

ISSUE SUMMARY:

The Clean Water Act section 404 establishes a framework and provisions for the U.S. Army Corps of Engineers and the EPA to jointly manage permitting for “discharges of dredge or fill material from a point source into a water of the United States.” In 1977, Congress amended CWA section 404 to allow states to administer their own dredged or fill material permitting program in certain waters of the United States within their jurisdiction, subject to EPA approval. CWA section 404(g); <https://www.epa.gov/cwa-404/overview-clean-water-act-section-404>. The states of Michigan and New Jersey currently administer section 404 programs. The EPA’s approval of Florida’s section 404 program was vacated in 2024.

Over the years, the EPA has heard from stakeholders expressing concerns regarding the 1988 regulations (40 CFR 233) and requested that the regulation be updated to provide additional process clarity and certainty. States have identified challenges to assuming the program, including lack of clarity as to which waters they can assume, lack of funding to administer the program, and the inability to only assume part of the program. In 2022, the EPA initiated a rulemaking to modernize the 1988 regulations. On August 14, 2023, the EPA published a proposed rule that would streamline and clarify the requirements and steps necessary for states and Tribes to administer CWA section programs.

<https://www.epa.gov/cwa404g/current-agency-efforts-regarding-assumption-under-cwa-section-404>

UPCOMING MILESTONES:

The EPA is considering public comments before taking final action.

BACKGROUND:

A Tribe or state administering a section 404 program is responsible for permitting discharges of dredged and fill material, taking enforcement actions with respect to unauthorized discharges, and ensuring compliance with the terms and conditions of permits under the Tribe’s or state’s authority. The EPA maintains oversight of Tribal and state section 404 programs.

Only Michigan and New Jersey currently administer the section 404 program. In August 2020, the state of Florida requested EPA approval for CWA section 404 assumption. The EPA approved Florida to assume the program in December 2020. However, on February 15, 2024, the U.S. District Court for the District of Columbia vacated the U.S. Fish and Wildlife Services’ Biological Opinion and Incidental Take Statement for the Environmental Protection Agency’s approval of Florida’s CWA Section 404 Program and vacated the EPA’s approval of Florida’s program on Endangered Species Act grounds. Since then, the court has denied requests for a partial stay and a stay pending appeal. As a result, the U.S. Army Corps of Engineers is currently the permitting authority for CWA section 404 in the state of Florida. EPA and Defendant-Intervenor the State of Florida have appealed the district court’s decision, and that appeal is pending.

In 2022, EPA initiated a rulemaking to modernize the 1988 regulations governing the process that a state or Tribe must follow to assume the CWA section 404 permitting program and administer consistent with the Clean Water Act.

KEY EXTERNAL STAKEHOLDERS:

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|--|---|--|--|---|--|
| <input checked="" type="checkbox"/> Congress | <input checked="" type="checkbox"/> Industry | <input checked="" type="checkbox"/> States | <input checked="" type="checkbox"/> Tribes | <input checked="" type="checkbox"/> Media | <input checked="" type="checkbox"/> Other Federal Agency |
| <input checked="" type="checkbox"/> NGO | <input checked="" type="checkbox"/> Local Governments | <input type="checkbox"/> Other (name of stakeholder) | | | |

MOVING FORWARD:

The Regulatory Agenda reflects the EPA finalizing the regulatory revision in December 2024. Following finalization, the EPA would implement the final rule through outreach, training and technical assistance to:

- promote consistent practices in the EPA headquarters and regional offices;
- help ensure Tribes, states, and territories understand final rule requirements; and

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- help federal agencies understand their obligations under section 404(g).

The EPA will continue to coordinate with DOJ on litigation.