

# Clean Water Act Section 404 Program Assumption

A Handbook for States and Tribes

August 2011

*Prepared by  
The Association of State Wetland Managers, Inc. and  
The Environmental Council of the States*



*MDEQ photo*



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*This handbook was prepared by the Association of State Wetland Managers in cooperation with an interagency workgroup convened by the Environmental Council of the States (ECOS) to encourage state/tribal assumption of the Clean Water Act Section 404 Program. Our thanks to staff of the Environmental Protection Agency (EPA) and other state, tribal and federal workgroup participants. Please note that any reference to a “state” program applies equally to tribes.*

### EXECUTIVE SUMMARY

State, tribal and federal resource agencies are facing increased pressure to reduce the cost of government, and to minimize regulatory costs imposed on businesses and the general public, while protecting important wetlands and other aquatic resources that remain under significant development pressure. At this time in our history the need for wetland ecosystem services—including flood storage, storm attenuation, and provision of migratory corridors for wildlife—is greater than ever in light of changing climatic conditions. Government agencies must also balance the cost and challenge of protecting other freshwater resources—for drinking water and protection of human health, natural habitat, water management, and a range of public uses.

In order to protect water resources while containing costs, it is essential that different levels of government share the work of managing wetlands and other waters. State, tribal and federal agencies are continuing to seek approaches to avoid duplication of effort and to improve the efficiency of permit programs, making the best use of the strengths of each agency to realize shared resource management goals. ASWM and ECOS have developed this handbook in the interest of encouraging a collaborative approach to wetland management by state or tribal and federal agencies.

The U.S. Congress has provided a mechanism for state/tribal and federal cooperation in the Clean Water Act Section 404 program (§404) since 1977. In the process known as §404 program assumption, a state or tribe may request to “administer its own individual and general permit program” in place of the federal dredge and fill permit program. In order to qualify for this provision, the state or tribal program must meet requirements that assure a level of resource protection that is equivalent to that provided by the federal agencies. Congress anticipated that this process would encourage a sharing of responsibility among states, tribes and the federal government.

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In spite of the promise and apparent advantages of §404 program assumption, only two states—Michigan and New Jersey—have requested and received approval for a state §404 program. The primary reasons for this are reported to be a strict requirement for consistency with federal law, setting a relatively high bar for permitting and enforcement, combined with a lack of dedicated federal funding to support state programs. However, states and tribes have demonstrated a willingness to manage wetlands within their boundaries, and have developed a variety of alternative approaches to working with federal agencies. The purpose of this handbook is to provide information to support those states and tribes willing to consider the step of full §404 program assumption in order to provide the maximum level of interagency cooperation and efficiency in their dredge and fill permit programs.

Benefits of program assumption There are multiple incentives for a state/tribe to assume administration of the §404 program. Among these,

- Elimination of a high percentage of duplication in state/tribal and federal permitting programs
- Reduced costs for permit applicants, resulting from reduced duplication, as well as often faster state/tribal permit processes
- More effective resource management at the landscape/watershed level, drawing on localized expertise and integration of wetland management with other state or tribal land use management and natural resource programs
- Incorporation of state or tribal goals and policies into the overall permit process, and
- Improved consistency and stability in the regulation of dredge and fill activities across multiple levels of government.

Challenges and potential obstacles A tribe or state that is considering §404 program assumption will need to weigh the clear benefits of this cooperative approach with a number of obstacles and challenges, including

- The need to meet §404 requirements with a parallel state or tribal program that regulates a wide range of waters – lakes, streams and wetlands – with stringent regulatory criteria
- Provision of a compliance and enforcement program consistent with the federal program
- Financial cost to the state or tribe
- Necessity of broad public and political support for this shared approach.

A state or tribe that is interested in pursuing §404 assumption will need to develop a full description of its planned program, undertake a legal comparison of state/tribal and federal regulations, take steps to amend state/tribal laws or regulations, identify program funding, and enter into cooperative agreements with both the EPA and the U.S. Army Corps of Engineers (Corps), and finally to submit an application for assumption in an application to the EPA Regional Administrator. This handbook provides additional discussion of each of these steps.

Moving forward After weighing the benefits and obstacles to §404 program assumption, a state or tribe may decide to proceed with development of an application to the EPA, or find it more advantageous to pursue other steps, such as development of a 401 certification program, or a (State) Programmatic General Permit — (PGP or SPGP) — in cooperation with the Corps. Regardless of the capabilities and interests of a given state or tribe, increased coordination and sharing of responsibility will increase the effectiveness and efficiency of dredge and fill regulations.

## OVERVIEW OF SECTION 404 PROGRAM ASSUMPTION

**The federal Section 404 Program.** §404 of the Federal Clean Water Act (CWA) defines a permitting program to regulate placement of dredged or fill material in the waters of the United States. This is the primary federal authority regulating the physical alteration of wetlands, as well as other waters of the United States, and complements the National Pollutant Discharge Elimination System (NPDES program), which regulates the discharge of pollutants into waters of the United States. The §404 program is jointly administered by the EPA and the Corps.

**State/tribal assumption.** In 1977, the U.S. Congress formally recognized the potential for and desirability of a major state/tribal role in management of dredge and fill activities, including administration of the §404 program. Congress recognized that many states had already established parallel permitting programs (resulting in duplicative state and federal permit requirements), and that the traditional role of the states/tribes in land use management provides states/tribes with a particularly effective basis for wetland management. However, Congress also emphasized the need to retain Corps control over navigation in interstate waters.

The resulting provisions of §404 allow a state or tribe to administer its own regulatory program in lieu of the Corps permit program for most waters, if approved by the EPA, and with oversight by the EPA. Congress prohibited assumption of the program in certain waters as defined in §404(g)(1) of the CWA—including waters which are or could be used to transport interstate and foreign commerce, waters subject to the ebb and flow of the tide, and wetlands adjacent to these waters (e.g. tidal waters, the Great Lakes and major river systems). The Corps retains §404 jurisdiction over these waters.

In the simplest terms, the assumption process authorizes states or tribes to assume greater responsibility for dredge and fill activities in waters of the United States. In practice, a state/tribal §404 program is a close partnership between state or tribal and federal agencies. Under a state/tribal §404 program,

- The state or tribe agrees to conduct its own permit program in accordance with the requirements of the CWA and associated regulations. This means that the state or tribe may impose more stringent requirements, but not less stringent requirements (40 CFR 233.1(d)). Permits issued by an approved state/tribal program provide the necessary authorization under §404. The Corps suspends processing of federal permits (including Nationwide or Regional General Permits) in state/tribal §404 assumed waters. The state or tribe may adopt Nationwide Permits, or may develop its own General Permit categories for its program.

The state/tribe also assumes primary responsibility for enforcement of the CWA. An annual report of program activities is provided to the EPA.

- The EPA directly reviews permit applications defined in advance in a Memorandum of Agreement (MOA) with EPA, and may object to issuance of a permit where federal guidelines are not met, or if the permit is subject to an interstate dispute. The EPA review also provides for coordination with other federal programs, including the Corps, U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS). Input from the EPA helps to ensure that baseline §404 requirements are consistently enforced on a national basis. A state/tribe cannot issue a permit under §404 if EPA objects to issuance of the permit and the state has not taken steps required by the EPA Regional Administrator to eliminate the objection.

In addition, the EPA reviews the state's annual program performance, and provides federal technical assistance. EPA also retains the right to take enforcement action on any §404 violation, although the primary responsibility for enforcement rests with the state/tribal §404 program.

- The Corps retains jurisdiction over waters which are, or could be, used as a means to transport interstate and foreign commerce, all waters subject to the ebb and flow of the tide, and wetlands adjacent to these waters (e.g. tidal waters, the Great Lakes and major river systems). This does not preclude operation of a state/tribal program in such waters, but such state permits do not provide §404 authorization. For a full description of the waters over which the Corp retains jurisdiction, please see "MOA with the Secretary of the Army" in the Special Topics section.

These roles and responsibilities are discussed in greater detail below.

Combining the work of state/tribal and federal agencies into a §404 partnership eliminates a significant amount of state/tribal and federal duplication —minimizing the regulatory burden— while taking advantages of the strengths of each level of government. State/tribal specific needs and policies are more directly addressed, without sacrificing national standards, interstate concerns, or federal technical expertise. At the same time, the §404 program regulations maintain a "level playing field" among the states and tribes, and to ensure protection of interstate water resources.

### Basic requirements for state/tribal assumption of the §404 Program

The overriding requirement for assumption is that the state or tribe have the authority to provide at least the same level of aquatic resource protection as the federal agencies. Only then can federal permitting be suspended in favor of the state/tribal program.

*“The conferees wish to emphasize that such a State program is one which is established under State law and which functions in lieu of the federal program. It is not a delegation of Federal authority.”*

*- Legislative History of the CWA of 1977– Conference Report – page 104*

Requirements for assumption of §404 are detailed in the EPA’s Section 404 State Program Regulations at **40 CFR Part 233**<sup>1</sup>. An approved state or tribal program must have in place – in state/tribal laws and regulations – provisions that address a number of requirements, including

- *Jurisdiction over all waters of the United States, including wetlands, other than waters where the Corps retains jurisdiction (e.g. the New Jersey program does not include tidal wetlands, and Michigan’s program does not include Great Lakes coastal waters);*
- *Authority to regulate all activities that are regulated under federal law. A state/tribe cannot exempt activities that are not exempt under the CWA;*
- *Permitting standards and procedures that will be at least as stringent as the federal permit program, and that will ensure consistency with the federal permitting criteria (including the § 404(b)(1) Guidelines and other requirements);*
- *Compliance and enforcement authority including the ability to enforce permit conditions, and to address violations with penalty levels that are at least comparable to federal fines and penalties;*
- *Program funding and staffing sufficient to implement and enforce the program.*

There is no provision for partial assumption of the program; that is, a state/tribe cannot assume authority for only certain categories of activities or certain categories of waters. However, it is not required that a state/tribe operate a permitting program in waters where the Corps retains jurisdiction. Nor is a state required to have authority over lands held in trust for tribes (Indian Country).

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<sup>1</sup> A list of legal references and sources is provided at the end of this document.

## How it Works: Federal Oversight & the Role of the EPA

Following approval of a state or tribal program by EPA, primary responsibility for permitting and enforcement in assumable waters is transferred to the state/tribe. The role of the EPA also changes; prior to assumption, the EPA reviews public notices and permits issued by the Corps, and provides comments to the Corps. In a state/tribal §404 program, EPA reviews public notices and permit applications received by the state/tribe, and provides comments to the state or tribe. The EPA is also responsible for programmatic oversight—for reviewing annual reports submitted by the state/tribe, and evaluating any changes in state/tribal or federal laws and regulations to ensure that program consistency is maintained.

While EPA has the authority to review any application processed by the state/tribe, federal regulations allow EPA to waive review of some categories of permits (*40 CFR §233.51*). However, EPA cannot waive review of permits such as those that may affect threatened or endangered species, draft general permits, discharges near public water intakes, etc. EPA and the state/tribe define the categories of projects subject to direct review by EPA at the time of program assumption in the MOA. As the program matures, as has been the case in Michigan and New Jersey, the level of federal oversight may decrease. In Michigan, EPA typically provides direct comments on about 2% of all applications received in normal year.

The detailed process for EPA review of state/tribal §404 program permit applications is spelled out in federal law and regulations (*Section 404(j); 40 CFR §233.50*). Generally,

- The state or tribe is required to send EPA a copy of the public notice for any complete permit application received by the state except where EPA has waived review in the MOA.
- EPA in turn provides these permit applications to the Corps, the USFWS, and (in coastal waters) the NMFS for review<sup>2</sup>. These agencies are given 50 days to provide comments to EPA.
- EPA must provide comments to the state/tribe within 90 days of its receipt of the permit application. These comments incorporate comments from the other federal agencies.
- In the event that EPA objects to the proposed project—typically by finding that some aspect of the project is not consistent with the 404(b)(1) Guidelines—then the state/tribe cannot issue a permit carrying §404 authority unless or until federal comments are resolved. This is similar to EPA’s authority to raise concerns with or veto Corps permits. In most instances, federal concerns are resolved as a result of modification of the project by the applicant; provision of clarifying information by the applicant (e.g. additional information regarding alternatives or project impacts); or by agreement on conditions to be added to the permit (e.g. mitigation requirements).

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<sup>2</sup> In practice, the state/tribe may provide applications directly to other federal resource agencies to facilitate the review process.

- There is a time limit for resolution of federal issues. Once EPA has sent a letter of objection, all issues must be resolved within a 90 day period. After this, the EPA cannot withdraw the objection to the permit (although the applicant may reapply).
- If the state/tribe does not satisfy EPA's objections or requirement for a permit condition or does not deny the permit, then processing of the §404 permit reverts to the Corps. The applicant may seek federal authority by filing a new application with the Corps. Should the Corps deny the permit, the applicant may appeal through the federal process. The state may, in some circumstances, issue a permit under state law in spite of an EPA objection (e.g. as the result of a legal appeal in state court) – but in this instance the state permit would not provide any authority under §404.

Some state legislators, tribal councils, or other policy makers may express concern regarding this level of federal oversight, in particular the authority of the EPA to block a state/tribal decision regarding issuance of a §404 permit. It has been suggested by some that EPA oversight be limited to review of the state program as a whole. However, the current framework provides several important functions:

- Direct coordination between state/tribal and federal staff on specific projects helps to maintain communication and consistency with federal requirements based on a case-by-case review. Understanding of the federal perspective carries over to other projects that are not directly scrutinized by the federal agencies.
- Federal review of certain types of permit applications provides for necessary coordination with other federal regulations (e.g. potential impacts to listed species, or to hazardous waste sites). If there was no provision for federal review and comment, an alternative mechanism would be needed to address the requirements of federal resource programs. Coordination with other federal programs is discussed under the Special Topics section.
- Federal input ensures that the concerns of adjacent (upstream, downstream) states or tribes are addressed.
- Federal comments and technical assistance often support state/tribal decisions on projects with large impacts.

Given that state/tribal regulations must be in accordance with federal requirements, and that EPA relies heavily on information gathered by the states, disagreements between state and federal reviewers are uncommon. In Michigan, where tens of thousands of permits have been issued since program assumption in 1984, there have only been 8 situations in which the state issued a permit over the objection of EPA – resulting in reversion of §404 processing to the Corp. In the vast majority of these cases, issuance of a permit was the result of a legal appeal of the state's action. In these instances, where a state permit is issued by order of a court or an administrative review process, reversion of §404 processing to the Corps provides the applicant with an avenue to pursue a parallel review and appeal through the federal system. In New Jersey, which

assumed the program in 1994, there has been one permit that reverted to the Corps for processing.

Alternate options for state/tribal federal coordination. Many states and tribes play a significant role in the regulation of dredge and fill activities in wetlands and other waters, but do not assume administration of §404. State/tribal roles may range from review of federal actions under the §401 Water Quality Certification Process and/or state Coastal Zone Management programs, to administration of a separate state/tribal permit program, to a high level of coordination and responsibility for permit review under an (S)PGP issued by Corps district offices. These types of programs may serve as steps to full assumption, or may represent a decision by the state/tribe regarding the desired level of participation. While this handbook is focused on §404 assumption, the value of other approaches is also recognized, and consideration of assumption may lead a state or tribe to a different option.

#### **THE PROS AND CONS OF STATE OR TRIBAL §404 ASSUMPTION**

State/tribal administration of the §404 program provides distinct benefits in terms of regulatory streamlining, resource protection, and integration with other state/tribal resource management programs. Along with these benefits, the state accepts added responsibility, finance administration of the program, and must be willing to work in partnership with the federal resource agencies. This section will discuss some of the major pros and cons that should be taken into account by a state or tribe that is considering this action.

##### **Benefits of state §404 program assumption**

Regulatory streamlining. The most apparent benefit of state/tribal §404 program administration is the reduced duplication between state/tribal and federal permit programs, and overall streamlining of the regulatory process. Many states have established comprehensive regulatory programs to protect the integrity of state waters and wetlands —often in coordination with other land and water management approaches (e.g. floodplain management, zoning and other land use regulations). If state/tribal regulations are consistent with federal requirements, then parallel state and federal permits are duplicative and wasteful of government time and resources.

The total cost for wetland permits issued to transportation agencies, local government agencies, as well private industries can be significantly reduced by reducing duplication of state/tribal and federal permit requirements. Elimination of duplicative permit requirements reduces the

*In New Jersey prior to §404 program assumption, wetlands were regulated at the federal, state, county and local levels. In the state legislation that supported program assumption, many water regulations were consolidated in one level of government and one agency, reducing duplication.*

*While this approach provides significant streamlining of the regulatory process, some parties may be concerned with a loss of local control.*

regulatory burden on the public, and as a result support for wetland and aquatic resource protection may increase. The CWA and EPA's assumption regulations are structured to ensure opportunity for federal input on projects and coordination with related federal programs. However, it is expected that most routine permitting decisions will be made independently by the state or tribe.

In addition to the elimination of duplicate permits, state/tribal assumption streamlines regulations in the following ways:

- Reduced time for review of regulated activities. Many state/tribal permit programs can make regulatory decisions in a more timely manner than the federal program – a significant factor for the business community.
- State/tribal administration of §404 replaces the §401 water quality certification process. Where a §404 permit is issued by the state or tribe under state/tribal law, then §401 certification is not required (i.e. there is no federal action). This does not change the essential water quality requirements under §404 – the state/tribal program must still ensure compliance with state/tribal water quality standards in conformance with the 404(b)(1) guidelines. However, a separate review process is unnecessary.
- State/tribal assumption supports and encourages full integration with other state/tribal regulatory review. Permitting decisions may be integrated with a wide range of other state/tribal requirements, ranging from Coastal Zone consistency to floodplain regulations, decisions regarding hydropower projects, or state/tribal protection of endangered species or habitat.
- Improved coordination with other state/federal programs. For example, coordination with state/tribal transportation programs or construction programs may be facilitated.
- Improved coordination and consistency in states/tribes with multiple Corps districts. Based on the experience of Michigan and New Jersey, assumption of the §404 program may result in consolidation of remaining Corps permit activities into a single district, or at least reduce the number of districts active in the state. Administration of the §404 program by the state/tribe will improve consistency across the state/Indian Country.

Improved resource protection. Although various agencies and organizations may be concerned that state/tribal assumption could result in a loss of federal protection under the Clean Water Act, a review of EPA's state §404 program assumption regulations makes it clear that federal standards must be maintained under a state/tribal administered program. Administration of a program at the state or tribal level of government actually has the potential to improve protection or management of resources – particularly those subject to cumulative smaller impacts—for a variety of reasons.

- Increased staff levels. State/tribal programs typically make use of more staff in more localized offices than programs operated from Corps districts. The public often considers state staff to be more accessible than federal staff.
- Local resource knowledge. State/tribal resource managers frequently have extensive knowledge of local resource values, condition and issues. They may be aware of the presence of locally rare resources, or conditions that threaten those resources. State/tribal staff also typically work closely with local units of government, including agencies responsible for overall land use and development, and with related state/tribal programs that manage fish, wildlife and water resources.
- Regulations are tailored to address specific policies and needs of state and tribes. Water management policies vary across the nation – for example, protection of riparian areas in an arid western landscape differs significantly from management of vast tidal wetland resources in southern states, or forested northern wetlands. State/tribal §404 programs maintain basic national goals, while tailoring regulations to make sense and work effectively and efficiently within the local or regional context.
- Potentially broader regulation under state or tribal jurisdiction. In some states and tribes, regulated waters are defined more broadly than federal jurisdiction. A combined state/federal program may therefore provide more comprehensive protection for isolated wetlands and other unregulated waters that are important for protection and management of state/tribal water resources and habitat. State or tribal/ federal programs can also integrate regulation of other activities, such as drainage.
- Integration with other state/tribal management of resource management and land use. As state/tribal and federal wetland programs have matured, it has become apparent that wetland protection and management is frequently most effective in the context of broader resource protection—especially consideration of watershed level functions and values. The loss of public benefits provided by wetlands becomes more apparent when considering cumulative losses of functions and values on a watershed scale.

State, tribal and local government agencies operate numerous programs to address water quantity and water quality issues, to encourage protection of wildlife habitat corridors and greenspace, and to address other local values. The § 404(b)(1) Guidelines require consideration of these same issues. State/tribal administration of the §404 regulatory program can support state/tribal watershed programs, while avoiding state and federal duplication in the review of wetland permit applications.

*In Wisconsin, the state's dredge and fill permit program is coordinated with lake shoreline protection through special state zoning provisions.*

*Oregon protects water resources as one component of the statewide land use planning program.*

*In New Jersey, state regulations recognize the importance of protection buffer zones around wetlands as one component of regulation.*

Other benefits. States and tribes will likely identify a number of other positive benefits for the agency and the public. Examples include

- Public acceptance. Many complaints about wetland regulation are based on permit procedures, rather than on the need for wetland protection. To the extent that wetland regulation is made more efficient, less duplicative, and more specific to the state/tribe, resistance to regulation is reduced.
- Access to state/tribal appeal processes and courts. The program requirements for public input are discussed under special topics. However, in many states/tribes the public – including both permit applicants and citizens who may be impacted by a proposed project – may have more ready access to appeals (including administrative appeals or state/tribal courts) than is perceived to be available in federal permit programs.
- Program stability. Although state/tribal and federal programs are both subject to changes in law and policy, the desire to maintain state or tribal and federal consistency can buffer these changes. As long as the state/tribe is committed to program administration, amendments that would result in withdrawal of state/tribal authorization are less likely. At the same time, changes in federal law and policy will impact the state or tribe only to the extent that state/tribal laws are amended accordingly. As a result, state/tribal administered programs have tended to be more stable, and less affected by individual legal decisions or procedural modifications.
- Consistency in permit decisions. Eliminating issuance of duplicative permits from the state or tribe and the Corps (often from multiple Corps district offices) will reduce inconsistencies in permit decisions or conditions from the perspective of the applicant.

### **Potential obstacles and disadvantages**

The fact that only two states (Michigan and New Jersey) have assumed the §404 program since 1977 is a reflection of the challenges associated with this process. States/tribes should be aware of the following concerns or potential barriers when they seek §404 program approval.<sup>3</sup>

Need to demonstrate jurisdiction over all waters of the United States. In order to administer the §404 program, a state or tribe must – at a minimum – have regulations in place that provide jurisdiction over all waters of the United States (other than those waters retained by the Corps under

*New Jersey adopted the 1989 Federal manual as the standard to identify the extent of wetlands. Since this manual is conservative in defining the extent of wetlands, it remains acceptable under the state assumed §404 Program. Consequently, New Jersey has not been subject to changes in delineation techniques over the past decade.*

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<sup>3</sup> The EPA presented a more detailed review of potential barriers to assumption to ASWM and Society of Wetland Scientists members. This powerpoint presentation is available through the ASWM Section 404 assumption webpage, under Wetland Programs.

§404(g), and, for states, lands held in trust for the tribes). The scope of federal jurisdiction is very broad, including most wetlands, lakes, streams and tributaries, and tidal waters as established by regulation and implemented consistent with U.S. Supreme Court decisions in SWANCC and Rapanos.

If the jurisdiction of a state/tribal program is limited, e.g. if the state/tribe does not regulate small wetlands, tributary streams, or some other category of regulated waters, state or tribal law would need to be amended prior to program assumption.

Need to demonstrate consistency between state/tribal and federal regulations. State/tribal regulatory authority must include all activities regulated under §404. The state/tribal program must be consistent with the §404(b)(1) Guidelines and all other parts of the federal program. Some states have found that their existing permit exemptions exceed what is allowed under the Clean Water Act. Closing these gaps may prove to be a significant political challenge, even though the assumption program provides overall regulatory streamlining.

When a state or tribe requests approval to administer the §404 program, the EPA will thoroughly compare state and federal regulatory standards. States/tribes are allowed a degree of flexibility in the structure of the state or tribal program, language, and policies, but ultimately the “no less stringent than federal requirements” standard must be applied. This issue is discussed in more detail in the section on Special Topics. At a minimum, the state/tribe should anticipate that a detailed legal evaluation will be required, with the assistance of legal counsel.

It should also be noted that the state/tribe must *maintain* federal consistency. Changes in state/tribal law or regulation – whether arising from the state legislature, tribal council, or the courts—must be reported to EPA and evaluated for consistency. The state or tribe will also be expected to be responsive to future changes in *federal* law or regulations, with parallel changes in state/tribal provisions as needed. For example, promulgation of federal regulations defining §404 program mitigation requirements in 2008 in turn required a fresh evaluation of parallel state standards in Michigan and New Jersey. Some state lawmakers object to this influence on state regulations, although in Michigan and New Jersey it has generally been accepted given the overall benefit to the state.

Potentially high percentage of waters that must remain under Corps jurisdiction. For some states/tribes – particularly coastal states – the extent of jurisdiction that would be retained by the Corps is itself an impediment to program assumption. In states/tribes where jurisdiction over a high percentage of waters would be retained by the Corps, assumption may be seen as less beneficial. In Michigan and New Jersey, program benefits were viewed as outweighing this limitation.

Financial cost.

- Initial evaluation and development of a state-tribal program. The initial cost of program assumption, which includes development of a full application, modifications to the state/tribal program to achieve consistency, development of procedures for coordination with federal agencies, and educating the public regarding the change in state/tribal and federal roles, can also be significant. EPA has estimated that states spend an average of \$225,000 when investigating the option to assume the §404 program. Program development (but not administrative) costs may be partially offset through EPA Wetland Program Development Grants.
- Operation of state/tribal §404 program. There is no dedicated source of funding for administration of state/tribal §404 programs. A state may allocate a portion of CWA Section 106 water program funds to the state/tribal wetland program, but in reality this source is already severely constrained by the needs of other programs. The cost of compliance and enforcement should not be underestimated, as it may add significantly to an existing program.

*When the Commonwealth of Virginia considered assumption of the §404 program, a number of issues were considered. However, the anticipated cost of the program was such that further consideration was ended.*

*Virginia estimated that in order to provide additional services similar to those provided by the Corps – including verification of wetland delineation – the annual budget for the state program would increase by \$5-6 million.*

It should be noted that many states and tribes already expend funds operating a state permit program or §401 certification program. For these states, the added cost of state assumption may not be significant, depending upon the scope of the current program.

Political will & public desires. Multiple interests groups from both sides of the political spectrum may have serious concerns about the impact of state/tribal program assumption. Environmental or conservation groups may initially view a state/tribal program as less protective than the federal program. The regulated public may see assumption as an expansion of overall permit requirements. For state legislators and tribal councils, cost of the regulatory program may be the primary concern.

The state/tribe will need to gauge public support, and initial public understanding of the program. As policy makers, permit applicants, and interested citizens gain knowledge of how §404 program assumption alters the division of responsibility for wetland management among state/tribal and federal agencies, support may increase. When all parties understand the dynamics of the proposed change, then the overall cost to the state, including the cost of staffing the state/tribal program and the relative cost in time and fees for permit applicants, must be weighed against public desires regarding resource protection programs. Each state/tribe is advised to openly weigh state/tribal and federal roles, and to determine which approach to wetland management best matches programmatic as well as public goals and support.

***How does the Section 404 program differ from Section 402?***

Many state and tribes are familiar with the regulation of discharges through the National Pollution Discharge Elimination System (NPDES Program) under §402 of the Clean Water Act. Although there are similarities between the §402 and §404 programs, there are also distinct differences.

<b>§402 (NPDES)</b>	<b>§404</b>
Regulates the ongoing discharge of pollutants to waters of the U.S., setting pollution limits for each 5 year period.	Regulates placement of dredge or fill material in wetlands, lakes and streams. The permit is typically in effect only until changes are completed, but shall not exceed a 5 year period.
Permit limits may be modified in future based on monitoring data.	Changes are typically permanent.
Permit applicants are typically businesses or municipal facilities that are familiar with permit requirements.	High percentage of permit applicants are individual landowners who have limited understanding of environmental regulations.
Regulated discharges are typically to public waters.	Regulated activities in wetlands are often located on private land.
Public notice is typically in the form of a draft permit, including limits set by agency.	Public notice is typically issued upon receipt of a complete application, seeking input on the proposed project from all interested parties.
Compliance relies heavily on monitoring and reporting by the permit holder.	Violations may be reported by observations of numerous individuals; resolution may require restoration of the damaged site.
Administration of the program by a state or tribe may be phased in over time. A state or tribe may request approval to administer only some of the discharge categories.	Partial administration of the program by a state or tribe is not allowed; the state must simultaneously assume administration of all components of the §404 program.
No dedicated source of funding; however, typically funded in part by federal §106 funds.	No dedicated source of federal funding. While §106 funds could be used, these funds are typically committed to other essential programs.

## GETTING ORGANIZED

A full consideration of §404 program assumption will require technical input from program managers, as well as legal assistance, in order to evaluate implications for state/tribal resource protection, related state/tribal policies, and the regulated public. This may require months or years to complete. Therefore, it is recommended that a state or tribe begin with consideration of the broad requirements of the §404 program, how well these requirements mesh with state/tribal goals, and the extent to which equivalent state/tribal programs are already in place. Then if the state/tribe wishes to proceed with assumption, a more detailed legal assessment will be required.

Keep in mind that materials developed to help a state/tribe make a decision regarding assumption, such as a legal comparison of state/tribal and federal authorities, will also be a component of the state or tribe's formal application for assumption if it decides to proceed. Therefore, the basic requirements for an application for assumption should be reviewed at the outset to avoid repeating a step. Wetland Program Development grants can be applied for to help fund the work needed to fully consider and prepare for state or tribal assumption of §404.

While the circumstances of each state or tribe will be unique, the state/tribe may wish to begin with the following considerations.

***Define state/tribal goals: what is the benefit to the state or tribe? Why is assumption being considered at this time?***

A state or tribe may be motivated to consider program assumption for a variety of reasons—to reduce duplication with federal programs, increase efficiency, and improve business climate; to improve resource management through increased integration with state/tribal programs; or to increase the emphasis on wetlands of particular importance to the state/tribe, including wetlands with regional significance. Provided that the state/tribe's purpose in considering assumption includes maintenance of a level of aquatic resource protection and management at least equal to that established by the federal program, state/tribal administration of the §404 program may be useful in achieving these goals.

On occasion, §404 program assumption is proposed as a means of limiting federal regulation, or reducing federal involvement in state/tribal resource management, without balancing goals for resource protection and management. For example, some states/tribes have inquired about §404 program assumption primarily to facilitate permitting for specific highway or development projects. If the overriding goal is limited to a single purpose, or is primarily to reduce regulation, it is less likely that the state or tribe will be able to implement a successful §404 program, or to coordinate with federal agencies to the degree necessary. A state/tribe in this position may wish to consider other options to expand the state/tribal role, reduce duplication of effort, and improve coordination with federal agencies, short of full §404 program assumption.

***Is there public support for comprehensive administration of a dredge and fill permit program by the state or tribe?***

In addition to resource protection goals, a state or tribe must either have – or be willing to develop – a comprehensive permitting and enforcement program that ensures compliance with federal standards. The political will for development - and continuation—of this program should be assessed, taking into account support from the public and private sector. A wide range of interests may support state/tribal level regulations for different reasons. Conservation and environmental agencies and organizations may understand the benefits of a more localized program that is integrated with other state/tribal programs while maintaining federal standards, or may fear loss of resource protection. Business and development interests may understand the benefit of more expedited, and less duplicative regulation, or may oppose an expansion of the state or tribe’s role. The interests of multiple stakeholders should be considered in terms of long-term program support.

***Inventory existing state/tribal statutes and regulations: are basic program requirements met, or is there support for amendment of the current program?***

Does the state or tribe have an adequate permit program in place under *state* law, providing the appropriate state/tribal agency with the authority to issue or deny permits, and authority to enforce regulations? Undertake an initial side-by-side comparison of state/tribal and federal:

- ***Jurisdiction*** over waters of the United States, including wetlands. Does the state/tribe have jurisdiction over all assumable waters?
- ***Authority to regulate*** all actions regulated under §404.
- ***Exemptions***. State/tribal exemptions cannot be broader than federal exemptions.
- ***Permitting standards***. A state/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.
- ***Compliance and enforcement***. A state/tribal program must have authority to enforce compliance with permits, and to address violations of permitting requirements. This includes the ability to assess appropriate fines and penalties, and to provide for public participation in the compliance program.

The state or tribe’s authority to administer a permit program may rest on both primary statutes such as a statewide (nontidal) wetland law, and related authorities – e.g. floodplain regulations, coastal zone regulations, shoreline zoning requirements, dam safety laws, and so on. For example,

- ***The scope of jurisdiction*** over waters and wetlands may be defined in state/tribal water quality standards, in specific dredge and fill statutes or regulations, in broader water authorities, or in state/tribal land use regulations (e.g. authority to regulate shorelines)
- ***Compliance and enforcement requirements*** may be found in multiple state/tribal regulatory authorities, in administrative procedure requirements, or in other state or tribal laws.

Each state/tribal agency that will implement the program must be authorized to make use of all necessary authorities. It should be assumed that assistance from in-house counsel, or the state Attorney General or Tribal Attorney, will be needed to identify all authorities in a final page-by-page assessment. This assessment, and certification of authority by the Attorney General/Tribal Attorney, will be one of the key components of an application for §404 program assumption.

***Identify gaps: what additional regulations, staffing, funding, or enforcement authority would the state/tribe need to assume the §404 program?***

If the state or tribe does not currently have permitting authority needed to provide the same level of resource protection as federal law, then it will have to develop or revise its regulations to be consistent with and at least as stringent as federal law. At this stage, if not before, it is advisable to evaluate public support for the change, and to work closely with the EPA to determine as specifically as possible what changes would bridge the gap.

Staffing and financial resources. The extent of funding and staff resources needed to sustain a state or tribal §404 program should be estimated, and sources of potential funding identified. An application for program assumption will require both an annual budget, and a workload analysis defining staffing needs<sup>4</sup>. Additional information regarding program costs is included in the Special Topics section.

If a state or tribe already administers a comprehensive permitting and enforcement program, then the *added* cost of coordinating with EPA under a state/tribal §404 program may be minimal. In Michigan, one full-time position is dedicated to coordination with EPA and program reporting, and the time needed for federal coordination is estimated to require the equivalent of three additional permitting staff statewide. By comparison, New Jersey requires less than one full-time position to coordinate with EPA. For programs that must expand permitting requirements or enforcement actions, a significant new amount of funding may be necessary.

***Develop a strategy: what is the best approach to meeting state or tribal goals given the requirements of the federal program and limits on the state/tribal program? Is it advisable to seek program assumption, or are other program options a better first step?***

Following a review of the program requirements and an assessment of its current status, the state or tribe will make a preliminary decision about program direction, and the most logical means of improving state/tribal wetland protection and management.

- ***If the state or tribe determines – based on discussions with 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.*** The state may

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<sup>4</sup> The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) developed a *State Water Quality Management Resource Model* in 2001 that may assist a state or tribe in analyzing workload requirements (***add citation***).

then outline a strategy to proceed with development an application for assumption that is likely to include the following actions.

- A stakeholder process that identifies the concerns of all interest groups, and provides an ongoing source of information to the public
  - Amendment of state/tribal regulations 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
  - Development of supporting materials such as staff guidelines and permit application forms, and a means of documenting permit decisions
  - Training staff in new procedures and requirements
  - Notification of the public of the shift in permitting responsibility
  - Full documentation of the state/tribal program as needed for the application for assumption.
- ***If the state or tribe does not currently have the basic legal capacity to assume administration of the §404 program, but has support for increasing responsibility for wetland protection, it may take steps to build the needed capacity.*** Numerous possibilities are available, depending upon the status of the state/tribal program. The state may wish to consider the following.
    - 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
    - Coordination with EPA to further define changes that are needed for program assumption, and to inform the federal agencies of the state or tribe's long-term plans
    - Increase state or tribal responsibility relative to §404 permitting. If the state/tribe does not currently have a process for coordinating regulatory review with the Corps, possible development of an (S)PGP, or review of §404 permit applications through an expanded §401 Water Quality Certification Process. These programs may provide the state/tribe with useful experience and a greater understanding of the federal program, and/or 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.***
    - 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 and federal regulations.

- Development of a more limited (S)PGP to gradually build capacity and experience, consistent with existing state authorities
- Development of the state/tribal wetland program through non-regulatory approaches, such as assessment of wetland condition, mapping, and public education to build state/tribal expertise while supporting effective wetland protection and management.

### APPLICATION REQUIREMENTS

The *final* step in the process for approval of a state or tribal §404 program is initiated by formal submittal of a detailed description of the state or tribe's program to the Regional Administrator of the EPA, with a request for approval of the program from the Governor of the State or Tribal Chair. This request must include the following.

*Primary requirements:*

- *A letter from the Governor of the State or Tribal Chair, requesting program approval and formally transmitting the request to EPA.*
- *A complete program description.*
- *A statement by the Attorney General or Tribal Attorney that the laws and regulations of the state/tribe provide adequate legal authority to carry out the program and to meet the applicable requirements of federal law. That is, the appropriate state/tribal agency has authority to review permit applications, and to issue permits to regulate dredge and fill activities in assumable water, as well as to enforce regulations for dredge and fill activities in waters of the United States under the state or tribe's jurisdiction.*
- *A Memorandum of Agreement with the Regional Administrator.*
- *A Memorandum of Agreement with the Secretary [of the Army].*
- *Copies of all applicable state/tribal statutes and regulations, including those governing applicable state/tribal administrative procedures.*

*Reference: 40 CFR §233, Subpart B.*

Letter from Governor or Tribal Chair requesting approval. Once EPA receives a complete package and request for assumption from the state governor or tribal chair, it must determine whether to approve the state/tribal program within 120 days<sup>5</sup>. This schedule in practical terms

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<sup>5</sup> This 120 day time frame may be extended if the Administrator and Governor/Tribal Chair agree.

means that all elements of the state or tribal program should be in place prior to program submittal, and agreement must have been reached with the EPA Regional Administrator and the Corps District Engineer as to how the program would be operated if approved.

The program description must include a detailed discussion of the scope and structure of the state or tribal regulatory program. These include

- A description of the scope and structure of the state/tribal program. This includes the extent of state/tribal jurisdiction; activities regulated, permit exemptions, permit review criteria and program coordination;
- State or tribal procedures for permitting, administrative and judicial review, and program operation;
- A description of the organizational structure of the state/tribal agency or agencies that will administer the program;
- A workload analysis including a description of staff and financial resources;
- Copies of permit application forms, permit forms and reporting forms;
- A description of state/tribal compliance and enforcement programs, and means of coordination with the EPA and the Corps;
- A description of waters where the Corps will retain jurisdiction; and
- A description of best management practices that will be used to satisfy requirements in the §404 program exemptions for the construction of farm, forest and temporary mining roads.

**Note that when completed, the program description may essentially serve as an operating manual for the state or tribal program, and as such will be useful not only in approval of the program, but as a reference during program administration.**

A state or tribe may find it useful to compare its permit process and requirements with the permits issued by the Corps (including Nationwide General Permits), to help determine whether its program will meet federal requirements. Although specific processes may vary, the overall scope of permit application review and the basic type of permit issued must ensure that wetlands and other aquatic resources are protected in accordance with federal standards. For example, the state might determine whether any activities authorized under a state or tribal general permit process are given more intense scrutiny and individual public notice under the Corps program.

The statement of the Attorney General or Tribal Attorney will include a detailed comparison of state/tribal and federal authorities, which will also be a useful ongoing reference for the state or tribe. This legal documentation must also address specific issues such as state takings law and jurisdiction over Indian lands. Note that the Attorney General/Tribal Attorney's statement is based on laws and regulations in effect at the time of signing; that is, state/tribal law must be modified as necessary to qualify for §404 program assumption before the final request for assumption is submitted. In Michigan's experience, EPA has twice requested that the basic statement by the Attorney General be updated following major changes in the state program, e.g. reorganization of state agencies.

Memoranda of Agreement (MOAs) with the Corps and with EPA must be signed prior to a formal request for program approval. These agreements will become effective upon approval of the state or tribal program. The content of these agreements is discussed below under Special Topics. MOAs should be negotiated well in advance of the expected date of the program submittal to allow adequate time for administrative review and signature at both the state/tribal and federal level. Following program approval, these documents may be amended from time to time by the parties.

The state or tribe may also find it helpful to enter into MOAs with other state/tribal agencies where more than one agency holds responsibility for components of program operation, or with other federal agencies – in particular the USFWS. While such agreements are not a mandatory component of the program submittal, the state or tribe must document in some manner how it will coordinate among agencies.

Public review and comment Following submittal, the EPA must publish notice of the state or tribe's application in the *Federal Register*. The EPA will provide for a public hearing in the state. The state/tribe should be prepared for this review – both through ongoing discussions with interest groups, and through preparation of explanatory or supporting materials.

## SPECIAL TOPICS

### Interpreting “No Less Stringent Than”

#### *Primary requirements:*

- *States must have the authority to issue permits which “apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under section (b)(1) of this section, and sections 301 and 403 of this Act...” (CWA Section 404(h)(1)(A)(i))*
- *“Any approved State Program shall, at all times, be conducted in accordance with the requirements of the [Clean Water] Act and of this Part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose”. (40 CFR §233.1 (d))*
- *“No permit shall be issued by the Director [of the State Agency] in the following circumstances: (a) When permit does not comply with the requirements of the Act or the regulations... including the Section 404(b)(1) Guidelines...”. (40 CFR §233.20)*

The essential requirement that state/tribal programs be no less stringent than federal programs appears fairly straightforward. However, based on the states' experience to date, differences of opinion may arise regarding the specific requirements of a state or tribal program as compared to federal law.

In large part, this results from the difficulty of directly comparing the language of two different regulations. Even where state or tribal law is drafted with the intent of meeting federal requirements, it is unlikely that the format and wording will be identical. For any party who is concerned with how a regulation may be interpreted in the future by regulatory agencies or the courts, differences in language can raise questions.

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. Legal expertise will be needed to compare state/tribal and federal requirements, and to engage in discussions with EPA staff to ensure mutual understanding of both state/tribal and federal programs.

Comparison of state/tribal and federal standards is made more difficult by the fact that many decision points in wetland permit programs require a degree of professional judgment. For example, the 404(b)(1) Guidelines prohibit issuance of a permit if the proposed discharge, “*will cause or contribute to significant degradation of waters of the United States.*” The federal guidelines detail factors that should be considered, and require not only professional expertise, but consideration of comments received from others during the public comment period. During an application for §404 program assumption, the federal agencies may ask to review state/tribal guidance documents or legal decisions that demonstrate how state/tribal laws are interpreted as compared to federal requirements. Thus, program experience is very helpful in documenting state or tribal approaches.

Finally, it is essential to understand that the basic foundations of parallel state and federal regulations will differ – even though regulatory goals may be fully shared. The CWA relies heavily on the authority of the federal government to regulate interstate navigation and interstate commerce, along with other federal authorities. By contrast, states/tribes regulate resources within their borders based on the constitution and laws of the state, including land use authorities, water rights (riparian or appropriation), the duty to protect public trust resources, and other public health and welfare authorities, as well as police powers.

One option for limiting these consistency issues is to adopt the 404(b)(1) Guidelines by reference into state/tribal regulations. However, this is not a requirement for program assumption.

State – Federal Consistency: three examples from Michigan’s §404 Program <sup>6</sup>		
Federal provision	Parallel state provision	Decision on consistency
<p><b>Is a state exemption consistent with this federal exemption?</b></p> <p><i>“The following activities are exempt from Section 404 permit requirements... Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products... To fall under this exemption, the activities...must be part of an established (ongoing) operation”. [Excerpt from 40CFR §232.3(c)]</i></p>	<p><b>Original state language:</b></p> <p><i>“The following uses are allowed in a wetland without a permit...Farming, horticulture, silviculture, lumbering, and ranching activities including plowing, irrigation, irrigation ditching, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products...”</i></p>	<p>State language and local requirements may differ to an extent, but the exemption cannot be broader than the §404 exemption.</p> <ul style="list-style-type: none"> <li>• EPA questioned whether “lumbering” and “horticulture” were covered by the federal exemption. Based on additional information from the state, explaining how horticulture and lumbering fit within the federal exemption, it was determined that this state provision <u>is</u> acceptable.</li> <li>• EPA also objected to the fact that the state exemption does not include the word “normal” and <u>does not</u> expressly limit the exemption to established operations, even though this is how the Michigan has interpreted its exemption. An amendment to state law to add “established” is being sought.</li> </ul>

<sup>6</sup> These examples are drawn from a review of Michigan’s program more than a decade after program assumption. This informal review was intended to determine whether state regulations were still consistent with federal requirements after multiple amendments of both programs. Please note that the federal review considered significantly more detailed state and federal regulatory language than is summarized here.

<p><b>Can state language with a different legal foundation be consistent with federal review criteria?</b></p> <p><i>“...no discharge of dredged or fill material shall be permitted which will cause or contribute to the significant degradation of the waters of the United States.... ..effects contributing to significant degradation include... significant adverse effects... on human health and welfare... on life stages of aquatic life and other wildlife... on aquatic ecosystem diversity, productivity and stability... on recreational, aesthetic, and economic values”. [Excerpt from 404(b)(1) guidelines]</i></p>	<p><b>State language reflecting concern with riparian property rights and public trust issues:</b></p> <p><i>[For inland lakes and streams]... “The department shall issue a permit if it finds that the ... <u>project will not adversely affect the public trust or riparian rights.</u> ... the department shall consider the effect ...upon the inland lake or stream and upon waters from which and into which its waters flow and uses of all such waters, including... recreation, fish and wildlife, aesthetics, local government, agriculture, commerce and industry. <u>The department shall not grant a permit if the project...will unlawfully impair or destroy any of the waters or other natural resources of the state.</u> This part does not modify the rights and responsibilities of riparian owners”. [Note: applies to inland lakes and streams – Michigan has separate regulations for wetlands.]</i></p>	<p>The state’s basic criteria for issuance of a permit to impact inland lakes and streams were found to be consistent with the requirements of the 404(b)(1) Guidelines.</p> <p>[Note that EPA did not object to state language regarding the underlying state emphasis on riparian rights and protection of public trust. State and federal language were found to be consistent because the state law provides protection of the resource that is at least as stringent as federal law.]</p>
<p><b>Must a state law be modified to reflect changes in a federal law or regulations, if the state requirement is at least as stringent as the new requirement?</b></p> <p><i>“The mitigation banking instrument may allow for initial debiting of a percentage of the total credits projected at mitigation bank maturity...”</i></p>	<p><b>State regulation, based on long established policy:</b></p> <p><i>“The department shall not authorize the use of credits from a mitigation bank in advance of initial restoration or creation of wetlands in the bank...”</i></p>	<p>A potential mitigation banker challenged Michigan’s rule prohibiting advance mitigation credits after promulgation of the federal rule. EPA determined, after an internal legal review, that the state language reflects an acceptable difference in state policy, providing protection of the resource at least as stringent as the federal program. The state provides mitigation banking credits consistent with federal regulations, but on a different release schedule.</p>

## Federal jurisdiction and assumable waters

Federal jurisdiction under §404 extends to all “waters of the United States” as defined in the Clean Water Act (**40 CFR §232.2**). Very generally, waters of the United States include marine and tidal waters, lakes, streams and their tributaries, and wetlands adjacent to all of these waters.

For purposes of §404 program assumption, it is important to know what subset of the waters of the United States are not open to state/tribal assumption. By law, the Corps retains jurisdiction over waters that are, or could be used to transport interstate or foreign commerce, all waters subject to the ebb and flow of the tide, and wetlands adjacent to these waters. Examples include tidal waters, large river systems, and the Great Lakes. Thus, these waters are regulated by the Corps under both §404 and Section 10 of the Rivers and Harbors Act of 1899. The Corps also retains jurisdiction over wetlands adjacent to such waters. All other waters of the United States *must* be under the jurisdiction of the state or tribe that assumes administration of §404. “Partial” assumption is not allowed.<sup>7</sup>

The state or tribe may have *broader* jurisdiction – including for example some isolated wetlands that are not regulated under federal law. Here, permits issued by the state or tribe are not subject to federal regulations. If the state or tribe also has jurisdiction over waters over which the Corps retains jurisdiction, coordination with the Corps is recommended. In Michigan, the Corps and the Michigan Department of Environmental Quality (MDEQ) use a joint permit application form. All permit applications are sent to the MDEQ, which forwards applications that also require Corps authorization to the Detroit District.

The state/tribe may define the method used to delineate wetlands, provided that it results in regulation of all assumable waters. New Jersey adopted the 1989 federal manual. Michigan used its own delineation manual for many years, but recently adopted the Corps 1987 manual together with appropriate Regional Supplements.

## Compliance with other Federal laws (NEPA, ESA, etc.)

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 – such as NEPA and Section 7 of the Endangered Species Act – are not applicable. However, the §404 assumption regulations define alternative mechanisms that address many of the environmental goals of related federal programs.

- Review under the National Environmental Policy Act (NEPA) may still be required for projects that make use of federal funding – e.g. transportation, HUD – in order to satisfy the requirements of the funding agency. In addition, many states/tribes have laws that are similar in scope to NEPA. Finally, state/tribal programs must comply with the §404(b)(1) Guidelines, which address some issues covered by parallel NEPA (e.g. consideration of alternatives).

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<sup>7</sup> A state is not required to have jurisdiction over Indian Country.

- Threatened and Endangered Species. Under a state/tribal program, direct consultation with the USFWS under the federal Endangered Species Act is not triggered. However, protection of federally listed species is ensured by alternative mechanisms. First, the EPA must review all applications that have a reasonable potential for affecting federally listed species, and in this review coordinates with the USFWS, as well as the NMFS and Corps as applicable. A state cannot issue a permit that carries §404 authority if the EPA objects to issuance of a permit.

Finally, a state permit must ensure compliance with the 404(b)(1) Guidelines, which prohibit issuance of a permit if it would jeopardize the continued existence of a listed threatened or endangered species or result in the likelihood of the destruction or adverse modification of critical habitat, unless an exemption has been granted by the Endangered Species Committee. **(40 CFR 230.10(b)(3))**

In Michigan, the state screens permits for potential impacts to federally listed species in cooperation with the state nongame wildlife program, which administers the state threatened and endangered species act. If a proposal is found to have a reasonable potential for impacts to a listed species, a public notice is subject to review by EPA and the USFWS. For minor projects that do not normally require a public notice, the screening process is still followed early in the review of the application, and provisions are made for review by the federal agencies.

New Jersey developed a separate MOA with the EPA and USFWS outlining a coordinated review process for applications that may affect federally listed species, and also coordinates with the USFWS early in the permit application process.

*The State of Oregon seriously considered §404 program assumption on two different occasions. Although both ends of the political spectrum initially had reservations, the State was able to articulate the benefits of assumption. Ultimately, however, the state was unable to overcome the need for extensive coordination regarding federally listed species – including adandromous fish.*

In some states, the need for coordination under the ESA has proven to be a significant impediment to state program assumption. In Oregon, for example, the extent of anadromous fish habitat protected under the ESA is extensive – limiting the potential efficiency of a state program. Florida also recognized the need for quite extensive coordination to protect federal listed species early in its consideration of assumption. This was not the sole barrier to assumption in either state, but it is advisable to investigate the extent of coordination required early in the process of evaluating state program options.

- Coordination under the National Historic Preservation Act is typically carried out in coordination with the State Historic Preservation Office. In both Michigan and New Jersey, proposals are screened through a computer system for proximity to known historic or archaeological sites. EPA cannot waive review of permits involving discharges within sites identified or proposed under the National Historic Preservation Act. **(40 CFR 233.52(b)(6))**

Direct review of permit applications and coordination with federal agencies also ensures protection of federally designated wild and scenic rivers, national parks and reserves, and similar sites. The NNFS may review public notices in coastal states and comment through EPA; however the NMFS has waived review of all applications in Michigan. Coordination with state coastal zone

management programs is achieved directly through state CZM programs. In short, protection of specially designated federal resources is ensured under a state program, but often through different mechanisms. Attention should be paid to state/tribal and federal coordination.

### **Gaining and Sustaining Public Support**

State and tribal agencies are aware of the need for public support to improve programs to meet federal standards, and to accept the ongoing cost of program administration. Opportunities for public comment are included in the process of applying for federal approval of a state/tribal program – including both hearings and public notices. Normally, the state or tribe will have engaged a variety of interest groups in weighing options for state-federal coordination well before the formal application for assumption.

Various interest groups may express a wide variety of legitimate concerns, and misconceptions, regarding state/tribal assumption. During public review, the following questions and concerns are common.

- *What is the purpose of state/tribal program assumption?*
- *Why should the state consider the additional burden of administering the federal program?*
- *Will the state's water resources be adequately protected?*
- *Why does EPA have an oversight role, including the ability to object to an individual permit?*

*Some states – e.g. Kentucky, have initially established a task force to consider the pros and cons of wetland assumption. Although Kentucky ultimately decided against assumption at that time, the task force process built public understanding of and support for alternative approaches to state-federal cooperation.*

*In Wisconsin, the state legislature played a major role in evaluating the option to assume the §404 Program.*

## Funding Considerations

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 should be aware of the initial cost of developing a request for program assumption and initial implementation. States have reportedly spent on the average of \$225,000 to investigate assumption (EPA 2008). Federal financial assistance for assumption planning is available through Wetland Program Development Grants – the EPA has provided this assistance to six of the nine states that have fully considered assumption to date.

Annual costs for ongoing administration of a §404 program will obviously vary from state to state (or tribe to tribe) depending upon the size of the state/tribe and extent of regulated waters (lakes, streams, and wetlands) within the state or tribe, among other factors. Kentucky compared program costs among states as a component of its investigation of assumption. The following estimates include both state §404 programs and other mature state programs:

<u>State</u>	<u>Annual cost</u>	<u>FTEs</u>	
New Jersey	\$3 million	42	(State Assumed §404)
Michigan	\$7 million	86	(State Assumed §404)
Wisconsin	\$3.5 million	27	(State program/RGP)
Tennessee	\$1 million	16	(State program)
Maryland	\$2.4 million	40	(SPGP)
est. to assume 404	+ \$2 million	+ 23 FTEs	

In weighing program costs and benefits, the following may be considered:

- What is the additional cost of program assumption?*  
 If the state/tribe has a broad existing program, or already coordinates with the Corps through a general permit process, the additional cost of §404 administration may be minimal.
- Does the financial benefit to the public offset the cost to the state or tribe?*  
 To the extent that operation of a combined state/tribal - federal program is more timely and efficient than separate programs, the overall cost to the regulated public may be significantly reduced. It may be difficult to adequately calculate these savings, but business groups in both Michigan and New Jersey have demonstrated a willingness to support program costs in part through increased permit fees to gain an increase in efficiency.

*The Kentucky Division of Water received \$250,000 through an EPA State Program Development Grant to investigate §404 program assumption. Funds supported the work of a stakeholder task force, staff legal review and similar tasks.*

- *How would a state administered program be funded?*  
There is currently no dedicated source of federal funding for state or tribal §404 program administration. States and tribes are technically allowed to make use of CWA §106 water program funds for operation of a §404 program, but in reality may not be able to shift these limited funds from other programs. State/tribal general program funding, permit fees, and other special sources of state/tribal funding (e.g. special license plates, bottle deposits, etc.) are typically used to finance program operation.

Ongoing administration of a comprehensive state/tribal dredge and fill program – covering all state/tribal waters – is a costly enterprise. In Michigan’s experience, the cost of program compliance and enforcement was initially underestimated. While there are a range of acceptable means of resolving an enforcement issue – e.g. voluntary site restoration, after-the-fact permitting for projects that meet permit standards, and out of court settlements – an ongoing enforcement action can be much more time consuming than review of a typical permit application. Legal action associated with some cases may not be resolved for a number of years. Moreover, while permit fees may cover a significant portion of the cost of reviewing permit applications, these funds may not be available for enforcement actions. Therefore, the state/tribe should fully evaluate the financial and staff resources needed to address all permitting and enforcement needs on an ongoing basis.

### **Memorandum of Agreement between the state/tribal agencies and EPA Regional Administrator**

#### *Primary Requirements:*

- *Defines state and federal responsibilities for §404 program administration and enforcement, including all state agencies with program responsibility*
- *Defines categories of permit applications for which EPA will waive federal review*
- *Establishes a schedule for reporting and submittal of other information to EPA*
- *Addresses state and federal responsibilities for compliance monitoring and enforcement*
- *Provides for modification of the MOA*

*Reference: 40 CFR §233.13 **Memorandum of agreement with Regional Administrator**  
40 CFR §233.51 **Waiver of review***

A Memorandum of Agreement, signed by the Director of the state or tribal program and the EPA Regional Administrator, is one of the primary requirements of the state/tribe’s request for program assumption, and the application is incomplete without a signed agreement. This agreement must include, at a minimum, the elements outlined above, and will take effect upon program approval.

Essentially, the state/tribe agrees to administer the §404 program in a manner that is in accordance with the requirements of federal laws and regulations. These include a prohibition of §404 permit issuance by the state when the permit is not in compliance with the §404(b)(1) Guidelines or other regulations, and when the EPA has objected to issuance of a permit and the objection has not been resolved.

One particularly important component of the MOA is the section that defines waiver of permit application review by EPA. The Clean Water Act begins with the premise that EPA may be allowed to review and comment on all §404 permit applications, but that also allows EPA to waive review of all but a select set of categories (e.g. projects that jeopardize federally listed threatened or endangered species, draft general permits, and a number of others).<sup>8</sup> In Michigan, EPA waives review of all but about 1 – 2% of all applications. For categories where direct EPA review is waived, the state reviews applications and makes a decision without federal review (although permit information must be summarized and submitted annually to EPA). The categories of applications subject to federal approval should be defined as clearly and specifically as possible to avoid procedural challenges.

It is also advisable to clearly describe state/tribal and federal roles in compliance and enforcement. Although the state/tribe assumes primary responsibility for compliance and enforcement, the EPA may also assert its enforcement authority – this may be particularly helpful in the instance of a violation that impacts the waters of more than one state or tribe, or a major violation. The state/tribal and federal agencies should determine how and under what circumstances information regarding violations should be provided to the EPA (other than in an annual report).

***Definition of continued Corps jurisdiction***

The extent of Corps jurisdiction over wetlands should be defined in an MOA based on an agreed upon criterion. This may be done utilizing maps, by defining a distance from Corps- regulated waters within which the Corps will retain jurisdiction over adjacent wetlands, or by using other readily available information.

Michigan’s program relies to an extent on a case by case determination by the Corps, which can result in delays and uncertainty from the perspective of the permit applicant. In New Jersey, the Corps retains jurisdiction over wetland that are within 1000 feet of tidal or interstate waters, as documented in their MOA.

**Memorandum of Agreement with the Secretary of the Army Corps of Engineers**

*Primary Requirements:*

- *Describes waters that remain under the jurisdiction of the Corps of Engineers following approval of the state program.*
- *Establishes procedure of transfer of pending applications and other materials to the state following program approval.*
- *Defines any general permits issued by the Corps that will be transferred to the state, and a processing for transferring information regarding general permits.*

*Reference: 40CFR §233.14 Memorandum of Agreement with the Secretary*

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<sup>8</sup> See 40 CFR 233.51 for a list of categories that must be reviewed by EPA.

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 include the following critical components. First, it will identify waters – and adjacent wetlands – where the Corps will retain jurisdiction for purposes of §404. §404 prohibits transfer of the program to a state or tribe in “waters that are presently used, or are susceptible to use in their natural condition... as a means to transport interstate or foreign commerce... including wetlands adjacent thereto.” (**CWA Section 404 (g)(1)**). 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. It may be easier to define the upstream extent of jurisdiction over major river systems than over adjacent wetlands.

Secondly, the MOA between the state or tribe and the Corps must define procedures for transfer of the program – including pending applications - to the state upon program approval. At this point, the Corps will suspend processing of permit applications in waters identified under the state/tribal program. In theory, the §404 program authority is fully transferred to the state/tribe at a single point in time; at an agreed upon date following program approval, the state/tribal program is initiated and the Corps program is suspended. As a practical matter, the state and the Corps should agree on a schedule for program transfer that recognizes the practicality of action on nearly complete permit reviews by Corps staff, and completion of ongoing federal enforcement actions. In Michigan, the state administered a pilot program for several months prior to full assumption, under federal supervision, and permit files were transferred to the state during this period. States or tribes that have been actively administering a permit program under an (S)PGP may also find it somewhat simpler to transition to state permit processing. An outreach program – explaining the change in permit processing authorities – should be a significant component of the transition period, but is not required under the federal regulations.

Joint jurisdiction Given that a state or tribe may also continue to regulate tidal, coastal, or other waters where §404 jurisdiction is retained by the Corps, the state/tribal-Corps MOA may also include procedures for interagency coordination in such waters. This portion of the agreement may include provisions for a joint permit application process (retaining separate permitting), coordination of review to avoid conflicting permit requirements, coordination of mitigation banks and similar issues.

### **Public Participation**

One area of uncertainty, or in need of clarification, is what opportunities for public participation does a state/tribe need to provide for in an assumed §404 Program.

States/tribes must provide public notice of and comment on permit applications, draft general permits, potential major modifications of issued permits, public hearings, and issuance of an emergency permit. In addition, states/tribes must allow for and consider requests for public hearings. [40 CFR §233.32, §233.33]

With respect to enforcement matters, a state/tribe must provide for public participation in the State enforcement process by providing either:

- 1) Authority which allows for a citizen with an interest in or may be adversely affected by an action with a right of intervention in any civil or administrative action or,
- 2) Assuring that the state/tribal agency or enforcement authority will:
  - a. Investigate and provide written responses to all citizen complaints submitted regarding states/tribal procedures
  - b. Not oppose intervention by any citizen when allowed by statute, rule or regulation and
  - c. Publish notice of and provide at least 30 days for public comment on any proposed settlement of an enforcement action. [40 CFR §233.41(e)]

In general, ASWM believes that third parties typically have greater ability to challenge a decision under a state/tribal §404 program because they maintain access to the federal courts for some purposes, while potentially gaining access to state/tribal civil or administrative processes, as well as informal interaction with the state or tribal agencies. However, this issue may need to be addressed on a case-by-case basis when a state/tribe is considering assumption.

### **Tribal Issues**

In addition to the statutory and regulatory requirements listed above (and at CWA §404 (g)-(l) and 40 CFR 233), tribes must meet a few additional conditions as a result of their unique status and relationship with the federal government.

- **Eligibility** Tribes seeking assumption must meet the eligibility requirements under §518 of the CWA (**40 CFR 233.60-62**). These include
  - The tribe is recognized by the Secretary of the Interior
  - The tribe has a governing body carrying out substantial governmental duties and powers
  - The functions to be exercised by the tribe pertain to the management and protection of water resources under their jurisdiction
  - The Administrator believes the tribe is capable of administering the §404 program in accordance with the act.
- **Enforcement Authority** In general, tribes must meet the same criteria for enforcement as states, however, when tribal enforcement authority does not exist or is precluded from asserting criminal enforcement authority (e.g., for actions against non-tribal members or fines over \$5000), tribes need to refer the criminal enforcement matters to EPA and/or the Corps as outlined in the appropriate MOAs (**40 CFR 233.41(f)**).

It is recommended that the tribe work closely with EPA and the Corps early in their pursuit of §404 to identify waters under the tribe's jurisdiction as well as the tribal waters over which the Corps will retain §404 jurisdiction.

**Detailed timeline for review and approval of state/tribal application for §404 program assumption**

Procedures for the approval of a state or tribal program by EPA are detailed at **40 CFR §233.15**. This regulation details the 120 day review period that is defined in §404(h) of the Clean Water Act. Specifically:

**Day 1** **Date of receipt of a complete state/tribal program application.** Note: upon receipt of the application, EPA has **30 days** to determine whether the application is complete.

After determining that the state/tribal application is complete, the RA will publish notice of the application in the *Federal Register*.

**Day 10** **Deadline for submittal of application to other federal agencies.** The EPA Regional Administrator (RA) will provide copies of the state or tribe's submission to the Corps, USFWS, and NMFS (both headquarters and regional offices).

**Day 30±** **Approximate time frame for public hearing.** The RA shall provide for a public hearing, within the state/tribe, not less than **30 days after** the notice is published in the *Federal Register*.

**Day 75±** **Approximate time frame for public comment.** The *Federal Register* notice must provide a comment period of at least **45 days**.

**Day 90** **Deadline for comments to EPA from other federal agencies.**

**Day 120** **Deadline for EPA decision on the application.** Within 120 days of receipt of a complete application, the RA must either approve or disapprove the application, based on whether or not the state/tribal program fulfills the requirements of the CWA. The RA will also respond to comments received. The EPA Assistant Administrator for Water, the Office of General Counsel, and the Assistant Administrator for the Office of Enforcement and Compliance Assurance will provide concurrence on the decision.

If the RA approves the state/tribal program, s/he shall notify the state/tribe and the Corps of the decision, and publish notice in the *Federal Register*. The state/tribal program will not become effective until publication of this notice or until the date specified in the *Federal Register*.

If the RA disapproves the state/tribal program application, the RA shall notify the state or tribe of the reasons for disapproval, and revisions needed to gain approval. **If the state or tribe submits a revised plan, the 120 day review process begins again.**

**Day 120+** The state/tribe and EPA may extend the review period by agreement.

**LEGAL AND TECHNICAL REFERENCES**

**Federal law and regulations** may be found on line in standard legal references.

- Federal regulations: <http://www.gpoaccess.gov/fr/index.html>
- Library of Congress – legislative information: <http://thomas.loc.gov/>
- EPA laws and regulations: <http://www.epa.gov/lawsregs/regulations/index.html>

<b>IMPORTANT LAWS AND REGULATIONS RELATED TO §404 PROGRAM ASSUMPTION</b>	
Clean Water Act, Section 404(g) – (l)	Legal authority for state/tribal assumption of the §404 program, and basic requirements
40 CFR Part 230	<b>Guidelines for the Specification of Disposal Sites for Dredged and Fill Material.</b> These are the 404 program Section (b)(1) Guidelines – the detailed definition of criteria for permit application review. A state/tribal program must provide a level of resource protection that is at least as stringent as these standards. Subpart J details mitigation requirements.
40 CFR Part 232	<b>§404 Program Definitions; Exempt Activities not Requiring §404 Permit.</b> Program definitions apply both the federal and state/tribal administered programs. State/tribal program exemptions cannot be broader than federal exemptions.
40 CFR Part 233	<b>§404 State Program Regulations</b> These regulations detail the requirements for approval of a state/tribal §404 program, program operation, federal oversight, and related issues.
Jurisdictional guidance memo  <i>Federal Register</i> , June 8, 2007, page 31824	<b>EPA/Corps Memorandum Re: <i>Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States</i></b> This June 5, 2007 provides guidance on determining the scope of federal jurisdiction over waters of the U.S.
Proposed new jurisdictional guidance  <i>Federal Register</i> , May 22, 2011	<b>EPA and Army Corps of Engineers Draft Guidance on Identifying Waters Protected by the Clean Water Act</b> <i>[Released April 27, 2011 for public review and comment.]</i>

### Links to helpful information

#### Association of State Wetland Managers

- 404 Assumption Web Pages: <http://aswm.org/wetland-programs/s-404-assumption>
- Descriptions of state programs: <http://www.aswm.org/state-summaries>
- Program funding: <http://aswm.org/wetland-programs/funding>

#### Environmental Council of the States

- General information: [www.ecos.org](http://www.ecos.org)

#### Environmental Protection Agency – information on state assumption

- State assumption: <http://water.epa.gov/type/wetlands/outreach/fact23.cfm>
- Funding for core state/tribal wetland programs:  
[http://water.epa.gov/grants\\_funding/wetlands/cefintro.cfm#whatEPA 401 wiki](http://water.epa.gov/grants_funding/wetlands/cefintro.cfm#whatEPA_401_wiki)
- Proposed Clean Water Act Guidance:  
<http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>

#### U.S. Army Corps of Engineers

- Corps of Engineers regulatory information:  
[http://www.usace.army.mil/CECW/Pages/cecwo\\_reg.aspx](http://www.usace.army.mil/CECW/Pages/cecwo_reg.aspx)

#### University of North Carolina – sustainable funding for wetland programs

- <http://www.efc.unc.edu/projects/wetlands/>

**List of Acronyms and abbreviations**

ASWM	Association of State Wetland Managers
CFR	Code of Federal Regulations
Corps	U.S. Army Corps of Engineers
CWA	Federal Clean Water Act
CZMA	Coastal Zone Management Act
ECOS	Environmental Council of the States
EPA	U.S. Environmental Protection Agency
ESA	Federal Endangered Species Act
NEPA	National Environmental Protection Act
NMFS	National Marine Fisheries Service
NPDES	National Pollutant Discharge Elimination System
RA	Regional Administrator (of EPA)
(S)PGP	(State) Programmatic General Permit
SWS	Society of Wetland Scientists
USFWS	U.S. Fish and Wildlife Service
§401	Section 401 of the Federal Clean Water Act
§404	Section 404 of the Federal Clean Water Act
Section 10	Section 10 of the Rivers and Harbors Act