

# EPA Proposes Changes to CWA Section 404 Tribal and State Assignment and Administration Regulations

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August 29, 2023

For the first time in nearly 35 years, the U.S. Environmental Protection Agency (EPA or the Agency) has proposed to comprehensively revise regulations governing how Tribes and States assume responsibility over administration of the Clean Water Act's (CWA's) Section 404 permitting program for discharges of dredged and fill material into waters of the United States (WOTUS).[1]

This advisory will briefly explain the background of EPA's Section 404 Program before discussing the proposed modifications to EPA's Section 404 Tribal and State program approval system, permit requirements, program operations, compliance evaluation and enforcement provisions, federal oversight, and other miscellaneous program components.

EPA is accepting comments on the proposals through October 13, 2023.

## Background

Section 404 of the CWA establishes a program regulating the discharge of dredged (*i.e.*, excavated) or fill (*e.g.*, rock, sand, dirt) material into navigable waters, defined as WOTUS.[2] It requires a permit for discharges of dredged and fill material from a point source into WOTUS unless the discharge is associated with an activity exempt from Section 404 permitting.[3] Section 404(a)[4] authorizes the Secretary of the Army ("Secretary") to issue permits after notice and opportunity for public hearings, and Section 404 generally vests the Secretary with the day-to-day administration of the Act's Section 404 mandates.

Tribes and States can assume this authority and administer their own programs when approved by EPA.[5] Currently, only Michigan, New Jersey and Florida administer their own Section 404 programs, and the U.S. Army Corps of Engineers (Corps or USACE) manages the other 47 States, all Tribal lands, U.S. territories, the District of Columbia, and specific waters within the above three states.[6]

Under Section 404 programs, discharges of dredged or filled materials are authorized by general or individual permits. General permits (a/k/a national or regional permits) cover categories of activities that are relatively minor in scope and intensity. In many cases, no additional permit or notification to the Corps or Tribal/State regulator is required. Where activity is not covered by a general permit, individual permits must be submitted. Under these permits, the proposed activity must be consistent with the permitting agency's (*i.e.* the Corps or the approved Tribal/State regulator) environmental review criteria.[7]

If a Tribe or State assumes administration over these programs, they must exercise jurisdiction over all assumed waters subject to the CWA except those retained by the Corps.[8]

## Program Approval

### Program Assumption Requirements

First, EPA is requiring that Tribes and States seeking to assume Section 404 responsibility demonstrate adequate funding and staff to sustain these programs.[9] Funding would need to be identified to ensure the financial viability of program administration, compliance evaluation, and enforcement specifically as they relate to permit reviews, program operations, and compliance evaluation and enforcement programs.[10] To demonstrate financial sustainability, the Tribe or State must provide in the application's program description section "staff position descriptions and qualifications, program budget and funding mechanism[s]," and any other information the Tribe or State considers relevant.[11]

Similarly, current application regulations require Tribes and States to provide "[a] description of the scope and structure of the State's program. The description should include extent of State's jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, and permit review criteria." [12] EPA now proposes that applications *must* disclose *each* of these descriptive factors.[13]

Finally, EPA proposes to revise the existing program description requirement to disclose inter-agency coordination if more than one Tribal or State agency would administer the program.[14]

### Retained Waters

Under EPA's existing regulatory infrastructure, before the Tribe or State submits its application to the Agency, it must submit an inquiry that the Corps identify the subset of WOTUS that will remain under Corps jurisdiction. EPA proposes to require Tribes and States to provide additional information with that inquiry demonstrating that the Tribe or State "has taken concrete and substantial steps toward program assumption." [15] EPA is requiring one of the following to be provided in such inquiries: a citation or copy of legislation authorizing funding to prepare for assumption, a citation or copy of legislation authorizing assumption, a Governor or Tribal leader directive, a letter from a head of a Tribal or State agency, or a copy of a letter awarding a grant or other funding allocated to investigate and pursue assumption.[16] Submitting this starts a review period by the USACE whereupon they will evaluate which waterbodies they may consider retaining jurisdiction over and which they may cede under the Tribe or State program.[17] EPA outlines the proposed evaluation criteria at 88 Fed. Reg. 55,287.

In attempting to clarify the jurisdictional authority of "adjacent" [18] wetlands, EPA proposes that the Corps retain jurisdiction over such waters unless agreed upon between the Corps and the Tribe or State.[19]

### Mitigation

Tribal and State applicants will be required to submit a description of their proposed program's approach to demonstrating compliance with the substantive criteria of 40 C.F.R. § 230, Subpart J: Compensatory Mitigation for Losses of Aquatic Resources. EPA would authorize deviations from the specific requirements of Subpart J "to the extent necessary to reflect [Tribal or State] administration of the program as opposed Corps administration, but may not be less stringent than the substantive criteria of Subpart J." [20]

## Effective Date for Approved Programs

The Agency is proposing that transfer of an approved Section 404 program to a Tribe or State would take effect 30 days after publication of the notice of EPA's approval in the Federal Register, unless EPA and the Tribe or State have agreed on a later effective date, not to exceed 120 days from the date of notice in the Federal Register.[21]

## Permit Requirements

### Compliance With CWA 404(b)(1)[22] Guidelines

CWA Section 404(h)(1)(A)(i)[23] requires that the Administrator, after consulting with the Secretary and the Secretary of the Interior (acting through the Director of the U.S. Fish and Wildlife Service), determine whether the State has the authority to "apply, and assure compliance with," Section 404 with respect to the issuance of permits pursuant to Tribe and State Section 404 programs. Stakeholders have apparently put pressure on EPA to provide ways that a Tribe or State could satisfy Section 404(h)(1)(A)(i) requirements demonstrating the Tribe or State has authority to issue permits that "apply and assure compliance with" Section 404(b)(1) Guidelines.

Though EPA declines to provide regulatory language on the matter "because [the Agency] does not want to unintentionally constrain how Tribes and States can demonstrate their authority,"[24] EPA does provide a litany of examples of program mandates that would satisfy such requirements.[25]

### Judicial Review and Rights of Appeal

EPA proposes that States seeking to assume Section 404 authority must provide for judicial review of decisions to approve or deny permit, and adopts language similar to that of CWA Section 402 National Pollutant Discharge Elimination System (NPDES) State program regulations.[26] EPA proposes one modification from the NPDES judicial review provisions though: that State requirements that provide for the losing party in a challenge to pay all attorneys' fees, regardless of the merit of their position, are prohibited.[27] Tribes have been expressly excluded from this provision.[28]

## Program Operation

### Five-Year Permits and Long-Term Projects

The Agency is proposing to revise the application process for long-term permitting projects under the statutory limitation that permits not exceed five years in duration.[29] For applications where planned construction may extend beyond the five-year permit period, EPA proposes the application include a 404(b)(1)[30] analysis demonstrating how the project complies with the environmental review criteria set in those guidelines "for the full project"[31] when applicants submit the initial application for the five-year permit. The proposed regulations allow modification, as necessary, when submitting applications for subsequent five-year permits.[32]

### Tribes as Affected Downstream States

EPA is proposing three amendments surrounding review and comment provisions of 404 permits. First, downstream Tribes approved by EPA to be treated in a manner similarly as a State would have an opportunity to suggest permit conditions for Section 404 permits by upstream Tribes and States on downstream biological, chemical or physical impacts.[33] Second, Tribes not authorized to be treated as States would be treated as States solely to comment on the aforementioned impacts.[34] Thirdly, EPA would allow Tribes to request EPA review of permits that may impact Tribal interests

even if Federal review has been waived.[35]

## Compliance Evaluation and Enforcement

As part of the criminal enforcement regulations authorized in 40 C.F.R. §§ 123.27 and 233.41, EPA proposes that Tribes and States administering Section 402 NPDES programs and Section 404 programs be required to authorize prosecution based on *mens rea*, or criminal intent, for any negligence or gross negligence suit.[36]

## Federal Oversight

### “No Less Stringent Than”

Simply put, the Agency’s existing regulations prohibit Tribes and States from imposing permitting requirements less stringent than EPA’s federal requirements. EPA seeks to implement regulatory language restricting Tribes and States from crafting programs where some permitting restrictions are more lenient with regulated entities than others, seeking to ensure that each program facet is in practice “no less stringent than” existing EPA regulations.[37]

Similarly, proposed regulatory language would require Tribe and State applicants to show that they will, at all times, have authority to issue permits for all non-exempt discharges of dredged and fill material into WOTUS except for discharges into WOTUS subsets the Corps retains authority over under CWA section 404(g)(1).[38] This language would also require Tribe and State applicants to include in their applications an acknowledgement of responsibility for administration over all 404(g) programs.

### Withdrawal Procedures

Under CWA Section 404(i),[39] if the Administrator determines that a Tribe or State is not properly administering their delegated Section 404 program, and after being given an opportunity to address those alleged shortcomings, the Administrator must withdraw program approval and redesignate administration back to the Corps. EPA now proposes to grant Regional Administrators authority to notify Tribes and States of program inadequacies, and give them 30 days to come into compliance. If compliance is still not demonstrated to the Regional Administrator’s satisfaction after that period, that Regional Administrator may notify the EPA Administrator for further action.[40]

### Program Reporting

EPA seeks to add program self-assessment reporting requirements not present in the existing regulations.[41] The proposal would require self-assessment of programs with identification of implementation shortcomings and proposed solutions, as well as self-assessment of program components and any quantitative reporting required in existing regulations.[42]

## Miscellaneous Changes

### Dispute Resolutions

In the Section 404 permitting process, disputes often arise between Tribes, States, permittees, other affected parties, and the EPA. The proposed regulations allow EPA to “facilitate resolution of disputes between Federal agencies, Tribes, and States seeking to assume and/or administer a CWA section 404 program.”[43]

### Conflict of Interest

EPA proposes that any “public officer, employee, or individual” with responsibilities related to a Section 404 permitting program who “has a direct personal or pecuniary interest in any matter that is subject to decision by the agency” disclose that interest in official records and be prohibited from participating in any related decision-making.<sup>[44]</sup>

### Partial Assumption

Despite requests to do so, EPA has declined to revise 40 C.F.R. § 233.1(b), which clarifies that partial coverage programs are not approvable under Section 404.

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[1] 88 Fed. Reg. 55,278 (August 14, 2023).

[2] 33 U.S.C. § 1344 - Permits for dredged or fill material.

[3] 33 U.S.C. § 1344(f).

[4] 33 U.S.C. § 1344(a).

[5] 33 U.S.C. § 1344(g)-(i).

[6] 88 Fed. Reg. 55,278.

[7] The Corps’s criteria are outlined at 40 C.F.R. § 20.

[8] 33 U.S.C. § 1344(g).

[9] 88 Fed. Reg. 55,283.

[10] 88 Fed. Reg. 55,283. These regulations are currently outlined at 40 C.F.R. Subparts C – E.

[11] 88 Fed. Reg. 55,283.

[12] 40 C.F.R. § 233.11(a).

[13] 88 Fed. Reg. 55,283.

[14] 88 Fed. Reg. 55,283.

[15] 88 Fed. Reg. 55,284.

[16] 88 Fed. Reg. 55,284-85.

[17] 88 Fed. Reg. 55,285.

[18] EPA notes that “the agencies currently interpret the term “adjacent” consistent with the Supreme Court’s decision in *Sackett v. EPA*, No. 21-454 (U.S. May 25, 2023).” 88 Fed. Reg. 55,285 at FN24.

[19] 88 Fed. Reg. 55,285.

[20] 88 Fed. Reg. 55,292.

[21] 88 Fed. Reg. 55,294.

[22] 33 U.S.C. § 1344(b)(1).

[23] 33 U.S.C. § 1344(h)(1)(A)(i).

[24] 88 Fed. Reg. 55,296.

[25] 88 Fed. Reg. 55,297-98.

[26] 88 Fed. Reg. 55,298.

[27] 88 Fed. Reg. 55,298.

[28] 88 Fed. Reg. 55,298.

[29] 33 U.S.C. § 1344(h)(1)(A)(ii).

[30] 33 U.S.C. § 1344(b)(1).

[31] 88 Fed. Reg. 55,301.

[32] 88 Fed. Reg. 55,301.

[33] 88 Fed. Reg. 55,303.

[34] 88 Fed. Reg. 55,303.

[35] 88 Fed. Reg. 55,303.

[36] 88 Fed. Reg. 55,306.

[37] 88 Fed. Reg. 55,308.

[38] 88 Fed. Reg. 55,308.

[39] 33 U.S.C. § 1344(i).

[40] 88 Fed. Reg. 55,310.

[41] 88 Fed. Reg. 55,311.

[42] 88 Fed. Reg. 55,311.

[43] 88 Fed. Reg. 55,323.

[44] 88 Fed. Reg. 55,324.