

US EPA ARCHIVE DOCUMENT

# Part 233: 404 State Program Regulations

## Subpart G\_Eligible Indian Tribes

### § 233.60 Requirements for eligibility.

### § 233.61 Determination of Tribal eligibility.

### § 233.62 Procedure for processing an Indian Tribe's application.

Source: 58 FR 8183, Feb. 11, 1993, unless otherwise noted.

### **§ 233.60 Requirements for eligibility.**

Section 518(e) of the CWA, 33 U.S.C. 1378(e), authorizes the Administrator to treat an Indian Tribe as eligible to apply for the 404 permit program under section 404(g)(1) if it meets the following criteria:

- (a) The Indian Tribe is recognized by the Secretary of the Interior.
- (b) The Indian Tribe has a governing body carrying out substantial governmental duties and powers.
- (c) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the Untied States in trust for the Indians, held by a member of an Indian Tribe if such property interest is subject to a trust restriction an alienation, or otherwise within the borders of the Indian reservation.
- (d) The Indian Tribe is reasonably expected to be capable, in the Administrator's judgment, of carrying out the functions to be exercised, in a manner consistent with the terms and purposes of the Act and applicable regulations, of an effective section 404 dredge and fill permit program.

[58 FR 8183, Feb. 11, 1993, as amended at 59 FR 64345, Dec. 14, 1994]

### **§ 233.61 Determination of Tribal eligibility.**

An Indian Tribe may apply to the Regional Administrator for a determination that it meets the statutory criteria which authorize EPA to treat the Tribe in a manner similar to that in which it treats a State, for purposes of the section 404 program. The application shall be concise and describe how the Indian Tribe will meet each of the requirements of section 233.60. The application should include the following information:

- (a) A statement that the Tribe is recognized by the Secretary of the Interior.
- (b) A descriptive statement demonstrating that the Tribal governing body is currently carrying out substantial governmental duties and powers over a defined area. This Statement should:
  - (1) Describe the form of the Tribal government.
  - (2) Describe the types of governmental functions currently performed by the Tribal governing body, such as, but not limited to, the exercise of police powers affecting (or relating to) the health, safety, and welfare of the affected population; taxation; and the exercise of the power of eminent domain; and
  - (3) Identify the source of the Tribal government's authority to carry out the governmental functions currently being performed.
- (c)
  - (1) A map or legal description of the area over which the Indian Tribe asserts regulatory authority pursuant to section 518(e)(2) of the CWA and section 233.60(c);
  - (2) A statement by the Tribal Attorney General (or equivalent official) which describes the basis for the Tribe's assertion under section 518(e)(2) (including the nature or subject matter of the asserted regulatory authority) which may include a copy of documents such as Tribal constitutions, by-laws, charters, executive orders, codes, ordinances, and/or resolutions which support the Tribe's assertion of authority;
- (d) A narrative statement describing the capability of the Indian Tribe to administer an effective 404 permit program. The Statement may include:
  - (1) A description of the Indian Tribe's previous management experience which may include the administration of programs and services authorized by the Indian Self Determination & Education Act (25 U.S.C. 450 *et seq.*), The Indian Mineral Development Act (25 U.S.C. 2101 *et seq.*), or the Indian Sanitation Facility Construction Activity Act (42 U.S.C. 2004a).
  - (2) A list of existing environmental or public health programs administered by the Tribal governing body, and a copy of related Tribal laws, regulations, and policies;

- (3) A description of the entity (or entities) which exercise the executive, legislative, and judicial functions of the Tribal government.
- (4) A description of the existing, or proposed, agency of the Indian Tribe which will assume primary responsibility for establishing and administering a section 404 dredge and fill permit program or plan which proposes how the Tribe will acquire additional administrative and technical expertise. The plan must address how the Tribe will obtain the funds to acquire the administrative and technical expertise.
- (5) A description of the technical and administrative abilities of the staff to administer and manage an effective, environmentally sound 404 dredge and fill permit program.

(e) The Administrator may, at his discretion, request further documentation necessary to support a Tribal application.

(f) If the Administrator has previously determined that a Tribe has met the requirements for eligibility or for ``treatment as a State" for programs authorized under the Safe Drinking Water Act or the Clean Water Act, then that Tribe need only provide additional information unique to the particular statute or program for which the Tribe is seeking additional authorization.

(Approved by the Office of Management and Budget under control number 2040-0140)

[58 FR 8183, Feb. 11, 1993, as amended at 59 FR 64345, Dec. 14, 1994]

#### **§ 233.62 Procedures for processing an Indian Tribe's application.**

- (a) The Regional Administrator shall process an application of an Indian Tribe submitted pursuant to section 233.61 in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.
- (b) The Regional Administrator shall follow the procedures described in section 233.15 in processing a Tribe's request to assume the 404 dredge and fill permit program.

[58 FR 8183, Feb. 11, 1993, as amended at 59 FR 64346, Dec. 14, 1994]

# Part 233: 404 State Program Regulations

## Subpart H\_Approved State Programs

### § 233.70 Michigan.

### § 233.71 New Jersey.

### § 233.70 Michigan.

The applicable regulatory program for discharges of dredged or fill material into waters of the United States in Michigan that are not presently used, or susceptible for use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to the ordinary high water mark, including wetlands adjacent thereto, except those on Indian lands, is the program administered by the Michigan Department of Natural Resources, approved by EPA, pursuant to section 404 of the CWA. Notice of this approval was published in the Federal Register on October 2, 1984; the effective date of this program is October 16, 1984. This program consists of the following elements, as submitted to EPA in the State's program application.

(a) *Incorporation by reference.* The requirements set forth in the State statutes and regulations cited in this paragraph are hereby incorporated by reference and made a part of the applicable 404 Program under the CWA for the State of Michigan. This incorporation by reference was approved by the Director of the Federal Register on October 16, 1984.

- (1) The Great Lakes Submerged Lands Act, MCL 322.701 *et seq.*, reprinted in Michigan 1983 Natural Resources Law.
- (2) The Water Resources Commission Act, MCL 323.1 *et seq.*, reprinted in Michigan 1983 Natural Resources Law.
- (3) The Goemaere-Anderson Wetland Protection Act, MCL 281.701 *et seq.*, reprinted in Michigan 1983 Natural Resources Law.
- (4) The Inland Lakes and Stream Act, MCL 281.951 *et seq.*, reprinted in Michigan 1983 Natural Resources Law.
- (5) The Michigan Administrative Procedures Act of 1969, MCL 24-201 *et seq.*
- (6) An act concerning the Erection of Dams, MCL 281.131 *et seq.*, reprinted in Michigan 1983 Natural Resources Law.

(7) R 281.811 through R 281.819 inclusive, R 281.821, R 281.823, R 281.824, R 281.832 through R 281.839 inclusive, and R 281.841 through R 281.845 inclusive of the Michigan Administrative Code (1979 ed., 1982 supp.).

(b) *Other Laws.* The following statutes and regulations, although not incorporated by reference, also are part of the approved State-administered program:

- (1) Administrative Procedures Act, MCLA 24.201 *et seq.*
- (2) Freedom of Information Act, MCLA 15.231 *et seq.*
- (3) Open Meetings Act, MCLA 15.261 *et seq.*
- (4) Michigan Environmental Protection Act, MCLA 691.1201 *et seq.*

(c) *Memoranda of Agreement.*

- (1) The Memorandum of Agreement between EPA Region V and the Michigan Department of Natural resources, signed by the EPA Region V Administrator on December 9, 1983.
- (2) The Memorandum of Agreement between the U.S. Army Corps of Engineers and the Michigan Department of Natural Resources, signed by the Commander, North Central Division, on March 27, 1984.

(d) *Statement of Legal Authority.* (1) ``Attorney General Certification section 404/State of Michigan", signed by Attorney General of Michigan, as submitted with the request for approval of ``The State of Michigan 404 Program", October 26, 1983.

(e) The Program description and any other materials submitted as part of the original application or supplements thereto.

(33 U.S.C. 13344, CWA 404)

[49 FR 38948, Oct. 2, 1984. Redesignated at 53 FR 20776, June 6, 1988. Redesignated at 58 FR 8183, Feb. 11, 1993]

## **§ 233.71 New Jersey.**

The applicable regulatory program for discharges of dredged or fill material into waters of the United States in New Jersey that are not presently used, or susceptible for use in their natural

condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to the ordinary high water mark, including wetlands adjacent thereto, except those on Indian lands, is the program administered by the New Jersey Department of Environmental Protection and Energy, approved by EPA, pursuant to section 404 of the CWA. The program becomes effective March 2, 1994. This program consists of the following elements, as submitted to EPA in the State's program application:

(a) *Incorporation by reference.* The requirements set forth in the State statutes and regulations cited in paragraph (b) of this section are hereby incorporated by reference and made a part of the applicable 404 Program under the CWA for the State of New Jersey, for incorporation by reference by the Director of the Federal Register in accordance with 552(a) and 1 CFR part 51. Material is incorporated as it exists at 1 p.m. on March 2, 1994 and notice of any change in the material will be published in the Federal Register.

(b) Copies of materials incorporated by reference may be inspected at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC. Copies of materials incorporated by reference may be obtained or inspected at the EPA OUST Docket, 401 M Street, SW., Washington, DC 20460, and at the Library of the Region 2 Regional Office, Federal Office Building, 26 Federal Plaza, New York, NY 10278.

- (1) New Jersey Statutory Requirements Applicable to the Freshwater Wetlands Program, 1994.
- (2) New Jersey Regulatory Requirements Applicable to the Freshwater Wetlands Program, 1994.

(c) *Other laws.* The following statutes and regulations, although not incorporated by reference, also are part of the approved State-administered program:

- (1) Administrative Procedure Act, N.J.S.A. 52:14B-1 *et seq.*
- (2) New Jersey Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 *et seq.*
- (3) Open Public Meetings Act, N.J.S.A. 10:4-6 *et seq.*
- (4) Examination and Copies of Public Records, N.J.S.A. 47:1A-1 *et seq.*
- (5) Environmental Rights Act, N.J.S.A. 2A:35A-1 *et seq.*
- (6) Department of Environmental Protection (and Energy), N.J.S.A. 13:1D-1 *et seq.*
- (7) Water Pollution Control Act, N.J.S.A. 58:10A-1 *et seq.*

(d) *Memoranda of agreement.* The following memoranda of agreement, although not incorporated by reference also are part of the approved State administered program:

- (1) The Memorandum of Agreement between EPA Region II and the New Jersey Department of Environmental Protection and Energy, signed by the EPA Region II Acting Regional Administrator on June 15, 1993.
- (2) The Memorandum of Agreement between the U.S. Army Corps of Engineers and the New Jersey Department of Environmental Protection and Energy, signed by the Division Engineer on March 4, 1993.
- (3) The Memorandum of Agreement between EPA Region II, the New Jersey Department of Environmental Protection and Energy, and the U.S. Fish and Wildlife Service, signed by all parties on December 22, 1993.

(e) *Statement of legal authority.* The following documents, although not incorporated by reference, also are part of the approved State administered program:

- (1) Attorney General's Statement, signed by the Attorney General of New Jersey, as submitted with the request for approval of The State of New Jersey's 404 Program.
- (2) The program description and any other materials submitted as part of the original application or supplements thereto.

[59 FR 9933, Mar. 2, 1994]