

## Proposed Rule: Revision of Clean Water Act Section 404 Tribal and State Program Regulations

On July 19, 2023, the U.S. Environmental Protection Agency (EPA) announced a proposed rule that would streamline and clarify the Agency's Clean Water Act (CWA) Section 404 state and Tribal Program Regulations. Clean Water Act section 404(g) authorizes states and Tribes to assume responsibility for administration of the section 404 program. The Agency's section 404(g) regulations were last revised in 1988. The CWA section 404 program addresses discharges of dredged or fill material into regulated waters.

### Background

Section 404(g) of the CWA authorizes states and Tribes to assume responsibility for administration of the section 404 program. States and Tribes do not assume responsibility for discharges into all waters of the United States; rather, the Corps retains responsibility for discharges into certain waters. Michigan, New Jersey, and Florida have approved section 404 programs they administer. Currently, no Tribes have assumed administration of the program.

### Key Elements of the Proposal<sup>1</sup>

- **Program Description**
  - The proposal clarifies what should be included in the program description when a state or Tribe requests to assume the section 404 program.
  - The proposal provides direction on how a state or Tribe can demonstrate their program is consistent with and no less stringent than federal requirements, and how they can ensure and demonstrate that permits they issue are consistent with the substantive environmental permit review criteria as laid out by EPA for section 404 permits.
- **Retained Waters/Adjacent Wetlands**
  - The proposal responds to longstanding requests from states and Tribes seeking clarity about which waters they can assume, and which waters are retained by the Corps.
  - Consistent with current practice, when a state or Tribe assumes a section 404 program, project applicants should request permits from the Corps for discharges into retained waters and from the state or Tribe for discharges into assumed waters of the United States.
- **Program Approval and Withdrawal Procedures**
  - The proposal responds to concerns from states that it can be challenging to immediately administer the program upon program approval.
  - The proposal provides for a default 30-day effective date between when EPA approves a state/Tribal section 404 program, and when the state or Tribe begins administering the program.

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<sup>1</sup> Certain proposed revisions are summarized in this fact sheet. However, the fact sheet is not comprehensive, and states, Tribes, and the public should consult the proposed rule published in the *Federal Register* for the Agency's proposed regulatory revisions.

- The proposal provides flexibility by allowing for the effective date to be extended to 120 days upon mutual agreement between EPA and the state or Tribe.
- The proposal revises the current program withdrawal process to increase clarity and harmonize the withdrawal procedures with the approval procedures.
- **Compensatory Mitigation**
  - The proposal clarifies state and Tribal responsibilities and requirements for compensatory mitigation and requires an opportunity for federal review of certain mitigation instruments established by the state or Tribe.
- **Long-term Permitting**
  - The CWA limits state and Tribal permits to five years in length, but some projects extend well beyond five years.
  - The proposal provides a clear approach for state and Tribal permitting of long-term projects, while also providing for the consideration of the full scope of environmental impacts.
- **Compliance and Enforcement**
  - The proposal clarifies that states and Tribes may prosecute violations under any criminal negligence standard, for purposes of state and Tribal CWA section 402 and 404 programs.
- **Additional Topics**
  - The proposal addresses several additional topics to address requests from states and Tribes regarding assumption of the section 404 program, administration of assumed programs, and Tribal requests for meaningful input on permits issued by other Tribes or states with an approved section 404 program.

## Public Input on This Action

The 60-day public comment period for this action (Docket ID No. EPA-HQ-OW-2020-0276) will begin when the proposed rule publishes in the *Federal Register*. The Agency will host one input meeting for states and two input meetings for Tribes in addition to a virtual public hearing during the public comment period. Tribes will also be offered the opportunity for formal consultation.

Please visit EPA's website at <https://www.epa.gov/cwa404g/current-efforts-regarding-assumption-under-cwa-section-404#rule> for additional information.