

State/Tribal Assumption Under Section 404 of the Clean Water Act: U.S. Environmental Protection Agency Finalizes Amendments



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The United States Environmental Protection Agency (“EPA”) issued a final rule on December 11th whose purpose is described as to:

...streamline, modernize, and clarify the procedures for states, territories, and authorized tribes to administer programs that protect local waterbodies.

EPA states that this is the first comprehensive update to the Clean Water Act Section 404(g) Tribal and State Assumption Program regulations in 35 years.

Section 404 of the Clean Water Act establishes a program to regulate the discharge of dredged or fill material into Waters of the United States. These include wetlands.

Activities in Waters of the United States regulated pursuant to Section 404 include, for example:

- Fill for development.
- Water resource projects (such as dams and levees).
- Infrastructure development.
- Mining projects.

Section 404 requires a permit before dredged or fill material may be discharged into Waters of the United States. Certain exemptions are provided by the statutory language for some farming and forestry activities.

No discharge of dredged or fill material may be permitted under the federal regulations if:

1. A practical alternative exists that is less damaging to the aquatic environment; or,
2. Waters of the United States would be significantly degraded.

Such proposed activities are regulated through a permit review process staffed by the United States Corps of Engineers (“Corps”).

The Corps divides portions of the United States for regulation purposes into various districts. Three areas of Arkansas are encompassed by Corps district headquarters which include:

- Little Rock District.
- Vicksburg District.

- Memphis District.

Section 404(g) provides states and tribes the opportunity to submit to EPA a request to assume administration of the Section 404 program in certain waters within state or tribal jurisdiction. The regulations establishing the requirements for state or tribal assumption of the 404 program are codified at 40 C.F.R. Parts 232 and 233.

Despite the ability to obtain delegation of the 404 program, since the early 1970's only three states have obtained delegation of this program. This is in contrast to the Clean Water Act National Pollutant Discharge Elimination System Program which has been delegated to most states (including Arkansas).

The 93rd Arkansas General Assembly in 2021 enacted legislation that would authorize the Arkansas Department of Energy and Environment – Division of Environmental Quality (“DEQ”) to seek and accept delegation of the Section 404 Clean Water Act program. DEQ, to date, has not submitted an application for assumption of the program.

EPA indicates that a number of states and tribes have expressed interest in administering the program. However, the federal agency also indicates that the states, tribes, and other stakeholders identified barriers to assumption and requested that certain program requirements and procedures be clarified.

EPA states that key components of the December 11th final rule address:

- Clarification of program assumption requirements.
- Establishing transparent timeframes and procedures.
- Ensuring state and tribal programs meet Clean Water Act requirements.
- Enhancing tribal engagement opportunities.
- Creating new opportunities for meaningful public engagement.

A link to the federal register notice can be found [here](#).