

Clean Water Act §404 Assumption: What Is It, How Does It Work, and What Are the Benefits?

by David Evans

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In my capacity as Director of the U.S. Environmental Protection Agency's (EPA's) Wetlands program, I oversee efforts to enhance state and tribal wetlands programs, including state and tribal assumption of the Clean Water Act (CWA) §404 program (§404 Assumption).¹ As such, I feel it is my responsibility to clarify the requirements, oversight, and benefits of §404 Assumption in response to Lance Wood's Article in the March 2009 issue of the *Environmental Law Reporter's News & Analysis*.² I will not comment on the Environmental Council of the States' legislative proposal recommending restoration of the CWA's jurisdictional scope and changes to the §404 Assumption regulations, as EPA and the Administration have not taken a position on it.

I. §404 Assumption

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

In enacting the §404 program, the U.S. Congress granted states and tribes the option of assuming administration of the §404 permit program. To assume the program, the state or tribe must submit a request for assumption to EPA demonstrating that their program: (1) is consistent with and no less stringent than the federal program; (2) has an equivalent scope of jurisdiction for those waters they may assume; (3) regulates at least the same activities as the federal program;

(4) provides for public participation; (5) is consistent with the CWA §404(b)(1) Guidelines (the environmental review criteria used in evaluating permit applications); and (6) has adequate enforcement authority.

Federal protections are not wholly lost under a state or tribal §404-assumed program, as Mr. Wood asserts. Approved state and tribal §404 programs must, at a minimum, regulate all the waters they are eligible to assume that the federal government would regulate; regulate all the same dredge and fill activities the federal government would regulate; have mechanisms that provide for public involvement, including citizen suit standing with respect to permit decisions; and use environmental review criteria to evaluate the impact of proposed projects when making permit determinations that are consistent with the CWA §404(b)(1) Guidelines. While certain federal laws, such as the Endangered Species Act³ and the Coastal Zone Management Act,⁴ do not apply in the same manner to a state-issued permit, the CWA §404(b)(1) Guidelines provide for consideration of many of the concerns addressed by those statutes during the state permitting process. For example, the Guidelines explicitly require consideration of impacts to threatened and endangered species⁵ and impacts to coastal areas.⁶ In other words, the state or tribe must demonstrate how its program and procedures are at least as comprehensive as or protective as the federal program per the §404(b)(1) Guidelines. The federal protections are assured through a rigorous assessment that the state or tribal program is consistent with and is no less stringent than the federal program and through EPA oversight of state or tribal permits. If a state permit is not consistent with the Guidelines, and the state does not take action to amend the permit for consistency, EPA objects to the permit and gives it to the U.S. Army Corps of Engineers to process as a federal permit.

1. 33 U.S.C. §1344, ELR STAT. FWPCA §404. The §404 Assumption regulations can be found at 40 C.F.R. §233, available at <http://www.epa.gov/owow/wetlands/pdf/40cfrPart233.pdf> (last visited Mar. 30, 2009).

2. Lance D. Wood, *The ECOS Proposal for Expanded State Assumption of the CWA §404 Program: Unnecessary, Unwise, and Unworkable*, 39 ELR 10209 (Mar. 2009).

3. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

4. 16 U.S.C. §§1451-1465, ELR STAT. CZMA §§302-319.

5. 40 C.F.R. §230.30.

6. *Id.* §230.10(a)(5).

II. EPA's Role in Assumption

EPA approves only those state and tribal §404 programs that are consistent with and no less stringent than the federal §404 program. A state or tribal program can be more expansive and/or more protective of aquatic resources than the federal government's program. During the program approval process, the Corps, the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (FWS) provide comments to EPA.

Once EPA approves the state or tribal program, EPA oversees the state or tribal program by: reviewing state or tribal permits for which review has not been waived;⁷ receiving and reviewing state or tribal notification of permit applications; reviewing the state's or tribe's annual report; and making site visits. In processing permits, the state or tribe determines which permit determinations need to be sent to EPA for review. If permit review is not waived, the state or tribe sends a copy of the public notice to EPA, which then provides the Corps, the FWS, and the NMFS a copy of the public notice and 50 days in which to provide comments to EPA. EPA uses these comments when deciding whether to comment on, object to, or require conditions on the state or tribal permit.⁸ EPA also reviews state and tribal program modifications for consistency with the federal program, oversees any §404 program transfer back to the federal government, and, if needed, initiates withdrawal of program approval when the program is no longer consistent with the federal program and corrective actions have not been undertaken to rectify the inconsistencies. This oversight structure is similar to EPA's role in Corps-issued §404 permits where only a subset of permits are reviewed by EPA and the Services; the vast majority of Corps permits are issued as general permits or nationwide permits

III. Why States and Tribes Assume the §404 Program

In his Article, Mr. Wood suggests that states' and tribes' primary interest in assuming the §404 program is to weaken environmental protections. EPA recently assessed state experiences relative to §404 Assumption and reached entirely different conclusions. In 2007, EPA examined why states and tribes pursue §404 Assumption; what, if any, challenges and barriers there are to §404 Assumption; and what the benefits are.⁹ We reviewed the §404 Assumption files from nine

states¹⁰ who seriously considered state assumption and spoke to their staff.¹¹ The results quantified and generally confirmed our understanding of state/tribal §404 Assumption issues.¹²

The states in this review reported that their primary reasons for investigating §404 Assumption were to:

- increase permit review efficiency (nine states);
- provide more consistent and thorough protection of water resources (four states); and
- achieve consistency in program administration (three states).

For those states that did not assume the program, the surveyed states explained that they chose not to do so primarily because they:

- lacked state program equivalency and did not think they could change their authorities to be consistent with the federal program (four states);
- lacked sufficient state implementation funds (three states); and
- faced difficulties in working out an acceptable way to handle threatened and endangered species issues with the FWS and the NMFS (three states).

States that have assumed the §404 program believe that the combination of federal and state involvement makes for a more stable, consistently implemented program. But the lack of implementation funds is often a threshold barrier to §404 Assumption, short-circuiting further investigation.

Shortfalls in program implementation funding currently is causing Michigan,¹³ one of the two states that have assumed the §404 program, to consider transferring the program back to the federal government for administration. In reaction to this news, a wide range of stakeholders, including the state chapter of National Home Builders Association and several regional environmental groups, have expressed their support for the state's program. They cite a number of benefits to Michigan's program including: (1) permitting that is quicker, more comprehensive, and in some cases more stringent than the federal program; (2) efficiency in obtaining only one permit; and (3) the Michigan Department of Environmental Quality staff's greater familiarity with the aquatic resources and ability to visit project sites (especially prior to permit issuance).¹⁴ These

7. Which permits require EPA review and which ones for which review is "waived" are set forth in the memorandum of understanding between EPA and the state or tribe for an approved program. EPA may not waive review of permits that might impact threatened or endangered species.

8. In comparison, EPA, the FWS, and the NMFS have only 15 to 30 days to comment on Corps standard permits. Additionally, there are some standard permits called "Letters of Permission," on which EPA, the FWS, and the NMFS are not provided the opportunity to comment. "Letters of Permission" are not issued under general permits, e.g., nationwide permits, state programmatic general permits, or regional general permits.

9. Kathy Hurlid & 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/calendar/state2008/hurlid.pdf> (last visited Mar. 30, 2009).

10. We intended to include a tribe in this inquiry; however, scheduling an interview time proved difficult.

11. A state or tribe was deemed to have undertaken a serious inquiry if it spent money, invested significant staff time investigating §404 Assumption, or was directed by the governor or legislature to investigate §404 Assumption.

12. Some states cited more than one reason for their decisions.

13. Michigan assumed the §404 program in 1984. 49 Fed. Reg. 38948 (Oct. 2, 1984), codified at 40 C.F.R. §233.70 (2008).

14. Letters, articles, and testimony from former Gov. William Miliken (R-Mich.), environmental groups, e.g., the National Wildlife Federation, Tip of the Mitt, etc., the regulated community, e.g., Michigan National Home Builders Association, the Drainage Districts Association, etc., and the general public regarding the benefits of the Michigan program over the federal §404 program outnumber the letters in support of voluntarily transferring the §404 program back to the federal government. Many of the letters in support and against the Michigan §404 program are available at <http://groups.google.com/group/michigan-wetlands?lnk=srg> (last visited Mar. 30, 2009).

letters speak loudly to the quality of Michigan's program and the potential benefits of §404 Assumption.

IV. Importance of Federal-State Partnerships

EPA agrees that the best protection for aquatic resources is a strong partnership between the federal government and states and tribes. However, we know that this partnership can be achieved through a variety of approaches, each with their own strengths and weaknesses. For example, CWA §401 requires federal permit applicants to first obtain state or tribal certification that the permitted discharge will comply with applicable effluent limitations, water quality standards, new source performance standards, and toxic and pretreatment requirements. Thus, CWA §401 certification can be a very powerful tool when the state or tribal certification conditions are incorporated and enforced in the federal permit. The courts, however, have limited §401 certification to those activities "affecting water quality in one manner or another."¹⁵ An independent state or tribal wetlands regulatory program that only fills the gaps in federal jurisdiction can be a great complement to the federal program if permitting processes are effectively communicated and coordinated. An independent yet parallel state or tribal permitting program that covers at least the same scope and jurisdiction as the federal program can ensure federal and state objectives are achieved, but such a program can be seen as duplicative. Implementation of a Corps-issued state programmatic general permit¹⁶ can streamline potentially duplicative federal and state programs, but they only apply to waters found jurisdictional under the CWA and are limited in scope to permits with minimal impacts. The Corps must make permit determinations on projects that may have more than a minimal impact on waters of the United States on a case-by-case basis. State or tribal assumption under §404, however, eliminates duplicativeness and achieves federal and state or tribal goals. A state or tribal §404 program can streamline permitting, have a greater jurisdictional scope, and regulate more activities than the federal program. State assumption, however, can be expensive, particularly since there is no specific federal funding for state or tribal §404 program implementation. All of these are very effective and efficient mechanisms states and tribes can use in managing their aquatic resources, and no one method is "clearly the superior approach," as Mr. Wood believes.

There are many federal-state approaches for managing aquatic resources, and one approach may be right for one state or tribe but not another. Because their needs and resources vary, so must their management options. EPA is committed to working with states and tribes to enhance their program capacity and capability in a manner that makes sense for the state and tribe and their resources. EPA recently clarified what it considers to be the key components of wetlands monitoring and assessment, voluntary restoration and protection, water quality standards for wetlands, and regulatory programs in its Core Elements Framework.¹⁷ This framework is part of a broader effort to assist states and tribes with the development or enhancement of their wetlands programs—be it §401 certification, §404 Assumption, or something in between.

V. Conclusion

In my 25-plus years of service at EPA in several media programs, I have closely observed state and tribal participation in the implementation of environmental programs. For example, from 1995-2002, I led the Superfund program's State and Tribal Site Identification Center, which financially and technically supported state and tribal participation in addressing abandoned and uncontrolled hazardous waste sites. Since 2005, I have observed and promoted state and tribal engagement in the management of wetland resources. I have perceived many reasons why states and tribes wish to take the lead role in administering environmental programs. While political considerations are among them, as Mr. Wood states, I believe a sincere desire to exert leadership in managing the state and tribal resources is generally the strongest motivator. Regardless of their motivations, I have consistently been impressed with the professionalism, creativity, and innovation of state and tribal environmental managers as they administer their programs in the face of difficult fiscal and political challenges. EPA stands ready to work with states and tribes to meet their goals by providing technical assistance and grants to help develop their wetlands and aquatic resource programs.

15. *American Rivers v. Federal Energy Regulatory Comm'n*, 129 F.3d 99, 107, 28 ELR 20258, 20261 (2d Cir. 1997).

16. State programmatic general permits are a type of general permit issued by the Corps that authorize, for the purposes of §10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §403), §404 of the CWA (33 U.S.C. §1344), and/or §103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. §1413), certain projects that are also regulated by another federal, tribal, state, or local regulatory authority.

17. U.S. EPA, *Core Elements of an Effective State and Tribal Wetlands Program*, <http://www.epa.gov/owow/wetlands/initiative/cefintro.html> (last visited Mar. 30, 2009).