

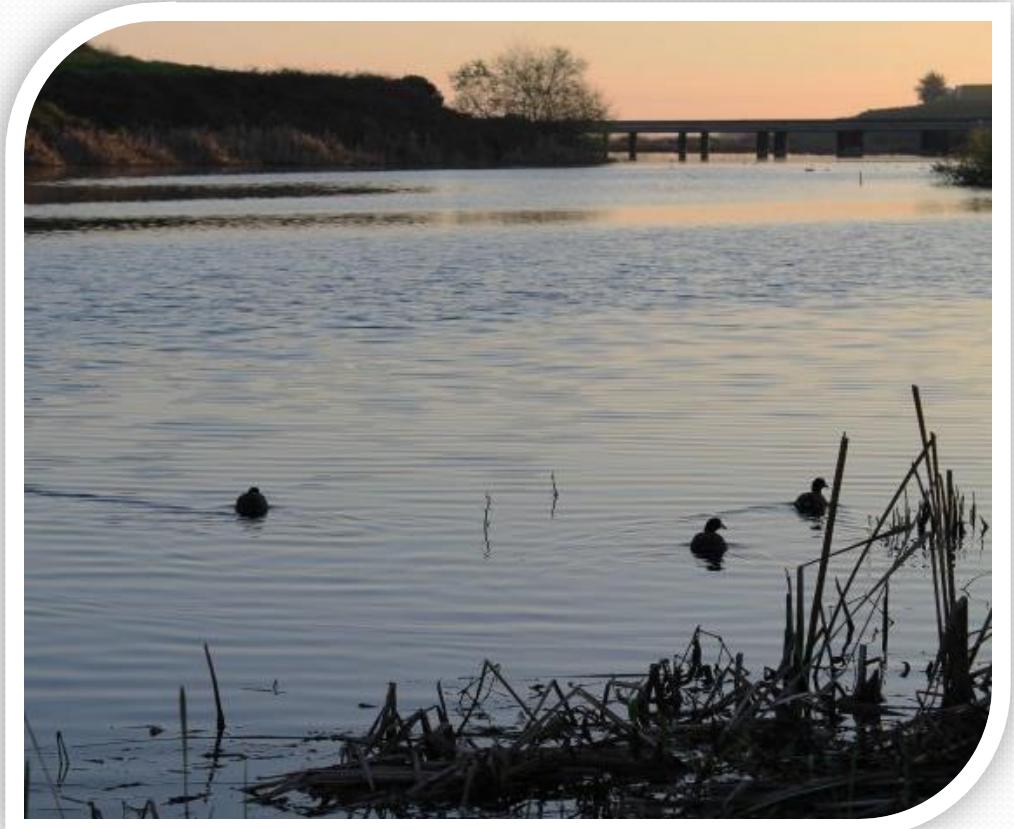
Clean Water Act: Section 404(g) Tribal & State Assumption of Section 404

Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency

Posted Date: December 22, 2025

Overview

- Section 404(g) background, administration requirements and procedures.
- Section 404(g) implementing regulations and the 2024 Rule.
- Resources.

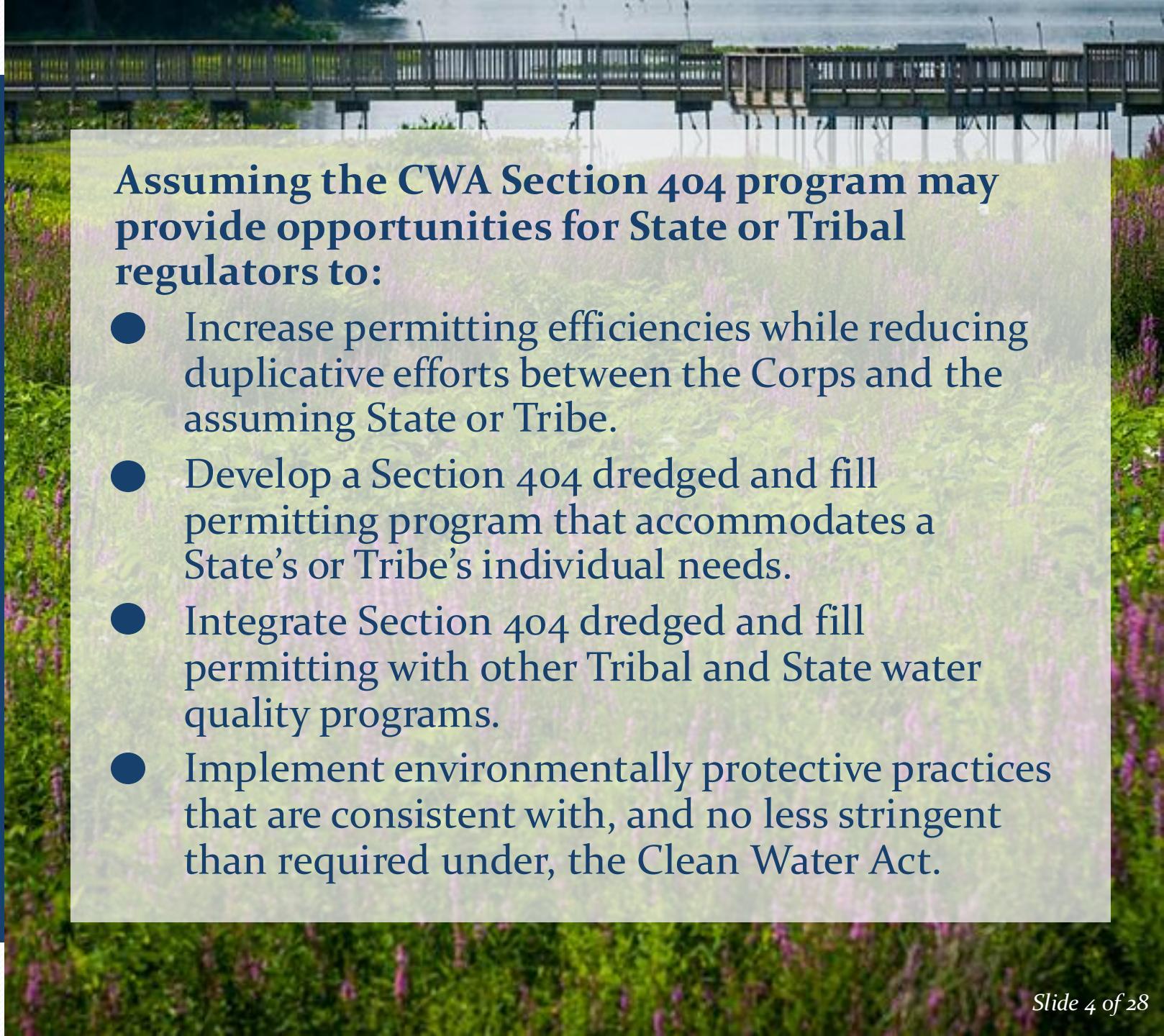


CWA Section 404(g): Background

Clean Water Act (CWA) Section 404(g) authorizes States and eligible Tribes to take over, or assume, administrative responsibilities over Section 404 dredged and fill permitting in certain waters of the United States.

- *Fulfills Cooperative Federalism by shifting Section 404 permitting responsibility from the federal government to the authorized State, which can increase permitting efficiency.*
- *Places States in the primary decision-making position for permitting discharges of dredged or fill material into certain waters of the United States.*

Why assume CWA Section 404?



Assuming the CWA Section 404 program may provide opportunities for State or Tribal regulators to:

- Increase permitting efficiencies while reducing duplicative efforts between the Corps and the assuming State or Tribe.
- Develop a Section 404 dredged and fill permitting program that accommodates a State's or Tribe's individual needs.
- Integrate Section 404 dredged and fill permitting with other Tribal and State water quality programs.
- Implement environmentally protective practices that are consistent with, and no less stringent than required under, the Clean Water Act.

Assumption: Requirements and Procedures

A State, Tribe, or Territory requesting to take over, or assume, a Clean Water Act Section 404 program must establish a program that is **consistent** with and **no less stringent than** the Clean Water Act requirements and implementing regulations.

Program Request and Approval

States submit their program description and supporting documents to EPA. The CWA provides EPA 120 days to review the program and determine if the requesting entity has the required authority to implement the proposed program under State law.

Program Implementation

The State takes over permitting responsibilities from the U.S. Army Corps of Engineers (Corps) in assumed waters of the United States within their jurisdiction and ensures compliance with the permit and program requirements.* The State is also responsible for coordinating with federal agencies and affected States.

Federal Oversight

EPA maintains oversight of the CWA Section 404 program.* EPA ensures the program remains compliant with the Clean Water Act and implementing regulations by reviewing certain permits and mitigation proposals as well as the State's annual report.

*Entities taking over the CWA Section 404 dredged and fill permitting program may integrate the CWA Section 404 with other water quality programs (e.g., monitoring and water quality standards). Regulation of non-WOTUS are not part of the approved CWA Section 404 program and thus are not subject to EPA oversight or enforcement.

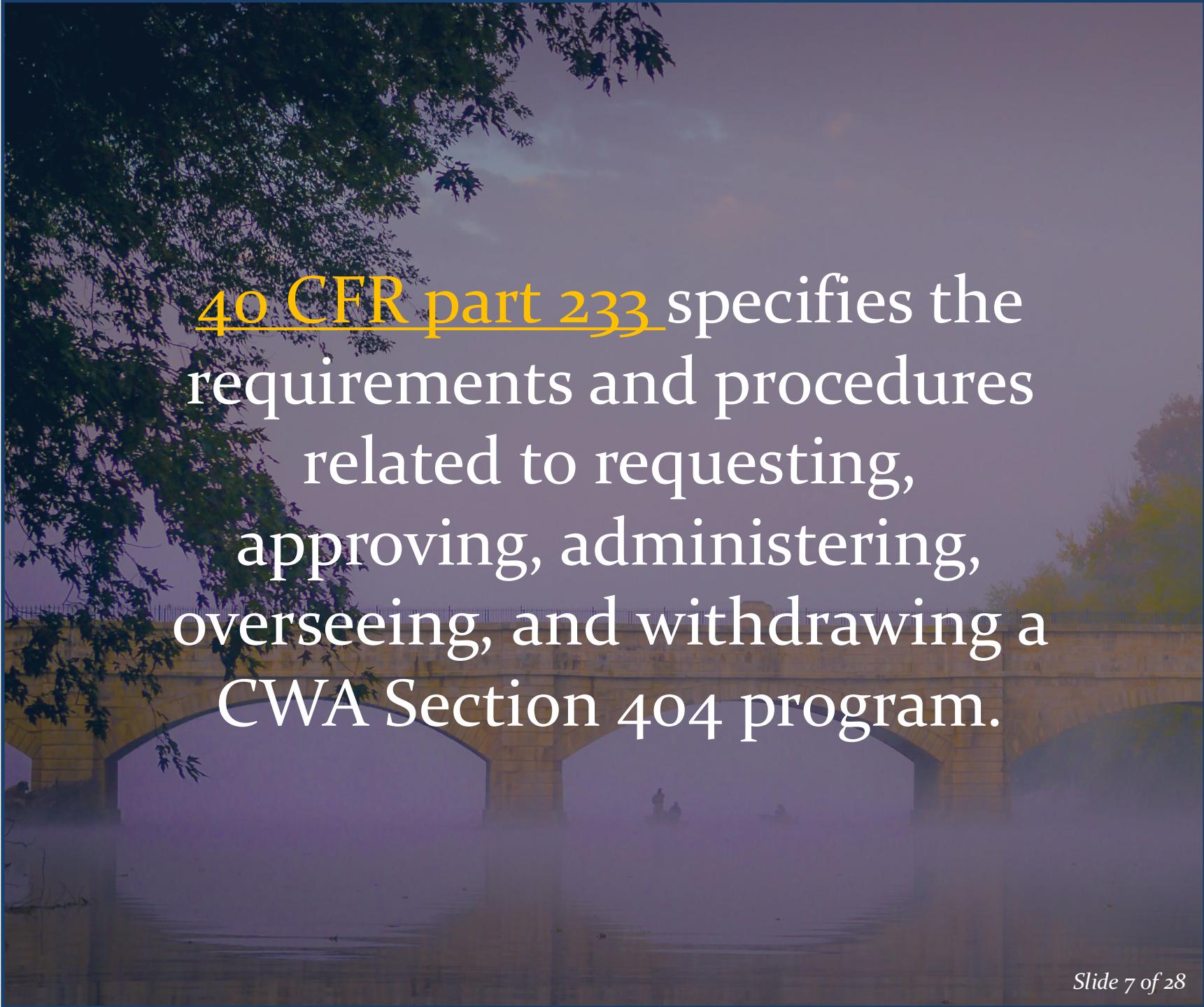
EPA-Approved Programs & Challenges to Assumption

- As of 2025, two States – Michigan and New Jersey – administer an EPA-approved CWA Section 404 dredged and fill permitting program.*
- Several States and Tribes have expressed interest in assuming CWA Section 404 but have identified challenges to assuming the program.

Identified Barriers to Assumption

- Lack of federal funding for State 404 programs (unlike for 402 NPDES program).
- Lack of clarity about which waters are assumable and the generally reduced scope of assumable waters.
- Need for more clarity about the requirements & procedures for requesting and administering the program.

CWA Section 404(g): Implementing Regulations Summary

A photograph of a stone arch bridge spanning a river. The bridge is in the foreground, with a dark, silhouetted tree branch in the upper left corner. The river flows under the bridge, and the background shows a hilly landscape with more trees and a clear sky.

40 CFR part 233 specifies the requirements and procedures related to requesting, approving, administering, overseeing, and withdrawing a CWA Section 404 program.

CWA Section 404(g): Implementing Regulations Summary

Subpart A – General

[\(40 CFR 233.1 - 233.4\)](#)

Describes the program purpose and scope, defines key terms, and addresses confidentiality of information and conflicts of interest.

Subpart B – Program Approval

[\(40 CFR 233.10 - 233.16\)](#)

Sets forth the elements of the program assumption package, including the program description. Establishes the procedures for seeking approval of and revisions to State programs.

Subpart C – Permit Requirements

[\(40 CFR 233.20 - 233.24\)](#)

Addresses requirements for general and emergency permits. Describes prohibited activities and permit conditions.

Subpart D – Program Operation

[\(40 CFR 233.30 - 233.39\)](#)

Lays out the requirements and procedures for processing a permit application, including public notice and a public hearing. Addresses the criteria for reviewing permit applications, as well as for issuing and modifying a permit. Describes coordination with States that may be affected by the proposed discharge. Addresses expiring permits and electronic reporting requirements.

CWA Section 404(g): Implementing Regulations Summary

Subpart E – Compliance Evaluation and Enforcement (40 CFR 233.40 - 233.41)

Establishes requirements for State compliance evaluation programs.

Subpart F – Federal Oversight

(40 CFR 233.50 - 233.53)

Describes EPA's oversight of State-issued permits and third-party mitigation instruments, sets forth the requirements of a State's program report, and establishes the requirements and procedures for voluntarily transferring responsibilities back to the Corps or withdrawing EPA's approval of a State program.

Subpart G – Eligible Indian Tribes

(40 CFR 233.60 - 233.62)

Lays out Tribal eligibility criteria and outlines the procedures for processing assumption requests from Indian Tribes.

Subpart H – Approved State Programs

(40 CFR 233.70 - 233.71)

Codifies EPA's approval of Michigan's and New Jersey's programs and incorporates certain State laws by reference.

ENVIRONMENTAL PROTECTION
AGENCY

40 CFR Parts 123, 124, 232, and 233

[EPA-HQ-OW-2020-0276; FRL-6682-01-OW]

RIN 2040-AF83

Clean Water Act Section 404 Tribal and State Assumption Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing revisions to the regulations governing Clean Water Act

longstanding requests from Tribes and States to clarify the requirements and procedures for assuming and administering the section 404 program. The revisions facilitate Tribal and State assumption of the section 404 program, taking the procedures and substantive requirements for assumption transparent and straightforward. The revisions clarify the minimum Tribal and State programs while ensuring flexibility to accommodate individual Tribal and State needs. The revisions add clarity to criminal liability for the CWA section 404 program, as well as making corresponding changes in the corresponding changes in the section 404 program regulations. The revisions are associated with the section 404 Tribal and State program regulations.

DATES: This rule is effective on January 17, 2025. The incorporation by reference of certain material listed in the rule is approved by the Director of the Federal Register as of January 17, 2025.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-HQ-OW-2020-0276. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available in hard copy form. Publicly

available docket materials are available electronically through <https://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Table of Contents

A. Statutory and Regulatory History
B. Need for Rulemaking Revisions
C. Program Overview
D. Compliance Evaluation and Enforcement
E. Rulemaking
F. Other Considerations
G. Technical Revisions
H. Incorporation by Reference

Planning and Review, Executive Order 13563: Improving Regulation and Regulatory Review and Executive Order 13771: Executive Order on Environment, Public Health, and Safety

D. Unfunded Mandates Reform Act (UMRA) and Executive Order 13211: Unfunded Mandates

E. Executive Order 13354: Executive Order on Promoting the Rule of Law Through Executive Order 13204: Executive Order on Promoting Regulatory Fairness

F. Executive Order 13365: Executive Order on Promoting Regulatory Fairness

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

H. Executive Order 13162: Executive Order on Tribal Consultation

I. Executive Order 13211: Executive Order on Promoting Regulatory Fairness

J. Executive Order 13232: Executive Order on Promoting Regulatory Fairness

K. Executive Order 13250: Executive Order on Promoting Regulatory Fairness

L. Executive Order 13279: Executive Order on Promoting Regulatory Fairness

M. Executive Order 13354: Executive Order on Promoting Regulatory Fairness

N. Executive Order 13365: Executive Order on Promoting Regulatory Fairness

O. Executive Order 13211: Executive Order on Promoting Regulatory Fairness

P. Executive Order 13232: Executive Order on Promoting Regulatory Fairness

Q. Executive Order 13279: Executive Order on Promoting Regulatory Fairness

R. Executive Order 13354: Executive Order on Promoting Regulatory Fairness

S. Executive Order 13365: Executive Order on Promoting Regulatory Fairness

T. Executive Order 13211: Executive Order on Promoting Regulatory Fairness

U. Executive Order 13232: Executive Order on Promoting Regulatory Fairness

V. Executive Order 13279: Executive Order on Promoting Regulatory Fairness

W. Executive Order 13354: Executive Order on Promoting Regulatory Fairness

X. Executive Order 13365: Executive Order on Promoting Regulatory Fairness

Y. Executive Order 13211: Executive Order on Promoting Regulatory Fairness

Z. Executive Order 13232: Executive Order on Promoting Regulatory Fairness

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EE. Executive Order 13232: Executive Order on Promoting Regulatory Fairness

FF. Executive Order 13279: Executive Order on Promoting Regulatory Fairness

GG. Executive Order 13354: Executive Order on Promoting Regulatory Fairness

HH. Executive Order 13365: Executive Order on Promoting Regulatory Fairness

II. Executive Order 13211: Executive Order on Promoting Regulatory Fairness

JJ. Executive Order 13232: Executive Order on Promoting Regulatory Fairness

KK. Executive Order 13279: Executive Order on Promoting Regulatory Fairness

LL. Executive Order 13354: Executive Order on Promoting Regulatory Fairness

MM. Executive Order 13365: Executive Order on Promoting Regulatory Fairness

NN. Executive Order 13211: Executive Order on Promoting Regulatory Fairness

OO. Executive Order 13232: Executive Order on Promoting Regulatory Fairness

PP. Executive Order 13279: Executive Order on Promoting Regulatory Fairness

QQ. Executive Order 13354: Executive Order on Promoting Regulatory Fairness

RR. Executive Order 13365: Executive Order on Promoting Regulatory Fairness

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TT. Executive Order 13232: Executive Order on Promoting Regulatory Fairness

UU. Executive Order 13279: Executive Order on Promoting Regulatory Fairness

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WW. Executive Order 13365: Executive Order on Promoting Regulatory Fairness

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Overview of Section 404(g) & Rulemaking



This slide does not present a comprehensive summary of the program's history and rulemaking activities. To learn more about Section 404(g)'s program history, rulemaking and engagement efforts, please read the [2024 Final Rule Preamble](#).

EPA's Rulemaking Effort

- EPA convened a Federal Advisory Subcommittee and engaged with States, Tribes, other stakeholders to identify the best approach to resolve concerns and barriers to assumption.
- Additionally, the Agency responded to public input received on the proposed rule during the public comment period.



The next slide highlights some key moments in Section 404(g)'s history and rulemaking effort.

Final Rule: Overview

Provisions discussed in the proposed and final rule preamble.

Subpart A

General

- Program Scope
- Compliance with CWA 404(b)(1) Guidelines
- Stringency Requirements
- Conflict of Interest
- Dispute Resolution

Subpart B

Program Approval

- Program Assumption Requirements
- Retained Waters
- Delayed Effective Date

Subpart C

Permit Requirements

- Judicial Review

Program Operation

- Commenting as an affected State
- Five-Year Permits for Long-Term Projects

Subpart D

Compliance Evaluation & Enforcement

- Enforcement

Subpart E

Federal Oversight

- Program Reporting
- Third-Party Compensatory Mitigation Instruments
- Withdrawal Provisions
- Opportunities for EPA review of certain permits that may affect Tribal rights or interests

Subpart F

Subpart A: General Requirements

Program Scope. 40 CFR 233.1.

The 2024 Rule:

- Clarifies that an assuming State must demonstrate it will have authority to issue permits for all non-exempt discharges of dredged and fill material to all waters of the United States within its jurisdiction except for discharges to the subset of waters of the United States (“retained waters”) over which the Corps retains administrative authority pursuant to CWA section 404(g)(1).
- Maintains EPA’s long-held position that the CWA does not authorize partial or phased assumption. The preamble discusses other actions Tribes and States can take if they are not prepared to assume the entire program.

Subpart A: General Requirements (cont.)

Compliance with 404(b)(1) Guidelines & No Less Stringent than the Federal Requirements. 40 CFR 233.1.

The 2024 Rule:

- Outlines approaches that States and Tribes can undertake to demonstrate that they have sufficient authority to issue permits that apply and assure compliance with the CWA 404(b)(1) Guidelines. *See the 2024 Rule Preamble for this discussion.*
- Codifies the principle that States and Tribes may not compensate for making one requirement more stringent than required by making another requirement more lenient. 40 CFR 233.1(e).
- Clarifies that references to the Corps as the permitting authority in subpart J of the CWA 404(b)(1) Guidelines (addressing compensatory mitigation) apply to the State or Tribal permitting agency or decisionmaker, as appropriate. 40 CFR 233.1 (e).

Subpart A: General Requirements (cont.)



Dispute resolution. 40 CFR 233.1(f).

The 2024 Rule states that EPA may help to resolve disputes between the State or Tribe and Federal agencies. The State or Tribal Memoranda of Agreement may articulate specific procedures for resolution or elevation procedures, or disputes could be addressed on a case-by-case basis.

Conflict of Interest. 40 CFR 233.4.

The 2024 Rule prohibits any individual with responsibilities over the Section 404 program from participating in matters in which they have a direct personal or pecuniary interest, including any decisions by the State or Tribal agency as well as any entity that reviews decisions of the agency.

Subpart B: Program Approval

Program Description Requirements.
40 CFR 233.11.

Generally speaking, the 2024 Rule harmonizes the requirements for the program description with the requirements for program operation and facilitates EPA's ability to ensure that Tribal and State permits can comply with CWA requirements (including 404(b)(1) Guidelines).



For Example, the 2024 Rule:

- Clarifies that the program description must demonstrate that all agencies participating in the Section 404 permitting process have sufficient funding and staff to carry out the existing regulatory requirements for program operation, compliance evaluation and enforcement.
- Requires States and Tribes to ensure that all permits will apply and ensure compliance with the substantive criteria for compensatory mitigation consistent with subpart J.
40 CFR 233.11(k).

Subpart B: Program Approval (cont.)

Retained Waters. 40 CFR 233.11(i).

CWA section 404(g) provides that a State or Tribe may request to assume the 404 dredged and fill permitting program for all waters of the US within its boundaries, **“other than:”**

“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 ... including wetlands adjacent thereto.”



The 2024 Rule:

- Clarifies procedures for determining which waters and adjacent wetlands will be retained by the Corps following assumption (i.e., “retained waters description”).
- Establishes procedures for requesting the retained waters description, including establishing timelines and creating an opportunity for public input.
- Updates the procedures for modifying the retained waters descriptions.

Contents of the Retained Waters Description

WOTUS = Waters of the United States

Surface waters that are WOTUS

- Start with the most recently published Rivers and Harbor Act (RHA) section 10 list; and
- Modify to meet the language of the CWA: only waters known to be presently used or susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce are retained.

Adjacent wetlands that are WOTUS

- The default understanding is that the Corps will retain all wetlands “adjacent” to retained waters.
- In the future the EPA may consider proposed programs that establish administrative boundaries through adjacent wetlands, landward of which the State administers the program.

The Corps retains CWA section 404 permitting authority for all non-assumed waters as well as Rivers and Harbors Act (RHA) section 10 permitting authority in all waters subject to RHA section 10. For example, States generally do not assume CWA section 404 authority over Tribal waters or waters in Lands of Exclusive Federal Jurisdiction.

Developing the Retained Waters Description.

See 40 CFR 233.11(i)

- 1 The State or Tribe **submits** their request to EPA.
- 2 EPA **transmits** the request to the Corps.
- 3 The Corps **has up to 30 days to inform** the requesting State or Tribe if they will proceed.
 - 3a If the Corps agrees, the Corps **has up to 180 days** to provide the description to the requesting State or Tribe.
 - 3b If the Corps declines, the State or Tribe may develop the retained waters description following the procedures pursuant to § 233.11(i)(4).
- 4 EPA **notifies the public** of the retained waters description request. The **public has up to 60 days** from EPA's public notification to submit input to the Corps and/or State or Tribe.

Revising an Approved Program

Revising the Retained Waters Description. 40 CFR 233.16.

The previous implementing regulations required States and Tribes to follow the substantive revisions procedures for all modifications to the retained waters description.



- The 2024 Rule revises the regulations at § 233.16(d)(3) to clarify that certain additions of waters from the retained waters description does not require a State or Tribe to follow the substantive revisions procedures.
- Additionally, the 2024 Rule requires that the requesting State or Tribe and the Corps must now establish a process for revising the retained waters description following updates to the Rivers and Harbors Act section 10 list. See § 233.14(b)(4).

Subpart B: Program Approval (cont.)

Program Effective Date. 40 CFR 233.13(b)(5).

*Under the previous regulations,
State or Tribal programs became
effective immediately following
EPA's approval being posted in the
Federal Register.*



The 2024 Rule allows for a delay of the State's program effective date.

The program transfer from the Corps to the approved State or Tribe takes effect 30 days from Federal Register notice of program approval, except where EPA and the State or Tribe have established a later effective date, not to exceed 180 days.

- *Delayed implementation allows involved parties time to prepare for taking on the responsibilities of administering the program.*

Subpart C: Permit Requirements

Judicial Review. 40 CFR 233.24

- The 2024 rule codifies the requirement that States seeking to assume the section 404 program must provide an opportunity for judicial review in State court of the final approval or denial of permits by the State.
- The 2024 rule also requires Tribes to provide a commensurate form of citizen recourse for applicants and others affected by Tribe-issued permits.



Subpart D: Permit Operation



Five-year permits and long-term projects. 40 CFR 233.30.

The 2024 Rule requires that permit applications for projects exceeding 5 years must assess the water quality impacts of the full scope of the project for each five-year permit. This offers a greater degree of economic certainty to permittees and ensures a comprehensive 404(b)(1) Guidelines analysis.

Commenting as an Affected State. 40 CFR 233.31.

The 2024 Rule clarifies Tribes with TAS for any CWA provision may comment as an affected State. The 2024 Rule also provides an opportunity for Tribes to request TAS for the sole purpose of commenting as an affected State under the 404(g) program.



Subpart E: Compliance Evaluation & Enforcement

Criminal Enforcement. 40 CFR 233.41.



The 2024 Rule clarifies that States may implement any criminal negligence *mens rea* for their CWA authorized programs, and that they need not authorize prosecutions based on simple negligence.

Subpart F: Federal Oversight

Third-party compensatory mitigation. 40 CFR 233.50.

Requires any instruments associated with third-party compensation mechanisms (e.g., in-lieu fee programs and mitigation banks) to be sent to EPA, the Corps, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service for review, as well as to any State or Tribal resource agencies to which the State or Tribal committed to send draft instruments in the program description.

Waiver of Review. 40 CFR 233.51.

Allows Tribes to request EPA review of draft permits that could affect Tribal rights or interests.

Program Reporting. 40 CFR 233.52.

Updates the contents of a State or Tribe's annual report to EPA (e.g., clarifies what is expected as a self-assessment and adds reporting on compensatory mitigation and resources/staffing).

Withdrawal. 40 CFR 233.53.

Replaces the adjudicatory hearing process with a more streamlined approach modeled on the Underground Injection Control (UIC) program.

Subpart H: Impacts to State-Approved Programs



Whether revisions to existing State-assumed programs are needed depend on the programs' existing authority and their implementation procedures, as well as the interpretation of these authorities and processes by State Attorneys General or State courts.

- Implementing States may already have some or all of the authority or procedures in place that these provisions require.
- States that do not have the authority required to administer the provisions of the final rule would need to submit a program revision for EPA approval after issuance of the final rule in accordance with 40 CFR 233.16.

Please contact your [EPA region](#) to determine any necessary changes to your EPA-approved Section 404 program.

Resources



www.epa.gov/cwa404g

Documents and Outreach Materials

- Rule, Economic Analysis, and Response to Comment.
- One-page and overview factsheets.
- Presentations.

Interested in Assumption?

- Apply for [grant dollars](#) to complete a feasibility study.
- Contact your [EPA region](#) to discuss program details.

Not ready to Assume?

- Explore other opportunities to oversee aquatic resources.
- For example:
 - *State or Tribal Section 404 Dredged and Fill Permit Programs, or*
 - *State Programmatic General Permits.*

Questions? Contact us at cwa404g@epa.gov.