



River Network

Connecting People, Saving Rivers

Written Testimony of Todd L. Ambs

President, River Network

September 20, 2012

United States House of Representatives

Committee on Transportation and Infrastructure

Subcommittee on Water Resources and Environment

Regarding

States Assumption of the Clean Water Act Section 404 Program:

Enhancing Cooperative Federalism with the States

Good morning, Chairman Gibbs, Ranking Member Bishop, and Members of the Committee. My name is Todd Ambs. I currently serve as President of River Network, a national conservation organization. For 24 years, River Network has focused on helping the hundreds of river and watershed groups around this nation to do their work better. In that capacity, I travel all over this nation working with our several hundred partner groups and certainly have a working knowledge of the issues across the country relative to requests to dredge and fill the lakes, rivers and wetlands of this nation and the regulatory tools available to monitor, assess and approve or deny such actions.

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But I offer my thoughts today with a primary focus on how the State of Wisconsin approaches these issues. My insight regarding this matter comes from working in the environmental field for more than 30 years and, from having the honor of serving as the Water Division Administrator at the Wisconsin Department of Natural Resources for eight years (2003-2010).

As we know, the Federal Water Pollution Control Act Amendments of 1972 (better known as the Clean Water Act (CWA)), is a sweeping statute enacted to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”¹ To achieve this goal, Congress adopted a cooperative federalism approach, by which each level of government—federal, state, and local—has defined roles and responsibilities, and yet all must work together, collaboratively, in the pursuit of clean water – from the headwaters of our rivers and streams to their outlets downstream in the nation’s prized estuaries, bays, and sounds.² Several CWA programs were specifically designed by Congress to be delegated to, and administered by, the states. Most significantly, 46 states have delegated authority to administer the CWA Section 402 National Pollutant Discharge Elimination System program for point source discharges.

By contrast, while the statute allows, under Section 404(g) and (h), for states to assume authority to administer the program which regulates the discharge of dredged or fill material into navigable waters, including wetlands, only two states – Michigan and New Jersey – have this authority.

Today, I will share some of Wisconsin’s experience over the last four decades working with the various aspects related to Section 404 of the CWA. I will share some background on Wisconsin’s assessment of the pros and cons of asking for full assumption of authority to administer the

¹ 33 U.S.C. § 1251(a) (2006).

² Federal Water Pollution Control Act Amendments, Pub. L. No. 92-500, 86 Stat. 816 (1972), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL WATER POLLUTION ACT AMENDMENTS OF 1972, at 16879 (1972). Regarding the geographical extent of jurisdiction, *see e.g.*, Senate Committee on Public Works, S. Rep. No. 92-414, 92nd Cong., 76, 77 (1971); S. Rep. No. 95-370, at 75 (1977); Sen. Chafee, 123 Cong. Rec. 26716-17 (daily ed. Aug. 4, 1977); Sen. Baker, 123 Cong. Rec. 26718-19 (daily ed. Aug. 4, 1977).

program, some ideas regarding alternative approaches to full assumption and some cautions for the Committee to consider as you investigate this important regulatory topic.

Wisconsin is blessed with abundant natural resources. We have 15,000 lakes, 84,000 miles of rivers and streams, 1,100 miles of Great Lakes shoreline and enough groundwater that if it was spread evenly across the state it would be 100 feet deep. In addition, despite the fact that we have lost approximately 50% of our wetlands in the last 200 years, we still have more than 5.3 million acres of these critical freshwater resources.

We also have a proud conservation tradition in Wisconsin, with broad bi-partisan support for strong protections of our natural resources. This tradition is fostered in part due to the critical role that healthy natural resources play, not only in the quality of life for Wisconsinites, but also for a healthy economy in the state. Tourism, for example, is the third largest industry in the state, generating \$13 billion a year. Much of that industry exists because of the plentiful, healthy, natural resources that draw people to recreate in Wisconsin.

Wetland Permitting Process in Wisconsin

Under the federal Clean Water Act, most activities that involve grading, filling, removing, or disturbing the soil in a wetland—such as residential construction, road building, and pond creation—require approval from both DNR and the Army Corps of Engineers. DNR is also authorized under 2001 Wisconsin Act 6 to regulate activities in small, isolated wetlands that are not subject to federal permitting requirements.

DNR regulates Wisconsin wetlands as part of a larger waterway permitting program. In FY 2005-06 when the Wisconsin Legislative Audit Bureau conducted an audit of the Wisconsin Wetlands Program, an estimated 19.3 full-time equivalent (FTE) staff performed wetland permitting, enforcement, mapping, policy coordination, and other regulatory activities. Expenditures for these activities were estimated at \$1.75 million at that time.³

³ Report 07-6, May 2007, An Evaluation of Wetland Regulatory Programs, Wisconsin Legislative Audit Bureau, Pages 3-4.

Question of 404 Assumption a Recurring Theme

Over the years, the State of Wisconsin has looked at the question of assumption of this program and for a variety of reasons; the state has always chosen to not pursue this approach. As far back as 1991 and again in 1993, the issue was reviewed by the WDNR. Specifically, a 1993 DNR report noted that doing so would simplify the wetland permitting process. However, the report also identified several barriers, including the need for statutory changes to recognize the State's jurisdiction over non-navigable waters and a lack of federal funding to implement the program.

Review of Wisconsin Program in 2006-2007 Most Comprehensive

As mentioned earlier, in May 2007 the Wisconsin Legislative Audit Bureau issued a full audit of the Wisconsin Wetlands Program. As Water Division Administrator, I was heavily involved in the process. Although the audit was generally positive, the agency was specifically asked to address the question of state assumption of the 404 program.

The request in the Audit report read, *“Evaluate the feasibility and advantages of assuming the federal wetland permit program, as allowed under Section 404 of the Clean Water Act with an estimate of the required staffing levels, anticipated program costs, and effects on wetland resources.”*⁴

On December 18, 2007, the Secretary of the Wisconsin DNR responded to this request and several others. Much of the response is provided below verbatim for the record.

“We have investigated the feasibility of the state assuming the federal 404 permit program in the past and again in response to the audit request. We continue to find the feasibility of assuming the federal program low due significant barriers that involve state law changes and the lack of federal funding available to states for implementation. Our fiscal estimate and staffing needs for federal program implementation include an annual budget increase of \$1,047,300 and an additional 16.6 full time employees. We have also found state assumption would not result in additional protection of Wisconsin's wetland resource, since all wetlands in Wisconsin are already protected under either current federal or state laws.”

⁴ Ibid., Pg. 86

“...While we found potential benefits of assumption, we continue to find the feasibility of assuming the federal 404 program low due to inadequate state jurisdiction and limited funding and staffing. Furthermore, state assumption would not result in additional protection of Wisconsin’s wetland resource, since all wetlands in Wisconsin are already protected under either current federal or state laws.”

“...It is important to note that the federal government through the U.S. Army Corps of Engineers retains permit authority over waters traditionally used for commercial navigation, defined as Section 10 waters. A few examples include the Great Lakes, Mississippi River, St. Croix River and the Wisconsin River. The state assumption approval process is coordinated by the Environmental Protection Agency and states applying must have state law that is as protective as the federal law.

When a state assumes the federal 404 permit program, permit streamlining should occur. Applicants for most waterway and wetland permits are no longer required to obtain a separate federal permit; only the state permit and standards apply. State “assumption” combines the federal and state permit processes creating one set of permit standards. This combination should eliminate applicant confusion between federal and state requirements that may appear to be different. While assumption should streamline the permit process, applicant confusion may remain because Section 10 applicants are still required to obtain federal permits for projects associated with Section 10 waters.

In order to assume the federal 404 permit program, state law must be at least as protective as the existing federal law and if the state chooses, can be more protective. Although Wisconsin currently has protective wetland and waterway laws, several law changes would be required to ensure consistency with the existing federal 404 permit program.”⁵

Adequate Funding Remains an Impediment to Assumption

Today, many of those law changes have occurred in Wisconsin so that is less of an impediment to assumption in the state. However, Frank’s letter goes on to address one of the most critical challenges for any state considering 404 assumption – money.

“To assume the federal permit program, DNR must assume the additional duties associated with the federal permit program implementation. To determine what additional work the Department would take on, we obtained 2006 data

⁵ Wetlands Audit Report Follow-up Letter, from WDNR Secretary Matt Frank to Legislative Audit Committee Co-Chairs, December 18, 2007, Pages 10-11.

from the Corps St. Paul District, the office currently responsible for implementing the 404 permit program in Wisconsin. We compared Corps data and state data, and estimated hours to perform additional tasks, to determine an approximate cost associated with assumption. To implement the federal program in Wisconsin we have estimated an annual increase of approximately \$1,047,300 with an additional 16.6 full-time employees..."

Frank's letter then went on to note, *"We have taken many steps to eliminate agency duplication of effort and confusion for the applicants. The major benefit resulting from state assumption is the potential for permit streamlining for permit applicants. Recognizing this benefit we have worked with the Corps to make the permit process as seamless as possible for the applicant."*⁶

The letter then went into some detail regarding the steps being taken to streamline the permit application process in Wisconsin. As a result of those actions and others since that time, the Wisconsin wetlands program appears to be working well. In fact, as I noted in testimony before the Wisconsin State Senate earlier this year:

- As of 2010, 94% of all wetland permit applications were approved by the department.
- Two acts passed in 2010, Act 373 and Act 391, addressed key needs in terms of more wetland notification and identification services and directed the Department to move forward with a general permit.
- No significant economic development projects have been stopped because of onerous wetland determinations.
- The department received a very detailed and quite favorable audit from the Legislative Audit Bureau just five years ago.
- The DNR Wetlands Team has one of the most thorough and specific wetland strategy and action plans that I know of at the state regulatory level. In fact *Reversing the Loss*, as the plan is called, should be held up as a model for how to balance the need to protect wetlands and respond to regulatory needs.

⁶ Idid., Pages 11-12

Assumption Not the Only Way to Have Strong Program

The point here is not to in any way denigrate the efforts in Michigan or New Jersey, where state 404 assumption has already occurred, or to suggest that efforts underway in states like Ohio and Oregon to move toward state assumption are without merit.

What I am suggesting is that 404 assumption is far from the only tool available to states that wish to have a streamlined, yet effective program to protect some of our most precious natural resources – our waters.

It is also worth noting that in addition to the funding challenges associated with 404 assumption, there continues to be other issues that may this choice problematic. The Association of State Wetland Managers has articulated some of them before. Those challenges include but are not limited to:

- **Need to demonstrate strict consistency with federal requirements.** Some states find it difficult to demonstrate that their program is at least as stringent as all federal program requirements, especially where the framework for state and federal laws differs significantly.
- **Need for broader political/public support.** Some states/tribes are reluctant to assume responsibility for a program that has been developed under federal law. Uncertainties in the public's mind about how the program would operate if run by the state rather than the federal government have led to opposition to assumption in some states. In addition states or tribes may have greater needs for use of public funds in other program areas.
- **Need for Clarification of Current Assumption Requirements.** In part because only two states taken over the Section 404 program there is a need for additional clarification from EPA with respect to certain 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. Some issues are addressed on a case by case basis when a state or tribe begins putting together an

assumption application. Finally, the current uncertainty over the extent of Waters of the U.S. under the Clean Water Act may create uncertainty over what waters in the state must be regulated.

As the Association notes above, the need to make sure that a state considering assumption has laws that are as stringent as the federal government is a most important requirement. Any move to enhance the ability of states to undertake this program must continue to emphasize this component. In our effort to find efficiencies in the permitting process, we should never lose sight of the fundamental need to adequately protect these critical resources.

Transparency and Public Involvement Critical

States that undertake these programs should also be held to a high standard when it comes to transparency, public involvement and the ability for substantive review of permitting decisions. Michigan appears to have a very good system in this regard as my former colleague will note in his testimony. Some states however, make it difficult to request a public hearing, receive notices about permit applications and/or severely limit aggrieved parties in the permit appeals process. In addition, it would be preferable if a state that assumes the program has a citizen suit provision at the state level, since legal interpretations vary regarding whether this critical Clean Water Act provision continues to apply when a state assumes the program.

Clear Guidelines Are Essential, But Currently Lacking

Finally, I want to emphasize the need for clear guidelines regarding what waterbodies come under Clean Water Act jurisdiction. This clarity is essential for state agencies to consistently and efficiently implement Clean Water Act programs. It is also essential for them to understand where they must expand state programs in order to protect valuable water resources no longer being protected under the Clean Water Act. Wisconsin acted quickly to fill the gap created by the United States Supreme Court SWANCC decision in 2001. Within months that legislature passed a law to provide protections for these so-called isolated wetlands. The existence of a strong program in Wisconsin also ameliorated the impacts of the Rapanos decision. Nonetheless, my experience while Water Division Administrator was that the single most significant reason for delays in wetland permitting during my tenure was the difficulty with determining jurisdictional wetlands in the wake of these two

Supreme Court cases. I can only imagine the difficulty – and resulting risk to vulnerable wetlands, lakes, and streams – in states with less developed programs.

In my view a single, clear set of guidances from the federal government is the only way to make sure that this federal law, the Clean Water Act, is applied fairly and uniformly across the country.

Wetlands provide numerous public benefits and ecosystem services including fish and wildlife habitat and water management. Protection from natural hazards including flooding, storm surges, and drought, as well as protection of drinking water supplies, are just a few of the benefits that these complex water systems, sometimes called nature's kidneys, can provide. Over the last forty years, Congress has consistently recognized the close link between land use decisions made by the states and effective protection of wetlands, lakes, and streams.

For these reasons and more, any effort to promote better state-federal coordination, or when appropriate state assumption, of the responsibilities contained in Section 404 of this law, is a most useful exercise. But adequate funding, consistent state laws, transparent processes and clear direction from the federal government regarding how the law is applied will continue to be important foundations if the exercise is to produce healthier water bodies in this nation.

Mr. Chairman, Ranking Member Bishop, and Members of the Subcommittee, I thank you for the opportunity to provide this testimony. We at River Network look forward to working with you as you continue to explore this issue. Please do not hesitate to contact me or my staff for further insights on this issue. I would, of course, be happy to answer any questions that you may have.

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
Truth in Testimony Disclosure

Pursuant to clause 2(g)(5) of House Rule XI, in the case of a witness appearing in a nongovernmental capacity, a written statement of proposed testimony shall include: (1) a curriculum vitae; and (2) a disclosure of the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) received during the current fiscal year or either of the two previous fiscal years by the witness or by an entity represented by the witness. Such statements, with appropriate redaction to protect the privacy of the witness, shall be made publicly available in electronic form not later than one day after the witness appears.

(1) Name: Todd Ambs

(2) Other than yourself, name of entity you are representing:

River Network

(3) Are you testifying on behalf of an entity other than a Government (federal, state, local) entity?

YES X

If yes, please provide the information requested below and attach your curriculum vitae.

NO

(4) Please list the amount and source (by agency and program) of each Federal grant (or subgrant thereof) or contract (or subcontract thereof) received during the current fiscal year or either of the two previous fiscal years by you or by the entity you are representing:

Please see attached list



Signature

Sept. 17, 2012
Date

TODD AMBS

WORK HISTORY

2010-PRESENT RIVER NETWORK

President – Madison, WI/Portland, OR

- Guides the activities of twenty-four year old national river conservation organization. Works to empower hundreds of state and local river and watershed groups to better protect and restore their home waters.
- Develops programs with key staff to enhance habitat protection efforts, water efficiency programs, safe drinking water operations and state and federal regulatory activities across the nation.
- Specialize in assessments of water regulatory programs for efficiency and effectiveness in meeting water quality and quantity goals.
- Manages a staff of organizational development experts who provide critical training tools and facilitation services to groups so that they can achieve their maximum potential.
- Regionally active in the Upper Midwest as a former member of the Great Lakes Commission, Great Lakes Protection Fund, Upper Mississippi River Basin Association and current member of the Healing Our Waters Coalition.

2003-2010

WISCONSIN DEPARTMENT OF NATURAL RESOURCES

Water Division Administrator – Madison, Wisconsin

- Guided the activities of 675 employees in programs including Watershed Management, water quality management of state water bodies; Fisheries Management and Habitat Protection, managing and monitoring aquatic ecosystems and habitat, and; Drinking and Groundwater Management, which includes assuring the safety, quality and availability of drinking water and groundwater.
- Lead negotiator for Wisconsin on the Great Lakes Compact. This historic agreement establishes a comprehensive water management system for the eight states and two Canadian Provinces that are part of the Great Lakes Basin.
- Created a new Water Use Section and led the development of a statewide water monitoring strategy to better align Water Division resources to water quality and quantity priorities.
- Managed a \$ 70 million annual budget during extremely difficult state budgets, securing additional staffing and resources for stormwater management and groundwater quantity protection programs.
- Coordinated the efforts of the Doyle Administration to pass important Groundwater Quantity Protection Act, setting first state standards for protecting high quality waters when large groundwater pumping wells are proposed nearby.

1998-2003

RIVER ALLIANCE OF WISCONSIN
Executive Director - Madison, Wisconsin

- Created and implemented a comprehensive strategic and fundraising plan for this nonprofit organization. Significantly increased the breadth and scope of the group in four years. Revenue and staff increased more than 600 percent.
- Positioned the organization as one of the leaders on water policy issues in Wisconsin. Senator Gaylord Nelson referred to the River Alliance as, "One of the most effective and credible voices for the flowing waters of our state."
- Spearheaded the effort to create the Clean Water Coalition. Over three dozen groups worked for several years to help to pass a strong set of state rules to control polluted runoff – the number one water quality threat in Wisconsin.
- Led the effort to pass legislation to create the State River Grants Protection Program. Since the law went into effect in 1999, nearly two million dollars has gone to assist nearly 100 river and watershed organizations across the state.

1997-1998

WISCONSIN DEPARTMENT OF JUSTICE
Senior Policy Analyst - Madison, WI

- Served as the lead analyst for the Wisconsin Attorney General on important public policy issues affecting the agency.
- Organized three national meetings on utility deregulation issues on behalf of the Attorney General when he served as President of the National Association of Attorneys General.
- Led staff effort to develop the One-Percent for Kids initiative to tie funding for child abuse prevention programs to the amount of money spent on the Department of Corrections. This funding initiative was ultimately included in the truth in sentencing law passed in 1998.
- Coordinated the development and implementation of the Attorney General's Safe Schools initiative. Organized seven hearings around Wisconsin to identify key issues and solutions to make Wisconsin schools safer.

1995-1997

RIVERS UNLIMITED
Executive Director - Columbus, Ohio

- Created and implemented a comprehensive strategic and fundraising plan for this nonprofit organization. Quadrupled the income and tripled staff size through successful fundraising efforts in the first year.
- Positioned the group as a leader in water policy issues in Ohio. Appointed to serve on the Ohio EPA's Great Lakes Water Quality Advisory Committee. The Akron Beacon Journal said the organization has "emerged as the umbrella organization for local grass-roots groups pushing greenway plans in Ohio."
- Spearheaded the effort to organize the Citizen's for Clean Water in Ohio. The 34 organizations, representing nearly one million people, was Ohio's largest alliance ever assembled for clean water.

1991-1995

OHIO ATTORNEY GENERAL'S OFFICE

Director of Policy - Columbus, Ohio

- Combined policy and communications operations to create the first Policy Section ever in an Attorney General's office. The National Association of Attorneys General (NAAG) called this new office structure the "*Ohio model*." A NAAG management review team said this unique approach was, "one of the key front office innovations of the last decade" for AG's offices in the country.
- Developed and implemented over 80 new programs in the office including the creation of a Children's Protection Section, establishment of an Early Warning Policy for Ohio businesses, and the development of law enforcement programs that led the *Columbus Dispatch* to call Attorney General Lee Fisher an "innovative, adaptable crime fighter."
- Supervised a public relations staff called, "one of the most effective press/PR operations in state government" by Ohio's largest newspaper, *The Cleveland Plain Dealer*.

1987-1990

OHIO DEPARTMENT OF NATURAL RESOURCES

Assistant Chief, Public Information & Education - Columbus, Ohio

- Developed innovative media relations strategy, consistently increasing the number of broadcast and print opportunities.
- Designed and implemented statewide activities for Earth Day 20th Anniversary. Created theme and coordinated efforts of 30 state agencies.
- Supervised a staff of seven.

EDUCATION B.A. in Political Science/Speech; Eastern Michigan University, April 1980.
Graduated Cum Laude. Dean's list every semester.
Member, National Championship Collegiate Speech Team.

**AWARDS,
BOARDS**

Serve(d) on behalf of the Governor on a number of water related boards and commissions including the Great Lakes Commission (Vice Chair), Council of Great Lakes Governors (2003-2010), Great Lakes Protection Fund, Groundwater Coordinating Council (Chair - 2003-2010), and the Upper Mississippi River Basin Association (Chair). National River Hero, 2003.

TECHNICAL SKILLS Proficient in Microsoft Office Suite, Outlook, HTML Web Design.

REFERENCES Available on request.

River Network
Federal grants received

Source (Agency & Program)	Amount Received		
	FY12	FY11	FY10
Corporation for National and Community Service 2011--OPE1-H89-COO-20101-4101	24,029.72	-	-
National Park Service	2,500.00	2,500.00	2,500.00
United States Forest Service	15,000.00	15,000.00	22,000.00
US Environmental Protection Agency - Clinton River	34,004.16	24,413.68	-
US Environmental Protection Agency - P & R Water Quality	-	2,500.00	-
US Environmental Protection Agency - Rally Sponsorship	20,000.00	25,000.00	-
US Environmental Protection Agency - Urban Waters	116,594.13	75,661.26	-
US Environmental Protection Agency - Non-WSN	-	-	25,000.00
US Environmental Protection Agency - TWG/WSN Supplemental	-	-	90,213.00
US Fish & Wildlife Service	-	5,000.00	5,000.00
US Geological Survey	15,000.00	15,000.00	10,000.00