

## Clean Water Act Section 404 State Assumption

### Overview

States and tribes<sup>1</sup> play a major role in the implementation of many Clean Water Act (CWA) programs. It is also clear that Congress envisioned that the states would play an active role in permitting dredge and fill activities, and thus provided a mechanism for states to assume the CWA Section 404 from the federal government.

### States and Federal Agencies Share Critical Roles in Regulating Wetlands

States are particularly well-situated to address regional water management issues and to effectively interact with private landowners. Federal resource agencies play a critical role in maintaining a “level regulatory playing field” among the states and in helping to define common national goals under the Clean Water Act. While a number of states have strong wetland programs, only two states have assumed administration of Section 404. Instead other states have developed, or are developing, other types of cooperative permit programs, such as joint permitting,<sup>2</sup> State Programmatic General Permits (SPGPs) or Regional General Permits (RGPs). However, since the U.S. Supreme Court decision on Solid Waste Agency of Northern Cook County (SWANCC) of 2001, interest in state assumption has increased.

### What “Assumption” Means for a Dredge and Fill Permitting Programs

Under the Clean Water Act (CWA), states may seek to implement Section 404 that governs dredge and fill activities in wetlands and other waters. Before a state assumes CWA § 404, the U.S. Army Corps of Engineers (Corps) regulates those waters and reviews the related permits at the federal level. State assumption of the 404 program allows a state to regulate those waters—including streams and wetlands—and assume the jurisdictional responsibility to condition, approve or deny dredge and fill permits rather than the Corps. Where a state 404 Program is approved by the EPA, the Corps of Engineers suspends processing of 404 permits, and the state permit provides the necessary authorization under Section 404. While Section 404 is often described as a wetlands program, it applies to all waters, not just wetlands. In fact the majority of dredge and fill permits in most areas of the country are for streams and rivers and other waters that are not wetlands.

“Assumption” means a state has applied to the EPA and been approved to administer a state dredge and fill permitting program in lieu of the federal section 404 program administered by the Corps and EPA. An approved state is responsible for all dredge and fill activities within the state that impact waters of the US.

<sup>1</sup> Tribes that have applied to be treated as a state for the purposes of implementing Clean Water Act programs

<sup>2</sup> Joint permitting includes state-federal permitting, state-state permitting, such as stormwater & Wetlands, as well as state-local permitting. For more information on Programmatic General Permits, visit: <http://aswm.org/wetland-programs/programmatic-general-permits>



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## Requirements of State Assumption

In order to be eligible to assume administration of Section 404, a state program must meet specified criteria. These are the primary requirements:

- The state must have jurisdiction over all waters, including wetlands that are under federal jurisdiction<sup>3</sup>. Dredge and fill activities in lakes, streams, and other waters defined in federal regulations must be regulated by the state in addition to wetlands.
- The state laws must regulate at least the same activities as those regulated under federal law. State regulations can be broader than federal regulations, but cannot exempt activities which require a federal permit.
- The state laws must ensure compliance with federal regulations, including the 404(b)(1) guidelines. State regulations can provide greater resource protection, but cannot be less stringent than federal regulations.
- The state program must have adequate enforcement authority. Under a state-assumed program, primary responsibility for enforcement rests with the state.

A state must have the authority needed to assume responsibility for the entire Section 404 permit program. At the present time, it is not possible to assume only a portion of the program.

## State Program Operation and Federal Oversight

The EPA has responsibility for oversight of state assumed Section 404 Programs. An approved state Section 404 Program is operated under the provisions of EPA's Section 404 State Program Regulations, found at 40 CFR Part 233. These regulations define the process for requesting approval of a state program, and operation of a state program. As noted in the preamble to these regulations, the relationship between the EPA and the state in an assumed program is intended to be a partnership, and in the experience of Michigan and New Jersey, this has proven to be true. Coordination of the state and federal programs has worked effectively.

A Memorandum of Agreement (MOA) between EPA and the state or tribe, signed at the time of program approval, clarifies the roles and responsibilities of both parties, and the scope of federal oversight. While all permit applications received by the state are subject to review by EPA, EPA typically waives review of all but a small percentage (2-5% on an annual basis). These applications include (a) those public notices for which

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<sup>3</sup> A state does not need to assume administration of the program on tribal lands; the Corps could retain permitting in these jurisdictions. This does not constitute partial program assumption.



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review is mandated under the federal regulations – including projects with the potential to impact critical resource areas such as wetlands that support federally listed species, sites listed under the National Historical Preservation Act, components of the National Wild and Scenic River System, and similar areas – and (b) state- specific categories of projects negotiated in the state program MOA. Significantly, if EPA does review a project and objects to issuance of a permit, the state may not issue a Section 404 permit unless the objection is resolved. This factor is important in ensuring compliance with other federal program areas as discussed below. States also provide EPA with an annual report that summarizes permitting and enforcement actions taken during the year.

### **Mechanisms for Coordination with Federal Laws, e.g. Endangered Species Act**

- Section 404 provides for coordination with a number of other federal resources management programs. Because permits issued under a state assumed program are issued under state law, specific federal requirements do not apply. Instead they are addressed through EPA oversight as required by the statute and regulations.
- However, an alternative mechanism is provided through EPA oversight role. As noted above, EPA’s regulations at 40 CFR §233.51 require EPA review of any permit application that has a reasonable potential to impact federally listed threatened or endangered species, within sites identified under the National Historic Preservation Act, or in components of the National Wild and Scenic River System, among other critical areas. EPA in turn is required to coordinate with other federal agencies i.e., the Corps, U.S. Fish and Wildlife Service, and National Marine Fisheries Service.
- The comments provided to the state by the EPA represent the comments of the federal government, and the state cannot issue a 404 Permit if EPA objects. Therefore, for example, should the U.S. Fish and Wildlife Service object to issuance of a permit due to concerns regarding a listed species, EPA may block issuance of the permit by the state.
- A state must comply with the Section 404(b)(1) Guidelines, and those guidelines prohibit issuance of a permit that may jeopardize the continued existence of a listed species, the state is under an additional obligation to protect listed species. The authority of the state to assure compliance with the 404(b)(1) Guidelines must be demonstrated prior to EPA approval of state assumption (and would be based on an evaluation of state laws and regulations). For example, Michigan has a stand alone law which protects federally listed species in addition to state listed species.
- Through the above mechanisms and processes, states and EPA assure compliance with federal environmental regulations.



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## Benefits of State Assumption of Section 404

Based on the experience of Michigan and New Jersey, administration of the Section 404 program by qualified states and tribes offers several significant benefits in terms of overall program efficiency and wetland resource protection. These include the following:

- Improved resource protection. Ultimately, the coordinated efforts of both state and federal agency staff, the use of state specific methods and state expertise backed by federal scientific expertise, and a more efficient regulatory program will provide greater protection of wetland resources.
- Increased program efficiency. State program assumption greatly reduces duplicative state and federal permitting requirements, and eliminates potentially conflicting permit decisions, conditions, and mitigation requirements.

State permit programs are often more timely than federal programs. In Michigan, for example, actions must typically be taken on completed permit applications within 90 days, and the average permit processing time is approximately 60 days (less for general or minor permits). In New Jersey, generally permit decisions are made in 60 days on average while wetland boundary verifications generally are completed in 90 days and individual permit decisions take less than 180 days.

- Effective allocation of federal and state agency resources. State programs such as those in Michigan and New Jersey are staffed by local offices with the capability of providing on-site review of almost all permit applications (including those reviewed by the Corps under the nationwide permit process), and work directly with permit applicants to reduce adverse impacts to the resource. When reviewing particularly complex applications, state and federal resource agency staffs retain the opportunity to work cooperatively.
- Improved integration with other state resource programs. Administration of the dredge and fill permitting program at the state level enables states to integrate dredge and fill regulations and other related land and water management programs. Issues such as floodplain management, storm water management, local or regional zoning or land use plans, and similar concerns are more likely to be fully integrated into the permit review process. Coordination with agencies and organizations responsible for watershed management is also improved.



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## Benefits of Assumption, continued

- Use of state-specific resource policies and procedures. Under a state assumed 404 program, the state has a degree of flexibility in the selection of policies and procedures that are best suited to the needs of the state, provided that the basic federal requirements are met. Thus, a state can develop a wetland delineation manual that is suited to its climate and topography, rather than using a manual developed for the entire nation; it can use functional assessment procedures specific to the ecological types of wetland present within the region; and it can otherwise ensure that the wetland program is tailored to the needs of the resource and the public in that state.
- Increased regulatory program stability. Experience in Michigan indicates that its wetland regulatory program requirements have remained much more stable and predictable over the past 18 years than the 404 permit program administered by the Corps of Engineers in most states. There are two reasons for this stability. First, because Michigan's program relies on state, rather than federal law, it is not impacted by changes in the federal program unless those changes render the state program inconsistent with the federal program. Therefore, numerous changes that have resulted in a significant degree of controversy and confusion at the federal level have not directly impacted Michigan's program (e.g. early revision of the delineation manual and regional updates, rule changes following the Tulloch decision, and, most recently the SWANCC and Rapanos decisions).

On numerous occasions, suggested changes to state law in Michigan have been rejected by the legislature after it was determined that the proposed amendment(s) would render Michigan's program inconsistent with federal law resulting in the potential withdrawal of program approval. Thus, the combination of elements of the state and federal programs has served to temper changes in state regulation and policy, and has led, overall, to a more stable, predictable dredge and fill permitting program than has existed in most states over the past decade.

- Increased public support. State permit staff are often more readily accessible to the public. Overall public support for wetland regulation is increased by more consistent decision making among state and federal agencies, and by policies and procedures tailored to the needs of the state.



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## Barriers to State Assumption of Section 404

The fact that only two states have assumed 404 program administration also highlights that there are some significant limitations associated with this process. Here are some examples below:

- Meeting program requirements. Current Section 404 program regulations are quite complex, particularly in terms of the definition of jurisdiction, activities regulated, permit review criteria, and permit exemptions. In order to be approved to administer the program at the state level, a state must demonstrate that it has equivalent authority in all areas. This can appear exceptionally difficult, particularly since the basis for state authority may be quite different than the basis for federal authority but states can demonstrate their program and authorities are consistent with the federal program.

For example, while federal jurisdiction over wetlands is essentially based on the commerce clause of the Constitution, state jurisdiction is typically based at least in part on authority to regulate land use and to protect to the state's natural resources. The specific language arising from these distinct authorities may, initially, appear quite different, even though the protection ultimately afforded the resource is equivalent. In New Jersey, this obstacle was overcome by developing a separate legal authority to regulate wetlands that was intentionally designed to enable assumption of the Section 404 Program.

- Inability to assume administration of Section 10 waters of the Rivers and Harbors Act and wetlands adjacent to these waters. This severely limits the appeal of the overall program, and may lead to a decision to forego state assumption. For some coastal states, the inability to assume administration of the 404 permit program in tidal wetlands or coastal areas, which may eliminate state regulation of some of a state's most significant wetland resources. However, MI and NJ entered into an SPGP with the Corps to manage some of these waters.
- Inability to assume 404 authority in only one geographic portion of the state. Some states would prefer to administer a state 404 program only in certain geographic areas, such as the coastal zone, or in tidal wetlands, including a portion of Section 10 waters. There is currently no option for partial assumption of a state 404 program based on a limited geographic area.
- Need for alternative coordination with other federal resource programs. Because the permits issued under a state assumed 404 program are issued under state rather than federal law, alternative mechanisms must be developed to assure compliance with the requirements of the federal Endangered Species Act, National Historic Preservation Act, and similar federal programs. These issues are addressed to an extent through oversight of state assumed programs by the EPA.



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## Continued Barriers to Assumption

But federal agencies and interest groups may oppose assumption over concerns about maintaining protection consistent with the other federal laws in the state following assumption. (See section on coordination with federal laws for more discussion.)

- Lack of dedicated federal funding specifically for Section 404 Program administration. Perhaps most importantly, states administering the Section 404 permit program receive no federal funds specifically dedicated to support operation of the permit program. In theory, states may make use of Section 106 water program funds for this purpose, but this would be difficult in practice since these funds are already dedicated to other existing water programs, which are usually located in the water quality agency of the state while a 404 program is often located in another state agency. It is not reasonable to expect that funds will be withdrawn from those programs, to fund another, especially one in another agency or department.
- The EPA has provided State Wetland Program Development grants to support development of state wetland regulatory programs. However, the funds can only be used for program development, not implementation. While the states have made good use of these funds, it is clear that the primary program cost for an established program is not one of development, but ongoing program administration. The cost of administering not only the permit process, but the associated mitigation requirements and enforcement program, places a significant burden on a state administering a Section 404 Program.

Case: In Michigan, although assumption of the 404 Program has been broadly supported for many years due to increased program efficiency and effectiveness, challenging economic conditions have raised concerns about the total cost of program operation, and led the Governor to propose returning the program back to the federal agencies.

For a more thorough discussion of benefits and barriers to assumption, see [CWA Section 404 Program Assumption: A Handbook for States and Tribes](#)



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## ASWM's Recommended Changes to the CWA—Actions to Support States

- Authorizing funding for state administration of the § 404 program at a level commensurate with that provided for administration of similar federal environmental permit programs. Federal funding is appropriate for implementing any state wetland program which effectively protects waters of the U.S. These programs include full state assumption of the § 404 Program, PGPs and RPs, and § 401 Water Quality Certification Programs; § 401 provides the State with the authority to condition § 404 permit applications.
- CWA § 404 could be amended to allow for assumption of the permitting program, in a portion of Section 10 waters. Allowing a state to administer the CWA § 404 program in major waterways as well as tidal wetlands, coastal wetlands, and other wetlands adjacent to major waterways will make the program worthwhile to coastal states, where these are among the most important wetland resources. States recognize the on-going responsibility of the Corps to maintain interstate navigation in primary interstate waters, and can coordinate with the Corps regarding impacts in primary interstate Section 10 waters where the Corps would retain responsibility.
- Section 404 could be amended to allow for partial assumption of the permitting program in specific geographic areas only. Some states have wetland programs that extend only to certain geographic areas, such as the coastal zone or coastal waters. Allowing a state to assume administration of the CWA § 404 program in areas where the state has such jurisdiction would reduce state/federal duplication in those areas and generally provide the other benefits of program assumption in at least a portion of the state. It would also allow a state to pursue gradual assumption over a period of several years. Partial adoption is allowed under § 402.



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## Getting Organized for State Assumption

### Questions for States Considering Section 404 Program Assumption

1. Why is the state interested in assumption, and how would the state/public benefit? Review the potential benefits and limitations of assumption.
2. Does the state have the legal authority to meet all federal requirements? Are all waters and wetland regulated? Are all activities regulated?
3. Does the state have adequate enforcement capability?
4. Does the state have sufficient human and fiscal resources to maintain the program?
5. Does the state have the political support to maintain the program?

### Materials required to request approval of a state program

The § 404 State Program Regulations define the materials that must be submitted to EPA to gain approval of a state program. This list is summarized at 40 CFR §233.10 as follows.

- (a) A letter from the Governor of the State requesting program approval.
- (b) A complete program description. This detailed description will include a full description of the state's permitting and enforcement programs, including regulatory authorities, staffing, organization, and basic procedures.
- (c) An Attorney General's statement as set forth in §233.12 -- essentially certifying that the state has legal authority to meet all federal requirements.
- (d) A Memorandum of Agreement with the Regional Administrator or EPA.
- (e) A Memorandum of Agreement with the Secretary of the Army.

Summaries of all materials used in the state dredge and fill permit program will be useful in compiling this program description.



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## Key Resources to Have on Hand When States Consider 404 Assumption

1. Section 404 of the federal Clean Water Act
2. EPA's Section 404 State Program Regulations, at 40 CFR Part 233
3. EPA's Section 404 (b)(1) Guidelines, at 40 CFR Part 230
4. EPA's Clean Water Section 404 Program Definition and Permit Exemptions at 40 CFR Part 232
5. Any state statutes (drafts or adopted/passed into law) addressing the issuance of dredge and fill permits in lakes, streams and wetlands
6. Corps 1987 delineation manual and regional supplements, if available
7. June 5, 2007 EPA/Corp Memorandum regarding Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* [or other current information regarding the scope of federal jurisdiction]
8. EPA and/or American Rivers' wetland fact sheets on importance of headwater streams
9. CWA 404 abbreviations and acronyms (found in assumption handbook)
10. Endangered Species Handbook, FWS (1998)
11. Section 7 Handbook, FWS (for initial assumption discussion)
12. Endangered Species Act summary information specific to state with focus on section 7 consultation (get this from FWS)
13. ASWM's Handbook on Assumption:  
[CWA Section 404 Program Assumption: A Handbook for States and Tribes](#)

Many of these resources can be found on ASWM's Assumption webpage at:  
<http://aswm.org/wetland-programs/s-404-assumption>