

State/Tribal Assumption of the CWA §404 Program

**Overview for
The Montana Water Policy Interim
Committee**

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Overview*

- EPA's role in CWA §404 Assumption
- Authorities for state/tribe
- Requirements for assumption of CWA §404 program
- Assumption approval process
- Permit process once program approved
- EPA oversight of assumed programs
- Assumable Waters Federal Advisory subcommittee

* For this presentation: state refers to state or tribe

EPA's Role in Assumption

- Prior to assumption
 - Work with states to enhance capacity/capability and develop programs
 - Wetland Program Development Grants (MT DEQ-2)
- Evaluate and approve/disapprove state assumption request
- Oversight of assumed program
 - Coordinate federal oversight of permits
 - Review of modifications of state program
 - Withdraw program approval, if needed

Assumption Authority

- **CWA §404(g)**
 - States may assume administration of the permit and enforcement program for certain waters
- **CWA §404(h) and 40 CFR part 233**
 - Lists state requirements
 - Lists EPA responsibilities: approval and oversight of assumed program
 - Requirements for review and modification of state program as necessary

Requirements for Assumption of CWA §404 Program

**Statutory and Regulatory
Requirements**

Requirements for Assumption

- A state program must be:
 - consistency with and
 - no less stringent than the Act and implementing regulations
- The state approved program must:
 - Have equivalent scope of jurisdiction
 - Regulate at least the same activities as federal program
 - Allow for public participation
 - Be consistency with the 404(b)(1) Guidelines
 - Have adequate enforcement authority

Complete MT Assumption Application

- Shall Include:
 - Letter from Governor
 - Complete program description
 - Attorney General's statement
 - MOA with EPA Region 8 Administrator
 - MOA with Secretary of Army (through Chief USACE)
 - All applicable state statutes and regulations administering the program

Complete Assumption Application

Program Description Includes:

- Scope and structure of program
 - Jurisdiction
 - Activities regulated
 - Anticipated coordination
 - Permit review criteria
 - Scope of permit exemptions
- Procedures for permitting, administrative review and judicial review
- Structure and organization of state agency(ies) responsible for program administration
- Funding and staffing levels

Complete Assumption Application

Program Description cont.

- Anticipated workload
- Copies of permit application forms, permit forms, and reporting forms
- Compliance evaluation and enforcement programs
- Clarification of waters under state jurisdiction and those under USACE jurisdiction
- Best management practices proposed to satisfy farm, forest and temporary mining roads exemption provisions

Complete Assumption Application

Attorney General's Statement Includes:

- Citations of specific statutes, administrative regulations and judicial reviews demonstrating adequate authority
- Legal analysis of the effect of state laws regarding private property takings
- Certification of the authority of each state agency to administer the program
- Analysis of authority over Indian lands
 - Not assuming authority over Indian lands does not constitute partial assumption

Complete Assumption Application

MOA with EPA Region 8 Administrator would include:

- Classes and categories of permits for which EPA waives federal review
- Provisions for state reporting on program implementation
- EPA and MT state roles and coordination regarding:
 - Compliance monitoring
 - Enforcement
- Provisions for modification of the MOA
 - Including transfer or withdrawal

Complete Assumption Application

MOA with USACE would include:

- Description of waters of the U.S. over which USACE retains jurisdiction which are:
 - Waters presently used, or susceptible to use (either in natural condition or with reasonable improvement) as a means to transport interstate or foreign commerce and their adjacent wetlands.
 - *Tidal waters and their adjacent wetlands [Not an issue for MT]*
- Procedures for transfer of pending permit applications upon program approval
- Identification of any USACE general permits to be assumed by MT
 - Including a plan for transferring responsibility
 - Identification of current enforcement cases

CWA §404 Program Assumption Approval Process

**Statutory and Regulatory
Requirements**

Assumption Approval Process

- Assumption package submitted to EPA
 - 30-day EPA review for package completeness
 - Complete – state notified
 - Incomplete - package returned to state
 - EPA has 120 days to approve or disapprove the state request*

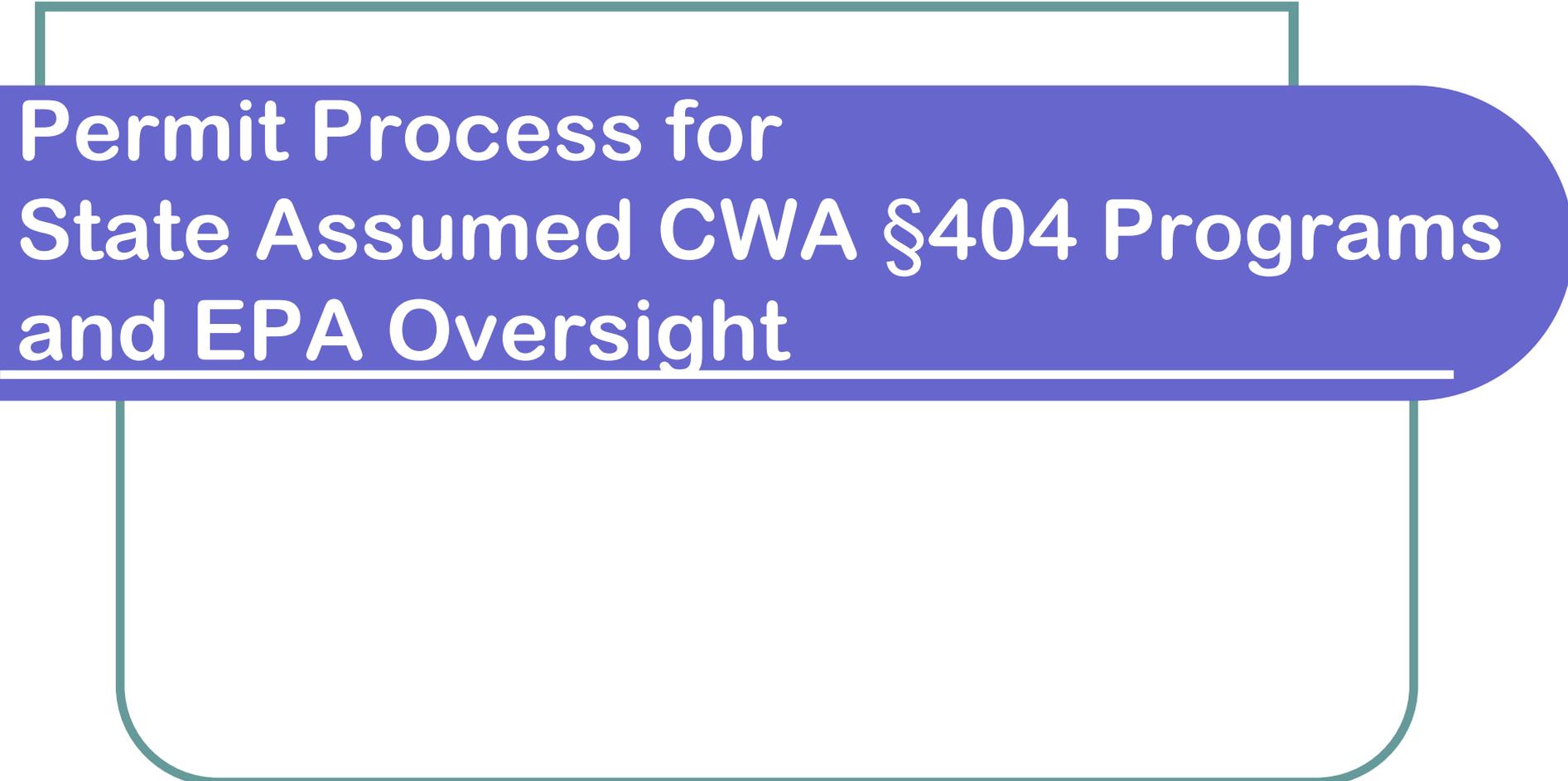
*MT and EPA can agree to an extension of the 120-day statutory timeframe for program review and approval.

Assumption Approval Process cont.

- Review period includes:
 - State notification that package is complete
 - Package sent to USACE, USFWS and NMFS ≤ 10 days
 - Comments due to EPA within 90 days
 - Notice of assumption request published in Federal Register and newspapers
 - 45-day comment period
 - Public hearing ≥ 30 days after Federal Register notice published

Assumption Approval Process cont.

- EPA Region 8 reviews the request
 - Consults with Tribes as appropriate (EO 13175)
 - Responds to comments in final FR notice
 - Sends direct response to USACE, USFWS (and NMFS)
 - Coordinates with EPA headquarters
 - 120-day review period may be extended by the state and EPA
- Region 8 Administrator will approve or disapprove assumption request
 - Approval requires EPA headquarters concurrence
 - Upon approval, State is notified and notice is published in the Federal Register
 - If program is not approved, the state is notified and provided a list of necessary revisions needed to obtain approval



Permit Process for State Assumed CWA §404 Programs and EPA Oversight

Permit Process Once Assumed

- State transmits, to EPA, notice of every permit application received
- EPA reviews permits; where federal review is not waived, EPA coordinates USACE, USFWS (& NMFS) comments
- State shall not issue a permit to which EPA has objected or placed requirements for a permit condition, until EPA's concerns are addressed

Permit Process Once Assumed cont.

- Waiver of review:
 - MOA with EPA identifies categories of projects for which EPA review is waived
 - EPA cannot waive review of:
 - Draft general permits
 - Discharges that may impact endangered species
 - Discharges that may adversely impact waters of another state
 - Discharges with known or suspected toxic or hazardous pollutants
 - Discharges proximal to public water supply intakes
 - Discharges within critical State/Federal areas

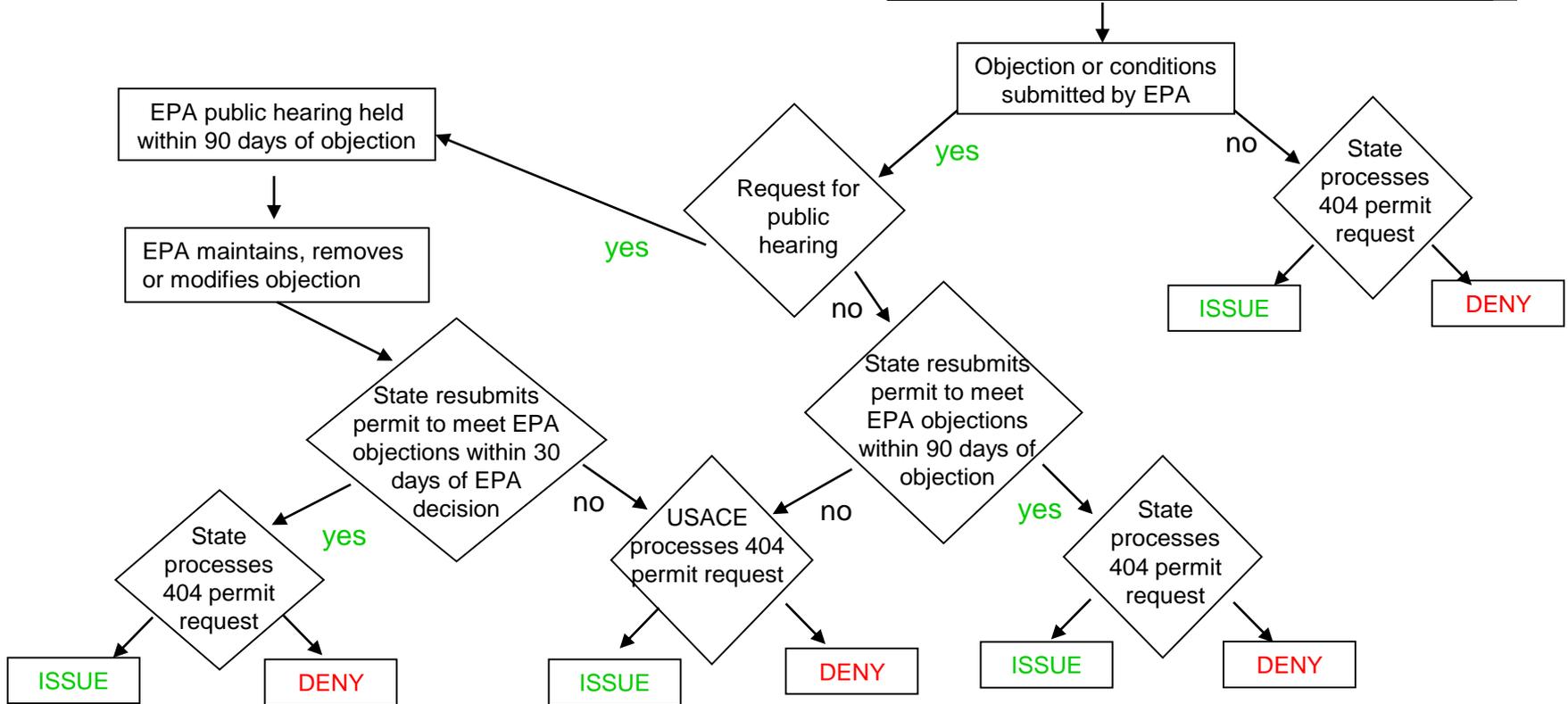
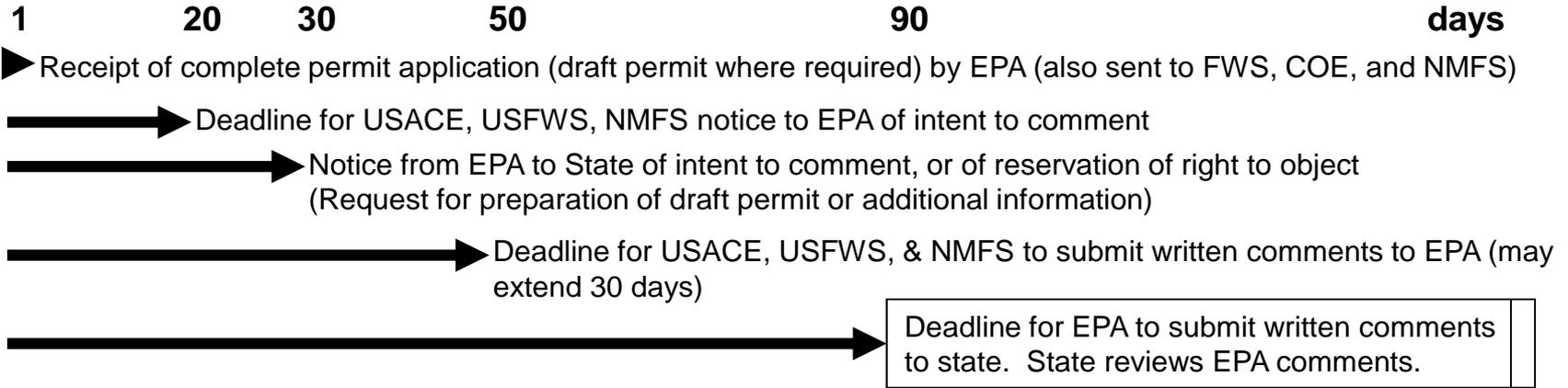
EPA Oversight

- Review of permits not waived. EPA may require review of additional categories or all permits e.g.,
 - In NJ, EPA also reviews NJ permits that
 - fill ≥ 5 acres of freshwater wetlands or state open waters and/or any regulated activity which results in significant reductions in the ecological, commercial, or recreational values of ≥ 5 acres of freshwater wetlands or state open waters
 - are culvert enclosures of >100 feet with >200 cubic yards of fill
 - channelizing >500 feet of a river or stream
 - In MI EPA also reviews MI permits that
 - discharge into critical areas
 - are major discharges as defined in the MOA e.g., culverts >100 feet, wetlands fill $>10,000$ yds³ of material

EPA Oversight cont.

- Ensures State programs remain consistent with new statutory or regulatory requirements
 - e.g., Mitigation regulations, Rapanos guidance
- Program reporting
 - State submits draft annual reports
 - Draft annual report made available for public review
- Periodic program review and evaluation

Flow Chart of State Permit Process Review



Assumable Waters: Federal Advisory Subcommittee

- States requested EPA clarify scope of waters for which they assume permitting responsibility
- Why is Clarity important?
 - Program package – description of waters regulated, MOA with USACE, funding and staff level estimates
 - Designing the state program

Assumable Waters: Federal Advisory Subcommittee

- EPA established NACEPT* subcommittee - 9/15

Charge: “. . . to provide advice and recommendations to EPA on how to clarify for which states and tribes will assume CWA section 404 permitting responsibilities, and for which waters the USACE will retain permitting authority.”

- Status: meet in October and December 2015; next meeting March 15-17, 2016

- Webpage:

<http://www.epa.gov/cwa-404/assumable-waters-sub-committee>

MT Assumption of CWA §404 Program

- **Questions?**
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