



Association of State Wetland Managers Clean Water Section 404 Assumption Series

A Comparison of Two Options for States and Tribes to Increase Programmatic Responsibility: Assumption and State Programmatic General Permits

The Clean Water Act (CWA) provides several ways for states to increase input and responsibility for aquatic resource protection. This document compares two of these options: state programmatic general permits (SPGPs) and state assumption.

Assumption of the Clean Water Act §404 Program

Clean Water Act Section 404(g)(1) allows a state to assume administration of the Section 404 permit program for discharges of dredged or fill material within its jurisdiction, except for waters retained by the U.S. Army Corps of Engineers (Corps). Retained waters include those being used for or are susceptible to use to transport interstate or foreign commerce, waters subject to ebb and flow of the tide, and their adjacent wetlands. Tribes with “Treatment as a State” status also may apply to assume the Section 404 program.

Under 404(g), the U.S. Environmental Protection Agency (EPA) is responsible for determining whether to approve a request to assume the Section 404 program. In order to assume, a state or tribe must show it has authority to administer all aspects of a 404(g) regulatory program, and if approved will operate the assumed program under state or tribal law. An assumed program must be consistent with all the CWA programmatic requirements, including the Section 404(b)(1) environmental guidelines, but a state or tribal program can be more stringent than the federal program. Once EPA has approved a state or tribe’s program, the state or tribe issues dredge and fill permits for discharges into *assumed* waters, not those retained under Corps jurisdiction. Since this provision was adopted in 1977, many states have indicated interest in the assumption of permitting. However, only three states have assumed the 404 program to date – Michigan, New Jersey and Florida.

Considerations:

Assumption of the Section 404 Program:

- Covers ALL dredge and fill activities, not just minor activities, within assumed waters.
- May increase regulatory program stability, if a state or tribe is concerned about frequent changes in federal regulations.

- May increase program efficiency by reducing duplication between federal and state/tribal agencies and can be faster than applying to the Corps.
- Can provide better, more targeted customer service.
- Improves integration with other state/tribal resource programs.
- Relies on state- or tribal-specific resource policies and procedures.
- May be more accessible to permittees with greater access to State/Tribal permitting staff than federal staff under a non-assumed program.
- Can bring federal technical assistance, expertise and clout through the assumption relationship with EPA.
- Is limited to assumable waters.
- Does not currently allow assumption of only part of program (aka “partial assumption”).
- Has significant expense associated with preparing to apply for and operating a 404(g) program.

State Programmatic General Permits (SPGPs)

Another alternative for enhanced state or tribal engagement in addressing dredge and fill activities are programmatic general permits. These are general permits issued by the Corps which can be issued to address activities on a statewide or regional basis - State Programmatic General Permits (SPGPs) and Regional General Permits (RGPs), respectively. CWA section 404(e) authorizes the Corps to issue general permits for discharges of dredge/fill material, authorizing certain categories of discharge activities when they are similar in nature and will cause only minimal adverse environmental effects, individually or cumulatively. Once a general permit has been issued, individual activities falling within the categories of activities in the general permit may be authorized (or “verified”) under that permit, so long as they have no more than minimal effects and meet additional conditions contained in the permit. A SPGP is a form of Corps programmatic general permit, issued by Corps districts, which covers activities involving discharges of dredged or fill material that are also being effectively regulated by an ongoing state/tribal regulatory program.

Activities regulated by a state or tribal program can get an expedited federal Section 404 authorization through the SPGP subject to necessary federal agency oversight and safeguards to ensure the aquatic environment is being adequately protected. A discharge is authorized under an SPGP if the permittee has first received a permit for the discharge under the state or tribal permitting program for projects of the type listed in the SPGP and if the discharge will have no more than minimal adverse environmental impacts. The SPGP allows a state or tribe to verify an applicant’s project qualification for federal authorization along with issuance of a state permit. An SPGP, once issued, can be applied to an individual activity that is authorized under a Corps general permit without another alternatives analysis or other Section [404\(b\)\(1\) Guidelines](#) steps.

More states and tribes choose to utilize SPGPs to manage their aquatic resources rather than undertake assuming a 404 program. *For information on states that have SPGPs, see [ASWM's State Wetland Program Summaries](#).*

Considerations:

State Programmatic General Permits:

- Reduce duplication between federal and state/tribal agencies.
- Increase program efficiency for those permitting activities covered by the SPGP.
- Are often faster than applying to the Corps.
- Can provide better, more targeted customer service for permitting activities covered.
- Can cover all waters in the state or tribe, including waters transporting interstate or foreign commerce and their adjacent wetlands.
- Can be issued for only a portion of the state or tribe or for particular activities, allowing a state or tribe to take on broader coverage with each successive SPGP, if desired.
- Does not address all that can be written into the SPGP in the state permit, thus the state/tribal program does not need to be adjusted for consistency.
- Do not require total comparability of programs, and thus may not need to change the existing state/tribal permitting program.
- Allow state/tribe to manage permitting process without complexities of assumption.
- Can provide better, more targeted customer service.
- Bring less continuing federal oversight than for assumption, because the SPGP is available only for activities with only minimal adverse impacts.
- Create a combined federal/state (or tribal) permit with some measure of federal oversight on individual permits.
- Can bring federal technical assistance, expertise and clout.
- May serve as a potential stepping stone for states that are not ready to assume the Section 404 program.
- Are limited to activities that have no more than minimal adverse effects.
- May result in possible confusion around which are federal waters and permits.
- Require state or tribal staff and resource commitment (but can be connected to a state/tribe's existing program and may limit the need for substantial changes to the existing program).

Comparing the Assumption and SPGP Options

Assumption	SPGPs
State/Tribal Program can provide consistency throughout the state with one set of requirements for all state waters (assumed and those beyond the scope of the approved program).	Increases consistency within the state, but may not apply to all waters of the State if those waters are broader than federal waters

Reduces duplication between Corps and state/tribal agencies.	Reduces duplication between Corps and state/tribal agencies.
Can be faster than applying to the Corps.	Can be faster than applying to the Corps.
Covers all dredged/fill activities in assumed waters.	Limited to activities with minimal impacts in all federal waters, subject to exclusions and conditions.
Does not cover all waters; Corps retains most traditionally navigable waters and their adjacent wetlands.	Scope is spelled out in the SPGP. Can cover all federal waters, but not necessarily.
State/tribe is permitting authority for assumed waters.	Corps is permitting authority.
Partial assumption currently not allowed.	Can cover partial waters, activities, areas.
Assumed program does not expire.	Must be issued at least every five years.

Useful Resources:

- [EPA Assumption Website](#)
- [ASWM Assumption Website](#)
- Fletcher, K. (2000). [States assuming responsibility over wetlands: State assumption as a regulatory option for protection of wetlands](#). In: Proceedings of a Conference on Sustainability of Wetlands and Water Resources, May 23-25, Oxford, Mississippi, eds. Holland, Marjorie M.; Warren, Melvin L.; Stanturf, John A., p. 57-64
- Kusler, J. (2004). [Addressing the Gap: A Federal, State, Tribal and Local Partnership for Wetland Regulation](#). Association of State Wetland Managers.

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