

**FORTY YEARS AFTER THE CLEAN WATER ACT:  
IS IT TIME FOR THE STATES TO  
IMPLEMENT SECTION 404 PERMITTING?**

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**(112-106)**

**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON  
WATER RESOURCES AND ENVIRONMENT  
OF THE  
COMMITTEE ON  
TRANSPORTATION AND  
INFRASTRUCTURE  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED TWELFTH CONGRESS  
SECOND SESSION

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**U.S. House of Representatives**  
**Committee on Transportation and Infrastructure**  
**Washington, DC 20515**

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**Ranking Member**

James W. Coon II, Chief of Staff

September 14, 2012

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?"

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**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)-(i). 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 Kechner  
Director, Office of Wetlands, Oceans, and Watersheds  
U.S. Environmental Protection Agency

## **FORTY YEARS AFTER THE CLEAN WATER ACT: IS IT TIME FOR THE STATES TO IMPLEMENT SECTION 404 PERMITTING?**

**THURSDAY, SEPTEMBER 20, 2012**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON WATER RESOURCES  
AND ENVIRONMENT,  
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10:02 a.m. in Room 2253, Rayburn House Office Building, Hon. Bob Gibbs (Chairman of the subcommittee) presiding.

Mr. GIBBS. Good morning. We will convene the Subcommittee on Water Resources and Environment, a subcommittee of T&I. And welcome, everybody, here today. I will start with my opening statement. Let's get organized here a little bit. This is a lot more cozy, up here in this room. We shouldn't have any trouble hearing everybody.

Again, welcome. This is a Water Resources and Environment Subcommittee hearing on "Forty Years After the Clean Water Act: Is it Time for the States to Implement Section 404 Permitting?"

A note that next month will be the 40th anniversary of the Clean Water Act. When Congress wrote the Clean Water Act, it did not contemplate having a single, federally dominated water quality program. Rather, Congress intended the States and the EPA to implement the Clean Water Act as a Federal-State partnership, where States and the EPA act as co-regulators. This, in essence, is a cooperative federalism.

While the States have played an integral role in implementing many parts of the Clean Water Act over the past 40 years, including water quality standards and NPS permitting, there is an important program under the Clean Water Act that remains predominantly administered by the Federal Government. This is the dredge, or fill, wetlands permit program under Section 404 of the Clean Water Act.

While some of the 46 States have primary responsibility for implementing NPDES permit program, only 2 States have assumed administration of the 404 permit program. This is despite the fact that, as I understand it, there are numerous States that are interested in assuming the program.

State assumption of Section 404 gives a State the lead role in evaluating and issuing permits. This can eliminate a significant amount of State and Federal duplication, and result in increased

program efficiency and consistency in permit decisions. It also can help us ensure that State-specific needs and conditions are more directly addressed.

States know best what their issues are and how to address them. I want to know why more States have not assumed the 404 program. And specifically, I want to hear about what are the barriers that are holding States back from assuming the program, and what statutory or other impediments, if any, are standing in the way of making this program an effective Federal-State partnership.

The aim of this hearing today is fact-finding, so we can learn more about the States' assumption issue—assuming—this issue. And also, I think, as part of our role as an oversight capacity.

We assembled two panels of witnesses, including two Federal agencies responsible for Section 404 permitting, and several State representatives who will share their perspective on State assumption of this program. I welcome all of our witnesses. But this time I want to yield to my ranking member, Mr. Bishop, for any comments you may have.

MR. BISHOP. Thank you very much, Mr. Chairman. And thank you for holding today's hearing. While the topic of today's hearing is an interesting one, I have to question how today's hearing will help address the issues that this subcommittee should be focusing on, which is creating jobs for American families. In light of this Congress' mantra of doing more with less, I am curious how our Republican majority plans to address many of the concerns raised by the States without further diminishing Clean Water Act protections over our waters.

Today we will discuss how some States wish to assume regulatory authority over dredged and fill activities currently covered by Section 404 of the Clean Water Act. Several States have articulated why they would like to assume regulatory authority over 404 activities, but have failed to use existing Clean Water Act provisions to do so, provisions that were adopted by this committee over 30 years ago.

The chairman mentioned perceived barriers to State assumptions that—to State assumption that States recommend action on. However, we need to be honest with our witnesses and explain how, even if we agree with the States' concerns, many of their recommendations are unlikely to find support with the current House leadership.

First, States are requesting that Congress enact a new, dedicated grant program for States to set up and manage their individual wetlands programs. Yet all year the Republican majority has blocked this subcommittee from moving any legislation that would either reauthorize existing programs, such as the Clean Water State Revolving Fund at increased levels, or would create any new authorities.

In addition, this Congress must soon address the consequences of sequestration, where Federal agencies such as the Corps and the EPA will need to absorb an additional 7- to 9-percent cut in funding, including an estimated cut of \$120 million from the Clean Water SRF and an estimated \$20 million cut from Section 106 funding. So, I would ask my colleagues and the State witnesses



where they would have Congress cut further to come up with these additional funds for State 404 implementation.

Second, some States are recommending that Congress grant them authority to regulate activities in the traditionally navigable waters, water that—waters that are covered by Section 10 of the Rivers and Harbors Act. Here again, I imagine that my Republican colleagues would be reluctant to grant States with potential veto authority over essential Federal functions such as national defense, protection of commercial navigation, and flood control projects.

Some also suggest that State assumption of the 404 authority will result in faster and cheaper permits for the regulated community, as well as greater consistency and efficiency in permitting process. Yet there is evidence to the contrary, and I want the record to reflect the following.

Number one, when you compare apples to apples, the average permit processing time for the States of Michigan and New Jersey is currently about the same as the overwhelming majority of Federal 404 permits approved by the Corps. So existing data does not show that permits will be processed faster by States.

Second, in the absence of additional Federal appropriations, States may be forced to raise an additional funds to administer the 404 program through State general revenues, or permit fees. So it is not necessarily a given that 404 permits will be cheaper under State authority.

And, third, permit applicants may also face greater confusion trying to figure out which Federal or State agency is responsible in those States that choose to administer only portions of the 404 program, or if States are unable to assume authority over navigable, in fact, waters.

So, exactly why are we holding today's hearing, especially as this Congress plans on making its getaway tomorrow for the upcoming elections? If the reason for today's hearing is to lay down a marker for further changes to Clean Water Act protections over waters, similar to other bills moved by this subcommittee through the Congress, then in my view this is the wrong approach for protecting the health and well-being of American families, and one that I cannot support.

Rather than holding this hearing, I would have preferred to see this subcommittee meeting be an opportunity to advance legislation such as the Clean Water SRF reauthorization, to address the current 11.3 percent unemployment rate for the construction industry nationally—and I will point in my—pardon me, on Long Island, over 30 percent unemployment in the heavy construction industry.

Just like the recently enacted surface transportation program, the need for investing in wastewater infrastructure is enormous, and will not go away, simply by ignoring it. Similarly, reauthorization and reforming programs to rebuild our crumbling infrastructure will create thousands of jobs. For every \$1 billion invested in wastewater infrastructure, this Nation can create between 28,000 and 33,000 jobs in communities across America, while improving public health and the environment.

For the past year-and-a-half I have been working in good faith with outside groups and colleagues across the aisle to reach consensus on the best way to renew the Federal commitment to fund-

ing wastewater infrastructure. Unfortunately, these efforts have been rebuffed by the Majority at every step, including a party-line vote against reauthorization of the Clean Water SRF before the August recess.

It looks as if we will recess this committee and this Congress for the elections without moving a Clean Water SRF reauthorization. This will mark the first time since Chairman Bud Shuster led this committee that we have not acted on a Clean Water SRF reauthorization. This is a missed opportunity, not only in terms of what this committee should be doing to promote good-paying jobs here at home, but also in meeting its longstanding obligation to work with the States in protecting public health and the environment.

I yield back the balance of my time.

Mr. GIBBS. OK. Before I introduce our witnesses, I want to ask unanimous consent that the following letters and supporting documents from the aggregates—the Ohio Coal Association and the Association of State Wetland Managers—be included in the record.

[No response.]

Mr. GIBBS. Without objection?

Mr. BISHOP. No objection.

Mr. GIBBS. OK——

Mr. BISHOP. And I have one, also, one——

Mr. GIBBS. Oh, OK, OK. Well, OK. So that is so ordered.

[Please see pp. 107–161 for the materials referenced by Hon. Bob Gibbs.]

Mr. BISHOP. OK.

Mr. GIBBS. And go ahead.

Mr. BISHOP. I ask—thank you, Mr. Chairman. I ask unanimous consent that a letter from Mr. William Snape of the Center for Biological Diversity be included in today's hearing record.

Mr. GIBBS. So ordered.

[The information follows:]

September 19, 2012

The Honorable Robert Gibbs  
 Chairman, House Subcommittee on Water Resources and Environment  
 The Honorable Timothy Bishop  
 Ranking Member, House Subcommittee on Water Resources and Environment  
 U.S. House of Representatives Committee on Transportation and Infrastructure  
 House Rayburn Office Building  
 Washington, D.C. 20515

Re: Hearing on Clean Water Act 404 Permitting and Potential State Assumption

Dear Congressmen Gibbs and Bishop, and Members of the Subcommittee:

We write to you today expressing deep concern about encouraging the delegation of authority of Section 404 permitting to the states under the Clean Water Act. Below is a brief background and overview of key issues related to the Army Corps of Engineers' ("Corps") compliance with the Endangered Species Act (ESA) in connection with its administration of the nationwide permit program under the Clean Water Act. As we demonstrate, unlike the Clean Water Act NPDES and Clean Air Act permitting, which recognize and embrace the importance of state delegation and cooperative federalism, the Section 404 program as a whole possesses no clear federal policy or permitting structure, and state assumption of "dredged or fill material" permitting would thus lead to more regulatory chaos, more destruction of wetlands/water systems and more extirpation of imperiled wildlife. In the Endangered Species Act (ESA) context, delegation to the states of "take" permitting authority is an even more controversial idea, in part because states themselves are as bound by the prohibition against take as private parties, and in part because of the historic reality that the federal ESA was passed to address the significant weaknesses of state protection for threatened and endangered species.

#### I. Background

According to the Congressional Research Service, as much as 90 percent of the Corps' regulatory workload consists of processing general permits.<sup>1</sup> The National Oceanic and Atmospheric Administration's Fisheries Services ("Fisheries Service") notes that the number of activities authorized through "nationwide permits" (a form of general permit) is so great that thousands of acres of the nation's wetlands are being lost every year. The NWP which took effect on March 19, 2012, will authorize at least 43,000 activities every year, more than 217,000 activities over five years, resulting in a cumulative loss of 140,000 acres of jurisdictional wetlands to activities authorized under NWPs since 1982.<sup>2</sup>

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<sup>1</sup> Congressional Research Service, *The Army Corps of Engineers' Nationwide Permits Program: Issues and Regulatory Developments* (Jan. 30, 2012).

<sup>2</sup> U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service, *Endangered Species Consultation, Biological Opinion on U.S. Army ACOE of Engineers' Nationwide Permit Program* (Feb. 2012) ("Fisheries BiOp") at 178.

The sheer number of activities authorized under NWP has sobering consequences for the nation's resources. The nation's waters and wetlands provide critical ecosystem services to aquatic systems and important habitats for wildlife, including endangered and threatened birds, fish, and plants as well as organisms on the lower rungs of the food chain. The Clean Water Act and Endangered Species Act can work together to protect the nation's wetlands, clean water, species, and habitat. However, the Corps has a long history of failing to comply with the ESA in administering the NWP program – in fact, having had so many years to correct its course in connection with ESA compliance, reflecting an institutional resistance, or an inability, to do so.<sup>3</sup>

## II. Key Issues

There are two primary issues related to the Corps' failure to comply with the ESA in connection with its administration of the NWP program: (1) failure to consider the effects of the program as a whole at the programmatic level; and (2) flaws with the agency's analysis of effects to listed species at the site-specific level.

### 1. Failure to Comply with the ESA when Authorizing NWPs

First, the Corps consistently fails to consider the effects of authorization of NWPs for five-year terms. This "programmatic"-level consultation is the only point in the regulatory process when the cumulative effects of NWPs on environmental resources, including endangered and threatened species, may be considered as a whole, with the knowledge gained from such analysis factored into the scope, terms and conditions by which specific NWPs are authorized. Without such information, however, there is no way for the Corps, Fisheries Service, U.S. Fish and Wildlife Service, or the public to understand and be informed of the degree to which listed species and habitat is being adversely affected, and as a result, agency decisionmakers' ability ultimately to adopt, modify, or cancel specific NWPs is undermined.

The Endangered Species Act requires agencies to ensure that their actions are not likely to jeopardize the continued existence of listed species, and are not likely to destroy or adversely modify listed species' critical habitat. 16 U.S.C. § 1536(a)(2). The ESA's implementing regulations set forth a specific set of procedures, compliance with which is the only way to ensure compliance with these affirmative duties. 50 C.F.R. Part 402. The Corps has never complied with these procedures at the programmatic level, throughout the history of the NWP program. In 2005, a federal court found this to be a violation of the ESA. *Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1 (D.D.C. 2005). Nevertheless, the Corps has not come into

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<sup>3</sup> Although this memorandum focuses on issues that arise under the ESA, we also note that through the NWP program, the Corps is also allowing activities that are having far more than a "minimal cumulative adverse effect on the environment", in contravention of the Clean Water Act's authority for the program, 33 U.S.C. § 1344(e)(1), and that the Corps has failed to analyze fully the environmental consequences of NWPs in accordance with the National Environmental Policy Act through preparation of environmental impact statements.

compliance since that federal ruling, maintaining that it complies with the ESA at the site-specific level (see discussion below).<sup>4</sup>

The Corps' position that it may fully comply with the ESA solely at the site-specific level – *i.e.*, when activities are authorized under NWP at a particular site – is simply not justified. It is well-settled in ESA jurisprudence that agencies may be required to comply with the ESA at multiple levels in connection with a regulatory regime, including at the programmatic as well as site-specific levels, and there is no reason – legal, policy, or otherwise – why the Corps may avoid ESA compliance at the programmatic level in connection with the NWP program. Indeed, this is the only level when a cumulative analysis of the program may be conducted. *See, e.g., NWF v. Brownlee*, 402 F.Supp.2d at 10 (“overall consultation for the NWPs is necessary to avoid piece-meal destruction of ... habitat through failure to make a cumulative analysis of the program as a whole”). Nevertheless, the Corps routinely fails to conduct this analysis, including in connection with the most recent authorization of the NWPs for a new five-year term.<sup>5</sup>

Closely related to this issue is the Corps' failure to maintain basic information that would inform an analysis to satisfy the ESA. In a biological opinion dated February 15, 2012, the Fisheries Services concluded that the agency does not maintain even basic information about how many waters and wetlands are being impacted, or monitor these impacts consistently, such that it can ensure that NWPs are not likely to jeopardize listed species.<sup>6</sup> This conclusion underpins the Corps' failure to meet its obligations under the ESA in connection with the most reauthorization of the NWPs for a new five-year term. The Fisheries Service set forth a “reasonable and prudent alternative” which the Corps is mandated to follow in order to comply with the ESA, but since the issuance of the Fisheries' Service's biological opinion, the Corps has finalized its authorization of the NWPs for five more years, has rejected the Fisheries Services' findings and the conclusions in its biological opinion, and has simply proceeded with its program according to business as usual. Moreover, the Corps never requested consultation with the Fish

<sup>4</sup> After the federal court in *Brownlee* remanded the NWPs to the Corps, on March 13, 2007 the Corps reinitiated programmatic ESA Section 7(a)(2) consultation with the Fisheries Service, which has jurisdiction under the ESA over most aquatic and marine species, and the Fish and Wildlife Service, which has jurisdiction over most terrestrial species. 77 Fed. Reg. at 10,187. Yet, final biological opinions, which are the procedural mechanism by which agencies meet their duties under the ESA, were never produced by either Service, and programmatic consultation between the Corps and the Fisheries Service was delayed multiple times before the Corps began to reauthorize its NWPs for a new five-year term. 76 Fed. Reg. 9174, 9176-77 (Feb. 16, 2011) (describing uncompleted 2007 programmatic consultation).

<sup>5</sup> Violations of the ESA in connection with the Corps' NWP reauthorization for 2012-2017 are outlined in the Center's August 16, 2012 notice of intent to sue the Corps, which is attached to this memorandum.

<sup>6</sup> The Fisheries Service found that the Corps has not structured its NWP program “to know or reliably estimate the general and particular effects of the activities that would be authorized”, the effect of those activities on water quality or listed species, or to take action necessary to prevent direct or cumulative degradation of water quality and habitat. *See Fisheries BiOp* at 223.

and Wildlife Service to consider the effects of NWP's to terrestrial species at all. The Corps' recalcitrance in light of these serious issues will necessitate more litigation, and quite possibly Congressional intervention, in order to force the Corps to rehabilitate its regulatory approach and to ensure protection of the nation's listed species.

## 2. Flaws with Site-Specific Analyses

As noted above, the Corps maintains that it may adequately meet its obligations under the ESA solely by considering the effects of activities authorized through NWP's at the site-specific level. However, there are serious flaws with the way in which the Corps conducts these analyses as well.

By way of a brief overview, the NWP's authorize a wide range of impacts to the nation's waters and wetlands, including, among other activities: exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf (NWP 8); utility lines (including power lines, substations, and pipelines) (NWP 12); bank stabilization (NWP 13); transportation projects (NWP 14); bridges (NWP 15); hydropower projects (NWP 17); coal mining activities (including activities associated with mountaintop removal) (NWP 21, NWP 49, NWP 50); other mining (NWP 44); and shellfish aquaculture (NWP 48). Some NWP activities require "pre-construction notification" ("PCN") to the Corps, but the Corps does not provide public notice of PCNs. Eighteen NWP's permit activities to proceed without any notification to the Corps, if they conform to the terms and conditions that apply to NWP's.

General Condition 18 provides that no activity may proceed under a NWP if it is likely to jeopardize the continued existence of a threatened or endangered species (or a proposed species), or destroy or adversely modify listed species' critical habitat. Section 7 consultation is required for an activity authorized under a NWP that "may affect" a listed species or critical habitat. General Condition 18 makes non-federal permittees responsible for notifying the District Engineer if any listed species or critical habitat may be affected or are "in the vicinity of the project." 77 Fed. Reg. at 10,192; 33 C.F.R. § 330.4(f)(2) ("Non-federal permittees shall notify the DE if any Federally listed (or proposed for listing) endangered or threatened species or critical habitat might be affected or is in the vicinity of the project.").

Thus, General Condition 18 delegates authority for ESA Section 7 consultation to the permittee — *i.e.*, the party with the greatest degree of interest in proceeding with the activity pursuant to an NWP, after a relatively short, streamlined permitting process, and the party with the least expertise in assessing the presence of species that may be affected. *See* Fisheries BiOp at 191 ("the conditions ... make prospective permittees solely responsible for compliance with the requirements of the ESA" and "assume that prospective permittees would have sufficient knowledge of the presence or absence of [listed] species and ... critical habitat on a project site and the requirements of the ESA" as well as the "technical knowledge necessary to determine if their activity might have direct or indirect effects" on listed species"); *see also id.* at 197 ("By design, the USACE intended activities authorized by [NWP's] to receive a lower level of review than activities authorized by standard permits."). Indeed, for these reasons the Fisheries Service doubted that General Condition 18 will result in ESA compliance, because while "[s]ome prospective applicants certainly will have sufficient knowledge to make these judgments",

“recent surveys of the depth of public knowledge of science, environmental information, and causal relationships suggest that it would be an error to make the same assumption about the general population.” *Id.* at 192 (citations omitted).

For activities pursuant to the 28 NWP that do require the permittee to provide pre-construction notification to the Corps, the Fisheries Service noted that even then, PCN is unlikely to cure these flaws, as “the evidence suggests that the [Corps] does not use the information contained in PCNs to filter ou[t] projects that are likely to have significant individual or cumulative impacts on waters of the United States, endangered or threatened species, or designated critical habitat.” *Id.* at 197. As the Fisheries Service concluded:

The limited review schedules for NWPs almost certainly preclude project managers from critically reviewing PCNs and verifying whether the basic information on project location, timing, and impacts contained in the notifications is correct or whether the conclusions about [listed] species and ... critical habitat contained in the notifications were well-reasoned and had been based on the best scientific and commercial data available, as required by section 7(a)(2) of the ESA.

*Id.* at 198.

Lastly, there is another flaw in the scope of the ESA analysis that is conducted at the site-specific level that warrants mention here. Pursuant to General Condition 18, the proposed permittee is directed only to consider the potential effects “in the vicinity” of the proposed activity. The term “vicinity” is not necessarily consistent with the “action area”, which the geographic scope for which ESA analysis is required. *See* 50 C.F.R. § 402.02 (defining “action area” under the ESA as “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action”); *id.* § 402.14(c) (formal consultation initiated when the action agency notifies FWS whether there are any listed species or critical habitat that may be affected by the action). Thus, species may be in a project’s “action area” but not its “vicinity”, as the “action area” constitutes areas that are “not merely in the immediate area involved”. As a consequence, to the extent it considers the effects of activities authorized under NWPs at all, the Corps limits its analysis to the direct footprint of the activity, omitting any consideration of indirect, upland, or downstream effects.

Thank you for the opportunity to offer our views.

Sincerely,

/s/

William J. Snape, III  
Senior Counsel  
Center for Biological Diversity  
Professor and Practitioner in Residence  
American University, Washington College of Law  
202-274-4443

Mr. BISHOP. Thank you very much.

Mr. GIBBS. OK. Our first panel of witnesses—I will just go through quickly and introduce you—is Mr. David Paylor, he is the director of the Virginia Department of Environmental Quality and vice-chair of the Water Committee of the Environmental Council of the States; Mr. Jeff Littlejohn, he is the deputy secretary for regulatory programs, Florida Department of Environmental Regulation; Mr. George Elmaraghy, chief, Division of Surface Water, Ohio Environmental Protection Agency, and member, Association of State Wetland Managers; Mr. William Creal, he is the chief of the Water Resources Division of the Michigan Department of Environmental Quality, and board member, Association of Clean Water Administrators; and Mr. Todd Ambs, president of River Network.

And we will start this way. Welcome, Mr. Paylor, and the floor is yours.

**TESTIMONY OF DAVID K. PAYLOR, DIRECTOR, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, AND VICE-CHAIR, WATER COMMITTEE, ENVIRONMENTAL COUNCIL OF THE STATES; JEFF LITTLEJOHN, P.E., DEPUTY SECRETARY FOR REGULATORY PROGRAMS, FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION; GEORGE ELMARAGHY, P.E., CHIEF, DIVISION OF SURFACE WATER, OHIO ENVIRONMENTAL PROTECTION AGENCY, AND MEMBER, ASSOCIATION OF STATE WETLAND MANAGERS; WILLIAM CREAL, CHIEF, WATER RESOURCES DIVISION, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, AND BOARD MEMBER, ASSOCIATION OF CLEAN WATER ADMINISTRATORS; AND TODD L. AMBS, PRESIDENT, RIVER NETWORK**

Mr. PAYLOR. Thank you. Good morning, Mr. Chairman, members of the subcommittee. I am pleased to be here today to discuss what many of the States see as the benefits associated with State assumption of Section 404 of the Clean Water Act, and to recommend actions that would help remove some of the barriers to State assumption. My name is David Paylor, and I have been the director of the Virginia Department of Environmental Quality since 2006. I am also here representing the Environmental Council of the States, a nonpartisan, nonprofit organization which consists of the key environmental commissioners of the States and territories.

In 2008, ECOS issued Resolution 08-3 supporting delegation of Section 404 responsibilities to States that are prepared to do so, and making recommendations to EPA to facilitate this process. We see a number of benefits to having the 404 program implemented by the States.

Most States define their waters more broadly than the Clean Water Act, and include isolated wetlands, ephemeral streams, and ground water that are not under Federal jurisdiction. A State-run program would eliminate jurisdictional uncertainty, and provide a consistent and predictable definition of regulated waters.

Similarly, a State-run program would provide a streamlined, one-stop permitting experience, which removes duplication and regulatory redundancy. A single regulatory agency implementing the rules would eliminate the potential confusion that can come from



two regulatory bodies, and would provide for greater consistency in the application of regulatory requirements.

The program could be administered by most States at significantly less cost. In Virginia, we currently estimate it would cost an additional \$3 million per year in operating cost to assume the 404 program on top of our current duties. Our best estimate is that this program cost the Norfolk District of the Army Corps of Engineers \$7.5 million per year to administer.

States are often positioned to provide timely service to project applicants through a knowledge of the areas of proposed impact. ECOS has identified four primary barriers to State assumption. Federally funding is not currently available for Section 404 implementation by the States. Other sections of the act, such as the wastewater discharge regulations, provide Federal funding for State implementation.

In Virginia, this is our single largest impediment to our assumption of Section 404. There is uncertainty regarding the criteria EPA would use for assessing States' legal authorities and their assumption decision. EPA correctly requires that State authorities be sufficient to meet Federal requirements. But because of differences in State jurisdiction from their underlying constitutions and statutes, those criteria may vary from State to State, creating some uncertainty regarding EPA's expectations.

Section 404 provides for no phased assumption option, which would allow States to transition toward full assumption. Similarly, Section 404 does not include an option for partial assumption by States. Partial assumption could be based on specific geographic areas, or certain types of activities.

As I mentioned earlier, the States, through ECOS, support efforts to encourage Section 404 delegation to those States prepared to implement the program. As such, we make the following recommendations.

U.S. Congress should take action to authorize and appropriate adequate fundings for States to assume the Section 404 permitting program, should they choose to seek it. Based on Virginia's estimates, Federal funding for a State program could result in at least a 50-percent savings, and a consequent reduction in the cost borne by taxpayers.

Encourage EPA to develop clear guidelines and processes for State assumption, which encourage States to apply for and assume regulatory responsibility for the program.

And support of simplified and more flexible process for State assumption of the Section 404 program, including partial and phased options.

The goal of protecting our Nation's wetlands and streams is critical to our future. It is a goal that can best be realized through a process that is consistent, efficient, and responsive to the unique features and qualities of the individual States. State assumption can provide a mechanism for individual States to realize enhanced water resource protection while providing a streamlined regulatory program with a single point of contact.

Mr. Chairman and members of the subcommittee, I appreciate the opportunity to present my testimony to you today, and will be happy to answer any questions you may have.

Mr. GIBBS. Now, before we move on, an oversight—I sincerely apologize—I didn't introduce our last witness. My problem is I broke my glasses last week, and I got these readers, and I am struggling here because when I look up with my glasses on, you are all blurry.

But we have Mr. Todd Ambs. He is president of the River Network. And welcome.

Go back to Mr. Littlejohn. The floor is yours.

Mr. LITTLEJOHN. Thank you, sir. Good morning, Chairman Gibbs, Ranking Member Bishop, other members of the subcommittee. I am Jeff Littlejohn, deputy secretary for the Florida Department of Environmental Protection. Our responsibilities include administering Florida's federally delegated programs under provisions of the Clean Water Act, Clean Air Act, Safe Drinking Water Act, and other Federal laws.

In Florida we value our waters and wetlands and have protected them under State law since 1974 through integrated management of storm water, landscape alteration, and our State-owned submerged lands. We do this because Floridians know our natural resources better than anyone else. But our commitment to safeguarding Florida's environment results in duplication with the U.S. Army Corps of Engineers and its Section 404 wetlands program.

This duplication of effort comes in spite of using joint permit applications with the Corps, implementing a State programmatic general permit from the Corps, and integrating Section 401 water quality certification and coastal zone management consistency into our State wetland permitting process.

When Congress amended the Clean Water Act in 1977 to enable States to assume the 404 program, it had the clear intention of making that assumption possible. Unfortunately, obstacles remain 35 years later for Florida and 47 other States to accepting the full 404 program. Without changes, perhaps to Federal law, and certainly to the Federal review process, Florida and the Corps will continue issuing two permits for applicants who are only asking to do one thing. That surely was not Congress' intention.

Requiring two permits for one project might make sense if the State and Corps were addressing different types of activities or achieving different outcomes. However, my staff just completed an analysis of Corps wetland permits recently issued in northeast Florida. Of 31 projects where the Corps and Florida issued a permit for the same activity, the wetland jurisdiction line was identical in all 31 instances. The permitted wetland impacts were similar, and Florida required about 50 percent more wetland mitigation, overall. This analysis at least suggests that Federal permits are not more extensive or more protective than Florida's. And if they are not, it is difficult to make the case that two permits are necessary.

The primary barrier to Florida's full assumption of Section 404 is that many tidal and other navigable waters subject to the Clean Water Act are also subject to Section 10 of the Rivers and Harbors Act, which cannot legally be assumed. These waters constitute a large and important part of Florida's aquatic systems, including coastal waters and public trust lands transferred to Florida at time

of statehood. This prohibition negates many potential benefits of Section 404 assumption.

We absolutely respect the Corps of Engineers' vital and distinct role in maintaining navigation. However, by virtue of its sovereignty, Florida has significant proprietary powers, including the authority to maintain navigation. In fact, we have demonstrated, year after year, the ability to protect navigation as we are protecting aquatic resources, through comprehensive wetlands and coastal regulatory programs, and our federally approved coastal zone management program.

Surely responsibilities can better be divided to take full advantage of Florida's proven abilities and the Corps' important oversight role. We are ready and eager to assume expanded authority over Section 10 waters under the Corps' watchful eye and guidance.

A second barrier to assumption has been the uncertainty in the State and Federal roles in administering the Endangered Species Act. In 2010, EPA clarified that consultation under the ESA is not required before approval of a State 404 program. This was helpful, but not sufficient. Florida has robust State constitutional authority to protect listed species through the Florida Fish and Wildlife Conservation Commission, through which we coordinate all of our wetlands and coastal permitting. The Commission recently amended its rules to mirror the protections afforded to federally listed species. We believe we can demonstrate the necessary equivalency of Florida's program in this regard.

During past consideration of Section 404 program assumption by Florida, questions have been raised regarding the equivalency of a number of aspects of our program to Federal law. The Clean Water Act requires that approved State programs have adequate authority to carry out the 404 program in a manner that is no less stringent than Federal requirements. This is a reasonable standard.

Certainly Florida's laws, like those in other States, are not identical to Federal law. But that is not the test. In its review of our program, we need EPA to recognize Florida's combination of State constitutional, statutory, and proprietary authorities, along with its suite of rules, that combine to provide comprehensive management of the State's aquatic resources at least equivalent to Section 404, which itself rests primarily on the Federal obligation to protect interstate commerce.

We are confident that States like Florida can demonstrate equivalency to Section 404, provided the reasonable standard of adequate authority to carry out the program is appropriately applied. We have proved this in our implementation of the Section 402 NPDES program for more than a decade. Whether in the context of our wetland delineation method, regulatory jurisdiction, protections for listed species, water quality standards, mitigation requirements, public participation, procedural rigor, or compliance and enforcement authority, Florida implements substantially equivalent—if not greater—protections, with more extensive coverage for our aquatic resources.

In summary, we believe Congress provided for State assumption of Section 404 because it recognized the additional strength that comprehensive State water and land use programs would bring to the program, and the virtues of a State-Federal partnership. Flor-

ida is fully committed to preserving its aquatic resources and will continue to carry out science-based, wide-ranging, publicly supported programs for wetland and water resource management. We hope, with Congress' support, that Florida and the Federal Government can realize the full potential of Section 404 program assumption to protect these resources and, at the same time, unburden the public of unnecessary bureaucracy and pointless costs. Thank you for the opportunity. I am happy to answer any questions you may have.

Mr. GIBBS. Thank you.

Mr. Elmaraghy, the floor is yours.

Mr. ELMARAGHY. Good morning, Chairman Gibbs, Ranking Member Bishop, and members of the subcommittee. I am George Elmaraghy, chief of the Division of Surface Water of the Ohio Environmental Protection Agency. I am grateful for the opportunity to speak on behalf of the State of Ohio and the Association of the State Wetland Managers regarding the State experiences in pursuing the assumption of Clean Water Act Section 404 permitting.

In Ohio, the Corps of Engineers authorizes impacts to the water of the U.S. through Section 404 permits. Ohio EPA issues 401 certificates for these permits, and then U.S. EPA provides oversight.

Ohio, along with other States, is interested in assuming Section 404 permitting for the following reasons and benefits. One, the permitting process would be streamlined into one permit from one regulatory agency, thus reducing the regulatory uncertainty and burden for business in Ohio.

Two, State regulatory staff are more aware of local development and local water resources issues.

Three, State regulatory staff can better coordinate the issuance of 404 permits with other State-issued permits, such as air permits, NPDES permits, and storm water construction permits.

And four, a simplified environmental permitting process would encourage investment in the State, leading to job creation.

The States have had the opportunity to pursue assumption of Section 404 program since 1977. As of today, only two States have assumed permitting authority. Numerous other States have investigated assumption of the 404 program. However, these States have been unsuccessful. In contrast, 46 States have received NPDES permitting delegation. We need to learn from this success.

From our perspective, there are four main obstacles: number one, lack of congressional mandate to delegate 404 authority to States; two, a cumbersome assumption process; three, lack of guidance from U.S. EPA in preparing an assumption package; and four, lack of program implementation program funding.

We need to eliminate these obstacles to State Section 404 program assumption by, one, simplifying the assumption process, an unworkable process that can be drawn out for several years. The Oregon experience is a good example that illustrates the difficulty of this process. Oregon started the assumption process more than 15 years ago, and has yet to receive authorization.

Two, development of a joint U.S. EPA and Corps of Engineers guidance on how to prepare a 404 assumption package.

Three, establish a pilot assumption project between the Corps of Engineers, U.S. EPA and a State to serve as an example for other interested States. Ohio volunteers to be this pilot State.

Four, providing funding for preparing the assumption package by allowing States to use current wetland grants to fund assumption activities.

And, number five, provide funding to implement the program upon assumption. This could be accomplished by establishing a mechanism to reallocate the funding currently used by the Corps of Engineers to authorize the States.

Mr. Chairman and members of the subcommittee, thank you for this opportunity to share Ohio's perspective on the Section 404 program assumption process. I have additional materials to be added to the record from the Association of State Wetland Managers. I am happy to answer any questions you may have. Thank you.

Mr. GIBBS. Yes, we already accepted those additional materials.

Mr. ELMARAGHY. Thank you.

Mr. GIBBS. Thank you. Mr. Creal, the floor is yours. Welcome.

Mr. CREAL. Thank you. Good morning, Chairman Gibbs and fellow committee members. I am Bill Creal. I am the chief of the Water Resources Division of Michigan, which is 300 engineers and scientists that work on water resource issues in Michigan. I am testifying on behalf of both Michigan and the Association of Clean Water Administrators. With me today is my assistant division chief, Kim Fish. And between the two of us, we have over 60 years of administering Clean Water Act programs in the State of Michigan. Thank you for the opportunity to participate in this important discussion regarding Section 404 of the Clean Water Act.

Michigan is one of the two States to assume the Section 404 program. We assumed this program 28 years ago. You are probably asking why would Michigan assume this program. Well, Michigan is defined by an abundance of water. We have borders with four of the five Great Lakes, which results in over 3,000 miles of coastal freshwater shoreline, the most freshwater shoreline of any State in the Nation. We also have over 11,000 inland lakes, more than any other State in the Nation. And we have 5.5 million acres of wetlands in our State. It is important to wisely use these water resources.

Since assuming the Section 404 program, we have issued over 100,000 permits. And we issue about 4,000 to 5,000 permits every year. We know and understand what it takes for a State to run this program, and what the benefits are to a State.

You have heard some of these benefits from the other members of this panel. We think these benefits include a clear definition of what is regulated waters and what are regulated activities. We don't have the confusion in Michigan that is on the national level on what are regulated waters. We make faster permit decisions. We have statutory State deadlines that drive us towards this. We have reduced the regulatory burden. We have consolidated permitting actions throughout the State. We have better access to decisionmakers. We have 10 district offices in Michigan, and we issue our permits in those district offices. We have more public oversight of our decisions, and we have a fair and impartial appeal process

for those that aren't satisfied with our decisions. We have provided examples and further explanation in our written testimony of this.

We know this can be a difficult program to run. We have seen the controversies over 28 years. But Michigan thinks it is worth it for States to assume. This support was demonstrated as recently as 2009. Our department has seen general fund reductions from \$120 million of State funding down to \$20 million by 2009. This makes tough budget times in Michigan. In 2009 our Governor proposed turning this program back to the Federal Government. But the regulated parties, including Realtors, home builders, manufacturers, the farming community, and the environmental groups and other stakeholders, prevented this from happening.

However, we continue to face the funding issue for our program. We are saving the Federal Government over \$5 million per year by running this program. Specific Federal funding is not provided to run this program. So, Michigan has saved the Federal Government quite a bit by running this program for 28 years. We strongly recommend that you consider sharing some of these savings with the States that assume the Section 404 program. This would assure that States are able to assume and keep this program.

In our specific case, we propose that States like Michigan be eligible for up to \$2 million per year in grants when they assume the program. We believe such a process can be put in place so there are real Federal budget savings, and States also receive some Federal funding to run this important program.

Mr. Chairman, thank you for the opportunity to provide this testimony today. We look forward with—working with you as you continue to explore this issue. And I would be happy to answer any questions.

Mr. GIBBS. Thank you.

Mr. Ambs, welcome.

Mr. AMBS. Thank you. Good morning, Chairman Gibbs and Ranking Member Bishop, members of the subcommittee. My name is Todd Ambs. As president of River Network, a national conservation organization, I work for an organization that for 24 years has focused on helping the hundreds of river and watershed groups around this Nation to do their work better. In short, we work to feed the heart of the watershed movement, the hundreds of groups across our Nation that, though sometimes short on funds, are long on passion for protecting their home waters.

But I offer my thoughts today with a primary focus on how the State of Wisconsin approaches these issues. My insight regarding this matter comes from working in the environmental field for more than 30 years, and from having the honor of serving as the water division administrator, the Wisconsin Department of Natural Resources, for 8 years, 2003 to 2010.

I will stress three concepts in my brief oral remarks. One, as my former colleague from Michigan has already stated so eloquently, States can assume the responsibility for handling Section 401 of the Clean Water Act, and do it well. But they can only achieve that goal if they have adequate funding, solid staffing resources, and firm expertise in the water resources of their State. Michigan has been at it for 28 years. They built that program over time. Other

States considering this path need to do so deliberately, and with a firm understanding of the responsibilities.

That, to me, is what I hope is one of the take-aways from today's hearing. There are, no doubt, many reasons why only two States have assumed 404 jurisdiction, as others have noted, in the last 40 years, while 46 States are—the delegated entity for Section 402. But I believe that one of the main reasons is because this is a much harder program to manage. Issuing NPDES permits is pretty straightforward, once you get it set up. You are measuring effluent from the end of a pipe and making sure that the pollutants are below a certain number.

When someone proposes to fill a wetland, it is a very case-specific issue. In Wisconsin, we have at least a dozen different types of wetland communities, each with their own set of functional values, plant species, and place in the hydrologic cycle. If you make the wrong choice on a permit to fill one of these treasures, you have wiped 10,000 years of Mother Nature's work off the landscape. If a discharger in the 402 program continues to operate under an old permit due to budget cuts, staffing vacancies or other circumstances, it is not ideal. But waterways can and are protected using the old permits.

If budget cuts and staffing vacancies occur at the same time as there is pressure to approve a large number of dredge and fill permits, there is nothing to fall back on, especially if the State has assumed full responsibility for the program.

My second point, though, is that there are other tools available, other than full assumption, if you want to save Government dollars, making the permitting system more efficient, and protect these special resources. That was the path that Wisconsin each time we looked at this question. Working more closely with the Army Corps, adopting general permits, digitizing wetland maps were all steps that we took, instead of seeking 404 assumption.

And, as we noted in our response to the Wisconsin legislative auto bureau's audit of the program in 2007, "We have investigated the feasibility of the State assuming the Federal 404 program in the past decade and again in response to the audit request. We continue to find the feasibility of assuming the program low, due to significant barriers that involve State law changes and lack of Federal funding available to the States for implementation."

The letter then went on into some detail regarding the steps being taken to streamline the permit application process, and I have actually got some of that detailed in the written testimony. As a result of those actions, and others since that time, the Wisconsin wetlands program was working well when I departed in 2010. As of 2010, 94 percent of all wetland permit applications were approved by the department. The time for processing a permit had fallen by more than two-thirds in the last decade. And no significant economic development projects had certainly been stopped because of onerous wetland determinations.

The point here is not to in any way denigrate the efforts of Michigan or New Jersey, where State 404 assumption has occurred, or to suggest that efforts underway in States like Ohio and Oregon and others to move towards State assumption are without merit. What I am suggesting is that 404 assumption is far from the

only tool available to States that wish to have a streamlined yet effective program to protect some of our most precious natural resources, our waters.

Finally, a quick reminder about the importance of these resources and the impact that this program can have on these resources. Wetlands provide more than just habitat. They serve as nature's sponge, acting as flood control during high-water events. They filter out harmful pollutants that can help address serious water quality challenges. They release waters to parched ecosystems in times of drought. For these reasons and more, any effort to promote State-Federal coordination or, when appropriate, State assumption of responsibilities contained in Section 404 of the law, the most useful exercise—but adequate funding, consistent State laws, transparent processes, and broad public and political support for taking charge of a program like this are key ingredients and important foundations if the exercise is to produce healthier water bodies in the Nation.

I thank you for the opportunity to testify, and certainly look forward to working with you, and happy to answer any questions.

Mr. GIBBS. Great, thank you. I will start off. I would like to maybe have questions—more of a discussion, I think. Because what I am hearing, we have issue of cost. I heard in testimony that—from Ohio and Florida—we can save some money if the States do it.

What it comes down to me, though, is the service to the entities we serve, as public officials. And I know in Ohio—correct me if I am wrong—the legislature actually stopped a move by Ohio EPA to move—is that correct, Mr.—

Mr. ELMARAGHY. Yes, Mr. Chairman. We were planning to introduce legislation to authorize the director to seek assumption of Section 404. And because of concern from some industries, we decided to reintroduce that bill later. And we are currently working with industry and the environmental groups to alleviate their concerns.

Mr. GIBBS. OK. And then to follow up on that a little bit, I think Florida is an interesting example. Because my understanding in Florida, with Section 10, because you have so much navigable water that is related to the wetlands issue, you—I think, Mr. Littlejohn, you said in your testimony that if you took it over you could streamline it.

Now, are you talking about areas that aren't interrelated with the Section 10, or would you be—Florida be interested in having to do—be—jurisdiction over the whole Section 10 everything?

Mr. LITTLEJOHN. Thank you, Mr. Chairman. Florida would be interested in assuming Section 10. But, obviously, that would require an act of Congress.

Mr. GIBBS. Yes.

Mr. LITTLEJOHN. However, I think that there is a reasonable compromise if we were to pursue Section 404 assumption and an expanded State programmatic general permit to cover more activities over traditionally navigable waters and adjacent wetlands. I think that could be a reasonable approach.

Mr. GIBBS. OK. The other concern I have heard and read through—of course States, you know, currently do the 401 permitting. And I think there is some concern that—some of our entities,



the people that we serve, States doing the 404 permitting. I heard some testimony about, you know, we could streamline it into one permit, essentially, if States were doing it. So almost 404 would replace the 401 if States take it over. What is the experience in Michigan with the customers you serve?

Mr. CREAL. Well, yes. We took that over. We don't issue the 401 certs, because we issue the 404 permits. And the customers are very satisfied. We have a consolidated permitting process where we include a variety of State-required actions for the permittee under one permit and one permit fee. So we don't make them get numerous permits or pay numerous permit fees. But that has worked out excellent in Michigan.

Mr. GIBBS. OK. I guess I will go back to Florida for a second, because I am just thinking of the Section 10. I realize we got—we will separate the 404 that is not related to the Section 10.

But currently, anybody that is in that area—you say Florida is not really involved at all, then, or—how is the 401's coming in? Explain to me how that works, then.

Mr. LITTLEJOHN. Yes, sir, Mr. Chairman. The State has a 401 program. And so, if the Corps of Engineers issues a permit over traditional navigable waters or adjacent wetlands, the State is also issuing, through our own wetland permitting program, the Section 401 water quality certification, as well as our coastal zone management, consistency determination.

But even within Section 10 waters and adjacent wetlands, the State does authorize some activities on behalf of the Corps through our State programmatic general permit. Our concern is—and one of the reasons why I am advocating for an expanded role in Section 10 waters—is that we are seeing the activities that we are allowed to authorize on behalf of the Corps shrink, or become eroded over time.

And just for example, we have been implementing an SPGP for the Corps since 1995. And we saw that authority expand significantly between 1995 and 1997, to the point where the State of Florida could essentially authorize the vast majority of Corps nationwide permits over Section 10, traditional navigable waters and adjacent wetlands, all throughout Florida. But that authority has been shrinking since then. And in 2006, when our most recent SPGP was reauthorized, there are only four types of activities that we can issue on behalf of the Corps.

Mr. GIBBS. OK. I am going to go over to Mr. Paylor from Virginia. I think in your testimony you stated that in the Norfolk Army Corps division you could save \$7.5 million with the change?

Mr. PAYLOR. It would be—excuse me, Mr. Chairman. Yes, it would be—they currently spend, by our estimate, \$7.5 million. It would cost us three. So the saving—

Mr. GIBBS. OK. I had one more question for Mr. Creal. The ranking member, in his opening statement, talked about how the permitting was so slow in Michigan and the two States that have adopted it, Michigan and, I believe, New Jersey. And I think I saw in your statement—I think I got it here—Michigan's processing is subject to deadlines mandated by State statute, and has frequently made permitting decisions on individual permits weeks or months sooner than the Army Corps of Engineers. However, decisions on

general permits, which are smaller, routine projects, are about the same.

Could you just expand a little bit on what is happening, in your experience, you know, serving our customers out there, getting their permits?

Mr. CREAL. Sure. And we think that is the way it is. In the routine, general permits, which are a fair number of the permits, it is about the same. But when we get into the individual permits that are more complicated, we have statutory deadlines that are put in place by our State legislature, and we operate under those, 90 days or 120 days. And so we are moving to delineate the wetlands very rapidly, and make our permit decisions. We think that we do it much more rapidly than the Army Corps of Engineers. And we have some comparisons when we deal with the——

Mr. GIBBS. Well, that was the next point. I might just stop you right there and ask from the other States what time periods—apples to apples here for individual permits—that is happening from the Army Corps to get those permits done. You say you are by State statute in Michigan no more than 90 to 120 days?

Mr. CREAL. Yes.

Mr. GIBBS. Anybody else want to respond? What is happening in Virginia?

Mr. PAYLOR. Mr. Chairman, our statutory requirement is 120 days. The Army Corps, many cases, they are as fast as that. But they have no deadlines, and we have seen permits take over a year, year-and-a-half, to be processed.

Mr. LITTLEJOHN. Mr. Chairman, in Florida, since 1995, our statutory deadline has been 90 days to review wetland permits. And just this last legislative session our review time was reduced from 90 to 60 days. And that was partly in response to our increased efficiencies in reducing our average processing time. And we are down to about 47 days for our average time to process a wetland permit in Florida.

Mr. GIBBS. I am confused here. The Army Corps is the one that is doing it.

Mr. LITTLEJOHN. Sir, I mean the State wetland permit. We have our own wetland permit program that mirrors that of the Corps of Engineers program. And our program satisfies the 401 water quality certification requirement——

Mr. GIBBS. OK.

Mr. LITTLEJOHN [continuing]. And the coastal zone management requirement. It is—in comparing our permit decisions to the Corps permit decisions, we are finding the exact same wetland delineation and——

Mr. GIBBS. OK. How long is it taking the Corps to do it?

Mr. LITTLEJOHN. I see. I misunderstood your question.

Mr. GIBBS. Yes.

Mr. LITTLEJOHN. I don't have specific data for within Florida on the average Corps individual permit. But I am very confident that it greatly exceeds 47 days.

Mr. ELMARAGHY. In Ohio, for the 401, we have a regulatory deadline of 180 days. However, we have imposed our own internal deadline of 120 days and we are meeting this 120 days regularly.

For the Corps of Engineers, of course they have to take more than 180 days or 120 days, because they have to wait for us to issue the 401 before they act. So just the fact that having two agencies dealing with the same project definitely will make it longer to—for the applicant to get the final permit and start construction.

Mr. GIBBS. OK.

Mr. ELMARAGHY. Generally, the Corps maybe takes an average of around 1 year. I don't have—

Mr. GIBBS. OK. That is what I wanted to know.

Mr. ELMARAGHY. Yes, I don't have really—

Mr. GIBBS. I will stop. I think I have used up plenty of my time, and I want to—

Mr. ELMARAGHY. OK.

Mr. GIBBS [continuing]. Let Mr. Bishop have his turn.

Mr. BISHOP. Thank you, Mr. Chairman. Just on this subject, just—I am not going to prolong the discussion. Just the Corps data shows that 91 percent of general permit decisions are made within 60 days, 91 percent. And individual permit decisions, 71 percent are made within 120 days.

I—as I mentioned in my opening statement, I am very concerned about the looming possibility of something that none of us ever thought would be this real a possibility, and that is the sequestration that exists in current law that will go into effect on January 2nd if we do not find ways to reduce the deficit by \$1.2 trillion.

Current law suggests that the deficit—pardon me, the sequestration—would be split 50/50 between defense and nondefense spending. That would yield cuts ranging anywhere from 7 percent to 9 percent for all accounts, all accounts in what we call the domestic discretionary budget. Such a cut would reduce funding in the Clean Water State Revolving Fund by approximately \$120 million. It would cut \$75 million from the Drinking Water State Revolving Fund, and it would cut an estimated \$20 million from the Section 106 program.

I will also tell you that the House of Representatives has voted twice to turn off the sequester for defense spending, and essentially load all of the sequester onto what we call nondefense discretionary, which would essentially double those amounts.

So, my question is how—what impact would these kinds of cuts have on the ability of your States to protect water quality and drinking quality, if the State were to, in effect—pardon me—if the Federal Government were, in effect, to walk off the field to the extent of the numbers I am talking about? What impact would it have on the States? How would the States accommodate that? Would the States simply be able—be forced to do less? Would you divert expenses from other areas of your budget to cover this, given the priorities?

So, Mr. Paylor, I will start with you, from Virginia.

Mr. PAYLOR. Thank you, Mr. Chairman—Mr. Bishop. We would set priorities, and we would likely have to divert monies from one section to another. For example, we would likely do less water quality monitoring, and we may, in fact, have to have a smaller compliance presence. But it would be certainly our top priority to make sure that all those facilities operating in the Commonwealth

who were regulated had their permits with clear requirements of what it took to protect our water quality.

Mr. BISHOP. OK. Mr. Littlejohn?

Mr. LITTLEJOHN. Ranking Member Bishop, in Florida it has been my priority over the last year-and-a-half since I have had this job, to plan for ultimately not having to rely on Federal funding in order to run our regulatory programs.

So, we have a lot of programs that are completely State-funded. And I think the impact of significantly reduced or even no funding from the EPA could be absorbed by Florida.

Mr. BISHOP. At the risk of being a wise ass, we should—we have to cut funding everywhere in this legislature. So we will take note of Florida's position.

[Laughter.]

Mr. BISHOP. I am teasing. I am teasing. Thank you.

Mr. LITTLEJOHN. In exchange for the 404 program?

[Laughter.]

Mr. ELMARAGHY. Twenty-five percent of our budget is coming from Federal money. And if we have cuts in this portion of our funding, definitely we need to establish priority and see how we can run effective programs with less funding.

But I see that the effect of cuts in the Federal money will require us to take a look at our resources on the Federal level and the State level and to find better ways to do our programs. As mentioned here by my colleagues in Ohio, if we took over the 404 program, the Federal Government will be saving \$3 million. So this kind of savings will be needed to deal with the issues in the budget on the Federal level. And it will be a good idea to divert part of this savings to the States which volunteer to assume the 404 program.

Mr. BISHOP. OK, thank you. Mr. Creal?

Mr. CREAL. Yes. We are still trying to understand exactly where the cuts in sequestration would occur, and what impacts would happen in Michigan. I would like to note, though, that Michigan understood back in 2002 that State Revolving Fund cuts were coming in that program, and Michigan passed Proposition 2 in that year which set aside State bonding authority for—to help cover it if we lost that infrastructure funding. And we are at the point of putting reforms in place through our legislators right now to spend that money that we haven't spent yet for State-funded State Revolving Fund.

So, we had anticipated that State Revolving Fund would achieve cuts in the wastewater side back in 2002. And Michigan voters responded with a way to deal with that.

Mr. BISHOP. OK.

Mr. CREAL. But we are still not clear where the sequestration—and I know that it is all being worked out, but we are very concerned about the impacts from it.

Mr. BISHOP. Thank you. Mr. Ambs?

Mr. AMBS. Perhaps this is the benefit of no longer being employed by the State. I think the cuts in Wisconsin will be devastating. We have significant difficulties managing programs today. We had significant difficulties managing the delegated programs. When I was there we had a D-delegation agreement with EPA—

region five, specifically—on managing the Safe Drinking Water Act, pieces of the Safe Drinking Water Act program.

A number of States—and certainly Wisconsin—are up against it, in terms of very, very dire circumstances. And having to, every day—used to make no bones about it—every day we had to make choices about which State or Federal laws we were going to enforce more than others, because there just aren't enough resources. And the further we cut those resources—the challenges don't go away. The problems that are out there don't go away if the funding does.

Mr. BISHOP. Thank you. I am sure I have exhausted my time. Thank you all very much.

Mr. GIBBS. Mr. Duncan.

Mr. DUNCAN. Well, thank you, Mr. Chairman. Mr. Creal, you mentioned that the State of Michigan has 10 offices located across the State. How many offices does the Army Corps have, or did it have before the State assumed this program, do you know?

Mr. CREAL. I am being told they had four offices.

Mr. DUNCAN. And you say that you can issue your permits a lot quicker than the Army Corps. And I heard some mention that the Army Corps has to wait on the States on the—for part of their process. Is their delay just because they have to wait on the State? Or what could they learn from your ability to issue your permits much quicker?

And also, you mentioned this cut in your funding from \$120 million to \$20 million. How have you made that up? Have you gotten any money from other sources to alleviate that cut, or—

Mr. CREAL. Yes, sir. That is several questions.

Mr. DUNCAN. Yes, let me—

Mr. CREAL. Well, I think the 401 that you are hearing from States like Ohio, that is a little different than Michigan. Where we can tell you we have the experience in comparison with the Corps is in waters where we and the Corps both issue permits. And we had a—

Mr. DUNCAN. Oh, OK.

Mr. CREAL. And some of that is the—

Mr. DUNCAN. You are talking about the 404.

Mr. CREAL. The 404. And we are issuing a State permit, and the Corps is issuing a Federal permit. We had a power company that wants to put a nuclear power plant on Lake Erie. And part of this comes back to how you delineate wetlands, and the confusion on the Federal level and complications on how you do that.

We have a much simpler way to do it in Michigan, on how to delineate them. We went—for that Federal power plant, we delineated the wetlands in 45 days, and it took the Army Corps of Engineers over 700 days to do the wetland delineation. Direct comparison. So we have examples like that that we can point to, where we compare ourselves to where the Army Corps is. Plus we have the statutory deadlines for issuing our permits that aren't there on the Federal level. So, we can draw direct comparisons that way.

Regarding how we have made up the funding, what the State has resorted to was we had put in permit fees in various programs, like under the NPDES permit program. We never had permit fees in place before 2004. And a result of continued erosion to the general funds, we had to make up some of that from putting permit fees

in place for municipalities and industries and storm water entities to cover some of the general fund shortfall.

But there has also been a corresponding reduction in staff as we have gone along, too. And as you heard Mr. Ambs talk about, we have reduced things like our permitting—ability to process our permits and do inspections and take compliance activities.

We have also had to gain efficiencies through technology, which we continue to do. So we tried to make up this through a variety of mechanisms. It has been a struggle.

Mr. DUNCAN. OK, thank you. Mr. Elmaraghy, is it accurate that Oregon has been working since 1995 to try to assume the 404 program there? And why is this taking so long? And why have only two States taken it over thus far, if that is correct?

Mr. ELMARAGHY. Yes. That is the story I hear about Oregon. They started to try to take over this program some time in the 1990s. And of course, the difficulty of getting this assumption, as I mentioned in my testimony, lack of funding, the process to get assumption is very long, and we don't have good guidelines on how to assume the program. And I assume Oregon is facing the same problems we have in Ohio right now.

Mr. DUNCAN. Well, I read someplace that 46 States handle the NPDES program. Why is it so much more complicated or difficult or time consuming to assume the 404 program as each of you have said would save millions of dollars?

Mr. ELMARAGHY. My feeling is the reason 46 States assumed the 402 program is because it comes with funding. And also, as I recall, early, after the Clean Water Act was enacted, there was a mandate for U.S. EPA to delegate this program to the States. And we need to learn about what happened to delegate the 402 program in order to find out how it happened and how we can apply the same experience for 404.

But the funding and this mandate which U.S. EPA was under to delegate this program to the States is the major reason.

Mr. DUNCAN. All right. My time is up. Thank you very much.

Mr. GIBBS. Representative Napolitano, do you have a question?

Mrs. NAPOLITANO. Yes, Mr. Chair, I do. And just following up on that, 402 is a mandate?

Mr. ELMARAGHY. It is—

Mrs. NAPOLITANO. A general mandate?

Mr. ELMARAGHY. At one time after the enactment of the Clean Water Act, Congress apparently pushed U.S. EPA to delegate this program to the States.

Mrs. NAPOLITANO. So it is funded, but—it is at least partially funded, fully funded by the Feds?

Mr. ELMARAGHY. We have the 106 program which is funded the—like the NPDES program, but less monitoring and so on. I will say, like, part of our NPDES permit program funded federally and the rest come from the State.

Mrs. NAPOLITANO. So, in essence, if the 404 were to be taken on and followed more or less the same type of area of funding, then the States would be able to take it on?

Mr. ELMARAGHY. If we have some source of funding from the Federal Government, it will encourage the State to do it. However,

Ohio feels like the advantage of taking 404 assumption is so great that we are willing to do it even without further funding.

I give you an example. In the Department of Transportation Ohio, they have a lot of projects which require 404 permits. And in order to expedite their projects, they are supporting us to take assumption—and, as a matter of fact, they are willing to partially fund the 404 program.

Mrs. NAPOLITANO. OK. But—and I understand that. However, the Corps is a national program. So it is a little harder—and I know they have regional offices that take care of their own local requests. But any State can do their own; they don't have to worry about other than their own. So there might be a difference there in the delivery, besides you have to get permitting from them, they have to get some permitting from you, I understand.

Mr. ELMARAGHY. Yes, like—

Mrs. NAPOLITANO. Right.

Mr. ELMARAGHY [continuing]. They have to get a 404 permit, regardless. So you are eliminating—from two permits to one permit.

Mrs. NAPOLITANO. Right. Well—

Mr. ELMARAGHY. Also—yes, that is what simplifies the process.

Mrs. NAPOLITANO. Question, then. Why are the coastal States reluctant to administer the 404 program? And what can be done? Or should we incentivize the coastal States to administer that 404 program? Anybody?

Mr. PAYLOR. As we have said in Virginia, we believe that we could do it for—in the range of half the cost. If those dollars that are going towards that program right now through the Army Corps of Engineers, if a portion of those could be converted to EPA dollars for grant funding, it would end up in Virginia still being only partially federally funded, and there would be at least half of that that would be fee or otherwise funded.

Mrs. NAPOLITANO. Which brings up the point that you—there are some States that do follow and do support their own funding. But each State is different. Would there be a requirement, then, for the Feds to be able to have a followup and ensure that the program is being carried out properly? Anybody?

Mr. PAYLOR. Absolutely. All of the programs that we have that are delegated by EPA to us have an auditing function. And there is a fairly robust dialogue that goes along with those programs with EPA, to assure that we are meeting Federal guidelines.

Mrs. NAPOLITANO. Mr. Ambs?

Mr. AMBS. Yes, just agree with that. And, in fact, EPA, I know, is very active in reviewing permits that are issued in both Michigan and New Jersey.

However, one of the things you always have to be concerned about is what happens in terms of the States having strong enough laws on the books to be consistent, at least as stringent as Federal law. And, you know, Wisconsin is a good example of where you are always going to have these challenges if you have more States that go to assumption.

A few years ago, if we had chosen to move toward 404 assumption, I thought we were well positioned to be able to say we had a program that was as stringent as the Federal Government. Legislation was just passed this year in Wisconsin that I believe no

longer makes that the case in Wisconsin. Way too much flexibility in the—so you just got to be very careful that those States maintain strong State—

Mrs. NAPOLITANO. Thank you, Mr. Ambs. That is a point, because each State is different. They have different priorities and, of course, they have different budget impacts. And you are right, the laws may not be the same to protect as there are now.

So, Mr. Chair, with that I yield back. I may have some questions for the record.

Mr. GIBBS. Representative—Chip, go ahead.

Mr. CRAVAACK. Thank you, Mr. Chair. Mr. Creal, I had a question in regards to listening to your testimony and Mr. Ambs's testimony. Mr. Ambs is basically saying he can't do it right in Virginia without Federal funding. Do you do it right in Michigan?

Mr. CREAL. We believe we do it right in Michigan. And I would stress that EPA does provide us very good oversight on our program. And they have the ability to object to our issuing of the permit. And if we can't resolve their objections, then the permitting process does revert back to the Army Corps of Engineers. We have a set timeframe to resolve those.

But we think we have the statutes in place. We check very closely with EPA to make sure we are consistent with Federal laws, and that our State programs are adequately administered, and we have done that for 28 years now.

Mr. CRAVAACK. So you think your State legislators and your Governors take care of your water pretty well?

Mr. CREAL. Yes, sir.

Mr. CRAVAACK. And your wetlands pretty well?

Mr. CREAL. Yes, sir.

Mr. CRAVAACK. Would I get a concurrence with all the Members at the table, except for Wisconsin? Why can't you do it well in Wisconsin?

Mr. AMBS. Well, as I say, as it relates to the wetland regulations, I just think in terms of being as stringent as Federal law, this legislation that was passed this year—which I actually testified in opposition to—I thought provided too much flexibility and too much ability for applicants to be able to fill in the wetlands of the State. So—

Mr. CRAVAACK. So, philosophically, what you are saying then is you think that these gentlemen aren't going to be able to take care of their States' waters as they should?

Mr. AMBS. No. What I am saying is that in each individual State you are going to have to continually—the more States that assume the 404 program, you are going to have to continue to be very vigilant to make sure that they are as stringent as—to meet the requirements under the Clean Water Act.

Mr. CRAVAACK. Well, my—

Mr. AMBS. And I would agree. I grew up in Michigan. I would agree that the State of Michigan is doing a fine job with it. But I am just saying those pressures are always going to be there at the State level. And they are—they tend to be, when you are dealing with dredge and fill permits, they tend to be—my experience, 8 years as the lead regulator for the water division in Wisconsin—



they tend to be much more intense, pronounced, focused, than they are in the NPDES permit.

Mr. CRAVAACK. But at the same time, as I am understanding, is that you still have to comply with the Army Corps of Engineer and the EPA. Is that correct?

Mr. CREAL. It is EPA.

Mr. CRAVAACK. EPA.

Mr. CREAL. When we have the permit program in Michigan, it is EPA that reviews our programs and can object or——

Mr. CRAVAACK. So you are maintaining Federal standards, it is just that you are implementing the program and streamlining the process. Am I correct?

Mr. ELMARAGHY. Yes. As a matter of fact, Ohio will not be able to get delegation for a 404 program unless we show U.S. EPA that our requirements are as stringent as the Federal requirement. And in the NPDES permit program, our requirements, most of the time are more stringent than the Federal requirements to account for special features in Ohio, and special conditions in Ohio.

Mr. CRAVAACK. I appreciate you bringing—I am from the land of 10,000 lakes, or 100,000 mosquitos, whatever you want to say.

[Laughter.]

Mr. CRAVAACK. But we—from Minnesota, we actually have higher State laws, requirements, than we do Federal laws. So our State laws actually are more stringent at times than the Federal laws themselves, but we still must maintain the Federal compliance.

So, even though you have the 404 permitting process authority, you should—you would also be maintaining the Federal standard. In essence, what we are doing is streamlining the system so that we are able to cut out some of the bureaucracy associated with it, so that you can get the permits to the people that need them as quickly as possible.

Mr. PAYLOR, you said that you would have to make—you know, if you do lose some funding, you have to make some type of priority settings. Now, help me understand this. A lot of the companies that I know—we are big in mining, for example—they regulate their own water. I mean they will make sure that they stay within compliance, because they know that, you know, somebody is going to be coming around checking on them, obviously.

But more importantly, we live in these communities. These are our homes that directly affect our water that our kids drink. So they are doing it because they want to be a good citizen and taking care of our own natural resources. But can you comment on that?

Mr. PAYLOR. I have no disagreement with that comment, whatsoever. We have a pretty high compliance rate with all of our facilities in Virginia. We do, in fact, periodically show up to make sure that things are proceeding according to the permit. But I absolutely agree with your statement.

Mr. CRAVAACK. A lot of these companies want to be good citizens because, quite frankly, we live there. This is our home. These are our counties and our State.

So, I am out of time, Mr. Chairman. I will yield back. Thank you for your answers.

Mr. GIBBS. Thank you. I want to follow up a little bit. We had a lot of discussion—I know, Mr. Elmaraghy, from Ohio, and I am

from Ohio, so I am going to ask you a couple more questions because you made some points—made sense about streamlining the process, staff local, and you know, and I am all for more local control.

You said—in your last question you said that on the 401 permitting, under State statute, you have so many days to have to get done—just what—

Mr. ELMARAGHY. 180 days.

Mr. GIBBS. 180 days. Are you meeting—I know it is the law, but are they—are you meeting that?

Mr. ELMARAGHY. We imposed an internal deadline for us, which is 120 days. We feel that these permits are needed to create jobs. And it is our priority to protect the environment and to create jobs in the same time. So we feel like it is important for us to expedite these permits for all of us.

Mr. GIBBS. And it is actually happening.

Mr. ELMARAGHY. Actually happening in 120 days. As of yesterday, there is no permit pending in Ohio more than 120 days.

Mr. GIBBS. OK. Was that a substantial improvement in the last couple years because you have been working at that, or where was it before that?

Mr. ELMARAGHY. Yes. Two or three years ago we had a backlog, and some of the permits were pending more than 180 days. But we felt that is a very high priority for us, and that is why we started to pay attention to try to streamline the process—

Mr. GIBBS. Now, I guess—

Mr. ELMARAGHY [continuing]. Reduce the number of days needed to get the permit.

Mr. GIBBS. OK. Now, my understanding, the—when an entity comes in here and, you know, applies for permits 404 and 401, is it that 401 has to happen first? Did I hear that? Before the 404 process starts? Is that correct?

Mr. ELMARAGHY. I think the applicant needs to apply for a 404 first, and then come with the 401 application.

Mr. GIBBS. But the 401—what happened before the 404 would be approved by the Army Corps?

Mr. ELMARAGHY. Yes, that is true.

Mr. GIBBS. They can't be concurrently—or—so the 401 happens and then the Army Corps would start their process on the 404?

Mr. ELMARAGHY. I think they will start maybe with a review concurrently, but they cannot issue their 404 permit before they have the 401 permit.

Mr. GIBBS. OK. Go ahead.

Mr. LITTLEJOHN. Mr. Chairman, in Florida, the arrangement we have with the Corps of Engineers is we implemented what we call the joint permit application process, where the Corps and the State have agreed to use the same application form. And an applicant can submit an application to either the DEP or the Corps of Engineers and, by interagency agreement, we distribute copies of that application to the other agency.

So, we do process them concurrently. But the Corps of Engineers, before they can issue their permit, they require our State water quality certification, that 401 certification, from Florida. So we do have to issue before them. We try to do it as concurrently as—

Mr. GIBBS. Well, you see where I am going with this. I want to make sure that we are, as public officials, doing due diligence so that the entities who are applying—because you are right, it is all about job creation. And the longer it takes to get permits done because of bureaucratic red tape—and so that is what this hearing is really all about, to figure out, you know, how we can do it better, you know, we can streamline it.

And so, that is why I was wanting to know, you know, what the process really is. And then also, so we can get, I think, apples to apples comparison, because there has been a little—you know, from different States, on what Army Corps—how many days it has been, and the 401, to get that all factored in. So that is what I am trying to get a handle on.

So I know, Mr. Creal, when you talked about the—I think it was you—do it a lot faster, I just want to make sure that we are counting the days right when the Army Corps takes over.

So if—OK, if I came in and applied for a 404 and a 401 permit, OK, and start the clock counting, OK. And in Ohio, got to get it done in 120 days. And the Corps can't do it, issue the 404, until after the 401 is done, OK, how fast then would we expect the Corps to be able to do it if I came in and applied for both those permits the same day? Would I, as an entity, expect the Corps to be able to have it done within 30 days after the 401 was issued? Or is there more lag?

I don't know who wants to—what is happening? What is, you know, happening out there in the field?

Mr. ELMARAGHY. Yes. There is a way we do it in Ohio. We require the applicant to submit evidence that they already submitted as a 404 permit application. But before the applicant does the application, the Corps needs to do jurisdictional determination and the wetland delineation. So a lot of legwork needs to be done before you submit the application.

Mr. GIBBS. Mr. Creal?

Mr. CREAL. Yes. In Michigan we run a consolidated permit application where they submit one application and then the State processes it. And if—we let the Corps know if they—you know, that we have the permits, and if they need to process a permit also. But—and we have the statutory deadlines, 90 days with a wetland permit and 120 days with—that deals with streams and lakes.

One of the—some of the confusion that results, though, is we understand that the Corps counts time only after wetland delineation and public noticing are done, whereas Michigan counts the time from the day we receive an application. So that is when our 90-day clock and 120-day clock starts. So we are confident we are making decisions and issuing permits faster, especially on the complicated, large projects that we are dealing with, and the Army Corps of Engineers is.

Mr. GIBBS. OK. OK, I guess that is—Mr. Shuster?

Mr. SHUSTER. Yes, sir. I am sorry, I was down in a hearing with Chairman Mica. And you may have talked about this somewhat, but I would just like to get a reaction from the various States on the general permitting process.

The Corps has decided to expand—when you take the stream crossings from a category 1 to a category 3—and in Pennsylvania

it has caused tremendous delays in the permitting process. And in fact, we can't figure out the reason why they did it, except to give the Corps more work, justify why they are there, because the Pennsylvania Department of Environmental Protection for years—for 50 years or so or more—has done this with little to no incident. And now we have got an expanded Corps review process again slowing things down.

So, in general permitting, on pipelines especially, can you just comment on what your experience has been over the past couple of years with the Corps?

Mr. PAYLOR. Mr. Chairman, I would agree with Mr. Creal's comments, that one of the delays can be how long it takes after an applicant is ready to get a delineation in place. I would say that for the simpler applications there is not a great deal of delay between us and the Corps. The complicated applications, there can be, you know, a significant multimonth delay beyond—

Mr. SHUSTER. Right.

Mr. PAYLOR [continuing]. Beyond the time that the State is able to act.

Mr. SHUSTER. Mr. Littlejohn.

Mr. LITTLEJOHN. Mr. Shuster, in Florida I believe that the Corps is still making a lot of effort to try to create new general permits, to try to streamline activities.

However, there has been an erosion of the general permit that the Corps issued to the State to act on its behalf, and it is called the State programmatic general permit.

Mr. SHUSTER. Right.

Mr. LITTLEJOHN. And since—in 2006, before the most recent SPGP renewal, we had authority to act on behalf of the Corps for nearly all of their regional general permits in the State of Florida and the nationwide permits that were issued in the State of Florida. And so we issued a significant number of authorizations on behalf of the Corps, including in Section 10, traditional navigable waters and adjacent wetlands.

But at the last renewal, the scope of authority under that general permit granted to the State of Florida was significantly reduced. And I am afraid that—and I hesitate to speak on behalf of the Corps—I think that they are probably reacting to growing concerns from other Federal commenting agencies that these general permit authorities were too broad. And so they were essentially requested to constrict them back to a much smaller—

Mr. SHUSTER. But what was the history? I mean did you have incidents? Did you—

Mr. LITTLEJOHN. Not that I am aware of, sir.

Mr. SHUSTER. That is—so the evidence is you were doing a fine job, and with no incidents or very few. So—OK.

Mr. LITTLEJOHN. No, sir. I don't—I have asked them during discussions about once again expanding our State programmatic general permit. If we can establish some way to audit the decisions that we make so they would get more comfortable—because I think there is just uncertainty that whatever the State is doing, they don't have enough oversight over.

Mr. SHUSTER. Even though you have been doing a great job, in your opinion—and probably mine, too. OK.

Yes, sir?

Mr. ELMARAGHY. In Ohio, we don't have a State programmatic general permit. However, we have a nationwide permit, which is really making things great for a project which does not have a big impact. But that is something we need to explore if we can use the State programmatic general permit to streamline our program. Something we need to do.

Mr. SHUSTER. And the Utica, as it starts to come into play more and more in Ohio, it is going to be something you want to—

Mr. ELMARAGHY. Sure.

Mr. SHUSTER [continuing]. Get that oil and gas out of the ground as quick as possible—

Mr. ELMARAGHY. Sure.

Mr. SHUSTER [continuing]. To create jobs, and—

Mr. ELMARAGHY. But a State programmatic general permit does not resolve all the issues. You still have two Government agencies involved in the same project.

Mr. SHUSTER. Right.

Mr. ELMARAGHY. And there—Federal involvement in the 402 programs, NPDES permit program. And especially the enforcement. Any time you have joint enforcement between Ohio EPA and the U.S. EPA, some of the cases took 10 years, like Akron.

Mr. SHUSTER. Right.

Mr. ELMARAGHY. Akron, we have 10 years of litigation without settling the case. It is just any time you involve more players the process becomes more complicated and takes longer.

Mr. SHUSTER. Right.

Mr. ELMARAGHY. That is just as simple as that.

Mr. SHUSTER. Mr. Creal?

Mr. CREAL. I would just like to note that Michigan issues the pipeline permits, not the Corps of Engineers in Michigan, and we have done a very good job of doing that.

We have a complication, though. We had the Enbridge Pipeline break in 2010, about a million gallons of crude oil spilled into the Kalamazoo River. We are still working with EPA and Enbridge to clean that up, which has made our public very sensitive to pipeline permits and very aware of the easements that the pipeline companies have. Enbridge is in the process now of replacing that pipeline, which cuts across southern Michigan. And a lot of residents are very sensitive and much more knowledgeable than they were 2 years ago about where pipelines are in Michigan.

Mr. SHUSTER. OK, thank you. Mr. Ambs, if you have a—if the chairman will indulge for another—

Mr. AMBS. Thank you. Yes, just quickly, as Mr. Creal said, we also had some issues with pipelines and actually significant wetland violations for pipeline installation in Wisconsin.

But, you know, generally speaking, again, the experience in Wisconsin, we are able to process permits quickly. We have got joint permits. As I mentioned in my testimony, these are—94 percent of them get approved, they get approved quickly. The challenge here, I would submit, is that you have to be very careful about those difficult questions, those difficult requests to dredge and fill that require difficult delineations. You have got to have adequate staff and you have to have time to do it right.

And I get very nervous about very tight statutory deadlines for those sorts of projects because, from my standpoint in Wisconsin, when I look at those questions I am not just looking at job creation relative to the permit that is going to be issued. I look at continued job retention in the State of Wisconsin, where our third largest industry is tourism. We get \$13 billion a year from the tourism industry, and we get it because we have good, plentiful water and wetland resources. And if it takes some time to make sure that those are protected on complicated permits, I think it is well worth it.

Mr. SHUSTER. Thank you. Yield back.

Mr. GIBBS. Mr. Bishop?

Mr. BISHOP. Yes. Very quickly, Mr. Chairman, thank you.

Mr. Littlejohn, the decision that you are referring to that limited the scope of the general permit, you are referring to the 2007 decision that was made?

Mr. LITTLEJOHN. Yes, sir. At that time, we were operating under what we call the SPGP3, the third iteration of our first SPGP from the Corps. And it was replaced by the SPGP4 in 2006.

Mr. BISHOP. OK.

Mr. LITTLEJOHN. And so that replacement document—

Mr. BISHOP. It is the one that imposed the limitation?

Mr. LITTLEJOHN. Our very first SPGP authorized four types of activities: docks, shoreline stabilization, like sea walls, boat ramps, and maintenance dredging. So four major categories of activities. And we had those, only those, activities in our SPGP until 1997, when it was expanded to include all of the general permits and nationwide permits—essentially all of them, not all of them. But in 2006 it was reduced back to those four original activities.

Mr. BISHOP. OK. All right. Thank you for the clarification.

Mr. LITTLEJOHN. Yes, sir.

Mr. GIBBS. I believe we have had our questions answered. And I want to thank you for coming. And at this time we will stand at ease while we excuse our panel and bring up our next panel. Thank you for being here.

[Recess.]

Mr. GIBBS. OK, we will come back in order. At this time I want to welcome our panel two. We have the Honorable Jo-Ellen Darcy, who is the Assistant Secretary of Army for Civil Works, and Ms. Denise Keehner, who is the director of the Office of Wetlands, Oceans, and Watersheds of the U.S. EPA.

I guess I didn't—wetlands, oceans, and watersheds. That is an interesting—I didn't ever hear that one before.

[Laughter.]

Mr. GIBBS. We will start with Secretary Darcy. Welcome, and the floor is yours.

**TESTIMONY OF JO-ELLEN DARCY, ASSISTANT SECRETARY OF THE ARMY FOR CIVIL WORKS; AND DENISE KEEHNER, DIRECTOR, OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS, U.S. ENVIRONMENTAL PROTECTION AGENCY**

Ms. DARCY. Thank you. Thank you, Chairman Gibbs, Ranking Member Bishop, and members of the subcommittee. I am Jo-Ellen Darcy, the Assistant Secretary of the Army for Civil Works. Thank

you for the opportunity to discuss the Army Corps of Engineers regulatory authority under Section 404 of the Clean Water Act and the Corps' role and involvement when a State wishes to assume the Section 404 program.

Since 1972, the Corps has regulated discharges of dredged or fill material into waters, including wetlands, of the United States under Section 404 of the Clean Water Act related to activities such as highway construction, residential, commercial, and industrial development, and energy projects.

Section 10 of the Rivers and Harbors Act of 1899 gives the Corps the authority to ensure there are no obstructions to the navigable waters of the United States by work and structures such as piers, jetties, and weirs. Thus, the Corps had been regulating activities in the Nation's navigable waters for over 70 years when the Clean Water Act was passed.

Regulatory programs are implemented day-to-day by the Corps at the district level by staff that knows their regions and their resources and the public that they serve. Nationwide, the Corps makes tens of thousands of final permit decisions annually. Activities that are similar in nature and are expected to cause no more than minimal effects individually and cumulatively may be authorized by a general permit, while activities that do not meet the criteria for a general permit are typically evaluated under a standard individual permit procedure.

All permits meet the requirements of the National Environmental Policy Act, and the Corps can only authorize those activities that are not contrary to the public interest.

In carrying out all aspects of the regulatory program implementation, the Corps acts as neither an opponent nor a proponent for any specific projects. Rather, the Corps' responsibility is to make fair, objective, and timely permit decisions.

Under Section 404(g) of the Clean Water Act, Congress gave tribes and States the authority to administer their own individual and general permit program for the discharge of dredged or fill material into waters within their jurisdiction. The process for approval of the Clean Water Act State assumption program rests with EPA.

There are two States, as you know, that currently have assumed 404: Michigan adopted the program in 1984 and New Jersey adopted it in 1993.

There are activities in certain waters where the Corps retains regulatory authority, even in States that have assumed the 404 program. The Corps retains permitting authority in traditionally navigable waters and adjacent wetlands. This retained authority includes jurisdiction over Section 404 activities, as well as all Section 10 activities. All Section 10 authority is retained by the Corps in order to review and determine whether any proposal may potentially impede or interfere with navigation, to ensure that essential Federal functions such as national defense, protection of commercial navigation, and flood control are considered from a broad perspective.

EPA is responsible for oversight of a State-assumed Clean Water Act Section 404 program. In that role, EPA directly reviews a small percentage of permit applications processed by a State that has assumed the Section 404 program. When EPA does review a permit

application, they transmit that application to the appropriate Corps district office for review and for comment.

Several other States, including Alabama, Florida, Kentucky, Minnesota, Ohio, Oregon, and Virginia have in the past or are currently considering assuming the Clean Water Act Section 404 program. When requested, the Corps has provided input and expertise on the Section 404 program to the EPA and States during the program assumption review process.

In every instance in which a State has an effective program to protect aquatic resources, the Corps has demonstrated its willingness to minimize duplication of regulatory effort between the State program and the Federal Clean Water Act Section 404 program to reduce the burden on the public. In many cases, this has been effectively done by working cooperatively with States to establish joint permit processing, as well as State programmatic general permits and regional general permits.

In States such as Florida, as you have heard, there is a large amount of traditionally navigable waters and adjacent wetlands, which are not able to be assumed by a State under the Clean Water Act or under Section 10 of the Rivers and Harbors Act. Often times a State programmatic general permit or regional general permit provides solutions.

Developed in coordination with the Corps, these permits are general permits that authorize activities conducted in accordance with the State or tribal permit programs. It allows States or tribes to evaluate applications and issue permits consistent with the Clean Water Act and tribal or State regulations. This reduces duplication of effort, thus increasing efficiency.

These general permits apply to specific activities, geographic areas, resource types, or sizes of impacts. There are currently eight States that have these State programmatic general permits: Maryland, Pennsylvania, Florida, New Hampshire, Vermont, New Jersey, Virginia, and North Carolina.

Some of the main challenges that are faced in State assumption processes are the lack of funding, the need to revise or expand existing State laws and regulations, and jurisdictional issues that may arise.

It is important to note that States have authority under the Clean Water Act Section 401 and the Coastal Zone Management Act to add conditions to protect aquatic resources that the State sees are necessary, and which complement the Clean Water Act Section 404 program.

The Corps provides data to inform States and EPA regarding aquatic resources, and can provide information pertaining to the administration of the Clean Water Act Section 404 program in a given geographic area. But, EPA is the decisionmaking authority for State assumption.

Thank you for the opportunity to testify this morning, and I am happy to answer any questions you might have.

Mr. GIBBS. Thank you.

Ms. Keehner, the floor is yours. Welcome.

Ms. KEEHNER. Good morning, Chairman Gibbs, Ranking Member Bishop, and members of the subcommittee. I want to thank the subcommittee for its invitation to be here at this hearing today,



whose purpose is to better understand the impediments to and the benefits of assumption of the Clean Water Act Section 404 program by States. My name is Denise Keehner, and I am the career executive at EPA headquarters that has responsibility for implementing the national wetlands program. I am the director of the Office of Wetlands, Oceans, and Watersheds in EPA's Office of Water.

Protecting and restoring our Nation's waters, as is the mandate of the Clean Water Act, requires very strong partnerships between tribes, States, and Federal agencies and departments. EPA is committed to working with those States and tribes who want to increase their role in the protection and restoration of waters nationwide. EPA supports tribal and State assumption of the Clean Water Act Section 404 program, and is ready and willing to assist any State or tribe who is interested in assuming the program.

In my testimony today I will address the requirements, benefits, and challenges associated with assumption of the 404 program, EPA's role in the assumption process, and our efforts to support States and tribes who want to increase their role in wetlands protection and restoration.

Section 404 of the Clean Water Act establishes a program to regulate, or permit, the discharge of dredged or fill material into waters, including wetlands. Section 404 of the Clean Water Act designates the Army Corps of Engineers as the Federal agency responsible for issuing these permits. However, Congress decided in 1977 to amend the Clean Water Act to enable States to assume permitting authority for certain waters under Section 404. In 1987 Congress extended the same authority or opportunity to tribes.

A State or tribe seeking to administer the 404 program for assumable waters must submit a request for assumption to the appropriate regional administrator of EPA and demonstrate in the submission that their program has the legal authority in State law and regulation to issue permits consistent with and no less stringent than the Clean Water Act and its implementing regulations, including the 404(b)(1) guidelines, that it has an equivalent scope of coverage for those waters they—States or tribes—may assume, that it regulates at least the same activities as the Federal program, that it provides for public participation, and that it has adequate enforcement authority.

A State or tribal program under 404 can be more expansive and/or more protective of aquatic resources than the Federal 404 program. But the Clean Water Act requires that State and tribal 404 programs must, at a minimum, regulate all the waters they are eligible to assume. State programs have to regulate the same fill activities that the Federal Government regulates. And also, State programs have to be consistent with the 404(b)(1) guidelines.

EPA has, in the past, undertaken efforts to better understand why States pursue 404 assumption, and to better understand what States consider to be some of the impediments or most significant barriers to 404 assumption. When we ask States why they pursue 404 assumption, you heard some, I think, of the reasons from the States that testified this morning. This desire to have a single permitting authority. Some States also believe that they can do it more efficiently. Some States feel that they know their waters bet-

ter, and are in the best position to exercise permitting authority under a 404 program.

Some of the most frequently mentioned barriers to assumption are that State laws and regulations are not consistent with the Clean Water Act and its implementing regulations, and that there is a fairly heavy lift associated with changing State laws and regulations to be consistent, that there is a lack of sufficient funds for implementation, that there is a lack of EPA authority to approve partial assumption or phased assumption.

Depending on the State, the number of waters that must remain by law under Army Corps of Engineers jurisdiction can also be a factor and an impediment to a State wanting to move forward in an aggressive way to assume the 404 program.

EPA supports States and tribes that want to assume the 404 program by: providing funding for program development through the Wetland Program Development Grants, and that can include some work after the State has received authority to implement the 404 program to actually improve certain aspects—develop tracking systems, for example, and engage early in the State and tribal process. We have worked very cooperatively with States and tribes to ensure that the process and requirements are understood. We remain engaged during the development of materials to be submitted to EPA in the application process. And we review and approve program assumption applications consistent with the Clean Water Act and its implementing regulations.

Once the program is assumed by a State, we have an oversight responsibility to ensure that the State and tribal 404 program remains consistent with the Act and the implementing regulations, and that the permits that are issued comply with the environmental review criteria found in the Section 404(b)(1) guidelines.

EPA has maintained very sound, productive relations with both Michigan and New Jersey, the two States that have already assumed the 404 program. We have a strong professional and supportive working relationship with these State programs. We know, from working with these States, that these programs are strong and effective in protecting aquatic resources in those States.

EPA has also worked with the Environmental Council of States and the Association of State Wetland Managers to clarify requirements and the process for assumption. For example, EPA has clarified that Section 7 consultation under the Endangered Species Act is not required for EPA's action to approve a State program, or for individual permits that States issue after they have assumed the program. EPA also supported the Association of State Wetland Managers and ECOS in the development of a handbook to help States that are seeking assumption to better understand both the process and the requirements.

In addition, we have also sponsored training workshops in partnership with the University of North Carolina, where information was shared amongst States and tribes across the Nation about successful approaches to sustainably financing wetland programs, including 404 programs.

EPA appreciates the opportunity to be here today to have heard directly this morning from the States about their views on the impediments to and the benefits of assumption of the 404 program,

and we look forward to continuing to help those States and tribes who are interested in assuming the program move through the process in an effective and efficient manner.

It is clear that our collective ability to protect and restore our Nation's waters is significantly enhanced by effective State and tribal programs. Thank you.

Mr. GIBBS. Thank you. I am going to yield to my ranking member, Mr. Bishop, because I think he has a schedule conflict.

Mr. BISHOP. I do, and I thank you very much for indulging my schedule, Mr. Chairman. And I thank our witnesses. I just have one question. It is for Secretary Darcy, and it does not relate to the assumption of Section 404 permits.

I have recently become aware of a legislative proposal that I believe is circulating within the Corps that would propose to outsource existing operation and maintenance responsibilities that the Corps traditionally had undertaken to private contractors, and that this is an effort on the part of the Corps to respond to declining budget levels.

And it is my further understanding that there is an assumption within the Corps that engaging in this practice would reduce O&M expenses by somewhere between 10 and 20 percent.

So I have two requests. And I am not authorized to speak for the committee, so I will simply make the request for me. One is could you provide me with any studies, assessments, analysis that have been done that buttresses this 10 to 20 percent savings reduction, one. And two, could you provide me, in writing, the status of this proposal? How far along it is, in terms of the Corps process?

Ms. DARCY. Well, yes. We will definitely do that, Congressman. I think one of the areas of concern is the fact that we are looking at ways to finance our aging infrastructure. As you know, that is a concern from every aspect, whether it is looking for private funds for the operation and maintenance, or looking for other sources of revenue in order to meet those demands. But as far as privatizing a workforce, I will provide you whatever we have been considering, from that perspective.

Mr. BISHOP. If you could, I appreciate that.

Mr. Chairman, I yield back. And thank you again for indulging my schedule.

Mr. GIBBS. OK, thank you. I will start off here. You heard from the panel one, the States, that said they think they can do it more cost effectively, streamlining it, closer to the people, all that.

I guess, Secretary Darcy, can you kind of respond if you think that is possible? Or where does the Corps stand on that? Or why—or, if it is true, why is the cost higher with the Corps doing it?

Ms. DARCY. As you know, only two States have the program.

Mr. GIBBS. Yes.

Ms. DARCY. We have to administer the program in all the other 48 States. We have offices in every State. In some States we have several regional offices to just do implementation of our regulatory program.

I don't think we have done an analysis of the cost savings, but as you know, it has been demonstrated here by Michigan, in particular, and the proponents of the Virginia assumption, that they would be able to do it for \$3 million, as opposed to our current \$7

million. But it is not exactly comparing apples to apples, because that \$7 million figure is for our entire regulatory program, not just for the 404 program.

Mr. GIBBS. OK. Ms. Keehner, I guess—I have heard some feedback. If a State wants to move in this direction and apply for assumption, they go through the regional offices, the regional administrator. And how would that mechanism work? Because I guess I get a little concerned. I have heard, you know, over the years in my State legislative capacity there is some times, you know, different things coming out from different regional offices that maybe aren't apples to apples, and we might hear how a different regional office—so how would that interact, and what was your role in—to facilitate that?

Ms. KEEHNER. Well, the EPA headquarters office of the Office of Wetlands, Oceans, and Watersheds, we have a division that is responsible within that office, the Wetlands Division, for working in cooperation and collaboration with both State partners, as well as our regional offices. There are many opportunities for coordination and collaboration across the Nation. There are, you know, conference calls that are held—

Mr. GIBBS. When a State like Ohio—would they be working—

Ms. KEEHNER. With region five, yes.

Mr. GIBBS. Chicago office?

Ms. KEEHNER. Yes.

Mr. GIBBS. And so they would go through there first, before it gets to you here, in DC?

Ms. KEEHNER. The regional administrator is the—is actually the approving authority for the assumption. So we would be—I mean we were very—in EPA's regional offices, there is a lot of communication and coordination that occurs with headquarters, particularly on issues as important and significant as a 404 assumption. There would be dialogue that would occur between the regional office staff and our—my headquarters staff—and Office of General Counsel, as well.

Mr. GIBBS. OK.

Ms. KEEHNER. And there is always concurrence on those packages with headquarters, Office of General Counsel, Office of Water and OECA before it is final.

Mr. GIBBS. I am just looking for some uniformity.

Ms. KEEHNER. Right.

Mr. GIBBS. You know, make sure we have that. Because I know there has been instances before, you will hear—we will hear things about the region five office and, you know, interpreting things maybe different than another region. And that is—you know, the uniformity aspect of that.

I guess I will just start—let's see. We don't have any Democrats here any more, do we? Who wants to go next? Mr. Shuster?

Mr. SHUSTER. Sure. Thank you, Mr. Chairman. Secretary Darcy, pipelines, permitting, the delegation, the Pennsylvania Delegation. We sent you a letter. We appreciate your response to us. But in your response to us you acknowledge and restated the goal of eliminating duplicative—the review process. However, the new approach that the Corps is doing is just the exact opposite, in my view, and the view of my colleagues—most of my colleagues—and the view of

our DEP. As well as taking the exact opposite approach, it is also not—we don't believe there is any additional environmental benefit to the approach.

And furthermore, we don't believe Pennsylvania is being treated like other States are being treated. The average—Pennsylvania's mid-stream permits are averaging about 150 days now, give or take, under GP4. Other States with nationwide permitting have a maximum of 45 days, and in some cases don't require the Corps to even approve.

And so, first question is why is Pennsylvania being treated differently? And then we will get on to a couple other questions.

Ms. DARCY. Congressman, are you referring to our nationwide permits, or the general permits?

Mr. SHUSTER. Well, general permits in Pennsylvania. But my understanding, when I talk to the nationwide permits, there are other States, not—Pennsylvania is not one of them—that don't even have to have Corps followup.

Ms. DARCY. Well, on our nationwide permits, if you are referring in particular to pipeline permitting—

Mr. SHUSTER. Correct.

Ms. DARCY [continuing]. Under our nationwide permits for pipelines, if you are intending to cross a wetland, or for your pipeline, you have to submit what is called a pre-construction notice to the Corps of Engineers. Within 45 days of that time, if we do not require any changes or differences, you are allowed to go ahead with that. That is a nationwide permit, that applies everywhere in the country.

Mr. SHUSTER. Right.

Ms. DARCY. Regarding the general permit for Pennsylvania that you are referring to for pipelines, my understanding is that we are currently in discussions with the pipeline companies in Pennsylvania to help to develop that general permit.

Mr. SHUSTER. Right. And that is—but again, what you have done is you have changed from a category 1 to a category 3. And for a long time, a long period of time, Pennsylvania DEP approved those under a category 1 status. Now, under category 3, they have to go through and, again, there are significant delays.

And we have—I think you have been in talks with the pipeline companies for some time now. This is about—first of all, we want to do it environmentally in a sound way, to protect the environment, which our Secretary Krancer is doing a great job and, trust me, he is feared by the pipeline or the energy companies, because they know if they do something willfully, he is going to come down on them hard.

But we have taken away the ability for Pennsylvania to quickly approve these pipelines, the gathering lines, stream crossings. Again, and that is an expansion of what the Corps has done. So can you tell me why have you done it? I mean Pennsylvania wasn't a bad actor, they did a great job. So I would understand that if we were out there, doing the wrong things.

Ms. DARCY. I don't know the answer. But what I can tell you is that I expect that the reason for why it is taking longer may be because when we issue general permits there has to be a public no-

tice and comment period, and we have to respond to the comments. I can't tell you for certain.

But what I can tell you is that I will personally look into——

Mr. SHUSTER. What I would prefer to see is us go back to letting them be category 1, where they fall under the State review. And now, today, 90 percent of them under category 3 have to be reviewed. And that is a significant challenge to the State of Pennsylvania and to these energy companies. And it just seems to me, under category 3—or, excuse me, under category 1, the impacts were temporary and minimal. And those stream crossings are all temporary and minimal in most cases. So again, I would like the Corps to go back and reverse itself and put us back into category 1. Because, again, I just don't see any reason for it to penalize Pennsylvania by doing this. Can you talk about that?

Ms. DARCY. What I can tell you is that I will look at it and see why they are considered category 3. Because right now I can't, off the top of my head, tell you why.

Mr. SHUSTER. And I don't know if you have ever interacted with Secretary Krancer, but I would highly recommend you—I mean this guy is outstanding. We have had him in front of Congress a number of times. He is a former judge, former environmental judge, who wants to do things right for Pennsylvania. He cares about Pennsylvania as much—I should say more—than the Corps of Engineers or more than the EPA, because he is a Pennsylvanian. And again, he has a great respect from the energy companies because they know if they do something willfully, if they do something knowingly, he is not going to tolerate it.

So, I would hope that we could again move past this and get these energy companies back to drilling and getting the energy out, paying the royalties to the folks that have leased their land to these people, because it adds to the economy tremendously in Pennsylvania. So thank you.

Mr. GIBBS. I would just like to also ditto on what the representative just said. He testified before this committee and they had a problem in Pennsylvania and they shut it down in 27 hours when they realized they had a problem. And I don't think anybody could have moved that fast, so I was impressed.

Mr. Cravaack, do you have any questions?

Mr. CRAVAACK. Oh, yes. Thank you for being here today. Madam Darcy, could you please tell me what constitutes a waters of the United States? How does—how do you go across that determination?

Ms. DARCY. We have a definition that is in the statute, as well as in our regulation and EPA's regulation on what determines a water of the U.S. I used to know this off the top of my head, but it is defined in statute.

Mr. CRAVAACK. You can get some help from your wingmen if you need it, you know.

Ms. DARCY. William? Where are you, William? Well, Ryan probably can do it, too.

The significant nexus to an existing body of water. Is that right?

Mr. CRAVAACK. Definition of nexus?

Ms. DARCY. Connection is——

Mr. CRAVAACK. Well, if you could give our office a reasoning why the Mille Lacs Lake in the middle of Minnesota, which is by the Army Corps of Engineers, considered a nonnavigable lake——

Ms. DARCY. What is the name of the lake, Congressman?

Mr. CRAVAACK. Mille Lacs Lake.

Ms. DARCY. Mille Lacs.

Mr. CRAVAACK. Why the United States Government took that from the State? I would love to hear that. Because we actually have a bill to prevent it. And I would like to know what the Army Corps of Engineers genesis was when they actually—in the report itself it said it is not navigable. But anyway, I would love to hear that from you in the future, though we do have legislation that has passed the House into the Senate, and hopefully we are going to hotline that with Senator Klobuchar over there.

How long do you think it would take for the State to assume a permitting process? And does the Federal Government really support that, in your opinion?

Ms. DARCY. Assuming the 404 process?

Mr. CRAVAACK. Right.

Ms. DARCY. I am going to defer to EPA, because they are the ones who——

Mr. CRAVAACK. OK.

Ms. KEEHNER. The experience that we have had with the State of Michigan and New Jersey, for the State of Michigan, from the time the State began the process of developing its program until authorization, I believe, was 5 years. And the State of New Jersey, I believe, was 8 years.

Mr. CRAVAACK. OK, 4 and 8 years. How do you view the States? Do you—Mr. Creal had an excellent—I mean I was really impressed when he says he views, you know, companies and—do you view them as customers?

Ms. KEEHNER. Do I view the States as customers?

Mr. CRAVAACK. Customers and companies within the States as customers.

Ms. KEEHNER. Of the Federal Government and of regulation? Yes, they are—States are both partners in the implementation of the Clean Water Act. In this case, they are also customers of EPA, in the sense that EPA has obligations and responsibilities to provide interpretations, guidance, direction. We run grant programs. So, yes.

Mr. CRAVAACK. OK. Well, we have had a lot of troubles with EPA in Minnesota in regards to—for example, some of our mining, for example, where the States—actually, and some of our restrictions are even more strict than what the EPA puts out. And yet the EPA swoops in and says, “We are not going to follow your State guidelines, and we are going to go ahead and do what we want to do,” mainly—it is out of your jurisdiction, probably, regarding air quality—it is a haze issue, actually, which, really, the Federal Government shouldn’t have any direct input in implementing, anyway.

So, I really question if the EPA wants to partner with businesses and States, or they wish to mandate to businesses and States. Because I would like to see Federal Government partnering with companies and States to create jobs, while at the same time protecting our environment.

In the 2 years I have been here—and I admittedly am a freshman—but all I have seen is the Federal Government coming in and playing Gotcha, instead of partnering with companies, with States, and say, “How can we do this better together, while increasing jobs and at the same time make sure we all take care of our environment?” And that is just an observation. So I hope that you will possibly take that back.

Ms. KEEHNER. Thank you.

Mr. CRAVAACK. What is the process, in your—Ms. Darcy, what is the process for actual determining—we kind of asked that earlier, but, you know, how do you go about determining what is a water body of the United States? How would that be? You see a water—and I have a specific issue in mind. But how do you go about saying that this is now a Federal body of water?

Ms. DARCY. To determine it is—we have what is called a—

Mr. CRAVAACK. Not even navigable, but it just becomes a body of water for the United States.

Ms. DARCY. We have, through our regulations, what is called the delineation manual that all of our folks on the ground and our districts utilize to make a determination as to what is navigable. It depends on the amount of water, the time of year, what the vegetation is, what the aquatic life is there, for example. All of those things go into determining whether it is a water of the U.S. for jurisdictional reasons.

Mr. CRAVAACK. Can you explain to me how a body of water could be in existence for 25 years, and then all of a sudden the Federal Government comes in and says it is now a Federal body of water?

Ms. DARCY. That it was at one point and is no longer? Is that—

Mr. CRAVAACK. No. It was not a Federal body of water, and all the sudden the Government swoops in and says now it is a Federal body of water.

Ms. DARCY. I can only speculate that perhaps the nature of the—whether it is a lake or river—has changed over time, has increased, and now perhaps supports aquatic wildlife that it didn’t before.

Mr. CRAVAACK. OK. All right. I see my time has expired. Thanks for the indulgence to the chair, and I will yield back.

Mr. GIBBS. Ms. Herrera Beutler?

Ms. HERRERA BEUTLER. Thank you, Mr. Chairman. A couple of questions. You know, and a general statement on the NPDES and the nationwide permitting. I don’t know who is responsible, because when I work with my local Corps, both—I am in southwest Washington, so I deal with both the Portland Corps and the Seattle Corps, depending on where we are.

And I have seen very—you know, we have new colonels right now doing a great job working on reducing permitting times. But the numbers that he shared with you, Mr. Shuster, are far and away worse in our neck of the woods. And what I hear—what I am hearing is, as the colonels are trying to make a—I mean we are hundreds of days longer on both of those than—you can pull out several different Corps offices, district offices. We are hundreds of days beyond that. And we are not talking about for permitting a pipeline or a mine. We are talking about building a building.

I mean it is—I almost wish our problems were with permitting, you know, the more onerous types of projects. It is building a shop-



ping center in basic areas. I mean we had people who had to—cities who had to either give back—have been in danger of losing their stimulus grants because they just didn't know if they could get a permit in under 200 days. I mean it is drastic, and something absolutely has to change.

The efforts that I have had from the colonels on both—the new colonels commanding both districts have been tremendous. I appreciate them. But as they tell me when they do—they have shown me numbers. When they are doing the permitting alone, the permit times are less. But when they have anything to do with the EPA is when it gets bad. And they didn't say it like that, I am not trying to throw anybody under the bus. But it significantly lengthens the amount of time it takes to get one of these two permits.

I want to know from either of you who on this level my office can turn to with specific examples to change that? I mean at this point I don't know who the problems are, but we have double-digit unemployment in my neck of the woods, and tremendous projects ready to go that the Federal Government has, on the one hand, said, "Hey, here is stimulus money." On the other hand, we can't even—we can't get a permit to build a building.

So I guess I am asking from both of you who I can turn to here who is going to make something happen. And I am not saying permit things that are—shouldn't be permitted. I am talking about the basics.

Ms. DARCY. I think you are looking at how we can speed up the coordination process that is required when we have to process a permit. We do have to coordinate with EPA or the Fish and Wildlife Service or locals. We also have to coordinate with the State historic preservation office—there are all kinds of—

Ms. HERRERA BEUTLER. Well, this is one of the things I was told was, "Well, maybe there is more sensitive environmental or tribal issues in this area, as compared to a different district."

And I said, "Well, why are we hundreds of days different than the Portland Corps, because they have the same environmental and tribal issues that we do in Washington"—I mean I live right on the border. They are very, very similar. So, yes. It is the streamlining process, perhaps.

Ms. DARCY. One thing I think we can look at doing is coordinating with our sister agencies earlier in the process. We often get a permit application and it is not complete, so that takes time. You have to go back to the applicant and request information, for example.

But, if coming in the door we know that there is an endangered species, or we know that there is a possibility for impacts to a wastewater treatment system or something, we could, earlier in the process, coordinate with our—

Ms. HERRERA BEUTLER. Do you do a type of concurrent permitting? Because one of the things I found was people will turn everything in and not be told for 4 weeks that there—it is an incomplete—or there was something else. Or it wasn't even incomplete. I have stories where people have completely done everything they were supposed to do, and then they just wanted more information. But they didn't find out that they wanted more information until it had already been sitting on someone's desk for a month.

I mean is there a process that we can—where do I go—because I have been trying at those levels to fix this, and it is not working. So I have you both here.

Ms. DARCY. Well, as you know, it is Corps districts who do our permitting, and it is the ultimate decision of the District Commander in all instances whether a permit is granted or not. But I think, in looking at streamlining, I think it was the Portland district, or maybe the Seattle district, years ago we got a provision in law referred to as Section 214 that gave additional funding to permit processing. And it has been very successful. And that has helped. But it is clear that it is not helping enough in getting this more expeditious—

Ms. HERRERA BEUTLER. So who in your office is—who could raise their hand that we could—

Ms. KEEHNER. I would be happy to follow up with that region and the office in Seattle with the specifics of the cases.

Ms. HERRERA BEUTLER. Great.

Ms. KEEHNER. And—so that we can better understand, really—

Ms. HERRERA BEUTLER. Great.

Ms. KEEHNER [continuing]. What was the nature of any problem.

Ms. HERRERA BEUTLER. And the challenge I have is that they—my folks can demonstrate a difference between the Portland office and the Seattle office.

Ms. KEEHNER. We will take a look—

Ms. HERRERA BEUTLER. I mean they can demonstrate it. One more quick thing. As we are talking about this 404 and letting the States assume this authority, what would the difference be—I see that under Section 10 of Rivers and Harbors the Corps would retain authority to—even if this is transferred to the States, would they still be able to say, “Hey, wait a minute, you are going to impede a navigable water”?

Ms. DARCY. Yes, Congresswoman. We don’t have the authority to delegate the Section 10—

Ms. HERRERA BEUTLER. Great.

Ms. DARCY [continuing]. Responsibility.

Mr. GIBBS. Yes—

Ms. HERRERA BEUTLER. So that doesn’t go away.

Mr. GIBBS. Congress would have to change the law for that to happen.

Ms. DARCY. Yes.

Ms. HERRERA BEUTLER. Great. Thank you. Thank you, Mr. Chairman.

Mr. GIBBS. Mrs. Capito?

Mrs. CAPITO. Thank you. Thank you both for your testimony.

Secretary Darcy, first of all, I want to thank you. I am Shelley Moore Capito from West Virginia. Thank you for the letter that Congressman Rogers and I had written about the permitting. As you know, West Virginia has had some deep difficulties with our permitting issues and with the coordination, and I appreciate the chart that you sent me updating the latest.

And you also know that the Corps has struck down the enhanced coordination procedures that were put into effect by the EPA. I believe that was in 2009, early 2009.

I would like to know from you, Secretary Darcy, how has the interaction between the Corps and the EPA changed since the 2012 court decision? Because, basically, my understanding at the basic is the court said this enhanced coordination procedure is unlawful and an overreach by the EPA.

So, I am assuming it has been dropped. But is that in reality what is happening? And——

Ms. DARCY. Yes.

Mrs. CAPITO [continuing]. What has changed?

Ms. DARCY. What has changed is we have gone back to the way we were operating before the enhanced procedures process in 2009, as a result of the court decision this year.

Mrs. CAPITO. And the District Commander is making the decision without the EPA having the ability to come back and review after they have already approved the water standards, et cetera?

Ms. DARCY. The District Commander still retains the right to make the decision. He also still has the ability to ask for additional information or coordination. But it is not the same process that we put in place in 2009.

Mrs. CAPITO. Right. Then what is the EPA's role right now, then?

Ms. KEEHNER. EPA has an ability to review those permits and to make comments on them at the proposed permit stage, if there is any——

Mrs. CAPITO. Once it has been finalized. Once the——

Ms. KEEHNER. Well, EPA has the ability under 404 to potentially veto a permit. But that is very rarely used.

Mrs. CAPITO. Right. The other question—I mean we have had just such difficulty. We have got people who are withdrawing a lot of their applications, capital investments not going forward in our coal mining region because of the difficulty with the permitting issues. You are both well aware of this, I am not telling you something you don't know.

But, you know, since the hearing here is about whether the States would take over the 404 permitting, I noticed my State was noticeably absent in the listing of the States. Would you like to say why West—I don't know why West Virginia is not one of those. I would have to say the complexities involved may be why the State doesn't want to take this on. I don't know. Would you——

Ms. DARCY. Well, I don't know either, Congresswoman. The States who were represented here this morning did point out some of the reasons why the State assumption is difficult. One of them was funding, one of them was having to redo your own regulations to be consistent. I mean they raised those concerns.

Mrs. CAPITO. I would like to ask Ms. Keehner—did I say that right?

Ms. KEEHNER. Yes, Keehner. Yes.

Mrs. CAPITO. Keehner. Yes, thank you. As you know, EPA's objections have drastically impacted the ability of our State to run our own NPDES permitting under Section 402. Is there any hope that EPA would show greater deference to a prospective 404 permitting program if the State takes it over, than it has for the NPDES State program?

Ms. KEEHNER. What I can comment on is that the relationship we have with the State of Michigan and New Jersey, as they have

implemented the 404 program, has demonstrated that EPA reviews and comments on less than 2 percent of the permits that those States move forward under the 404 program. And over the history of both of those programs, there have been only three cases where objections, EPA objections, were maintained and those permits moved over to the Corps of Engineers. So I think that is a good indication of EPA's—how EPA, in practice, oversees State programs that—under 404 that have been assumed.

Mrs. CAPITO. With the court striking down the enhanced coordination procedures that were put into effect by the EPA, has there been any activity in the EPA to reconstitute these under a different form?

Ms. KEEHNER. No.

Mrs. CAPITO. Good answer.

Ms. KEEHNER. We respect the rule of law and the judge's decisions.

Mrs. CAPITO. Good. And then for the Corps, on the back log, I know staffing has been an issue sometimes at the Huntington Corps, they are working like crazy. I realize that. There is a lot of activity, and the colonels have done a great job. I would concur with my colleagues who—you can't meet a finer group of people, really, and I have great respect from them. But what are you doing to address the backlog at the Corps level in those particular districts that I am concerned about?

Ms. DARCY. We are trying to be more efficient within the resources we have. We are also looking at ways that we can, as we talked about, streamline the process, maybe be in touch with those people with whom we need to coordinate earlier in the process. And also, we have a dedicated group of folks in those district offices trying to process those permits, and there are a lot of permits.

Mrs. CAPITO. Thank you. Thank you, Mr. Chairman.

Mr. GIBBS. A couple more questions here. The Corps reissued its nationwide permits under Section 404 of the Clean Water Act in February of 2012. And shortly before the Corps reissuance, the National Marine Fishery Service issued a jeopardy biological opinion under the Endangered Species Act on the Corps' nationwide permit program.

In August of 2012, the Center for Biological Diversity notified the Corps of its intent to file a lawsuit in 60 days to challenge the Corps' nationwide permit program, alleging that the nationwide permits reissuance violated the Endangered Species Act. How might this Endangered Species Act litigation impact the nationwide permits and overall 404 program?

Ms. DARCY. Well, as you say, they have issued an intent to sue.

Mr. GIBBS. Yes.

Ms. DARCY. I don't believe they have actually filed a lawsuit yet. I would have to check. We will continue to operate under our nationwide permits as they have been approved. In light of the litigation stopping us from using them, we are going to proceed under the nationwides as they have been adopted.

Mr. GIBBS. OK. I think we are good. Just to follow up, I know last year, before you came before this committee, we were talking about the permits and the revocation of the one permit in said State, and you said that the EPA said they had the authority to

do that. Apparently, the—at least in the first round court decision, they didn't have the authority. I just wanted to reinforce that. And I know the administration is moving forward, which is unbelievable to me, but I just had to get that in.

I want to thank you for coming today. Oh, OK. The—you know, this hearing and our first panel, you know, we are really trying to figure out how we can do things better and—because when I am out in Ohio and elsewhere, one thing you hear from businesses and, you know, our customers, that, you know, we can't get our permits, permit delays, or—I think Representative Herrera Beutler said it too, sometimes they don't get back. Lots of times I hear instances where they say, "Well, we haven't heard back. We inquire, it's been months, and we can't get, you know, any feedback, we don't even know what the status is."

And, you know, they might need more information but, you know, I think you really need to get filtered down through the agency that there are customers and they are the ones that create the jobs and grow the economy. And we certainly don't want to be putting more barriers, making it more difficult, and streamline the process when we can. So hopefully we can, you know, out of this hearing today we can figure out how we can do things better.

And I guess one quick question just comes to mind. If a State wants to come in and do this, what is the position of the Army Corps to—you know, don't have a position, or are you just—are you going to facilitate the needs, what they want?

Ms. DARCY. If the State requires information for us to review in order to submit the application to EPA, we would be happy to—and we support that.

Mr. GIBBS. Yes, I figured you did, I just wanted to make sure.

I guess just another quick thought. We have had hearings in this committee on our entire maritime transportation system, especially in the waterway and the ports, you know, it is really critical, and we have had a lot of discussion about the aging assets, you know, our locks, levies, and dams, and then, of course, flood mitigation.

When we are looking at Corps personnel, can you kind of break down, you know, where the emphasis is? I mean I will just tell you. My strong belief is I think the Corps' top priorities ought to be the maritime transportation system and flood mitigation. And would it be better if the Corps was relieved of this responsibility to do some of these 404 permits that really don't pertain, as such, maybe to those—that—those two issues?

Ms. DARCY. As far as focusing our program on what those priorities are that you mentioned, I think if you look at our budget over the last several years, we are spending more on operation and maintenance than we are on most other business line functions, and that is because of the aging infrastructure, and because of the importance of the maritime system to this country.

You know, as far as the 404 program, our regulatory program is about \$185 million of our entire \$4.7 billion budget. So it is not a huge part, but it is a really important part. And I think we have been doing it pretty well. I mean it was given to us in 1972 by the—

Mr. GIBBS. When the Clean Water Act was—

Ms. DARCY. Passing the Clean Water Act for the dredge and fill materials. So I think it is operating well, but you know, with the increased needs of not only permits, but also the increased needs of the navigation system, we need to weigh where we are going to put our money.

Mr. GIBBS. Yes. No, I agree, and we got serious challenges, because I have always made the argument if we don't have the correct transportation system and maritime—essential cog of that, our total transportation system, that, you know, our economy will suffer and then we won't have the resources to do some of these other things, you know, eco-restoration and all the other programs you do.

So, anyway, thank you again for being here today, and we look forward to seeing you in the future.

Ms. DARCY. Thank you.

Mr. GIBBS. This concludes this hearing.

[Whereupon, at 12:13 p.m., the subcommittee was adjourned.]

September 20th, 2012

**Testimony of David K. Paylor  
Director, Virginia Department of Environmental Quality  
Vice-Chair, Environmental Council of the States Water Committee**

**United States House of Representatives**

**Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment**

**Regarding**

**State Assumption of Clean Water Act Section 404**

Good Morning Mr. Chairman and Members of the Subcommittee. I am pleased to present testimony today regarding the benefits associated with state assumption of Section 404 of the Clean Water Act (CWA), and to discuss the administrative and financial barriers that make the process prohibitive.

My name is David Paylor and I'm the Director of Virginia's Department of Environmental Quality (VDEQ). During my six years as VDEQ's Director I've had the opportunity to work with the administrations of two Virginia governors to protect our natural resources while providing efficient regulatory programs that are responsive to the regulated community. I'm also a former president of the Environmental Council of the States (ECOS) and I currently serve as Vice-Chair of the ECOS Water Committee. ECOS is the national non-profit, non-partisan association of state and territorial environmental agency leaders. Today I am testifying on behalf of both ECOS and the Virginia Department of Environmental Quality.

Congress passed the Clean Water Act (CWA) in 1972 and it is the primary federal law governing water quality in the United States. The U.S. Army Corps of Engineers administers the Section 404 program for EPA through the issuance of permits for activities in jurisdictional waters of the United States. When Congress passed the CWA, it included a provision whereby states may seek to implement certain parts of the Act,

including Section 402, the point source discharge program, and Section 404, which regulates the discharge of dredged or fill material into waters of the United States, including wetlands. Currently, only Michigan and New Jersey have assumed Section 404. This is in contrast to the forty-five states that have assumed Section 402. This disparity is evidence of financial and administrative barriers that are specifically associated with Section 404 assumption.

There are significant potential benefits to a state administered Section 404 program. States are well-positioned to provide a consistent, streamlined regulatory program that is protective of a state's unique wetland and stream resources. Most states define their waters more broadly than the Clean Water Act and include isolated wetlands, ephemeral streams and groundwater. During times of jurisdictional uncertainty at the federal level, such as in the wake of the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC") decision<sup>1</sup>, states are able to maintain a consistent and predictable definition of the waters they regulate. This consistency provides stability to the regulated community and encourages trust between the government and private land owners. In addition to consistency, a state administered Section 404 program provides the public with an efficient and streamlined one-stop shopping experience, effectively removing the duplication of effort and regulatory uncertainty that often occurs with parallel state and federal programs.

While states are able to provide consistency, efficiency and enhanced resource protections through stewardship of the Section 404 program, ECOS has identified substantial financial and administrative barriers facing states that seek to assume the program. Among the most significant of these barriers:

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<sup>1</sup> The Court held that the Corps' assertion of jurisdiction over isolated waters on the basis of the "migratory bird rule" exceeds the authority granted under Section 404(a) of the CWA. The Court based its decision on the CWA alone, thereby avoiding the constitutional question of whether the regulation was within Congress' power under the Commerce Clause. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)



- Funding is not currently available from the federal government for implementation of the Section 404 program. The Section 404 program is transferred to a state through primacy, more commonly called "Section 404 assumption". The Section 404 assumption process differs from the transference of Section 402 of the CWA, which is *delegated* to states by the EPA. This distinction between assumption and delegation renders states seeking to implement 404 ineligible for federal funding. While there are federal funds potentially available for a state's development of the 404 program, it is the implementation phase that is financially challenging as the state hires new staff, funds new training programs, and expands administrative resources in advance of assumption. ECOS supports U.S. Congressional action to authorize funding for states that assume the Section 404 permitting program and to make the existing U.S. EPA wetland grant program available for both development and implementation activities.
- There is uncertainty regarding the criteria for assessing a state's legal authority to assume administration of the Section 404 program. The basic foundations of parallel state and federal regulations are different, even though the goals of those regulations are shared. The CWA relies heavily on the authority of the federal government to regulate interstate navigation and interstate commerce while states regulate their water resources based on the constitution and laws of the state. The rules require that the state administered Section 404 program is no less stringent than the federal program. ECOS supports this requirement, but suggests that EPA provide guidance to states about available flexibility in meeting the requirement while taking into account differing wording and underlying constitutional authority for state programs. This would help to reduce the uncertainty and difficulty of assessing parity by directly comparing the language of two different regulations.
- The Section 404 assumption process provides no phased assumption option to states. The requirement of states to assume the entire program all at once creates a complex and lengthy process that can last up to two years with no

certainty that EPA will approve the request. ECOS suggests a process that allows a state to assume the program in phases. A phased assumption would allow the Corps to maintain any projects that are in process while new applications would go to the state. A phased approach would also lighten the financial and administrative burden on states to provide the resources for an “overnight transfer” up front.

- The Section 404 program does not include an option for partial assumption by states. For instance, states cannot seek to assume the 404 program for only specific geographic areas or certain types of activities; they must assume the entire program. A partial assumption allowance would enable states to choose those portions of the program that they are best positioned to administer. Under a partial assumption scenario workload division could be structured around categories like impact thresholds, or specific responsibilities like jurisdictional determinations versus permit processing. The specifics of the workload division could be based on a state’s unique aquatic resources or workload and administrative factors. Though not part of the assumption process, there is one currently available option for states to share Section 404 responsibilities with the Corps. States can pursue development of a State Programmatic General Permit (SPGP) with the Corps. A robust state programmatic permit program, like the successful SPGP program that Virginia has administered over the past twelve years, provides a working example of how dividing Section 404 regulatory workload between a state and the Corps can provide a more streamlined and consistent permitting process to the regulated public while maintaining wetland and stream protection.

In Virginia, Section 404 assumption has been a recurring discussion since 2000, and has been driven, in part, by the Tulloch ditching decision<sup>2</sup>, the Wilson case<sup>3</sup>, and the

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<sup>2</sup> The Court held that the Tulloch rule exceeded the Corps’ and EPA’s authority under the CWA because the “incidental fallback” of material associated with excavation activities was not a “discharge of dredged or fill material” within the meaning of the statute. *American Mining Congress v. U.S. Army Corps of Engineers*, 951 F. Supp. 267 (D.D.C. 1997)

limitations of the Corps' jurisdiction over isolated wetlands and excavation in wetlands and other waters resulting from these court cases. The Virginia Water Protection Permit (VWP) Program was first enacted in May 1992 to serve as the Commonwealth's nontidal wetlands program and Section 401 Certification process. In 2001, the program was expanded into a nontidal wetlands regulatory program independent of Section 401 Certification, including an SPGP and general permits for development, mining and linear transportation projects. However, Virginia's program still operates in parallel with the Corps' Section 404 program, creating some unnecessary duplication of effort.

Virginia's SPGP was first released in 2001 and expanded in 2007 and 2012. Virginia's SPGP has reduced regulatory duplication for projects that qualify for the SPGP, but there is still a "two-stop shopping" experience for the regulated community for projects that are beyond the SPGP thresholds of 1.0 acre of wetland impacts and 2000 linear feet of stream impacts. Two regulatory frameworks can create confusion for the regulated community because of differing timeframes and the absence of a single point of contact for permits. Through the development and ongoing evolution of Virginia's SPGP, the Corps and VDEQ identified and implemented impact thresholds that capture the majority of the permit load for residential development in Virginia and allow VDEQ to serve as the sole point of contact to the regulated community for those projects. Virginia's experience with the SPGP has shown that by working closely with the Corps it is possible to develop a state programmatic permit that is structured to divide responsibilities and workloads to best utilize the strengths of both the state and federal programs. Virginia has found that administering a well developed SPGP provides many of the benefits that are not currently available through the 404 assumption process due to the lack of a partial 404 assumption option.

VDEQ has evaluated the costs and benefits of pursuing Section 404 assumption in the past and is currently preparing an updated 2012 study at the request of Virginia's

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<sup>3</sup> The Court held that CWA jurisdiction over isolated water bodies based on their potential, as opposed to actual, connections with interstate or foreign commerce was invalid because it exceeded Congressional intent (emphasis added). *United States v. Wilson*, 133 F. 3d 251 (4th Cir. 1997).

General Assembly. These studies require VDEQ to perform a thorough accounting of the Agency's and the Corps' respective workloads, existing staff and information technology resources. VDEQ used those data to project the funding required to successfully assume the Section 404 program from the Corps. Both studies include extensive stakeholder input from the regulated community, state resource agencies, federal agencies and environmental conservation groups. Both the 2006 and the 2012 assumption studies identified several of the same anticipated benefits and concerns.

The potential benefits identified by Virginia's assumption studies are in line with other states' findings as set out in the ECOS resolution broadly adopted by the states. Namely, that assumption of the Section 404 program could provide a consistent, streamlined permitting process with a single point of contact and broader resource protection than the CWA. Virginia regulated stakeholder's voiced appreciation of VDEQ's statutory timeframes that make us more responsive and lead to consistently quicker permit processing times than the Corps. VDEQ, if adequately funded, would provide that same level of customer service while administering the assumed federal program and providing equivalent environmental safeguards.

Virginia's analysis of the costs revealed that the single largest impediment to Virginia's assumption of the federal program is the expense of acquiring the staff, administrative resources and information technology infrastructure needed to handle the expanded workload. Projections are that implementing the program would require VDEQ to roughly double its existing work force at a projected additional cost of approximately 3 million dollars per year. Some of this cost could be defrayed through the phasing in of key personnel with the full workforce coming on line towards the end of the assumption process. More prohibitive is the anticipated need for approximately 2 million dollars in the first year of assumption and approximately 1.5 million dollars in year 2 and year 3 for the development of a database and other computer resources to process the tracking and reporting requirements of the assumed program. For a point of comparison, VDEQ estimates that based on average salaries, the number of full time

employees and administrative costs, the Corps Norfolk District that currently administers Virginia's Section 404 Program has an annual budget of 7.3 million dollars.

The stakeholders also identified the anticipated cost of implementing the program as their main concern. They warn that without adequate money, and absent federal assistance, the assumed program might not be funded to the level required to maintain the level of service and efficiency that VDEQ brings to its own permitting program. In Virginia, conservation groups expressed concern that state assumption would result in the loss of a permitting process with dual agency oversight, providing greater assurance of environmental protections.

The Environmental Council of States (ECOS) issued Resolution Number 08-3 in 2008, and reaffirmed it in 2011, supporting delegation of Section 404 responsibilities to states that demonstrate a robust commitment and capacity to protect wetlands. The ECOS resolution:

Encourages U.S. EPA to develop clear guidelines and processes for state assumption of Section 404 of the Clean Water Act that will encourage states to apply for and assume regulatory responsibility over this important natural resource program;

Supports U.S. Congressional action to authorize and appropriate adequate funding for states that assume the Section 404 permitting program and to broaden the eligibility of the existing U.S. EPA wetland grant program for both development and implementation activities; and

Supports a simplified and more flexible process for state assumption of the Section 404 Permit Program, including partial assumption of program responsibilities, in order to improve effectiveness and provide more efficient and effective permitting for applicants while maintaining protection of wetlands in the United States.

ECOS is committed to the idea that there is an untapped potential for strong state programs to further increase wetland program efficiency, and to integrate the best of state and federal programs to more effectively manage wetlands and other waters for the future.

The goal of protecting the nation's wetlands and streams can be best realized through a process that is consistent, efficient and responsive to the unique features and qualities of the individual states. The Clean Water Act's Section 404 state assumption authority provides the mechanism for individual states to realize enhanced water resource protection while providing a streamlined regulatory program with a single point of contact. States can and do define their jurisdictional waters more broadly than the federal government and implement regulations protective of water resources such as groundwater, ephemeral streams and isolated wetlands that the federal program does not address. Currently, these benefits are realized by only two states, due mainly to the prohibitive costs and complexities involved with the assumption process. Congress could encourage state assumption by making federal funds available for states to implement the program, as is the case for Section 402 delegation. Congress could further encourage state assumption by simplifying the application process and allowing for both phased and partial assumption of the program in accordance with a state's available financial resources and water protection goals. The integration of the best elements of the state programs with the base level protections provided by the Clean Water Act and EPA is the best way forward to increased national resource protection and wetland program efficiency. Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to present my testimony to you today and will be happy to answer any questions that you have.

September 20, 2012

**Testimony of Jeff Littlejohn, P.E.  
Deputy Secretary for Regulatory Programs  
Florida Department of Environmental Regulation**

**United States House of Representatives  
Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment  
Regarding  
State Clean Water Act Section 404 Assumption**

Good morning Chairman Gibbs, Ranking Member Bishop, and Members of the Subcommittee. I am Jeff Littlejohn, Deputy Secretary of the Florida Department of Environmental Protection. My responsibilities include administering Florida's federally delegated programs under provisions of the Clean Water Act, Clean Air Act, Safe Drinking Water Act, and other federal laws.

Florida's 1,200 miles of coastline, 11 million acres of wetlands, and 7.7 million acres of sovereign submerged land are essential to our quality of life and economic vitality. We value our beaches and wetlands and have protected them under state law since before 1975, through integrated management of stormwater, landscape alteration, and our state-owned submerged lands. We do this because Floridians know our natural resources better than anyone else. But our commitment to safeguarding Florida's environment results in duplication with the U.S. Army Corps of Engineers and its §404 federal wetlands program. This duplication of effort comes in spite of using joint permit applications with the Corps, implementing a State Programmatic General Permit from the Corps, and integrating §401 water quality certification and Coastal Zone Management consistency into our wetland permitting process.

Congress amended the Clean Water Act in 1977 to enable states to assume the §404 program, with the clear intention of making that assumption possible. Unfortunately, obstacles remain 35 years later, for Florida and 47 other states, to accepting the full §404 program. Without changes—perhaps to federal law and certainly to the federal review process—Florida and the Corps will continue issuing two permits for applicants who are asking to do only one thing. That surely was not Congress's intention.

Two permits for one project might make sense if we were addressing different types of activities or achieving different outcomes. However, my staff just completed an analysis of Corps wetland

permits recently issued in Northeast Florida. Of 31 projects where the Corps and Florida issued a permit for the same activities, the wetland jurisdiction line was identical in all 31 instances, wetland impacts were similar, and Florida required 50% more wetland mitigation overall. This analysis at least suggests that federal permits are not more extensive or more protective than Florida's and, if they are not, it is difficult to make the case that two permits are necessary.

A primary barrier to Florida's full assumption of §404 is that many tidal and other navigable waters subject to the Clean Water Act are also subject to Section 10 of the Rivers and Harbors Act of 1899, and cannot legally be assumed. These waters constitute a large and important part of Florida's aquatic systems, including coastal waters and public trust lands transferred to Florida in 1845 at the time of statehood. This prohibition negates many potential benefits of §404 assumption.

We absolutely respect the Corps of Engineers' vital and distinct role in maintaining navigation. However, by virtue of its sovereignty, Florida has significant proprietary powers, including the authority to maintain navigation. In fact, we have demonstrated, year after year, the ability to protect navigation as we are protecting aquatic resources through comprehensive wetlands and coastal regulatory programs, and federally-approved Coastal Zone Management program. Surely, responsibilities can be better divided to take full advantage of Florida's proven abilities and the Corps' important oversight role. At a minimum, Congress's support for expanded State Programmatic General Permits in traditionally navigable Section 10 waters is warranted. We are ready and eager to assume expanded authority over Section 10 waters under the Corps' watchful eye and guidance.

A second barrier to assumption has been uncertainty in the state and federal roles in administering the Endangered Species Act. In 2010, EPA clarified that consultation under the Endangered Species Act is not required before approval of a state §404 program. This is helpful but not sufficient. Florida has robust state constitutional authority to protect listed species through the Florida Fish and Wildlife Conservation Commission, through which we coordinate all of our wetlands and coastal permitting. The Commission recently amended its rules to mirror the protections afforded to federally-listed species. We believe we can demonstrate the necessary equivalency of Florida's program in this regard.

During past consideration of §404 program assumption by Florida, questions have been raised regarding the "equivalency" of a number of aspects of our program to federal law. The Clean Water Act requires that approved state programs have "adequate authority" to carry out the §404 program in a manner that is no less stringent than federal requirements. This is a reasonable



standard. Certainly, Florida's laws, like those in other states, are not identical to federal law—but that is not the test. In its review of our program, we need EPA to recognize Florida's combination of state constitutional and statutory authorities, along with its suite of rules, that combine to provide comprehensive management of the state's aquatic resources at least equivalent to §404, which itself rests largely on the federal obligation to protect interstate commerce.

We are confident that states like Florida can demonstrate equivalency with §404, provided the reasonable standard of “adequate authority” to carry out the program is appropriately applied. We have proved this in our implementation of the federal National Pollutant Discharge Elimination System (§402 Clean Water Act) program for more than a decade. Whether in the context of our wetland delineation method, regulatory jurisdiction, protections for listed species, water quality standards, mitigation requirements, public participation, procedural rigor, and compliance and enforcement authority, Florida implements substantially equivalent if not greater protections, with more extensive coverage, for our aquatic resources.

In summary, we believe Congress provided for state assumption of §404 because it recognized the additional strength that comprehensive state water and land use management programs would bring to the program and the virtues of a federal-state partnership. Florida is fully committed to preserving its aquatic resources and will continue to carry out science-based, wide-ranging, publicly-supported programs for wetland and water resource management. We hope, with Congress's support, that Florida and the federal government can realize the full potential of §404 program assumption to protect these resources and, at the same time, unburden the public of unnecessary bureaucracy and pointless costs.

Thank you for this opportunity. I am happy to answer questions you may have.



***September 20, 2012***

***Testimony of George Elmaraghy, P.E.  
Chief, Division of Surface Water  
Ohio Environmental Protection Agency***

***United States House of Representatives***

***Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment***

***Regarding***

***State Clean Water Act Section 404 Assumption***

Good morning, Chairman Gibbs, Ranking Member Bishop, and Members of the Subcommittee.

My name is George Elmaraghy and I am Chief of the Ohio Environmental Protection Agency's Division of Surface Water. I have more than 30 years of experience in implementing Clean Water Act programs. I am also a long standing member in the Association of Clean Water Administrators (ACWA).

Ohio wetland program staff work with the Association of State Wetland Managers (ASWM), a national organization that broadly supports state and tribal wetland programs by effectively merging science, law and policy. ASWM coordinates with the U.S. Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (Corps), and other federal agencies and nongovernmental organizations that manage the nation's wetland resources. State agencies make a major contribution to wetland protection and management in both regulatory and conservation programs, merging watershed and wetland programs with land use and habitat management. The value of state wetland programs has long been acknowledged by Congress.

I am pleased to present testimony on behalf of the Ohio Environmental Protection Agency (Ohio EPA) and ASWM today regarding state experiences on investigation into the assumption of CWA Section 404 permitting from the Corps.

#### Background

Sections 404 and 401 of the CWA regulate the “discharge of dredged or fill material” into waters of the U.S., which includes streams, lakes and wetlands. Any project seeking to place fill into waters of the U.S. will need authorization under 404 and 401.

Under the CWA, the 404 permit is issued to prevent unacceptable adverse impacts to water supplies, aquatic life, wildlife and recreation. The permitting requirements added by the state through 401 certification ensures that the federal permit is in compliance with any applicable state standards to protect water quality as well as any applicable effluent limitation guidelines, new source performance standards, toxic pollutant restrictions and other appropriate requirements under state law (see CWA §401(d) and 33 USC 1341(d)). In other words, the 401 certification is also designed to prevent adverse impacts to water supplies, aquatic life, wildlife, and recreation.

In Ohio, the Corps authorizes impacts to waters of the state through Section 404 individual permits and Section 404 Nationwide permits. The Nationwide permits authorize activities that are similar in type, e.g. utility lines, and generally cover activities with lesser impacts to water resources. The Corps conducts site visits to evaluate the quantity and quality of wetland and stream resources at the project site as part of the permit review for individual and many Nationwide permit applications.

Under the Clean Water Act and state law, Ohio EPA also issues individual Section 401 Certifications for each Corps individual permits as well as a certification to the Nationwide permits. EPA provides oversight to the Corps implementation of the program.

As you can see, receiving a permit for dredge and fill activity is a very complex process with both the State and Corps reviewing applications to prevent adverse impacts to water quality. This complexity results in a lengthy, expensive and confusing permit process, both for applicants and the regulatory agencies. The regulatory complexity adds to the regulatory uncertainty of business in making economic decisions.

#### Why Pursue Section 404 Assumption

Ohio is blessed with many streams and wetlands due to its soils, topography and usually plentiful rainfall. The many wetland areas and streams mean that most economic development type projects will impact those surface waters and require a dredge and fill permit. Currently, applicants must navigate separate state and federal processes that contain numerous overlapping requirements. Both agencies require an alternatives analysis and compensatory mitigation to offset any unavoidable impacts. The current complexity of the Section 401/404 permit process thus has a direct impact on jobs and economic activity in the state.

Ohio believes strongly that assuming the Section 404 program will significantly simplify the permitting process and result in substantial cost savings for business and regulatory agencies, leading to job creation. Those cost savings would come from the following efficiencies:

- Consolidating two separate permits into one - saving permittees costs from application development to permit review.
- Consolidating regulatory agencies involved in the permitting process. Permittees deal with one agency thereby simplifying regulatory requirements and eliminating conflicting requirements of several agencies. This will significantly reduce the regulatory uncertainty businesses encounter when making economic decisions.
- Eliminating duplicative regulatory review resulting in significant cost savings for the federal government.
- Locating regulatory staff in Ohio to implement the program. Significant travel time savings will be realized since most Corps staff are not located in Ohio. This lack

of a local presence has resulted in delays for applicants due to Corps scheduling issues and a lack of experience with community specific development issues.

- Having the-on-ground knowledge and review at state level is helpful in understanding community issues and coordination with other state issued permits.
- Streamlining program oversight for EPA, consistent with other CWA programs, should also reduce federal government costs.

Ohio strongly believes that assuming the 404 program will continue to protect water quality. Assuming delegation "does not change the essential water quality requirements under Section 404 – the state program must ensure compliance with state water quality standards in conformance with federal requirements" (ASWM 2011). EPA oversight ensures that federal requirements are met.

Ohio, like other states, has been hit hard by the economic downturn. Ohio has made jobs its first priority. Streamlined environmental permitting would ensure Ohio's waters are protected while encouraging industries to build in Ohio, giving Ohio a competitive advantage at home and abroad. State decision making allows local factors to be considered affording better environmental protection.

#### What is Required for a State to Assume Administration of Section 404

In order to obtain approval to assume its Section 404 program, Ohio EPA will have to revise state law to grant the Director of Ohio EPA the authorization to seek assumption. This statutory revision is currently being sought. The next step will be for Ohio EPA to adopt administrative rules that are at least as stringent as the current federal requirements. Then Ohio EPA will have to compile an assumption package for submittal to EPA. That package will need to include a program organization and staffing proposal with proof that there is adequate funding to implement the program. The assumption package will also need to include proof that Ohio EPA has the legal authority to implement the program. This process will likely take several years. Oregon began the 404 assumption process in 1995 and has yet to assume the program.

Based on information gathered from the Corps and Michigan, Ohio EPA estimates that it can run the Section 404/401 program with approximately 50 employees. Ohio EPA devotes about 17 staff currently to the Section 401 program, so we would need to add an additional 33 staff. This is an additional cost of about \$3 million.

It is our understanding that the Corps devotes approximately 50 full time staff to implementing the Section 404 program in Ohio. Assuming these 50 staff are no longer needed in this program area, the Corps would realize a savings of over \$5 million.

#### Ohio's Experience Pursuing Assumption

Ohio began investigating Section 404 program assumption in 2011. At this point we have initiated discussions with EPA, interviewed staff from Michigan on their experience as a state approved to administer the 404 program, requested information from the Corps, and started compiling staffing needs. We also initiated discussions with state legislators on pursuing revisions to our state law to authorize assumption.

#### ASWM Actions to Encourage 404 Assumption

During 2010-2011, ASWM coordinated with the Environmental Council of the States (ECOS) and EPA to convene a national Section 404 assumption workgroup. On July 22, 2011, ECOS sent a letter to Nancy Stoner, U.S. EPA summarizing the results of the workgroup, including the following specific recommendations. The workgroup recommended that "training materials or outreach supported jointly by EPA and the USACE would facilitate state/federal partnerships and 404 program assumption by:

- Improving state/federal staff understanding of the assumption process and its multiple benefits;
- Encouraging cooperative working relationships between state and federal agency staff;
- Clarifying the roles and responsibilities of each agency;
- Assisting state and tribal agencies as they navigate through the assumption process; and,

- Increasing field staff understanding of the changes that occur in the state/federal programs following assumption.
- Such materials could include web-based reference materials such as FAQs, handbooks, and so on, in addition to webinar or online training sessions (Brown 2011)."

In accordance with workgroup recommendations, the ASWM and ECOS have since completed a Section 404 Assumption Handbook for use by state and federal agencies. In addition to discussing the factors listed above, the handbook acknowledges that current provisions of the CWA tend to discourage 404 assumption in states having a high percentage of Section 10 waters, where the Corps of Engineers retains jurisdiction, including coastal states where tidal waters or major rivers systems are a major consideration under both state and federal law. Increased flexibility in negotiating state and federal roles in such waters could strongly encourage state program assumption. Ohio strongly supports this recommendation, as well as the other recommendations of the ECOS/ASWM workgroup.

We also recommend that Congress specifically state in legislation that the Corps and EPA encourage and support states interested in receiving Section 404 assumption. Such support can go a long way to reduce the time and effort needed to prepare application materials needed for assumption. It also encourages federal agency cooperation in pursuing state assumption. At one time there was a congressional mandate to increase the number of states with CWA program delegation – 46 states are now delegated to implement the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program. State assumption of Section 404 permitting is comparable to state delegation of Section 402 NPDES permitting.

One way for the Corps and EPA to demonstrate support for states' Section 404 assumption would be to develop a pilot project in cooperation with a state interested in pursuing assumption. The experiences encountered through the pilot project could

serve as examples to other interested states, and hopefully paving a smoother, faster road towards program assumption.

Federal funds should also be allocated to states to support state implementation of the Section 404 program. Lack of funds continues to be a top deterrent for states considering assumption of the Section 404 program. Not only do states assume significant costs to develop the application materials, the state agency must also fund the work load assumed from the Corps. This work load includes project review, impact assessment, program enforcement and administration, and the assumption of new responsibilities for compliance with certain federal statutes (Fletcher 2001).

Although Ohio is willing to take on the Section 404 permitting program without federal funding because of the strong desire to streamline environmental permitting, it only makes sense and is fair for a percentage of the Corps funding to be diverted to Ohio EPA. The additional cost to run the Section 404 program is estimated to be \$3 million. Ohio, like other states, is facing financial problems and it is not fair for Ohio tax payers to pay this money when the federal government would be saving \$5 million because the Corps would not have to spend this money.

Ohio is willing to assume the Section 404 permitting program without federal funding because streamlining environmental permitting is a high priority. However, the Corps is spending approximately \$5 million per year on the Section 404 program in Ohio. If Ohio assumes the program, the estimated additional cost is \$3 million per year. The federal government should allocate a portion of the \$5 million in savings to Ohio EPA.

In 2008, U.S. EPA conducted a survey of nine states in the process of pursuing assumption or had assumed the Section 404 program. The following bullets summarize a few of the survey findings:

- "States spent an average of \$225,000 to investigate assumption (EPA provided grants to 6 of the 9 states).



- Lack of implementation funds is a threshold barrier to assumption – it is one of the first barriers a state encounters, short-circuiting further investigation and identification of additional barriers.
- It takes a lot of work for states to assume (Even for states with comprehensive programs already in place).
- States that have assumed 404 feel that the combination of federal and state involvement makes for a more stable, consistent program (Hurlb and Linn 2008)."

#### Conclusion

Ohio believes strongly that assuming the Section 404 program will significantly simplify the permitting process and result in substantial cost savings for business and regulatory agencies.

Governor Kasich's desire is to improve the climate for business and job creation in Ohio while improving Ohio's environment. Simplifying the permit process for dredge and fill permits will reduce the regulatory uncertainty for business, reduce compliance and regulatory costs, and significantly reduce federal government costs by eliminating the need for federal agency reviews. Finally, a simplified process will allow faster permit reviews.

We are requesting support for this effort and support for other states which are interested in or already in the process of assuming Section 404 assumption. We look forward to working with U.S. EPA and Corps on streamlining the effort and overcoming obstacles.

We appreciate the grant support that the federal government has provided for development of state and tribal wetland programs; however we believe that a cooperative state and federal partnership should be financially supported in part with federal funds as are other delegated programs. This can occur through making U.S. EPA's state wetland program development grants (CWA Section 104(b)(3)) available to

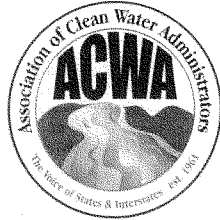
be used for implementation in addition to development and establishing a pass through of funds from the Corps to the assumed states.

Mr. Chairman, Members of the Subcommittee, I thank you for this opportunity to share the thoughts of Ohio EPA and the Association of State Wetland Managers on state Section 404 program assumption. I will be happy to answer any questions that you may have.

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September 20, 2012

Written Testimony of William Creal

Board Member, Association of Clean Water Administrators

Chief, Water Resources Division, Michigan Department of Environmental Quality

United States House of Representatives  
Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment

Regarding

States Assumption of the Clean Water Act Section 404 Program:  
Enhancing Cooperative Federalism with the States

ACWA & MDEQ  
Written Testimony of William Creal  
September 20, 2012  
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Good morning, Chairman Gibbs, Ranking Member Bishop, and Members of the Committee. My name is Bill Creal, Chief of the Michigan Department of Environmental Quality's (MDEQ) Water Resources Division (WRD). I have 34 years of experience implementing the federal Clean Water Act (CWA) programs and associated state laws. I also serve on the Board of Directors of the Association of Clean Water Administrators (ACWA). With me today is Kim Fish, Assistant Division Chief of the MDEQ's WRD. Kim brings 26 years of experience with federal CWA programs.

I am honored today to testify on behalf of both the MDEQ and ACWA. Now over 50 years old, ACWA is the national, nonpartisan, professional organization representing the state, interstate, and territorial water quality control official responsible for the implementation of surface water protection programs throughout the United States. ACWA's members are on the front lines of CWA monitoring, permitting, inspection, compliance, and enforcement across the nation. We are dedicated to Congress' goal of restoring and maintaining the chemical, biological, and physical integrity of America's waters.

As we know, the CWA is a sweeping statute enacted to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."<sup>1</sup> To achieve this goal, Congress adopted a cooperative federalism approach, by which each level of government—federal, state, and local—has defined roles and responsibilities, and yet all must work together, collaboratively, in the pursuit of clean water.<sup>2</sup> Several CWA programs were specifically designed by Congress to be delegated to, and administered by, the states. Most significantly, 46 states have delegated authority to administer the CWA Section 402 National Pollutant Discharge Elimination System program for point source discharges.

By contrast, while the statute allows, under Section 404(g) and (h), for states to assume authority to administer the program which regulates the discharge of dredged or fill material into navigable

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<sup>1</sup> 33 U.S.C. § 1251(a) (2006).

<sup>2</sup> Federal Water Pollution Control Act Amendments, Pub. L. No. 92-500, 86 Stat. 816 (1972), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION ACT AMENDMENTS OF 1972, at 16879 (1972).

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waters, including wetlands, only two states – Michigan and New Jersey – have this authority. Today I will share Michigan's experience during its nearly three decades of experience administering Section 404 of the CWA. We have demonstrated significant success in achieving regulatory clarity, as well as cost savings as the administrator of this program. I believe our perspective will be helpful to the Subcommittee as it studies this area of the CWA and its implementation.

Michigan is blessed by its water resources. The Great Lakes define the shape and character of our state with 3,288 miles of fresh water shoreline, more than any other state. In addition, Michigan has 11,000 inland lakes, 36,000 miles of rivers, and 5.5 million acres of wetland. Even before Michigan was a state, its residents recognized the importance of our water resources for transportation, hunting and trapping, agriculture, drinking water, commerce, and industry.

The same year that Congress passed the CWA, Michigan passed a state lakes and streams statute, and then in 1979, passed a wetland statute with the expressed intention of assuming the CWA Section 404 Program. In 1984, Michigan became the first state to receive Environmental Protection Agency (EPA) approval to administer the CWA Section 404 Program. Over the past 28 years, we have issued over 100,000 permits. We currently authorize about 4,000 projects annually under the 404 program, with no federal funding for program operation. Although limited funds are available for program development under CWA §104(b)(3) through the EPA State Wetland Program Development Grants, no federal funding is provided for the implementation of the Section 404 Program.

The Section 404 Program in Michigan is administered through a combination of state laws. To maintain 404 authorization under 40 C.F.R. § 233.1(d), state law must remain consistent with federal regulations, such as exemptions, permitting criteria, general permits, public notice procedures. However, the state has the flexibility to design the regulations to meet the needs of the state and its constituents. State assumption of the program provides benefits to both the regulated community and the citizens of Michigan. Prime examples of the benefits of Michigan's program are:

- **Michigan law provides a clear and consistent definition of regulated waters and regulated activities.** Because of the ambiguity in federal law, the scope of regulated waters has been defined by the federal courts and has changed several times in the last decade. Similarly, federal law does not specifically define what activities are regulated. The federal agencies must rely on guidance documents and various court decisions to determine if some activities are regulated. The ambiguities in the federal regulations can often delay permit processing. Because Michigan law contains clear measurable criteria, the regulated community, the public, and state staff can easily determine if a waterbody or wetland is regulated and what activities within those waterbodies are regulated.
- **Faster permit decisions.** Unlike the federal permit program, Michigan's permit processing is subject to deadlines mandated by state statute. As a result, we frequently make permitting decisions on individual permits weeks or months sooner than the United States Army Corps of Engineers (Corps); however, our decisions on general permits, which are the smaller routine projects, are about the same. As an example, a wetland delineation and jurisdictional decision for expansion of a nuclear power plant on the shore of Lake Erie, clearly a very large and complex project, took the MDEQ 45 days to complete, and took the Corps over 700 days. This determination was just the first step in the permitting process for this project.
- **Reduces the regulatory burden for permit applicants.** Michigan operates a consolidated joint permit application process. Applicants submit one application and receive review and authorizations under multiple state regulations. The state coordinates with the Corps when required, reducing duplication and applicant confusion. This process results in a more efficient, cost effective, and streamlined permitting process for applicants.

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- **Provides the regulated property owners with better access to decision makers.** Michigan has staff located in ten offices throughout the state that are available to meet with landowners to review applications, explain decisions, and provide pre-application consultations.
- **Provides more public oversight of regulatory decisions.** Michigan law requires public noticing and an opportunity for interested persons to request public hearings on all individual permit applications. We normally hold public hearings on about four percent of the individual permit applications; the Corps rarely holds public hearings.
- **Fair and impartial appeal process.** Permitting decisions can be appealed under Michigan's Administrative Procedures Act. Appeals are adjudicated by an independent, third-party, administrative law judge. The Corps' appeal process consists of appealing the permit decision to a higher ranking individual within the Corps.

Although Michigan has been able to run a successful 404 program for nearly three decades, the sustainability of this program turns on the issue of funding. For the last 28 years, Michigan has administered the 404 program with primarily state funds from application fees and the state general fund. However, over the past decade, the MDEQ has seen a decline in state general funds from \$120 million to \$20 million, forcing many difficult discussions and decisions regarding what programs the state should continue to operate.

As part of Michigan's budget cuts in 2009, Michigan's governor and several legislators proposed to eliminate Michigan's wetland program thereby giving up the state's assumption of the 404 program as a means of saving state general fund money. Strong support from a diverse group, including regulated entities such as realtors, home builders, farmers, and manufacturers, along

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with environmental groups prevented this from happening. As a result of the strong support for the program, the Michigan legislature found temporary funding for the program through 2012.

The Michigan legislature also established an advisory council in 2009 to evaluate the program, ensure the program remains consistent with CWA requirements, and to make recommendations regarding appropriate funding. The council consists of 22 members representing business, industry, consultants, state and local governments, environmental groups, and academia. Several federal agencies, including the Corps and EPA, have participated in the council serving as a resource regarding the CWA and federal procedures. The council recently completed its work and made several recommendations to our governor and legislature. The council evaluated Michigan's current funding structure along with several potential alternative options, including increasing application fees. The council determined that increasing application fees was not a viable option; it would make fees unreasonably high and unaffordable for many applicants and would require legislative action which would be politically difficult. Therefore, the council has recommended continuing to fund Michigan's wetland program with a combination of reasonable fees, state general fund or other state obligated funds, and to pursue federal funding to support continuation of 404 assumption.

We estimate that Michigan is saving the federal government between \$3 and \$5 million each year by operating the 404 program. Without Michigan's program, the Corps has estimated that it would need that amount of additional money annually to hire additional staff and open more offices throughout the state. Not only do we save the federal government's finite dollars, we are able to administer the program at a lower cost and with a greater level efficiency, allowing projects that provide vital economic growth to our communities to move forward more quickly.

As we mentioned above, there are many advantages to the public and the regulated community when states assume the Section 404 Program. Additionally, many states have contacted Michigan seeking advice on how to assume the program. As the other witnesses demonstrate, states are interested in assuming the 404 program.



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However, we need strong diversified funding to keep this program in Michigan as a state run, successful program, and to make 404 assumption possible for interested states. One possible avenue to explore is for Congress to enact, and appropriate funds, for a grant program to make up to \$2 million per year for ten years available to states that assume the 404 program. If ten states assumed the program with this incentive, the annual cost to the federal government would be \$20 million a year. The annual savings to the federal government would be upwards of \$30 million.

States would have a choice regarding whether to seek assumption of this program, as capacity even with federal funding would vary due to state priorities, expertise, staffing, facilities, and other resource considerations. However, if the Michigan experience is representative, state administration of the 404 program could benefit states, the regulated community, and the federal government through streamlining and great cost efficiencies.

Mr. Chairman, Ranking Member Bishop, and Members of the Subcommittee, I thank you for the opportunity to provide this testimony. We look forward to working with you as you continue to explore this issue. Please do not hesitate to contact the State of Michigan or ACWA for further insights on this issue. I would, of course, be happy to answer any questions that you may have.

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**Written Testimony of Todd L. Ambs  
President, River Network  
September 20, 2012**

**United States House of Representatives  
Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment**

**Regarding**

**States Assumption of the Clean Water Act Section 404 Program:  
Enhancing Cooperative Federalism with the States**

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Good morning, Chairman Gibbs, Ranking Member Bishop, and Members of the Committee. My name is Todd Ambs. I currently serve as President of River Network, a national conservation organization. For 24 years, River Network has focused on helping the hundreds of river and watershed groups around this nation to do their work better. In that capacity, I travel all over this nation working with our several hundred partner groups and certainly have a working knowledge of the issues across the country relative to requests to dredge and fill the lakes, rivers and wetlands of this nation and the regulatory tools available to monitor, assess and approve or deny such actions.

But I offer my thoughts today with a primary focus on how the State of Wisconsin approaches these issues. My insight regarding this matter comes from working in the environmental field for more than 30 years and, from having the honor of serving as the Water Division Administrator at the Wisconsin Department of Natural Resources for eight years (2003-2010).

As we know, the Federal Water Pollution Control Act Amendments of 1972 (better known as the Clean Water Act (CWA)), is a sweeping statute enacted to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”<sup>1</sup> To achieve this goal, Congress adopted a cooperative federalism approach, by which each level of government—federal, state, and local—has defined roles and responsibilities, and yet all must work together, collaboratively, in the pursuit of clean water – from the headwaters of our rivers and streams to their outlets downstream in the nation’s prized estuaries, bays, and sounds.<sup>2</sup> Several CWA programs were specifically designed by Congress to be delegated to, and administered by, the states. Most significantly, 46 states have delegated authority to administer the CWA Section 402 National Pollutant Discharge Elimination System program for point source discharges.

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<sup>1</sup> 33 U.S.C. § 1251(a) (2006).

<sup>2</sup> Federal Water Pollution Control Act Amendments, Pub. L. No. 92-500, 86 Stat. 816 (1972), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION ACT AMENDMENTS OF 1972, at 16879 (1972). Regarding the geographical extent of jurisdiction, *see e.g.*, Senate Committee on Public Works, S. Rep. No. 92-414, 92nd Cong., 76, 77 (1971); S. Rep. No. 95-370, at 75 (1977); Sen. Chafee, 123 Cong. Rec. 26716-17 (daily ed. Aug. 4, 1977); Sen. Baker, 123 Cong. Rec. 26718-19 (daily ed. Aug. 4, 1977).

By contrast, while the statute allows, under Section 404(g) and (h), for states to assume authority to administer the program which regulates the discharge of dredged or fill material into navigable waters, including wetlands, only two states – Michigan and New Jersey – have this authority.

Today, I will share some of Wisconsin's experience over the last four decades working with the various aspects related to Section 404 of the CWA. I will share some background on Wisconsin's assessment of the pros and cons of asking for full assumption of authority to administer the program, some ideas regarding alternative approaches to full assumption and some cautions for the Committee to consider as you investigate this important regulatory topic.

Wisconsin is blessed with abundant natural resources. We have 15,000 lakes, 84,000 miles of rivers and streams, 1,100 miles of Great Lakes shoreline and enough groundwater that if it was spread evenly across the state it would be 100 feet deep. In addition, despite the fact that we have lost approximately 50% of our wetlands in the last 200 years, we still have more than 5.3 million acres of these critical freshwater resources.

We also have a proud conservation tradition in Wisconsin, with broad bi-partisan support for strong protections of our natural resources. This tradition is fostered in part due to the critical role that healthy natural resources play, not only in the quality of life for Wisconsinites, but also for a healthy economy in the state. Tourism, for example, is the third largest industry in the state, generating \$13 billion a year. Much of that industry exists because of the plentiful, healthy, natural resources that draw people to recreate in Wisconsin.

#### **Wetland Permitting Process in Wisconsin**

Under the federal Clean Water Act, most activities that involve grading, filling, removing, or disturbing the soil in a wetland—such as residential construction, road building, and pond creation—require approval from both DNR and the Army Corps of Engineers. DNR is also authorized under 2001 Wisconsin Act 6 to regulate activities in small, isolated wetlands that are not subject to federal permitting requirements.

DNR regulates Wisconsin wetlands as part of a larger waterway permitting program. In FY 2005-06 when the Wisconsin Legislative Audit Bureau conducted an audit of the Wisconsin Wetlands

Program, an estimated 19.3 full-time equivalent (FTE) staff performed wetland permitting, enforcement, mapping, policy coordination, and other regulatory activities. Expenditures for these activities were estimated at \$1.75 million at that time.<sup>3</sup>

#### **Question of 404 Assumption a Recurring Theme**

Over the years, the State of Wisconsin has looked at the question of assumption of this program and for a variety of reasons; the state has always chosen to not pursue this approach. As far back as 1991 and again in 1993, the issue was reviewed by the WDNR. Specifically, a 1993 DNR report noted that doing so would simplify the wetland permitting process. However, the report also identified several barriers, including the need for statutory changes to recognize the State's jurisdiction over non-navigable waters and a lack of federal funding to implement the program.

#### **Review of Wisconsin Program in 2006-2007 Most Comprehensive**

As mentioned earlier, in May 2007 the Wisconsin Legislative Audit Bureau issued a full audit of the Wisconsin Wetlands Program. As Water Division Administrator, I was heavily involved in the process. Although the audit was generally positive, the agency was specifically asked to address the question of state assumption of the 404 program.

The request in the Audit report read, "Evaluate the feasibility and advantages of assuming the federal wetland permit program, as allowed under Section 404 of the Clean Water Act with an estimate of the required staffing levels, anticipated program costs, and effects on wetland resources."<sup>4</sup>

On December 18, 2007, the Secretary of the Wisconsin DNR responded to this request and several others. Much of the response is provided below verbatim for the record.

*"We have investigated the feasibility of the state assuming the federal 404 permit program in the past and again in response to the audit request. We continue to find the feasibility of assuming the federal program low due significant barriers that involve state law changes and the lack of federal funding available to states for implementation. Our fiscal estimate and staffing needs for federal program implementation include an annual budget increase of \$1,047,300 and*

<sup>3</sup> Report 07-6, May 2007, An Evaluation of Wetland Regulatory Programs, Wisconsin Legislative Audit Bureau, Pages 3-4.

<sup>4</sup> Ibid., Pg. 86

*an additional 16.6 full time employees. We have also found state assumption would not result in additional protection of Wisconsin's wetland resource, since all wetlands in Wisconsin are already protected under either current federal or state laws."*

*"...While we found potential benefits of assumption, we continue to find the feasibility of assuming the federal 404 program low due to inadequate state jurisdiction and limited funding and staffing. Furthermore, state assumption would not result in additional protection of Wisconsin's wetland resource, since all wetlands in Wisconsin are already protected under either current federal or state laws."*

*"...It is important to note that the federal government through the U.S. Army Corps of Engineers retains permit authority over waters traditionally used for commercial navigation, defined as Section 10 waters. A few examples include the Great Lakes, Mississippi River, St. Croix River and the Wisconsin River. The state assumption approval process is coordinated by the Environmental Protection Agency and states applying must have state law that is as protective as the federal law.*

*When a state assumes the federal 404 permit program, permit streamlining should occur. Applicants for most waterway and wetland permits are no longer required to obtain a separate federal permit; only the state permit and standards apply. State "assumption" combines the federal and state permit processes creating one set of permit standards. This combination should eliminate applicant confusion between federal and state requirements that may appear to be different. While assumption should streamline the permit process, applicant confusion may remain because Section 10 applicants are still required to obtain federal permits for projects associated with Section 10 waters.*

*In order to assume the federal 404 permit program, state law must be at least as protective as the existing federal law and if the state chooses, can be more protective. Although Wisconsin currently has protective wetland and waterway laws, several law changes would be required to ensure consistency with the existing federal 404 permit program."<sup>5</sup>*

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<sup>5</sup> Wetlands Audit Report Follow-up Letter, from WDNR Secretary Matt Frank to Legislative Audit Committee Co-Chairs, December 18, 2007, Pages 10-11.

### Adequate Funding Remains an Impediment to Assumption

Today, many of those law changes have occurred in Wisconsin so that is less of an impediment to assumption in the state. However, Frank's letter goes on to address one of the most critical challenges for any state considering 404 assumption – money.

*“To assume the federal permit program, DNR must assume the additional duties associated with the federal permit program implementation. To determine what additional work the Department would take on, we obtained 2006 data from the Corps St. Paul District, the office currently responsible for implementing the 404 permit program in Wisconsin. We compared Corps data and state data, and estimated hours to perform additional tasks, to determine an approximate cost associated with assumption. To implement the federal program in Wisconsin we have estimated an annual increase of approximately \$1,047,300 with an additional 16.6 full-time employees...”*

Frank's letter then went on to note, *“We have taken many steps to eliminate agency duplication of effort and confusion for the applicants. The major benefit resulting from state assumption is the potential for permit streamlining for permit applicants. Recognizing this benefit we have worked with the Corps to make the permit process as seamless as possible for the applicant.”*<sup>6</sup>

The letter then went into some detail regarding the steps being taken to streamline the permit application process in Wisconsin. As a result of those actions and others since that time, the Wisconsin wetlands program appears to be working well. In fact, as I noted in testimony before the Wisconsin State Senate earlier this year:

- As of 2010, 94% of all wetland permit applications were approved by the department.
- Two acts passed in 2010, Act 373 and Act 391, addressed key needs in terms of more wetland notification and identification services and directed the Department to move forward with a general permit.
- No significant economic development projects have been stopped because of onerous wetland determinations.

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<sup>6</sup> Idid., Pages 11-12

- The department received a very detailed and quite favorable audit from the Legislative Audit Bureau just five years ago.
- The DNR Wetlands Team has one of the most thorough and specific wetland strategy and action plans that I know of at the state regulatory level. In fact *Reversing the Loss*, as the plan is called, should be held up as a model for how to balance the need to protect wetlands and respond to regulatory needs.

#### **Assumption Not the Only Way to Have Strong Program**

The point here is not to in any way denigrate the efforts in Michigan or New Jersey, where state 404 assumption has already occurred, or to suggest that efforts underway in states like Ohio and Oregon to move toward state assumption are without merit.

What I am suggesting is that 404 assumption is far from the only tool available to states that wish to have a streamlined, yet effective program to protect some of our most precious natural resources – our waters.

It is also worth noting that in addition to the funding challenges associated with 404 assumption, there continues to be other issues that may this choice problematic. The Association of State Wetland Managers has articulated some of them before. Those challenges include but are not limited to:

- **Need to demonstrate strict consistency with federal requirements.** Some states find it difficult to demonstrate that their program is at least as stringent as all federal program requirements, especially where the framework for state and federal laws differs significantly.
- **Need for broader political/public support.** Some states/tribes are reluctant to assume responsibility for a program that has been developed under federal law. Uncertainties in the public's mind about how the program would operate if run by the state rather than the federal government have led to opposition to assumption in some states. In addition



states or tribes may have greater needs for use of public funds in other program areas.

- **Need for Clarification of Current Assumption Requirements.** In part because only two states taken over the Section 404 program there is a need for additional clarification from EPA with respect to certain program requirements. Current Section 404 program regulations are quite complex, particularly in terms of the definition of jurisdiction, activities regulated, permit review criteria, and permit exemptions. Some issues are addressed on a case by case basis when a state or tribe begins putting together an assumption application. Finally, the current uncertainty over the extent of Waters of the U.S. under the Clean Water Act may create uncertainty over what waters in the state must be regulated.

As the Association notes above, the need to make sure that a state considering assumption has laws that are as stringent as the federal government is a most important requirement. Any move to enhance the ability of states to undertake this program must continue to emphasize this component. In our effort to find efficiencies in the permitting process, we should never lose sight of the fundamental need to adequately protect these critical resources.

#### **Transparency and Public Involvement Critical**

States that undertake these programs should also be held to a high standard when it comes to transparency, public involvement and the ability for substantive review of permitting decisions. Michigan appears to have a very good system in this regard as my former colleague will note in his testimony. Some states however, make it difficult to request a public hearing, receive notices about permit applications and/or severely limit aggrieved parties in the permit appeals process. In addition, it would be preferable if a state that assumes the program has a citizen suit provision at the state level, since legal interpretations vary regarding whether this critical Clean Water Act provision continues to apply when a state assumes the program.

#### **Clear Guidelines Are Essential, But Currently Lacking**

Finally, I want to emphasize the need for clear guidelines regarding what waterbodies come under Clean Water Act jurisdiction. This clarity is essential for state agencies to consistently and efficiently implement Clean Water Act programs. It is also essential for them to understand where they must

expand state programs in order to protect valuable water resources no longer being protected under the Clean Water Act. Wisconsin acted quickly to fill the gap created by the United States Supreme Court SWANCC decision in 2001. Within months that legislature passed a law to provide protections for these so-called isolated wetlands. The existence of a strong program in Wisconsin also ameliorated the impacts of the Rapanos decision. Nonetheless, my experience while Water Division Administrator was that the single most significant reason for delays in wetland permitting during my tenure was the difficulty with determining jurisdictional wetlands in the wake of these two Supreme Court cases. I can only imagine the difficulty – and resulting risk to vulnerable wetlands, lakes, and streams – in states with less developed programs.

In my view a single, clear set of guidances from the federal government is the only way to make sure that this federal law, the Clean Water Act, is applied fairly and uniformly across the country.

Wetlands provide numerous public benefits and ecosystem services including fish and wildlife habitat and water management. Protection from natural hazards including flooding, storm surges, and drought, as well as protection of drinking water supplies, are just a few of the benefits that these complex water systems, sometimes called nature's kidneys, can provide. Over the last forty years, Congress has consistently recognized the close link between land use decisions made by the states and effective protection of wetlands, lakes, and streams.

For these reasons and more, any effort to promote better state-federal coordination, or when appropriate state assumption, of the responsibilities contained in Section 404 of this law, is a most useful exercise. But adequate funding, consistent state laws, transparent processes and clear direction from the federal government regarding how the law is applied will continue to be important foundations if the exercise is to produce healthier water bodies in this nation.

Mr. Chairman, Ranking Member Bishop, and Members of the Subcommittee, I thank you for the opportunity to provide this testimony. We at River Network look forward to working with you as you continue to explore this issue. Please do not hesitate to contact me or my staff for further insights on this issue. I would, of course, be happy to answer any questions that you may have.

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DEPARTMENT OF THE ARMY

COMPLETE STATEMENT

OF

THE HONORABLE JO-ELLEN DARCY  
ASSISTANT SECRETARY OF THE ARMY  
(CIVIL WORKS)

BEFORE

THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE  
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT

UNITED STATES HOUSE OF REPRESENTATIVES

ON

State Assumption of the Clean Water Act Section 404 Program:  
Enhancing Cooperative Federalism with the States

September 20, 2012

Chairman Gibbs, Ranking Member Bishop, and Members of the Subcommittee, I am Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works). Thank you for the opportunity to discuss the Army Corps of Engineers (Corps) regulatory authority under Section 404 of the Clean Water Act (CWA). I will specifically discuss the Corps' role and involvement when a State wishes to assume the Section 404 program and makes final Section 404 permit decisions. I will also discuss the Corps' experiences in the two states, Michigan and New Jersey, which have assumed the 404 program, followed by my observations on a path forward for additional States wanting to assume the program.

#### **Background on Clean Water Action Section 404 and Section 10 of the Rivers and Harbors Act**

Section 404 of the CWA established a program to regulate the discharge of dredged or fill material into waters of the United States. Since 1972, the Corps has regulated discharges of dredged or fill material into waters and wetlands related to activities such as highway construction; residential, commercial, and industrial developments; energy projects; and a variety of other projects. Section 10 of the Rivers and Harbors Act of 1899 gives the authority to the Corps to ensure that there are no obstructions to the navigable waters of the United States. Under this authority, the Corps has regulated work and/or structures within navigable waters related to activities such as: construction of piers, jetties, and weirs; dredging projects; and other such projects. The Corps has been regulating activities in the Nation's navigable waters for over 70 years at the time of the passage of the CWA.

Discharges of dredged or fill material into waters, including wetlands, of the United States as well as work or structures within navigable waters require authorization from the Corps. Activities that are similar in nature and that are expected to cause no more than minimal effects, individually and cumulatively, as described in Section 404(e) of the CWA, may be authorized by a "general permit." General permits protect the aquatic environment, but also provide applicants with a quicker authorization process because impacts are anticipated to be minor.

Activities that do not meet the criteria for a general permit are typically evaluated under the "standard individual permit" procedures. These procedures include issuance of a public notice; preparation of an environmental document in accordance with requirements of the National Environmental Policy Act; and, for applications that involve the discharge of dredged or fill material, application of the "Section 404(b)(1) Guidelines" developed by the EPA in conjunction with the Corps. Regulatory program personnel in Corps districts work with applicants to avoid and minimize impacts to waters of the United States and to develop satisfactory compensatory mitigation plans for unavoidable impacts to aquatic resources. For these individual permit applications, the Corps conducts a full public interest review balancing the anticipated benefits against the anticipated impacts. The Corps can only authorize those activities that are not contrary to the public interest, and may only authorize the least environmentally damaging practicable alternative, so long as that alternative complies with other aspects

of the Guidelines and does not have other significant adverse environmental consequences.

The Secretary of the Army, through the Chief of Engineers, has delegated responsibility for making final decisions on permit applications to the commanders in the 38 Corps districts. The regulatory program is implemented day-by-day at the district level by staff that knows their regions and resources, and the public they serve. Nationwide, the Corps makes tens of thousands of final permit decisions (both general and individual permits) annually. In all but the very rarest of circumstances, these decisions are appropriately made at the district level with no review of those decisions by Corps division (regional) or headquarters staff. When implementing the Corps regulatory program, the Corps is neither an opponent nor a proponent for any specific project - the Corps responsibility is to make fair, objective, and timely permit decisions.

#### **State Assumption Authority Process under Section 404(g) of the Clean Water Act**

Under Section 404(g) of the Clean Water Act, Congress gave the States/Tribes the authority to administer individual and general permit program for the discharge of dredged or fill material into waters within their jurisdiction under State law or under an interstate compact. Section 404(g)(1) provides that States may administer such programs "for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark...)..." The State Program Regulations are found at 40 CFR Part 233. The State must provide evidence that the laws of the State provide adequate authority to carry out the prescribed program. The process for approval is carried out by the EPA who has the final authority on CWA Section 404 jurisdiction, and who coordinates with the Corps, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service during the approval process. The Corps and the Services can provide comments to the EPA to inform their review of the State program to determine its adequacy in fulfilling the requirements of the CWA Section 404 program. The program that a State/Tribe implements must ensure that the laws of the State/Tribe provide adequate authority to carry out the CWA Section 404 program. The materials that are required to be provided to the EPA for the approval of an assumption program are: a letter from the Governor; a complete project description; a statement from the state Attorney General; a Memorandum of Agreement with the Regional Administrator of the EPA; and a Memorandum of Agreement with the Secretary of the Army. The State must show that their program would cover all waters they are eligible to assume, that it would regulate at least the same activities, that it would provide for sufficient public participation, that it would ensure compliance with the Section 404(b)(1) guidelines, and that it would have adequate enforcement authority. There are only two States that currently have assumed the CWA Section 404 authority, Michigan and New Jersey.

If States approach the Corps regarding the assumption process, the Corps notifies the State that the EPA is the lead Federal agency and the Corps will coordinate with the

EPA on the process. The Corps will provide information but the EPA has the final decision authority.

#### **What are the Limits of State Assumption With Respect to the Corps Authority?**

Section 404(b)(1) States that no CWA Section 404 permit will be issued if, in the judgment of the Corps, anchorage and navigation of any of the navigable waters would be substantially impaired by the activity, even in States that have assumed the CWA section 404 program.

Thus, there are activities in certain waters where the Corps retains regulatory authority even in States that have assumed the CWA Section 404 program. The Corps retains authority in waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their ordinary high water mark, including wetlands adjacent thereto. The Corps retains permitting authority in these waters (and their adjacent wetlands), for Section 404 activities. These can be major activities, such as large dredging activities, beach nourishment activities, and ferry docking structures. All Section 10 authority is retained by the Corps in order to review and determine whether any proposal may potentially impede or interfere with navigation. It is essential that the Corps maintain regulatory authority over these waters to ensure that essential Federal functions such as national defense, protection of commercial navigation, and flood control are considered from a broad perspective. Across the country there is great variability in the types of waters in individual States with some States having significant numbers of waters for which the State cannot assume 404 permitting authority while other States may have significantly fewer. This variability can play a role in the feasibility and effectiveness of State assumption.

The EPA is responsible for oversight of a state-assumed CWA Section 404 Program. In this role, the EPA directly reviews a small percentage of the applications processed by a State that has assumed the program. The permit applications directly reviewed by the EPA generally include those for projects with the largest impacts or those with potential impacts to especially sensitive natural resources.

#### **State Assumption Regulatory Framework and Interagency Coordination**

**Michigan:** In 1984, Michigan became the first state to assume the CWA Section 404 program. The program is administered by the Michigan Department of Environmental Quality. EPA waives review of most activities except for certain classes or categories of discharges, such as draft general permits and discharges potentially affecting endangered or threatened species. For activities that are not waived, Michigan transmits a copy of the permit application to the EPA, which is the primary contact for the State on State Section 404 permits. The Corps may comment on public notices issued by the Michigan Department of Environmental Quality, but does not normally play any other direct role in Michigan's 404 Program. When the EPA does review a

permit application, they transmit a copy to the appropriate Corps district office and US Fish and Wildlife Service office for review and comment.

Michigan revisited and modified their MOA with EPA in 2011 to ensure further clarity and address inconsistencies between the State and Federal regulations. The Corps participated in the review process to ensure consistent program implementation in assumed and non-assumed waters. The Corps Detroit District has noted that the District workload has been reduced by Michigan state assumption. In general, we enjoy good coordination and a positive relationship with the State.

**New Jersey:** New Jersey's program began in 1994 and is administered by the New Jersey Department of Environmental Protection. Consistent with the EPA's regulations, EPA waives review of most activities, except for a few categories of activities, such as major discharges that impact greater than five acres of wetlands or those that may affect threatened or endangered species. Unless review has been waived, the EPA provides a copy of the public notice for any complete permit application to the appropriate Corps district office, US Fish and Wildlife Service office and National Marine Fisheries office and follows a review and comment process like that described in Michigan. The most prominent and challenging factor in the New Jersey assumption process was the Endangered Species Act (ESA). Under a memorandum of Understanding in New Jersey, the state coordinates with the U.S. Fish and Wildlife Service (FWS) on permits that may affect threatened or endangered species to avoid any adverse effects.

**Other States:** There are other states including Minnesota, Oregon, Florida, Ohio, and Virginia that are considering assuming the Clean Water Act Section 404 program. When requested, the Corps has provided input and expertise on the CWA Section 404 Program to the EPA and States during the program assumption review process. In the past, other states including Alabama and Kentucky, began the initial review process but did not carry through to assumption.

Florida is a state that reviewed the assumption of the CWA Section 404 program and expressed interest in assuming both CWA Section 404 and Section 10 of the Rivers and Harbors Act authority. There is no legal authority for states to assume Rivers and Harbors Act authorities from the Corps. In addition, we understand that the State encountered challenges related to the Endangered Species Act and the State's need to make changes to its regulations under their Environmental Resource Permitting process to assume the CWA Section 404 program. In light of these challenges, the State instead determined that a State Program General Permit (SPGP) would be a better solution as they have a large amount of traditionally navigable waters and their adjacent wetlands that require Corps permit evaluation. From January 2000 through September 2011, the Florida Department of Environmental Protection has authorized 23,641 actions under the SPGP.

### **Types and Totals for Issued Corps Permits in Assumed Waters States of MI and NJ**

The Corps plays an active role in permitting in the traditionally navigable waters and their adjacent wetlands of Michigan and New Jersey as a result of its authority under Section 10 of the Rivers and Harbors Act and its retained CWA section 404 authority in those waters. Most of the permits/verifications that the Corps issues in these States are activities that require authorization under both Section 10 and Section 404. The Corps coordinates its permit application review responsibilities closely with the State to ensure that the State's views are considered in the Corps' permitting action. In Michigan and New Jersey, the Corps district and state program staffs benefit by sharing workload in those states.

Over the last 10 years, the Corps Detroit District has authorized approximately 11,000 General Permits and 1,000 Standard Permits with approximately 55% (~6,000) involving Section 404 activities (~5,000 General Permits and ~1,000 Standard Permits) and the remainder involving Section 10 activities. The two Corps Districts with responsibility for New Jersey (New York District and Philadelphia District) authorized approximately 4,000 General Permits and 600 Standard Permits with slightly over 30% (~1,300) involving Section 404 activities (~1,200 General Permits and ~100 Standard Permits).

### **Challenges**

Some of the challenges to State assumption of the 404 program include:

- **Funding:** Some States may lack funding to implement the program;
- **Revisions to Existing Laws and Requirements:** Some States may need to revise or expand existing laws or requirements to match Federal requirements in order to assume the program;
- **States with Significant Coastal Waters:** Some States with significant coastal waters might be willing to consider assuming the 404 program if they could also assume the Section 10 program. However, under current law States cannot assume traditionally navigable waters (and their adjacent wetlands) under CWA Section 404, nor can they assume the Section 10 program;
- **Jurisdiction:** In some states, there may be differences in the waters covered and how these waters are defined by Federal law and applicable State laws; and
- **Public Misconceptions:** Misunderstanding about agency roles and procedures may lead to misunderstandings concerning how assumption would change these procedures.



### **Alternatives to Assumption**

As noted above, we have heard from some States that have a large portion of coastal waters that they see limited benefit from CWA Section 404 assumption because the Corps would still retain jurisdiction pursuant to Section 10 of the Rivers and Harbors Act and of traditionally navigable waters under CWA section 404 after State program assumption.

In these circumstances, states have another option to improve efficiency and effectiveness in traditionally navigable waters and their adjacent wetlands without pursuing CWA Section 404 assumption. States could work with the Corps to develop State Program General Permits (SPGP), which can include many of the activities that are covered in a CWA Section 404 permit. An SPGP is a form of Corps programmatic general permit; it is authorized by Section 404(e) and defined in 33 CFR Section 325.5(c)(3). The SPGP can be crafted to include pre-authorization without the need to contact the Corps or may only require a pre-construction notification, which can significantly improve the decision-making timeframes. These can provide significant benefits and provide an option for State or tribal wetland permit programs. This can also be used as the first step in moving towards assumption. SPGPs can expedite CWA Section 404 authorization but still allow federal oversight and safeguards to ensure the aquatic environment is being adequately protected.

States have constitutional authority to adopt and implement State regulatory programs to protect their aquatic resources. The Corps strives to minimize or eliminate duplication between Federal and State programs by using cooperative Federal/State joint permit processing and State program general permits. Short of state assumption, States also have authority under the Clean Water Act Section 401 and the Coastal Zone Management Act to allow them to add conditions to protect aquatic resources and complement and influence the CWA Section 404 program.

Thank you again for the opportunity to be here today. I will be happy to answer any questions you may have.



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
CIVIL WORKS  
103 ARMY PENTAGON  
WASHINGTON DC 20310-0108

JAN 24 2013

Honorable Bob Gibbs  
Chairman, Subcommittee on Water Resources  
and Environment  
United States House of Representatives  
329 Cannon House Office Building  
Washington, DC 20515-3518


Dear Chairman Gibbs:

I am responding to your October 11, 2012, letter submitting Questions for the Record that resulted from the September 20, 2012, hearing entitled "Forty Years after the Clean Water Act: Is it Time for the States to Implement Section 404 Permitting?" appreciated the opportunity to appear as a witness at this hearing.

Enclosed are the responses to the Subcommittee's questions concerning a jurisdictional issue in Minnesota and permitting issues related to Marcellus Shale development in Pennsylvania.

If I can be of further assistance, please do not hesitate to contact me or have a member of your staff contact Mr. Chip Smith of my staff at [REDACTED] or at [REDACTED] if you have any questions.

Very truly yours,

  
Jo-Ellen Darcy  
Assistant Secretary of the Army  
(Civil Works)

Enclosure

**QUESTION for The Honorable Jo-Ellen Darcy**  
**From the Office of Congressman Chip Cravaack (MN-8)**

**Question 1:** We recently learned of a mining operation with a water treatment system, located in Minnesota's 8th Congressional District, that has never, in nearly 50 years of existence, been designated a "Water of the United States," but has recently been subject to new inquiries related to Clean Water Act jurisdiction. This is a mine that was designed, constructed, and permitted prior to (as well as many times since) the enactment of the Clean Water Act.

If operations at the mine have not deviated from past practices and the permitted mining plan, what has changed in law, regulation or guidance that would lead Federal regulators to now change their minds about the jurisdictional status of the mine and its treatment system under the Clean Water Act and allow a potential dramatic disruption of operations that directly threatens the jobs of thousands of people in my district and tens of thousands of other jobs reliant on the ore supplied from these mines?

**Response:**

The mining operation referenced is operated by U.S. Steel and is known as the Minntac Mine. U.S. Steel is planning to expand its iron ore tailings disposal operation into an adjacent area containing a 258-acre wetland that has not yet been used for tailings disposal. The entire area is enclosed by a porous berm. Discharges of wastewater from various mine operations pass through this area and into a tributary to the Pike River, a navigable water. These discharges are regulated under Section 402 of the Clean Water Act. Until April 2012, when U.S. Steel requested an approved jurisdictional determination (JD), the Corps had not received any request to determine whether the wetlands on the site were subject to regulation under Section 404 of the Clean Water Act. U.S. Steel requested that the Corps determine whether the entire area should be considered a waste treatment system and therefore not a water of the United States.

After coordination with the Minnesota Pollution Control Agency and Region V of the U.S. Environmental Protection Agency, the Corps St. Paul District determined in November 2012, that the area is not a *water of U.S.* and not subject to permitting under Section 404 of the Clean Water Act.

**QUESTIONS for The Honorable Jo-Ellen Darcy**  
**From the Office of Congressman Bill Shuster (PA-9)**

**Question 2:** In your August 9, 2012, response letter (to the Pennsylvania Delegation), you acknowledged and restated the goal of eliminating duplicative reviews. However the Corps' new approach is doing the exact opposite while providing no additional environmental benefit. Further, Pennsylvania is not being treated the same as other states that operate under a Nationwide Permit. While PA midstream permits are averaging 150 days under PASPGP-4, other states do not require notice to the Corps at all if the nationwide permit is followed.

**Why is Pennsylvania being treated differently than other states? How is PASPGP-4 consistent with the general permit goal of reducing duplicative reviews?**

**Response:** The Corps strives to treat all States the same under applicable laws and regulations. The overall requirements for complying with Section 404 of the Clean Water Act do not vary state by state, although the processes, procedures, and approaches for achieving CWA objectives may vary. These differences depend on many factors – including but not limited to the nature and scope of the activity, the types of aquatic resources affected, state and local laws and regulations, and other interests. Regional general permits (RGPs), state programmatic general permits (SPGPs) and Corps nationwide permits (NWPs) are permitting tools that are all designed to improve the process.

Elimination of duplicative reviews is a major benefit of State Programmatic General Permits. These general permits allow a state to incorporate its legal requirements and take a more active role in making decisions that affect economic development activities and environmental protection in the state. In Pennsylvania, the PASPGP-4 is a permitting tool that is used to authorize a variety of activities within the state and does not apply solely to activities in waters of the United States related to Marcellus shale development. The state of Pennsylvania requested that the Corps develop an SPGP with them almost 20 years ago, and this permitting mechanism has been in place since then. Since the inception of PASPGP-4 in July 2011, thousands of applications for many different types of activities in Pennsylvania have been processed by the Pennsylvania DEP as Category I/II activities with no Corps review. Approximately 26 percent of activities in waters of the United States in association with all Marcellus shale gas activities require Corps review as Category III activities.

**Question 3:** In your August 9, 2012, response letter, you assert that PASPGP-4 is substantively the same as the previous version. The Corps fails to recognize the fundamental change to the categorizing review process by the expansion of the definition of "single and complete project" to include an "overall project" component.

Before PASPGP-4 virtually all midstream projects were in Category 1. Now over 90% of these same projects are in Category 3, requiring Corps review. This has caused significant delay (an average of 150 days) in the authorization of virtually all midstream pipeline projects. How can you say that this is not a fundamental change?

**Response:** The way in which single and complete projects and overall projects were captured under PASPGP-3 is not different than the procedures used for PASPGP-4. It was standard practice under the PASPGP-3 to require information on all activities in waters of the United States in order to assess cumulative effects, and this concept was simply clarified in the PASPGP-4, by including specific definitions for and examples of these terms. What has changed substantially is the number of activities related to Marcellus Shale exploration, production, and transmission. Because of this increase it

is easy to see how one could conclude that there is now an increased emphasis on Category III activities, when in fact the Corps review of these particular activities has only increased to keep pace with the increased number of activities that are occurring in association with Marcellus shale production.

**Question 4:** Further, there has been no substantial change associated with midstream pipeline development to warrant such a regulatory change. The pipeline crossings that the Corps previously approved as Category 1 activities are not different or more complex, and the requirements for construction following Category 3 review are the same. Impacts are still temporary and minimal.

**What circumstances warrant the substantial change in the permitting program, creating extended delays and providing no environmental benefit? Why should temporary impacts be included as part of the pre-authorization review of each single and complete project, rather than as part of a compliance program for cumulative impacts?**

**Response:** With respect to temporary impacts, consideration of these effects is not inconsistent with the NWP's. While temporary impacts do not count toward the total loss of waters that may be verified under a NWP, this does not mean that activities of a temporary nature cannot trigger notification to the Corps. For example, a utility line exceeding 500-feet in waters of the U.S. triggers Corps notification under the general conditions of NWP 12, even if this impact does not result in a loss of waters of the U.S. As a further example, under NWP 12, the conversion of a forested wetland to a scrub shrub wetland does not constitute a permanent loss of waters of the U.S. and thus does not count towards the acreage limit of loss, even though that activity will require notification, may result in the permanent loss of certain functions, and may require compensatory mitigation.

The Corps districts in PA have determined that when temporary and/or permanent impacts associated with an overall linear project exceed either 250' of stream or one acre of wetland impacts, notification to the Corps is necessary. It is incumbent upon the Corps to assess the effects of the overall projects as a whole prior to making decisions on single and complete crossings. Consideration of temporary impacts applies to the entire PASPGP-4 and all activities that may be covered by the SPGP and is not limited to those activities related to Marcellus shale development.

**Question 5:** A recent report from Barclays said bottlenecks in pipeline development are holding back significant amounts of natural gas in areas including the Marcellus. The Corps practices and policies appear to be a significant cause of these bottlenecks, which are impacting pipeline development in the Commonwealth of Pennsylvania.

Every time a concern is raised, the Corps reiterates that 90% of the permits are completed by the Corps in 60 days or less. However, when giving this number, the Corps completely ignores the impact of the duplicative and extended review process required for Category 3 projects. Category 3 is a much more involved process, and

numerous agencies are required to get involved with Category 3 projects as compared to Category 1. This adds significant time. The Corps continues to say that they do not start the clock until an application is “administratively complete” – after other Federal and state agencies, etc., have added significant wait time. The Corps is completely ignoring the impact that the Corps categorization of these projects has on the permitting timelines, even though the Corps is responsible for it in the first place.

**Does the Corps recognize this as a problem? Are there any steps being taken to rectify the permitting bottlenecks and delays caused by the duplicative and extended review process resulting from the re-categorization of these projects?**

**Response:** While only about 12 percent of all activities covered by the PASPGP-4 are Category 3 activities that require Corps review we are always committed to find ways to improve the process. The activities that fall into Category 3 must be evaluated by the Corps to ensure the proposed work is in compliance with applicable statutes including Section 404 of the Clean Water Act, the National Historic Preservation Act, and Section 7 of the Endangered Species Act. Development of the PASPGP has evolved through coordination among Corps district offices and the Pennsylvania Department of Environmental Protection (PADEP) through a number of years, focusing on minimizing duplicative reviews, improving process efficiency, and increasing responsiveness to permit applicants. The Commanders in the Baltimore, Pittsburgh, and Philadelphia districts are fully aware of the concerns expressed by many project advocates with respect to PASPGP4. Corps representatives have met with industry representatives to listen to and discuss concerns with the implementation of PASPGP4 as it pertains to certain companies’ applications for Department of the Army permits for impacts associated with midstream pipeline projects.

In response to these discussions, we have taken a fresh look at PASPGP-4 and Corps Headquarters has asked that the three districts pursue additional discussions with PADEP on these matters, including potential options such as the termination of the PASPGP and reinstatement of NWP in Pennsylvania, or the Corps reinstatement of only NWP 12 with appropriate regional conditions. Before any change along these lines is made the Corps will work with the State to assess the feasibility of any proposed change, its fairness, and the overall consequences of any proposed change on the aquatic environment and regulated public. In the interim, we will continue to work to improve the pre-application process so that applicants have a more clear understanding of permit application requirements.

**Question 6:** The Corps, itself, has defended the use of the nationwide permits and the definition of “single and complete project” in the recent Sierra Club challenge of the Keystone Pipeline.

**Why does “single and complete project” make sense for a pipeline the magnitude of Keystone and not for gathering lines in Pennsylvania?**

**Response:** The definition of "single and complete project" (i.e. single and complete crossing) for linear projects, from 33 C.F.R. § 330.2(i), was applied to the separate waterbody crossings associated with the Gulf Coast Pipeline (the southern portion of the proposed Keystone XL pipeline). A parallel definition for "single and complete project" for linear projects is a part of the SPGP, and this definition is applied to separate waterbody crossings associated with gathering lines in Pennsylvania, as well as any crossings of the same waterbody that are separate and distant. While the Corps districts in PA will evaluate all impacts associated with an overall linear project when that overall project impacts more than 250' of stream, each single and complete crossing may still be verified under the SPGP, provided the Corps determines that each separate crossing would have no more than minimal effect.

**TESTIMONY OF  
DENISE KEEHNER  
DIRECTOR, OFFICE OF WETLANDS, OCEANS, AND WATERSHEDS  
OFFICE OF WATER  
U.S. ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE  
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT  
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE  
UNITED STATES HOUSE OF REPRESENTATIVES**

**SEPTEMBER 20, 2012**

Good morning, Chairman Gibbs, Ranking Member Bishop, and members of the Subcommittee. My name is Denise Keehner, and I am the Director of the Office of Wetlands, Oceans, and Watersheds in the U.S. Environmental Protection Agency's (EPA) Office of Water. I want to thank you for the opportunity to be here today together with Assistant Secretary Jo-Ellen Darcy of the Department of the Army to speak about state and tribal assumption of the Clean Water Act (CWA) Section 404 program as well as the EPA's efforts to support state and tribal wetlands programs.

Through my testimony I hope to clarify the requirements, benefits, and challenges associated with Section 404 assumption, and the EPA's leadership role in the assumption process. I will also discuss how the EPA is working with states and tribes to support and enhance their wetland program capacity and capability in a manner that is tailored to each individual state and tribe. The goal of the Clean Water Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The EPA believes that our ultimate ability to achieve this goal is significantly enhanced by strong and effective state and tribal programs.

**Introduction**

Forty years ago next month, in the midst of national concern about the integrity of our nation's rivers, streams, lakes, wetlands, and coastal waters, Congress passed the Clean Water Act (CWA). The CWA embodies a federal-state partnership in which guidelines, objectives and limits were to be set by the federal government, while states, territories and authorized tribes would have the authority to administer and enforce some CWA programs. The CWA set a new national goal "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Since the passage of the CWA, the quality of our Nation's waters has significantly improved. We have kept billions of pounds of sewage, chemicals and trash out of our waterways. The federal government has provided more than \$140 billion for projects to improve the nation's water infrastructure and reduce water pollution. The rate of wetland loss resulting from dredged and fill activities has declined significantly. And our urban waterways, once heavily polluted places to avoid, have become centers for redevelopment



and activity. Overall, this progress means that more of America's waters are swimmable and fishable, and that our drinking water sources are better protected.

Protecting and restoring the nation's rivers, streams, lakes, wetlands and coastal waters requires a strong partnership among state, tribal, local and federal entities. In 1977, embodying the federal-state partnership framework of the CWA, Congress amended the CWA to enable states to assume some permitting responsibility under CWA Section 404. In 1987, Congress amended the CWA to extend the same opportunity to eligible tribes. To date, 24 states and tribes have considered assuming the Section 404 program, but only two states have requested the EPA's approval of a state program: Michigan and New Jersey. No federally recognized tribe has requested the EPA's approval of a tribal program.

#### **Background on Section 404 Assumption**

Section 404 of the 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 can include discharges of fill into waters of the U.S., including wetlands, associated with development, infrastructure (e.g., highways, bridges, and airports). CWA Section 404 requires authorization of a discharge of dredged or fill material into waters of the United States, unless the proposed activity is exempt from Section 404 regulation, such as certain farming and forestry activities.

Under the CWA, a state or tribe seeking to administer a Section 404 program must submit a request for assumption to the EPA and demonstrate that their program meets the requirements of CWA Section 404(h) and its implementing regulations. This includes a requirement that the state or tribe's program: (1) has the authority to issue permits consistent with and no less stringent than the Act and implementing regulations, including the Section 404(b)(1) Guidelines; (2) has an equivalent scope of jurisdiction for those waters they may assume;<sup>1</sup> (3) regulates at least the same activities as the federal program; (4) provides for public participation; and, (5) has adequate enforcement authority.<sup>2</sup>

A state or tribal program can be more expansive and/or more protective of aquatic resources than the federal government's program,<sup>3</sup> but the CWA requires that state and tribal Section 404 programs be consistent with and no less stringent than the Act and its implementing regulations. Because an "assumed program" operates under state or tribal law, the state or tribe must have its own laws that authorize the program and meet the applicable requirements for program approval. Approved state or tribal Section

<sup>1</sup> By statute (CWA 404(g)), jurisdiction over dredge and fill activities in the following waters are retained by the Corps: "[w]aters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto."

<sup>2</sup> 33 U.S.C. Section 1344, ELR STAT. FWPCA Section 404. The Section 404 Assumption regulations can be found at 40 C.F.R. Section 233 *et. seq.*, available at <http://www.epa.gov/owow/wetlands/pdf/40cfrPart233.pdf>

<sup>3</sup> CWA Section 404(t) and EPA regulations at 40 CFR 233.1(c) preserve the rights of states and tribes to operate a program with a greater scope than the federal program and to regulate discharges of dredged or fill material into those waters over which the Corps retains Section 404 jurisdiction. Where the state or tribal program is greater in scope than is required by federal law the additional coverage is not part of the federally approved program and is not subject to federal oversight or enforcement.

404 programs must, at a minimum, regulate all the waters they are eligible to assume and the same or fill discharges the federal government would regulate. The CWA does not allow the EPA to approve partial state or tribal Section 404 programs – that is, programs that cover only a portion of the waters that are assumable or programs that only address a subset of discharges to the nation’s waters (e.g., only discharges from a particular industry sector).

Once the EPA approves a Section 404 program, the state or tribe assumes all responsibility for the Section 404 permitting program under its jurisdiction, determines what areas and activities are regulated, processes individual permits or general permits for specific proposed activities, and carries out compliance and enforcement activities. By statute and regulation, the EPA has a general oversight responsibility of the state or tribal program including, for example, reviewing draft permits for which review has not been waived.<sup>4</sup> The EPA reviews approximately one to two percent of the Section 404 permits issued by Michigan and New Jersey.

#### **Why States and Tribes Assume the Section 404 Program**

Over the years, the EPA has periodically asked states and tribes who have taken steps toward Section 404 assumption why they were interested in assuming the CWA Section 404 program. This has included participation in an Environmental Council of the States (ECOS) workgroup in 2010 and EPA efforts in 1992<sup>5</sup> and 2007.<sup>6</sup> In our 2007 assessment, for example, we reviewed the Section 404 assumption files from nine states that seriously considered assumption and spoke with state officials familiar with the effort.<sup>7</sup>

The EPA believes that there could be several benefits to states or tribes taking a more active role in regulating impacts from the discharge of dredged or fill material to aquatic resources through Section 404 assumption. Through assumption, a state or tribe can leverage and incorporate other statutes and regulations into their programs, such as land use requirements; effectively manage the tribal or state resources on a watershed scale; and, define the waters for which they provide protections in a manner that is broader in scope than the federal program.<sup>8</sup> As the administrator of other aquatic management programs, state and tribal programs can work to increase integration and cooperation with local, state and federal resource programs to effectively address a wide range of water-related issues such as flood control and groundwater protection during the permit review process. While state and tribally assumed programs

<sup>4</sup> The Memorandum of Agreement (MOA) between the EPA and the state or tribe describes the categories of permits that are subject to Federal oversight and those categories for which review is “waived.” The EPA’s 404 assumption regulations list the categories of permits for which EPA may not waive review. For example, the EPA may not waive review of permits that might impact threatened or endangered species or have discharges into waters in a State or National park. Additional categories for which the EPA does not waive review may be added to the MOA.

<sup>5</sup> 1992 USEPA, Office of Regulatory Management and Evaluation, Study of state assumption of the Section 404 program.

<sup>6</sup> Hurlid, Kathy & Jennifer Linn, Pursuing Clean Water Act 404 Assumption: What States Say about the Benefits and Obstacles, Presentation at the ASWM Annual State/Federal Coordination Meeting (May 30, 2008), available at [http://www.aswm.org/pdf\\_lhb/hurlid.pdf](http://www.aswm.org/pdf_lhb/hurlid.pdf).

<sup>7</sup> A state or tribe was deemed to have undertaken a serious inquiry if it spent money, invested significant staff time investigating Section 404 Assumption, or was directed by the governor or legislature to investigate Section 404 Assumption.

<sup>8</sup> Both the Michigan and New Jersey programs are broader in scope than the federal program.

can have requirements which are more stringent or have a greater scope than required by federal law, they must, at a minimum, cover at least the waters they are eligible to assume and regulate the same discharges as the federal program.

- According to the states that ultimately did not apply to assume the program, they chose not to do so primarily because they:
- did not have requisite state authorities as required by the CWA and implementing regulations and did not believe they could change authorities to comply with such requirements (four states);
- lacked sufficient state implementation funds (three states);
- faced difficulties in working out an acceptable way to handle threatened and endangered species issues with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (three states);
- were interested only in partial, or incremental steps toward, assumption (two states); or
- did not want to pay for something federal government is already doing and felt that Corps implementation was working well (two states).

In addition to the reasons cited above for not assuming the program, states and tribes participating in the 1992 and 2007 EPA inquiries and the 2010 ECOS workgroup identified several additional issues they consider to be barriers to assumption. These included:

- no dedicated federal source of funding for program implementation;
- lack of flexibility in program approval, given that there is no phase-in or partial program approval;
- lack of specific guidance on the process and program expectations;
- lack of clarity on the waters over which they would assume jurisdiction; and
- limits on the ability to assume jurisdiction over all waters within their state.

#### **EPA Support for Section 404 Assumption**

The EPA supports states and tribes that want to assume the Section 404 program by engaging a state or tribe when it expresses an interest in assumption, remaining engaged during development of the assumption package, and reviewing program applications consistent with the CWA and implementing regulations. Moreover, the EPA continues to play a critical oversight role if and when a state/tribal program has been approved.

The EPA also provides critical financial and technical assistance to state or tribal wetlands programs.

### *Funding*

In order to explore the feasibility of assuming the Section 404 program, tribes and states may request and use EPA funds provided through the competitive Wetland Program Development Grant (WPDG) program under CWA Section 104(b)(3). States and tribes have used these funds to develop state regulatory programs, investigate assumption and fund task forces or workgroups to aid in their consideration of assumption. The EPA's budget currently provides approximately \$15 million in annual WPDGs assistance to fund development of state and tribal wetlands programs. While WPDGs cannot be used for implementing state or tribal Section 404 programs, Michigan and New Jersey have continued to successfully compete for these grant monies, using these funds to continue to develop and improve their programs, such as to develop databases to track permitting.

In 2005, in response to states' and tribes' desire to use grants for wetland program implementation, the EPA used the CWA Section 104(b)(3) authority to award grants for demonstration projects to offer one-time, three-year Wetland Demonstration Pilots. The purpose of the pilot program was to demonstrate whether the use of WPDG funding for program implementation would result in positive environmental outcomes. Interest in this pilot was high, and 28 states and six tribes submitted 45 proposals. The EPA provided a total of \$18.6 million over three years for 26 projects in 22 states and one tribe. The three-year pilot project illustrated that states and tribes can achieve substantial environmental outcomes when WPDG funds are used for program implementation. For example, states were able to develop stronger state regulatory and enforcement programs. A targeted investment in ten states resulted in more than 3,600 site inspections and 1,100 enforcement actions to bring wetland sites into compliance. One state increased compliance of mitigation sites meeting performance measures from 10% to 100%. As an additional example, Michigan created a Compliance and Enforcement Unit to monitor compensatory mitigation sites. Within a one-year period, Michigan's staff inspected an additional 325 acres of mitigation sites that and took steps to bring 185 acres of substandard mitigation into compliance.

CWA Section 106 funds can be used for implementing state and tribal Section 404 regulatory and wetlands programs, although Michigan is the only state we are aware of that has, in the past, used 106 funds to support part of its Section 404 program. Some tribes have used these funds to review federal Section 404 public notices. States prioritize the use of these funds to support other CWA programs, such as Water Quality Standards development and the National Pollutant Discharge Elimination System and Total Maximum Daily Load programs. Congress appropriated approximately \$238 million for Section 106 support in FY 2012.

### *Technical Assistance*

In partnership with the University of North Carolina, Chapel Hill Environmental Finance Center, the EPA has provided technical assistance to state and tribal wetland programs to help them sustainably finance their wetland programs, including but not limited to 404-assumed programs. This assistance has been provided largely in the form of training workshops, which shared successful approaches to financing programs and taught participants how to market their programs to potential funders and program partners; how to utilize partners to accomplish program goals; how to develop effective financial plans; and how to

write successful grant applications. These workshops have been held in nine of the EPA's ten Regions, with three workshops exclusively for tribes. A total of 24 states and 75 tribes attended the workshops.

Once a state or tribal program has been approved, the EPA continues to provide technical assistance to ensure the program remains consistent with the CWA and its implementing regulations. For example, EPA Region 5 personnel provided technical assistance to Michigan by attending meetings of the Michigan workgroup charged with identifying efficiencies in its program. EPA Region 2 is working to help New Jersey revise its in-lieu-fee program structure consistent with the 2008 mitigation rule.

More generally, whenever a state or tribe is interested in developing an assumed program, the EPA answers questions, assists with informal reviews, provides technical input on potential legislation or regulations, and participates in public hearings about the state program. When Kentucky investigated assumption in 2005, the EPA participated in every public and task force meeting the state held and was available as a technical resource. The EPA also provided Kentucky with additional assistance, such as by developing a map that depicted the Kentucky waters over which the state would need to assume jurisdiction and those waters over which the Corps would retain jurisdiction. Ultimately, however, the state of KY chose not to apply for assumption.

#### **Other Regulatory Approaches Available to States and Tribes**

Assumption is not the only approach states and tribes can use to manage CWA-regulated dredge and fill activities. Three other approaches include:

- Issuance (or denial) of state or tribal CWA Section 401 certifications for federal permits and licenses to conduct any activity which may result in any discharge into waters of the U.S.;
- An independent state or tribal permitting program under state or tribal laws and regulations; and
- A State Programmatic General Permit (SPGP) or a Regional General Permit (RGP), which are developed by the Corps in collaboration with states or tribes.

Now, I would like to speak in greater detail about CWA Section 401 certification and about state or tribal permitting programs.

#### *Section 401 Certification*

The CWA Section 401<sup>9</sup> certification process enables states and eligible tribes to prevent the issuance of, or place mandatory conditions or requirements on, federal licenses or permits to conduct activities that may result in any discharge to waters of the U.S. A federal agency cannot issue a permit or license to an activity that may result in a discharge to waters of the U.S. until the state or tribe where the discharge would originate has granted, granted with conditions, or waived CWA Section 401 certification. Any conditions a state or tribe chooses to include in its CWA Section 401 certification must be added to the federal license or permit. States and tribes that exercise their CWA Section 401 certification authorities

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<sup>9</sup> <http://www.epa.gov/OWOW/wetlands/regs/sec401.html>

are able to prevent impacts from activities subject to federal licenses or permits that would cause violations or exceedences of narrative or numeric water quality standards, effluent limitations guidelines, new source performance standards, toxic pollutant restrictions, water quality-based effluent limitations or any other appropriate requirement of state or tribal law. Certification is not limited to individual permits. States and tribes can certify, place conditions on or deny certification of general permits, including the Corps' Nationwide Permits. Section 401 conditions must be included as special conditions in a Corps-issued Section 404 permit to ensure that permittees understand that they are responsible for complying with those conditions as well.

In 2010, the EPA released a handbook entitled "*Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes*."<sup>10</sup> This handbook describes state and tribal CWA Section 401 certification authorities and how different state and tribal programs use Section 401 authorities to achieve effective environmental outcomes.

#### *Independent State and Tribal Programs*

States and tribes can develop their own permitting programs to avoid, minimize or compensate for impacts to wetlands and other aquatic resources. These programs can cover aquatic resources under federal jurisdiction as well as additional state or tribal waters. A state or tribe may establish their own program in order to have direct authority over aquatic resources and to provide clear permitting requirements and jurisdictional limits regardless of the status of federal regulatory programs. For example, Florida regulates all alterations to the landscape. Alternatively, states or tribes may choose to address just those waters or activities not covered by the federal program. For example, Wisconsin has passed legislation to regulate isolated waters regardless of federal jurisdiction.

#### **EPA's Support for State and Tribal Wetland Programs**

The EPA believes that a strong partnership between states, tribes and the federal government can best protect America's aquatic resources, including wetlands. These partnerships can take many forms, can address diverse elements of state wetlands programs, and can complement protections provided by the Section 404 regulatory program. The EPA is committed to working with states and tribes to enhance their program capacity and capability in a manner that is tailored to each individual state and tribe. With this in mind, the EPA has created a framework to focus states and tribes in developing their wetland programs: the Enhancing State and Tribal Programs Initiative (ESTP) and Core Elements Framework. The goal of the ESTP is to enhance the EPA's delivery of technical and financial support for state and tribal wetland programs, with the goal of accelerating program development.

Key objectives of the ESTP include:

- increasing dialogue between the EPA and states and tribes on wetland program development;

<sup>10</sup> This handbook is available at [http://water.epa.gov/lawsregs/guidance/cwa/upload/CWA\\_401\\_Handbook\\_2010\\_Interim.pdf](http://water.epa.gov/lawsregs/guidance/cwa/upload/CWA_401_Handbook_2010_Interim.pdf).

- clearly articulating program-building goals and activities - the Core Elements Framework<sup>11</sup>;
- aligning Wetland Program Development Grants with program development activities in the Core Elements Framework; and
- providing targeted technical assistance for states and tribes.

The ESTP and Core Elements Framework were designed especially for state and tribal wetland programs that are in the early stages of program development, but are also useful to states/tribes that are refining more mature wetland programs.

The Core Elements Framework provides states and tribes with a road map to develop or enhance the four basic elements that form the foundation of wetlands management and protection. The core elements of effective state and tribal wetland programs are:

1. Monitoring and Assessment;
2. Regulatory activities including 401 certification;
3. Restoration and Protection; and
4. Water Quality Standards for Wetlands.

Drafted in 2008 with state and tribal input, this framework describes objectives for each core program element and provides an extensive menu of program building activities. It is intended to be fairly comprehensive yet flexible so that states and tribes can choose from an array of actions that are best suited to their goals and resources.

To help assist states and tribes with continued development of these core elements, the EPA has aligned our grants to support development of state and tribal programs consistent with the Core Elements Framework, and have helped states and tribes to develop Wetland Program Plans, which articulate programmatic goals over a 3-5 year period.

The EPA also provides technical assistance to states and tribes through workshops and grants. In the past three years, the EPA has provided grants and contract support to universities and organizations such as the Association of State Wetland Managers and the Environmental Law Institute to develop and provide technical resources for states and tribes and to hold trainings on various aspects of wetland programs. These efforts have included a CWA Section 401 certification capacity building project,<sup>12</sup> a webinar series on water quality standards for wetlands that identifies best practices, workshops on how to develop an in-lieu-fee program under the Corps' and EPA's 2008 mitigation regulations, and a Section 404 assumption handbook<sup>13</sup> for states and tribes just beginning to consider assuming the program.

<sup>11</sup> The CEF outlines the core elements of a state or tribal wetland program, describes each core element, and provides a comprehensive menu of program-building activities for each core element. It can be found at: [http://water.epa.gov/grants\\_funding/wetlands/upload/2009\\_03\\_10\\_wetlands\\_initiative\\_cef\\_full.pdf](http://water.epa.gov/grants_funding/wetlands/upload/2009_03_10_wetlands_initiative_cef_full.pdf)

<sup>12</sup> ASWM Certification Capacity Building Project <http://www.aswm.org/wetland-programs/water-quality-standards-for-wetlands>

<sup>13</sup> CWA Section 404 Program Assumption: A Handbook for States and Tribes <http://aswm.org/wetland-programs/s-404-assumption/1221-cwa-section-404-program-assumption-a-handbook-for-states-and-tribes>

Through the ESTP, Core Elements Framework, and other efforts, the EPA has improved assistance to state and tribal programs by working together to set forth a comprehensive set of potential wetland program objectives.

**Conclusion**

I appreciate the opportunity to share with you the EPA's work with states and tribes to support and enhance their wetland programs. The EPA believes that our ultimate ability to protect our nation's waters is significantly enhanced by strong and effective state and tribal programs. By forging strong state and tribal partnerships, the EPA can help states and tribes take a leadership role in the management of dredge and fill activities affecting aquatic resources.

Thank you for the chance to be here with you today. I look forward to answering any questions you may have.



17 South High Street  
Suite 410  
Columbus, Ohio 43215



TEL 614 228 6336  
FAX 614 228 6349

March 7, 2012

Scott Nally  
Director  
Ohio Environmental Protection Agency  
Lazarus Government Center  
50 West Town Street, Suite 700  
Columbus, OH 43216-1049

RE: Ohio Coal Association Opposition to Ohio EPA's  
Request for Authority to Pursue Delegation Under  
Section 404 of the Clean Water Act

Director Nally:

On behalf of the Ohio Coal Association and its membership, we are writing to express our opposition to the proposal to obtain from the Ohio General Assembly authority to pursue delegation from the Federal Government to issue permits under Section 404 of the Clean Water Act. These permits, which are currently issued by the Army Corps of Engineers, are part of the comprehensive permitting process for surface and underground coal mining operations, and as such, careful consideration must be given to any proposed changes to the current permitting program. Based upon the Ohio Coal Association's members experience with the Army Corps of Engineers and Ohio EPA's 401 Certification Unit, we believe that there is a significant value to Ohio's coal mine operators in having the Army Corps of Engineers as the lead agency for permitting decisions under the Clean Water Act, subject, of course, to Ohio EPA's 401 Certification authority. This belief stems from a number of factors, including the current regulatory efforts directed against coal mining by U.S. EPA, the potential costs associated with Ohio pursuing this program, and the potential political complications of Ohio EPA having to deal directly with U.S. EPA on mining permits. At this point in time, we believe that the Army Corps provides a valuable counter balance to the regulatory overreach of U.S. EPA and having another federal agency, with all its resources, involved in discussions concerning coal mining permits remains critical. We do not believe that the transfer 404 Permitting authority to Ohio EPA will make the permitting process for coal mines easier and may, in fact, create additional complexities and difficulties because of the lack of another federal agency in the process to provide a counter weight to U.S. EPA overreach.

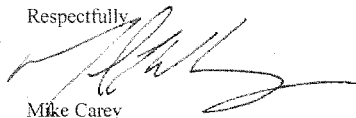
**SUPPLYING THE POWER**

**OHIO COAL ASSOCIATION**

We are also concerned by practical consideration of the ability of Ohio EPA to manage the additional requirements related to 404 permitting, particularly in instances where federal law and state law requirements differ or in instances where U.S. EPA injects its views and demands into the 404 permitting process, particularly where a 404 application deals with coal mining. We believe that the participation of the Army Corps of Engineers in permitting decisions related to surface and underground coal mining operations is valuable, and that the Army Corps of Engineers serves as a useful buffer between U.S. EPA and coal operators, particularly given the significant policy discussions occurring at the Federal level. Ohio EPA should seek to streamline its current 401 certification process and provide a counterbalance to USEPA's aggressive intervention into the 404 permitting process for coal mining operations. All too often in recent months, USEPA and Ohio EPA have aggressively sought to impose additional regulatory costs and requirements upon the coal industry which have little, if anything, to do with environmental protection, but which are designed principally to delay or obstruct coal mining operations in Ohio. The recent efforts to impose a new designated use -- the so-called "primary headwater habitat" --- upon small ephemeral and intermittent streams in Ohio, without first engaging in required rulemaking, and without affording the public and the coal industry an opportunity to participate meaningfully in any discussion or debate about the policy and scientific basis for establishing such a use, is a good example of why our members oppose the transfer of the 404 program to Ohio EPA. We do not believe that the permitting process will benefit from removal of the one federal regulatory agency involved that is the most practical and pragmatic, not to mention most responsive to the regulated community, from the process.

Consequently, because of the current political environment and the regulatory uncertainty associated with Clean Water Act permitting, it is the opinion of the Ohio Coal Association that Ohio EPA should not at this time seek to obtain delegation under Section 404 of the Clean Water Act. Ohio EPA should rather focus its efforts on making sure that the 401 Certification process is transparent and consistent. We therefore recommend that you withdraw your proposed changes to Senate Bill 294, and that Ohio EPA not pursue 404 permitting authority at this time.

Respectfully,



Mike Carey



## OHIO AGGREGATES & INDUSTRIAL MINERALS ASSOCIATION

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March 13, 2012

Director, Scott Nally  
Ohio Environmental Protection Agency  
P. O. Box 1049  
50 W. Town St., Suite 700  
Columbus, OH 43216

Ref: Amendment to SB 294

Dear Director Nally:

On behalf of the Ohio Aggregates and Industrial Minerals Association, we wish to thank you for meeting with us to discuss the amendment to SB294. This amendment (129SB294-3009) seeks legislative approval for the Director of the OEPA to pursue assumption of the 404 permitting program currently administered by the Army Corp of Engineers.

While we appreciate your perspective and understand your position, we remain opposed to this amendment as it adds an unnecessary measure of uncertainty at a time where our industry can ill afford such.

Additionally, should this legislative authority be granted, we welcome your offer to participate in Rulemaking that would follow.

Again, thank you for the opportunity to discuss this issue with you

Sincerely,

Patrick Jacomet  
Executive Director  
Ohio Aggregates & Industrial Minerals Association

Cc: Sen. Tim Schaeffer  
OAIMA Board of Directors.

**President** Dennis K. Phillips, Phillips Companies, Beavercreek, OH - **First Vice President** Tony L. Price, National Lime & Stone Co., Findlay, OH - **Second Vice President** Hugh A. Gunn, East Fairfield Coal Co., Limestone Div., North Lima, OH - **Immediate Past President** Ken W. Holland, Olen Corporation, Columbus, OH



## The Association of State Wetland Managers, Inc.

"Dedicated to the Protection and Restoration of the Nation's Wetlands"

September 20, 2012

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Erik Stockdale  
WA State Department of Ecology

Honorable Bob Gibbs, Chairman

House Subcommittee on Water Resources and Environment  
Committee on Transportation and Environment  
2165 Rayburn House Office Building  
Washington, D.C. 20515

Re: September 20, 2012 Hearing On "Forty Years after the Clean Water Act: Is it Time for the States to Implement Section 404 Permitting?"

Dear Mr. Chairman Gibbs:

The Association of State Wetlands Managers (ASWM) is a national non-profit association established in 1983 to support state wetland program managers and others in promoting sound wetland science, law, and policy. We actively work with state, federal, and local environmental and conservation agencies to support sound wetland management, and to coordinate with related resource programs to improve the protection of wetland resources.

On behalf of the Association, I would like to thank you for holding a hearing on State Assumption of the Section 404 program. Over past decades, the states have played a major role in wetland management and regulation, and bear significant responsibility for decisions regarding dredge and fill activities in wetlands and other waters. ASWM has worked with the Environmental Protection Agency, the U.S. Army Corps of Engineers, and other state associations to facilitate the integration of state and federal regulatory programs, and to reduce state/federal regulatory duplication. We believe that states can assume even greater responsibility, while maintaining strong standards for protection of water resources. This hearing is a vital step in this process.

We are very pleased to be providing joint testimony with the state of Ohio today. In addition, we are submitting the following materials for the use of subcommittee members and staff:

- *ASWM Fact Sheets on State Assumption.* These materials provide a brief description of the assumption process, and a digest of primary requirements.
- *CWA Section 404 Assumption: A Handbook for States and Tribes.* This handbook was developed by ASWM in response to a recommendation by a national workgroup on state 404 assumption.
- *December 27, 2010 Letter from Mr. Peter Silva, EPA Assistant Administrator, to Mr. R. Steven Brown, ECOS, and Ms. Jeanne Christie, ASWM.* This letter is a response to a request from ECOS and ASWM to clarify the requirements for approval of a state 404 Program in regard to consultation under the Endangered Species Act. The letter clarifies that EPA is not required to engage in a §7 consultation with the U.S. Fish and Wildlife Service prior to approving a state 404 Program.

We request that these documents be included in the official hearing record. We trust that these materials will support our joint testimony by providing additional information that is useful to the Subcommittee in determining how to encourage and support a strong state role in the administration of the Section 404 Program. These and additional materials are also available on the ASWM web pages at <http://aswm.org/wetland-programs/s-404-assumption>.

Should you or other members of the Subcommittee or their staff have questions regarding state roles in the 404 Program, please contact me at (207) 892-3399 or [jeanne.christie@aswm.org](mailto:jeanne.christie@aswm.org). ASWM is always pleased to provide technical assistance and information. Thank you.

Sincerely,

A handwritten signature in black ink that reads "Jeanne Christie". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Jeanne Christie  
Executive Director

Cc: Mr. Jon Pawlow  
Mr. George Elmaraghy

Attachments *ASWM Fact Sheets on State Assumption*  
*CWA Section 404 Assumption: A Handbook for States and Tribes*  
*December 27, 2010 Letter on Endangered Species Act*

## Clean Water Act Section 404 State Assumption

### Overview

States and tribes<sup>1</sup> play a major role in the implementation of many Clean Water Act (CWA) programs. It is also clear that Congress envisioned that the states would play an active role in permitting dredge and fill activities, and thus provided a mechanism for states to assume the CWA Section 404 from the federal government.

### States and Federal Agencies Share Critical Roles in Regulating Wetlands

States are particularly well-situated to address regional water management issues and to effectively interact with private landowners. Federal resource agencies play a critical role in maintaining a “level regulatory playing field” among the states and in helping to define common national goals under the Clean Water Act. While a number of states have strong wetland programs, only two states have assumed administration of Section 404. Instead other states have developed, or are developing, other types of cooperative permit programs, such as joint permitting,<sup>2</sup> State Programmatic General Permits (SPGPs) or Regional General Permits (RGPs). However, since the U.S. Supreme Court decision on Solid Waste Agency of Northern Cook County (SWANCC) of 2001, interest in state assumption has increased.

### What “Assumption” Means for a Dredge and Fill Permitting Programs

Under the Clean Water Act (CWA), states may seek to implement Section 404 that governs dredge and fill activities in wetlands and other waters. Before a state assumes CWA § 404, the U.S. Army Corps of Engineers (Corps) regulates those waters and reviews the related permits at the federal level. State assumption of the 404 program allows a state to regulate those waters—including streams and wetlands—and assume the jurisdictional responsibility to condition, approve or deny dredge and fill permits rather than the Corps. Where a state 404 Program is approved by the EPA, the Corps of Engineers suspends processing of 404 permits, and the state permit provides the necessary authorization under Section 404. While Section 404 is often described as a wetlands program, it applies to all waters, not just wetlands. In fact the majority of dredge and fill permits in most areas of the country are for streams and rivers and other waters that are not wetlands.

“Assumption” means a state has applied to the EPA and been approved to administer a state dredge and fill permitting program in lieu of the federal section 404 program administered by the Corps and EPA. An approved state is responsible for all dredge and fill activities within the state that impact waters of the US.

<sup>1</sup> Tribes that have applied to be treated as a state for the purposes of implementing Clean Water Act programs

<sup>2</sup> Joint permitting includes state-federal permitting, state-state permitting, such as stormwater & Wetlands, as well as state-local permitting. For more information on Programmatic General Permits, visit: <http://aswm.org/wetland-programs/programmatic-general-permits>

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### Requirements of State Assumption

In order to be eligible to assume administration of Section 404, a state program must meet specified criteria. These are the primary requirements:

- The state must have jurisdiction over all waters, including wetlands that are under federal jurisdiction<sup>3</sup>. Dredge and fill activities in lakes, streams, and other waters defined in federal regulations must be regulated by the state in addition to wetlands.
- The state laws must regulate at least the same activities as those regulated under federal law. State regulations can be broader than federal regulations, but cannot exempt activities which require a federal permit.
- The state laws must ensure compliance with federal regulations, including the 404(b)(1) guidelines. State regulations can provide greater resource protection, but cannot be less stringent than federal regulations.
- The state program must have adequate enforcement authority. Under a state-assumed program, primary responsibility for enforcement rests with the state.

A state must have the authority needed to assume responsibility for the entire Section 404 permit program. At the present time, it is not possible to assume only a portion of the program.

### State Program Operation and Federal Oversight

The EPA has responsibility for oversight of state assumed Section 404 Programs. An approved state Section 404 Program is operated under the provisions of EPA's Section 404 State Program Regulations, found at 40 CFR Part 233. These regulations define the process for requesting approval of a state program, and operation of a state program. As noted in the preamble to these regulations, the relationship between the EPA and the state in an assumed program is intended to be a partnership, and in the experience of Michigan and New Jersey, this has proven to be true. Coordination of the state and federal programs has worked effectively.

A Memorandum of Agreement (MOA) between EPA and the state or tribe, signed at the time of program approval, clarifies the roles and responsibilities of both parties, and the scope of federal oversight. While all permit applications received by the state are subject to review by EPA, EPA typically waives review of all but a small percentage (2-5% on an annual basis). These applications include (a) those public notices for which

<sup>3</sup> A state does not need to assume administration of the program on tribal lands; the Corps could retain permitting in these jurisdictions. This does not constitute partial program assumption.



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review is mandated under the federal regulations – including projects with the potential to impact critical resource areas such as wetlands that support federally listed species, sites listed under the National Historical Preservation Act, components of the National Wild and Scenic River System, and similar areas – and (b) state-specific categories of projects negotiated in the state program MOA. Significantly, if EPA does review a project and objects to issuance of a permit, the state may not issue a Section 404 permit unless the objection is resolved. This factor is important in ensuring compliance with other federal program areas as discussed below. States also provide EPA with an annual report that summarizes permitting and enforcement actions taken during the year.

#### **Mechanisms for Coordination with Federal Laws, e.g. Endangered Species Act**

- 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, specific federal requirements do not apply. Instead they are addressed through EPA oversight as required by the statute and regulations.
- However, an alternative mechanism is provided through EPA oversight role. As noted above, EPA's regulations at 40 CFR §233.51 require EPA review of any permit application that has a reasonable potential to impact federally listed threatened or endangered species, within sites identified under the National Historic Preservation Act, or in components of the National Wild and Scenic River System, among other critical areas. EPA in turn is required to coordinate with other federal agencies i.e., the Corps, U.S. Fish and Wildlife Service, and National Marine Fisheries Service.
- The comments provided to the state by the EPA represent the comments of the federal government, and the state cannot issue a 404 Permit if EPA objects. Therefore, for example, should the U.S. Fish and Wildlife Service object to issuance of a permit due to concerns regarding a listed species, EPA may block issuance of the permit by the state.
- A state must comply with the Section 404(b)(1) Guidelines, and those guidelines prohibit issuance of a permit that may jeopardize the continued existence of a listed species, the state is under an additional obligation to protect listed species. The authority of the state to assure compliance with the 404(b)(1) Guidelines must be demonstrated prior to EPA approval of state assumption (and would be based on an evaluation of state laws and regulations). For example, Michigan has a stand alone law which protects federally listed species in addition to state listed species.
- Through the above mechanisms and processes, states and EPA assure compliance with federal environmental regulations.

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#### Benefits of State Assumption of Section 404

Based on the experience of Michigan and New Jersey, administration of the Section 404 program by qualified states and tribes offers several significant benefits in terms of overall program efficiency and wetland resource protection. These include the following:

- Improved resource protection. Ultimately, 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 will provide greater protection of wetland resources.
- Increased program efficiency. State program assumption greatly reduces duplicative state and federal permitting requirements, and eliminates potentially conflicting permit decisions, conditions, and mitigation requirements.

State permit programs are often more timely than federal programs. In Michigan, for example, actions must be typically be taken on completed permit applications within 90 days, and the average permit processing time is approximately 60 days (less for general or minor permits). In New Jersey, generally permit decision are made in 60 days on average while wetland boundary verifications generally are completed in 90 days and individual permit decisions take less than 180 days.

- Effective allocation of federal and state agency resources. State programs such as those in Michigan and New Jersey are staffed by local offices with the capability of providing on-site review of almost all permit applications (including those reviewed by the Corps under the nationwide permit process), and work directly with permit applicants to reduce adverse impacts to the resource. When reviewing particularly complex applications, state and federal resource agency staffs retain the opportunity to work cooperatively.
- Improved integration with other state resource programs. Administration of the dredge and fill permitting program at the state level enables states to integrate dredge and fill regulations and other related land and water management programs. Issues such as floodplain management, storm water management, local or regional zoning or land use plans, and similar concerns are more likely to be fully integrated into the permit review process. Coordination with agencies and organizations responsible for watershed management is also improved.

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### Benefits of Assumption, continued

- Use of state-specific resource policies and procedures. 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 of the state, provided that the basic federal requirements are met. Thus, a state can develop a wetland delineation manual that is suited to its climate and topography, rather than using a manual developed for the entire nation; it can use functional assessment procedures specific to the ecological types of wetland present within the region; and it can otherwise ensure that the wetland program is tailored to the needs of the resource and the public in that state.
- Increased regulatory program stability. Experience in Michigan indicates that its wetland regulatory program requirements have remained much more stable and predictable over the past 18 years than the 404 permit program administered by the Corps of Engineers in most states. There are two reasons for this stability. First, because Michigan's program relies on state, rather than federal law, it is not impacted by changes in the federal program unless those changes render the state program inconsistent with the federal program. Therefore, numerous changes that have resulted in a significant degree of controversy and confusion at the federal level have not directly impacted Michigan's program (e.g. early revision of the delineation manual and regional updates, rule changes following the Tulloch decision, and, most recently the SWANCC and Rapanos decisions).  
  
On numerous occasions, suggested changes to state law in Michigan have been rejected by the legislature after it was determined that the proposed amendment(s) would render Michigan's program inconsistent with federal law resulting in the potential withdrawal of program approval. Thus, the combination of elements of the state and federal programs has served to temper changes in state regulation and policy, and has led, overall, to a more stable, predictable dredge and fill permitting program than has existed in most states over the past decade.
- Increased public support. State permit staff are often more readily accessible to the public. Overall public support for wetland regulation is increased by more consistent decision making among state and federal agencies, and by policies and procedures tailored to the needs of the state.



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### Barriers to State Assumption of Section 404

The fact that only two states have assumed 404 program administration also highlights that there are some significant limitations associated with this process. Here are some examples below:

- Meeting program requirements. Current Section 404 program regulations are quite complex, particularly in terms of the definition of 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 appear exceptionally difficult, particularly since the basis for state authority may be quite different than the basis for federal authority but states can demonstrate their program and authorities are consistent with the federal program.

For example, while federal jurisdiction over wetlands is essentially based on the commerce clause of the Constitution, state jurisdiction is typically based at least in part on authority to regulate land use and to protect to the state's natural resources. The specific language arising from these distinct authorities may, initially, appear quite different, even though the protection ultimately afforded the resource is equivalent. In New Jersey, this obstacle was overcome by developing a separate legal authority to regulate wetlands that was intentionally designed to enable assumption of the Section 404 Program.

- Inability to assume administration of Section 10 waters of the Rivers and Harbors Act and wetlands adjacent to these waters. This severely limits the appeal of the overall program, and may lead to a decision to forego state assumption. For some coastal states, the inability to assume administration of the 404 permit program in tidal wetlands or coastal areas, which may eliminate state regulation of some of a state's most significant wetland resources. However, MI and NJ entered into an SPGP with the Corps to manage some of these waters.
- Inability to assume 404 authority in only one geographic portion of the state. Some states would prefer to administer a state 404 program only in certain geographic areas, 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.
- Need for alternative coordination with other federal resource programs. Because the permits issued under a state assumed 404 program are issued under state rather than federal law, alternative mechanisms must be developed to assure compliance with the requirements of the federal Endangered Species Act, National Historic Preservation Act, and similar federal programs. These issues are addressed to an extent through oversight of state assumed programs by the EPA.



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### Continued Barriers to Assumption

But federal agencies and interest groups may oppose assumption over concerns about maintaining protection consistent with the other federal laws in the state following assumption. (See section on coordination with federal laws for more discussion.)

- Lack of dedicated federal funding specifically for Section 404 Program administration. Perhaps most importantly, states administering the Section 404 permit program receive no federal funds specifically dedicated to support operation of the permit program. In theory, states may make use of Section 106 water program funds for this purpose, but this would be difficult in practice since these funds are already dedicated to other existing water programs, which are usually located in the water quality agency of the state while a 404 program is often located in another state agency. It is not reasonable to expect that funds will be withdrawn from those programs, to fund another, especially one in another agency or department.
- The 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. While the states have made good use of these funds, it is clear that the primary program cost for an established program is not one of development, but ongoing program administration. 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.

Case: In Michigan, although assumption of the 404 Program has been broadly supported for many years due to increased program efficiency and effectiveness, challenging economic conditions have raised concerns about the total cost of program operation, and led the Governor to propose returning the program back to the federal agencies.

For a more thorough discussion of benefits and barriers to assumption, see CWA Section 404 Program Assumption: A Handbook for States and Tribes



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#### ASWM's Recommended Changes to the CWA—Actions to Support States

- Authorizing funding for state administration of the § 404 program at a level commensurate with that provided for administration of similar federal environmental permit programs. Federal funding is appropriate for implementing any state wetland program which effectively protects waters of the U.S. These programs include full state assumption of the § 404 Program, PGPs and RPs, and § 401 Water Quality Certification Programs; § 401 provides the State with the authority to condition § 404 permit applications.
- CWA § 404 could be amended to allow for assumption of the permitting program, in a portion of Section 10 waters. Allowing a state to administer the CWA § 404 program in major waterways as well as tidal wetlands, coastal wetlands, and other wetlands adjacent to major waterways will make the program worthwhile to coastal states, where these are among the most important wetland resources. States recognize the on-going responsibility of the Corps to maintain interstate navigation in primary interstate waters, and can coordinate with the Corps regarding impacts in primary interstate Section 10 waters where the Corps would retain responsibility.
- Section 404 could be amended to allow for partial assumption of the permitting program in specific geographic areas only. Some states have wetland programs that extend only to certain geographic areas, such as the coastal zone or coastal waters. Allowing a state to assume administration of the CWA § 404 program in areas where the state has such jurisdiction would reduce state/federal duplication in those areas and generally provide the other benefits of program assumption in at least a portion of the state. It would also allow a state to pursue gradual assumption over a period of several years. Partial adoption is allowed under § 402.

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## Getting Organized for State Assumption

### Questions for States Considering Section 404 Program Assumption

1. Why is the state interested in assumption, and how would the state/public benefit? Review the potential benefits and limitations of assumption.
2. Does the state have the legal authority to meet all federal requirements? Are all waters and wetland regulated? Are all activities regulated?
3. Does the state have adequate enforcement capability?
4. Does the state have sufficient human and fiscal resources to maintain the program?
5. Does the state have the political support to maintain the program?

### Materials required to request approval of a state program

The § 404 State Program Regulations define the materials that must be submitted to EPA to gain approval of a state program. This list is summarized at 40 CFR §233.10 as follows.

- (a) A letter from the Governor of the State requesting program approval.
- (b) 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.
- (c) An Attorney General's statement as set forth in §233.12 -- essentially certifying that the state has legal authority to meet all federal requirements.
- (d) A Memorandum of Agreement with the Regional Administrator or EPA.
- (e) A Memorandum of Agreement with the Secretary of the Army.

Summaries of all materials used in the state dredge and fill permit program will be useful in compiling this program description.



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### Key Resources to Have on Hand When States Consider 404 Assumption

1. Section 404 of the federal Clean Water Act
2. EPA's Section 404 State Program Regulations, at 40 CFR Part 233
3. EPA's Section 404 (b)(1) Guidelines, at 40 CFR Part 230
4. EPA's Clean Water Section 404 Program Definition and Permit Exemptions at 40 CFR Part 232
5. Any state statutes (drafts or adopted/passed into law) addressing the issuance of dredge and fill permits in lakes, streams and wetlands
6. Corps 1987 delineation manual and regional supplements, if available
7. June 5, 2007 EPA/Corp Memorandum regarding Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* and *Carabell v. United States* [or other current information regarding the scope of federal jurisdiction]
8. EPA and/or American Rivers' wetland fact sheets on importance of headwater streams
9. CWA 404 abbreviations and acronyms (found in assumption handbook)
10. Endangered Species Handbook, FWS (1998)
11. Section 7 Handbook, FWS (for initial assumption discussion)
12. Endangered Species Act summary information specific to state with focus on section 7 consultation (get this from FWS)
13. ASWM's Handbook on Assumption:  
CWA Section 404 Program Assumption: A Handbook for States and Tribes

Many of these resources can be found on ASWM's Assumption webpage at:  
<http://aswm.org/wetland-programs/s-404-assumption>

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Association of  
State Wetland  
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CWA §404  
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Assumption

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Nov. 2010



# Clean Water Act Section 404 Program Assumption

A Handbook for States and Tribes

August 2011

*Prepared by  
The Association of State Wetland Managers, Inc. and  
The Environmental Council of the States*



*MDEQ photo*



## Section 404 Program Assumption A Handbook for States and Tribes

*Prepared by the Association of State Wetland Managers  
and  
the Environmental Council of the States*



*August 2011*

*This handbook was prepared by the Association of State Wetland Managers in cooperation with an interagency workgroup convened by the Environmental Council of the States (ECOS) to encourage state/tribal assumption of the Clean Water Act Section 404 Program. Our thanks to staff of the Environmental Protection Agency (EPA) and other state, tribal and federal workgroup participants. Please note that any reference to a "state" program applies equally to tribes.*

### EXECUTIVE SUMMARY

State, tribal and federal resource agencies are facing increased pressure to reduce the cost of government, and to minimize regulatory costs imposed on businesses and the general public, while protecting important wetlands and other aquatic resources that remain under significant development pressure. At this time in our history the need for wetland ecosystem services—including flood storage, storm attenuation, and provision of migratory corridors for wildlife—is greater than ever in light of changing climatic conditions. Government agencies must also balance the cost and challenge of protecting other freshwater resources—for drinking water and protection of human health, natural habitat, water management, and a range of public uses.

In order to protect water resources while containing costs, it is essential that different levels of government share the work of managing wetlands and other waters. State, tribal and federal agencies are continuing to seek approaches to avoid duplication of effort and to improve the efficiency of permit programs, making the best use of the strengths of each agency to realize shared resource management goals. ASWM and ECOS have developed this handbook in the interest of encouraging a collaborative approach to wetland management by state or tribal and federal agencies.

The U.S. Congress has provided a mechanism for state/tribal and federal cooperation in the Clean Water Act Section 404 program (§404) since 1977. In the process known as §404 program assumption, a state or tribe may request to "administer its own individual and general permit program" in place of the federal dredge and fill permit program. In order to qualify for this provision, the state or tribal program must meet requirements that assure a level of resource protection that is equivalent to that provided by the federal agencies. Congress anticipated that this process would encourage a sharing of responsibility among states, tribes and the federal government.

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In spite of the promise and apparent advantages of §404 program assumption, only two states—Michigan and New Jersey—have requested and received approval for a state §404 program. The primary reasons for this are reported to be a strict requirement for consistency with federal law, setting a relatively high bar for permitting and enforcement, combined with a lack of dedicated federal funding to support state programs. However, states and tribes have demonstrated a willingness to manage wetlands within their boundaries, and have developed a variety of alternative approaches to working with federal agencies. The purpose of this handbook is to provide information to support those states and tribes willing to consider the step of full §404 program assumption in order to provide the maximum level of interagency cooperation and efficiency in their dredge and fill permit programs.

Benefits of program assumption There are multiple incentives for a state/tribe to assume administration of the §404 program. Among these,

- Elimination of a high percentage of duplication in state/tribal and federal permitting programs
- Reduced costs for permit applicants, resulting from reduced duplication, as well as often faster state/tribal permit processes
- More effective resource management at the landscape/watershed level, drawing on localized expertise and integration of wetland management with other state or tribal land use management and natural resource programs
- Incorporation of state or tribal goals and policies into the overall permit process, and
- Improved consistency and stability in the regulation of dredge and fill activities across multiple levels of government.

Challenges and potential obstacles A tribe or state that is considering §404 program assumption will need to weigh the clear benefits of this cooperative approach with a number of obstacles and challenges, including

- The need to meet §404 requirements with a parallel state or tribal program that regulates a wide range of waters – lakes, streams and wetlands – with stringent regulatory criteria
- Provision of a compliance and enforcement program consistent with the federal program
- Financial cost to the state or tribe
- Necessity of broad public and political support for this shared approach.

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A state or tribe that is interested in pursuing §404 assumption will need to develop a full description of its planned program, undertake a legal comparison of state/tribal and federal regulations, take steps to amend state/tribal laws or regulations, identify program funding, and enter into cooperative agreements with both the EPA and the U.S. Army Corps of Engineers (Corps), and finally to submit an application for assumption in an application to the EPA Regional Administrator. This handbook provides additional discussion of each of these steps.

Moving forward After weighing the benefits and obstacles to §404 program assumption, a state or tribe may decide to proceed with development of an application to the EPA, or find it more advantageous to pursue other steps, such as development of a 401 certification program, or a (State) Programmatic General Permit — (PGP or SPGP) — in cooperation with the Corps. Regardless of the capabilities and interests of a given state or tribe, increased coordination and sharing of responsibility will increase the effectiveness and efficiency of dredge and fill regulations.

#### OVERVIEW OF SECTION 404 PROGRAM ASSUMPTION

**The federal Section 404 Program.** §404 of the Federal Clean Water Act (CWA) defines a permitting program to regulate placement of dredged or fill material in the waters of the United States. This is the primary federal authority regulating the physical alteration of wetlands, as well as other waters of the United States, and complements the National Pollutant Discharge Elimination System (NPDES program), which regulates the discharge of pollutants into waters of the United States. The §404 program is jointly administered by the EPA and the Corps.

**State/tribal assumption.** In 1977, the U.S. Congress formally recognized the potential for and desirability of a major state/tribal role in management of dredge and fill activities, including administration of the §404 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/tribes in land use management provides states/tribes with a particularly effective basis for wetland management. However, Congress also emphasized the need to retain Corps control over navigation in interstate waters.

The resulting provisions of §404 allow a state or tribe to administer its own regulatory program in lieu of the Corps permit program for most waters, if approved by the EPA, and with oversight by the EPA. Congress prohibited assumption of the program in certain waters as defined in §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). The Corps retains §404 jurisdiction over these waters.

In the simplest terms, the assumption process authorizes states or tribes to assume greater responsibility for dredge and fill activities in waters of the United States. In practice, a state/tribal §404 program is a close partnership between state or tribal and federal agencies. Under a state/tribal §404 program,

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- The state or tribe agrees to conduct its own permit program in accordance with the requirements of the CWA and associated regulations. This means that the state or tribe may impose more stringent requirements, but not less stringent requirements (40 CFR 233.1(d)). Permits issued by an approved state/tribal program provide the necessary authorization under §404. The Corps suspends processing of federal permits (including Nationwide or Regional General Permits) in state/tribal §404 assumed waters. The state or tribe may adopt Nationwide Permits, or may develop its own General Permit categories for its program.

The state/tribe also assumes primary responsibility for enforcement of the CWA. An annual report of program activities is provided to the EPA.

- The EPA directly reviews permit applications defined in advance in a Memorandum of Agreement (MOA) with EPA, and may object to issuance of a permit where federal guidelines are not met, or if the permit is subject to an interstate dispute. The EPA review also provides for coordination with other federal programs, including the Corps, U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS). Input from the EPA helps to ensure that baseline §404 requirements are consistently enforced on a national basis. A state/tribe cannot issue a permit under §404 if EPA objects to issuance of the permit and the state has not taken steps required by the EPA Regional Administrator to eliminate the objection.

In addition, the EPA reviews the state's annual program performance, and provides federal technical assistance. EPA also retains the right to take enforcement action on any §404 violation, although the primary responsibility for enforcement rests with the state/tribal §404 program.

- The Corps retains jurisdiction over waters which are, or could be, used as a means to transport interstate and foreign commerce, all 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). This does not preclude operation of a state/tribal program in such waters, but such state permits do not provide §404 authorization. For a full description of the waters over which the Corp retains jurisdiction, please see "MOA with the Secretary of the Army" in the Special Topics section.

These roles and responsibilities are discussed in greater detail below.

Combining the work of state/tribal and federal agencies into a §404 partnership eliminates a significant amount of state/tribal and federal duplication—minimizing the regulatory burden—while taking advantages of the strengths of each level of government. State/tribal specific needs and policies are more directly addressed, without sacrificing national standards, interstate concerns, or federal technical expertise. At the same time, the §404 program regulations maintain a "level playing field" among the states and tribes, and to ensure protection of interstate water resources.

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#### Basic requirements for state/tribal assumption of the §404 Program

The overriding requirement for assumption is that the state or tribe 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/tribal program.

*“The conferees wish to emphasize that such a 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.”*

*- Legislative History of the CWA of 1977– Conference Report – page 104*

Requirements for assumption of §404 are detailed in the EPA’s Section 404 State Program Regulations at 40 CFR Part 233<sup>1</sup>. An approved state or tribal program must have in place – in state/tribal laws and regulations – provisions that address a number of requirements, including

- Jurisdiction over all waters of the United States, including wetlands, other than waters where the Corps retains jurisdiction (e.g. the New Jersey program does not include tidal wetlands, and Michigan’s program does not include Great Lakes coastal waters);
- Authority to regulate all activities that are regulated under federal law. A state/tribe 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 (including the § 404(b)(1) Guidelines and other requirements);
- 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;
- Program funding and staffing sufficient to implement and enforce the program.

There is no provision for partial assumption of the program; that is, a state/tribe cannot assume authority for only certain categories of activities or certain categories of waters. However, it is not required that a state/tribe 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 (Indian Country).

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<sup>1</sup> A list of legal references and sources is provided at the end of this document.

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#### How it Works: Federal Oversight & the Role of the EPA

Following approval of a state or tribal program by EPA, primary responsibility for permitting and enforcement in assumable waters is transferred to the state/tribe. The role of the EPA also changes; prior to assumption, the EPA reviews public notices and permits issued by the Corps, and provides comments to the Corps. In a state/tribal §404 program, EPA reviews public notices and permit applications received by the state/tribe, and provides comments to the state or tribe. The EPA is also responsible for programmatic oversight—for reviewing annual reports submitted by the state/tribe, and evaluating any changes in state/tribal 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/tribe, federal regulations allow EPA to waive review of some categories of permits (*40 CFR §233.51*). However, EPA cannot waive review of permits such as those that may affect threatened or endangered species, draft general permits, discharges near public water intakes, etc. EPA and the state/tribe define the categories of projects subject to direct review by EPA at the time of program assumption in the MOA. As the program matures, as has been the case in Michigan and New Jersey, the level of federal oversight may decrease. In Michigan, EPA typically provides direct comments on about 2% of all applications received in normal year.

The detailed process for EPA review of state/tribal §404 program permit applications is spelled out in federal law and regulations (*Section 404(j); 40 CFR §233.50*). Generally,

- The state or tribe is required to send EPA a copy of the public notice for any complete permit application received by the state except where EPA has waived review in the MOA.
- EPA in turn provides these permit applications to the Corps, the USFWS, and (in coastal waters) the NMFS for review<sup>2</sup>. These agencies are given 50 days to provide comments to EPA.
- EPA must provide comments to the state/tribe within 90 days of its receipt of the permit application. These comments incorporate comments from the other federal agencies.
- In the event that EPA objects to the proposed project—typically by finding that some aspect of the project is not consistent with the 404(b)(1) Guidelines—then the state/tribe cannot issue a permit carrying §404 authority unless or until federal comments are resolved. This is similar to EPA’s authority to raise concerns with or veto Corps permits. In most instances, federal concerns are resolved as a result of modification of the project by the applicant; provision of clarifying information by the applicant (e.g. additional information regarding alternatives or project impacts); or by agreement on conditions to be added to the permit (e.g. mitigation requirements).

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<sup>2</sup> In practice, the state/tribe may provide applications directly to other federal resource agencies to facilitate the review process.

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- There is a time limit for resolution of federal issues. Once EPA has sent a letter of objection, all issues must be resolved within a 90 day period. After this, the EPA cannot withdraw the objection to the permit (although the applicant may reapply).
- If the state/tribe does not satisfy EPA's objections or requirement for a permit condition or does not deny the permit, then processing of the §404 permit reverts to the Corps. The applicant may seek federal authority by filing a new application with the Corps. Should the Corps deny the permit, the applicant may appeal through the federal process. The state may, in some circumstances, issue a permit under state law in spite of an EPA objection (e.g. as the result of a legal appeal in state court) – but in this instance the state permit would not provide any authority under §404.

Some state legislators, tribal councils, or other policy makers may express concern regarding this level of federal oversight, in particular the authority of the EPA to block a state/tribal decision regarding issuance of a §404 permit. It has been suggested by some that EPA oversight be limited to review of the state program as a whole. However, the current framework provides several important functions:

- Direct coordination between state/tribal and federal staff on specific projects helps to maintain communication and consistency with federal requirements based on a case-by-case review. Understanding of the federal perspective carries over to other projects that are not directly scrutinized by the federal agencies.
- Federal review of certain types of permit applications provides for necessary coordination with other federal regulations (e.g. potential impacts to listed species, or to hazardous waste sites). If there was no provision for federal review and comment, an alternative mechanism would be needed to address the requirements of federal resource programs. Coordination with other federal programs is discussed under the Special Topics section.
- Federal input ensures that the concerns of adjacent (upstream, downstream) states or tribes are addressed.
- Federal comments and technical assistance often support state/tribal decisions on projects with large impacts.

Given that state/tribal regulations must be in accordance with federal requirements, and that EPA relies heavily on information gathered by the states, disagreements between state and federal reviewers are uncommon. In Michigan, where tens of thousands of permits have been issued since program assumption in 1984, there have only been 8 situations in which the state issued a permit over the objection of EPA – resulting in reversion of §404 processing to the Corp. In the vast majority of these cases, issuance of a permit was the result of a legal appeal of the state's action. In these instances, where a state permit is issued by order of a court or an administrative review process, reversion of §404 processing to the Corps provides the applicant with an avenue to pursue a parallel review and appeal through the federal system. In New Jersey, which



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assumed the program in 1994, there has been one permit that reverted to the Corps for processing.

Alternate options for state/tribal federal coordination. Many states and tribes play a significant role in the regulation of dredge and fill activities in wetlands and other waters, but do not assume administration of §404. State/tribal roles may range from review of federal actions under the §401 Water Quality Certification Process and/or state Coastal Zone Management programs, to administration of a separate state/tribal permit program, to a high level of coordination and responsibility for permit review under an (S)PGP issued by Corps district offices. These types of programs may serve as steps to full assumption, or may represent a decision by the state/tribe regarding the desired level of participation. While this handbook is focused on §404 assumption, the value of other approaches is also recognized, and consideration of assumption may lead a state or tribe to a different option.

#### THE PROs AND CONs OF STATE OR TRIBAL §404 ASSUMPTION

State/tribal administration of the §404 program provides distinct benefits in terms of regulatory streamlining, resource protection, and integration with other state/tribal resource management programs. Along with these benefits, the state accepts added responsibility, finance administration of the program, and must be willing to work in partnership with the federal resource agencies. This section will discuss some of the major pros and cons that should be taken into account by a state or tribe that is considering this action.

##### Benefits of state §404 program assumption

Regulatory streamlining. The most apparent benefit of state/tribal §404 program administration is the reduced duplication between state/tribal and federal permit programs, and overall streamlining of the regulatory process. Many states have established comprehensive regulatory programs to protect the integrity of state waters and wetlands —often in coordination with other land and water management approaches (e.g. floodplain management, zoning and other land use regulations). If state/tribal regulations are consistent with federal requirements, then parallel state and federal permits are duplicative and wasteful of government time and resources.

The total cost for wetland permits issued to transportation agencies, local government agencies, as well private industries can be significantly reduced by reducing duplication of state/tribal and federal permit requirements. Elimination of duplicative permit requirements reduces the

*In New Jersey prior to §404 program assumption, wetlands were regulated at the federal, state, county and local levels. In the state legislation that supported program assumption, many water regulations were consolidated in one level of government and one agency, reducing duplication.*

*While this approach provides significant streamlining of the regulatory process, some parties may be concerned with a loss of local control.*

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regulatory burden on the public, and as a result support for wetland and aquatic resource protection may increase. The CWA and EPA's assumption regulations are structured to ensure opportunity for federal input on projects and coordination with related federal programs. However, it is expected that most routine permitting decisions will be made independently by the state or tribe.

In addition to the elimination of duplicate permits, state/tribal assumption streamlines regulations in the following ways:

- Reduced time for review of regulated activities. Many state/tribal permit programs can make regulatory decisions in a more timely manner than the federal program – a significant factor for the business community.
- State/tribal administration of §404 replaces the §401 water quality certification process. Where a §404 permit is issued by the state or tribe under state/tribal law, then §401 certification is not required (i.e. there is no federal action). This does not change the essential water quality requirements under §404 – the state/tribal program must still ensure compliance with state/tribal water quality standards in conformance with the 404(b)(1) guidelines. However, a separate review process is unnecessary.
- State/tribal assumption supports and encourages full integration with other state/tribal regulatory review. Permitting decisions may be integrated with a wide range of other state/tribal requirements, ranging from Coastal Zone consistency to floodplain regulations, decisions regarding hydropower projects, or state/tribal protection of endangered species or habitat.
- Improved coordination with other state/federal programs. For example, coordination with state/tribal transportation programs or construction programs may be facilitated.
- Improved coordination and consistency in states/tribes with multiple Corps districts. Based on the experience of Michigan and New Jersey, assumption of the §404 program may result in consolidation of remaining Corps permit activities into a single district, or at least reduce the number of districts active in the state. Administration of the §404 program by the state/tribe will improve consistency across the state/Indian Country.

Improved resource protection. Although various agencies and organizations may be concerned that state/tribal assumption could result in a loss of federal protection under the Clean Water Act, a review of EPA's state §404 program assumption regulations makes it clear that federal standards must be maintained under a state/tribal administered program. Administration of a program at the state or tribal level of government actually has the potential to improve protection or management of resources – particularly those subject to cumulative smaller impacts—for a variety of reasons.

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- Increased staff levels. State/tribal 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. State/tribal resource managers frequently have extensive knowledge of local resource values, condition and issues. They may be aware of the presence of locally rare resources, or conditions that threaten those resources. State/tribal staff also typically work closely with local units of government, including agencies responsible for overall land use and development, and with related state/tribal programs that manage fish, wildlife and water resources.
- Regulations are tailored to address specific policies and needs of state and tribes. Water management policies vary across the nation – for example, protection of riparian areas in an arid western landscape differs significantly from management of vast tidal wetland resources in southern states, or forested northern wetlands. State/tribal §404 programs maintain basic national goals, while tailoring regulations to make sense and work effectively and efficiently within the local or regional context.
- Potentially broader regulation under state or tribal jurisdiction. In some states and tribes, regulated waters are defined more broadly than federal jurisdiction. A combined state/federal program may therefore provide more comprehensive protection for isolated wetlands and other unregulated waters that are important for protection and management of state/tribal water resources and habitat. State or tribal/ federal programs can also integrate regulation of other activities, such as drainage.
- Integration with other state/tribal management of resource management and land use. As state/tribal and federal wetland programs have matured, it has become apparent that wetland protection and management is frequently most effective in the context of broader resource protection—especially consideration of watershed level functions and values. The loss of public benefits provided by wetlands becomes more apparent when considering cumulative losses of functions and values on a watershed scale.

State, tribal and local government agencies operate numerous programs to address water quantity and water quality issues, to encourage protection of wildlife habitat corridors and greenspace, and to address other local values. The § 404(b)(1) Guidelines require consideration of these same issues. State/tribal administration of the §404 regulatory program can support state/tribal watershed programs, while avoiding state and federal duplication in the review of wetland permit applications.

In Wisconsin, the state's dredge and fill permit program is coordinated with lake shoreline protection through special state zoning provisions.

Oregon protects water resources as one component of the statewide land use planning program.

In New Jersey, state regulations recognize the importance of protection buffer zones around wetlands as one component of regulation.

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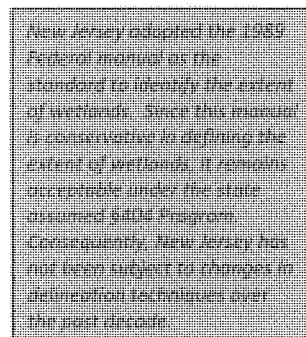
Other benefits. States and tribes will likely identify a number of other positive benefits for the agency and the public. Examples include

- Public acceptance. Many complaints about wetland regulation are based on permit procedures, rather than on the need for wetland protection. To the extent that wetland regulation is made more efficient, less duplicative, and more specific to the state/tribe, resistance to regulation is reduced.
- Access to state/tribal appeal processes and courts. The program requirements for public input are discussed under special topics. However, in many states/tribes the public – including both permit applicants and citizens who may be impacted by a proposed project – may have more ready access to appeals (including administrative appeals or state/tribal courts) than is perceived to be available in federal permit programs.
- Program stability. Although state/tribal and federal programs are both subject to changes in law and policy, the desire to maintain state or tribal and federal consistency can buffer these changes. As long as the state/tribe is committed to program administration, amendments that would result in withdrawal of state/tribal authorization are less likely. At the same time, changes in federal law and policy will impact the state or tribe only to the extent that state/tribal laws are amended accordingly. As a result, state/tribal administered programs have tended to be more stable, and less affected by individual legal decisions or procedural modifications.
- Consistency in permit decisions. Eliminating issuance of duplicative permits from the state or tribe and the Corps (often from multiple Corps district offices) will reduce inconsistencies in permit decisions or conditions from the perspective of the applicant.

#### Potential obstacles and disadvantages

The fact that only two states (Michigan and New Jersey) have assumed the §404 program since 1977 is a reflection of the challenges associated with this process. States/tribes should be aware of the following concerns or potential barriers when they seek §404 program approval.<sup>3</sup>

Need to demonstrate jurisdiction over all waters of the United States. In order to administer the §404 program, a state or tribe must – at a minimum – have regulations in place that provide jurisdiction over all waters of the United States (other than those waters retained by the Corps under



<sup>3</sup> The EPA presented a more detailed review of potential barriers to assumption to ASWM and Society of Wetland Scientists members. This powerpoint presentation is available through the ASWM Section 404 assumption webpage, under Wetland Programs.

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§404(g), and, for states, lands held in trust for the tribes). The scope of federal jurisdiction is very broad, including most wetlands, lakes, streams and tributaries, and tidal waters as established by regulation and implemented consistent with U.S. Supreme Court decisions in SWANCC and Rapanos.

If the jurisdiction of a state/tribal program is limited, e.g. if the state/tribe does not regulate small wetlands, tributary streams, or some other category of regulated waters, state or tribal law would need to be amended prior to program assumption.

Need to demonstrate consistency between state/tribal and federal regulations. State/tribal regulatory authority must include all activities regulated under §404. The state/tribal program must be consistent with the §404(b)(1) Guidelines and all other parts of the federal program. Some states have found that their existing permit exemptions exceed what is allowed under the Clean Water Act. Closing these gaps may prove to be a significant political challenge, even though the assumption program provides overall regulatory streamlining.

When a state or tribe requests approval to administer the §404 program, the EPA will thoroughly compare state and federal regulatory standards. States/tribes are allowed a degree of flexibility in the structure of the state or tribal program, language, and policies, but ultimately the “no less stringent than federal requirements” standard must be applied. This issue is discussed in more detail in the section on Special Topics. At a minimum, the state/tribe should anticipate that a detailed legal evaluation will be required, with the assistance of legal counsel.

It should also be noted that the state/tribe must *maintain* federal consistency. Changes in state/tribal law or regulation – whether arising from the state legislature, tribal council, or the courts—must be reported to EPA and evaluated for consistency. The state or tribe will also be expected to be responsive to future changes in *federal* law or regulations, with parallel changes in state/tribal provisions as needed. For example, promulgation of federal regulations defining §404 program mitigation requirements in 2008 in turn required a fresh evaluation of parallel state standards in Michigan and New Jersey. Some state lawmakers object to this influence on state regulations, although in Michigan and New Jersey it has generally been accepted given the overall benefit to the state.

Potentially high percentage of waters that must remain under Corps jurisdiction. For some states/tribes – particularly coastal states – the extent of jurisdiction that would be retained by the Corps is itself an impediment to program assumption. In states/tribes where jurisdiction over a high percentage of waters would be retained by the Corps, assumption may be seen as less beneficial. In Michigan and New Jersey, program benefits were viewed as outweighing this limitation.

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#### Financial cost.

- Initial evaluation and development of a state-tribal program. The initial cost of program assumption, which includes development of a full application, modifications to the state/tribal program to achieve consistency, development of procedures for coordination with federal agencies, and educating the public regarding the change in state/tribal and federal roles, can also 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.
- Operation of state/tribal §404 program. There is no dedicated source of funding for administration of state/tribal §404 programs. A state may allocate a portion of CWA Section 106 water program funds to the state/tribal wetland program, but in reality this source is already severely constrained by the needs of other programs. The cost of compliance and enforcement should not be underestimated, as it may add significantly to an existing program.

*When the Commonwealth of Virginia considered assumption of the §404 program, a number of issues were considered. However, the anticipated cost of the program was such that further consideration was ended.*

*Virginia estimated that in order to provide additional services similar to those provided by the Corps – including verification of wetland delineation – the annual budget for the state program would increase by \$5-6 million.*

It should be noted that many states and tribes already expend funds operating a state permit program or §401 certification program. For these states, the added cost of state assumption may not be significant, depending upon the scope of the current program.

Political will & public desires. Multiple interests groups from both sides of the political spectrum may have serious concerns about the impact of state/tribal program assumption. Environmental or conservation groups may initially view a state/tribal program as less protective than the federal program. The regulated public may see assumption as an expansion of overall permit requirements. For state legislators and tribal councils, cost of the regulatory program may be the primary concern.

The state/tribe will need to gauge public support, and initial public understanding of the program. As policy makers, permit applicants, and interested citizens gain knowledge of how §404 program assumption alters the division of responsibility for wetland management among state/tribal and federal agencies, support may increase. When all parties understand the dynamics of the proposed change, then the overall cost to the state, including the cost of staffing the state/tribal program and the relative cost in time and fees for permit applicants, must be weighed against public desires regarding resource protection programs. Each state/tribe is advised to openly weigh state/tribal and federal roles, and to determine which approach to wetland management best matches programmatic as well as public goals and support.

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<p><b><i>How does the Section 404 program differ from Section 402?</i></b></p> <p>Many state and tribes are familiar with the regulation of discharges through the National Pollution Discharge Elimination System (NPDES Program) under §402 of the Clean Water Act. Although there are similarities between the §402 and §404 programs, there are also distinct differences.</p>	
<b>§402 (NPDES)</b>	<b>§404</b>
Regulates the ongoing discharge of pollutants to waters of the U.S., setting pollution limits for each 5 year period.	Regulates placement of dredge or fill material in wetlands, lakes and streams. The permit is typically in effect only until changes are completed, but shall not exceed a 5 year period.
Permit limits may be modified in future based on monitoring data.	Changes are typically permanent.
Permit applicants are typically businesses or municipal facilities that are familiar with permit requirements.	High percentage of permit applicants are individual landowners who have limited understanding of environmental regulations.
Regulated discharges are typically to public waters.	Regulated activities in wetlands are often located on private land.
Public notice is typically in the form of a draft permit, including limits set by agency.	Public notice is typically issued upon receipt of a complete application, seeking input on the proposed project from all interested parties.
Compliance relies heavily on monitoring and reporting by the permit holder.	Violations may be reported by observations of numerous individuals; resolution may require restoration of the damaged site.
Administration of the program by a state or tribe may be phased in over time. A state or tribe may request approval to administer only some of the discharge categories.	Partial administration of the program by a state or tribe is not allowed; the state must simultaneously assume administration of all components of the §404 program.
No dedicated source of funding; however, typically funded in part by federal §106 funds.	No dedicated source of federal funding. While §106 funds could be used, these funds are typically committed to other essential programs.

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#### GETTING ORGANIZED

A full consideration of §404 program assumption will require technical input from program managers, as well as legal assistance, in order to evaluate implications for state/tribal resource protection, related state/tribal policies, and the regulated public. This may require months or years to complete. Therefore, it is recommended that a state or tribe begin with consideration of the broad requirements of the §404 program, how well these requirements mesh with state/tribal goals, and the extent to which equivalent state/tribal programs are already in place. Then if the state/tribe wishes to proceed with assumption, a more detailed legal assessment will be required.

Keep in mind that materials developed to help a state/tribe make a decision regarding assumption, such as a legal comparison of state/tribal and federal authorities, will also be a component of the state or tribe's formal application for assumption if it decides to proceed. Therefore, the basic requirements for an application for assumption should be reviewed at the outset to avoid repeating a step. Wetland Program Development grants can be applied for to help fund the work needed to fully consider and prepare for state or tribal assumption of §404.

While the circumstances of each state or tribe will be unique, the state/tribe may wish to begin with the following considerations.

***Define state/tribal goals: what is the benefit to the state or tribe? Why is assumption being considered at this time?***

A state or tribe may be motivated to consider program assumption for a variety of reasons—to reduce duplication with federal programs, increase efficiency, and improve business climate; to improve resource management through increased integration with state/tribal programs; or to increase the emphasis on wetlands of particular importance to the state/tribe, including wetlands with regional significance. Provided that the state/tribe's purpose in considering assumption includes maintenance of a level of aquatic resource protection and management at least equal to that established by the federal program, state/tribal administration of the §404 program may be useful in achieving these goals.

On occasion, §404 program assumption is proposed as a means of limiting federal regulation, or reducing federal involvement in state/tribal resource management, without balancing goals for resource protection and management. For example, some states/tribes have inquired about §404 program assumption primarily to facilitate permitting for specific highway or development projects. If the overriding goal is limited to a single purpose, or is primarily to reduce regulation, it is less likely that the state or tribe will be able to implement a successful §404 program, or to coordinate with federal agencies to the degree necessary. A state/tribe in this position may wish to consider other options to expand the state/tribal role, reduce duplication of effort, and improve coordination with federal agencies, short of full §404 program assumption.



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***Is there public support for comprehensive administration of a dredge and fill permit program by the state or tribe?***

In addition to resource protection goals, a state or tribe must either have – or be willing to develop – a comprehensive permitting and enforcement program that ensures compliance with federal standards. The political will for development - and continuation—of this program should be assessed, taking into account support from the public and private sector. A wide range of interests may support state/tribal level regulations for different reasons. Conservation and environmental agencies and organizations may understand the benefits of a more localized program that is integrated with other state/tribal programs while maintaining federal standards, or may fear loss of resource protection. Business and development interests may understand the benefit of more expedited, and less duplicative regulation, or may oppose an expansion of the state or tribe's role. The interests of multiple stakeholders should be considered in terms of long-term program support.

***Inventory existing state/tribal statutes and regulations: are basic program requirements met, or is there support for amendment of the current program?***

Does the state or tribe have an adequate permit program in place under *state* law, providing the appropriate state/tribal agency with the authority to issue or deny permits, and authority to enforce regulations? Undertake an initial side-by-side comparison of state/tribal and federal:

- ***Jurisdiction*** over waters of the United States, including wetlands. Does the state/tribe have jurisdiction over all assumable waters?
- ***Authority to regulate*** all actions regulated under §404.
- ***Exemptions***. State/tribal exemptions cannot be broader than federal exemptions.
- ***Permitting standards***. A state/tribe cannot issue a §404 permit that does not provide the same level of protection as the 404(b)(1) Guidelines and other federal regulations.
- ***Compliance and enforcement***. A state/tribal program must have authority to enforce compliance with permits, and to address violations of permitting requirements. This includes the ability to assess appropriate fines and penalties, and to provide for public participation in the compliance program.

The state or tribe's authority to administer a permit program may rest on both primary statutes such as a statewide (nontidal) wetland law, and related authorities – e.g. floodplain regulations, coastal zone regulations, shoreline zoning requirements, dam safety laws, and so on. For example,

- ***The scope of jurisdiction*** over waters and wetlands may be defined in state/tribal water quality standards, in specific dredge and fill statutes or regulations, in broader water authorities, or in state/tribal land use regulations (e.g. authority to regulate shorelines)
- ***Compliance and enforcement requirements*** may be found in multiple state/tribal regulatory authorities, in administrative procedure requirements, or in other state or tribal laws.

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Each state/tribal agency that will implement the program must be authorized to make use of all necessary authorities. It should be assumed that assistance from in-house counsel, or the state Attorney General or Tribal Attorney, will be needed to identify all authorities in a final page-by-page assessment. This assessment, and certification of authority by the Attorney General/Tribal Attorney, will be one of the key components of an application for §404 program assumption.

***Identify gaps: what additional regulations, staffing, funding, or enforcement authority would the state/tribe need to assume the §404 program?***

If the state or tribe does not currently have permitting authority needed to provide the same level of resource protection as federal law, then it will have to develop or revise its regulations to be consistent with and at least as stringent as federal law. At this stage, if not before, it is advisable to evaluate public support for the change, and to work closely with the EPA to determine as specifically as possible what changes would bridge the gap.

Staffing and financial resources. The extent of funding and staff resources needed to sustain a state or tribal §404 program should be estimated, and sources of potential funding identified. An application for program assumption will require both an annual budget, and a workload analysis defining staffing needs<sup>4</sup>. Additional information regarding program costs is included in the Special Topics section.

If a state or tribe already administers a comprehensive permitting and enforcement program, then the *added* cost of coordinating with EPA under a state/tribal §404 program may be minimal. In Michigan, one full-time position is dedicated to coordination with EPA and program reporting, and the time needed for federal coordination is estimated to require the equivalent of three additional permitting staff statewide. By comparison, New Jersey requires less than one full-time position to coordinate with EPA. For programs that must expand permitting requirements or enforcement actions, a significant new amount of funding may be necessary.

***Develop a strategy: what is the best approach to meeting state or tribal goals given the requirements of the federal program and limits on the state/tribal program? Is it advisable to seek program assumption, or are other program options a better first step?***

Following a review of the program requirements and an assessment of its current status, the state or tribe will make a preliminary decision about program direction, and the most logical means of improving state/tribal wetland protection and management.

- ***If the state or tribe determines – based on discussions with EPA – that it has an established regulatory program that is essentially consistent with federal §404 program requirements, it may decide to proceed with the assumption process.*** The state may

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<sup>4</sup> The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) developed a *State Water Quality Management Resource Model* in 2001 that may assist a state or tribe in analyzing workload requirements (*add citation*).

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then outline a strategy to proceed with development an application for assumption that is likely to include the following actions.

- A stakeholder process that identifies the concerns of all interest groups, and provides an ongoing source of information to the public
  - Amendment of state/tribal regulations as needed. The timeframe for legal amendments or rulemaking will in turn dictate the timeline for assumption
  - Further definition of funding and confirmation of the availability of funds in coordination with the state/tribal budget process
  - Discussions with all other impacted state, tribal, federal and local agencies
  - Development of supporting materials such as staff guidelines and permit application forms, and a means of documenting permit decisions
  - Training staff in new procedures and requirements
  - Notification of the public of the shift in permitting responsibility
  - Full documentation of the state/tribal program as needed for the application for assumption.
- ***If the state or tribe does not currently have the basic legal capacity to assume administration of the §404 program, but has support for increasing responsibility for wetland protection, it may take steps to build the needed capacity.*** Numerous possibilities are available, depending upon the status of the state/tribal program. The state may wish to consider the following.
  - Building support for the state/tribal program through establishment of a stakeholder group to assist in definition of an appropriate course of action, and to further educate stakeholders regarding state/tribal administration of §404
  - Coordination with EPA to further define changes that are needed for program assumption, and to inform the federal agencies of the state or tribe's long-term plans
  - Increase state or tribal responsibility relative to §404 permitting. If the state/tribe does not currently have a process for coordinating regulatory review with the Corps, possible development of an (S)PGP, or review of §404 permit applications through an expanded §401 Water Quality Certification Process. These programs may provide the state/tribe with useful experience and a greater understanding of the federal program, and/or provide an opportunity to demonstrate and document state/tribal capabilities.
  - Pursuing modifications of state/tribal regulations as needed to meet federal requirements.
- ***If public support for an increased state regulatory role is lacking, the state/tribe may wish to build its wetland program using other approaches.***
  - Focus on a wetland outreach program to build public understanding of wetland functions and values, and the role of regulation. Assist policy makers in understanding approaches for streamlining state/tribal and federal regulations.

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- Development of a more limited (S)PGP to gradually build capacity and experience, consistent with existing state authorities
- Development of the state/tribal wetland program through non-regulatory approaches, such as assessment of wetland condition, mapping, and public education to build state/tribal expertise while supporting effective wetland protection and management.

#### APPLICATION REQUIREMENTS

The *final* step in the process for approval of a state or tribal §404 program is initiated by formal submittal of a detailed description of the state or tribe's program to the Regional Administrator of the EPA, with a request for approval of the program from the Governor of the State or Tribal Chair. This request must include the following.

*Primary requirements:*

- *A letter from the Governor of the State or Tribal Chair, requesting program approval and formally transmitting the request to EPA.*
- *A complete program description.*
- *A statement by the Attorney General or Tribal Attorney that the laws and regulations of the state/tribe provide adequate legal authority to carry out the program and to meet the applicable requirements of federal law. That is, the appropriate state/tribal agency has authority to review permit applications, and to issue permits to regulate dredge and fill activities in assumable water, as well as to enforce regulations for dredge and fill activities in waters of the United States under the state or tribe's jurisdiction.*
- *A Memorandum of Agreement with the Regional Administrator.*
- *A Memorandum of Agreement with the Secretary [of the Army].*
- *Copies of all applicable state/tribal statutes and regulations, including those governing applicable state/tribal administrative procedures.*

*Reference: 40 CFR §233, Subpart B.*

Letter from Governor or Tribal Chair requesting approval. Once EPA receives a complete package and request for assumption from the state governor or tribal chair, it must determine whether to approve the state/tribal program within 120 days<sup>5</sup>. This schedule in practical terms

<sup>5</sup> This 120 day time frame may be extended if the Administrator and Governor/Tribal Chair agree.

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means that all elements of the state or tribal program should be in place prior to program submittal, and agreement must have been reached with the EPA Regional Administrator and the Corps District Engineer as to how the program would be operated if approved.

The program description must include a detailed discussion of the scope and structure of the state or tribal regulatory program. These include

- A description of the scope and structure of the state/tribal program. This includes the extent of state/tribal jurisdiction; activities regulated, permit exemptions, permit review criteria and program coordination;
- State or tribal procedures for permitting, administrative and judicial review, and program operation;
- A description of the organizational structure of the state/tribal agency or agencies that will administer the program;
- A workload analysis including a description of staff and financial resources;
- Copies of permit application forms, permit forms and reporting forms;
- A description of state/tribal compliance and enforcement programs, and means of coordination with the EPA and the Corps;
- A description of waters where the Corps will retain jurisdiction; and
- A description of best management practices that will be used to satisfy requirements in the §404 program exemptions for the construction of farm, forest and temporary mining roads.

**Note that when completed, the program description may essentially serve as an operating manual for the state or tribal program, and as such will be useful not only in approval of the program, but as a reference during program administration.**

A state or tribe may find it useful to compare its permit process and requirements with the permits issued by the Corps (including Nationwide General Permits), to help determine whether its program will meet federal requirements. Although specific processes may vary, the overall scope of permit application review and the basic type of permit issued must ensure that wetlands and other aquatic resources are protected in accordance with federal standards. For example, the state might determine whether any activities authorized under a state or tribal general permit process are given more intense scrutiny and individual public notice under the Corps program.

The statement of the Attorney General or Tribal Attorney will include a detailed comparison of state/tribal and federal authorities, which will also be a useful ongoing reference for the state or tribe. This legal documentation must also address specific issues such as state takings law and jurisdiction over Indian lands. Note that the Attorney General/Tribal Attorney's statement is based on laws and regulations in effect at the time of signing; that is, state/tribal law must be modified as necessary to qualify for §404 program assumption before the final request for assumption is submitted. In Michigan's experience, EPA has twice requested that the basic statement by the Attorney General be updated following major changes in the state program, e.g. reorganization of state agencies.

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Memoranda of Agreement (MOAs) with the Corps and with EPA must be signed prior to a formal request for program approval. These agreements will become effective upon approval of the state or tribal program. The content of these agreements is discussed below under Special Topics. MOAs should be negotiated well in advance of the expected date of the program submittal to allow adequate time for administrative review and signature at both the state/tribal and federal level. Following program approval, these documents may be amended from time to time by the parties.

The state or tribe may also find it helpful to enter into MOAs with other state/tribal agencies where more than one agency holds responsibility for components of program operation, or with other federal agencies – in particular the USFWS. While such agreements are not a mandatory component of the program submittal, the state or tribe must document in some manner how it will coordinate among agencies.

Public review and comment Following submittal, the EPA must publish notice of the state or tribe's application in the *Federal Register*. The EPA will provide for a public hearing in the state. The state/ tribe should be prepared for this review – both through ongoing discussions with interest groups, and through preparation of explanatory or supporting materials.

## SPECIAL TOPICS

### Interpreting “No Less Stringent Than”

#### *Primary requirements:*

- *States must have the authority to issue permits which “apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under section (b)(1) of this section, and sections 301 and 403 of this Act...” (CWA Section 404(h)(1)(A)(i))*
- *“Any approved State Program shall, at all times, be conducted in accordance with the requirements of the [Clean Water] Act and of this Part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose”. (40 CFR §233.1 (d))*
- *“No permit shall be issued by the Director [of the State Agency] in the following circumstances: (a) When permit does not comply with the requirements of the Act or the regulations... including the Section 404(b)(1) Guidelines...” (40 CFR §233.20)*

The essential requirement that state/tribal programs be no less stringent than federal programs appears fairly straightforward. However, based on the states' experience to date, differences of opinion may arise regarding the specific requirements of a state or tribal program as compared to federal law.

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In large part, this results from the difficulty of directly comparing the language of two different regulations. Even where state or tribal law is drafted with the intent of meeting federal requirements, it is unlikely that the format and wording will be identical. For any party who is concerned with how a regulation may be interpreted in the future by regulatory agencies or the courts, differences in language can raise questions.

The state or tribe may need to supply additional explanatory material to demonstrate how its laws and regulations are interpreted and applied in a manner that is consistent with and “no less stringent than” federal standards. Legal expertise will be needed to compare state/tribal and federal requirements, and to engage in discussions with EPA staff to ensure mutual understanding of both state/tribal and federal programs.

Comparison of state/tribal and federal standards is made more difficult by the fact that many decision points in wetland permit programs require a degree of professional judgment. For example, the 404(b)(1) Guidelines prohibit issuance of a permit if the proposed discharge, “*will cause or contribute to significant degradation of waters of the United States.*” The federal guidelines detail factors that should be considered, and require not only professional expertise, but consideration of comments received from others during the public comment period. During an application for §404 program assumption, the federal agencies may ask to review state/tribal guidance documents or legal decisions that demonstrate how state/tribal laws are interpreted as compared to federal requirements. Thus, program experience is very helpful in documenting state or tribal approaches.

Finally, it is essential to understand that the basic foundations of parallel state and federal regulations will differ – even though regulatory goals may be fully shared. The CWA relies heavily on the authority of the federal government to regulate interstate navigation and interstate commerce, along with other federal authorities. By contrast, states/tribes regulate resources within their borders based on the constitution and laws of the state, including land use authorities, water rights (riparian or appropriation), the duty to protect public trust resources, and other public health and welfare authorities, as well as police powers.

One option for limiting these consistency issues is to adopt the 404(b)(1) Guidelines by reference into state/tribal regulations. However, this is not a requirement for program assumption.

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State – Federal Consistency: three examples from Michigan's §404 Program <sup>6</sup>		
Federal provision	Parallel state provision	Decision on consistency
Is a state exemption consistent with this federal exemption?  "The following activities are exempt from Section 404 permit requirements... Normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products... To fall under this exemption, the activities... must be part of an established (ongoing) operation". (Excerpt from §404(b)(2)(2), 33 USC)	Original state language:  "The following uses are allowed in a wetland without a permit... Farming, horticulture, silviculture, lumbering, and ranching activities including plowing, irrigation, drainage, ditching, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products..."	State language and local requirements may differ to an extent, but the exemption cannot be broader than the §404 exemption.  • EPA questioned whether "lumbering" and "horticulture" were covered by the federal exemption. Based on additional information from the state, explaining how horticulture and lumbering fit within the federal exemption, it was determined that this state provision is acceptable.  • EPA also objected to the fact that the state exemption does not include the word "normal" and does not expressly limit the exemption to established operations, even though this is how the Michigan has interpreted its exemption. An amendment to state law to add "established" is being sought.

<sup>6</sup> These examples are drawn from a review of Michigan's program more than a decade after program assumption. This informal review was intended to determine whether state regulations were still consistent with federal requirements after multiple amendments of both programs. Please note that the federal review considered significantly more detailed state and federal regulatory language than is summarized here.



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<p>Can state language with a different legal foundation be consistent with federal review criteria?</p> <p>"...no discharge of dredged or fill material shall be permitted which will cause or contribute to the significant degradation of the waters of the United States... effects contributing to significant degradation include... significant adverse effects... on human health and welfare... on the stages of aquatic life and other quality... on aquatic ecosystem diversity, productivity and stability... on recreational, aesthetic, and economic values" (Excerpt from 404(b)(1) guidelines)</p>	<p>State language reflecting concern with riparian property rights and public trust issues:</p> <p>(For inland lakes and streams):</p> <p>"The department shall issue a permit if it finds that the project will not adversely affect the public trust in riparian rights... the department shall consider the effect... upon the inland lake or stream and upon waters from which and into which its waters flow and uses of all such waters, including... recreation, fish and wildlife, aesthetics, local government, agriculture, commerce and industry. The department shall not issue a permit if the project will unduly impact or destroy any of the waters or other natural resources of the state. This part does not modify the rights and responsibilities of riparian owners" (Note: applies to inland lakes and streams)</p> <p>(Michigan has separate regulations for wetlands.)</p>	<p>The state's basic criteria for issuance of a permit to impact inland lakes and streams were found to be consistent with the requirements of the 404(b)(1) Guidelines.</p> <p>(Note that EPA did not object to state language regarding the underlying state emphasis on riparian rights and protection of public trust. State and federal language were found to be consistent because the state law provides protection of the resource that is at least as stringent as federal law.)</p>
<p>Must a state law be modified to reflect changes in a federal law or regulations, if the state requirement is at least as stringent as the new requirement?</p> <p>"The mitigation banking instrument may allow for initial banking of a percentage of the total credits projected or mitigation bank maturity."</p>	<p>State regulation, based on long established policy:</p> <p>"The department shall not outpace the use of credits from a mitigation bank in advance of initial restoration or creation of wetlands in the bank..."</p>	<p>A potential mitigation banker challenged Michigan's rule prohibiting advance mitigation credits after promulgation of the federal rule. EPA determined, after an internal legal review, that the state language reflects an acceptable difference in state policy, providing protection of the resource at least as stringent as the federal program. The state provides mitigation banking credits consistent with federal regulations, but on a different release schedule.</p>

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### Federal jurisdiction and assumable waters

Federal jurisdiction under §404 extends to all “waters of the United States” as defined in the Clean Water Act (40 CFR §232.2). Very generally, waters of the United States include marine and tidal waters, lakes, streams and their tributaries, and wetlands adjacent to all of these waters.

For purposes of §404 program assumption, it is important to know what subset of the waters of the United States are not open to state/tribal assumption. By law, the Corps retains jurisdiction over waters that are, or could be used to transport interstate or foreign commerce, all waters subject to the ebb and flow of the tide, and wetlands adjacent to these waters. Examples include tidal waters, large river systems, and the Great Lakes. Thus, these waters are regulated by the Corps under both §404 and Section 10 of the Rivers and Harbors Act of 1899. The Corps also retains jurisdiction over wetlands adjacent to such waters. All other waters of the United States *must* be under the jurisdiction of the state or tribe that assumes administration of §404. “Partial” assumption is not allowed.<sup>7</sup>

The state or tribe may have *broader* jurisdiction – including for example some isolated wetlands that are not regulated under federal law. Here, permits issued by the state or tribe are not subject to federal regulations. If the state or tribe also has jurisdiction over waters over which the Corps retains jurisdiction, coordination with the Corps is recommended. In Michigan, the Corps and the Michigan Department of Environmental Quality (MDEQ) use a joint permit application form. All permit applications are sent to the MDEQ, which forwards applications that also require Corps authorization to the Detroit District.

The state/tribe may define the method used to delineate wetlands, provided that it results in regulation of all assumable waters. New Jersey adopted the 1989 federal manual. Michigan used its own delineation manual for many years, but recently adopted the Corps 1987 manual together with appropriate Regional Supplements.

### Compliance with other Federal laws (NEPA, ESA, etc.)

Permits issued under a state or tribal §404 program are *state* permits issued under *state* law. For this reason, the provisions of other federal laws that apply to federal permit actions – such as NEPA and Section 7 of the Endangered Species Act – are not applicable. However, the §404 assumption regulations define alternative mechanisms that address many of the environmental goals of related federal programs.

- Review under the National Environmental Policy Act (NEPA) may still be required for projects that make use of federal funding – e.g. transportation, HUD – in order to satisfy the requirements of the funding agency. In addition, many states/tribes have laws that are similar in scope to NEPA. Finally, state/tribal programs must comply with the §404(b)(1) Guidelines, which address some issues covered by parallel NEPA (e.g. consideration of alternatives).

<sup>7</sup> A state is not required to have jurisdiction over Indian Country.

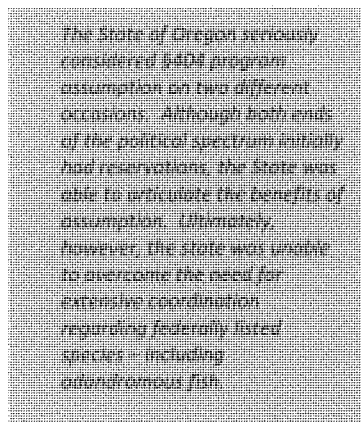
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- Threatened and Endangered Species. Under a state/tribal program, direct consultation with the USFWS under the federal Endangered Species Act is not triggered. However, protection of federally listed species is ensured by alternative mechanisms. First, the EPA must review all applications that have a reasonable potential for affecting federally listed species, and in this review coordinates with the USFWS, as well as the NMFS and Corps as applicable. A state cannot issue a permit that carries §404 authority if the EPA objects to issuance of a permit.

Finally, a state permit must ensure compliance with the 404(b)(1) Guidelines, which prohibit issuance of a permit if it would jeopardize the continued existence of a listed threatened or endangered species or result in the likelihood of the destruction or adverse modification of critical habitat, unless an exemption has been granted by the Endangered Species Committee. (40 CFR 230.10(b)(3))

In Michigan, the state screens permits for potential impacts to federally listed species in cooperation with the state nongame wildlife program, which administers the state threatened and endangered species act. If a proposal is found to have a reasonable potential for impacts to a listed species, a public notice is subject to review by EPA and the USFWS. For minor projects that do not normally require a public notice, the screening process is still followed early in the review of the application, and provisions are made for review by the federal agencies.

New Jersey developed a separate MOA with the EPA and USFWS outlining a coordinated review process for applications that may affect federally listed species, and also coordinates with the USFWS early in the permit application process.



In some states, the need for coordination under the ESA has proven to be a significant impediment to state program assumption. In Oregon, for example, the extent of anadromous fish habitat protected under the ESA is extensive – limiting the potential efficiency of a state program. Florida also recognized the need for quite extensive coordination to protect federal listed species early in its consideration of assumption. This was not the sole barrier to assumption in either state, but it is advisable to investigate the extent of coordination required early in the process of evaluating state program options.

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- Coordination under the National Historic Preservation Act is typically carried out in coordination with the State Historic Preservation Office. In both Michigan and New Jersey, proposals are screened through a computer system for proximity to known historic or archaeological sites. EPA cannot waive review of permits involving discharges within sites identified or proposed under the National Historic Preservation Act. (40 CFR 233.52(b)(6))

Direct review of permit applications and coordination with federal agencies also ensures protection of federally designated wild and scenic rivers, national parks and reserves, and similar sites. The NNFS may review public notices in coastal states and comment through EPA; however the NMFS has waived review of all applications in Michigan. Coordination with state coastal zone management programs is achieved directly through state CZM programs. In short, protection of specially designated federal resources is ensured under a state program, but often through different mechanisms. Attention should be paid to state/tribal and federal coordination.

*Some states – e.g. Kentucky, have initially established a task force to consider the pros and cons of wetland assumption. Although Kentucky ultimately decided against assumption at that time, the task force process built public understanding of and support for alternative approaches to state-federal cooperation.*

*In Wisconsin, the state legislature played a major role in evaluating the option to assume the 404 Program.*

#### **Gaining and Sustaining Public Support**

State and tribal agencies are aware of the need for public support to improve programs to meet federal standards, and to accept the ongoing cost of program administration. Opportunities for public comment are included in the process of applying for federal approval of a state/tribal program – including both hearings and public notices. Normally, the state or tribe will have engaged a variety of interest groups in weighing options for state-federal coordination well before the formal application for assumption.

Various interest groups may express a wide variety of legitimate concerns, and misconceptions, regarding state/tribal assumption. During public review, the following questions and concerns are common.

- *What is the purpose of state/tribal program assumption?*
- *Why should the state consider the additional burden of administering the federal program?*
- *Will the state's water resources be adequately protected?*
- *Why does EPA have an oversight role, including the ability to object to an individual permit?*

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### Funding Considerations

The ongoing cost of a state/tribal §404 program is one of the primary considerations in making a decision on program assumption. In addition, states and tribes should be aware of the initial cost of developing a request for program assumption and initial implementation. States have reportedly spent on the average of \$225,000 to investigate assumption (EPA 2008). Federal financial assistance for assumption planning is available through Wetland Program Development Grants – the EPA has provided this assistance to six of the nine states that have fully considered assumption to date.

Annual costs for ongoing administration of a §404 program will obviously vary from state to state (or tribe to tribe) depending upon the size of the state/tribe and extent of regulated waters (lakes, streams, and wetlands) within the state or tribe, among other factors. Kentucky compared program costs among states as a component of its investigation of assumption. The following estimates include both state §404 programs and other mature state programs:

State	Annual cost	FTEs	
New Jersey	\$3 million	42	(State Assumed §404)
Michigan	\$7 million	86	(State Assumed §404)
Wisconsin	\$3.5 million	27	(State program/RGP)
Tennessee	\$1 million	16	(State program)
Maryland	\$2.4 million	40	(SPGP)
est. to assume 404	+ \$2 million	+ 23 FTEs	

In weighing program costs and benefits, the following may be considered:

- *What is the additional cost of program assumption?*

If the state/tribe has a broad existing program, or already coordinates with the Corps through a general permit process, the additional cost of §404 administration may be minimal.

- *Does the financial benefit to the public offset the cost to the state or tribe?*

To the extent that operation of a combined state/tribal - federal program is more timely and efficient than separate programs, the overall cost to the regulated public may be significantly reduced. It may be difficult to adequately calculate these savings, but business groups in both Michigan and New Jersey have demonstrated a willingness to support program costs in part through increased permit fees to gain an increase in efficiency.

The Kentucky Division of Water received \$250,000 through an EPA State Program Development Grant to investigate §404 program assumption. Funds supported the work of a stakeholder task force, staff legal review and similar tasks.

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- *How would a state administered program be funded?*

There is currently no dedicated source of federal funding for state or tribal §404 program administration. States and tribes are technically allowed to make use of CWA §106 water program funds for operation of a §404 program, but in reality may not be able to shift these limited funds from other programs. State/tribal general program funding, permit fees, and other special sources of state/tribal funding (e.g. special license plates, bottle deposits, etc.) are typically used to finance program operation.

Ongoing administration of a comprehensive state/tribal dredge and fill program – covering all state/tribal waters – is a costly enterprise. In Michigan’s experience, the cost of program compliance and enforcement was initially underestimated. While there are a range of acceptable means of resolving an enforcement issue – e.g. voluntary site restoration, after-the-fact permitting for projects that meet permit standards, and out of court settlements – an ongoing enforcement action can be much more time consuming than review of a typical permit application. Legal action associated with some cases may not be resolved for a number of years. Moreover, while permit fees may cover a significant portion of the cost of reviewing permit applications, these funds may not be available for enforcement actions. Therefore, the state/tribe should fully evaluate the financial and staff resources needed to address all permitting and enforcement needs on an ongoing basis.

#### **Memorandum of Agreement between the state/tribal agencies and EPA Regional Administrator**

##### *Primary Requirements:*

- *Defines state and federal responsibilities for §404 program administration and enforcement, including all state agencies with program responsibility*
- *Defines categories of permit applications for which EPA will waive federal review*
- *Establishes a schedule for reporting and submittal of other information to EPA*
- *Addresses state and federal responsibilities for compliance monitoring and enforcement*
- *Provides for modification of the MOA*

*Reference: 40 CFR §233.13 Memorandum of agreement with Regional Administrator  
40 CFR §233.51 Waiver of review*

A Memorandum of Agreement, signed by the Director of the state or tribal program and the EPA Regional Administrator, is one of the primary requirements of the state/tribe’s request for program assumption, and the application is incomplete without a signed agreement. This agreement must include, at a minimum, the elements outlined above, and will take effect upon program approval.

Essentially, the state/tribe agrees to administer the §404 program in a manner that is in accordance with the requirements of federal laws and regulations. These include a prohibition of §404 permit issuance by the state when the permit is not in compliance with the §404(b)(1) Guidelines or other regulations, and when the EPA has objected to issuance of a permit and the objection has not been resolved.

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One particularly important component of the MOA is the section that defines waiver of permit application review by EPA. The Clean Water Act begins with the premise that EPA may be allowed to review and comment on all §404 permit applications, but that also allows EPA to waive review of all but a select set of categories (e.g. projects that jeopardize federally listed threatened or endangered species, draft general permits, and a number of others).<sup>8</sup> In Michigan, EPA waives review of all but about 1 – 2% of all applications. For categories where direct EPA review is waived, the state reviews applications and makes a decision without federal review (although permit information must be summarized and submitted annually to EPA). The categories of applications subject to federal approval should be defined as clearly and specifically as possible to avoid procedural challenges.

It is also advisable to clearly describe state/tribal and federal roles in compliance and enforcement. Although the state/tribe assumes primary responsibility for compliance and enforcement, the EPA may also assert its enforcement authority – this may be particularly helpful in the instance of a violation that impacts the waters of more than one state or tribe, or a major violation. The state/tribal and federal agencies should determine how and under what circumstances information regarding violations should be provided to the EPA (other than in an annual report).

#### **Definition of continued Corps jurisdiction**

The extent of Corps jurisdiction over wetlands should be defined in an MOA based on an agreed upon criterion. This may be done utilizing maps, by defining a distance from Corps-regulated waters within which the Corps will retain jurisdiction over adjacent wetlands, or by using other readily available information.

Michigan's program relies to an extent on a case by case determination by the Corps, which can result in delays and uncertainty from the perspective of the permit applicant. In New Jersey, the Corps retains jurisdiction over wetland that are within 1000 feet of tidal or interstate waters, as documented in their MOA.

### **Memorandum of Agreement with the Secretary of the Army Corps of Engineers**

#### *Primary Requirements:*

- Describes waters that remain under the jurisdiction of the Corps of Engineers following approval of the state program.
- Establishes procedure of transfer of pending applications and other materials to the state following program approval.
- Defines any general permits issued by the Corps that will be transferred to the state, and a processing for transferring information regarding general permits.

Reference: 40CFR §233.14 *Memorandum of Agreement with the Secretary*

<sup>8</sup> See 40 CFR 233.51 for a list of categories that must be reviewed by EPA.

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A signed MOA between the state/tribe and the Corps (typically through the District Engineer) is a required component of the state/tribe's request for §404 program assumption. This agreement will include the following critical components. First, it will identify waters – and adjacent wetlands – where the Corps will retain jurisdiction for purposes of §404. §404 prohibits transfer of the program to a state or tribe in “waters that are presently used, or are susceptible to use in their natural condition... as a means to transport interstate or foreign commerce... including wetlands adjacent thereto.” (CWA Section 404 (g)(1)). It is suggested that waters which remain under Corps jurisdiction be listed and identified as specifically as possible to avoid case-by-case determinations after state assumption. This is important in order to avoid delays in processing of applications once they are received. It may be easier to define the upstream extent of jurisdiction over major river systems than over adjacent wetlands.

Secondly, the MOA between the state or tribe and the Corps must define procedures for transfer of the program – including pending applications - to the state upon program approval. At this point, the Corps will suspend processing of permit applications in waters identified under the state/tribal program. In theory, the §404 program authority is fully transferred to the state/tribe at a single point in time; at an agreed upon date following program approval, the state/tribal program is initiated and the Corps program is suspended. As a practical matter, the state and the Corps should agree on a schedule for program transfer that recognizes the practicality of action on nearly complete permit reviews by Corps staff, and completion of ongoing federal enforcement actions. In Michigan, the state administered a pilot program for several months prior to full assumption, under federal supervision, and permit files were transferred to the state during this period. States or tribes that have been actively administering a permit program under an (S)PGP may also find it somewhat simpler to transition to state permit processing. An outreach program – explaining the change in permit processing authorities – should be a significant component of the transition period, but is not required under the federal regulations.

Joint jurisdiction Given that a state or tribe may also continue to regulate tidal, coastal, or other waters where §404 jurisdiction is retained by the Corps, the state/tribal-Corps MOA may also include procedures for interagency coordination in such waters. This portion of the agreement may include provisions for a joint permit application process (retaining separate permitting), coordination of review to avoid conflicting permit requirements, coordination of mitigation banks and similar issues.

#### **Public Participation**

One area of uncertainty, or in need of clarification, is what opportunities for public participation does a state/tribe need to provide for in an assumed §404 Program.

States/tribes must provide public notice of and comment on permit applications, draft general permits, potential major modifications of issued permits, public hearings, and issuance of an emergency permit. In addition, states/tribes must allow for and consider requests for public hearings. [40 CFR §233.32, §233.33]



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With respect to enforcement matters, a state/tribe must provide for public participation in the State enforcement process by providing either:

- 1) Authority which allows for a citizen with an interest in or may be adversely affected by an action with a right of intervention in any civil or administrative action or,
- 2) Assuring that the state/tribal agency or enforcement authority will:
  - a. Investigate and provide written responses to all citizen complaints submitted regarding states/tribal procedures
  - b. Not oppose intervention by any citizen when allowed by statute, rule or regulation and
  - c. Publish notice of and provide at least 30 days for public comment on any proposed settlement of an enforcement action. [40 CFR §233.41(e)]

In general, ASWM believes that third parties typically have greater ability to challenge a decision under a state/tribal §404 program because they maintain access to the federal courts for some purposes, while potentially gaining access to state/tribal civil or administrative processes, as well as informal interaction with the state or tribal agencies. However, this issue may need to be addressed on a case-by-case basis when a state/tribe is considering assumption.

#### **Tribal Issues**

In addition to the statutory and regulatory requirements listed above (and at CWA §404 (g)-(l) and 40 CFR 233), tribes must meet a few additional conditions as a result of their unique status and relationship with the federal government.

- Eligibility Tribes seeking assumption must meet the eligibility requirements under §518 of the CWA (40 CFR 233.60-62). These include
  - The tribe is recognized by the Secretary of the Interior
  - The tribe has a governing body carrying out substantial governmental duties and powers
  - The functions to be exercised by the tribe pertain to the management and protection of water resources under their jurisdiction
  - The Administrator believes the tribe is capable of administering the §404 program in accordance with the act.
- Enforcement Authority In general, tribes must meet the same criteria for enforcement as states, however, when tribal enforcement authority does not exist or is precluded from asserting criminal enforcement authority (e.g., for actions against non-tribal members or fines over \$5000), tribes need to refer the criminal enforcement matters to EPA and/or the Corps as outlined in the appropriate MOAs (40 CFR 233.41(f)).

It is recommended that the tribe work closely with EPA and the Corps early in their pursuit of §404 to identify waters under the tribe's jurisdiction as well as the tribal waters over which the Corps will retain §404 jurisdiction.

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**Detailed timeline for review and approval of state/tribal application for §404 program assumption**

Procedures for the approval of a state or tribal program by EPA are detailed at 40 CFR §233.15. This regulation details the 120 day review period that is defined in §404(h) of the Clean Water Act. Specifically:

- Day 1**     **Date of receipt of a complete state/tribal program application.** Note: upon receipt of the application, EPA has 30 days to determine whether the application is complete.
- After determining that the state/tribal application is complete, the RA will publish notice of the application in the ***Federal Register***.
- Day 10**     **Deadline for submittal of application to other federal agencies.** The EPA Regional Administrator (RA) will provide copies of the state or tribe's submission to the Corps, USFWS, and NMFS (both headquarters and regional offices).
- Day 30±**     **Approximate time frame for public hearing.** The RA shall provide for a public hearing, within the state/tribe, not less than 30 days after the notice is published in the ***Federal Register***.
- Day 75±**     **Approximate time frame for public comment.** The ***Federal Register*** notice must provide a comment period of at least 45 days.
- Day 90**     **Deadline for comments to EPA from other federal agencies.**
- Day 120**     **Deadline for EPA decision on the application.** Within 120 days of receipt of a complete application, the RA must either approve or disapprove the application, based on whether or not the state/tribal program fulfills the requirements of the CWA. The RA will also respond to comments received. The EPA Assistant Administrator for Water, the Office of General Counsel, and the Assistant Administrator for the Office of Enforcement and Compliance Assurance will provide concurrence on the decision.
- If the RA approves the state/tribal program, s/he shall notify the state/tribe and the Corps of the decision, and publish notice in the ***Federal Register***. The state/tribal program will not become effective until publication of this notice or until the date specified in the ***Federal Register***.
- If the RA disapproves the state/tribal program application, the RA shall notify the state or tribe of the reasons for disapproval, and revisions needed to gain approval. **If the state or tribe submits a revised plan, the 120 day review process begins again.**
- Day 120+**     The state/tribe and EPA may extend the review period by agreement.

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**LEGAL AND TECHNICAL REFERENCES**

Federal law and regulations may be found on line in standard legal references.

- Federal regulations: <http://www.gpoaccess.gov/fr/index.html>
- Library of Congress – legislative information: <http://thomas.loc.gov/>
- EPA laws and regulations: <http://www.epa.gov/lawsregs/regulations/index.html>

<b>IMPORTANT LAWS AND REGULATIONS RELATED TO §404 PROGRAM ASSUMPTION</b>	
Clean Water Act, Section 404(g) – (l)	Legal authority for state/tribal assumption of the §404 program, and basic requirements
40 CFR Part 230	<b>Guidelines for the Specification of Disposal Sites for Dredged and Fill Material.</b> These are the 404 program Section (b)(1) Guidelines – the detailed definition of criteria for permit application review. A state/tribal program must provide a level of resource protection that is at least as stringent as these standards. Subpart J details mitigation requirements.
40 CFR Part 232	<b>§404 Program Definitions; Exempt Activities not Requiring §404 Permit.</b> Program definitions apply both the federal and state/tribal administered programs. State/tribal program exemptions cannot be broader than federal exemptions.
40 CFR Part 233	<b>§404 State Program Regulations</b> These regulations detail the requirements for approval of a state/tribal §404 program, program operation, federal oversight, and related issues.
Jurisdictional guidance memo  <i>Federal Register</i> , June 8, 2007, page 31824	<b>EPA/Corps Memorandum Re: <i>Clean Water Act Jurisdiction Following the U.S. Supreme Court Decision in Rapanos v. United States</i></b> This June 5, 2007 provides guidance on determining the scope of federal jurisdiction over waters of the U.S.
Proposed new jurisdictional guidance  <i>Federal Register</i> , May 22, 2011	<b>EPA and Army Corps of Engineers Draft Guidance on Identifying Waters Protected by the Clean Water Act</b> <i>[Released April 27, 2011 for public review and comment.]</i>

*August 2011*

Links to helpful information

**Association of State Wetland Managers**

- 404 Assumption Web Pages: <http://aswm.org/wetland-programs/s-404-assumption>
- Descriptions of state programs: <http://www.aswm.org/state-summaries>
- Program funding: <http://aswm.org/wetland-programs/funding>

**Environmental Council of the States**

- General information: [www.ecos.org](http://www.ecos.org)

**Environmental Protection Agency – information on state assumption**

- State assumption: <http://water.epa.gov/type/wetlands/outreach/fact23.cfm>
- Funding for core state/tribal wetland programs:  
[http://water.epa.gov/grants\\_funding/wetlands/cefintro.cfm#whatEPA 401 wiki](http://water.epa.gov/grants_funding/wetlands/cefintro.cfm#whatEPA_401_wiki)
- Proposed Clean Water Act Guidance:  
<http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm>

**U.S. Army Corps of Engineers**

- Corps of Engineers regulatory information:  
[http://www.usace.army.mil/CECW/Pages/cecwo\\_reg.aspx](http://www.usace.army.mil/CECW/Pages/cecwo_reg.aspx)

**University of North Carolina – sustainable funding for wetland programs**

- <http://www.efc.unc.edu/projects/wetlands/>

*August 2011*

**List of Acronyms and abbreviations**

ASWM	Association of State Wetland Managers
CFR	Code of Federal Regulations
Corps	U.S. Army Corps of Engineers
CWA	Federal Clean Water Act
CZMA	Coastal Zone Management Act
ECOS	Environmental Council of the States
EPA	U.S. Environmental Protection Agency
ESA	Federal Endangered Species Act
NEPA	National Environmental Protection Act
NMFS	National Marine Fisheries Service
NPDES	National Pollutant Discharge Elimination System
RA	Regional Administrator (of EPA)
(S)PGP	(State) Programmatic General Permit
SWS	Society of Wetland Scientists
USFWS	U.S. Fish and Wildlife Service
\$401	Section 401 of the Federal Clean Water Act
\$404	Section 404 of the Federal Clean Water Act
Section 10	Section 10 of the Rivers and Harbors Act



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

DEC 27 2010

OFFICE OF  
WATER

Mr. R. Steven Brown  
Executive Director  
Environmental Council of the States  
444 North Capitol Street, NW  
Suite 445  
Washington, DC 20001

Ms. Jeanne Christie  
Executive Director  
Association of State Wetland Managers, Inc.  
32 Tandberg Trail  
Suite 2A  
Windham, ME 04062

Dear Mr. Brown and Ms. Christie:

Thank you for your letter of December 6, 2010, regarding the applicability of the Endangered Species Act (ESA) §7 consultation requirements to EPA's approval of a state or tribe's (hereafter "state") application to assume Clean Water Act (CWA) §404 permitting authority

You have asked whether or not EPA needs to engage in a §7 consultation with the US Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) (hereafter "the Services") when it authorizes a transfer of §404 permitting authority pursuant to §404(g) and (h) to a qualified state. A 2007 US Supreme Court decision, *National Association of Home Builders v. Defenders of Wildlife*, sheds considerable light on this matter. 551 US 644 (2007). In this decision, the Court held that, "[s]ince the transfer of NPDES permitting authority is not discretionary, but rather is mandated once a State has met the criteria set forth in §402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger §7(a)(2)'s consultation and no-jeopardy requirements." *Id.* at 673.

Although there are some differences between §402(b) and §404(h), EPA believes that the Court's rationale in the *Defenders* case applies to EPA's transfer of the §404 permitting program. In making the finding, the Court upheld the FWS and NMFS regulations that limit §7 applicability to "discretionary federal actions." *Id.* at 665-71. The Court held that EPA is not acting with discretion when it transfers a §402 program to a state that meets the statutory criteria under §402(b)(2) and, therefore, §7 consultation is not required. The Court noted that "[w]hile EPA may exercise some judgment in determining whether a state has demonstrated that it has the authority to carry out §402(b)'s enumerated statutory criteria, the statute clearly does not grant it

the discretion to add another entirely separate prerequisite to that list.” *Id.* at 671. The Court also noted that “[n]othing in the text of § 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application.” *Id.*

Like §402(b), §404(h) (2) (A) requires EPA to “approve” the state’s application to transfer the permitting program if the state has the requisite authority. Under §404(h), EPA is only permitted to evaluate the specified criteria and does not have discretion to add to the list. If criteria are met, then EPA’s approval must be given. The legislative history clarifies Congress’s intent to make program transfer under §402 and §404 essentially the same.

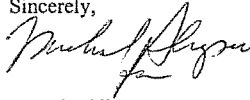
While there are some differences between §402(b) and §404(h), these differences do not transform EPA’s action approving a state 404 program into a “discretionary federal action.” Therefore, EPA believes that its action to transfer §404 permitting authority is not a discretionary federal action and thus the Agency need not engage in a §7(a) (2) ESA consultation.

Although §7 consultation is not required, a number of important safeguards exist in the CWA and EPA’s regulations which work to ensure that endangered species issues are addressed in authorized state permitting programs. State programs must issue §404 permits that comply with the 404(b) (1) Guidelines. 40 CFR 233.20(a). This includes the Guidelines’ requirement not to issue a permit that “[j]eopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in the likelihood of the destruction or adverse modification of...critical habitat....” 40 CFR 230.10(b)(3). In addition, EPA’s regulations require that EPA review permits for “[d]ischarges with reasonable potential for affecting endangered or threatened species as determined by FWS.” 40 CFR 233.51(b) (2). For these permits, EPA must transmit a copy of “each public notice, each draft general permit, and other information needed for review of the application to” the Corps of Engineers, FWS, and the NMFS for comment. 40 CFR 233.50 (b).

EPA remains committed to working with states and the Services on development of effective processes to facilitate the review of state permits for discharges with reasonable potential to affect endangered species. One such approach is the development of an agreement among the state, EPA, and the Services regarding the process for review of these permits; the Memorandum of Agreement between the State of New Jersey, FWS, and EPA provides an example.

If you have further questions on this issue, please contact David Evans, Wetlands Division Director, at (202) 566-0535.

Sincerely,



Peter S. Silva  
Assistant Administrator



September 27, 2012

Representative Bob Gibbs, Chairman  
Transportation and Infrastructure Committee  
Subcommittee on Water Resources & Environment  
8-370A Rayburn HOB  
Washington, DC 20515

Re: State Assumption of Clean Water Act 404

Dear Chairman Gibbs:

Thank you for holding the September 20, 2012 Subcommittee hearing on the potential for states to assume a lead role in wetland protection. This letter is written in support of your efforts to address this issue.

The State of Minnesota implements a comprehensive, stand-alone wetland protection program established in State law and rule entirely separate from Section 404 of the Federal Clean Water Act (404). The Minnesota Wetland Conservation Act (WCA), signed into law in 1991, operates similar to the 404 program in many respects, and because of that, and we have accomplished several coordination initiatives with the U.S. Army Corps of Engineers-St. Paul District. The WCA generally provides a greater level of protection and jurisdiction than 404 as it applies to all wetlands, including isolated wetlands and those affected solely by drainage.

The WCA relies on a network of trained State and local government staff to provide valuable expertise in program implementation, including site reviews and wetland impact authorizations or denials. The program includes a comprehensive wetland banking program that includes more restored wetlands than in any other state, including State funded wetland mitigation for public road projects. The State has also restored thousands of acres of wetlands through the Reinvest in Minnesota (RIM) program – mostly in the critical prairie pothole areas of western Minnesota.

In Minnesota, the WCA is implemented concurrent with the Federal 404 program. This can result in an extra layer of required regulatory approvals for landowners. For example, while the WCA includes specific time limits for decisions and administrative appeals, 404 decisions are often indeterminate. Minnesota is in a strong position to accomplish key 404 objectives through either a federally recognized state program or a coordinated approach that allows parts of the 404 program to be delegated to the State. With this in mind, we offer the following recommendations:

1. **Remove barriers to 404 assumption.** The assumption process should recognize overall protection and service delivery outcomes rather than being focused only on process, and thus be easier for states to accept implementation responsibility.
2. **Allow for formal recognition of state programs.** Provide a mechanism for federal recognition or delegation to state programs that achieve goals of the 404 program, without assuming all the federal processes.

<i>Bemidji</i>	<i>Brainerd</i>	<i>Duluth</i>	<i>Fergus Falls</i>	<i>Mankato</i>	<i>Marshall</i>	<i>New Ulm</i>	<i>Rochester</i>
403 Fourth Street NW Suite 200 Bemidji, MN 56601 (218) 755-2600	1601 Minnesota Drive Brainerd, MN 56101 (218) 828-2383	291 S. Lake Avenue Suite 403 Duluth, MN 55802 (218) 723-4752	1091 Frontier Drive Fergus Falls, MN 56537 (218) 736-5115	1160 Victory Drive South Suite 3 Mankato, MN 56001 (507) 389-6784	1400 East Lyon Street Marshall, MN 56258 (507) 537-6060	261 Highway 13 South New Ulm, MN 56073 (507) 359-6074	3555 9 <sup>th</sup> Street NW Suite 330 Rochester, MN 55901 (507) 286-2839
<i>Central Office / Metro Office</i>		520 Lafayette Road North		Saint Paul, MN 55155	Phone: (651) 296-3767 Fax: (651) 297-5615		
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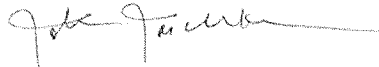


Representative Bob Gibbs, Chairman  
September 27, 2012  
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3. **Allow for partial assumption.** Assumption or "certification" of certain elements of a state program should also be allowed. Minnesota's wetland banking program is one example.
4. **Provide federal funding for implementation.** A shared approach to funding wetland protection programs would be more efficient and cost-effective for both state and federal governments.

In summary, the State of Minnesota supports efforts for formal recognition of state wetland protection programs, like the WCA, that achieve the resource objectives of 404. We appreciate the Subcommittee's attention to this issue and the opportunity to provide comments.

Sincerely,



John Jaschke, Executive Director  
Minnesota Board of Water and Soil Resources (BWSR)

Cc: Les Lemm, BWSR WCA Program Coordinator  
Tamara Cameron, Regulatory Branch Chief, Corps of Engineers-St. Paul District  
BWSR Wetland Committee Members  
Minnesota Congressional Delegation



STATE OF DELAWARE  
**DEPARTMENT OF NATURAL RESOURCES  
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September 27, 2012

Rep. Bob Gibbs, Chair  
 Rep. Timothy H. Bishop, Ranking Member  
 Subcommittee on Water Resources and Environment  
 U.S. House Committee on Transportation and Infrastructure  
 2165 Rayburn House Office Building  
 Washington, D.C. 20512

RE: Hearing on Assumption of CWA Section 404 by States

Dear Rep. Gibbs and Rep. Bishop:

Delaware recently finished a new statewide wetland mapping effort which produced the report *Delaware Wetlands: Status and Changes from 1992 to 2007*. In this report, wetland loss is increasing compared to a status report from the previous 10 years. Additionally, the acreage of loss of non-tidal wetlands is significantly higher than what has been permitted through Section 404 by the Corps of Engineers. The unpermitted conversions of wetlands have serious consequences for our State from the loss of flood mitigation and storm protection to the water quality benefits and the habitat value for waterfowl and other species.

Currently, Delaware is working with the Corps, EPA, and USFWS to determine the reasons for such significant losses. This investigation into the causes for wetland loss has revealed multiple reasons including insufficient resources at the Federal level to administer Section 404 effectively and efficiently, knowledge by the regulated community that Corps enforcement presence is lacking leading to impacts without contacting the Corps, a lack of coordination between the Corps and NRCS on agricultural projects and exemptions, confusion over what is regulated due to recent Supreme Court decisions, erroneous isolated wetland determinations without contacting the Corps, and minimal coordination and training for performing delineations accurately. The combination of these factors has left Delaware's wetlands susceptible to conversion and loss greater than is acceptable for the health and welfare of our citizens.

Assumption of Section 404 by States is a significant undertaking. In the 1990s, Delaware debated creating a State non-tidal wetland program; however, the State did not proceed due to uncertainty about whether full delegation was possible and concerns about permitting duplication and long-term costs.. In more recent discussion with regional EPA and Corps personnel about a Statewide Programmatic General Permit or full Assumption of the 404 program, they have been very receptive to assisting Delaware, but legislation must be in place before beginning that process which is estimated at more than a year to accomplish. The economic concerns of administering a new wetland program in Delaware are forefront

Rep. Bob Gibbs, Chair  
Rep. Timothy H. Bishop, Ranking Member  
Subcommittee on Water Resources and Environment  
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in the current fiscal climate due to uncertainty about projected fee revenues which depend upon development, uncertainty on the future of Federal appropriations and EPA grant programs, and flat general fund revenues. And while the State is confident that permits could be reviewed more efficiently than the current Federal system, concerns exist about the potential redundancy of permitting programs if full delegation is not received..

Most of these concerns could be allayed and more states would assume the 404 program responsibilities, if there was a smoother process of delegating the program to the States and some funding certainty as an incentive to take delegation. We believe that such an approach would be significantly more efficient, cost-effective, and protective of these important resources. States can more efficiently allocate resources and can protect valuable wetlands with localized knowledge more effectively as proven by the two States that have assumed the 404 program. Giving the regulated community an option for one-stop and faster issuance of permits builds support for a State run program while helping the local economy.

In the interim, Delaware will continue to assess and act on all options to conserve and protect wetland resources and the ecological services that wetlands provide. Funding and administrative support from the Federal government is necessary to achieve tangible success for Delaware's protection efforts.

Thank you for the opportunity to add comments to the hearing record.

Sincerely,

A handwritten signature in black ink, appearing to read "Collin O'Mara", written in a cursive style.

Collin O'Mara, Secretary  
Delaware Department of Natural Resources  
and Environmental Control