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Arkansas Authority to Seek Delegation/Section 404 Clean Water Act Program: Arkansas Department of Energy and Environment - Division of Environmental Quality Task Force

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The Arkansas Department of Energy and Environment - Division of Environmental ("DEQ") has set up an agency task force to potentially seek delegation of the Section 404 Clean Water Act permitting program.

The ability of DEQ to seek the delegation of such program was made possible by the recent enactment of Act 285.

Act 285 (formerly House Bill 1261) was introduced on January 25th during the 93rd Arkansas General Assembly to authorize the Arkansas water control agency (i.e., DEQ) to seek and accept delegation of the Section 404 Clean Water Act program. The legislation added an additional subdivision to Arkansas Code § 88-4-207(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 36 Clean Water Act.

An additional section of the bill amended 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 program for the dredge and fill provisions provided 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 federal 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 (including Arkansas). However, the State of Florida in the last several months obtained delegation of the 404 program.

Mitchell Dowden will be the coordinator of the DEQ task force exploring possible delegation of the 404 program. He is an attorney in the Office of Chief Counsel at DEQ. Mitchell’s email address is Mitchell.dowden@adeq.state.ar.us and telephone number is 501-682-0752.

A copy of Act 285 can be downloaded [here](#).