

Clean Water Act Section 404(g) Tribal and State Assumption Program Final Rule – December 2024

The 2024 *Clean Water Act Section 404(g) Tribal and State Assumption Program* rule represents the first comprehensive update in 35 years to the EPA's regulations governing Tribal or state CWA Section 404 programs. The EPA's 2024 Rule updates and clarifies the requirements and procedures for assuming, administering and overseeing the CWA Section 404 program. The 2024 Rule responds to input from Tribes, states and stakeholder groups. It provides flexibility in meeting the CWA requirements without being overly prescriptive, increases transparency and creates new opportunities for meaningful engagement.

This overview fact sheet summarizes the *Clean Water Act Section 404(g) Tribal and State Assumption Program* rule and rulemaking effort, highlights key improvements under the 2024 Rule and draws attention to some available resources for Tribes, states and stakeholders.

Background: Tribal and State Assumption Program and Rulemaking

What is CWA Section 404(g)? CWA Section 404 establishes a permitting program to regulate the discharge of dredged or fill material from a point source into waters of the United States. While the U.S. Army Corps of Engineers is primarily responsible for the administrative authority of permits, the CWA authorizes states, territories and eligible Tribes to take over, or assume, administrative authority over Section 404 permitting in some waters of the United States within their jurisdiction. The CWA Section 404(g) establishes the procedures and requirements for assuming and administering a Section 404 program. Even after a Tribe or state is approved to administer a CWA Section 404 program, the Corps retains permitting authority over certain waters of the United States and adjacent wetlands, and the EPA retains oversight of the program.

Why assume? An eligible Tribe or state may be interested in assuming the CWA Section 404 program for many reasons. For example, administering the CWA Section 404 program at the Tribe or state level provides opportunities for permitting efficiencies while reducing duplicative efforts between the Corps and the assuming Tribe or state. The assuming Tribe or state may also implement more environmentally protective practices than required under the CWA.

Why a rulemaking? Since CWA Section 404(g) was promulgated in 1977, Tribes and states expressing interest in assuming the program have outlined barriers to assuming the program. Some of these barriers include uncertainty regarding the scope of waters for which permitting authority can be assumed, confusion about the requirements and procedures for assuming and administering the program and lack of clarity over the EPA's oversight role. The 2024 Rule updates, streamlines and clarifies the substantive requirements and procedures to assume and administer the CWA Section 404 program as well as the EPA's oversight role. The 2024 Rule draws from the recommendation of the Federal Advisory Committee convened by the EPA to advise on certain assumption procedures. Visit the CWA Section 404(g) website to learn more about this effort.

Key Improvements under the 2024 Rule

The 2024 *Clean Water Section 404(g) Tribal and State Assumption Program* rule facilitates Tribal and state program assumption by making program assumption, administration and oversight procedures more straightforward and transparent. The 2024 Rule responds to Tribal, state and other stakeholder input as well as feedback received during the public comment period. For additional detail view the final rule preamble on the [CWA Section 404g website](#). The sections below highlight key improvements under the final rule.

CWA Section 404(g) Program Assumption and Administration Requirements and Procedures

The 2024 Rule modernizes and clarifies program assumption requirements, harmonizes program requirements with program operation, and responds to stakeholders' longstanding request to clarify the procedures for identifying which waters may be assumed by a Tribe or state. The final rule reaffirms programs must maintain and meet the CWA requirements and establishes clearer expectations and timelines for completing certain procedures. These changes will help increase transparency and certainty in the process.

Program Assumption Requirements. The 2024 Rule provides that when a Tribe or state seeks to assume the program, it must have the funding and staff to meet the regulatory requirements for program operation, including permit issuance, compliance evaluation and enforcement. These requirements help ensure that a Tribe or state seeking assumption has the necessary resources to carry out the program operation requirements.

Procedures for Describing Retained Waters. Under the program, the Corps retains a small subset of waters, whereas all other waters of the United States can be assumed by a Tribe or state. States have long identified a lack of clarity as to which waters are assumable as a key barrier to assumption. In response to these longstanding concerns, the 2024 Rule establishes a process for identifying which waters are assumable and which waters the Corps would retain following assumption. The 2024 Rule also establishes clear timeframes and procedures for Tribes or states to work with the Corps to develop and modify the retained waters description, as well as provides a new opportunity for the public to provide input on the scope of retained waters. Finally, the 2024 Rule clarifies that the Corps retains administrative authority over wetlands adjacent to Corps-retained waters of the United States. These revisions make the process of determining and modifying the scope of retained waters more collaborative and transparent.

Program Implementation Time Period. The 2024 Rule establishes a presumptive effective date for program assumption of 30 days from the date of publication of the notice of the EPA's program approval in the *Federal Register*. The effective date can be extended up to 180 days. This approach clarifies that Tribes and states seeking CWA Section 404 program assumption have additional time to effectively prepare to administer the program, including securing and allocating the necessary resources to successfully implement the assumed permitting program.

Consistent with the Clean Water Act Environmental Criteria. The 2024 Rule clarifies that Tribe- and state-issued permits must ensure compliance with federal requirements, while providing flexibility as to how they will meet these requirements. For example, all permits issued by a Tribe or state must ensure compliance with the substantive environmental criteria included in the CWA Section 404(b)(1) Guidelines, including compensatory mitigation. Nonetheless, Tribal and state CWA Section 404 programs may apply their specific knowledge to adopt effective permitting approaches to areas within their jurisdiction.

Requirements for Five Year Permits and Long-Term Projects. CWA Section 404(g) regulations limit CWA Section 404 permits to five years; however, some projects extend beyond this period. For projects that exceed beyond a five-year schedule, the rule requires a permit applicant to submit an analysis with the application for the first five-year permit that demonstrates compliance with the CWA Section 404(b)(1) Guidelines for the full term of the project. Permit applicants must apply for the new, subsequent five-year permit at least 180 days prior to expiration of the current permit. This process and timeline will maximize financial certainty and predictability for permittees while providing the Tribe or state and the public with information about the full scope of impacts of a permitted project.

Enforcement Requirements. The 2024 Rule establishes a certain degree of flexibility with respect to criminal enforcement of CWA requirements. It provides that states must have the authority to prosecute criminal violations committed with a negligence *mens rea*, but that they need not have authority to prosecute violations committed with simple negligence. This allows some degree of variability between federal and Tribal or state approaches to criminal enforcement. The 2024 Rule does not affect the obligation of Tribes and states to operate meaningful programs to abate permit program violations consistent with the regulatory requirements for Tribal and state criminal enforcement authority.

CWA Section 404 Program Oversight Requirements and Procedures

The EPA retains oversight authority of Tribal and state programs to ensure that they comply with the requirements of the CWA. The 2024 Rule clarifies the EPA's oversight role and elaborates on the requirements for program reporting rule as well as streamlining withdrawal procedures.

Program Reporting. The 2024 Rule clarifies that a Tribe's or state's annual report on program implementation must include specific metrics about compensatory mitigation, program resources, and staffing and discuss how issues identified in the previous annual report have been resolved. These clarifications will help ensure transparency around Tribal and state programs, help facilitate annual discussions between the Tribe or state and the EPA about program implementation and challenges. These updates to the regulations will improve transparency in the operation of assumed programs.

Dispute Resolution. The EPA is finalizing a new general provision that clarifies that the EPA may help to facilitate the resolution of disputes between federal agencies and a Tribe or state that administers or is seeking to administer a CWA Section 404 program. The EPA's involvement as a third party can help resolve impasses and ensure the program is administered consistent with the CWA requirements.

Withdrawal Procedures. The rule streamlines the process used by the EPA when withdrawing an assumed CWA Section 404 program from a previously eligible Tribe or state. Consistent with the EPA's longstanding practice, the agency will first seek to resolve program concerns and help enable Tribes and states to administer the CWA Section 404 program consistent with the requirements of the CWA and its implementing regulations.

Public Engagement in the Permitting Decisions

The 2024 Rule elucidates an existing requirement that States provide "descriptions" of their judicial review provisions in their program assumption packages by requiring that States provide an opportunity for judicial review of permit-related actions in state court. Tribes must also provide a commensurate form of citizen recourse for applicants and others affected by Tribe-issued permits.

Opportunities for Tribal Engagement

The 2024 Rule expands and clarifies on Tribal engagement opportunities. Tribes may obtain Treatment in a manner similar as a State, or TAS, status for purposes of commenting as an affected State on draft Tribal and state programs. The 2024 Rule clarifies Tribes with TAS for any CWA program may receive a heightened notice and comment opportunity for Tribe- or State-issued CWA Section 404 permits and establishes a new opportunity for Tribes to apply for TAS for the sole purpose of commenting as an affected State. Revisions to the regulatory requirements will also enable Tribes to request EPA review permits that may affect Tribal rights or interests within or beyond reservation boundaries. This approach promotes Tribal autonomy and efficiency by providing additional opportunities for Tribes to comment on draft permits and participate in the permitting process.

EPA resources for Tribes can be found on the [CWA Section 404g website](#).

Noteworthy Resources for Interested Parties

Tribes and states considering assuming the CWA Section 404 program may be interested in completing a feasibility study. A feasibility study helps a Tribe or state evaluate the benefits and costs associated with assumption and administration. Several states have already completed a feasibility study and those resources can be found on the [CWA Section 404\(g\) website](#). Additional resources, including funding opportunities, are available on the [Wetlands Program Development Grant website](#). The EPA can provide technical assistance in helping identify the type of information a Tribe or state may want to consider in their feasibility assessment. Please contact cwa404g@epa.gov to discuss your needs.

Tribes and states can already take on a major role in managing their aquatic resources and in the permitting process even without assuming the CWA Section 404 program. Some opportunities are included in the box to the right.

Example opportunities for Tribes and states to protect aquatic resources.

- Tribe or State Dredged or Fill Material Permitting Program
- State Programmatic General Permit

[Learn more about these and other opportunities at EPA.gov.](#)

Contact Information

For additional information, including the preamble and updated final regulations, fact sheets and other resources, please visit the EPA's [CWA Section 404g website](#) or contact cwa404g@epa.gov.