

# Proposed Rulemaking under 40 CFR Part 231: Section 404 (c) Procedures

Pre-Proposal State and Local Government Outreach Meeting

August 13, 2019

# Why Are We Here?

- On June 26, 2018, former EPA Administrator Pruitt issued a memo directing the Office of Water to propose revisions to 40 CFR Part 231: Section 404(c) Procedures, to provide greater clarity and certainty for the regulated public.
- The EPA is providing an opportunity to the intergovernmental associations to submit input during the pre-proposal period of the rulemaking to revise the Section 404(c) procedures.
- This presentation will provide you with information regarding EPA's preliminary considerations for revising the Section 404(c) regulations.

# Presentation Outline

- Background of Section 404 of the Clean Water Act (CWA)
- Current CWA Section 404(c) Review Process
- Summary of CWA Section 404(c) Actions to Date
- Considerations for Regulatory Revision
- Discussion

# Background

- Section 404 of the Clean Water Act (CWA) authorizes the Army Corps or an approved State or Tribe to issue permits for discharges of dredged or fill material at specified sites in waters of the United States.
- Section 404(c) authorizes the EPA to restrict, prohibit, deny, or withdraw the use of an area as a disposal site for dredged or fill material whenever the Administrator determines, after notice and opportunity for public comment, that the discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife, or recreational areas.
  - EPA can exercise this authority whenever it makes the requisite finding of unacceptable adverse effects including prior to submission of a permit application, while a permit application is pending, after a permit has been issued, and for Army Corps Civil Works projects.

# Current CWA Section 404(c) Process

Step 1

## **Initiation**

The Regional Administrator's notification to the appropriate USACE district or state, owner of record of the site, and the permit applicant, if any, initiating the 404(c) review process and providing opportunity for corrective action.

Step 2

## **Proposed Determination**

The Regional Administrator's Proposed Determination to prohibit or withdraw the specification of a defined area as a disposal site, or to deny, restrict or withdraw the use of any defined area for the discharge of any particular dredged or fill material (this step includes opportunity for public comment and public hearing(s)).

Step 3

## **Recommended Determination or Withdrawal**

The Regional Administrator's recommendation to the Administrator for determination as to the specification of a defined area as a disposal site. Alternatively, the Regional Administrator's decision to withdraw the Proposed Determination.

Step 4

## **Final Determination (FD) by the EPA Administrator**

The Administrator's Final Determination to affirm, modify or rescind the Recommended Determination after consultation with the Chief of Engineers or with the state and providing opportunity for corrective action. This authority has been delegated to the Assistant Administrator for the Office of Water.

# CWA Section 404(c) Process

- EPA's regulations implementing Section 404(c) of the CWA authorize the EPA to initiate and finalize the Section 404(c) review process whenever it determines, after notice and opportunity for public comment, that the discharge will have unacceptable adverse effects as described earlier.
  - EPA has issued 13 Final Determinations since 1972 – these include circumstances where permit applications had not yet be submitted, permit applications were pending, permits had been issued, and Corps Civil Works projects.
- The EPA can also modify Final Determinations, though the Agency's current Section 404(c) regulations do not detail a process for doing so.
- The EPA has never withdrawn a Final Determination and current regulations do not address withdrawal.

# Summary of Section 404(c) Actions to Date

<b>TOTAL number of cases initiated by the EPA since 1972</b>	<b>30</b>
Number of cases resulting in Final Determination	13*
Number of cases pending action at the Headquarters level	0
Number of cases pending action at the Regional level	0
Number of cases terminated upon resolution of issues	17

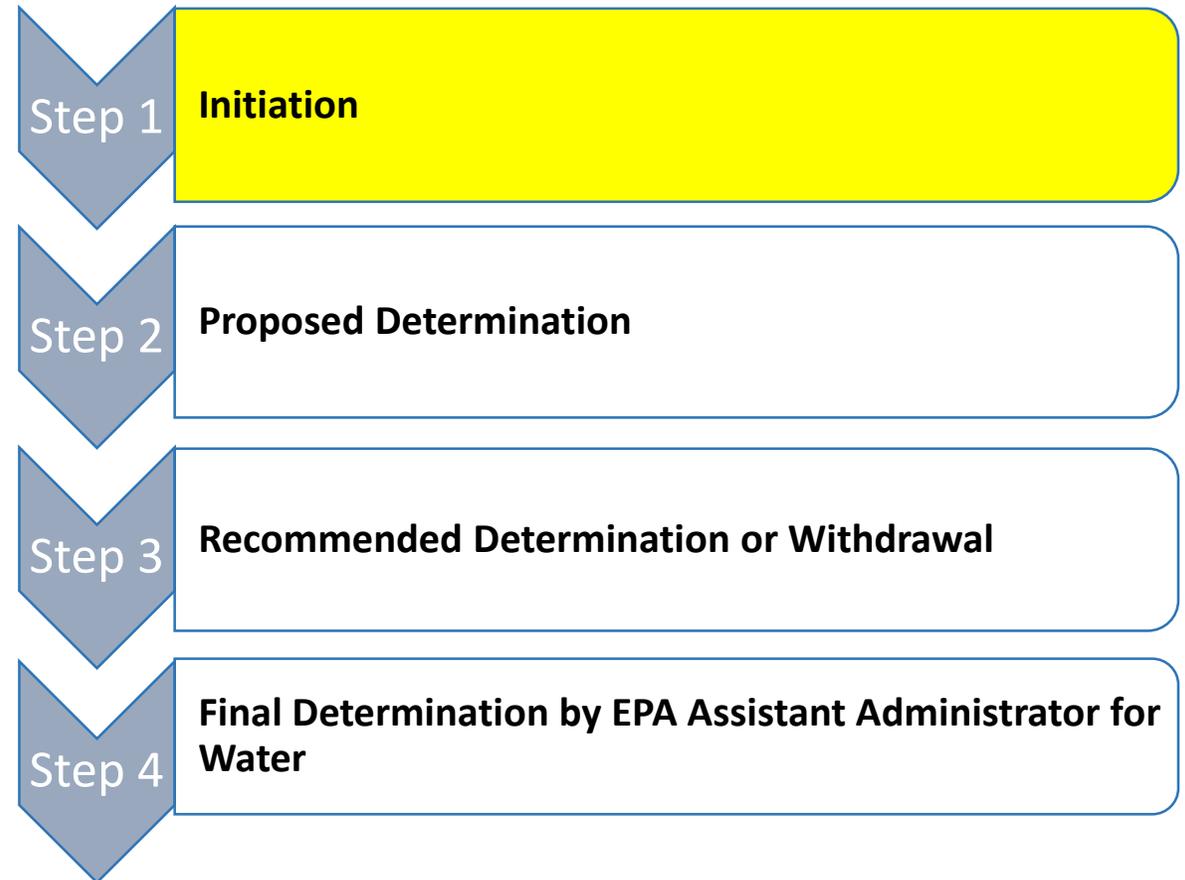
\*Three of these 13 Final Determinations have been modified; none have been withdrawn.

# Revising the Regulations

- On June 26, 2018, former EPA Administrator Pruitt issued a memorandum on “Updating the EPA’s Regulations Implementing Clean Water Act Section 404(c).” The memo directs the EPA’s Office of Water to propose revisions to the Agency’s Section 404(c) regulations.
  - <https://www.epa.gov/cwa-404/memo-updating-epas-regulations-implementing-clean-water-act-section-404c>
- The EPA’s Office of Water is considering revisions to the Section 404(c) regulations and is seeking input from the intergovernmental associations prior to noticing a proposed rule.

# 1) Considerations for Revision – Initiating the Section 404(c) Process

The EPA's Section 404(c) regulations will be proposed for revision to identify considerations for when the Agency initiates a Section 404(c) review either before a Section 404 permit application has been submitted or after a Section 404 permit has been issued.



# Potential Considerations for Pre-Permit Application Use

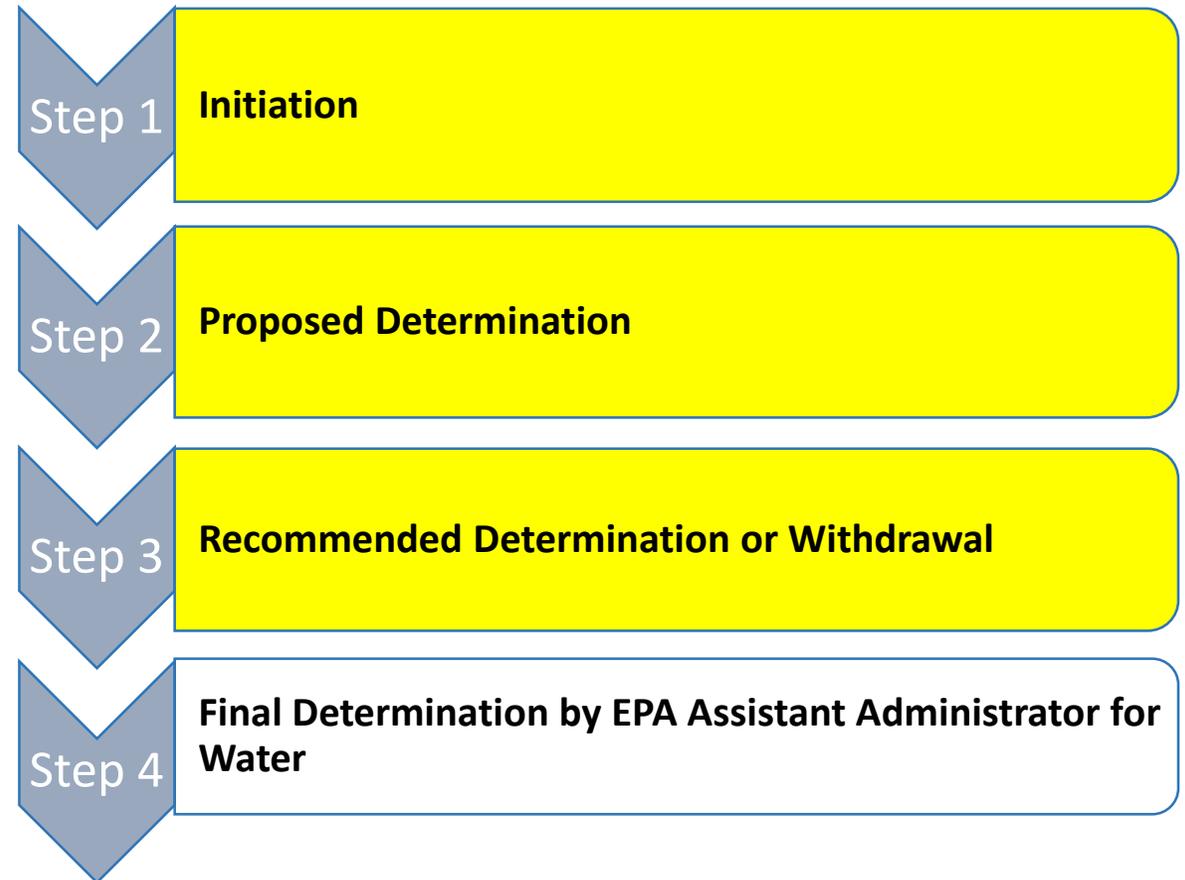
- Whether adequate information exists to support a finding that discharges of dredged or fill material into the defined area in question could result in unacceptable adverse effects,
- The degree of certainty regarding the nature and magnitude of the likely adverse effects of the discharge of dredged or fill material into the defined area in question,
- The degree and nature of the impact to the property owner or other individuals, communities, or sensitive populations who depend on the aquatic resource in question if EPA waited until a permit application is filed,
- The degree to which the potential disposal site owner would have sufficient notice that the defined area may be considered under CWA Section 404(c) prior to a permit application, and
- The degree to which a pre-permit application Section 404(c) action would provide certainty to the regulated community or individuals or communities who depend upon the aquatic resource in question.

# Potential Considerations for Post-Permit Issuance Use

- Whether the matters at issue were reviewed by the EPA without objections during the permit proceedings,
- Whether new information has come to the Agency's attention relevant to the discharge or effects of the discharge,
- Whether the Agency was notified by the permitting authority before issuance of the permit,
- Whether the nature of the discharge was changed after notifying the EPA of permit issuance,
- The degree and nature of the impact to the property owner or permittee,
- The degree and nature of the impact to individuals, communities, or sensitive populations related to the discharge,
- Whether all or a substantial portion of the discharges have occurred, and
- Whether the permitting authority has had an opportunity to suspend, modify, or revoke the permit in question.

## 2) Considerations for Revision – Coordination between Regional Offices and EPA HQ

The EPA's Section 404(c) regulations will be proposed for revision to identify how EPA Regional Offices coordinate with EPA Headquarters prior to taking action on the first three steps of the 404(c) review process.

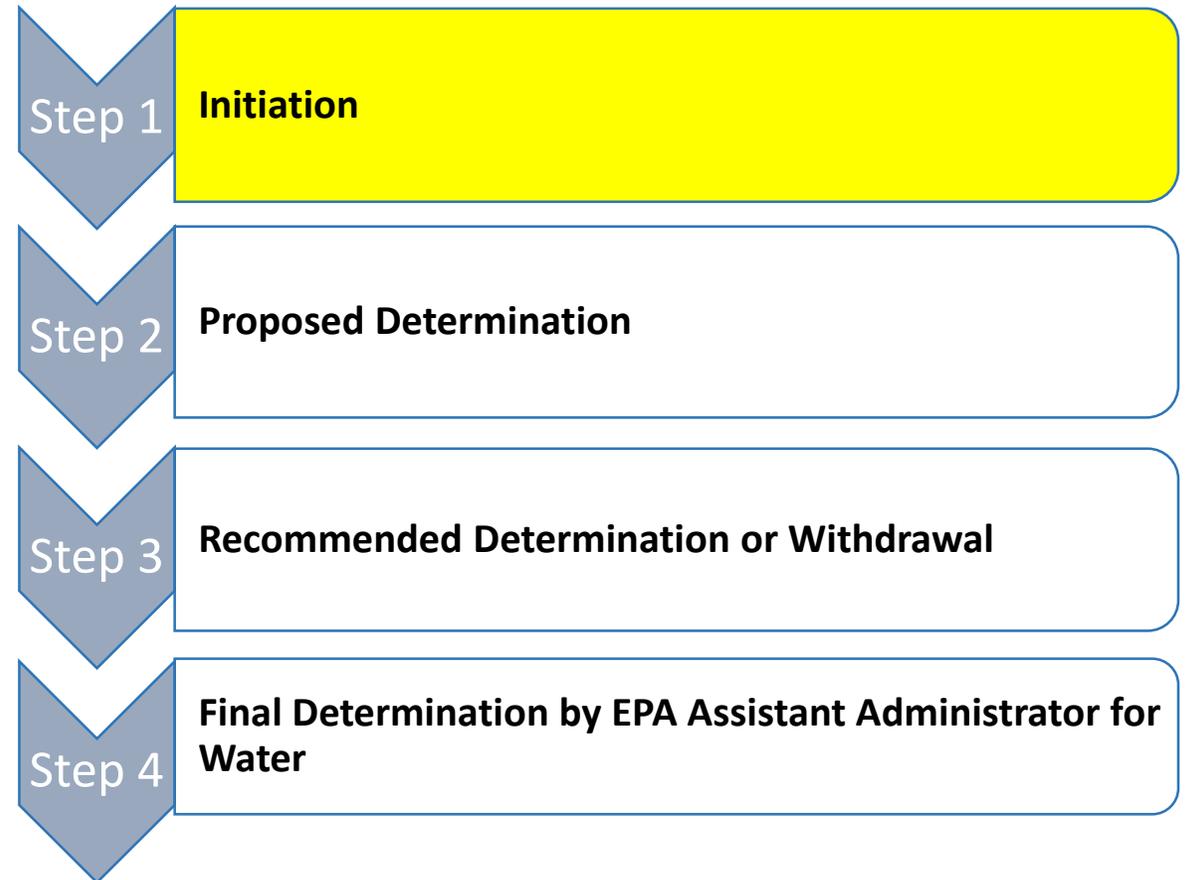


# Potential Considerations for HQ Coordination

- Is it a notification process or a concurrence process?
- At what level is notification provided or concurrence sought?
  - Office of Wetlands, Oceans, and Watersheds
  - Assistant Administrator for Water
  - EPA Administrator

### 3) Considerations for Revision – Referencing Permit Elevation Procedures Established Pursuant to Section 404(q) of the Clean Water Act

The EPA's Section 404(c) regulations will be proposed for revision to reference the individual permit elevation procedures established pursuant to Section 404(q) of the Clean Water Act if applicable.

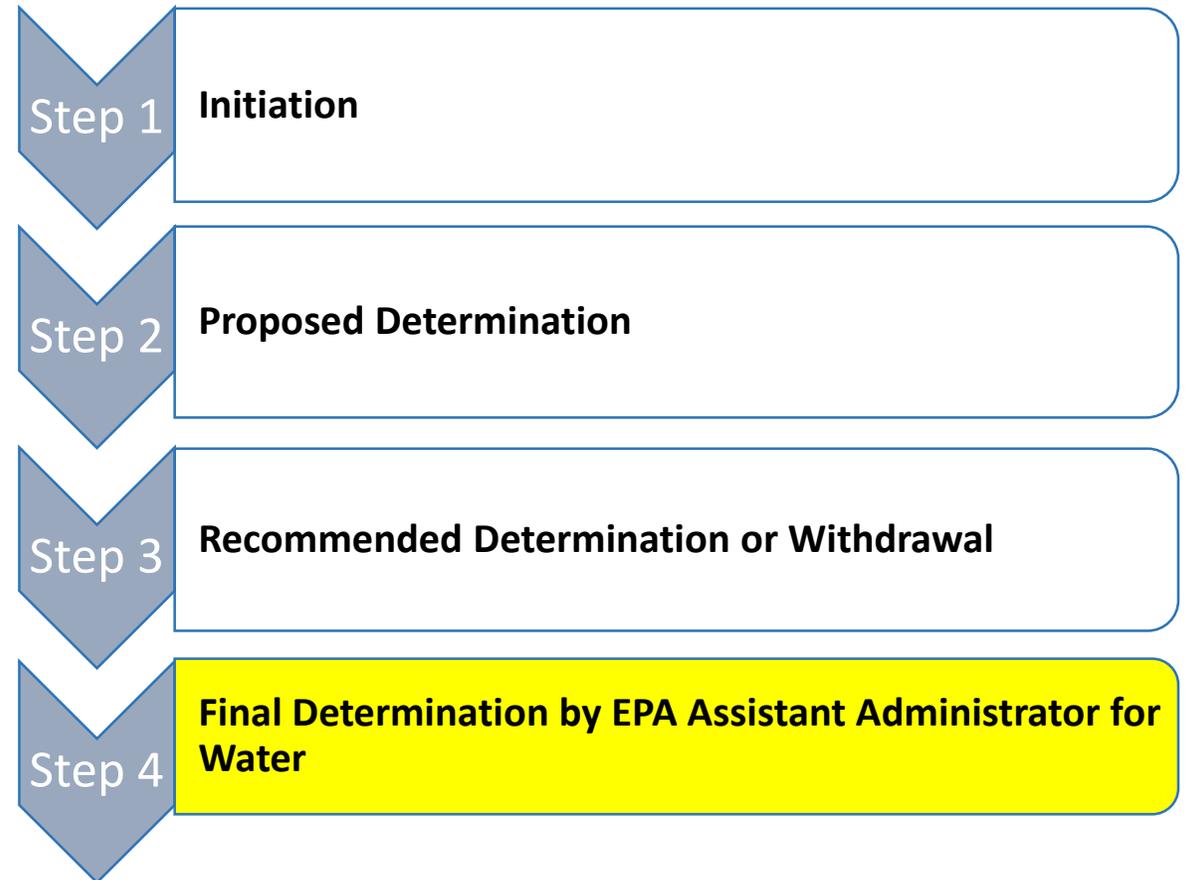


# Potential Considerations for Referencing Section 404(q) Procedures

- The EPA's Section 404(c) regulations (finalized in 1979) include references to a Section 404 "referral process" that:
  - Existed in the Corps' regulations until 1982
  - Were a precursor to the permit elevation procedures in 404(q) MOA
    - 1992 Army/EPA 404(q) MOA can be found at: <https://www.epa.gov/cwa-404/dispute-resolution-under-cwa-section-404q>.
- EPA could update the references to the old "referral process" to now reference applicable permit elevation procedures established in the 404(q) MOA.
  - Example of provision that could be updated: *"In cases involving a proposed disposal site for which a permit application is pending, it is anticipated that the procedures of the Section 404 referral process will normally be exhausted prior to any final decision of whether to initiate a 404(c) proceeding."*

## 4) Considerations for Revision – Modifying or Withdrawing Section 404(c) Final Determinations

The EPA's Section 404(c) regulations will be proposed for revision to describe a specific process for how to modify or withdraw a Section 404(c) Final Determination.



# Potential Options for Modification or Withdrawal Process

- **Two-step process** that involves issuing a Proposed Determination (with opportunity for public comment and public hearing(s)) followed by a Final Determination.
  - Solely Headquarters-led action
- **Three-step process** that involves issuing a Proposed Determination (with opportunity for public comment and public hearing(s)), a Recommended Determination, and a Final Determination.
  - Following steps two through four of the normal four-step 404(c) review process.
  - Proposed and Recommended Determinations would be Regional actions, Final Determination would be a Headquarters action

# Discussion

- The EPA is seeking input on:
  1. Whether the EPA's Section 404(c) regulations should be revised to identify considerations for when the Agency initiates a Section 404(c) review either before a Section 404 permit application has been submitted or after a Section 404 permit has been issued, and if so, recommendations for what those considerations should be.
  2. Whether the EPA's Section 404(c) regulations should be revised to require EPA Regional Offices to coordinate with EPA Headquarters prior to taking action on the first three steps of the 404(c) review process, and if so, recommendations for what that coordination process should involve.
  3. Whether the EPA's Section 404(c) regulations should be revised to reference the permit elevation procedures established pursuant to Section(q) of the Clean Water Act if applicable, and if so, recommendations for how to reference those procedures.
  4. Whether the EPA's Section 404(c) regulations should be revised to incorporate a specific process for how to modify or withdraw a Section 404(c) Final Determination, and if so, recommendations for what that process should be.

# Input Area #1

- Should the EPA's Section 404(c) regulations be revised to identify considerations for when the Agency initiates a Section 404(c) review, either before a Section 404 permit application has been submitted or after a Section 404 permit has been issued.
- If so, do you have any recommendations for what those considerations should be?

## Input Area #2

- Should the EPA's Section 404(c) regulations be revised to identify how EPA Regional Offices coordinate with EPA Headquarters prior to taking action on the first three steps of the 404(c) review process?
- If so, do you have any recommendations for what that coordination process should involve?

## Input Area #3

- Should the EPA's Section 404(c) regulations be revised to reference the permit elevation procedures established pursuant to Section(q) of the Clean Water Act if applicable?
- If so, do you have any recommendations for how to reference those procedures?

## Input Area #4

- Should the EPA's Section 404(c) regulations be revised to describe a specific process for how to modify or withdraw a Section 404(c) Final Determination.
- If so, do you have any recommendations for what that process should be?

# Next Steps

- **September 4, 2019** – informational webinar for intergovernmental associations.
  - More information forthcoming
- **September 13, 2019** – pre-proposal comment period closes.
  - Comments can be submitted to [404cRuleStates@epa.gov](mailto:404cRuleStates@epa.gov)

# Contact Information

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- For more information regarding Section 404(c):
  - <https://www.epa.gov/cwa-404/restriction-disposal-sites-under-cwa-section-404c>