



FAQs: Clean Water Act Section 404 Program for Dredged or Fill Material

A Fact Sheet for Tribal Wetland Programs



November 2023

Q: What Does Clean Water Act (CWA) Section 404 Require?

A: CWA §404 regulates the discharge of dredged or fill material into waters of the United States (WOTUS), including wetlands. Examples of activities that might be discharging into WOTUS and regulated under §404 include: housing and other land development; dams, levees, and other water resource projects; highways and other types of infrastructure; and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into WOTUS, unless the activity is exempt from Section 404 regulation.

Q: Who Administers the Section 404 Program?

A: The U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) co-administer the CWA section 404 program. The Corps runs the day-to-day permitting program, conducts or verifies “jurisdictional determinations” (which indicate whether waters into which a project would discharge are WOTUS), jointly develops policy and guidance with EPA, and shares enforcement authority with EPA. EPA develops and interprets policy and environmental considerations, determines the scope of WOTUS and applicability of exemptions, approves and oversees state and tribal assumption of the §404 program, reviews individual permit applications, can veto use of any defined area as a site for disposing of dredged or fill material, and shares enforcement authority with the Corps.

Q: Can Tribes Administer the Section 404 Program?

A: Yes. CWA §404(g) authorizes Tribes and states to apply to administer (or “assume”) a program that manages environmental impacts of dredge or fill material discharges in certain waters, in lieu of the federal program administered by the Corps and EPA. Currently, no Tribes and three states (MI, NJ, FL) have assumed the program. When a Tribe assumes the §404(g) program, permits for discharges into assumed waters would be issued by the Tribe instead of the Corps. An assumed dredged/fill program must be consistent with and no less stringent than the requirements of the CWA and associated regulations. The assumed program must include, at a minimum: (1) permitting procedures; (2) administrative and judicial review procedures; (3) regulation of discharges into all assumed waters within the Tribe’s jurisdiction; (4) regulation of at least the same scope of activities as the federal §404 program; (5) public participation; (6) meeting public notice requirements; (7) permit issuance consistent with the environmental review criteria known as the CWA §404(b)(1) Guidelines; (8) compliance and enforcement authorities as specified in the regulations; and (9) coordination procedures with federal agencies, adjacent states and tribes. In August 2023, EPA proposed changes to the regulations establishing the process of assuming the §404 program. Those changes likely will be finalized during 2024. The proposal may be viewed at [Current Agency Efforts Regarding Assumption under CWA Section 404 | US EPA](#)

Q: What is the Basic Premise of the Section 404 Program?

A: The basic premise of the §404 program is that no discharge of dredged or fill material may be permitted if (1) a practicable alternative exists that is less damaging to the aquatic environment, or (2) the nation’s waters would be seriously degraded.

Q: What Is Considered When Evaluating a Section 404 Permit Application?

A: The CWA requires an individual §404 permit for potentially significant impacts from discharges of dredged or fill material. A permit action will include both environmental and public interest considerations, as well as opportunities for public input. Environmental considerations for evaluating a potential permit are laid out under the CWA §404(b)(1) Guidelines (which are mandatory despite the name). Under the Guidelines, the reviewer of a permit application will consider whether less environmentally damaging alternatives are available, and if the project would result in significant degradation. A successful application for an individual §404 permit also must show the project will not violate water quality standards, will not jeopardize endangered species, that it will take steps to avoid impacts to wetlands and other aquatic resources, that it will minimize aquatic resource impacts, and that the project will provide compensatory mitigation for remaining unavoidable impacts. A permit application also will be evaluated using public interest considerations, such as the National Environmental Policy Act (NEPA) and the National Historic Preservation Act. A draft permit will be subject to applicable tribal consultation requirements, public notice and comment requirements, and CWA §401 water quality certification.

Q: Do Regulated Projects Always Need an Individual Section 404 Permit?

A: No. A general permit may be suitable for most discharges of dredged or fill material that will have only minimal adverse effects, both individually and cumulatively. General permits are issued on a nationwide, regional, or state/tribal basis for particular categories of activities such as utility line backfill and minor road maintenance. The general permit process eliminates individual review and allows certain activities to proceed with little or no delay, provided that the general and specific conditions for the applicable general permit are met.

Q: Do All Discharges of Dredged or Fill Material into WOTUS Require a §404 Permit?

A: No. Congress felt some activities resulting in discharges of dredged or fill material were so important that they should be exempt from §404 permitting requirements in many circumstances. As a result, CWA §404(f) provides exemptions from the requirement to get a permit for discharges of dredged or fill from specified types of activities. CWA §404(f)(1) exempts discharges from specified activities including, for example, ongoing farming, construction or maintenance of farm and forest roads, and maintenance of drainage ditches. If the exempted discharge results from a new use and it would reduce the size or circulation of the affected water, §404(f)(2) “recaptures” the discharge and the project would require a permit.

For Additional Information

For more information on the §404 program, go to [Section 404 of the Clean Water Act: Permitting Discharges of Dredge or Fill Material | US EPA](#)

For more information about tribal assumption of the §404 program, visit [Basic Information about Assumption under CWA Section 404 | US EPA](#), and NAWM’s fact sheet on Treatment In a Similar Manner as A State (TAS) Authority (available to download [here](#)).