

State Assumption Under Section 404 of the Clean Water Act: Environmental Council of the States Proposed Amendments



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The Environmental Council of the States (“ECOS”) transmitted a June 26th letter to the Chairmen and Ranking Members of the United States House of Representatives Committee on Transportation and Infrastructure and Water Resources and Environment Subcommittee proposing amendments to Section 404 of the Clean Water Act.

ECOS states that the amendments are intended to:

. . . improve state assumption of the Clean Water Act (CWA) Section 404 Program.

Congressman Bruce Westerman of Arkansas’s Fourth Congressional District is the Ranking Member of the United States House of Representatives Water Resources and Environment Subcommittee. Arkansas Secretary of Energy and Environment, Becky Keogh, serves as Past President of ECOS.

Section 404 of the Clean Water Act establishes a program to regulate the discharge of dredged or fill material into waters of the United States. These include wetlands. Activities in waters of the United States regulated pursuant to Section 404 include, for example:

- Fill for development
- Water resource projects (such as dams and levees)
- Infrastructure development
- Mining projects

Section 404 requires a permit before dredged or fill material may be discharged into waters of the United States. Certain exemptions are provided by the statutory language for some farming and forestry activities.

No discharge of dredged or fill material may be permitted under the federal regulations if:

1. A practical alternative exists that is less damaging to the aquatic environment; or
2. Waters of the United States would be significantly degraded

Such proposed activities are regulated through a permit review process staffed by the United States Corps of Engineers (“Corps”).

Section 404(g) of the Clean Water Act provides states and tribes the option of assuming the 404 permitting program. However, unlike many other federal environmental permitting programs, very few states (only two) have undertaken the measures necessary to assume Section 404 permitting authority. As a result, the Corps operates this permitting process in all but two states.

To obtain delegation of the Section 404 permitting program the state or tribe must demonstrate that it can operate a permitting process that is consistent with and no less stringent than the requirements of the Clean Water Act and regulations. Such programs must generally include:

- Permitting procedures
- Administrative and judicial review procedures
- Regulating discharges into all assumed waters within the state or tribe's jurisdiction
- Regulation of at least the same scope of activities as the Section 404 program
- Public participation
- Public notice requirements
- Permit issuance consistent with the Clean Water Act Section 404(b) guidelines
- Inspection, compliance and enforcement authorities
- Coordination procedures with federal agencies

ECOS states in its June 26th transmittal that state assumption of the 404 program "is an important part of the cooperative federalism structure of the CWA." The organization cites as potential benefits of state assumption:

- Streamlining permitting processes
- Reduction of duplication of effort
- Reduction of overall expenditures by state and federal authorities
- Better alignment of the Section 404 program with other Clean Water Act programs for which states have authority

ECOS notes that some states have expressed interest in state assumption and both the Corps and the United States Environmental Protection Agency ("EPA") have clarified the categories of waters that are assumable by states. Further, EPA has stated to have considered whether to integrate "consultation" under the Endangered Species Act into the assumption application process. This is cited as potentially further helping to streamline permitting requirements.

Two actions are suggested by ECOS to further facilitate assumption:

- Allowing states to seek partial assumption of the Section 404 program
- Allowing states to issue permits with the same duration as federal permits

Language is provided in the June 26th letter which would amend the Clean Water Act to accomplish these objectives.

A copy of the June 26th letter can be downloaded [here](#).