

## Expanding the States' Role in Implementing CWA § 404 Assumption

By Leah Stetson, with an introduction by Jeanne Christie, ASWM

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. However the 404 state assumption program has fared poorly in comparison to state adoption of other parts of the Clean Water Act. For instance, 45 states implement CWA § 402, the point source discharge program, and of those, 20 also have comprehensive wetland programs. But only two states, Michigan and New Jersey, have adopted CWA § 404. And even for those states, maintaining their leadership role has been challenging.

Two issues in particular have made assumption difficult. First states are held to a higher standard for implementing Section 404 than other parts of the Act. Second, unlike other Clean Water Act programs, the U.S. Environmental Protection Agency's (EPA) wetland grant program cannot be used to run state wetland programs; it can only be used to develop them. Additionally, the application process for assuming the 404 program is complex. Historically, states that have expressed interest in assumption (and began the application process) have faced a number of barriers, such as a lack of political will, lack of funding, uncertainty on how to address other federal requirements, especially the Endangered Species Act (ESA), and jurisdictional issues, e.g. Section 10 waters, post-Rapanos uncertainty over isolated wetlands and headwater streams. For the text of the CWA § 404, go to:

<http://water.epa.gov/lawsregs/guidance/wetlands/sec404.cfm>

Overall, States and tribes<sup>1</sup> play a major role in the implementation of Clean Water Act programs. (See [http://www.ecos.org/§/states/enviro\\_actlist/states\\_enviro\\_actlist\\_cwa](http://www.ecos.org/§/states/enviro_actlist/states_enviro_actlist_cwa)) It is clear that Congress envisioned that the states would play an active role in wetland management as well, and provided a legal mechanism by creating the state assumption process for § 404 in 1977. However Congress failed to provide funding<sup>2</sup> and this is problematic for many states. This was demonstrated in Michigan in March 2009 when the difficulties in balancing the state budget led Michigan's Governor Jennifer Granholm (D) to announce that the state would hand wetland permitting responsibilities back to the federal government. After many months of analysis and discussions, the state legislature decided to keep the 404 program in the state, rather than to return it to the federal government. For media coverage on this topic, go to:

<http://www.aswm.org/wetland-programs/state-wetland-programs>

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<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> States can use § 106 funds, however, these funds are usually appropriated to other programs in other agencies or divisions of state government.

## **States and Federal Agencies Share Critical Roles in Regulating Wetlands**

States and federal agencies can form successful partnerships. 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. Despite the apparent benefits of cooperative state / federal regulation of wetland resources, the CWA § 404 program continues to lag well behind other environmental program areas in terms of assumption of authority at the state or tribal level. While a number of states have comprehensive wetland programs, only two states have assumed administration of CWA § 404. Instead other states have developed, or are developing, other types of cooperative permit programs, such as joint permitting, State Programmatic General Permits (SPGPs) or Regional General Permits (RGPs). For more information on Programmatic General Permits, visit: <http://www.aswm.org/wetland-programs/programmatic-general-permits> However since the Solid Waste Agency of Northern Cook County (SWANCC) U. S. Supreme court decision of 2001 and Carabell/Rapanos Supreme Court decision of 2006 weakened federal protections for certain wetlands, interest in state assumption has increased.

### **What “Assumption” Means for a State Dredge and Fill Permitting Program**

Section 404(g) of the Clean Water Act allows a state to apply to the U.S. Environmental Protection Agency to administer its own permit program for the regulation of dredge and fill activities in lieu of the permit program administered by the Corps. The CWA § 404 assumption program is administered by EPA, which provides overall program oversight on state programs to ensure compliance with federal standards. However, much of the day-to-day state/federal coordination occurs with the Corps, which continues to issue permits for wetlands in Section 10 waters after state assumption.<sup>3</sup> The Corps must retain jurisdiction in waters which are traditionally utilized to transport interstate or foreign commerce, such as major rivers, tidal or coastal waters, and adjacent wetlands. These are the waters regulated by the Corps under Section 10 of the Rivers and Harbors Act. Where a state 404 Program is approved by the EPA, the Corps of Engineers suspends processing of 404 permits everywhere except Section 10 waters.

CWA § 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 ESA, do not apply. Instead they are addressed through EPA oversight as required by the statute and regulations. (See more examples under “Mechanisms for Coordination with Federal Laws, e.g. Endangered Species Act”)

### **State/Federal Partnerships – Sometimes it is the state that must step in to fill the gaps to protect water resources.**

Implementing the CWA § 404 program is a state-federal partnership. State assumption of § 404 gives the state the leadership role in evaluating and issuing permits while the U.S. Environmental Protection Agency (EPA) retains broad oversight authorities. The Clean Water Act provides EPA with the authority to review every permit if it has concerns over the state’s

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<sup>3</sup> Kusler, Jon and Jeanne Christie. “Common Questions: State Wetland Regulatory Programs.” ASWM. June 2006

ability to implement the program consistent with the requirements of the statute. However, in Michigan and New Jersey, the state runs the program on a day-to-day basis integrating wetland permitting with other CWA programs, providing a consistent, predictable program during times of jurisdictional uncertainty at the federal level. For example, following the Carabell/Rapanos decision (2006), the state of Michigan has asserted state jurisdiction in areas adjacent to the Great Lakes, where the Corps cannot. In New Jersey the state law provided protection of isolated wetlands when CWA does not.

On the other hand, the EPA retains the ability to place conditions on individual permits in addition to the protections provided by the states as part of its oversight role. It evaluates proposed state program changes to discourage those that might reduce protection and make the state ineligible to continue implementing the program. In Michigan and New Jersey coordination and communication between states and federal agencies have provided the public with a predictable, locally responsive program that protects state and federal waters.

Flexibility and choice are key. Not all states may be interested in adopting the 404 program. In some places states pursue 401 certification conditioning federal permits; in others they have SPGPs. But there are states that are interested in assumption. All choices should be equally viable for the states as long as these choices maintain a consistent minimum level of protection, which is the federal program. States retain the authority to regulate waters and/or activities beyond those regulated by § 404 and most state definitions of waters of the state are much broader than the Clean Water Act, such as reaching to groundwater and manmade structures. See Definitions of Waters of the U.S.

[http://aswm.org/pdf\\_lib/definition\\_of\\_waters.pdf](http://aswm.org/pdf_lib/definition_of_waters.pdf)

A strong commitment to a partnership approach by states and federal agencies will lead to stronger, more consistent and predictable permitting nationwide.

### **EPA Study: “What States Say About Benefits and Obstacles” of State Assumption**

The Wetland Division at EPA gathered information about state efforts to assume § 404 in 2007. At ASWM’s state/federal coordination meeting and joint conference with Society of Wetland Scientists in 2008, EPA’s Kathy Hurd and Jennifer Linn presented the results of the study, “Pursuing Clean Water Act 404 Assumption: What States Say About Benefits and Obstacles.” The principal investigators interviewed staff in nine states: Florida, Kentucky, Maryland, Michigan, New Jersey, North Dakota, Oregon, Virginia and Wisconsin about the states’ investigations of state assumption of the 404 program. Of these, three states developed draft assumption requests, and several made statutory, rule or programmatic changes.

Of the 9 states interviewed for this study, six states utilized funding from a Wetlands Program Development grant to conduct investigations into assumption. States spent \$225,000 on average to investigate assumption. States without a comprehensive wetlands program in place did not make it as far in the application process. Those states are part of a greater number of states that have used funds from a Wetlands Program Development grant to pursue assumption, for example, to conduct feasibility studies. Furthermore, the study found that a lack of funds available for implementing the 404 program is a common barrier for states. For a PowerPoint presentation with the complete study results, go to:

[http://www.aswm.org/state\\_meetings/2008/agenda\\_2008.pdf](http://www.aswm.org/state_meetings/2008/agenda_2008.pdf)

## State Feasibility Studies

Over the years many states have completed feasibility studies as part of their investigations on state assumption. Minnesota was one of the early states to look into assumption. Minnesota's Preliminary Assessment of SWANCC on Minnesota Wetlands (1989) states, "State Assumption of the 404 program would be the most straightforward way to provide landowners with one-stop-shopping for waters and wetlands permits," but three things would have to be done first.<sup>4</sup> 1) "The state laws, the Wetland Conservation Act (WCA) in particular, would need some modifications to match the requirements of Sec. 404 in some limited areas." 2) "Some portion of the USACOE personnel managing wetlands in Minnesota would need to be replaced using state funding as there would be additional training, project and program oversight, data management and federal coordination requirements placed on the state, and to a lesser extent, on local governments." 3) "An agreement developed to take advantage of the opportunity to link the Federal Farm Program Swampbuster" provisions with the state-assumed 404 program so that agricultural landowners can realize similar benefits from better coordinated regulation."<sup>5</sup> The state identified a long list of advantages and disadvantages. For a link to Minnesota's feasibility study on assumption, go to:

[http://www.aswm.org/pdf/lib/404\\_assumption\\_feasibility\\_study\\_0509.pdf](http://www.aswm.org/pdf/lib/404_assumption_feasibility_study_0509.pdf)

Florida also completed a feasibility study and evaluated state assumption. In Oct. 2005 the Department of Environmental Protection gave their report to the Florida Senate, which evaluated "assumption of the federal program and expansion of the State Programmatic General Permit (SPGP)." Two main concerns were Endangered Species Act (ESA) and Section 10 waters. Florida has an abundance of both endangered species and Section 10 waters. In addition, the study noted that substantial staff resources would be required in advance of assumption in order to comply with the federal "clean break" provision, which requires transfer of all pending applications to the state at the time of assumption (instead of requiring the Corps to finish processing such permits). The transfer process would be overwhelming to the state, resulting in delays for permit applicants. Florida also wanted to partner with the Corps on "monitoring, enforcing and issuing modifications to previously issued COE permits, including CWA general permits" in order to retain better continuity and prevent excessive workload burden on the state. Florida further considered that the state's review criteria for permits is quite similar to the federal criteria, so amending state law to explicitly address the same federal project criteria contained in the 404(b)(1) CWA guidelines would be reasonable. The state would require funding assistance to support an assumed 404 program.

The study concluded that Florida could not successfully pursue assumption unless there were changes made to the federal Clean Water Act, the federal Rivers and Harbors Act and state law. The Florida DEP recommended further investigation of these changes and suggested that, "an expanded SPGP can be pursued without changes to federal law. Under this option, the department issues permits on behalf of the federal government for projects of a defined and

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<sup>4</sup> Minnesota Wetland Report 1999-2000, MN *Preliminary assessment of the impacts of the SWANCC v. USACOE and the State's potential assumption of the § 404 Waters/Wetland Regulatory Program.* by John Jaschke, Land and Water § Administrator, Board of Water & Soil Resources.

<sup>5</sup> Minnesota Wetland Report (same)

limited impact.”<sup>6</sup> Furthermore, the report stated that, “Florida is committed to streamlining state and federal wetlands permitting programs to increase protection for our sensitive natural resources. To meet that goal and the specific objectives of House Bill 759, DEP recommends pursuing a greatly expanded SPGP in the short-term, which will not require legislative action, while also pursuing federal and state legislative actions to obtain assumption for the long-term.” For the evaluation report, go to: [http://www.aswm.org/pdf/lib/consolidation\\_program.pdf](http://www.aswm.org/pdf/lib/consolidation_program.pdf)

Oregon completed a feasibility study over a period of years that evaluated the options for state assumption and an SPGP. The state has implemented a state dredge and fill program since the early 1980s. It began looking into assumption of the 404 program in 1996 and began its serious pursuit of assumption in 2001. The state has an abundance of § 10 waters that are not coastal but big rivers, which are considered navigable waters. This would mean that a large portion of Oregon’s waters are non-assumable. In addition, Oregon administers its endangered species program differently than the federal ESA program, as the state’s ESA program applies to public lands, and is run by the forestry division at Oregon Department of State Lands (DSL). For the state to assume the 404 program, Oregon would have to change its ESA program and evaluate how the projects are handled after assumption. As part of its feasibility study, the state compiled side-by-side comparison information on the federal CWA § 404 program and the state’s removal fill program in 2002:

[http://www.aswm.org/pdf/lib/oregon\\_sidebyside\\_comparison.pdf](http://www.aswm.org/pdf/lib/oregon_sidebyside_comparison.pdf)

ASWM has posted additional links to state feasibility studies and state investigations of assumption at: <http://www.aswm.org/wetland-programs/s-404-assumption>

### **Michigan’s Pilot Assumption Program**

Michigan became the first state to assume the 404 program in 1984. The process spanned four years; the state worked with EPA Region 5 prior to its application package submittal for three years before it launched its pilot assumption program in 1983, effectively assuming the 404 program in 1984. The federal agency partners, including US Fish & Wildlife Service (FWS) at their East Lansing, MI field office, closely monitored and reviewed the state’s 404 program during that first year. Michigan received funding assistance from a Wetlands Program Development grant for the pilot program. After the pilot program, EPA and COE waived review of most permit applications with the exception of those pertaining to certain discharges (CWA § 404(t)).

### **New Jersey’s Journey toward Assumption**

After Michigan, New Jersey became the second state to assume the Section 404 wetlands program under the Clean Water Act in 1994. EPA’s decision to approve the state’s wetland program culminated in a nine-month negotiation process, which focused on the legal and regulatory requirements for state assumption. “While the assumption affects only New Jersey, the issues and problems that arose during the negotiation process may provide lessons for other states striving to eliminate regulatory inefficiencies while maintaining a high level of

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<sup>6</sup> Letter from Florida DEP to Florida Senate, October 3, 2005 accompanying the report, “Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)

environmental protection,” according to Susan Lockwood of New Jersey Department of Environmental Protection, who played a significant role in the state’s assumption process.<sup>7</sup>

What prompted the state to look into assumption of the 404 program? “New Jersey’s Freshwater Wetlands Protection Act<sup>8</sup> required the State to pursue assumption. New Jersey’s Act was started in response to dissatisfaction with the way the Corps was doing things,” explains Lockwood. The inclusion of assumption within the State’s law was a mechanism to get buy-in from the development community to support its passage of state law. The state had to satisfy a general need for the state law to be better than the Corps *at the time* the state assumed the 404 program. For example, the state issued general wetland permits annually between 1988-1992 for only 89 acres while Nationwide Permit 26 alone permitted the destruction of 394 acres of wetlands annually.<sup>9</sup> The state’s 404 program does not allow for self-regulation, for example; a person needs approval before doing regulated activities in wetlands. Since 1993, the Corps’ permitting criteria has become stricter.

## Lessons Learned

The most prominent and only truly challenging factor in New Jersey’s assumption process was the Endangered Species Act (ESA). During the negotiation period, EPA said, no, the state is not required to do formal Section 7 consultation, while FWS said, yes, they are required. New Jersey was willing to work with FWS, to coordinate with them, to identify a process that could be completed within the required permitting timelines. The state did not complete formal consultation. Instead, they worked out a process involving a memo of understanding with FWS. Under the MOU, the state and FWS use a database that identified every known occurrence of endangered species by county. The state identifies permits that could have an impact on endangered species and circulates those permit applications to FWS for a screening. The screening process allows up to 20 days to determine whether there is a problem with the permit. If there is a discrepancy between the state and FWS on whether a permit should be denied because of ESA concerns, the EPA has the final say as an arbitrator. Most of the time, there is no disagreement.

“Assumption makes the program stronger,” says Susan Lockwood, New Jersey DEP. Were there any issues or questions about partial assumption that came up during the process? Yes—when the state pursued assumption, it realized that the New Jersey Freshwater Wetlands Act excluded the Pinelands and the Hackensack Meadowlands. The Corps declared that the Hackensack Meadowlands were not “assumable” waters because they were tidal and regulated under § 10 of the Rivers and Harbors Act. However, the Pinelands were not tidal and would need to become part of the state’s 404 program; otherwise, New Jersey’s assumption would be partial, which is not allowed under the current federal regulations for the 404 program. (Note: partial

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<sup>7</sup> Lockwood, Susan. “Assumption, New Jersey Style.” National Wetlands Newsletter. July/August 1994

<sup>8</sup> New Jersey’s Freshwater Wetlands Protection Act states, “The Department and the Attorney General shall take all appropriate action to secure the assumption of the permit jurisdiction exercised by the United States Army Corps of Engineers pursuant to the Federal Act. The Department shall make an initial application to the United States Environmental Protection Agency for this assumption within one year of enactment of this act, and shall provide the Governor and the Legislature with a schedule therefor and a copy of the application and supporting material forwarded by the Federal government.” (N.J.S.A. 13:9B-27)

<sup>9</sup> Lockwood, Susan. “Assumption, New Jersey Style.” National Wetlands Newsletter. July/August 1994

assumption is allowed under § 402.) The Pinelands Commission's statute was more stringent than the state's program, so the state had to put together a memo of understanding with the Commission. When the Commission reviews permits for activities in the Pinelands, the Pinelands Commission can determine whether an activity meets the criteria for one of the State's adopted general permits. If an activity needs an individual permit, it may be denied because the Pinelands Commission generally does not allow for wetland impacts. If an individual permit is required for an activity that is permitted by the Pinelands Commission, the State processes the permit.

Lessons learned? Other states pursuing assumption can learn from New Jersey's experience. Lockwood suggests that states keep in mind that the federal government is most comfortable with programs that are similar to the 404 program. Any state program that is equivalent but not necessarily identical to federal programs will receive the greatest scrutiny. Secondly, it's important for states to keep extensive records on the program implementation. "New Jersey was able to answer criticisms because it could document that the specific projects that were criticized were not mismanaged."

New Jersey did not have to change its Freshwater Protections Act (FWPA) in order to assume § 404 but it did change its rules. The state had previously used a truncated definition of wetlands (borrowed from the federal definition), which had to be updated. The state wetland program was already fully funded, so as long as the wetland program would be in place, New Jersey would have the necessary funding to support the 404 program. For additional background, see, "Assumption, New Jersey Style" by Susan Lockwood:

[http://www.aswm.org/pdf/lib/assumption\\_nj\\_style.pdf](http://www.aswm.org/pdf/lib/assumption_nj_style.pdf)

### **Kentucky's Experience: To Assume or Not to Assume?**

In late 2004, Kentucky's Environmental and Public Protection Cabinet (EPPC) began discussions about pursuing assumption of the 404 program. By June 2005, with the help of an EPA wetland grant, EPPC had assembled a task force which held meetings twice a month. The task force was charged with looking at the big picture: should and could Kentucky assume the 404 program? One of the big issues was funding; another was Kentucky's existing Water Quality Certification Program and what it would need to do to bring it to a level of equivalency with the federal program. "This was an enormous undertaking and an intense process," explains Jennifer Garland, FWS, who was supervisor of the Water Quality Certification Program in Kentucky at the time. It required a huge time commitment on the part of the task force members, attending 11 task force meetings with training on all aspects of the federal program. The Corps was helpful in this process and provided training on many aspects of the federal 404 program, including wetland delineation, public interest review, National Environmental Policy Act, etc. Additional speakers came to present on endangered species, stream restoration, historic preservation, aquatic functions and values, and other topics. The task force considered many questions, including "do we need to enact additional programs (endangered species, historic preservation) to make the program equivalent?" Another question was what fees should be charged.

Then Secretary LaJuana S. Wilcher of the Kentucky Environmental and Public Protection Cabinet resigned in fall 2006. Secretary Wilcher had been a key supporter for the assumption investigation. In addition the Carabell/Rapanos decision was issued in 2006, creating uncertainty about the scope of federal jurisdiction. As a result Kentucky terminated its consideration of state assumption. The federal environment was “up in the air,” Garland says. And the lack of funding for the state to assume the 404 program was a significant issue. While the process did not result in state assumption of the 404 program, it dramatically increased awareness and understanding of the federal program and the issues surrounding it, laying the framework for future improvements to the state's Water Quality Certification Program. For a PowerPoint presentation on Kentucky Task Force on CWA § 404 Program Assumption, go to:

[http://aswm.org/pdf\\_lib/404\\_greg\\_peck\\_jim\\_giattinaassumption.pdf](http://aswm.org/pdf_lib/404_greg_peck_jim_giattinaassumption.pdf)

### **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 benefits:

- Improved resource protection. Ultimately, the coordinated efforts of both state and federal agency staff, the use of state specific methods 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 complete 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.

Reliance on state staff for most permit functions frees Corps staff to focus on the protection and management of traditionally navigable tidal or coastal waters, in line with the primary Corps mission.

- 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 with 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.
- 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; 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.

### **Barriers to State Assumption of Section 404**

The fact that only two states have successfully assumed the 404 program also highlights that there are some significant challenges associated with this process. Perhaps the most obvious barrier is that the process for applying for assumption of the 404 program is very complex. Here are some examples of barriers to assumption:

- 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 a 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 in some states. For some coastal states, the inability to assume administration of the 404 permit program in tidal wetlands or coastal areas may prohibit state leadership in 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 may be needed to assure compliance with the requirements of the federal Endangered Species Act, National Historic Preservation Act, and other federal programs. These issues are addressed to an extent through oversight of state assumed programs by the EPA. 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 program, 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.

For example, 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 raised concerns about the total cost of program operation, and led the Governor to propose returning the program back to the federal agencies in 2009. Many months later, it was determined that the state would keep the 404 program, rather than return it to the federal government.

- Lack of detailed guidance from EPA on steps needed to Assume 404 Program. EPA has issued regulations on Section 404 Assumption, but no guidance to provide needed details on what will be necessary to develop a successful program that will comply with the regulations.
- Uncertainty with inconsistent legal opinions at federal level in defining CWA waters. SWANCC and Carabell/Rapanos Supreme Court decisions have created uncertainty over the extent of jurisdiction that will be required for a complete application.
- Lack of political will within a state to deal with additional responsibilities of 404 assumption. Regulatory dredge and fill activities in wetlands and aquatic programs has been a controversial area of public policy for many years. Stakeholders within a state may have concerns about the state's ability to administer these programs. It takes years to complete the assumption process and states must gain and retain public support, sometimes through changing state administrations and legislatures.

## **Requirements of State Assumption**

In order to be eligible to assume administration of § 404, a state program must comply with specified criteria. These are the primary requirements:

- The state must have jurisdiction over all waters, including wetlands that are under federal jurisdiction except Section 10 waters<sup>10</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.

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<sup>10</sup> Corps may retain jurisdiction over tribal lands where a state lacks jurisdiction.

- 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.

In short, a state must have all of the authorities needed to assume responsibility for the CWA § 404 program. It is not possible to assume only a portion of the program.

### **Mechanisms for Coordination with Federal Laws, e.g. Endangered Species Act**

- CWA § 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, federal coordination requirements do not apply in the same manner.
- However, an alternative mechanism is provided through the EPA oversight role. As noted above, EPA's regulations at 40 CFR §233.51 require EPA review of any permit application that may impact federally listed threatened or endangered species, within sites identified under the National Historic Preservation Act, or in components of or is located within the National Wild and Scenic River System, among other critical areas. EPA in turn is required to coordinate review of the permits with other federal agencies such as the U.S. Fish and Wildlife Service.
- The comments provided to the state by the EPA represent the overall comments of the federal government, and the state cannot issue a 404 Permit if the 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.

### **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, PGP's and RP's, 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.

### **Questions for States Considering § 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?

### **Key Resources to Have on Hand When States Consider 404 Assumption**

1. Section 404 of the federal Clean Water Act
2. EPA's § 404 State Program Regulations, at 40 CFR Part 233
3. EPA's § 404 (b)(1) Guidelines, at 40 CFR Part 230
4. EPA's CWA § 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
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)

### **Materials required for a Complete Application Package**

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.

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