



Association of State Wetland Managers Clean Water Section 404 Assumption Series

Frequently Asked Questions About Assumption

March 2021

A. What is Clean Water Act § 404 Assumption?

“Assumption” of the federal Clean Water Act (CWA) Section 404 describes the process whereby a state or tribe obtains approval from the U.S. Environmental Protection Agency (EPA) to administer a § 404 program within their borders and consequently begins administering all aspects of the program. For those states or tribes with mature, integrated water management programs that include the regulation of dredged or fill activities, § 404 program assumption allows a state or tribe to carry out a fully integrated and comprehensive water program addressing the comprehensive range of state, tribal, and CWA requirements. Assumption is not delegation - the program is operated under state or tribal law, however the state/tribe is not delegated federal authority. Under assumption, the federal permit becomes a state or tribal permit. In a delegated program, a state or tribe is issuing a permit or taking an action on behalf of the federal government. A state or tribal dredge and fill permit program may protect “waters of the state/tribe” that are not “waters of the United States”. Support for state/tribal assumption has not been universal, however, and in some circumstances, environmental/conservation groups have actively opposed assumption. From their perspective, the lack of a federal nexus weakens the overall regulatory process.

B. What are the benefits of Assuming the § 404 Program?

- **Improved resource protection:** While hard to evaluate, greater protection of wetland resources may result from the coordinated efforts of both state/tribal and federal agency staff, the use of methods specific to the state or tribe, and state/tribal expertise backed by federal scientific expertise, and an equivalent, possibly more efficient regulatory program.
- **Increased program efficiency:** Program assumption can greatly reduce duplicative state/tribal and federal permitting requirements, and eliminate potentially conflicting permit decisions, conditions, and mitigation requirements. State/tribal permit programs have often been timelier than federal programs. This improves the state/tribe’s economy by reducing the overall cost of permit processing for applicants, and by providing coordinated,

regulatory predictability. In Michigan, for example, actions typically must 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, permit decisions are generally 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/tribal agency resources:** State/tribal 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 U.S. Army of Engineers (Corps) under the nationwide permit process) and work directly with permit applicants to reduce adverse impacts to the resource. When reviewing particularly complex applications under an assumed program/tribal, and federal resource agency staff retain the opportunity to work cooperatively.
- **Improved integration with other state/tribal resource programs:** Administration of the dredge and fill permitting program at the state/tribal level enables states/tribes to integrate dredge and fill regulations with other related land and water management programs. Issues such as floodplain management, storm water management, local or regional zoning, land use plans, and similar concerns are likelier to be fully integrated into the permit review process under an assumed program. Coordination with agencies and organizations responsible for watershed management is also improved.
- **Use of state/tribal-specific resource policies and procedures:** Under a state/tribe assumed 404 program, the state/tribe has a degree of flexibility in the selection of policies and procedures that are best suited to the needs of the state/tribe, provided that the basic federal requirements are met. Thus, they 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 wetlands 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/tribe.
- **Increased regulatory program stability:** Experience in Michigan indicates that its wetland regulatory program requirements have remained much more stable and predictable since assuming the § 404 permit program (versus those administered by the Corps 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 wetland delineation manual and regional updates, rule changes following the [Tulloch decision](#), and, most recently the [SWANCC](#) and [Rapanos](#) decisions).

- **Potential for Increased public support:** In some states/tribes, state permit staff are more readily accessible to the public. Overall public support for wetland regulation may be increased by more consistent decision making among state/tribal and federal agencies, and by policies and procedures tailored to the needs of the state/tribe. However, some states report that despite the benefits, the public has not increased their support.

C. What are the barriers to Assumption?

- **Meeting program requirements:** Current § 404 program regulations are quite complex, particularly in terms of the definition of covered waters, activities regulated, permit review criteria, and permit exemptions. To be approved to administer the program at the state/tribal level, a state/tribe must demonstrate that it has equivalent authority in all areas. This can initially appear very difficult, particularly since the basis for state/tribal authority may be quite different than the basis for federal authority, but states/tribes 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 U.S. Constitution, state/tribal jurisdiction is typically based at least in part on authority to regulate land use and to protect the state/tribe's natural resources. The specific language arising from these distinct authorities may initially appear quite different, even though the protection ultimately afforded the resource is equivalent. In New Jersey, this obstacle was overcome by developing a separate legal authority to regulate wetlands that was intentionally designed to enable assumption of the § 404 program.
- **Inability to assume administration of Section 10 waters of the Rivers and Harbors Act and wetlands adjacent to these waters:** For some states/tribes, this may severely limit the appeal of the program and may lead to a decision to forego assumption. For example, some states have a lot of Section 10 waters and others have very few. Also, in some coastal states, the inability to assume administration of the § 404 permit program in tidal wetlands or coastal areas may eliminate state regulation of some of a state's most significant wetland resources. Such concerns may be addressed, however. For example, Michigan and New Jersey entered into a State Programmatic General Permit (SPGP) with the Corps to manage some of these waters. For other states, such as Oregon, this is not a barrier. A state-by-state (or tribe-by-tribe) evaluation would be needed to determine whether or not this is a barrier for a specific state/tribe.
- **Inability to assume § 404 authority in only one geographic portion of the state/tribe.** Some states/tribes would prefer to administer a state/tribal § 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. EPA has been exploring the legal potential for partial assumption, and so in the future such options may become available.

- **Need for alternative coordination with other federal resource programs:** Because the permits issued under a state/tribal assumed § 404 program are issued under state/tribal law 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 /tribal assumed programs by the EPA.
- **Federal agencies and special interest groups may oppose assumption over concerns about maintaining protection consistent with the other federal laws in the state/tribe following assumption:** One argument that some groups or agencies may levy is that they prefer the dual role of the federal and state/tribe in the permitting process, concerned that a state or tribe having more responsibility could potentially lead to less oversight of water resources, whether these concerns are substantiated or not.
- **Lack of dedicated federal funding specifically for Section 404 Program administration:** A very important consideration is that states/tribes 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 Section 404 program is often located in a different state agency. It seems unlikely that funds would be withdrawn from those programs to fund another, especially for a program in another agency or department. This has been a primary consideration for states and tribes across the U.S. as they evaluate the possibility of assumption. In several cases, the lack of funding has tipped the scales in decisions against assuming the program (see [ASWM Status and Trends Report on State Wetland Programs in the United States Report](#)).
- **Wetland Program Development Grants cannot fund implementation activities:** The EPA provides state/tribal Wetland Program Development Grants (WPDG) to support development of state and tribal wetland regulatory programs, including activities necessary for developing a state/tribal assumed § 404 program. However, the grants cannot be used for program implementation once the state/tribe has an assumed program. While the states that have applied for funds to develop assumption program elements have made good use of these funds, it is clear 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. For example, in Michigan, although assumption of the Section 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 later led the Governor to propose returning the program back to the federal agencies.

D. Which states have assumed the §404 Program?

States with Approved § 404 Programs:

- **Michigan:** Michigan assumed the Section 404 program in 1984.
- **New Jersey:** New Jersey assumed the Section 404 program in 1993.
- **Florida:** Florida recently assumed the full Section 404 program, with approval from EPA in December 2020.

States Currently Preparing Assumption Packages:

- **Minnesota:** Minnesota is working towards full assumption. With a robust state regulatory program, the state has a multi-agency state dredge and fill regulatory program with a delegated role for local governmental units. Whether or not a model including a role from local government is allowable will depend on the forthcoming 404(g) rule.
- **Oregon:** Oregon is seeking partial assumption; however, it is not clear yet whether partial assumption will be allowable in the new, forthcoming Section 404(g) rule. Assumption is planned for all regulatory activities outside of Section 10 waters (with a 1,000+ boundary) and coastal waterways, within urban growth boundaries, as well as for mitigation banks and mining. The current proposal is for partial assumption only, in response to concerns by specific stakeholder groups (foresters, cattlemen and tribes).
- **Other states** that are actively exploring assumption include, but may not be limited to: Indiana, Nebraska, Nevada and Wisconsin.

Tribal Assumption of the 404 Program:

To date no tribes have assumed the Section 404 program. However, tribes that have treatment as a state are able to assume the program. In 2020, several tribes have considered pursuing assumption.

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

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

F. What does “Consistent with and No Less Stringent than Clean Water Act Regulations” mean?

To assume the § 404 program, a state or tribe’s program must be no less stringent than the federal program requirements in the CWA and implementing regulations. For example, a state or tribe must:

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

G. What Jurisdiction do States and Tribes with Assumed § 404 Programs have?

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

States and tribes assume permitting authority over certain waters, but others are retained under the authority of the Corps. The waters and wetlands that a state/tribe

may not assume, and the waters the Corps must retain CWA 404 permitting authority for, are described in CWA section 404(g)(1) as:

“... those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of

the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto ...”

In other words, a state or tribal dredge or fill permit program may protect waters of the state or tribe that are not waters of the United States.

H. Does EPA Retain Specific Authorities Regardless of § 404 Assumption?

In an assumed § 404 program, the EPA retains authority to review defined categories of permit applications and may request review of any application. The EPA provides any permit for which it has not waived review to the Corps, U.S. Fish & Wildlife Service, and the National Marine Fisheries Service for comment. The EPA reviews federal agency comments and comments on the state/tribal permit accordingly. In the event that the EPA objects to issuance of a 404 permit, the state or tribe cannot issue the 404 permit unless the EPA’s objection is resolved, and permit conditions met.

I. What are the requirements for a State or Tribe to Assume the § 404 Program?

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

J. What is the § 404 Assumption Process?

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

Step 1: State or Tribe submits a complete assumption application: The Governor of the State or Equivalent Tribal entity (a tribe that has received “treatment as a state” (TAS) status) submits to EPA a full and complete description of the program it proposes to establish and administer under State or tribal law or an interstate compact. The State or tribe must also submit a statement from the State or Tribal Attorney General certifying that their laws provide adequate authority.

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

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

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

Step 5: EPA Makes Decision: After reviewing the State or Tribal application and considering any Federal agency and public comments, EPA makes a decision whether the application meets the applicable statutory and regulatory requirements to assume the Federal permit program.

K. What are the Key Components of an Assumption Package?

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

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

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

L. What is the Assumption Package Program Description?

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

- A description of the scope and structure of the program, including jurisdiction, activities regulated, anticipated coordination, permit review criteria, and scope of permit exemptions, if any;

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

M. What is the Attorney General's Statement?

The state or tribe must include a statement from the Attorney General or tribal equivalent. ([40 CFR 233.12](#)). The statement typically is in the form of a letter and must include (but is not limited to):

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

N. Is a Memorandum of Agreement with an EPA Regional Administrator required?

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

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

- EPA and state or tribal roles and coordination procedures regarding compliance monitoring and enforcement; and
- Provisions addressing modification of the MOA.

O. Is a Memorandum of Agreement with US Army Corps of Engineers required?

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

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

P. What are the specific Elements of the Assumption Package’s Program Description?

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

[See EPA’s regulation here.](#)

- **Describing Waters under State or Tribal Jurisdiction and those under Corps Jurisdiction**

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

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

As part of the assumption application package, states and tribes are required to conduct an analysis that demonstrates program equivalency. This requirement ensures that the assumed program is equivalent to – even if not necessarily the same as - the federal requirements. An

analysis of equivalency requires the state or tribe to do a comparison, often referred to as a “crosswalk,” of federal requirements with the proposed state/tribal document(s). This can take different forms. The EPA’s assumption regulations establish the requirements for a complete program description, including the crosswalk portion that compares the federal and state/tribal legal authorities.

Some states to date have developed a more narrative, programmatic approach describing the similarities and differences (e.g., Florida), while others have developed comparison grids showing side-by-side text to demonstrate how one part of the statute or regulation is equivalent to another (e.g., Oregon). In some states working on assumption, rather than try to create something equivalent, the state has simply adopted the federal language to meet the equivalency requirement. As tribes continue to explore assumption, they likely will consider similar approaches to the “crosswalk.”

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

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

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

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

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

Q. What are different assumption frameworks/structures previously used by states seeking program approval?

A very helpful source for different assumption frameworks and structures will be the expected new 404(g) rule. Note that this regulation is currently being revised and a new proposed rule may be published in 2021. Another good source of information is the EPA assumption website: <https://www.epa.gov/cwa404g/assumption-request-package-under-cwa-section-404>. Your assumption request package (especially the program description) is the framework for your

program. EPA's assumption regulations include information on the requirements for a complete program description, including how the crosswalk portion should compare federal and state/tribal statutes and regulations that structure the assumed program. If a state or tribe does not have its own wetland program, other states and tribes with wetland programs may offer potential program structures that may work best for local circumstances. Programs can be vastly different, reflecting differences in natural and human resources, population, economies, as well as in programmatic goals.

For more information, contact:

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