

DEPARTMENT OF THE ARMY

COMPLETE STATEMENT

OF

**THE HONORABLE JO-ELLEN DARCY
ASSISTANT SECRETARY OF THE ARMY
(CIVIL WORKS)**

BEFORE

**THE COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT**

UNITED STATES HOUSE OF REPRESENTATIVES

ON

**State Assumption of the Clean Water Act Section 404 Program:
Enhancing Cooperative Federalism with the States**

September 20, 2012

Chairman Gibbs, Ranking Member Bishop, and Members of the Subcommittee, I am Jo-Ellen Darcy, Assistant Secretary of the Army (Civil Works). Thank you for the opportunity to discuss the Army Corps of Engineers (Corps) regulatory authority under Section 404 of the Clean Water Act (CWA). I will specifically discuss the Corps' role and involvement when a State wishes to assume the Section 404 program and makes final Section 404 permit decisions. I will also discuss the Corps' experiences in the two states, Michigan and New Jersey, which have assumed the 404 program, followed by my observations on a path forward for additional States wanting to assume the program.

Background on Clean Water Action Section 404 and Section 10 of the Rivers and Harbors Act

Section 404 of the CWA established a program to regulate the discharge of dredged or fill material into waters of the United States. Since 1972, the Corps has regulated discharges of dredged or fill material into waters and wetlands related to activities such as highway construction; residential, commercial, and industrial developments; energy projects; and a variety of other projects. Section 10 of the Rivers and Harbors Act of 1899 gives the authority to the Corps to ensure that there are no obstructions to the navigable waters of the United States. Under this authority, the Corps has regulated work and/or structures within navigable waters related to activities such as: construction of piers, jetties, and weirs; dredging projects; and other such projects. The Corps had been regulating activities in the Nation's navigable waters for over 70 years at the time of the passage of the CWA.

Discharges of dredged or fill material into waters, including wetlands, of the United States as well as work or structures within navigable waters require authorization from the Corps. Activities that are similar in nature and that are expected to cause no more than minimal effects, individually and cumulatively, as described in Section 404(e) of the CWA, may be authorized by a "general permit." General permits protect the aquatic environment, but also provide applicants with a quicker authorization process because impacts are anticipated to be minor.

Activities that do not meet the criteria for a general permit are typically evaluated under the "standard individual permit" procedures. These procedures include issuance of a public notice; preparation of an environmental document in accordance with requirements of the National Environmental Policy Act; and, for applications that involve the discharge of dredged or fill material, application of the "Section 404(b)(1) Guidelines" developed by the EPA in conjunction with the Corps. Regulatory program personnel in Corps districts work with applicants to avoid and minimize impacts to waters of the United States and to develop satisfactory compensatory mitigation plans for unavoidable impacts to aquatic resources. For these individual permit applications, the Corps conducts a full public interest review balancing the anticipated benefits against the anticipated impacts. The Corps can only authorize those activities that are not contrary to the public interest, and may only authorize the least environmentally damaging practicable alternative, so long as that alternative complies with other aspects

of the Guidelines and does not have other significant adverse environmental consequences.

The Secretary of the Army, through the Chief of Engineers, has delegated responsibility for making final decisions on permit applications to the commanders in the 38 Corps districts. The regulatory program is implemented day-by-day at the district level by staff that knows their regions and resources, and the public they serve. Nationwide, the Corps makes tens of thousands of final permit decisions (both general and individual permits) annually. In all but the very rarest of circumstances, these decisions are appropriately made at the district level with no review of those decisions by Corps division (regional) or headquarters staff. When implementing the Corps regulatory program, the Corps is neither an opponent nor a proponent for any specific project - the Corps responsibility is to make fair, objective, and timely permit decisions.

State Assumption Authority Process under Section 404(g) of the Clean Water Act

Under Section 404(g) of the Clean Water Act, Congress gave the States/Tribes the authority to administer individual and general permit program for the discharge of dredged or fill material into waters within their jurisdiction under State law or under an interstate compact. Section 404(g)(1) provides that States may administer such programs “for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark...)...” The State Program Regulations are found at 40 CFR Part 233. The State must provide evidence that the laws of the State provide adequate authority to carry out the prescribed program. The process for approval is carried out by the EPA who has the final authority on CWA Section 404 jurisdiction, and who coordinates with the Corps, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service during the approval process. The Corps and the Services can provide comments to the EPA to inform their review of the State program to determine its adequacy in fulfilling the requirements of the CWA Section 404 program. The program that a State/Tribe implements must ensure that the laws of the State/Tribe provide adequate authority to carry out the CWA Section 404 program. The materials that are required to be provided to the EPA for the approval of an assumption program are: a letter from the Governor; a complete project description; a statement from the state Attorney General; a Memorandum of Agreement with the Regional Administrator of the EPA; and a Memorandum of Agreement with the Secretary of the Army. The State must show that their program would cover all waters they are eligible to assume, that it would regulate at least the same activities, that it would provide for sufficient public participation, that it would ensure compliance with the Section 404(b)(1) guidelines, and that it would have adequate enforcement authority. There are only two States that currently have assumed the CWA Section 404 authority, Michigan and New Jersey.

If States approach the Corps regarding the assumption process, the Corps notifies the State that the EPA is the lead Federal agency and the Corps will coordinate with the

EPA on the process. The Corps will provide information but the EPA has the final decision authority.

What are the Limits of State Assumption With Respect to the Corps Authority?

Section 404(b)(1) States that no CWA Section 404 permit will be issued if, in the judgment of the Corps, anchorage and navigation of any of the navigable waters would be substantially impaired by the activity, even in States that have assumed the CWA section 404 program.

Thus, there are activities in certain waters where the Corps retains regulatory authority even in States that have assumed the CWA Section 404 program. The Corps retains authority in waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their ordinary high water mark, including wetlands adjacent thereto. The Corps retains permitting authority in these waters (and their adjacent wetlands), for Section 404 activities. These can be major activities, such as large dredging activities, beach nourishment activities, and ferry docking structures. All Section 10 authority is retained by the Corps in order to review and determine whether any proposal may potentially impede or interfere with navigation. It is essential that the Corps maintain regulatory authority over these waters to ensure that essential Federal functions such as national defense, protection of commercial navigation, and flood control are considered from a broad perspective. Across the country there is great variability in the types of waters in individual States with some States having significant numbers of waters for which the State cannot assume 404 permitting authority while other States may have significantly fewer. This variability can play a role in the feasibility and effectiveness of State assumption.

The EPA is responsible for oversight of a state-assumed CWA Section 404 Program. In this role, the EPA directly reviews a small percentage of the applications processed by a State that has assumed the program. The permit applications directly reviewed by the EPA generally include those for projects with the largest impacts or those with potential impacts to especially sensitive natural resources.

State Assumption Regulatory Framework and Interagency Coordination

Michigan: In 1984, Michigan became the first state to assume the CWA Section 404 program. The program is administered by the Michigan Department of Environmental Quality. EPA waives review of most activities except for certain classes or categories of discharges, such as draft general permits and discharges potentially affecting endangered or threatened species. For activities that are not waived, Michigan transmits a copy of the permit application to the EPA, which is the primary contact for the State on State Section 404 permits. The Corps may comment on public notices issued by the Michigan Department of Environmental Quality, but does not normally play any other direct role in Michigan's 404 Program. When the EPA does review a

permit application, they transmit a copy to the appropriate Corps district office and US Fish and Wildlife Service office for review and comment.

Michigan revisited and modified their MOA with EPA in 2011 to ensure further clarity and address inconsistencies between the State and Federal regulations. The Corps participated in the review process to ensure consistent program implementation in assumed and non-assumed waters. The Corps Detroit District has noted that the District workload has been reduced by Michigan state assumption. In general, we enjoy good coordination and a positive relationship with the State.

New Jersey: New Jersey's program began in 1994 and is administered by the New Jersey Department of Environmental Protection. Consistent with the EPA's regulations, EPA waives review of most activities, except for a few categories of activities, such as major discharges that impact greater than five acres of wetlands or those that may affect threatened or endangered species. Unless review has been waived, the EPA provides a copy of the public notice for any complete permit application to the appropriate Corps district office, US Fish and Wildlife Service office and National Marine Fisheries office and follows a review and comment process like that described in Michigan. The most prominent and challenging factor in the New Jersey assumption process was the Endangered Species Act (ESA). Under a memorandum of Understanding in New Jersey, the state coordinates with the U.S. Fish and Wildlife Service (FWS) on permits that may affect threatened or endangered species to avoid any adverse effects.

Other States: There are other states including Minnesota, Oregon, Florida, Ohio, and Virginia that are considering assuming the Clean Water Act Section 404 program. When requested, the Corps has provided input and expertise on the CWA Section 404 Program to the EPA and States during the program assumption review process. In the past, other states including Alabama and Kentucky, began the initial review process but did not carry through to assumption.

Florida is a state that reviewed the assumption of the CWA Section 404 program and expressed interest in assuming both CWA Section 404 and Section 10 of the Rivers and Harbors Act authority. There is no legal authority for states to assume Rivers and Harbors Act authorities from the Corps. In addition, we understand that the State encountered challenges related to the Endangered Species Act and the State's need to make changes to its regulations under their Environmental Resource Permitting process to assume the CWA Section 404 program. In light of these challenges, the State instead determined that a State Program General Permit (SPGP) would be a better solution as they have a large amount of traditionally navigable waters and their adjacent wetlands that require Corps permit evaluation. From January 2000 through September 2011, the Florida Department of Environmental Protection has authorized 23,641 actions under the SPGP.

Types and Totals for Issued Corps Permits in Assumed Waters States of MI and NJ

The Corps plays an active role in permitting in the traditionally navigable waters and their adjacent wetlands of Michigan and New Jersey as a result of its authority under Section 10 of the Rivers and Harbors Act and its retained CWA section 404 authority in those waters. Most of the permits/verifications that the Corps issues in these States are activities that require authorization under both Section 10 and Section 404. The Corps coordinates its permit application review responsibilities closely with the State to ensure that the State's views are considered in the Corps' permitting action. In Michigan and New Jersey, the Corps district and state program staffs benefit by sharing workload in those states.

Over the last 10 years, the Corps Detroit District has authorized approximately 11,000 General Permits and 1,000 Standard Permits with approximately 55% (~6,000) involving Section 404 activities (~5,000 General Permits and ~1,000 Standard Permits) and the remainder involving Section 10 activities. The two Corps Districts with responsibility for New Jersey (New York District and Philadelphia District) authorized approximately 4,000 General Permits and 600 Standard Permits with slightly over 30% (~1,300) involving Section 404 activities (~1,200 General Permits and ~100 Standard Permits).

Challenges

Some of the challenges to State assumption of the 404 program include:

- **Funding:** Some States may lack funding to implement the program;
- **Revisions to Existing Laws and Requirements:** Some States may need to revise or expand existing laws or requirements to match Federal requirements in order to assume the program;
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- **States with Significant Coastal Waters:** Some States with significant coastal waters might be willing to consider assuming the 404 program if they could also assume the Section 10 program. However, under current law States cannot assume traditionally navigable waters (and their adjacent wetlands) under CWA Section 404, nor can they assume the Section 10 program;
- **Jurisdiction:** In some states, there may be differences in the waters covered and how these waters are defined by Federal law and applicable State laws; and
- **Public Misconceptions:** Misunderstanding about agency roles and procedures may lead to misunderstandings concerning how assumption would change these procedures.

Alternatives to Assumption

As noted above, we have heard from some States that have a large portion of coastal waters that they see limited benefit from CWA Section 404 assumption because the Corps would still retain jurisdiction pursuant to Section 10 of the Rivers and Harbors Act and of traditionally navigable waters under CWA section 404 after State program assumption.

In these circumstances, states have another option to improve efficiency and effectiveness in traditionally navigable waters and their adjacent wetlands without pursuing CWA Section 404 assumption. States could work with the Corps to develop State Program General Permits (SPGP), which can include many of the activities that are covered in a CWA Section 404 permit. An SPGP is a form of Corps programmatic general permit; it is authorized by Section 404(e) and defined in 33 CFR Section 325.5(c)(3). The SPGP can be crafted to include pre-authorization without the need to contact the Corps or may only require a pre-construction notification, which can significantly improve the decision-making timeframes. These can provide significant benefits and provide an option for State or tribal wetland permit programs. This can also be used as the first step in moving towards assumption. SPGPs can expedite CWA Section 404 authorization but still allow federal oversight and safeguards to ensure the aquatic environment is being adequately protected.

States have constitutional authority to adopt and implement State regulatory programs to protect their aquatic resources. The Corps strives to minimize or eliminate duplication between Federal and State programs by using cooperative Federal/State joint permit processing and State program general permits. Short of state assumption, States also have authority under the Clean Water Act Section 401 and the Coastal Zone Management Act to allow them to add conditions to protect aquatic resources and complement and influence the CWA Section 404 program.

Thank you again for the opportunity to be here today. I will be happy to answer any questions you may have.