

93rd Arkansas General Assembly: Arkansas Authority to Seek Delegation/Section 404 Clean Water Act Program



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The 93rd Arkansas General Assembly convened for regular session on January 11th.

The pre-filing of bills and resolutions began on November 16th.

House Bill 1261 (“HB 1261”) was introduced on January 25th which would authorize the Arkansas Water Control Agency (i.e., Arkansas Department of Energy and Environment – Division of Environmental Quality [“DEQ”]) to seek and accept delegation of the Section 404 Clean Water Act program.

The legislation is sponsored by Representative Ladyman of Jonesboro.

The bill would add an additional subdivision to Arkansas Code § 8-4-207(1) referencing the state water pollution control agency that would provide the DEQ Director authorization to:

. . . require conditions in permits issued under this chapter regarding the dredge and fill permitting program established in Section 404 of the Clean Water Act, as amended, 33 U.S.C. § 1251 et seq. and regulations promulgated under Section 404 of the Clean Water Act . . .

An additional section of the bill would amend Ark. Code Ann. § 8-4-208(a) (concerning the state water pollution control agency) to provide DEQ (subject to the approval of the Governor) the authority to administer its own permit program for the dredge and fill permitting program established in Section 404 of the Clean Water Act and the accompanying regulations.

This is qualified by language stating that rules, standards, or other requirements adopted for purposes of DEQ obtaining authorization for the permitting program are not effective or enforceable until the United States Environmental Protection Agency (“EPA”) approves the state’s application for the 404 permit program.

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”).

The Corps divides portions of the United States for regulation purposes into various districts. Three areas of Arkansas are encompassed by Corps district headquarters, which include:

- Little Rock District
- Vicksburg District
- Memphis District

Section 404(g)(1) provides states and tribes the opportunity to submit to EPA a request to assume administration of the Section 404 program in certain waters within state or tribal jurisdiction. The regulations establishing the requirements for state or tribal assumption of the 404 Program are codified at 40 CFR Parts 232 and 233.

A state application to assume and administer the Section 404 program must include:

- a letter from the Governor of the state requesting approval;
- a complete program description as outlined in 40 CFR 233.11;
- an Attorney General’s statement that the laws and regulations of the State provide adequate authority to carry out the program and meet all applicable requirements;
- a Memorandum of Agreement with the EPA Regional Administrator;
- a Memorandum of Agreement with the Secretary of the Army; and
- copies of all applicable state statutes and regulations to implement the program, including applicable state administrative procedures.

Despite the ability to obtain delegation of the 404 program, since the early 1970s only two states had previously obtained delegation of this program. This is in contrast to the Clean Water Act National Pollution Discharge Elimination System program which has been delegated to most states. However, the State of Florida in the last few months recently obtained delegation of the 404 program. (See previous post [here](#).)

Note that a number of environmental organizations have challenged EPA’s delegation of the 404 program to Florida in the United States District Court for the District of Columbia. The Center for Biological Diversity and other organizations are arguing that EPA’s delegation of the program to Florida was undertaken in a manner that contravened the Endangered Species Act, the Rivers and Harbors Act, and the Administrative Procedures Act.

A copy of the Complaint for Declaratory and Injunctive Relief filed by these organizations can be found [here](#).

HB 1261 has been referred to the House Public Health, Welfare and Labor Committee.

A copy of HB 1261 can be downloaded [here](#).