

**TESTIMONY OF  
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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

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<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

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<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> Hurld, 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 lib/hurld.pdf](http://www.aswm.org/pdf_lib/hurld.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;

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<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.

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<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.