

**SUPPORTING STATEMENT FOR ICR 022014
CLEAN WATER ACT 404 STATE-ASSUMED PROGRAMS**

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1.

1. Identification of the Information Collection

1(a) Title of the Information Collection

Clean Water Act Section 404 State-Assumed Program.

1(b) Short Characterization/Abstract

This information collection request (ICR) incorporates information collected in three different sections:

A. Request for program assumption. Information requested by the Environmental Protection Agency (EPA) from states or tribes at the time of request for program assumption.

B. Permit application information. Information on the permits submitted to the state or tribe by permittees, copies of which are made available to EPA; and, as part of its federal oversight responsibilities, information on a subset of these permits which EPA reviews.

C. Annual reports and program information. Information included in the state or tribe's annual report about the program.

A. Request for program assumption

Section 404(g) of the Clean Water Act (CWA) authorizes states and tribes to assume the CWA Section 404 permit program for discharges of dredged or fill material into certain waters of the United States. States and tribes must demonstrate that they meet the statutory and regulatory requirements (40 CFR part 233 – *404 State Program Regulations*) for an approvable program. Specified information and documents must be submitted by the state or tribe to EPA to request assumption; these requirements are outlined in the regulation.

Once the required information and documents are submitted and EPA has a complete assumption request package, the statutory time clock starts for EPA's decision to either approve or deny the request. EPA must provide the information contained in the assumption request submission to the U.S. Army Corps of Engineers (Corps), the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), and to the public for review and comment. In a 2020 policy memo, EPA clarified that approval of a state or tribal CWA Section 404 program is a discretionary action¹ which may trigger consultation requirements under other acts such as Section 106 of the National Historic Preservation Act (NHPA) and Section 7 of the Endangered Species Act (ESA). EPA must be able to collect information associated with carrying out any obligations associated with the consultations.

B. Permit application information

¹ Policy memo signed by former EPA Assistant Administrator for the Office of Water, David P. Ross. August 27, 2020. https://www.epa.gov/sites/production/files/2020-08/documents/esa_consultation_policy_for_404g.pdf

After program approval, states and tribes administer and enforce general, individual and emergency permits under 40 CFR 233 *Subpart C – Permit Requirements*. For each permit, the state or tribe shall establish conditions which assure compliance with all applicable statutory and regulatory requirements, including *CWA Section 404(b)(1) Guidelines For Specification of Disposal Sites for Dredged or Fill Material* (Guidelines), applicable Section 303 water quality standards, and applicable Section 307 effluent standards and prohibitions. EPA’s assumption regulations establish requirements that must be included in state or tribal permit applications ensuring that sufficient information is available to make a thorough analysis of anticipated impacts of proposed projects. States and tribes and the reviewing federal agencies must be able to review proposed projects to evaluate, avoid, minimize, and compensate for anticipated impacts. These requirements are consistent with – that is, no less stringent than – those that must be submitted when applying for a CWA Section 404 permit from the Corps.

Each permit shall be in effect for a fixed term not to exceed five years and shall include conditions assuring that the discharge will be conducted in a manner which minimizes adverse impacts upon the physical, chemical, and biological integrity of the waters of the United States, such as requirements for restoration and mitigation. EPA is responsible for oversight of assumed programs to ensure that state and tribal programs are in compliance with applicable requirements, and that state or tribal permit decisions adequately consider, minimize, and where required, compensate for anticipated impacts.

Elements of a complete permit application are described in 40 CFR 233 *Subpart D - Program Operation* and include information such as name, telephone numbers, description of the proposed activity, location of the discharge activity, purpose of the intended use, description of the type, composition, source and quantity of the material to be discharged. Under *Subpart E – Compliance Evaluation and Enforcement*, the state or tribe shall maintain a program designed to identify persons subject to regulation that have failed to obtain a permit or comply with permit conditions. The program shall include authority addressing civil penalties and criminal fines.

C. Annual reports and program information

Subpart F – Federal Oversight, provides for the sharing of information related to permits, public notices and other documentation for the purpose of review and objection to state or tribal permits, waivers of review and program reporting, and withdrawal of program approval. Under 40 CFR 233.52, *Program reporting provisions*, states and tribes must evaluate their programs annually and submit an annual report to the region assessing their program, including the identification of problems and recommendations for solving these issues.

2. Need for and Use of the Collection

2(a) Need/Authority for the Collection

Section 404(g) of the CWA authorizes states and tribes to assume the CWA Section 404 permit program for discharges of dredged or fill material into certain waters of the United States. Implementing regulations establish specific information that must be submitted by the state or tribe to request program assumption (40 CFR 233). EPA is charged with approving or denying a

state or tribe's assumption request and overseeing the state or tribal program after approval, including revisions.

2(b) Practical Utility/Users of the Data

A. Request for program assumption

States and tribes are authorized to assume the CWA Section 404 permit program. States and tribes must meet certain requirements to be eligible to assume the program. These requirements are laid out in the CWA and in implementing regulations under 40 CFR 233 Subpart B – Program Approval.

States and tribes must submit required information if they want to assume the federal permit program for discharges of dredged or fill material into certain waters of the United States. States and tribes must submit sufficient information for EPA to determine whether the state or tribal program meets the regulatory requirements. To be eligible to assume, a state or tribe must meet the following requirements: have an equivalent scope of geographic jurisdiction for assumable waters as the federal program; regulate at least the same activities as the federal program; provide for sufficient public participation; ensure compliance with the CWA Section 404(b)(1) Guidelines (40 CFR 230) which provide environmental criteria for permit evaluation and decision; and, have adequate enforcement authority.

Elements of a Program Submission

A complete application pursuant to 40 CFR 233.10 includes:

- 1) a letter from the governor or equivalent tribal leader requesting program assumption;
- 2) a complete program description;
- 3) a statement from the Attorney General, or equivalent tribal official, certifying that state laws provide adequate authority to implement the program (40 CFR 233.12);
- 4) a Memorandum of Agreement (MOA) with the EPA Regional Administrator (40 CFR 233.13);
- 5) a MOA with the Secretary of the Army acting through the Army Corps of Engineers (40 CFR 233.14);
- 6) a MOA with the USFWS and the NMFS; and,
- 7) copies of all applicable statutes and regulations including those governing applicable administrative procedures.

Program elements are outlined in 40 CFR 233.11, *Program description*, and include the following information:

- 1) a description of scope and structure of the state or tribal program including the extent of jurisdiction;
- 2) permitting, administrative, judicial review, and other applicable procedures;
- 3) organization and structure of the state or tribal agencies, anticipated coordination;
- 4) funding and manpower estimate;
- 5) anticipated workload;
- 6) state or tribal compliance evaluation and enforcement program;
- 7) description of waters to be included under state or tribal jurisdiction, waters to remain

under the jurisdiction of the Corps, a comparison of state or tribal and federal wetlands definitions; and,

- 8) best management practices proposed to satisfy exemption provisions for farm roads, forest roads, and roads for moving mining equipment.

Endangered Species Act Section 7 Consultation

ESA Section 7 directs each federal agency to ensure, in consultation with USFWS and NMFS, that “any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of” listed species, or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. 1536(a)(2). In an August 27, 2020 policy memo,² EPA clarified that approval of a state or tribal CWA Section 404 program is a discretionary action and thus EPA is required to consult under Section 7 of the ESA on program approvals if it determines that the approval may affect threatened or endangered species or critical habitat.

Upon receipt of an application for assumption, EPA may initiate consultation with USFWS and/or NMFS. An ESA Section 7 consultation process could involve a series of meetings in which information is exchanged with the USFWS and/or NMFS on the scope of the proposed state-assumed permit program. EPA, or the state or tribe if they become designated as a non-federal representative under ESA, may prepare documentation for USFWS and/or NMFS to describe the state or tribal assumed program and discuss potentially affected species in the state or tribal lands. USFWS and/or NMFS may then prepare a Biological Opinion (BO) that could include an incidental take statement along with reasonable and prudent alternatives to avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

National Historic Preservation Act Section 106 Consultation

NHPA establishes historic preservation as a federal agency policy and provides for the identification and protection of historic properties and resources. State or tribal administration of the Section 404 program, and its issuance of permits over time, has the potential to affect historic properties, including cultural resources or historic properties of religious and cultural significance. Consistent with its determination that it has discretion to approve CWA Section 404 assumption requests, EPA has determined such program approvals would constitute a federal undertaking pursuant to the NHPA.

Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties that are listed or eligible for listing on the National Register of Historic Places, and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. Approval of a state or tribe’s request to assume the CWA Section 404 program would be an undertaking pursuant to Section 106 of the NHPA and the ACHP’s implementing regulations at 36 CFR part 800.

The state or tribe may provide information in their program submission to inform EPA’s consultation process. For instance, at the state level, one of several mechanisms to address historic preservation statutes and regulations is an Operating Agreement (OA) which sets forth a

² https://www.epa.gov/sites/production/files/2020-08/documents/esa_consultation_policy_for_404g.pdf.

process to identify historic properties that may be impacted by a state or tribal issuance of Section 404 permits, and develops recommendations for resolving adverse effects. An OA provides comprehensive procedures for assessing the effects of a state or tribal Section 404 program on historic properties and therefore can be an appropriate element of a state or tribal application package to inform EPA's Section 106 consultation.

Public Review by Federal Agencies

Once EPA has received a complete application package, EPA provides a copy of the assumption request to the Corps, USFWS, and NMFS for review and comment, publishes notice of the assumption request, solicits public comments on the assumption request, and holds public hearings on the request.

Pursuant to EPA's determination that its program approvals are federal undertakings under the NHPA, EPA must also engage in NHPA Section 106 consultation with the ACHP and take necessary steps to programmatically address concerns identified in the consultation process. Programmatic consultations, including identification of additional consulting parties that may be involved, and any resulting assessments, such as a Programmatic Agreement (PA), can take different forms in accordance with the historic preservation regulations at 36 CFR part 800. EPA must also issue public notice and solicit public comments on the Section 106 consultation.

EPA reviews the documentation submitted by the state or tribe, and considers the comments received from the public, and the federal review agencies, in its determination to approve or deny the assumption request.

Eligible Indian Tribes

Under 40 CFR 233.60, requirements for eligibility of tribes and a process is laid out for eligible tribes to request assumption. No tribes are expected to assume at this time.

Procedures for Revision of State Programs

Under 40 CFR 233.16, significant changes to the program, or actual changes to the state or tribe's statutory or regulatory authorities shall be revised within one year of the promulgation of such regulations, or two years if the state must amend or enact statute in order to make the required revisions. Program modifications that are substantial require submission of a modified program description to the Regional Administrator. When the Regional Administrator considers that the program modifications are substantial, public notice is published, an opportunity for public hearing is provided, and EPA consults with other federal agencies as appropriate.

Substantial revisions include revisions that affect the area of jurisdiction, scope of activities regulated, criteria for the review of permits, public participation, or enforcement capabilities. Approval of a revision of a state or tribal program may require that the state or tribe provide a supplemental Attorney General's statement, program description, or such documents or information as necessary to evaluate the programs' compliance with the requirements of the CWA. Approval of program changes that are not substantial may be given by letter from the Regional Administrator.

B. Permit application information

States and tribes must issue permits that comply with all applicable statutory and regulatory requirements, including the Section 404(b)(1) Guidelines (40 CFR 230). The requirements for a complete permit application are outlined in the federal regulations (40 CFR 233.30). Federal regulations incorporate permit application requirements contained in the Corps regulations (33 CFR 325). When reviewing proposed projects, states, tribes, and federal agencies must be able to evaluate, avoid, minimize, and compensate for anticipated impacts.

EPA retains authority to coordinate federal review of a subset of state and tribal permits. The intent of this review is to ensure that these permits comply with the CWA requirements, including the Section 404(b)(1) Guidelines, and that the state or tribe issues permits that minimize adverse impacts, consider alternatives, and provide for compensation commensurate with the impact.

C. Annual reports and program information

EPA is responsible for oversight of assumed state or tribal programs to ensure that the state or tribal program follows applicable requirements, and that the state or tribal permit decisions adequately consider, avoid, minimize, and compensate for anticipated impacts as per the Section 404(b)(1) Guidelines. Federal regulations also establish minimum requirements for state or tribal annual reports (40 CFR 233.52).

If a state or tribal assumed program is not administered in accordance with the regulatory requirements, EPA can revise the provisions for waiver of federal review of state and tribal permits and, in extreme situations, initiate withdrawal of the assumed program; adequate oversight and analysis of the state or tribal program provides a sound basis to initiate such an action.

The annual report provides the state or tribe the opportunity to evaluate and present their analysis of relevant permit information, identify any problems encountered in administering their programs, and provide recommendations for addressing any problems.

3. Non-duplication, Consultations, and Other Collection Criteria

3(a) Non-duplication

The information collected under this section may not be systematically collected or made available elsewhere.

In most cases, state and tribal assumption of the Section 404 permit program for discharges of dredged or fill material into certain waters of the United States eliminates duplication. Prior to an approved assumption, a permit applicant may be required to get two separate permits for a proposed project, one from the Corps and one from the state or tribal agency, if the state or tribe has a dredged and/or fill regulatory program that applies to that water. Once assumption is approved by EPA, only one permit is required from the appropriate state or tribal agency; a federal CWA Section 404 permit is no longer needed for discharges into waters

assumed by the state or tribe. However, states or tribes may choose to require a separate state permit as well.

Program Reporting by States or Tribes

The state or tribe is the only source of permit data, such as number of permit applications received and final actions by the state or tribe on these permit applications. CFR 233.52 lists the items that the state or tribe must include in its annual report. This includes number of applications received, permits issued, denied, modified, and number of enforcement actions taken. This information may also be needed by the state or tribe for its own purposes such as program evaluation, budget justification, etc. If the state or tribe prepares this reporting information for its own needs, it may select the period of time covered in the annual report to enable the state or tribe to use this information for both purposes.

3(b) Public Notice Required Prior to ICR Submission to OMB

An announcement of a public comment period for the renewal of this ICR was published in the *Federal Register* on January 15, 2021. EPA solicited comments and information to enable it to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond.

EPA received two comments between January 15, 2021 and March 16, 2021, and neither was within the scope of this ICR renewal. Only one comment was on the topic of assumption. That comment opposed Florida's assumption of the CWA Section 404 program and is not responsive to the request for comments on this ICR renewal.

3(c) Consultations

To update estimates in the ICR, a short questionnaire addressing the burden and costs of the assumed programs was sent to senior points of contact for Michigan and New Jersey, the two states authorized as of the first drafting of this ICR to operate assumed programs. The information provided by these programs informs the updated estimates in this ICR. A copy of the questionnaire is included in Appendix A. Because information collected by these two states for their annual reports and other operational or management purposes does not fully correspond to the questions relevant to this ICR, the burden and costs reflected in this ICR are surrogate best estimates. For example, Michigan does not differentiate between permits issued in assumed waters versus permits issued in state waters, nor do they account for staff time per permit. That means EPA could be overestimating the number of permits that are in fact permits for actions in federal waters.

The following two state officials were contacted for the purposes of gathering information for the renewal of this ICR:

Ms. Amy Lounds
Chief
Wetlands, Lakes and Streams Unit
Land and Water Management Division
Michigan Department of Environmental Quality
P.O. Box 30458
Lansing, Michigan 48909-7958
(517) 284-5531
LOUNDSA@michigan.gov

Ms. Diane Dow, Director, and Madhu Guru, Assistant Director
Division of Land Use Regulation
New Jersey Department of Environmental Protection
Mail Code 501-02A
P.O. Box 420
Trenton, New Jersey 08625
(609) 984-3444
Diane.dow@dep.nj.gov
Madhu.Guru@dep.nj.gov

On August 20, 2020, EPA received a request for program assumption from the state of Florida. Assumption was approved on December 17, 2020. While EPA did not conduct a consultation under 3(c) of this ICR with Florida as part of this ICR renewal, the information provided by the state further informed the estimates of burden and information collection for Section 404 state-assumed programs. For example, the submission from Florida reflected burden associated with operationalizing EPA's policy on consultation under both ESA and NHPA.

3(d) Effects of Less Frequent Collections

A. Request for program assumption

The information needed to request program assumption is submitted only once to EPA at the time of the formal request to assume the federal permit program. States and tribes requesting assumption cannot move forward and EPA may not proceed with approving assumption without the information required by statute and regulations.

Program revisions should be made in the case of significant changes to the program, or actual changes to the state or tribe's statutory or regulatory authorities, within one year of the promulgation of such regulations or two years if the state must amend or enact statute in order to make the required revisions. No significant changes or modifications are expected at this time.

B. Permit application information

Since each permit application is for a specific location, a permit application must be submitted and processed for each project unless authorized by a general permit. The information is needed to evaluate the proposed impacts of the specific project in the location in which it is

sited.

C. Annual reports and program information

The requirements for the annual report are clearly outlined in 40 CFR 233.52. Reporting requirements allow both EPA and the state or tribe to evaluate the assumed program, identify trends and/or problems, and propose solutions to any identified problems. The current frequency of reporting annually remains appropriate for proper EPA oversight.

3(e) General Guidelines

There are no special circumstances that would cause an information collection to be conducted in a manner that is inconsistent under 5 CFR 1320.5.

3(f) Confidentiality

This information collection request does not require the collection of any information of a confidential nature or status.

A. Request for program assumption

The information included in a state or tribe's assumption request, and/or significant changes or modifications, is made available for public review and comment.

B. Permit application information

The information included in a permit application is made available for public review and comment.

C. Annual reports and program information

The information included in the annual report to EPA is made available to the public.

3(g) Sensitive Questions

This information collection request does not require or include collection of any information of a sensitive nature.

4. The Respondents and the Information Requested

4(a) Respondents/SIC Codes

A. Request for program assumption

States and tribes are the identified respondents since the CWA authorizes only states and tribes to assume 404 permitting authority. No tribes have assumed to date. No states that have

assumed the program have made significant modifications. No significant changes or modifications are expected at this time. Two states are expected to request program assumption in the next three-year period; no tribes are expected to request program assumption during this time period.

Most state and tribal authorities will fall into the following Standard Industrial Classification (SIC) codes.

| <u>Code</u> | <u>Industry Title</u> |
|--------------------|--|
| 9111 | Executive Offices |
| 9199 | General Government, Not Elsewhere Classified |

B. Permit application information

Permittees are not identified by industry or business. Anyone who proposes a project which involves the discharge of dredged or fill material into waters within the jurisdiction of a state or tribal assumed program must submit a permit application to either the state or tribe unless authorized by a general permit. Given the broad range of potential entities nationwide that may be impacted by permitting the SIC code for this ICR EPA is unable to identify the SIC codes. However, the following general sectors would be expected to be highly represented among respondents.

| <u>Code</u> | <u>Industry Title</u> |
|------------------------------|--------------------------------------|
| <u>21</u> | <u>Mining</u> |
| <u>22</u> | <u>Utilities</u> |
| <u>23</u> | <u>Construction</u> |
| <u>31-33</u> | <u>Manufacturing</u> |

C. Annual reports and program information.

States and tribes that have assumed 404 programs are required to submit an annual report under CFR 233.52, which is made available to the public.

4(b)Information Requested

(i) Data Items, Including Record Keeping Requirements and (ii) Respondent Activities

A. Request for program assumption

The information needed for a complete assumption package is listed at 40 CFR 233.10 and is as follows:

- 1) a letter from the governor or tribal equivalent formally requesting program assumption;
- 2) a complete program description (40 CFR 233.11);

- 3) the Attorney General's statement (40 CFR 233.12);
- 4) a Memorandum of Agreement with EPA (40 CFR 233.13);
- 5) a Memorandum of Agreement with Corps (40 CFR 233.14); and,
- 6) copies of all applicable statutes and regulations.

In addition, potential consultations associated with historic preservation and endangered species statutes and regulations may require additional information and documents at the time of submission of an application to facilitate evaluation by EPA and potentially on program revisions; this documentation may include the following:

- 1) information associated with consultation under Section 106 of the NHPA and
- 2) information associated with consultation under Section 7 of ESA.

Whenever circumstances have changed that result in significant change to a state or tribal program, the state shall provide:

- 1) a supplemental Attorney General's statement and
- 2) program description, or other documents or information necessary to evaluate the program.

The statute and the regulations do not include specific record keeping requirements, and none are required by EPA.

B. Permit application information

States and tribes with assumed programs are required to issue permits consistent with and no less stringent than the federal regulatory requirements. Information that is needed for a complete permit application is listed at 40 CFR 233.30 and includes the following items:

- 1) name, address, and phone number of the applicant and adjoining property owners;
- 2) a complete description of the proposed project;
- 3) description of the type, composition, source and quantity of the material to be discharged;
- 4) certification that all the information submitted is true and accurate; and,
- 5) any additional information requested by the state or tribe to evaluate the project impacts.

Under the new 2020 consultation policy, the state/tribe will forward permits to USFWS and/or NMFS as required to fulfill certain obligations under ESA and as required to fulfill certain obligations under NHPA.

C. Annual reports and program information

States and tribes with assumed programs are required to submit an annual report. Information that must be included in the annual report is listed at 40 CFR 233.52. Items that must be included as per the regulation include the following:

- 1) an assessment of the cumulative impacts of the state or tribe's program on the integrity of the regulated waters;
- 2) identification of areas of concern or interest;

- 3) the number and nature of individual and general permits issued, modified, and denied;
- 4) number of violations identified, and number and nature of enforcement actions taken;
- 5) number of suspected unauthorized activities reported, and number of actions taken;
- 6) an estimate of the extent of activities regulated by general permits; and,
- 7) number of permit applications received but not yet processed.

5. The Information Collected: Agency Activities, Collection Methodology, and Information Management

5(a) EPA Activities

A. Request for program assumption

There is a 120-day statutory review period that shall commence on the date of receipt of a complete state or tribal submission. The Regional Administrator shall approve or disapprove the program based on whether the state or tribe fulfills the requirements outlined in the regulation.

EPA activities associated with review of a state or tribal assumption request are specified in the regulation at 40 CFR 233.15 and include the following actions:

- 1) determine if the assumption submission is complete and notify the state or tribe within 30 days of EPA's determination;
- 2) within 10 days, send copy of assumption request to the appropriate Corps District, USFWS and NMFS;
- 3) provide a public comment period of no less than 45 days;
- 4) publish public notice on receipt of assumption request
- 5) provide a public hearing to be held not less than 30 days after notice is published in the Federal Register;
- 6) review public comments received and preparation of a responsiveness summary of significant comments received;
- 7) make decision to approve or deny assumption request;
- 8) notify other federal agencies about the decision;
- 9) notify the state or tribe about the decision; and,
- 10) publish notice of decision in the Federal Register.

As part of any necessary consultation under ESA Section 7, EPA will:

- 1) send a letter initiating consultation to USFWS and/or NMFS;
- 2) prepare any necessary documentation to facilitate consultation in compliance with ESA Section 7 and its implementing regulations (e.g., a Biological Evaluation); and,
- 3) review any relevant documentation provided in the state or tribe's assumption submission package.

As part of any necessary consultation under NHPA Section 106, EPA will:

- 1) send a letter to initiate consultation with the ACHP and the state or tribal historical preservation office, as well as invite consultation from tribes that may have an interest in the state or tribe's assumption process,
- 2) provide for public notice and comment on EPA's Section 106 consultation and consider

- all comments received, and
- 3) review any relevant materials from the state or tribe's assumption submission package, such as an OA or other state-level agreement on historic preservation.

EPA activities associated with review of a state or tribal revision are specified in the regulation at 40 CFR 233.16 and may include the following actions:

- 1) evaluate modified program descriptions or other documents submitted by the state or tribe to determine if the program complies with the CWA;
- 2) publish and circulate notice to interested parties, provide opportunity for public hearing and consult with the relevant federal agencies;
- 3) request a supplemental Attorney General's statement, program description, or other documents or information necessary to evaluate the program's compliance with the CWA; and,
- 4) any necessary consultations.

B. Permit application information

EPA activities associated with review of a state or tribal permit application are specified at 40 CFR 233.50 and include the following:

- 1) a state or tribe will promptly transmit to EPA a copy of the public notice for any permit application subject to federal review, except for those for which review has been waived that under 40 CFR 233.51;
- 2) a copy of a draft general permit whenever a state (or tribe) intends to issue a general permit;
- 3) EPA will provide a copy of the public notice to the appropriate Corps, USFWS, and NMFS offices for review and comment;
- 4) if EPA intends to comment on the permit application, EPA will notify the state or tribe of its intent within 30 days;
- 5) if the state or tribe has been notified, the permit shall not be issued until after receipt of the comments, or 90 days from EPA's receipt of the public notice; and,
- 6) if the state or tribe receives comments from EPA, either objecting to the permit or requesting permit modification, the permit shall not be issued until such objections or request for modification are resolved.

Consistent with the policy position to consult if program approval may affect threatened or endangered species or critical fish habitat or historic properties, EPA will:

- 1) forward permits to USFWS and/or NMFS as required to fulfill any obligations resulting from any ESA consultations and
- 2) forward permits to ACHP as required to fulfill obligations resulting from any NHPA consultations.

C. Annual reports and program information

Actions associated with collection of information for of the annual report are listed at 40 CFR 233.50 and include the following:

- 1) the state or tribe shall submit a draft annual report to EPA within 90 days of the end of the identified reporting period;
- 2) the state or tribe shall make the draft report available to the public;
- 3) within 60 days, EPA shall complete review of the draft report and submit comments, questions or request for additional evaluation to the state or tribe;
- 4) within 30 days of receipt of EPA's comments, the state or tribe will finalize the annual report incorporating or responding to EPA's comments; and,
- 5) upon acceptance of the annual report, EPA will publish notice of availability in the *Federal Register*.

5(b) Collection Methodology and Management

A. Request for program assumption

Program approval under federal regulation requires submission to the Regional Administrator of at least three copies of the required elements of a program submission (40 CFR 233.10). The use of electronic forms of collection techniques are not appropriate for the submission of an application under current regulations.

B. Permit application information

The permit applicants are the best source of information about proposed projects. Only the applicant knows the purpose and plans for the project. The applicant must complete a permit application form and submit the completed form to the state or tribal agency administering the assumed program. Information is generally submitted by an applicant once, on a per permit basis. This information is used by the state or tribe to evaluate the impact of the proposed project and by the federal review agencies. The information is made available to the public in a public notice if an individual permit is required.

Under CFR 233.51, Waiver of review, the MOA with the Regional Administrator shall specify the categories of discharges for which EPA will waive review. Pursuant to this Section, only a portion of permits issued by states or tribes that have assumed a program are reviewed by EPA. As estimate of the permits that EPA reviews ranges from one to two percent per year.

Permits and information on permits in assumed states is collected by Michigan, New Jersey, and Florida, and these state agencies are the only source of information. In all other states and tribes this information is collected by the Corps.

C. Annual reports and program information

Under Section 233.52, states and tribes are required to submit information about their programs in an annual report that addresses a wide range of information – e.g., funding and staffing effort, permit application forms, number of permits processed, number of enforcement actions taken, disposition of these actions, and analysis of cumulative impact of the program. Under 40 CFR 233.39, Electronic reporting, reporting by electronic means is available to states

and tribes that choose to receive electronic documents that satisfy the requirements of 40 CFR part 3 (Electronic reporting).

5(c) Small Entity Flexibility

Small entities must apply for a permit if a planned project involves the discharge of dredged or fill material into waters regulated by the assumed program. This is required of any entity or person who proposes to discharge or fill a regulated aquatic resource. The information required from small entities applying for a permit in an assumed program is the same information that would have been required by the Corps if the state or tribe had not assumed the program.

EPA's regulations (40 CFR 233.30(d)) provide flexibility for small projects in that the level of detail of information required in the permit application should be commensurate with the type and size of the project and discharge.

5(d) Collection Schedule

A. Request for program assumption

The state or tribe's assumption request is a one-time request. The timing of this request is determined by the state or tribe. Revisions, when substantial changes take place, can be submitted within one or two years.

B. Permit application information

A permit application is submitted each time a permit applicant plans to do work that involves the discharge of dredged or fill material into a water of the United States.

C. Annual reports and program information

The state or tribe must submit an annual report to EPA assessing its program operations. The yearly period reported on in the annual report can be set by the state or tribe.

6. Estimating the Burden and the Cost of the Collection

A summary of burden hours and costs associated with the collection of information for the section 404 program can be found in Table 1: Burden and Cost Overview.

6(a) Estimating Respondent Burden

A. Request for program assumption

EPA estimates that a state will need a total of 1,012 hours to prepare the documentation for EPA to determine that a state's assumption is complete. This estimate includes requirements under 40 CFR 233.15 (770 hours) and any additional supporting documentation generated by the state. For example, Florida chose to provide information relating to threatened and endangered species to EPA for EPA's Section 7 consultation. While providing EPA such information is not

required, we have extrapolated this burden based on input received from Florida and provide it here in case other states or tribes chose to provide such information (242 hours).

As discussed above, this estimate includes an additional 242 hours to take into account potential consultations. In this ICR EPA estimated: 34 hours for an agreement generated by EPA and other signatories to fulfill requirements under the NHPA, four hours for EPA to initiate ESA Section 7 consultation with USFWS and NMFS, four hours to initiate consultation under NHPA Section 106, and 200 hours for EPA, USFWS, and NMFS to generate and review consultation documentation related to ESA Section 7 consultation (*e.g.*, one option being a Biological Evaluation). While this information is not required and is expected to vary widely depending on the state or tribe, these estimates are based on ESA Section 7 consultation on Florida's recent assumption package.

With regard to ESA, this estimate is based on the recent submission for Florida. Florida submitted a Biological Assessment (BA) to EPA prior to the submission of its application, and although this document is not mandatory, nor is there certainty about which states will choose to submit ESA consultation documentation and how extensive this documentation might be, this burden estimate is a valid and recent example of the additional burden to states and tribes resulting from EPA's 2020 policy on consultation.

This total estimate of 1,012 hours is an increase of 492 hours per state from 520 hours in the current ICR and is justified by the answers to the questionnaire (see Appendix A) received from New Jersey and Michigan, as well as accounting for potential hours associated with recent changes in policy regarding ESA and NHPA, if a state or tribe chooses to provide additional information to assist EPA in its consultations. EPA estimates that two states may request program assumption over the next three years. If two states were to assume the Section 404 program, the total one-time burden of 2024 hours would be divided over the next three years to calculate the ***annual burden of 675 hours***.

An estimate for program revisions is not available but should be minimal; however, program revisions are not expected in the next three years.

B. Permit application information

EPA estimates that the average time needed to review a permit application is 12.7 hours based on data provided by Michigan and New Jersey. The actual time to review a permit application will vary greatly depending on the size and location of a project. Small projects will require less time, while large, complex projects could require significantly more time. ***EPA estimates that the average assumed program will process 2,256 permits a year.*** This results in a burden of ***28,645 burden hours annually per assumed program for a states or tribe***. This figure will vary with the assumed program. It is likely that some states or tribes will have significantly fewer permit applications requested each year; others may have more. The number of permit applications may also vary annually. ***The total estimate for five assumed programs is 143,224 burden hours annually.***

The burden to permittees associated with filing a permit in Michigan, New Jersey, and

Florida can be estimated annually at **74,432 hours for all states**. For this calculation, the estimated time for a permittee to fill an application is 11 hours; this estimate is consistent with the current Corps ICR estimate. Although permit application requirements can be different under an assumed program versus that with the Corps, this estimate of 11 hours represents the best available information. (ICR No: 201807-0710-002, OMB Control No: 0710-0003.)³ Permittee burden associated with states assuming a program in the next three years are now accounted for in the Corps ICR; hence, including them in this estimate would result in double counting permittee burden. Once states complete the process to assume the 404 program over the next three years covered by this ICR, the estimated burden for permittees within those states that is currently reported by the Corps would transfer the permitting authority from the Corps to that state under 40 CFR 233. The burden for those newly assumed states or tribes will subsequently be included in future versions of EPA’s 404(g) ICR once they are approved.

C. Annual reports and program information

EPA estimates that **a state will need 110 hours to collect and analyze the information and prepare the annual report** required by the regulations. Because three states have already assumed the program, and EPA expects two additional states to assume the program, five reports per year are the total estimated number developed by states at an estimated **total burden of 550 hours per year**.

6(b) Estimating Respondent Costs

(i) Estimating Labor Costs

A. Request for program assumption

EPA estimates that a state will need 1,012 hours to prepare the documentation for a submission to EPA, including any additional documentation included on a voluntary basis to address the state’s treatment of historic properties and protection of threatened and endangered species that may support potential EPA consultation under NHPA Section 106 and/or ESA Section 7.

In the case of assumption by a tribe, EPA estimates that in order to receive Treatment as State (TAS) for the purpose of Section 404, tribal authorities will need to spend an additional 20 hours requesting TAS, adding this time to the assumption process up front. However, no tribe has expressed interest in assumption and these additional 20 hours are not included in the estimate for this ICR. However, if any tribe were expected to assume Section 404 programs, this number of hours would be added to the current estimate for tribes. **TAS in this case is estimated at 0 hours and \$0.**

EPA estimates that \$64,649 (i.e., the starting salary of a GS-11, “Rest of U.S.” locality for 2021) is a representative state or tribal employee salary for 2021 for a typical work year of 2080 hours per year. **This results in a one-time cost of \$31,454 per program assumption.** EPA

³ https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201807-0710-002.

estimates that two states may request program assumption over the next three years. This results in a total salary cost for two programs of \$62,908. Adding a 1.6 overhead factor results in a cost of **\$100,654 for two states.**

B. Permit application information

The average time spend on permit applications reported by Michigan and New Jersey is 12.7 hours per permit, and the average number of permits is 2,256 per program. **Using \$64,649 as an estimate for a state employee salary results in an approximate salary cost of \$890,318. Adding a 1.6 overhead factor results in a cost of \$1,424,508 for one program and \$7,122,542 for five programs annually.**

The burden hours for permittees is estimated at 74,432 hours. Costs for completing and submitting a permit are difficult to estimate as no information is available from New Jersey and Michigan; however, a reasonable estimate is the hourly rate in the Corps ICR; this rate is \$25.53 (ICR No: 201807-0710-002, OMB Control No: 0710-0003.) **A total estimate of cost to permittees in New Jersey, Michigan, and Florida is \$1,900,236.** Burden and cost to states that may assume the program during the period of this ICR are currently captured by the Corps ICR.

C. Annual reports and program information

EPA estimates that a state will need 110 hours to collect and analyze the information and prepare the annual report. Using \$64,649 as an estimate for a state employee salary results in an approximate salary cost of \$3,419 to prepare the annual report. Adding a 1.6 overhead factor results in a cost of \$5,470 per report; **the total for five reports is \$27,352.**

i. Estimating Capital and Operations and Maintenance Costs

None are anticipated.

ii. Capital/Start-up Operating and Maintenance Costs

None are anticipated.

iii. Annualizing Capital Costs

Not applicable to these programs.

6(c) Estimating Agency Burden and Cost

A. Request for program assumption

Each state or tribal request to assume the program must be reviewed by the federal government. EPA is the agency responsible for approval or denial of an assumption request; the Corps, USFWS, NMFS, and under NHPA Section 106, the ACHP, review and provide comments to EPA on the adequacy of the state or tribal program. Existing burden to federal

agencies is estimated at 200 hours to review and provide comments to EPA on the adequacy of the submission application. Per the August 27, 2020 policy, the new burden estimate includes an additional 242 hours for potential ESA and NHPA consultations on program approvals: 34 hours for an agreement generated by EPA and other signatories to fulfill requirements under the NHPA, four hours for EPA to initiate ESA Section 7 consultation with USFWS and NMFS, 4 hours to initiate consultation under NHPA Section 106, and 200 hours for EPA, USFWS and NMFS to generate and review consultation documentation related to ESA Section 7 consultation (e.g., one option being a Biological Evaluation). While this burden is expected to vary widely depending on the state and in some cases consultation obligations may not be triggered, these estimates are based on ESA Section 7 consultation on Florida’s recent assumption package.

A total of 442 hours for one state at the rate of a GS-13 (locality rest of U.S. starting salary of \$92,143) translates into a federal salary cost of \$19,580 per assumption request. This results in a total salary cost for two states of \$39,161. Adding a 1.6 overhead factor results in a **total cost of \$62,657**.

B. Permit application information

EPA estimates that federal review will be conducted on only a subset of state permit applications, approximately 25 permits annually per state program. The permits subject to federal review tend to be the larger projects with more potential for adverse environmental impacts. Federal review is coordinated by EPA and includes the Corps, USFWS, NMFS and ACHP as appropriate. Because of this, EPA estimates that federal review will average 80 hours per permit application. This results in an annual burden of 2,000 burden hours per assumed program. At the rate of a starting GS-12 (starting salary of \$77,488), the cost is \$74,507 in salary cost per program. Adding a 1.6 overhead factor results in a cost of \$119,212, or a **total of \$596,061 for five programs**.

C. Annual reports and program information

EPA estimates that review of each state annual report will take approximately 40 hours. At the rate of a GS-12 (starting salary of \$77,488), this translates into a salary cost of approximately \$1,490 per annual report. This results in a total salary cost of \$7,451 for five reports. Adding a 1.6 overhead factor results in a **total cost of \$11,921**.

6(d) Estimating the Respondent Universe and Total Burden and Costs

| Table 1: Burden and Cost Overview | | |
|--|-------------------------------------|---------------------------------|
| | Respondent Burden & Cost | Agency Burden & Cost |
| A: Program Assumption Request | | |
| States | 2 | 2 |
| Modifications | 0 | 0 |
| Application Hours per Request | 1,012 | 442 |
| Total Hours Requested | 2,024 (675 annually) | 884 (295 annually) |
| Current OMB Inventory (Hours) | 1,040 | 400 |

| | | |
|---|--|--|
| TAS Request for Tribes if Any Were to Assume | 0 (No tribes currently expected to assume) | 0 (No tribes currently expected to assume) |
| Cost per Request | \$31,454.23 | \$19,580.39 |
| Cost per Request with Overhead | \$50,326.76 | \$31,328.62 |
| Total Cost | \$100,653.52 | \$62,657.24 |
| B. 1: Permit Review (5 states) | State Review of Permits | Agency Review of Permits |
| Permit Applications Reviewed per State Annually | 2,255.50 | 25 |
| Application Hours per Permit | 12.7 | 80 |
| Total Hours Requested per State | 28,644.85 | 2,000 |
| Total Hours Requested for 5 State Assumed Programs | 143,224.25 | 10,000 |
| Current OMB Inventory (Hours) | 119,000 | 8,000 |
| Cost of Review per State | \$890,317.74 | \$74,507.69 |
| Cost per Request with Overhead | \$1,424,508.39 | \$119,212.31 |
| Total Annual Cost with Overhead for 5 State Assumed Programs | \$7,122,541.95 | \$596,061.54 |
| B. 2: Permittee Information | Public Burden | N/A |
| Application Hours per Permit | 11 | N/A |
| Total Hours for MI, NJ, and FL applicants | 74,432 | N/A |
| Total Cost to Permittees in MI, NJ, & FL | \$1,900,236.20 | N/A |
| C: Annual Report | State Development of Annual Report | Agency Review of Annual Report |
| Number of States That Have Assumed the Program | 5 | 5 |
| Hours per Report | 110 | 40 |
| Total Hours Requested | 440 | 200 |
| Current OMB Inventory (Hours) | 360 | 160 |
| Cost per Report | \$3,418.94 | \$1,490.15 |
| Total Cost with Overhead | \$27,351.50 | \$11,921.23 |

6(e) Bottom Line Burden Hours and Cost Tables

(i) Respondent Tally

The total average annual burden to states for assumed CWA Section 404 permit programs is **144,449 hours**. This number was derived by adding one-third of the labor from section A to reflect that a state submits one request to assume a program and this request could be during one calendar year or stretched over several years, plus the total annual labor from sections B and C in the table above. This was done to reflect the annual burden as required by OMB.

This is the first time EPA is reporting estimates for permit review costs. **The total**

estimate is \$7,183,445. This number was derived by adding one-third of the cost from section A to reflect that a state submits one request to assume a program and this request could be during one calendar year or stretched over several years, plus the total annual cost from sections B and C in the table above. This was done to reflect the annual burden as required by OMB. There are no capital or operation and maintenance costs.

This is the first time EPA is calculating the burden and cost to permittees. This estimate includes costs to Michigan, New Jersey, and Florida permittees alone because states that may assume the program during the period of this ICR are accounted for in the Corps ICR. **The total cost to permittees in these three states is estimated at \$1,900,236.**

i. Agency Tally

The burden to EPA for related activities is 10,495 hours. The cost from section A of the table was divided by three (\$20,886) and added to sections B and C to estimate an **annual burden equal to \$628,869.**

ii. Variations in the Annual Bottom Line

Annual variations are dependent upon how many states come forward with assumption applications.

6(f) Reasons for Change in Burden

The burden estimate for **program assumption** per state has changed; it has increased to 1012 from 520 based on the answers received from Michigan and New Jersey and recent changes in policy related to potential ESA and NHPA consultations as explained above.

It is important to note that the cost burden for **review of permit** was previously not estimated because of the large differences across states and lack of adequate data. However, in this ICR, EPA is using the best available data provided by New Jersey, Michigan, and the Corps' ICR to estimate respondent burden albeit recognizing the inherent limitations. Time per permit has increased to reflect the numbers received in the survey, mainly the estimated time reported by New Jersey. Permit estimates have decreased slightly from the previous number reported of 2,975 per state. In addition, the burden to the public had previously not been included in this ICR. The estimate of burden to permittees is consistent with the Corps data and ICR.

The burden estimate for **annual report** has changed slightly; it has increased by 20 hours. New Jersey reports spending less time on the annual report, while Michigan reports spending more time. However, Michigan also reports that planned database improvements will simplify and streamline the process in the future once these planned changes are fully implemented.

On December 17, 2020, EPA approved Florida's application for assumption of the section 404 permit program. This ICR has been updated to reflect the additional burden and costs associated with a third state assuming the program. This includes modeling for a total of five states rather than four states for permittee information and annual reporting burdens. The difference

between the prior submittal that was published on January 15, 2021, and this submittal is summarized in Table 2: Florida Burden and Cost.

| Table 2: Florida Burden and Cost | | |
|--|---|---------------------------------------|
| B. 1: Permit Review | State Review of Permits | Agency Review of Permits |
| Permit Applications Reviewed per State Annually | 2,255.50 | 25 |
| Application Hours per Permit | 12.7 | 80 |
| Total Hours Requested per State | 28,644.85 | 2,000 |
| Total Cost of Review with Overhead | \$1,424,508.39 | \$5,470.30 |
| C: Annual Report | State Development of Annual Report | Agency Review of Annual Report |
| Hours per Report | 110 | 40 |
| Total Cost per Report with Overhead | \$5,470.30 | \$2,384.25 |
| Total Burden Hours | 28,754.85 | 120.00 |
| Total Cost | \$1,429,978.69 | \$7,854.55 |
| Note: these values are extrapolated from averages derived from NJ and MI. In effect, these are the projected averages per state. Updated data that includes FL input will be in future ICRs. | | |

6(g) Burden Statement

This collection of information is separated into three parts. The annual public reporting and record keeping burden for this collection is estimated to average 1,012 hours to request program assumption (spread over three years), 12.7 hours for a state to review a permit application, 11 hours for a permittee to complete a permit application, and 110 hours for a state to prepare the annual report.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this ICR under

Docket ID Number EPA-HQ-OW-2013-0610, which is available for online viewing at <http://www.regulations.gov>, or in person viewing at the Office of Water Docket in the EPA Docket Center (EPA/DC), WCJ West, Room 3334, 1301 Constitution Ave., NW, Washington, D.C. EPA/DC Public Reading Room is open from 8 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202)566-1744, and the telephone number for RCRA Docket is (202) 566-0270. We encourage the public to submit comments via <https://www.regulations.gov/> or email, as there may be a delay in processing mail and faxes. Hand deliveries and couriers may be received by scheduled appointment only. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>. An electronic version of the public docket is available at <http://www.regulations.gov>. This site can be used to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. When in the system, select “search,” then key in the Docket ID No. EPA-HQ-OW-2013-0610. Also, you can send comments to the Office of Management and Budget at oir_submission@epa.gov, Attention: Desk Office for EPA. Please include the EPA Docket ID Number EPA-HQ-OW-2013-0610 and OMB Control Number 2040-0168 in any correspondence.

Appendix A

State and Tribal 404 Assumption Questionnaire:

1. Based on your past experience, how many hours do you estimate it would take to complete a submission package for assumption of the 404 wetlands program in 2020?
2. What is the annual average of permits issued by your agency for both general and individual permits?
3. What is the average amount of time spent by your staff reviewing a general, and an individual permit?
4. How many staff, in terms of full-time equivalents (FTEs), or employee-hours per year, do you devote to the assumed portion of your Section 404 wetlands program?
5. What is the average number of permits annually that require coordinating with tribes and downstream states? What is the average number of hours per permit that your staff spends on coordination with tribes and downstream states? Are there any additional coordination costs?
6. How many hours does your staff spend annually developing the annual report?