherently inaccurate given that – depending upon scale – the line on a map may be many feet wide. However, with the increasing accuracy of GPS systems, highly accurate digital maps may be prepared.

For these reasons, field level guidance should encourage development or adoption of mapping and geographic information systems that are available to the public.

**Findings and recommendations:**

It is highly desirable that the waters where Section 404 is administered by a state or tribe, and where the Corps retains administration are marked on an appropriate map or geographic information system. This will not only provide the information in a readily available format to all regulatory agencies, but to the public and other decision makers. A state that assumes the 404 Program and the associated Corps District(s) should decide on the mapping system to use; ideally areas of state and federal jurisdiction can be readily incorporated into an existing state or federal mapping system or systems.

The mapping system used should ideally have the following attributes:

- Scale that provides for determination of the appropriate Section 404 agency for an individual parcel of property;
- A format that is readily available to the public, and to other appropriate agencies;
- Location of the waters in question;

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- Disclaimers regarding the need for ground level boundary identification for waters and wetlands.
- Location of the mean high water mark (or higher high water mark as appropriate), and of the head of tide for tidal waterways.

Although not necessary to understand the scope and location of assumable waters, agencies may also find it desirable to include other information that is important for Section 404 administration and coordination, such as the locations of overlapping state/federal jurisdiction (e.g. Corps-regulated Section 10 waters where a state permit is also required); Coastal Zone boundaries; location of habitat for listed species that requires federal coordination; and similar features.

#### **UNRESOLVED QUESTIONS AND CONCERNS**

- Definitions of “historically used” that can be applied in a practical manner at field level.
- For purposes of assumption, what is the extent of “navigable waters” in terms of distinguishing between minor/intrastate/recreational use and “highways of commerce”?
- Dispute resolution regarding assumable waters; EPA role and who makes final decision?
- Identification of any special tribal concerns for recommended guidance/procedures (no tribal representative on waters workgroup).

Additional or general references?