404 Assumption Fact Sheet -

State or Tribal Assumption of the Section 404 Permit Program - The Clean Water Act provides States and Tribes the option of assuming administration of the Federal Section 404 permit program in certain waters within State or Tribal jurisdiction. This fact sheet describes reasons why States and Tribes might assume administration of the Section 404 program from the Federal government, which waters could be administered by States or Tribes under this program, and the process for assuming administration of these waters.

Why Assume Administration of the Section 404 Program? - More than a dozen States already are currently administering aquatic resources/wetlands protection programs similar to the Federal Section 404 program. This makes sense because State and Tribal regulators are, in many cases, located closer to the proposed activities and are often more familiar with local resources, issues, and needs than are Federal regulators. By formally assuming administration of the Federal regulatory program, States or Tribes can eliminate unnecessary duplication between programs. If States or Tribes assume program administration, Section 404 permit applicants would need only a State or Tribal permit for dredged or fill material discharges in certain waters.

Which Waters Can States/Tribes Administer under the Section 404 Program? - States and Tribes can assume the Federal Section 404 program only in certain "nonnavigable" waters. The U.S. Army Corps of Engineers retains jurisdiction in -

- tidal waters and their adjacent wetlands
- navigable waters and their adjacent wetlands.

The Corps continues to regulate navigable waters under Section 10 of the Rivers and Harbors Act of 1899.

How to Assume the Section 404 Program - To assume the Section 404 program, States or Tribes need to develop a wetlands permit program similar to the Federal program and submit to the EPA an application to assume the program. (See the flowchart below) Even for States or Tribes with an existing wetlands regulatory program, this process can require the passage of new legislation. To be eligible to assume the Federal program, State or Tribal programs must:

- have an equivalent scope of jurisdiction as the Federal program
- regulate at least the same activities as the Federal program
- provide for sufficient public participation
- ensure compliance with the Section 404(b)(l) guidelines, which provide environmental criteria for permit decisions
- have adequate enforcement authority.

What Happens After States or Tribes Assume the Program? - When States or Tribes assume administration of the Section 404 program, the Corps no longer processes Section 404 permits in waters under State or Tribal jurisdiction. The State or Tribe assumes responsibility for the program, determines what areas and activities are regulated, processes individual permits for specific proposed activities, and carries out enforcement activities. EPA reviews the program annually to ensure the State or Tribe is operating its program in compliance with requirements of the law and regulations. In addition, for some activities, which generally include larger discharges with serious impacts, EPA and other Federal agencies review the permit application and provide comments to the State or Tribe; the State or Tribe cannot issue a permit over EPA's objection.

Status of State/Tribal Section 404 Program Assumption - To date, two States, Michigan and New Jersey, have assumed administration of the Federal permit program. Other States and some Tribes are working toward or investigating the possibility of assuming the permit program. Reasons States have expressed for not more actively pursuing assumption of the program include lack of funding, limit of program administration to "non-navigable waters," concerns regarding Federal requirements and oversight, availability of alternative mechanisms for State/Tribal wetlands protection, and the controversial nature of regulation of wetlands and other aquatic resources.

State or Tribal 404 Assumption Process

State or Tribe submits a complete assumption application

The Governor of the State or Equivalent Tribal entity submits to EPA a full and complete description of the program it proposes to establish and administer under State law or an interstate compact. The State must also submit a statement from the State Attorney General certifying that the State laws provide adequate authority to regulate waters of the state.

EPA Reviews Application

EPA is responsible for reviewing and approving/ denying a State or Tribe's request to assume the Federal permit program within **120 days** of receipt of the completed application (application review is done within 30 days).

Distribution of Application for Public Comment

EPA distributes application for State or Tribal assumption to other Federal agencies

Public Hearing

EPA also makes the State/Tribal application available for public review and comment and holds public hearing(s) in the State.

EPA Decision

After reviewing the State or Tribal application and considering any Federal agency and public comments, EPA makes a decision of the requirements to assume the Federal permit program. EPA's decision is based on whether the State or Tribe meets the applicable statutory and regulatory requirements for an approvable program.

Assumption Application is Approved, or Assumption Application is Denied