

Section 404 Program Frequently Asked Questions

1. What is Senate Bill 27?

Senate Bill (SB) 27, enacted in May 2013, establishes authority for the Department of Environmental Conservation (DEC), in coordination with the Department of Natural Resources (DNR), to evaluate and take all actions necessary to receive federal authorization to administer and enforce (i.e., assume) a state dredge and fill permitting program, as authorized under Section 404 of the federal Clean Water Act, 33 U.S.C. §1344 (CWA or Act).

2. What is Section 404 of the Clean Water Act?

Section 404 regulates discharges of dredged or fill material into nation's waters and wetlands, requiring a section 404 permit issued by the U.S. Army Corps of Engineers (Corps) before dredge and fill material may be discharged into waters of the U.S. The Section 404 Program is administered by the Corps.

The regulated activities typically requiring a section 404 permit include:

- discharging dredged or fill material in waters of the U.S., including wetlands;
- site improvement fill for residential, commercial, or recreational development;
- construction of revetments, groins, breakwaters, levees, dams, dikes, and weirs; and
- placement of riprap and fill material for roads, airports, or buildings.

3. What are waters of the U.S.?

While the Section 404 Program is often described as a wetlands program, it applies to all "waters of the United States," not just wetlands. The current regulatory definition of "waters of the United States" includes the following seven categories of "waters":

- waters used in interstate or foreign commerce;
- interstate waters;
- other intrastate waters the use of which could affect interstate or foreign commerce;
- impoundments of waters that fall into the definition of waters of the United States;
- tributaries of the waters in categories (1)-(4);
- territorial seas; and
- wetlands adjacent to "waters."

4. What does state assumption of the Section 404 Program mean?

In 1977, Congress amended the Act by adding section 404(g), which allows individual states to "assume" regulatory authority over its own individual and general permit program for the discharge of dredge and fill material into waters of the state, except the following waters over which the Corps retains permitting authority as provided in section 404(g)(1) of the Act:

- waters subject to the ebb and flow of the tide (e.g., coastal waters);
- waters currently used for interstate or foreign commerce;
- waters susceptible to use for interstate or foreign commerce; and
- wetlands adjacent to the above-described waters.

When a state assumes administration over the federal 404 Program, the state accepts responsibility for implementing and enforcing all aspects of the program, including conducting jurisdictional determinations, processing permit applications, and ensuring compliance with the program.

5. What is EPA's Role in Assumption?

EPA is responsible for approving a state assumption program, and once approved, provides overall program oversight on state section 404 programs to ensure compliance with federal standards. An approved state section 404 Program is operated under the provisions of EPA's section 404 State Program Regulations, found at 40 CFR Part 233. These regulations define not only the process for requesting approval of a state program, but also the operation of a state program. As noted in the preamble to these regulations, the relationship between the EPA and the state in an assumed program is intended to be a partnership.

Under a state-assumed program, EPA must receive copies of all permit applications submitted to the state, and retains the ability to file objections and veto permits. While all permit applications received by the state are subject to review by EPA, EPA typically waives review of all but a small percentage (2-5% on an annual basis). However, if EPA does review a project and objects to issuance of a permit, the state may not issue a section 404 permit unless the objection is resolved. States must also provide EPA with an annual report that summarizes permitting and enforcement actions taken during the year.

6. What is "fill material"?

Fill material is any substance placed in waters of the United States where the material has the effect of either replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water. Examples of fill material include rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in waters of the United States. [USACE SPN-2003-01 and 33 CFR 323.2(5) (e)(1)]

7. When is a permit required?

Any activity that involves dumping, placing, or depositing, or discharging dredged or fill material into waters of the U.S., or activities that have the effect of fill requires a permit from the Corps of Engineers. Examples of projects likely to require a 404 permit include: mining, oil and gas projects, breakwaters, levees, dams and dikes, placement of riprap for roads and airports and housing or recreational developments on wetlands.

8. What types of permits are available?

The Corps of Engineers issues several types of permit depending on the type of activity and the level of wetland impact, including Nationwide Permits, Regional General Permits, and Individual Permits. Nationwide Permits authorize specific activities which are usually minor in scope and result in no more than minimal adverse environmental impacts. Regional General Permits authorize a general category of activities when the activities are similar in nature and cause minimal environmental impact. Individual permits authorize larger projects only after a full public interest review and an evaluation of the project's benefits and level of environmental impact.