

Association of State Wetland Managers
Assumption Frequently Asked Questions – Fall 2020

A. What is Clean Water Act § 404 Assumption?

“Assumption” of the CWA Section 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 dredged or fill activities, § 404 Program assumption allows a state or tribe to carry out a fully integrated and comprehensive water program addressing the full range of state, tribal, and CWA requirements. Assumption is not delegation. Delegated programs mean that a state or tribe is issuing a permit or taking an action on behalf of the federal government.

B. Benefits of Assuming the § 404 Program

- **Improved resource protection:** Ultimately, the coordinated efforts of both state and federal agency staff, the use of state specific methods and state expertise backed by federal scientific expertise, and a more efficient regulatory program will provide greater protection of wetland resources.
- **Increased program efficiency:** State program assumption greatly reduces duplicative state and federal permitting requirements, and eliminates potentially conflicting permit decisions, conditions, and mitigation requirements. State permit programs are often more timely than federal programs. In Michigan, for example, actions must be typically be taken on completed permit applications within 90 days, and the average permit processing time is approximately 60 days (less for general or minor permits). In New Jersey, generally permit decision are made in 60 days on average while wetland boundary verifications generally are completed in 90 days and individual permit decisions take less than 180 days.
- **Effective allocation of federal and state agency resources:** State programs such as those in Michigan and New Jersey are staffed by local offices with the capability of providing on-site review of almost all permit applications (including those reviewed by the Corps under the nationwide permit process), and work directly with permit applicants to reduce adverse impacts to the resource. When reviewing particularly complex applications, state and federal resource agency staffs retain the opportunity to work cooperatively.
- **Improved integration with other state resource programs:** Administration of the dredge and fill permitting program at the state level enables states to integrate dredge and fill regulations and other related land and water management programs. Issues such as floodplain management, storm water management, local or regional zoning or land use plans, and similar concerns are more likely to be fully integrated into the permit review process. Coordination with agencies and organizations responsible for watershed management is also improved.

- **Use of state-specific resource policies and procedures:** Under a state assumed 404 program, the state has a degree of flexibility in the selection of policies and procedures that are best suited to the needs of the state, provided that the basic federal requirements are met. Thus, a state can develop a wetland delineation manual that is suited to its climate and topography, rather than using a manual developed for the entire nation; it can use functional assessment procedures specific to the ecological types of wetland present within the region; and it can otherwise ensure that the wetland program is tailored to the needs of the resource and the public in that state.
- **Increased regulatory program stability:** Experience in Michigan indicates that its wetland regulatory program requirements have remained much more stable and predictable since assuming than the 404 permit program administered by the Corps of Engineers in most states. There are two reasons for this stability. First, because Michigan's program relies on state, rather than federal law, it is not impacted by changes in the federal program unless those changes render the state program inconsistent with the federal program. Therefore, numerous changes that have resulted in a significant degree of controversy and confusion at the federal level have not directly impacted Michigan's program (e.g. early revision of the delineation manual and regional updates, rule changes following the Tulloch decision, and, most recently the SWANCC and Rapanos decisions).
- **Increased public support:** State permit staff are often more readily accessible to the public. Overall public support for wetland regulation is increased by more consistent decision making among state and federal agencies, and by policies and procedures tailored to the needs of the state.

C. Barriers to Assumption

- **Meeting program requirements:** Current § 404 program regulations are quite complex, particularly in terms of the definition of jurisdiction, activities regulated, permit review criteria, and permit exemptions. In order to be approved to administer the program at the state level, a state must demonstrate that it has equivalent authority in all areas. This can appear exceptionally difficult, particularly since the basis for state authority may be quite different than the basis for federal authority but states can demonstrate their program and authorities are consistent with the federal program. For example, while federal jurisdiction over wetlands is essentially based on the commerce clause of the Constitution, state jurisdiction is typically based at least in part on authority to regulate land use and to protect to the state's natural resources. The specific language arising from these distinct authorities may, initially, appear quite different, even though the protection ultimately afforded the resource is equivalent. In New Jersey, this obstacle was overcome by developing a separate legal authority to regulate wetlands that was intentionally designed to enable assumption of the § 404 Program.
- **Inability to assume administration of Section 10 waters of the Rivers and Harbors Act and wetlands adjacent to these waters:** This severely limits the appeal of the overall program and may lead to a decision to forego state assumption. For some coastal states, the inability to assume administration of the § 404 permit program in tidal wetlands or coastal areas, which may eliminate

state regulation of some of a state's most significant wetland resources. However, MI and NJ entered into an SPGP with the Corps to manage some of these waters.

- **Inability to assume § 404 authority in only one geographic portion of the state.** Some states would prefer to administer a state § 404 program only in certain geographic areas, such as the coastal zone, or in tidal wetlands, including a portion of Section 10 waters. There is currently no option for partial assumption of a state § 404 program based on a limited geographic area.
- **Need for alternative coordination with other federal resource programs:** Because the permits issued under a state assumed § 404 program are issued under state rather than federal law, alternative mechanisms must be developed to assure compliance with the requirements of the federal Endangered Species Act, National Historic Preservation Act, and similar federal programs. These issues are addressed to an extent through oversight of state assumed programs by the EPA.
- **Federal agencies and interest groups may oppose assumption over concerns about maintaining protection consistent with the other federal laws in the state following assumption:** (See section on coordination with federal laws for more discussion.)
- **Lack of dedicated federal funding specifically for Section 404 Program administration:** Perhaps most importantly, states administering the Section 404 permit program receive no federal funds specifically dedicated to support operation of the permit program. In theory, states may make use of Section 106 water program funds for this purpose, but this would be difficult in practice since these funds are already dedicated to other existing water programs, which are usually located in the water quality agency of the state while a 404 program is often located in another state agency. It is not reasonable to expect that funds will be withdrawn from those programs, to fund another, especially one in another agency or department.
- **Wetland Program Development Grants Cannot Fund Implementation Activities:** The EPA has provided State Wetland Program Development grants to support development of state wetland regulatory programs. However, the funds can only be used for program development, not implementation. While the states have made good use of these funds, it is clear that the primary program cost for an established program is not one of development, but ongoing program administration. The cost of administering not only the permit process, but the associated mitigation requirements and enforcement program, places a significant burden on a state administering a Section 404 Program. Case: In Michigan, although assumption of the 404 Program has been broadly supported for many years due to increased program efficiency and effectiveness, challenging economic conditions have raised concerns about the total cost of program operation, and led the Governor to propose returning the program back to the federal agencies.

D. Which states have assumed the §404 Program?

Assumed States

- **Michigan** – Full assumption; had an inland lakes and streams protection act (1970s); state passed a wetland protection statute in '79 with idea applying for assumption; had existing program but filled gap with new statute (very similar to CWA language) – have crosswalk
- **New Jersey** – Full assumption (except Sec 10); section 10 is not on the table for assumption, but could be handled under a State Programmatic General Permit (SPGP); have permitting fees and delineation services (do or verify)

Currently Preparing Assumption Packages

- **Florida** – Florida has developed a state assumed program framework from 404 rule and also to demonstrate how program is going to function. Florida is unique because of its ability to modify the unique structure of its Environmental Resource Protection (ERP) program, which has a centralized division, districts, and an implementing program. Florida's efforts focused not on developing a new program, but instead how to fit 404 into existing program and knowledge. Work for the state has included training, development of templates, etc. for the program.
- **Indiana** - Indiana is seeking to assume the full program.
- **Minnesota** – Minnesota is working towards full assumption. With a robust state regulatory program, the state has a multi-agency state dredge and fill regulatory program with a delegated role for local governmental units. Whether or not a model including a role from local government is allowable will depend on the new 404(g) rule (forthcoming).
- **Nebraska** - Nebraska is seeking to assume the full program but would consider a partial assumption approach if it becomes allowable in the new 404(g) rule (forthcoming).
- **Oregon** – Oregon is seeking partial assumption; however, it is not clear yet whether partial assumption will be allowable in the new 404(g) rule (forthcoming). Assumption is planned for all regulatory activities for Section 10 water (with a 1,000+ boundary) and coastal waterways within the state's urban growth boundary, as well as mitigation banks and mining. Full assumption is planned for the future, but their current proposal is for partial, in response to concerns by specific stakeholder groups (foresters, cattlemen and tribes).

Tribal Assumption of the 404 Program

To date no tribes have assumed the 404 program. However, tribes are allowed to assume the program. In 2020, several tribes have been considering pursuing assumption.

E. State/Tribal Authority to Assume the § 404 Program

In accordance with the requirements of Section 404, a state or tribe may only be authorized to assume the Section 404 Program if it has authority over all assumable waters and demonstrates that it will apply legal standards consistent with the Clean Water Act (CWA) requirements in operating a permitting program. Tribes are eligible to apply to assume the Federal permit program after they have met requirements for "treatment as a state." See the February 11, 1993, Federal Register notice. (See Publications of Interest for details.)

F. Consistent with and No Less Stringent than Clean Water Act Regulations

To assume the § 404 program, a state or tribe's program must be consistent with (and no less stringent than) that required by the CWA and implementing regulations. For example, a state or tribe must:

- have sufficient authority to regulate all waters of the US that may be assumed;
- regulate at least the same activities as listed in the Act and regulations;
- provide for sufficient public participation;
- ensure compliance with the Section 404(b)(1) guidelines, which provide environmental criteria for permit decisions;
- have adequate enforcement authority; and
- comply with other applicable regulations (33 USC part 1344(h); 40 CFR part 233)

G. Jurisdiction in States and Tribes with Assumed § 404 Programs

Assumption by a state or tribe does not alter CWA jurisdiction over waters of the United States. Assumption does not reduce the scope of Clean Water Act jurisdiction, but instead shifts responsibility for administering the Section 404 permitting program for certain waters of the United States from the federal government to authorized states or tribes.

States and tribes assume permitting authority over certain waters, but others are retained under the authority of the Corps. The waters and wetlands that a state may not assume, and the waters the Corps must retain CWA 404 permitting authority for are described in section 404(g)(1) as:

"... those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto ..."

H. EPA Retains Specific Authorities Regardless of § 404 Assumption

In an assumed 404 program, the EPA retains the authority to review defined categories of permit applications and may request review of any application. Any permit for which EPA has not waived review, the EPA provides the permit to the Corps, USFWS, and NMFS for comment. EPA reviews comments provided and comments on the state permit accordingly. In the event that the EPA objects to issuance of a 404 permit, the state or tribe cannot issue the 404 permit unless the EPA's objection is resolved and permit conditions met.

I. Requirements for a State or Tribe to Assume the § 404 Program

A complete assumption "package" must detail what a state/tribe will do, what the permit process is, what criteria are used in the review, appeals processes, who is responsible, and lastly how, when and with whom coordination will occur. The package must include copies of permit forms, approval forms and any review criteria or guidance manuals. Additionally, the structure of state/tribal regulating agency must be described, as well as who does what, as well as funding and staffing levels. EPA does not determine these elements of the program, only the state/tribe does this decision-making.

J. The § 404 Assumption Process

The assumption process is comprised of multiple steps. These steps are formally outlined on EPA's website at: <https://www.epa.gov/cwa404g/assumption-process-under-cwa-section-404>. A summary of these steps, as of this document's publication date are:

Step 1: State or Tribe submits a complete assumption application: The Governor of the State or Equivalent Tribal entity* submits to EPA a full and complete description of the program it proposes to establish and administer under State law or an interstate compact. The State must also submit a statement from the State Attorney General certifying that the State laws provide adequate authority.

Step 2: EPA Reviews Application: EPA is responsible for reviewing and approving/ denying a State or Tribe's request to assume the Federal permit program within 120 days of receipt of the completed application.

Step 3: EPA Distribution of Application for Public Comment: EPA distributes application for State or Tribal assumption to other Federal agencies.

Step 4: EPA holds Public Hearing: EPA also makes the State/Tribal application available for public review and comment and holds public hearing(s) in the State.

Step 5: EPA Makes Decision: After reviewing the State or Tribal application and considering any Federal agency and public comments, EPA makes a decision of the requirements to assume the Federal permit program. EPA's decision is based on whether the State or Tribe meets the applicable statutory and regulatory requirements for an approvable program.

Step 6: EPA Approves or Denies Assumption Request

K. Key Components of an Assumption Package

Assumption package requirements can be found in the federal assumption regulations; however, EPA does not provide a standardized assumption application form. The requirements for a complete assumption request package are described in [EPA Section 404\(g\) regulations \(40 CFR 233.10-233.14\)](#). Also see EPA's page on the assumption application at: <https://www.epa.gov/cwa404g/assumption-request-package-under-cwa-section-404>

A state or tribal package requesting Section 404(g) assumption must include:

1. A letter from the Governor or equivalent tribal leader;
2. A Complete program description;
3. An Attorney General's statement or tribal equivalent;
4. A Memorandum of Agreement (MOA) with the respective EPA Regional Administrator;
5. A Memorandum of Agreement (MOA) with Secretary of Army (through the Chief of the U.S. Army Corps of Engineers); and
6. Copies of all applicable state or tribal statutes and regulations administering the program.

L. The Assumption Package Program Description

A state must develop a complete program description ([40 CFR 233.11](#)). The program description must include (but is not limited to):

- A description of the scope and structure of the program, including jurisdiction, activities regulated, anticipated coordination, permit review criteria, and scope of permit exemptions, if any;
- Procedures for permitting, administrative review and judicial review;
- Structure and organization of state or tribal agency responsible for program administration;
- Funding and staffing levels;
- Anticipated workload;
- Copies of permit application forms, permit forms, and reporting forms;
- Compliance evaluation and enforcement programs;
- Description of the waters under state jurisdiction and those under the U.S. Army Corps of Engineers (Corps) jurisdiction; and
- Best Management Practices proposed to satisfy farm, forest, and temporary mining roads exemption provisions.

M. The Attorney General's Statement

The state must include an Attorney General's statement ([40 CFR 233.12](#)). The content of this letter must include (but is not limited to):

- Citations of specific statutes, administrative regulations and, where appropriate, judicial reviews demonstrating adequate authority;
- Legal analysis of the effect of state or tribal laws regarding private property takings;
- Certification of the authority of each state or tribal agency to administer the program; and
- Analysis of state authority for a program covering activities on Indian lands, if applicable.

N. Memorandum of Agreement with EPA Regional Administrator

The state/tribe must include a signed Memorandum of Agreement (MOA) between the EPA Regional Administrator and the state/tribe ([40 CFR 233.13](#)). This MOA must include (but is not limited to):

- Classes and categories of permits for which EPA waives federal review (as specified in [40 CFR 233.51](#));
- Provisions specifying the frequency and content of reports, documents and other information which the state or tribe may be required to submit to EPA in addition to the annual report, as well as a provision establishing the submission date for the annual report.
- EPA and state or tribal roles and coordination procedures regarding compliance monitoring and enforcement; and
- Provisions addressing modification of the MOA.

O. Memorandum of Agreement with US Army Corps of Engineers

The state/tribe must include a signed Memorandum of Agreement (MOA) between the Corps and the state/tribe ([40 CFR 233.14](#)). This MOA must include (but is not limited to):

- A description of waters of the U.S. over which Corps retains jurisdiction;
- Procedures for transfer of pending Section 404 permit applications and other relevant information upon program approval; and
- Identification of all Corps general permits to be assumed by the state or tribe, including a plan for transferring responsibility and identification of current enforcement cases, as well as procedures for transmitting relevant information to the state or tribe.

P. Specific Elements of the Assumption Package's Program Description

- **Information Required Related to Procedures for Permitting, Administrative and Judicial Review?**

[See EPA's regulation here.](#)

- **Describing Waters under State and Corps Jurisdiction**

The assumption program description requires the inclusion of a description of the waters that are under state jurisdiction and which waters the Corps will retain. This definition of waters should be included in draft MOU with the Corps and draft rules. Refer to the [August 2018 Department of Army Memorandum to the Corps](#) regarding how the Corps is to identify waters to be retained. This description may need to be different than the way it is written in state law to reflect the way it needs to be written to show federal equivalency. In order to support this work, a state usually conducts an *assumable waters analysis*, which identifies those federal waters that will be retained by the Corps and those that will be assumed by the state/tribe. The 40CFR includes information on the requirements for a complete program description. An assumable waters analysis is primarily a mapping exercise. This is usually a joint process conducted by a state or tribe with the Corps.

- **Demonstrating Equivalency in Your State/Tribes Regulations and Permitting Activities**

As part of the assumption application package, states and tribes are required to conduct and analysis of and demonstrate equivalency. This is required to ensure that the assumed program is equivalent to (not necessarily the same as) the federal requirements. To do an analysis of equivalency, states and tribes are expected to do a comparison, often referred to as a “crosswalk” of federal requirements with the proposed state document(s). This can take different forms. The 40CFR includes information on the requirements for a complete program description, including crosswalk portion – comparing fed and state statute.

Some states develop a more narrative, programmatic approach describing the similarities and differences (example Florida), while others have developed comparison grids showing side-by-side text to demonstrate how one part of the regulation is equivalent to another (example Oregon). In some states working on assumption, rather than try to create something equivalent, the state has simply adopted the federal language to meet the equivalency requirement.

Adopting the Corps manuals (including regional supplements) can provide part of this equivalency. Adopting the Corps manual may also be easier in terms of political will with certain sectors. Some sectors, depending on location and circumstances, maybe more critical of new state-developed language, regardless of level of equivalency.

- **Providing the Draft Assumed Program Permit Application Forms and Reporting Forms**

An assumption application package must include submission of draft state permit application and reporting forms that will be used by the assumed program. In some states this is simple, involving a relabeling of existing forms that meet all equivalency requirements. However, other programs must create new forms or revise existing ones to make sure that they meet the same level of requirements as the federal program.

- **Documentation of Compliance and Evaluation Program Elements**

The assumption application package should include a description of how the assumed program will have equivalent compliance and evaluation elements. This equivalency analysis is usually provided through its inclusion in the *crosswalk analysis*. This description should include language on any enforcement statute that addresses compliance.

Q. What are different assumption frameworks/structures that have been tried?

A. It is essential to look directly at the 404(g) rule (which is being currently revised and will affect requirements and recommendations once published in 2020). Another good site to look to is the EPA Assumption Website: <https://www.epa.gov/cwa404g/assumption-request-package-under-cwa-section-404>. Your assumption request package (especially the program description) IS the framework for your program. The 40CFR includes information on the requirements for a complete program description; including crosswalk portion – comparing fed and state statute that structure the assumed program. If state does not have its own wetland program, look at other states to see what program structure works best for you. Other programs can be vastly diff (natural and human resources, population, economies, etc.). Look differences with the state and talk to stakeholders to get input. The EPA, working with the Corps, is developing an assumption rule (including allowable frameworks).