



Association of State Wetland Managers Clean Water Section 404 Assumption Series

Documenting Assumable Waters

March 2021

In accordance with the requirements of Clean Water Act (CWA) Section 404, a state or tribe may only be authorized to assume the Section 404 Program if it has authority over all assumable waters of the United States and demonstrates that it will apply legal standards consistent with and no less stringent than the CWA requirements in operating a permitting program.

Section 404(g) of the CWA authorizes states and tribes, with approval from the U.S. Environmental Protection Agency (EPA), to assume authority to administer the 404 program in some, but not all, navigable waters and adjacent wetlands. Section 404(g)(1) describes the waters over which the U.S. Army Corps of Engineers (Corps) must retain administrative authority even after program assumption by a state or tribe.

The Corps Retains Some Waters

The Corps retains jurisdiction over certain waters. The 2018 [Corps memo](#) describes these waters as:

- 1) Waters that are jurisdictional under Section 10 of the Rivers and Harbors Act of 1899, provided that:
 - a) retained waters include tidal waters shoreward to their mean high water mark, or mean higher high water mark on the west coast, and
 - b) retained waters do not include those waters that qualify as "navigable" solely because they were "used in the past" to transport interstate or foreign commerce; and
- 2) Wetlands adjacent to waters retained under a. above, landward to an administrative boundary agreed upon by the state or tribe and the Corps.

This does not preclude operation of a state/tribal program in such waters, but such state permits do not provide §404 authorization. If the state or tribe has jurisdiction over waters where the Corps retains jurisdiction, coordination with the Corps is recommended.

In all other waters, a state or tribe assumed program has jurisdiction. For waters not subject to federal requirements under the CWA, such as some isolated wetlands that are not regulated under federal law, the state or tribe issues its own permits which are not subject to federal

regulations. For CWA jurisdictional waters that the Corps does not retain jurisdiction over, the state or tribe assumed program issues §404 permits instead of the Corps.

The 2018 Corps memo constricted the previous extent of Corps jurisdiction, allowing more waters to be covered by an assumed state or tribal program. This decision makes assumption a more feasible option for states to consider. Previously, the Corps took an expansive view of retained waters, often retaining most waters in a state, meaning there was little benefit in assumption. The new interpretation of the CWA assumable waters means that assumption looks a little more appealing for some states who are interested in asserting local control over dredge and fill permitting.

Understanding Section 10 Waters

The Corps must retain authority over waters included on lists of waters regulated under Section 10 of the Rivers and Harbors Act (RHA). Generally, Section 10 waters are waters that historically served navigational purposes within a state. These lists are compiled and maintained by the Corps district offices for every state except Hawaii.

The list of Section 10 waters should be reviewed by the state to ensure that it is comprehensive and up to date. Some Section 10 waters that are no longer used for historic interstate commerce uses (e.g., fur trading) may be able to be assumed. Waters may be added to Section 10 lists after a state or tribe assumes the program, and it is recommended that such waters be added to lists of Corps-retained waters at that time. It is important for states to have a comprehensive and updated Section 10 list to ensure there is no confusion between the Corps and the state.

States and tribes should not target their assumption programs based *only* on what waters can be assumed. A recommended strategy is to focus on developing a broader, more stable program over time. States should conduct their own research to best understand how federal changes affect what waters are assumable by the state.

Memorandum of Understanding Between the State/Tribe and the Corps

A signed MOA between the state/tribe and the Corps (typically through the District Engineer) is a required component of the state/tribe's request for §404 program assumption. This agreement will identify waters, including wetlands, where the Corps will retain jurisdiction for purposes of §404. It is suggested that waters which remain under Corps jurisdiction be listed and identified as specifically as possible to avoid case-by-case determinations after state assumption. This is important in order to avoid delays in processing of applications once they are received.

Mapping Assumable Waters

CWA jurisdictional waters, except those retained by the Corps, are assumable. In most cases, the state/tribe will have jurisdiction over more waters than the Corps. Mapping assumable

waters will allow state/tribal agencies to show stakeholders which waters will be under state control, and which waters will be retained by the Corps.

The assumable waters analysis relies heavily on mapping. This process requires close work with the Corps and may result in a Memorandum of Understanding (MOU) with the Corps. In the end, the state/tribe should develop graphics about what is or is not assumable by the state, how wetland delineation compares with the federal, and ensure that the state/tribe's process is at least as stringent as federal to show equivalency. Most states/tribes will likely adopt the Corps manual and supplements.

Emerging Best Practices

Only a few states have conducted assumable waters analyses. While only Michigan, New Jersey and Florida have formally submitted an assumable waters analysis (as part of their assumption application package for EPA), some practices are emerging. Documentation of these practices can be found in two resources: 1) the final [report on assumable waters of the NACEPT Committee](#) and 2) ASWM's recorded webinar "[Documenting Assumable Waters for Assumption for the CWA § 404 Program](#)", which showcased assumable waters analytical work completed by three states to date: Oregon, Florida and Minnesota. The archived webinar and PDF PowerPoints are available on ASWM's website. For the latest information on assumption and the 404(g) rule, visit EPA's website on "[Current Efforts Regarding Assumption under CWA Section 404.](#)"

Additional Useful Resources

- [EPA 404\(g\) Rulemaking](#)
- [2018 Corps Memo](#)
- [EPA Assumable Waters Guidance Documents](#)
- [Archived Recording and PPTs for ASWM's "Documenting Assumable Waters" Webinar](#)
- [State Assumable Waters Document Examples](#)
- [NACEPT Assumable Waters Subcommittee Materials on Assumption](#)
- [Final report of the NACEPT Committee](#)

For more information about this document, contact:

Association of State Wetland Managers

www.aswm.org

(207) 892-3399