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**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 Bill Creal, Chief of the Michigan Department of Environmental Quality's (MDEQ) Water Resources Division. I have 34 years of experience implementing the federal Clean Water Act (CWA) programs and associated state laws. I also serve on the Board of Directors of the Association of Clean Water Administrators (ACWA). With me today is Kim Fish, Assistant Division Chief of the MDEQ's WRD. Kim brings 26 years of experience with federal CWA programs.

I am honored today to testify on behalf of both the MDEQ and the ACWA. Now over 50 years old, the ACWA is the national, nonpartisan, professional organization representing the state, interstate, and territorial water quality control official responsible for the implementation of surface water protection programs throughout the United States. The ACWA's members are on the front lines of CWA monitoring, permitting, inspection, compliance, and enforcement across the nation. We are dedicated to Congress' goal of restoring and maintaining the chemical, biological, and physical integrity of America's waters.

As we know, the 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.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

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).

waters, including wetlands, only two states – Michigan and New Jersey – have this authority. Today I will share Michigan's experience during its nearly three decades of experience administering Section 404 of the CWA. We have demonstrated significant success in achieving regulatory clarity, as well as cost savings as the administrator of this program. I believe our perspective will be helpful to the Subcommittee as it studies this area of the CWA and its implementation.

Michigan is blessed by its water resources. The Great Lakes define the shape and character of our state with 3,288 miles of fresh water shoreline, more than any other state. In addition, Michigan has 11,000 inland lakes, 36,000 miles of rivers, and 5.5 million acres of wetland. Even before Michigan was a state, its residents recognized the importance of our water resources for transportation, hunting and trapping, agriculture, drinking water, commerce, and industry.

The same year that Congress passed the CWA, Michigan passed a state lakes and streams statute, and then in 1979, passed a wetland statute with the expressed intention of assuming the CWA Section 404 Program. In 1984, Michigan became the first state to receive Environmental Protection Agency (EPA) approval to administer the CWA Section 404 Program. Over the past 28 years, we have issued over 100,000 permits. We currently authorize about 4,000 projects annually under the 404 program, with no federal funding for program operation. Although limited funds are available for program development under CWA §104(b)(3) through the EPA State Wetland Program Development Grants, no federal funding is provided for the implementation of the Section 404 Program.

The Section 404 Program in Michigan is administered through a combination of state laws. To maintain 404 authorization under §233.1(d), state law must remain consistent with federal regulations, such as exemptions, permitting criteria, general permits, public notice procedures. However, the state has the flexibility to design the regulations to meet the needs of the state and its constituents. State assumption of the program provides benefits to both the regulated community and the citizens of Michigan. Prime examples of the benefits of Michigan's program are:

- **Michigan law provides a clear and consistent definition of regulated waters and regulated activities.** Because of the ambiguity in federal law, the scope of regulated waters has been defined by the federal courts and has changed several times in the last decade. Similarly, federal law does not specifically define what activities are regulated. The federal agencies must rely on guidance documents and various court decisions to determine if some activities are regulated. The ambiguities in the federal regulations can often delay permit processing. Because Michigan law contains clear measurable criteria, the regulated community, the public, and state staff can easily determine if a water body or wetland is regulated and what activities within those water bodies are regulated.
- **Faster permit decisions.** Unlike the federal permit program, Michigan's permit processing is subject to deadlines mandated by state statute. As a result, we frequently make permitting decisions on individual permits weeks or months sooner than the United States Army Corps of Engineers (Corps); however, our decisions on general permits, which are the smaller routine projects, are about the same. As an example, a wetland delineation and jurisdictional decision for expansion of a nuclear power plant on the shore of Lake Erie, clearly a very large complex project, took the MDEQ 45 days to complete, and took the Corps over 700 days. This determination was just the first step in the permitting process for this project.
- **Reduces the regulatory burden for permit applicants.** Michigan operates a consolidated joint permit application process. Applicants submit one application and receive review and authorizations under multiple state regulations. The state coordinates with the Corps when required, reducing duplication and applicant confusion. This process results in a more efficient, cost effective, and streamlined permitting process for applicants.

- **Provides the regulated property owners with better access to decision makers.** Michigan has staff located in ten offices throughout the state that are available to meet with landowners to review applications, explain decisions, and provide pre-application consultations.
- **Provides more public oversight of regulatory decisions.** Michigan law requires public noticing and an opportunity for interested persons to request public hearings on all individual permit applications. We normally hold public hearings on about four percent of the individual permit applications; the Corps rarely holds public hearings.
- **Fair and impartial appeal process.** Permitting decisions can be appealed under Michigan's Administrative Procedure's Act. Appeals are adjudicated by an independent third party administrative law judge. The Corps' appeal process consists of appealing the permit decision to a higher ranking individual within the Corps.

Although Michigan has been able to run a successful 404 program for over two decades, the sustainability of this program turns on the issue of funding. For the last 28 years, Michigan has administered the 404 program with primarily state funds from application fees and the state general fund. However, over the past decade, the MDEQ has seen a decline in state general funds from \$120 million to \$20 million, forcing many difficult discussions and decisions regarding what programs the state should continue to operate.

As part of Michigan's budget cuts in 2009, Michigan's governor and several legislators proposed to eliminate Michigan's wetland program thereby giving up the state's assumption of the 404 program as a means of saving state general fund money. Strong support from a diverse group, including regulated entities such as realtors, home builders, farmers, and manufacturers, along

with environmental groups prevented this from happening. As a result of the strong support for the program, the Michigan legislature found temporary funding for the program through 2012.

The Michigan legislature also established an advisory council in 2009 to evaluate the program, ensure the program remains consistent with CWA requirements, and to make recommendations regarding appropriate funding. The council consists of 22 members representing business, industry, consultants, state and local governments, environmental groups, and academia. Several federal agencies, including the Corps and EPA, have participated in the council serving as a resource regarding the CWA and federal procedures. The council recently completed their work and made several recommendations to our governor and legislature. The council evaluated Michigan's current funding structure along with several potential alternative options, including increasing application fees. The council determined that increasing application fees was not a viable option; it would make fees unreasonably high and unaffordable for many applicants and would require legislative action which would be politically difficult. Therefore, the council has recommended continuing to fund Michigan's wetland program with a combination of reasonable fees, state general fund or other state obligated funds, and seek federal funding to support continuation of 404 assumption.

We estimate that Michigan is saving the federal government between \$3 and \$5 million each year by operating the 404 program. Without Michigan's program, the Corps has estimated that it would need that amount of additional money annually to hire additional staff and open more offices throughout the state. Not only do we save the federal government's finite dollars, we are able to administer the program at a lower cost and with a greater level efficiency, allowing projects that provide vital economic growth to our communities to move forward more quickly.

As we mentioned above, there are many advantages to the public and the regulated community when states assume the Section 404 Program. Additionally, many states have contacted Michigan seeking advice on how to assume the program. As the other witnesses demonstrate, states are interested in assuming the 404 program.

However, we need strong diversified funding to keep this program in Michigan as a state run, successful program, and to make 404 assumption possible for interested states. One possible avenue to explore is for Congress to enact, and appropriate funds, for a grant program to make up to \$2 million per year for ten years available to states that assume the 404 program. If ten states assumed the program with this incentive, the annual cost to the federal government would be \$20 million a year. The annual savings to the federal government would be upwards of \$30 million.

States would have a choice regarding whether to seek assumption of this program, as capacity even with federal funding would vary due to state priorities, expertise, staffing, facilities, and other resource considerations. However, if the Michigan experience is representative, state administration of the 404 program could benefit states, the regulated community, and the federal government through streamlining and great cost efficiencies.

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

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