



## Association of State Wetland Managers Clean Water Section 404 Assumption Series

### Checklist of Considerations for States and Tribes Exploring Assumption of the §404 Program

March 2021

In recent years, the U.S. Environmental Protection Agency (EPA) has been encouraging states and tribes to assume the Clean Water Act (CWA) §404 Program. Additionally, changes in federal regulations have prompted states and tribes to consider assumption in order to streamline and/or increase the predictability of §404 permitting, and ensure important wetlands and waters are appropriately protected.

Assumption of the CWA §404 program describes the process whereby a state or tribe obtains approval from the EPA to administer the §404 program within their borders and consequently begins administering all aspects of the program. For those states or tribes with mature, integrated water management programs that include the regulation of dredge or fill activities, assumption of the §404 program allows a state or tribe to carry out a fully integrated and comprehensive water program addressing the complete range of state, tribal, and CWA requirements. *Please note: Assumption is not delegation because the program is operated under state or tribal law and not under federal authority. Delegated programs mean that a state or tribe is issuing a permit or taking action on behalf of the federal government. However, with assumption, the state is instead creating a regulatory program under state control to implement a no less stringent regulatory program.*

The following list identifies key elements of considering and pursuing assumption, including suggestions for alternative actions that states and tribes might take when the timing is not right for assumption.

#### **When considering assumption, a state/tribe will want to:**

- Define state/tribal goals for wetland management:
  - What would be the benefit of assumption to the state or tribe?
  - Why is assumption being considered at this time?
  - Are there options other than assumption which would meet state or tribal goals for wetland management?

- Determine if there is public support for comprehensive administration of a dredge and fill permit program by the state or tribe. It is important for discussions to take place with stakeholders on issues such as:
  - What is the purpose of state/tribal program assumption?
  - Why should the state or tribe consider the additional burden of administering a dredge/fill permit program in lieu of the federal program?
  - What are the pros and cons of assumption?
  - How will the state or tribal water resources be adequately protected?
  - Would it be a concern that EPA would have an oversight role, including the ability to object to an individual permit?
  - What resources would the state or tribe need to administer an assumed program?
- Conduct an inventory of existing state/tribal statutes and regulations:
  - Does the state or tribe have an adequate permit program in place, with laws providing the appropriate agency with the authority to issue or deny permits, and authority to enforce requirements?
  - If basic program requirements are not currently met, is there support for amendment of the current program?
  - Is a new program needed?
- Undertake an initial side-by-side comparison of the state/tribal program versus the federal program based on these considerations:
  - Jurisdiction over waters of the United States, including wetlands: Does the state or tribe have jurisdiction over all waters that are assumable?
  - Authority to regulate all actions under state/tribal law that are regulated under §404. Does the state/tribe have authority to regulate all necessary actions?
  - Exemptions (incorporated exemptions cannot be broader than federal exemptions). Are state/tribal exemptions no less stringent?
  - Permitting standards (Note: a state or tribe cannot issue a §404 permit that does not provide the same level of protection as the 404(b)(1) Guidelines and other federal regulations). Are state/tribal permitting standards no less stringent?
  - Compliance and enforcement (Note: a state/tribal program must have authority to enforce compliance with permits, and to address violations of permitting requirements as well as unpermitted discharges. Do state/tribal authorities include the ability to assess appropriate fines and penalties, and provide for public participation in the compliance program?
  - General Considerations:
    - Legal expertise will be needed to compare state/tribal and federal program requirements, and to engage in discussions with EPA staff to ensure mutual understanding of both programs.
    - The state or tribe may need to supply additional explanatory material to demonstrate how its laws and regulations are interpreted and applied in

a manner that is consistent with and “no less stringent than” federal standards.

- Identify gaps:
  - Identify what gaps exist. For example, these might include the need for additional regulations, staffing, funding, or enforcement authority would the state or tribe need to assume the §404 program.
- Identify and secure funding mechanisms to support the assumed program:
  - The ongoing cost of a state/tribal §404 program is one of the primary considerations in making a decision on program assumption. In addition, states and tribes plan for the initial cost of developing a request for program assumption and initial implementation.
  - Federal financial assistance for assumption *planning* (not implementation) is available through EPA Wetland Program Development Grants.
  - States and tribes should work to answer the following questions around funding:
    - What would be the additional cost of program assumption?
    - Would the financial benefit to the public offset the cost to the state or tribe?
    - How would a state-or tribe-administered program be funded?
- Guarantee adequate public participation processes:
  - A state/tribal assumed program must provide an opportunity for public notice and comment on permit applications, draft general permits, potential major modifications of issued permits, public hearings, and issuance of emergency permits.
  - In addition, states and tribes must allow for and consider requests for public hearings.
  - A state/tribal assumed program must provide for public participation in the enforcement process.
- Identify how the state or tribe will comply with other required federal laws:
  - Permits issued under a state or tribal §404 program are state permits issued under state law. For this reason, the provisions of other federal laws that apply to federal permit actions are not applicable. The §404 assumption regulations define alternative mechanisms that address many of the environmental goals of related federal programs. An assumption application “package” will need to define how the state or tribe will recognize Tribal treat rights and comply with the:
    - National Environmental Policy Act,
    - Endangered Species Act ,
    - National Historic Preservation Act, and
    - Federal Coastal Zone Management Act.

### **If Review Indicated the State/Tribe is Prepared to Pursue Assumption**

If a state/tribe does not have an established regulatory program, a new regulatory program must be developed that meets the requirement for a no less stringent program. Development of a new program is often a major effort, requiring extensive coordination among federal and state agencies, among agencies within the state and with the engagement of stakeholders. Please see ASWM's resources of [developing wetland regulatory capacity](#) for more information on developing regulatory programs. If the state or tribe determines (based on discussions with the EPA) that it has an established regulatory program that is essentially consistent with federal §404 program requirements, it may decide to proceed with the assumption process, which includes:

- A stakeholder outreach process that identifies the concerns of all interest groups and provides an ongoing source of information to the public.
- Identification of gaps in state laws or regulations that need to be addressed.
- Amendment or adoption of state/tribal regulations or statutes as needed. The timeframe for legal amendments or rulemaking will in turn dictate the timeline for assumption.
- Further definition of funding and confirmation of the availability of funds in coordination with the state/tribal budget process.
- Discussions with all other impacted state, tribal, federal, and local agencies to reach agreement regarding which waters are assumed and which are retained, as well as which would need to be clarified as part of public notification of the shift in responsibility.
- Development of supporting materials such as staff guidelines and permit application forms, and a means of documenting permit decisions. Data management system for all actions related to applications, review and status, final decision, impacts and mitigation.
- Completion of an assumption "package" to submit to the EPA, including full documentation of the state/tribal program as needed for the application for assumption.
- Training staff in new procedures and requirements.
  - Notification of the public of the shift in permitting responsibility.

### **If Review Indicated the State or Tribe is Not Prepared to Pursue Assumption at this Time**

If the state or tribe does not currently have the legal capacity to assume administration of the §404 program, but has support for increasing responsibility for wetland protection, it may take the following steps to build the needed capacity:

- Building support for the state/tribal program through establishment of a stakeholder group to assist in definition of an appropriate course of action, and to further educate stakeholders regarding state/tribal administration of §404.
- Coordinating with the EPA to further define changes that are needed for program assumption, and to share information about state or tribal responsibility relative to §404 permitting. If the state or tribe does not currently have a process for coordinating regulatory review with the Corps, consider possible development of a State Programmatic

General Permit/Programmatic General Permit [(S)PGP], or review of §404 permit applications through an expanded §401 water quality certification process. These programs may provide the state or tribe with useful experience and a greater understanding of the federal program and will provide an opportunity to demonstrate and document state/tribal capabilities.

- Pursuing modifications of state/tribal regulations as needed to meet federal requirements.

If public support for an increased state regulatory role is lacking, the state/tribe may wish to build its wetland program using other approaches, such as:

- Focus on a wetland outreach program to build public understanding of wetland functions and values, and the role of regulation. Assist policy makers in understanding approaches for streamlining state/tribal regulations;
- Development of a more limited (S)PGP to gradually build capacity and experience, consistent with existing state/tribal authorities; and
- Development of the state/tribal wetland program through non-regulatory approaches, such as assessment of wetland condition, mapping, and public education to build expertise while supporting effective wetland protection and management.

**Additional Useful Information:**

- [EPA §404 Program Assumption Website](#)
- [Statutory Requirements for §404 Assumption](#)
- [Current state and tribal assumption efforts](#)
- [ASWM Assumption Website](#)
- [Clean Water Act §404 Program Assumption: A Handbook for States and Tribes](#)

**For more information, contact:**

Association of State Wetland Managers

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