December 2, 2016

Jennifer A. Moyer
Chief, US Army Corps of Engineers, Regulatory Program
441 G Street NW
Washington, DC 20314

Dear Chief Moyer:

Re: Assumable Waters under Clean Water Act Section 404

In 2014, the Environmental Council of the States (ECOS), the Association of Clean Water Administrators (ACWA), and the Association of State Wetlands Managers (ASWM) expressed support for a process to work collaboratively to discern the criteria that will be used by a state or tribe, the U.S. Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers (Corps) to identify assumable and non-assumable waters pursuant to Clean Water Act (CWA) §404(g).[1] We applauded and supported EPA's efforts in creating a Federal Advisory Committee to address this issue. Several of our members have been actively involved in the deliberations of the National Advisory Council for Environmental Policy and Technology (NACEPT) Assumable Waters Subcommittee, and subcommittee progress has also been closely tracked by our executive staff. As we approach the conclusion of this process, we are concerned that the advisory committee may be unable to reach consensus on which waters can be assumed by a state or tribal water program. We would like to take this opportunity to express our disappointment with the Corps' current position that it will retain both waters regulated under the authority of the Rivers and Harbors Act[2], and also (as it chooses) waters that are considered *traditional navigable waters* under the authority of the Clean Water Act.[3]

As organizations representing state program managers responsible for evaluating potential program implementation costs in the event of state/tribal assumption of the §404 program, lack of clarity concerning both the scope and the process of §404 assumption was an important issue to resolve for our memberships. As stated in *ECOS Resolution 08-3: State Delegation of Clean Water Act Section 404 Permit Program*, our organizations encourage EPA to "work with states to bring clarity and certainty to the identification of assumable and non-assumable waters." After committing significant resources and time to this process, ECOS, ACWA, and ASWM are concerned that the potential outcome may consist of a final report made up of two separate recommendations: one from the Corps, and one from the remainder of the NACEPT

[1] *See* https://www.epa.gov/sites/production/files/2015-07/documents/ecos_letter.pdf
[22] 33 U.S.C. 403; 33 U.S.C. Chp. 26.
[3] A background report by the Assumable Waters Workgroup including the Corps position has been posted on the Assumable Waters Subcommittee web page, at https://www.epa.gov/cwa-404/subcommittee-working-documents

subcommittee. Rather than creating a helpful consensus providing clarity to state and tribal program managers, this prospective final result leaves program managers unable to accurately evaluate the extent of waters likely to be assumable and, therefore, whether or not they should begin the assumption process. We believe that this approach would not reflect the "Charge to the Subcommittee[4]" that states the final report should reflect three assumptions, the third of which is "Clarity regarding who is the permitting authority (the state/tribe or the USACE) should be easily understood and implementable in the field." A potential recommendation to EPA that lacks consensus provides no such clarity.

Moreover, the second assumption to be reflected in the final subcommittee report and listed in the "Charge to the Subcommittee" reads that "Any recommendation must be consistent with the CWA and in particular section §404(g)." The associations are disappointed with the position of the Corps concerning which waters would be assumable by states/tribes versus being retained by the Corps, and believe that the Corps position does not reflect either the legislative history or past practice in the states that have assumed administration of §404. Rather, the Corps has defined waters to be retained to include not only waters traditionally regulated under the Rivers and Harbors Act as intended by Congress, but also other waters now termed "*traditional navigable waters*" where regulatory authority stems from the CWA. In addition, because the Corps indicates that it will determine which CWA waters it wishes to retain either at the time of program assumption or at some future date as it deems appropriate, the Corps position creates continued uncertainty regarding state/tribal versus Corps authority. Finally, jurisdiction over similar CWA waters under the Corps proposal could vary among states and tribes that assume §404, or even within an assumed state program (in a state that is part of multiple Corps districts), with no reasonable basis for assigning state versus Corps authority. The extent of adjacent wetlands to be retained by the Corps also remains unclear.

As discussed in the subcommittee meetings, the legislative history of §404(g) shows that Congress intended the Corps to keep jurisdiction over waters traditionally regulated by the Corps under Section 10 of the Rivers and Harbors Act as opposed to waters regulated by CWA jurisdiction.[5] This view is supported by the language of §404(g)(1), which is identical to the language used by the House Committee on Public Works and Transportation to narrow the definition of navigable waters in the context of assumption. It also reflects congressional intent to limit the waters retained by the Corps after state assumption to "Phase I waters" as defined in the Corps' own 1975 regulations[6] (aside from waters deemed navigable only because of past historical uses), as opposed to "Phase I", "Phase II", and "Phase III" waters.

Despite the lack of consensus on the scope of waters retained by the Corps and assumed by the states or tribes, the subcommittee has had valuable discussions about the specificity of guidance that EPA and the Corps should eventually issue. There was consensus that resulting guidance should be field level national guidance, with general procedures applicable to any state (or tribe) assuming §404 permitting authority, and that EPA and the Corps should provide clear definitions and instructive mapping for both state/tribal and public use in advance of assumption of permitting authority. Despite these productive discussions, the ultimate purpose of the committee

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[4] *See https://www.epa.gov/sites/production/files/2015-07/draft_charge.docx*

[5] *See https://www.epa.gov/cwa-404/legislative-history-documents-related-clean-water-act-section-404g1*

[6] 40 FR 31326, July 25, 1975

– establishing clear guidelines that states/tribes will be able to follow when they wish to assume the §404 program – could be in jeopardy if the Corps' current position remains in place in the final report. If the Corps continues to insist that they must retain all waters including *traditional navigable waters* regulated under the CWA, states and tribes will be in the same position that they have been in for many years and will remain reluctant to pursue assumption of the program in direct contradiction to both congressional intent and the text of §404(g)(1).

We will continue to monitor the NACEPT subcommittee deliberations until a report is finalized and we hope that the Corps will reconsider its current position on the extent of waters that a state or tribe may assume. We are confident that members of the subcommittee representing state/tribal interests are ready and willing to continue to work with the Corps to achieve a consensus report that fully reflects the "Charge to the Subcommittee."

Thank you again for your attention to this issue, and please feel free to get in touch with any one of us to discuss this matter further.

Sincerely,

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