

Nebraska's Clean Water Act 404 Assumption Journey

2023 Power Summit

Lincoln, NE

Nebraska Department of Environment and Energy

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Overview

Clean Water Act

What is the CWA 404 Program

404 Program Development

Investigation Report

History of Clean Water Act

- ▶ **Rivers and Harbors Act (1899):** protected navigation (limited control of water pollution, protection for waterways)
- ▶ **Federal Water Pollution Control Act (1948):** provided for pollution studies and development of local sewage plants
- ▶ **Water Quality Act (1965):** created water quality standards program
- ▶ **June 22, 1969, Cuyahoga River Fire (Cleveland, OH)**
 - ▶ Local Fire Chief: “Waterfront industries are responsible, dumping oil wastes into the river rather than reclaiming them.”
 - ▶ Time Magazine: “Some river! Chocolate-brown, oily, bubbling with subsurface gases, it oozes rather than flows.”



History of Clean Water Act


- ▶ 1969 Congress passes the National Environmental Policy Act (NEPA)
 - ▶ Directed President to create the Council on Environmental Quality
- ▶ 1970 President Nixon creates Environmental Protection Agency
- ▶ Federal Water Pollution Control Act Amendments (1972) - “Clean Water Act”
- ▶ Clean Water Act (1977)





What is the Clean Water Act Section 404

Section 404 of the Clean Water Act requires authorization from the Secretary of the Army, acting through the Corps of Engineers, for the discharge of dredged or fill material into all waters of the United States, including wetlands.



Types of 404 Permits

Nationwide Permits (NWP)

General Permits (GP)

Individual Permits (IP)

Nationwide Permits

Streamlined permit review process for projects that meet certain criteria

Minimal environmental effects/
impacts

57 predetermined NWPs

Re-authorized every 5 years

- ▶ Maintenance of existing structures (NWP 3)
- ▶ Oil or natural gas pipelines (NWP 12)
- ▶ Bank Stabilization (NWP 13)
- ▶ Linear Transportation Projects (NWP 14)
- ▶ Minor Dredging (NWP 19)
- ▶ Aquatic habitat restoration, establishment, and enhancement activities (NWP 27)
- ▶ Boat Ramps (NWP 36)
- ▶ Living Shorelines (NWP 54)
- ▶ Electric Utility Line and Telecommunications Activities (NWP 57)
- ▶ Utility Line Activities for Water and Other Substances (NWP 58)

Common Nebraska NWPs

Nebraska Regional General Permit

- ▶ Similar to Nationwide Permits but region-specific activities
- ▶ Streamlined review
- ▶ Reauthorized every 3-5 years
- ▶ 6 in Nebraska
 - ▶ Duck Blinds
 - ▶ Bank Protection on Game and Parks Water Bodies - Game and Parks
 - ▶ Manmade lake and pond maintenance and rehabilitation
 - ▶ Maintenance of existing Flood Control Facilities - Papio Missouri River NRD
 - ▶ Flood Protection and Repair for Flood Damaged Areas
 - ▶ Bank Protection for Central Nebraska Public Power and Irrigation District

Individual Permits

Larger and more complex projects

More review time involved

Projects that don't fit Nationwide Permit or General Permit requirements

Typically require mitigation of impacts and a mitigation plan

404 Assumption

What?

- The state is looking at assuming permitting responsibilities of the 404 program from the Army Corps of Engineers

Why?

- To standardize permit reviews at the state level with a program that is as stringent as the federal review and is transparent in the process

When?

- 1 - 1.5 years

Nebraska Legislative Bills

- ▶ LB302
 - ▶ 2019
 - ▶ Granted authority to investigate assumption of the CWA 404 program
- ▶ LB809
 - ▶ April 12, 2022, passed
 - ▶ July 21, 2022, went into effect
 - ▶ Develop rule and regulations for 404 program
 - ▶ Provides funding
 - ▶ To hire staff
 - ▶ Develop permitting software

404 Program Assumption

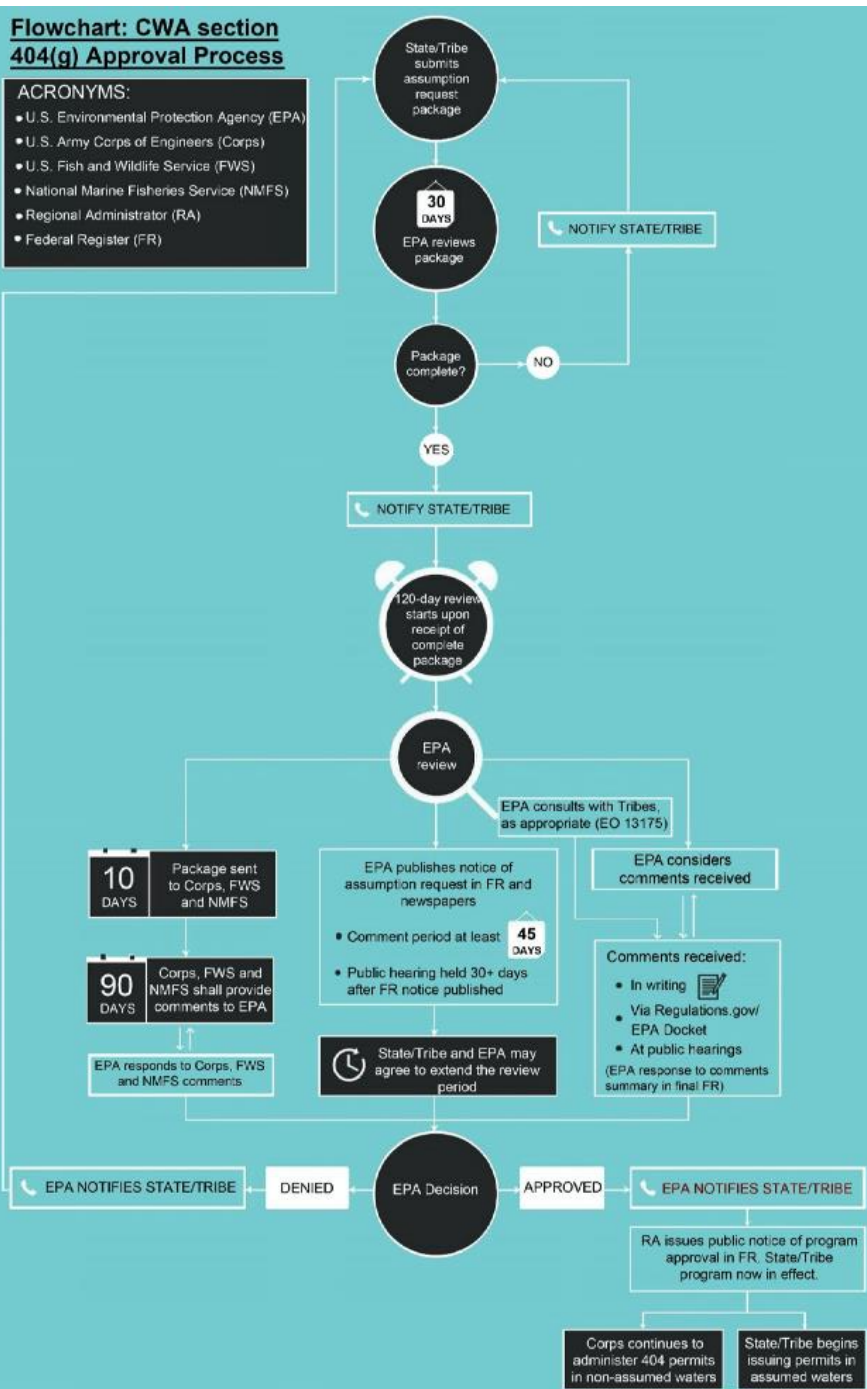
- ▶ Requires a program application to EPA (40 CFR §233.10)
 - ▶ Letter from the Governor requesting program approval
 - ▶ A complete program description
 - ▶ Attorney General's Statement
 - ▶ MOAs with EPA & USACE
 - ▶ Copies of state statutes and regulations

404 Program Application		
Element	40 CFR Section	Element Description
A		Governor letter requesting program approval
B	§233.11	Complete program description
	a	Scope and structure of state program
	b	Permitting, administration, & judicial review procedures
	c	State agency organization
	d	Funding and staffing description
	e	Estimated workload
	f	Permit application form, permit template, & reporting forms
	g	Description of compliance & enforcement & Coordination with EPA & Corps
	h	Description of waters in State vs. Corps jurisdiction
	i	BMPs for exempt provisions in 404(f)(1)(E)
C	§233.12	Attorney General's Statement
	a	Laws & Regulations provide proper authority
	b	Acknowledgement that tribal land is not a state assumption option
	c	Legal analysis of prohibition of taking private property without just compensation
	d	Multiple agency responsibility and authorities
D	§233.13	MOA with EPA Regional Administrator
	a	Identify permit applications which EPA will waive federal review
	b	Reports & files to be submitted to EPA
	c	Roles & coordination for compliance monitoring & enforcement
E	§233.14	MOA with Secretary of the Army
	a	Description of waters the Corps maintains jurisdiction over
	b	Procedures to transfer pending permit applications upon program approval
	c	Existing Corps general permits & how the state will administer them
F		Copies of all applicable state statutes and regulations

Flowchart: CWA section 404(g) Approval Process

ACRONYMS:

- U.S. Environmental Protection Agency (EPA)
- U.S. Army Corps of Engineers (Corps)
- U.S. Fish and Wildlife Service (FWS)
- National Marine Fisheries Service (NMFS)
- Regional Administrator (RA)
- Federal Register (FR)



EPA Approval Process

404 Program Assumption Plan



Assemble team



Develop assumption gnatt chart to track tasks



Divide plan into 2 phases

Investigation Phase

Program Development

Investigation Phase



Learn how 404 program is currently being administered



Develop workload analysis



Estimate staffing needs



Program administration cost estimates



How to get sustainable funding

**Clean Water Act Section 404
Program Assumption Investigation Report**



Photo Credit: Warner Wetland Lincoln, NE by Josh Wilhelm, NDEE



**Permitting and Engineering Division – CWA 404 Section
December 2021**

Investigation Report

Research

Reviewed 3 assumed states' permitting process

- Michigan
- New Jersey
- Florida

Army Corps of Engineers permitting process

Collaborations

Meet bi-monthly with EPA

- Assisting with process

- Giving early input so process will be smoother in end

Met bi-monthly with Corps to Develop MOA

- 90% complete will revisit closer to end

- Agreed upon administrative line

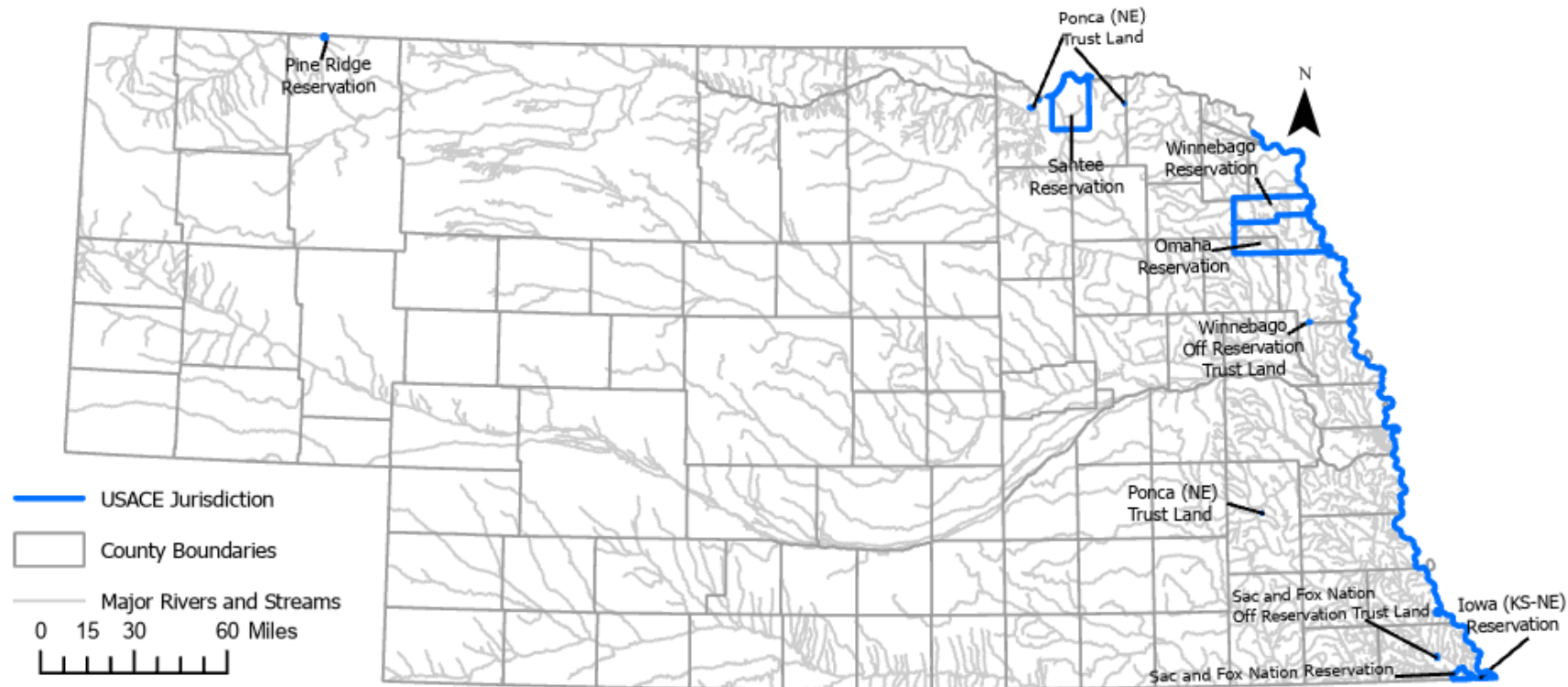
Meet monthly with internal Assumption Advisory Committee

- Get input from other permitting programs

- Also, water quality standards, process improvement, legal, fiscal and public information officers

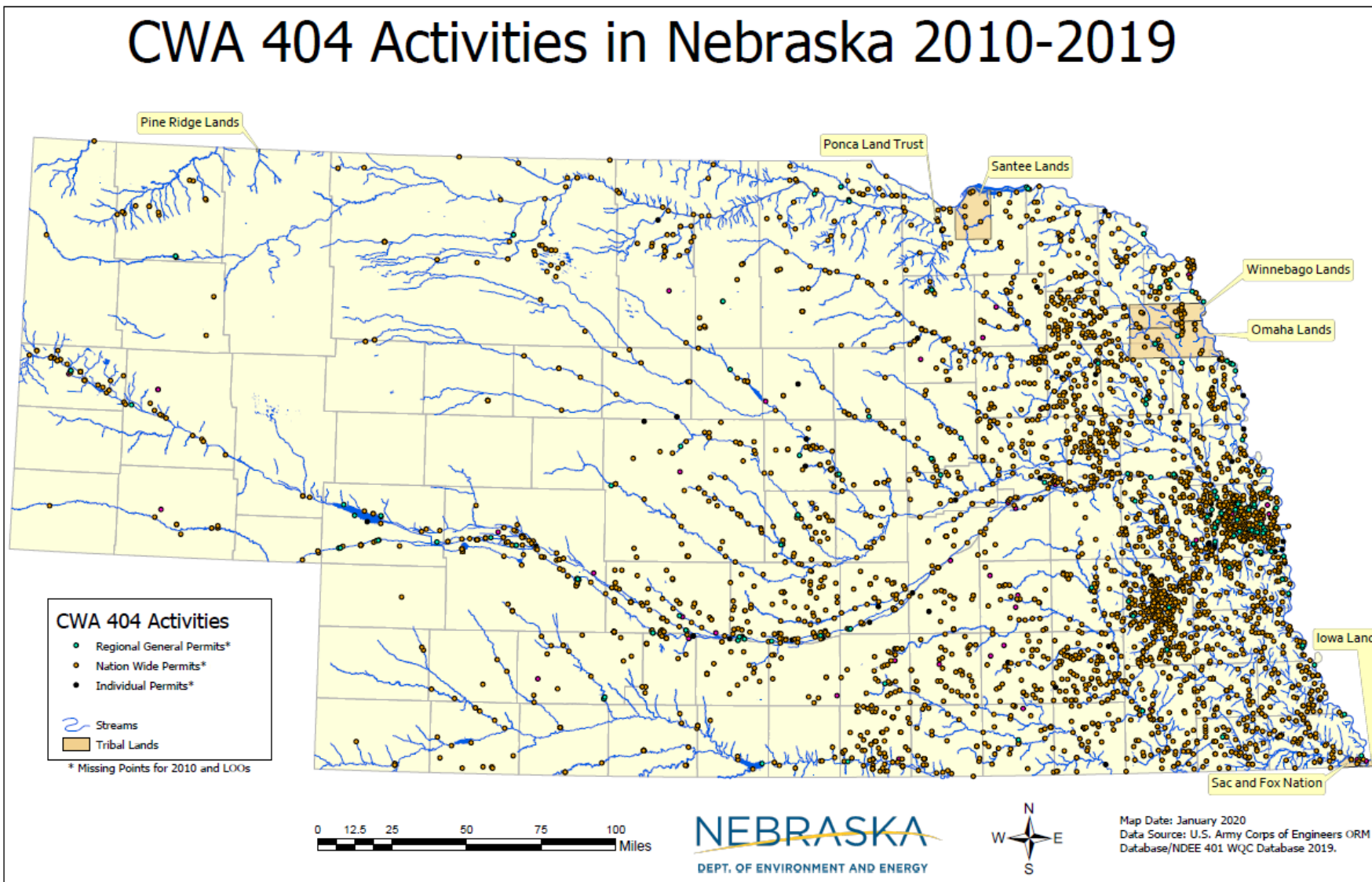
Assumable vs Retained Waters

404 Permitting Authority Retained by the Army Corps of Engineers



Workload Analysis

CWA 404 Activities in Nebraska 2010-2019



Annual Assumable Workload

Annual Assumable Workload	Total	IP	GP	JD
Full Assumption	871	8	448	415
Processing Time (Hours)		292	39	8
Total Annual Hours	23,128	2,336	17,472	3,320

* 5 year average from ORM Database

Full Assumption Annual Workload Estimates

IP = Individual Permit

GP = Regional General Permit, Program General Permit, and Nationwide Permit

JD = Jurisdictional Determination

Staffing Needs

Type of Employee	FTE	Total Hours	Notes
Section Supervisor	1	1300	Program Administration
Permit Writer	17.8	23128	Based on ORM data
Inspector	5.9	7709	Based on Department data
Engineer	3.0	3855	Based on Department data
Wetland Biologist	3.0	3855	Based on Department data
Total Staffing Needs	30.7	39847	

Administrative Costs

Department FTE Model	Direct Cost	Benefits	Indirect rate	Direct+Indirect	Total FTE Cost	Adminstration Cost
	Provided	33% of Direct	37% of Direct	D+I	D+B+I Costs	$((D+I) * 4) / 3$
		0.33	0.37			
Average FTE w/ Management	\$ 56,160.00	\$ 18,532.80	\$ 20,779.20	\$ 76,939.20	\$ 95,472.00	\$ 102,585.60
Average FTE w/o Management	\$ 45,760.00	\$ 15,100.80	\$ 16,931.20	\$ 62,691.20	\$ 77,792.00	\$ 83,588.27
Program Calculations	# Managers	# Staff		Direct+Indirect	Total TFE Cost	Adminstration Cost
Assumed 404 Program	1	29.7		\$ 1,938,867.84	\$ 2,405,894.40	\$ 2,585,157.12

Sustainable Funding Options

Funding Option (1)	Base	Annual Total	Unit	Fee per unit (100% Program Cost)
Pay Per Service (IP)	\$ -	8	Individual Permit	\$ 32,638.61
Pay Per Service (GP)	\$ -	448	General Permit	\$ 4,327.83
Pay Per Service (JD)	\$ -	415	Jurisdictional Determination	\$ 934.39

Funding Option (2)	Base	Annual Total	Unit	Fee per unit (100% Program Cost)
Chargeable Impact	\$ -	8710	acre/linear feet	\$ 296.80

Funding Option (3)	Base	Annual Total	Unit	Fee per unit (100% Program Cost)
Hourly Rate	\$ -	38547	hours	\$ 67.07
Hybrid Base + Hourly Rate	\$ 800.00	38547	hours	\$ 48.99

Funding Option (4)	Base	Annual Total	Unit	Fee per unit (100% Program Cost)
Hybrid Base + Project Cost	\$ 800.00	Program Cost - Base	1% project cost	\$ 2,168.03

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Funding Option (4)	Base	Annual Total	Unit	Fee per unit (100% Program Cost)
Hybrid Base + Project Cost	\$ 800.00	Program Cost - Base	1% project cost	\$ 2,168.03

Sustainable Funding Options

Preferred
Option →

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Next Steps

MOA w/ Fish and Wildlife Service and Game and Parks

MOA w/ State Historical Preservation Office (SHPO)

MOA w/ EPA

Drafting new state title to reflect new duties

Adopting the 40 CFR by reference

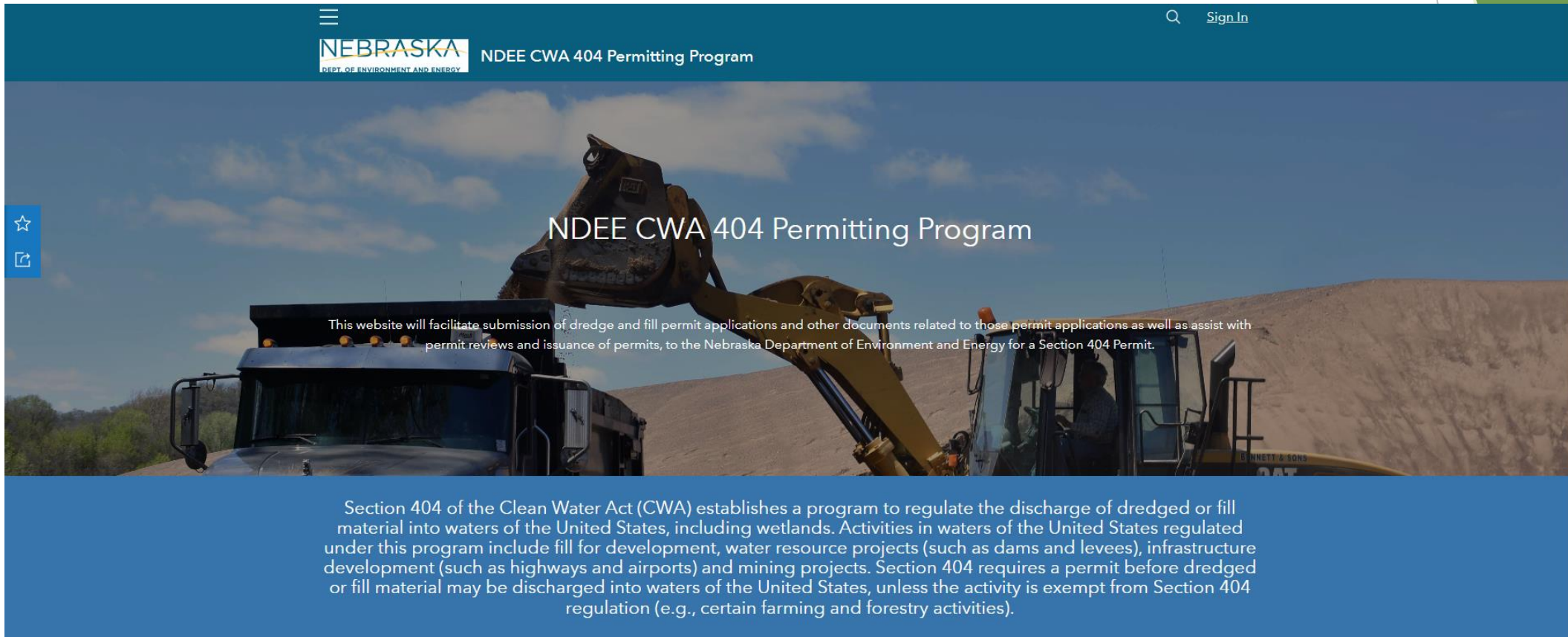
Online Permitting Portal

Permitting Portal



**Office of the Chief
Information Officer
State IT Section**

Permitting Portal



NEBRASKA
DEPT. OF ENVIRONMENT AND ENERGY

NDEE CWA 404 Permitting Program

Sign In

NDEE CWA 404 Permitting Program

This website will facilitate submission of dredge and fill permit applications and other documents related to those permit applications as well as assist with permit reviews and issuance of permits, to the Nebraska Department of Environment and Energy for a Section 404 Permit.

Section 404 of the Clean Water Act (CWA) establishes a program to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. Activities in waters of the United States regulated under this program include fill for development, water resource projects (such as dams and levees), infrastructure development (such as highways and airports) and mining projects. Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States, unless the activity is exempt from Section 404 regulation (e.g., certain farming and forestry activities).

Our Progress So Far

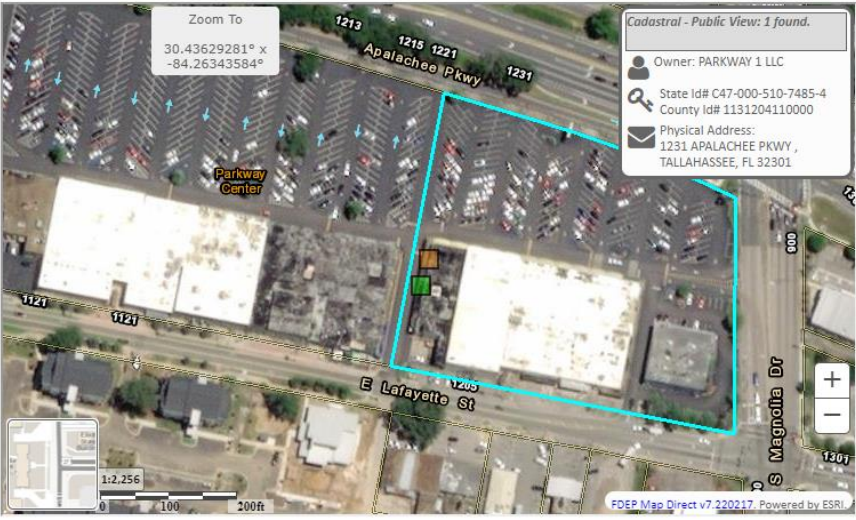
Leverage this section to share progress or other stats with the public. Make it transparent and exciting to see the results of the hard work or why an initiative needs support. This is also a great space to inspire your audience to potentially get involved.

Permitting Portal

- Introduction
- Application Purpose
- General Information
- Notification Type
- Notification Details Page 1
- State 404 Program
- Important Notice
- Manage Project Site
- Location Selection**
- Manage Contacts
- Project Information
- Project Description
- Wetlands and Surface Waters
- Construction Methods
- Additional Information
- Section K - General Information
- Section K Upload
- Attachment Checklist
- Document Upload
- Signature
- Payment of Fees

Home Process Help About

Location Selection



If Map Direct fails to load on your computer, or you encounter other problems, please refer to our troubleshooting guide.

Use the mapping tools to find your project location. Click on the map to select the approximate center of your project. At a minimum, the marker should be located on the correct project parcel or property. Failure to provide an accurate location may delay the processing of your application.

You will have the option to confirm or move the location on the next screen.

[Go Back to Previous Step](#) [Continue](#)

Public Outreach

- ▶ Will be holding several stakeholder meetings
- ▶ Fall 2023
- ▶ What we are looking for?
 - ▶ The Good and the bad
 - ▶ The Wishlist
 - ▶ Aspects of the current system that work
 - ▶ **Fee Structure**
 - ▶ **Regulation Review**

Current Status

MOA w/ EPA & SHPO in progress

MOA w/ USACE 85% done

Meeting w/ NE Game and Parks and US Fish and Wildlife Service on Threatened and Endangered Species Coordination

Reviewing draft regulations and permits

Developing permitting portal

Drafting a biological assessment

404 Team



Anthony Candelas
Permit Writer



Margaret Bass
Regulation Writer



Daniel Morales
Biologist



Anni Poetzl
404 Specialist



Danielle Hardesty
401 Coordinator

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Questions??

