When States Assume

Fulfilling Congress's Objectives Under the Clean Water Act's Wetlands Program

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For over 40 years, one of the Clean Water Act's (CWA's) key regulatory programs has not functioned as Congress originally intended, producing, over time, significant inefficiencies in the federal permitting process that increase costs and delays for developers and hinder environmental review and protection. Today, renewed efforts at both the state and federal levels seek to achieve the objectives established by Congress in 1977. In particular, the U.S. Environmental Protection Agency (EPA) recently announced that it intends to revise long-standing regulations that have derailed state implementation of the program. EPA's approach to this rulemaking, and whether it can adequately address critical barriers to state assumption, has the potential to transform the regulatory landscape and produce substantial benefits for states, the public, the regulated community, and the environment.

In 1972, Congress passed the CWA for the purpose of "restor[ing] and maintain[ing] the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress established a variety of tools to achieve this goal, including funding, research, and regulatory programs, and chose to "recognize, preserve, and protect the primary responsibilities of *States* . . . to plan the development and use . . . of land and water resources." *Id*. § 1251(b) (emphasis added). States, as comprehensive regulators of the aquatic environment, are often in the best position to timely and effectively address case-by-case environmental circumstances. Accordingly, the CWA enlists states to fulfill many of the statutory duties and includes key mechanisms for states to administer important permitting programs.

The National Pollutant Discharge Elimination System (NPDES), established in 1972 by section 402 of the CWA, is one such example. At base, this program authorizes EPA to issue permits for the discharge of any pollutant to navigable waters, like wastewater from industrial processes, effluent from concentrated animal feeding operations, and stormwater from construction activities. While EPA oversees this program, Congress included within the statute a process whereby EPA could transfer its authority to states to administer NPDES permits. Today, consistent with Congress's goal, 47 states administer and enforce the NPDES program.

In 1977, Congress sought to establish a similar structure for the CWA section 404 "wetlands" program (although often referred to as the wetlands program, the program covers all navigable waters regulated by the CWA, including lakes, rivers, and streams). CWA section 404 authorizes the U.S. Army Corps of Engineers (Corps) to issue permits for the discharge of dredged or fill material into navigable waters. These permits are generally relied on for the discharge of fill material where necessary to construct portions of infrastructure (e.g., highways, airports, pipelines, etc.), residential and commercial developments, mining sites, and a host of other development projects. As with the section 402 program, Congress added a mechanism for states to "assume" the permitting process, and anticipated that most states would administer the section 404 program in due time:

> By using the established mechanism in section 402 . . . , the committee anticipates the authorization of State management of the [404] permit program will be substantially expedited. At least 28 State entities which have already obtained approval of the national pollutant discharge elimination system under the section should be able to assume the program quickly.

S. Rep. No. 95-370, at 77–78, *reprinted in* 4 Legis. History 1977, at 710–11. Importantly, a state program will only receive approval if its permitting standards and procedures are at least as stringent as the federal program.

Published in *Natural Resources & Environment* Volume 35, Number 1, Summer 2020.

Yet, only two states have successfully assumed the section 404 program (Michigan and New Jersey), and no state has assumed the program since 1994. As a result, for over 40 years, the section 404 program has not functioned as Congress intended, producing, at times, inefficiencies in the permitting process, evidenced by substantial costs and delays for some permit applicants. A 2006 Supreme Court decision recognized that, as of 1999, it took the typical project developer over 788 days to prepare and negotiate an individual section 404 permit and cost, on average, $271,596. *Rapanos v. United States*, 547 U.S. 715, 721 (2006).

An assumed program may produce significant benefits for states, the Corps, and the public by reducing duplication and overlap between state and federal permitting programs; allowing the Corps to focus its resources; allowing a state to meet time constraints, incorporate local requirements, and integrate review of section 404 applications with other applicable regulatory requirements; providing more consistent and thorough protection of certain waters within the state; and increasing regulatory program stability. Moreover, state agencies are generally more familiar with local concerns, community needs, and environmental conditions.

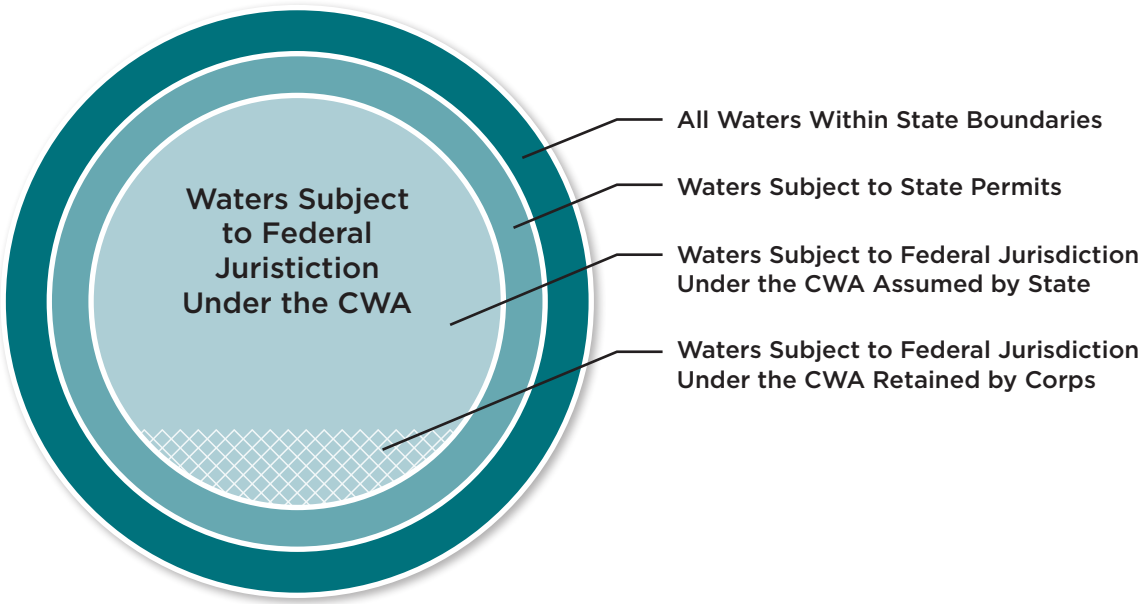
Recently, there has been renewed momentum at both the state and federal levels to fulfill the objectives set by Congress in 1977. In particular, the Corps has taken steps to facilitate state assumption, and according to the fall 2019 regulatory agenda, EPA will issue a Notice of Proposed Rulemaking in 2020 to modify its state assumption regulations. *Fall 2019 Unified Agenda of Regulatory and Deregulatory Actions*, https://www.reginfo.gov/public/do/eAgendaMain (Nov. 20, 2019). In addition, approximately 15 states recently have shown interest in assumption, *see* Timothy Cama, *Trump Officials Push States to Take Power over More Waterways*, thehill.com (Aug. 7, 2018), and states like Florida, Minnesota, and Oregon have taken administrative and legislative steps to assume the section 404 program. In light of this renewed focus on state assumption under the section 404 program, this article explores why states in the past generally did not undertake assumption, some of the issues states are wrestling with today as they consider assumption, and the administrative steps EPA could take to further facilitate state assumption.

Scope of Retained Waters Under an Assumed Program

When a state assumes the program, the statute requires the Corps to retain permitting authority over certain waters ("retained" waters). *See* 33 U.S.C. § 1344(g)(1). A key issue that has derailed many states' assumption efforts in recent years is the scope of waters to be retained by the Corps after a state assumes administration of the section 404 program.

To better understand the regulatory paradigm that exists under an assumed program, assumption essentially divides a state's waters into four general administrative categories, which starting with the broadest scope include the following: (1) all waters within state boundaries, which include all aquatic features in the state, including areas beyond state or federal regulation; (2) waters subject to the state permit requirements, which include all aquatic features in which certain activities require a permit from a state regulatory agency; (3) waters subject to federal jurisdiction under the CWA assumed by the state, which include waters previously regulated by the Corps under the CWA where section 404 permitting authority is transferred to the state; and (4) waters subject to federal jurisdiction under the CWA retained by the Corps, which include waters where section 404 permitting authority is retained by the Corps.

The diagram below provides a simplified graphic representation of this relationship. Please note that the diagram is not



to scale and does not accurately reflect the percentage of waters within each category, which varies between states:

In 1977, Congress defined the waters to be retained by the Corps very precisely in section 404(g)(1): ". . . 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, 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. . . ." 33 U.S.C. § 1344(g)(1).

Congress did not pull this language out of thin air; it has significant historical context. Based on the statutory text and the legislative history of the 1977 CWA amendments, it is clear that this language refers to those waters regulated under section 10 of the Rivers and Harbors Act of 1899 (RHA)—navigable waters that have been regulated by the Corps for more than 100 years—and adjacent wetlands. *See* EPA, Nat'l Advisory Council for Envtl. Pol'y & Tech. (NACEPT), Final Report of the Assumable Waters Subcommittee, app. F (May 2017). This makes sense because the purpose of the RHA is to maintain navigability for interstate commerce, as opposed to the CWA, which focuses on water quality. Thus, RHA section 10 waters are generally larger lakes and rivers that are susceptible for use as a means to transport people or goods.

In the past, however, states seeking assumption have been confronted by Corps district offices insisting that CWA section 404(g)(1) authorizes them to retain authority over more than just waters regulated under RHA section 10. The Corps has argued that it retains RHA section 10 waters, and also waters that have been identified as "traditional navigable waters" (TNWs) under the CWA in accordance with Corps regulations and guidance. *See* 33 C.F.R. § 328.3(a)(1) (2019); *Rapanos* Guidance. But TNWs, as defined by the Corps, encompass a much broader set of waters, significantly increasing the scope of waters retained by the Corps under an assumed program. What follows are some examples of streams and lakes that the Corps and EPA have in the past considered to be TNWs.

Kansas City District Streams. Within the Corps's Kansas City District, which includes parts of Colorado, Kansas, Nebraska, Iowa, and Missouri, there are 887 stream miles of RHA section 10 waters. Adding the Corps-defined CWA TNWs, many of which are too small to qualify as TNWs under the RHA, would nearly triple the scope of retained streams from 887 stream miles to 2,476 stream miles. EPA, NACEPT, Assumable Waters Subcommittee Meeting Sept. 28–29, 2016, *Meeting Summary*, at 12–13.

Bah Lakes, Minnesota. EPA determined that a 70-acre isolated lake, which is "usually covered with up to 10-foot-deepwater," was deep enough to provide navigation for small watercraft and, being only 60 miles from the border with North Dakota, was "readily accessible to interstate travelers." EPA, Memorandum for Jurisdictional Determination # 2007-04488-EMN (Jan. 16, 2008).

Lake Auman, North Carolina. In March 2016, the Corps determined that this 1,000-acre isolated lake is a TNW because it "is presently and has historically been used for reacreational [sic] fishing and swimming." Corps, Approved Jurisdictional Determination Form (Mar. 14, 2016).

Hurdsfield-Tuffy Lake, North Dakota. The Corps determined that this 538-acre lake is a TNW because "[d]uring the on-site inspection of October 22, 2015, both boating and waterfowl hunting was observed . . . and the parked vehicles indicated that these participants were from North Dakota, Minnesota and Wisconsin." Corps, Approved Jurisdictional Determination Form, NOW-2015-1512-BIS (Dec. 1, 2015).

Such waters are common across the American landscape. Identifying them as retained waters would significantly limit the scope of state administrative authority under an assumed program, requiring more permit applicants to obtain both state and federal approval, undermining the value of assumption to the states, and effectively defeating state efforts to assume the section 404 program. In 2014, affected states and their trade associations asked EPA to clarify the scope of the Corps's retained waters and the meaning of CWA section 404(g)(1). In response, EPA established a subcommittee under the Federal Advisory Committee Act to advise how EPA can clarify which waters may be assumed versus which waters must be retained. The subcommittee, comprising 22 members representing states and tribes, environmental organizations, the private sector, and the Corps, operated under the auspices of NACEPT.

After studying the issue for two years, the entire subcommittee (except the Corps representative) concluded that the Corps should only be able to retain authority over waters regulated pursuant to RHA section 10 (minus RHA section 10 waters deemed navigable based only on their historical use) and adjacent wetlands. All other CWA waters within the state's borders may be assumed by the state. The Corps representative contended that section 404(g) should be interpreted to allow the Corps to retain RHA waters *plus* TNWs regulated under 33 C.F.R. § 328.3(a)(1) (2019), which, as noted above, would result in many more waters being retained.

On July 30, 2018, the Assistant Secretary of the Army accepted the recommendations of the subcommittee and issued a memorandum clarifying the scope of waters to be retained by the Corps: "Retained waters" mean waters that are jurisdictional under RHA section 10 (minus waters deemed jurisdictional under the RHA based on historical use) and wetlands adjacent to RHA section 10 retained waters, landward to a boundary agreed to by the state and the Corps. The location and extent of RHA section 10 waters are fairly well understood, and most Corps districts possess and actively manage a list of RHA section 10 waters within their district. Thus, the Corps will use existing RHA section 10 lists of waters as a starting point to define retained waters.

EPA also intends to address this issue in a forthcoming rulemaking. *See*, *e.g.*, The Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22,250, 22,332 (Apr. 21, 2020). If EPA codifies the waters over which the Corps would retain permitting authority, states would be more inclined to pursue assumption and to take an active role in section 404 permitting within their jurisdiction.

Other Obstacles for States Contemplating Assumption

While the dispute over the scope of retained waters is all but settled, a number of other important legal and administrative obstacles remain. One such legal obstacle is that the federal section 404 program includes no restrictions regarding the expiration date of a permit; however, section 404 permits under an assumed program will be subject to a five-year expiration date requirement. *See* 33 U.S.C. § 1344(h)(1)(A)(ii) ("To issue permits which . . . are for fixed terms not exceeding five years."). If state law allows, states may be able to continue a state-issued permit pursuant to 40 C.F.R. § 233.38, but it is not clear how this provision would apply to larger construction, infrastructure, mining, or other projects that generally require longer than five years to complete, and a reissuance process could result in additional costs and uncertainty for permittees. This raises the question of whether a long-term project could opt out of the state program to pursue a Corps permit, or whether a state could issue a section 404 permit in accordance with a holistic project review, allowing renewals every five years without further regulatory action, provided there is no anticipated increase in environmental impacts. Perhaps EPA will also address such issues in its upcoming rulemaking.

Another legal issue is that Corps permits are federal actions that can trigger a range of environmental review requirements under federal laws such as the National Environmental Policy Act, the Endangered Species Act (ESA), and the National Historic Preservation Act. However, state permits issued under an assumed program are not considered federal actions. Thus, absent a federal action associated with their project, permit applicants and state permitting agencies may no longer be involved in these review processes, which could have practical implications for permittees and states. For example, without ESA section 7 consultation on the state permit, authorization for "incidental take" of federally listed species would require either section 7 consultation on a separate federal action associated with the project (a process that takes approximately one to two years to complete) or an ESA section 10 permit (a much longer process). This could present a substantial obstacle for applicants and states in locations where a large number of endangered or threatened species reside. If a proposed project would result in a take, applicants would need to design the project to avoid adverse impacts to listed species or their habitat, or obtain take authorization through another mechanism such as an ESA section 10 incidental take permit or an incidental take statement in section 7 consultation on a related federal agency action. For Florida, which has the third highest number of ESA-listed species (a total of 130), the absence of ESA section 7 consultation is an important consideration. *Listed Species Believed to or Known to Occur in Each State*, Fish & Wildlife Serv., Envtl. Conservation Online Sys., https://tinyurl.com/y6vjsra7. States like Oregon are also considering how to address and comply with the ESA under an assumed program, and Arizona recently abandoned its assumption effort, in part due to concerns expressed by stakeholders about endangered species considerations. *See* Elizabeth Whitman, *Arizona Abandons Controversial Effort to Manage Clean Water Act Permit Program*, Phoenix New Times (Dec. 4, 2019).

Administrative considerations also include whether a state has sufficient financial and human resources to administer the section 404 program. According to a recent study by the Environmental Integrity Project (EIP), when adjusted for inflation, 30 states have reduced funding for their agencies' environmental programs from 2008 to 2018. *See* EIP, *The Thin Green Line*, at 9 (Dec. 5, 2019). Thus, some states may not have the financial or political capital to implement, or even to assess the feasibility of, an assumed program.

At the outset, states may spend, on average, $225,000 to investigate the feasibility of assumption. Kathy Hurld & Jennifer Linn, Wetlands Div., EPA, *Pursuing CWA 404 Assumption: What States Say About the Benefits and Obstacles*, at 12 (May 30, 2008); *see also* Minn. Dep't of Natural Res. & Minn. Bd. of Water & Soil Res., *Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study*, front matter (Jan. 17, 2017) (*MN Feasibility Study*) (estimated cost to prepare feasibility study was $139,289). Once a state determines that assumption is feasible, it must prepare its formal application to EPA. To ensure the state's permitting program is eligible for assumption and to prepare a successful application, the state would need to take a number of preliminary steps. Initially, the state legislature may need to amend state statutes and the state regulatory agency may need to amend its regulations to ensure that the state permitting program aligns with the eligibility requirements. Also, the state would need to begin negotiations with EPA and the Corps to determine the scope of federal oversight and the scope of retained/assumed waters, should the state assume the program. Once the necessary statutes and regulations are in place, and the state has reached agreements with the Corps and EPA, the final step in the process would be to submit a formal application.

While some of these initial costs may be recovered via EPA's State Wetland Program Development grants, 33 U.S.C. § 1254(b)(3), such funds cannot be used for the significant annual costs associated with implementation or the ongoing administration of an assumed program. For example, the New Jersey program costs approximately $3 million per year and requires 42 full-time employees, and the Michigan program costs $7 million and requires 86 full-time employees. Greg Peck & Jim Giattina, *State/Tribal Assumption of the CWA 404 Program, Kentucky Task Force on CWA Section 404 Program Assumption*, at 19 (Nov. 17, 2005). Larger and wetter states, like Minnesota, estimate an annual cost of approximately $11 million with 102 state employees, *MN Feasibility Study* at viii–ix, while drier states, like Arizona, estimate an annual cost of $2.5 million and 10 full-time staff. Ariz. Dep't of Envtl. Quality, CWA § 404 Assumption Roadmap Review Meeting (Sept. 2019).

Importantly, however, for states such as Minnesota that already administer a permitting program that overlaps with the section 404 program, the incremental increase in costs associated with assumption of the section 404 program could be relatively small. For example, Minnesota's current permitting program costs the state approximately $10 million a year and

requires 98 full-time staff. *MN Feasibility Study* at ix. Under an assumed program, Minnesota projects an increase in annual expenditures of less than $1 million and a projected need of only four additional full-time staff. *Id.* at viii–ix. Furthermore, states can recover some of these costs through permit fees or taxes.

The CWA's statutory and regulatory requirements mandate that the Corps transfer all pending section 404 permits to the state as soon as the Corps receives notification from EPA that a state program has been approved. 33 U.S.C. § 1344(h)(4); 40 C.F.R. § 233.14(b)(2) (often referred to as the "clean break" provisions). Therefore, to avoid delays for permit applicants, states would need to appropriate the necessary funds, acquire sufficient staff, and develop the requisite information technology infrastructure to administer the section 404 program in advance of assumption.

In order to receive approval from EPA to administer an assumed program, the state must also demonstrate that its program is equivalent to or more stringent than the complex requirements of the federal section 404 program, including CWA standards for jurisdiction, mitigation, and permit review criteria and exemptions. For example, except for waters where the Corps retains permitting authority, the state must assume administrative authority over all other CWA waters, including wetlands (i.e., the state cannot assume authority for only certain categories of waters such that some waters of the U.S. are left unregulated). 40 C.F.R. § 233.1(b). Additionally, the state's delineation methodology for identifying wetlands and waters must be consistent with the federal delineation methodology. The state must have authority to regulate all activities that are regulated under federal law; a state cannot exempt activities that are not exempt under the CWA. *Id.* § 233.1(d). And the state agency must have enforcement authority including the ability to impose penalties that are at least comparable to federal fines and penalties. *Id.* § 233.41. Accordingly, a state that seeks assumption will most likely need to take complex administrative and legislative steps to adapt its program(s) to meet these requirements.

In Minnesota, for example, the state would need to modify various aspects of its Wetland Conservation Act to align with CWA § 404 requirements. Specifically, the state would need to revise exemptions that allow wetland impacts with no mitigation or reporting, amend the state's compensatory mitigation location requirements, and update the citizen suit provisions. *See MN Feasibility Study* at vi. Florida's 1997 attempt to assume the program was scuttled, in part, by issues related to Florida's wetlands delineation methodology. Evidently, Florida's designation of "slash pine" as an upland plant, rather than a facultative one, posed the most significant problem. *See* Debra Alise Spungin, *Troubled Waters: Florida's Isolated Wetlands in the Aftermath of* Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 26 Nova L. Rev. 371, 390 (2001) (citing Letter from Fla. Dep't of Envtl. Prot. to Carol Browner, Admin., Envtl. Prot. Agency (Sept. 17, 1997)).

Federal Steps to Facilitate Assumption

In addition to codifying the Corps's retained waters guidance, EPA could take additional steps to modify its regulations and further facilitate state assumption. Pursuant to 40 C.F.R. § 233.1, partial state programs are not approvable, i.e., a state program must regulate all discharges of dredged or fill material into waters regulated by the state under section 404(g)(1). However, some states may prefer to administer a state section 404 program only in certain geographic areas, such as the coastal zone, or in tidal wetlands, or for certain industries. Providing for partial assumption would also allow states to implement a phased program, potentially easing the transition and taking the sting out of the statutory "clean break" provision. As noted above, EPA has indicated in its regulatory agenda that it intends to revise its CWA section 404(g) regulations. This upcoming rulemaking would provide EPA with an opportunity to remove or modify the prohibition against partial assumption. By allowing for partial assumption, EPA could help states navigate many of the issues discussed above.

Oregon, which is well-known for its commitment to wetlands and water quality, is actively pursuing this option and may become the first state to obtain approval for a partially assumed section 404 program. In November 2019, the Oregon Department of State Lands submitted an update to the Oregon Legislature to consider partial section 404 assumption in advance of the 2020 session. This report indicates that Oregon seeks to gain approval from EPA for a partial section 404 permitting program. Under the proposed approach, the state would administer section 404 permitting for mining activities, the creation and operation of mitigation banks, and development activities within an urban growth boundary (excluding farming, ranching, or forestry activities). Ore. Dep't of State Lands, HB 2436 (2019): Partial 404 Assumption Legislative Update, at 2 (Nov. 2019). If EPA modifies its regulations to allow for partial assumption, Oregon intends to submit a complete application to assume the section 404 program during 2021. *Id.* According to earlier testimony, EPA has been "encouraging in recent discussions . . . regarding a partial assumption program." *Testimony of Eric Metz, Before the House Comm. on Agric. & Land Use* (Mar. 19, 2019).

States and other stakeholders have come a long way in resolving the legal obstacles to fulfilling Congress's goal of having states administer the section 404 program. A diversely represented advisory committee reached agreement on how to interpret the scope of retained waters, the Corps has now adopted those recommendations in guidance, and EPA plans to codify those recommendations this year. Yet, states still face a number of important financial and legal obstacles, and how such issues are managed by states and EPA will ultimately determine the number of states that successfully assume the program and whether EPA can achieve Congress's original objectives.

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