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***Testimony of George Elmaraghy, P.E.  
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***United States House of Representatives***

***Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment***

***Regarding***

***State Clean Water Act Section 404 Assumption***

Good morning, Chairman Gibbs, Ranking Member Bishop, and Members of the Subcommittee.

My name is George Elmaraghy and I am Chief of the Ohio Environmental Protection Agency's Division of Surface Water. I have more than 30 years of experience in implementing Clean Water Act programs. I am also a long standing member in the Association of Clean Water Administrators (ACWA).

Ohio wetland program staff work with the Association of State Wetland Managers (ASWM), a national organization that broadly supports state and tribal wetland programs by effectively merging science, law and policy. ASWM coordinates with the U.S. Environmental Protection Agency (EPA), U.S. Army Corps of Engineers (Corps), and other federal agencies and nongovernmental organizations that manage the nation's wetland resources. State agencies make a major contribution to wetland protection and management in both regulatory and conservation programs, merging watershed and wetland programs with land use and habitat management. The value of state wetland programs has long been acknowledged by Congress.

I am pleased to present testimony on behalf of the Ohio Environmental Protection Agency (Ohio EPA) and ASWM today regarding state experiences on investigation into the assumption of CWA Section 404 permitting from the Corps.

### Background

Sections 404 and 401 of the CWA regulate the “discharge of dredged or fill material” into waters of the U.S., which includes streams, lakes and wetlands. Any project seeking to place fill into waters of the U.S. will need authorization under 404 and 401.

Under the CWA, the 404 permit is issued to prevent unacceptable adverse impacts to water supplies, aquatic life, wildlife and recreation. The permitting requirements added by the state through 401 certification ensures that the federal permit is in compliance with any applicable state standards to protect water quality as well as any applicable effluent limitation guidelines, new source performance standards, toxic pollutant restrictions and other appropriate requirements under state law (see CWA §401(d) and 33 USC 1341(d)). In other words, the 401 certification is also designed to prevent adverse impacts to water supplies, aquatic life, wildlife, and recreation.

In Ohio, the Corps authorizes impacts to waters of the state through Section 404 individual permits and Section 404 Nationwide permits. The Nationwide permits authorize activities that are similar in type, e.g. utility lines, and generally cover activities with lesser impacts to water resources. The Corps conducts site visits to evaluate the quantity and quality of wetland and stream resources at the project site as part of the permit review for individual and many Nationwide permit applications.

Under the Clean Water Act and state law, Ohio EPA also issues individual Section 401 Certifications for each Corps individual permits as well as a certification to the Nationwide permits. EPA provides oversight to the Corps implementation of the program.

As you can see, receiving a permit for dredge and fill activity is a very complex process with both the State and Corps reviewing applications to prevent adverse impacts to water quality. This complexity results in a lengthy, expensive and confusing permit process, both for applicants and the regulatory agencies. The regulatory complexity adds to the regulatory uncertainty of business in making economic decisions.

#### Why Pursue Section 404 Assumption

Ohio is blessed with many streams and wetlands due to its soils, topography and usually plentiful rainfall. The many wetland areas and streams mean that most economic development type projects will impact those surface waters and require a dredge and fill permit. Currently, applicants must navigate separate state and federal processes that contain numerous overlapping requirements. Both agencies require an alternatives analysis and compensatory mitigation to offset any unavoidable impacts. The current complexity of the Section 401/404 permit process thus has a direct impact on jobs and economic activity in the state.

Ohio believes strongly that assuming the Section 404 program will significantly simplify the permitting process and result in substantial cost savings for business and regulatory agencies, leading to job creation. Those cost savings would come from the following efficiencies:

- Consolidating two separate permits into one - saving permittees costs from application development to permit review.
- Consolidating regulatory agencies involved in the permitting process. Permittees deal with one agency thereby simplifying regulatory requirements and eliminating conflicting requirements of several agencies. This will significantly reduce the regulatory uncertainty businesses encounter when making economic decisions.
- Eliminating duplicative regulatory review resulting in significant cost savings for the federal government.
- Locating regulatory staff in Ohio to implement the program. Significant travel time savings will be realized since most Corps staff are not located in Ohio. This lack

of a local presence has resulted in delays for applicants due to Corps scheduling issues and a lack of experience with community specific development issues.

- Having the-on-ground knowledge and review at state level is helpful in understanding community issues and coordination with other state issued permits.
- Streamlining program oversight for EPA, consistent with other CWA programs, should also reduce federal government costs.

Ohio strongly believes that assuming the 404 program will continue to protect water quality. Assuming delegation “does not change the essential water quality requirements under Section 404 – the state program must ensure compliance with state water quality standards in conformance with federal requirements” (ASWM 2011). EPA oversight ensures that federal requirements are met.

Ohio, like other states, has been hit hard by the economic downturn. Ohio has made jobs its first priority. Streamlined environmental permitting would ensure Ohio’s waters are protected while encouraging industries to build in Ohio, giving Ohio a competitive advantage at home and abroad. State decision making allows local factors to be considered affording better environmental protection.

#### What is Required for a State to Assume Administration of Section 404

In order to obtain approval to assume its Section 404 program, Ohio EPA will have to revise state law to grant the Director of Ohio EPA the authorization to seek assumption. This statutory revision is currently being sought. The next step will be for Ohio EPA to adopt administrative rules that are at least as stringent as the current federal requirements. Then Ohio EPA will have to compile an assumption package for submittal to EPA. That package will need to include a program organization and staffing proposal with proof that there is adequate funding to implement the program. The assumption package will also need to include proof that Ohio EPA has the legal authority to implement the program. This process will likely take several years. Oregon began the 404 assumption process in 1995 and has yet to assume the program.

Based on information gathered from the Corps and Michigan, Ohio EPA estimates that it can run the Section 404/401 program with approximately 50 employees. Ohio EPA devotes about 17 staff currently to the Section 401 program, so we would need to add an additional 33 staff. This is an additional cost of about \$3 million.

It is our understanding that the Corps devotes approximately 50 full time staff to implementing the Section 404 program in Ohio. Assuming these 50 staff are no longer needed in this program area, the Corps would realize a savings of over \$5 million.

#### Ohio's Experience Pursuing Assumption

Ohio began investigating Section 404 program assumption in 2011. At this point we have initiated discussions with EPA, interviewed staff from Michigan on their experience as a state approved to administer the 404 program, requested information from the Corps, and started compiling staffing needs. We also initiated discussions with state legislators on pursuing revisions to our state law to authorize assumption.

#### ASWM Actions to Encourage 404 Assumption

During 2010-2011, ASWM coordinated with the Environmental Council of the States (ECOS) and EPA to convene a national Section 404 assumption workgroup. On July 22, 2011, ECOS sent a letter to Nancy Stoner, U.S. EPA summarizing the results of the workgroup, including the following specific recommendations. The workgroup recommended that "training materials or outreach supported jointly by EPA and the USACE would facilitate state/federal partnerships and 404 program assumption by:

- Improving state/federal staff understanding of the assumption process and its multiple benefits;
- Encouraging cooperative working relationships between state and federal agency staff;
- Clarifying the roles and responsibilities of each agency;
- Assisting state and tribal agencies as they navigate through the assumption process; and,

- Increasing field staff understanding of the changes that occur in the state/federal programs following assumption.
- Such materials could include web-based reference materials such as FAQs, handbooks, and so on, in addition to webinar or online training sessions (Brown 2011).”

In accordance with workgroup recommendations, the ASWM and ECOS have since completed a Section 404 Assumption Handbook for use by state and federal agencies. In addition to discussing the factors listed above, the handbook acknowledges that current provisions of the CWA tend to discourage 404 assumption in states having a high percentage of Section 10 waters, where the Corps of Engineers retains jurisdiction, including coastal states where tidal waters or major rivers systems are a major consideration under both state and federal law. Increased flexibility in negotiating state and federal roles in such waters could strongly encourage state program assumption. Ohio strongly supports this recommendation, as well as the other recommendations of the ECOS/ASWM workgroup.

We also recommend that Congress specifically state in legislation that the Corps and EPA encourage and support states interested in receiving Section 404 assumption. Such support can go a long way to reduce the time and effort needed to prepare application materials needed for assumption. It also encourages federal agency cooperation in pursuing state assumption. At one time there was a congressional mandate to increase the number of states with CWA program delegation – 46 states are now delegated to implement the Section 402 National Pollutant Discharge Elimination System (NPDES) permit program. State assumption of Section 404 permitting is comparable to state delegation of Section 402 NPDES permitting.

One way for the Corps and EPA to demonstrate support for states’ Section 404 assumption would be to develop a pilot project in cooperation with a state interested in pursuing assumption. The experiences encountered through the pilot project could

serve as examples to other interested states, and hopefully paving a smoother, faster road towards program assumption.

Federal funds should also be allocated to states to support state implementation of the Section 404 program. Lack of funds continues to be a top deterrent for states considering assumption of the Section 404 program. Not only do states assume significant costs to develop the application materials, the state agency must also fund the work load assumed from the Corps. This work load includes project review, impact assessment, program enforcement and administration, and the assumption of new responsibilities for compliance with certain federal statutes (Fletcher 2001).

Although Ohio is willing to take on the Section 404 permitting program without federal funding because of the strong desire to streamline environmental permitting, it only makes sense and is fair for a percentage of the Corps funding to be diverted to Ohio EPA. The additional cost to run the Section 404 program is estimated to be \$3 million. Ohio, like other states, is facing financial problems and it is not fair for Ohio tax payers to pay this money when the federal government would be saving \$5 million because the Corps would not have to spend this money.

Ohio is willing to assume the Section 404 permitting program without federal funding because streamlining environmental permitting is a high priority. However, the Corps is spending approximately \$5 million per year on the Section 404 program in Ohio. If Ohio assumes the program, the estimated additional cost is \$3 million per year. The federal government should allocate a portion of the \$5 million in savings to Ohio EPA.

In 2008, U.S. EPA conducted a survey of nine states in the process of pursuing assumption or had assumed the Section 404 program. The following bullets summarize a few of the survey findings:

- “States spent an average of \$225,000 to investigate assumption (EPA provided grants to 6 of the 9 states).

- Lack of implementation funds is a threshold barrier to assumption – it is one of the first barriers a state encounters, short-circuiting further investigation and identification of additional barriers.
- It takes a lot of work for states to assume (Even for states with comprehensive programs already in place).
- States that have assumed 404 feel that the combination of federal and state involvement makes for a more stable, consistent program (Hurlid and Linn 2008).”

### Conclusion

Ohio believes strongly that assuming the Section 404 program will significantly simplify the permitting process and result in substantial cost savings for business and regulatory agencies.

Governor Kasich’s desire is to improve the climate for business and job creation in Ohio while improving Ohio’s environment. Simplifying the permit process for dredge and fill permits will reduce the regulatory uncertainty for business, reduce compliance and regulatory costs, and significantly reduce federal government costs by eliminating the need for federal agency reviews. Finally, a simplified process will allow faster permit reviews.

We are requesting support for this effort and support for other states which are interested in or already in the process of assuming Section 404 assumption. We look forward to working with U.S. EPA and Corps on streamlining the effort and overcoming obstacles.

We appreciate the grant support that the federal government has provided for development of state and tribal wetland programs; however we believe that a cooperative state and federal partnership should be financially supported in part with federal funds as are other delegated programs. This can occur through making U.S. EPA’s state wetland program development grants (CWA Section 104(b)(3)) available to

be used for implementation in addition to development and establishing a pass through of funds from the Corps to the assumed states.

Mr. Chairman, Members of the Subcommittee, I thank you for this opportunity to share the thoughts of Ohio EPA and the Association of State Wetland Managers on state Section 404 program assumption. I will be happy to answer any questions that you may have.

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### References

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