



**U.S. House of Representatives**  
**Committee on Transportation and Infrastructure**

Washington, DC 20515

John L. Mica  
Chairman

Nick J. Rahall, III  
Ranking Member

James W. Coon II, Chief of Staff

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James H. Zoia, Democrat Chief of Staff

**MEMORANDUM**

**TO:** Members of the Subcommittee on Water Resources and Environment

**FROM:** Bob Gibbs  
Subcommittee Chairman

**RE:** Hearing on "Forty Years after the Clean Water Act:  
Is It Time for the States to Implement Section 404 Permitting?"

**PURPOSE OF HEARING**

The Water Resources and Environment Subcommittee is scheduled to meet on Thursday, September 20, 2012, at 10:00 AM, in Room 2253 of the Rayburn House Office Building, to receive testimony from representatives of the U.S. Environmental Protection Agency, U.S. Army Corps of Engineers, and State water quality agencies on the potential opportunities for enhancing Cooperative Federalism with the States through State assumption of the Clean Water Act section 404 permit program.

**BACKGROUND**

In 1972, Congress passed the Federal Water Pollution Control Act Amendments of 1972 (commonly known as the "Clean Water Act" or the "CWA"; 33 USC § 1251 *et seq.*). The objective of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. The primary mechanism for achieving this objective is the CWA's prohibition on the discharge into a jurisdictional waterbody of a pollutant without a National Pollutant Discharge Elimination System (NPDES) permit. (*See CWA §§ 301, 402.*) The CWA also regulates, through a separate permit program under section 404, the discharge of dredged or fill material into jurisdictional waterbodies, including wetlands. (*See CWA § 404.*)

The U.S. Environmental Protection Agency (EPA) has the basic responsibility for administering and enforcing most of the CWA, including the NPDES permit program under CWA section 402, and the U.S. Army Corps of Engineers (Corps) has lead responsibility for administering the dredge or fill (wetlands) permit program under section 404 of the CWA.

Under the wetlands permitting program, it is unlawful for a facility to discharge dredged or fill materials into a jurisdictional waterbody unless the discharge is authorized by and in compliance with a dredge or fill (section 404) permit issued by the Corps.

The CWA does not contemplate a single, Federally-led water quality program. Rather, Congress intended the States and EPA to implement the CWA as a Federal-State partnership where the States and EPA act as co-regulators. The CWA established a system where States can receive EPA approval to implement water quality programs under State law, in lieu of Federal implementation. These States are called "authorized States." Under the CWA, 46 States have been authorized to implement and enforce NPDES permits.

Even when a State has the lead authority to implement the CWA's programs, EPA retains residual authority under the CWA to review certain actions by the State in implementing the CWA. EPA also retains authority to oversee and object to the Corps' issuance of section 404 permits for the discharge of dredged or fill material.

### **STATE ASSUMPTION OF THE SECTION 404 PERMITTING PROGRAM**

In 1977, the U.S. Congress formally recognized the potential for and desirability of a major State role in the management of dredge and fill activities, including administration of the section 404 permitting program. Congress recognized that many States had already established parallel permitting programs, resulting in duplicative State and Federal permit requirements, and that the traditional role of the States in land use management provides States with a particularly effective basis for wetland management. However, Congress also emphasized the need to retain Corps control over navigation in interstate waters.

Congress amended section 404 of the CWA, in the 1977 amendments to the CWA, to allow a State to assume the 404 program by applying to EPA to administer its own permit program for the regulation of dredge and fill activities in lieu of the permit program administered by the Corps. EPA provides overall program oversight over State programs that have assumed 404 permitting responsibilities, to ensure compliance with Federal standards.

Provisions authorizing States to apply for and assume the administration of the 404 program can be found in CWA section 404(g)-(l). Requirements for assumption of section 404 are detailed in EPA's section 404 State program regulations at 40 C.F.R. Part 233.

An approved State program is one which is established under State law and which functions in lieu of the Federal program. It is not a delegation of Federal authority. In practice, a State section 404 program is a close partnership between the State and Federal agencies, with much of the day-to-day State/Federal coordination occurring with the Corps.

Combining the work of State and Federal agencies into a section 404 partnership eliminates a significant amount of State and Federal duplication, minimizing regulatory burdens, while taking advantage of the strengths of each level of government. State-specific needs and policies are more directly addressed, without sacrificing national standards, interstate concerns,

or Federal technical expertise. At the same time, the section 404 program regulations maintain a “level playing field” among the States, and ensure protection of interstate water resources.

Congress prohibited assumption of the 404 program in certain waters, as defined in section 404(g)(1) of the CWA, including waters which are or could be used to transport interstate and foreign commerce, waters subject to the ebb and flow of the tide, and wetlands adjacent to these waters (*e.g.*, tidal waters, the Great Lakes, and major river systems). Generally these are the waters regulated by the Corps under section 10 of the Rivers and Harbors Act. The Corps retains section 404 jurisdiction over these waters. In waters where a State 404 program is approved by EPA, the Corps of Engineers suspends processing of 404 permits everywhere except in so-called section 10 waters.

Section 404 provides for coordination with a number of other Federal resources management programs. Because permits issued under a State-assumed program are issued under State law, other Federal laws, such as Endangered Species Act (ESA), do not directly apply. Instead, they are addressed through EPA oversight as required by the statute and regulations.

State assumption of the section 404 program has been limited as compared to States assuming other parts of the Clean Water Act. While 46 States are authorized to implement the NPDES permit program under section 402, only two States, Michigan and New Jersey, have assumed the 404 program.

### ASSUMPTION REQUIREMENTS

In order to be eligible to assume administration of section 404, a State program must comply with specified criteria. (*See* 40 C.F.R. Part 233.) The overriding requirement for assumption is that the State must have the authority to provide at least the same level of aquatic resource protection as the Federal agencies. Only then can Federal permitting be suspended in favor of the State program.

States need to develop a wetlands permit program similar to the Federal program and submit to EPA an in-depth application to assume the program. Even for States with an existing wetlands regulatory program, this process can require the passage of new legislation by the State legislature.

An approved State program must have in place, in State laws and regulations, provisions that address a number of requirements, including:

- Jurisdiction over all waters covered under Federal CWA jurisdiction, including wetlands, other than waters where the Corps retains jurisdiction.
- Authority to regulate all activities that are regulated under Federal law. A State cannot exempt activities that are not exempt under the CWA.
- Permitting standards and procedures that will be at least as stringent as the Federal permit program, and that will ensure consistency with the Federal permitting criteria.

- Adequate compliance and enforcement authority, including the ability to enforce permit conditions, and to address violations with penalty levels that are at least comparable to Federal fines and penalties. Under a State-assumed program, primary responsibility for enforcement rests with the State.
- Program funding and staffing sufficient to implement and enforce the program.

State regulations can be broader than Federal regulations, but cannot exempt activities which require a Federal permit. State regulations can provide greater resource protection, but cannot be less stringent than Federal regulations.

There is no provision for partial assumption of the program. A State cannot assume authority for only certain categories of activities or waters. However, it is not required that a State operate a permitting program in waters where the Corps retains jurisdiction. Nor is a State required to have authority over lands held in trust for tribes.

### THE ASSUMPTION PROCESS

A State that seeks to assume the 404 program must compile and submit to EPA an application, which will include the following supporting documents:

- A letter to EPA, from the Governor of the State, requesting program approval.
- A complete program description. This detailed description will include a full description of the State's permitting and enforcement programs, including regulatory authorities, staffing, organization, and basic procedures.
- A statement from the State Attorney General, certifying that the laws and regulations of the State provide adequate legal authority to carry out the program and to meet the applicable requirements of Federal law.
- Memoranda of Agreement with the Regional Administrator of EPA and with the Secretary of the Army, which among other things, define State and Federal responsibilities for section 404 program administration and enforcement, including all State agencies with program responsibility; define categories of permit applications for which EPA will waive Federal review; establish a schedule for reporting and submittal of other information to EPA; describe waters that remain under the jurisdiction of the Corps following approval of the State program; define any general permits issued by the Corps that will be transferred to the State; and address State and Federal responsibilities for compliance monitoring and enforcement.
- Copies of all applicable State statutes and regulations, including those governing applicable State administrative procedures.

Following submittal, EPA distributes the application for State assumption to other Federal agencies for review, and must publish notice of the State's application in the *Federal Register*. EPA also must provide for a public hearing in the State.

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 meets the applicable statutory and regulatory requirements for an approvable program. EPA is responsible for reviewing and approving/denying a State's request to assume the Federal permit program within 120 days of receipt of the completed application.

When a State assumes administration of the section 404 program, the primary responsibility for permitting and enforcement in assumable waters is transferred to the State. The Corps no longer processes section 404 permits in waters under State jurisdiction. The State assumes responsibility for the program, determines what areas and activities are regulated, processes individual permits for specific proposed activities, and carries out enforcement activities.

The role of EPA also changes. Prior to assumption, EPA reviews public notices and permits issued by the Corps, and provides comments to the Corps. In a State 404 program, EPA reviews public notices and permit applications received by the State, and provides comments to the State. A State cannot issue a permit over EPA's objection.

EPA also is responsible for programmatic oversight, including reviewing annual reports submitted by the State, and evaluating any changes in State or Federal laws and regulations to ensure that program consistency is maintained.

While EPA has the authority to review any application processed by the State, Federal regulations allow EPA to waive review of some categories of permits. However, EPA cannot waive review of certain types of permits such as those that may affect threatened or endangered species, draft general permits, and discharges near public water intakes. As the State program matures, the level of Federal oversight may decrease.

### **IDENTIFIED BENEFITS OF STATE ASSUMPTION**

State assumption of section 404 gives a State the lead role in evaluating and issuing permits (with EPA in an oversight role). Representatives of States have identified several significant benefits of State assumption in terms of overall program efficiency and water resource protection. These include the following:

- Regulatory streamlining/increased program efficiency/consistency in permit decisions. State program assumption may greatly reduce duplicative State and Federal permitting requirements, and eliminate potentially conflicting permit decisions and conditions. State permit programs are often more timely than Federal programs, resulting in reduced time for review of regulated activities.

- More effective allocation of State and Federal agency resources. State programs typically make use of more staff in more localized offices than programs operated from Corps districts. The public often considers State staff to be more accessible than Federal staff.
- Local resource knowledge and improved integration with other State resource programs. State resource managers frequently have extensive knowledge of local resource values, conditions, and issues, and also typically work closely with local units of government, including agencies responsible for overall land use and development, and with other related land and water management programs.
- State-specific resource policies and procedures are tailored to address specific conditions and needs of the State. Under a State-assumed 404 program, the State has a degree of flexibility in the selection of policies and procedures that are best suited to the needs and characteristics of the State.
- Increased regulatory program stability. The processes and procedures of State government tend to be more stable, and less affected by individual legal decisions or procedural modifications, leading overall to a more stable and predictable permitting program.
- Increased public support. State permit staff are often more readily accessible to the public, and more consistent decision-making is achieved by policies and procedures tailored to the needs of the State.
- Improved resource protection. The coordinated efforts of both State and Federal agency staff, the use of State-specific methods and State expertise backed by Federal scientific expertise, and a more efficient regulatory program can provide greater protection of wetland resources.

### **IDENTIFIED BARRIERS TO STATE ASSUMPTION**

The fact that only two States have assumed 404 program administration indicates there are some significant limitations associated with this process. Representatives of States have identified several barriers that stand in the way of States assuming the 404 program, including the following:

- Meeting program requirements. Current Federal regulations for the section 404 program are complex, particularly in terms of the definition of Federal jurisdiction, activities regulated, permit review criteria, and permit exemptions. In order to be approved to administer the program at the State level, a State must demonstrate that it has equivalent authority in all areas. This can be difficult, particularly if the basis for State authority is quite different than the basis for Federal authority.
- Potentially high percentage of waters that must remain under Corps jurisdiction. For some States, particularly coastal States, the extent of jurisdiction that would be retained by the Corps limits the appeal of the overall program, and may lead to a decision to forego program

assumption. In States where jurisdiction over a high percentage of waters would be retained by the Corps, assumption may be seen as less beneficial.

- Inability to partially assume 404 authority. Some States would prefer to administer a State 404 program only in certain geographic areas of, or waters in, the State, such as the coastal zone, or in tidal wetlands, including a portion of section 10 waters. There is currently no option for partial assumption of a State 404 program based on a limited geographic area or type of waters.
- High financial cost associated with the initial evaluation and development of a State program. The initial cost of program assumption, which includes development of a full application, modifications to the State program to achieve consistency, development of procedures for coordination with Federal agencies, and educating the public regarding the change in State and Federal roles, can be significant. (EPA has estimated that States spend an average of \$225,000 when investigating the option to assume the 404 program. Program development (but not administrative) costs may be partially offset through EPA Wetland Program Development Grants.)
- High financial cost of, and lack of dedicated Federal funding specifically for, State 404 program operation/administration. There is no dedicated source of Federal funding for States to assume the administration of 404 programs. In theory, States may make use of CWA section 106 water program funds (which are for assisting States in administering their programs for the prevention, reduction, and elimination of water pollution) for this purpose, but this would be difficult in practice since these funds are already dedicated to other existing State water programs, which may be located in another State agency. This is perhaps the most serious impediment to many State agencies. (EPA has provided State wetland program development grants to support development of State wetland regulatory programs. However, the funds can only be used for program development, not implementation. The cost of administering not only the permit process, but the associated mitigation requirements and enforcement program, places a significant burden on a State administering a section 404 program.)
- Political will and public desires. Multiple interest groups from both sides of the political spectrum may have serious concerns about the impact of State program assumption. Activist groups may initially view a State program as less protective than the Federal program. The regulated public may see assumption as an expansion of overall permit requirements. For State legislators, the cost of the regulatory program may be the primary concern.

As noted earlier, State assumption of the section 404 program has been limited in comparison to States assuming other parts of the Clean Water Act. While 46 States are authorized to implement the NPDES permit program under CWA section 402, only two States, Michigan and New Jersey, have assumed the 404 program to date. Nevertheless, numerous States recently have expressed increased interest in assuming the administration of the 404 program.

At the hearing, the Subcommittee will hear from three of these States, namely, Ohio, Florida, and Virginia, which have expressed interest in assuming the 404 program, and from a State (Michigan), which assumed the program in 1984. They are expected to discuss the perceived benefits of and barriers to program assumption. The Subcommittee also will hear from a former State regulator (from Wisconsin and Ohio), now turned activist, about his views, and from representatives of EPA and the Corps about the State assumption process.

## **WITNESSES**

### **Panel One**

Mr. David Paylor  
Director, Virginia Department of Environmental Quality  
(on behalf of ECOS-- Environmental Council of the States)

Mr. Jeff Littlejohn, P.E.  
Deputy Secretary for Regulatory Programs, Florida Dept. of Environmental Protection

Mr. George Elmaraghy  
Chief, Division of Surface Water, Ohio Environmental Protection Agency  
(on behalf of ASWM-- Association of State Wetland Managers)

Mr. William Creal  
Chief, Water Resources Division, Michigan Department of Environmental Quality  
(on behalf of ACWA-- Association of Clean Water Administrators)

Mr. Todd Ambs  
President, River Network

### **Panel Two**

The Honorable Jo-Ellen Darcy  
Assistant Secretary of the Army for Civil Works

Ms. Denise Keehner  
Director, Office of Wetlands, Oceans, and Watersheds  
U.S. Environmental Protection Agency