



ECOS

Environmental Council of the States

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June 26, 2020

The Honorable John Barrasso
Chairman
Committee on Environment
and Public Works
U.S. Senate
410 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tom Carper
Ranking Member
Committee on Environment
and Public Works
U.S. Senate
456 Dirksen Senate Office Building
Washington, DC 20510

VIA EMAIL

RE: Proposed Amendments to Improve State Assumption under Clean Water Act Section 404

Dear Chairman Barrasso and Ranking Member Carper:

ECOS submits the following proposed amendments for consideration to improve state assumption of the Clean Water Act (CWA) Section 404 Program. A large portion of the ECOS membership supports these measures as a means to provide greater flexibility to all states in assumption of the 404 program, consistent with [ECOS Resolution 08-3](#) which calls for such flexibility. Support of these proposals does not indicate intent to pursue program assumption by any individual state, and this letter may not reflect a unanimous endorsement from the ECOS membership. That said, the broad support for these measures demonstrates that such improvements could be beneficial and are generally uncontroversial.

State assumption of the Section 404 program is an important part of the cooperative federalism structure of the CWA. Assumption can streamline permitting processes, reduce duplication of effort and overall expenditures by state and federal authorities, and better align the Section 404 program with other CWA programs for which states have authority. Virtually all states have been delegated authority to administer the National Pollutant Discharge Elimination System permit program under CWA Section 402, as well as permitting programs under the Clean Air Act and other major environmental statutes. However, only two states have assumed authority for the CWA Section 404 program: Michigan in 1984 and New Jersey in 1994.

Recently, states have expressed renewed interest in the benefits of state assumption under Section 404. In response, the U.S. Army Corps of Engineers (USACE) recently clarified the categories of waters that are “assumable” by states. Likewise, the U.S. Environmental Protection Agency (EPA) is considering whether to integrate “consultation” under the Endangered Species Act (ESA) into the assumption application process, a step that would further help to streamline permitting requirements in a manner consistent with the ESA.

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These are important steps, and at least two other actions could also help: allowing states to seek “partial assumption” of the Section 404 program, consistent with other delegated program authorities under the CWA, and allowing states to issue permits with the same duration as federal permits. The following two amendments to the CWA would address these two issues and strengthen the cooperative federalism structure of the CWA, thereby allowing more states to assume the CWA Section 404 program.

Amendment A - Partial Assumption

Purpose: While the CWA is silent as to whether a state may assume the Section 404 program in whole or in part, the federal regulations implementing the CWA currently prohibit partial assumption. See 40 C.F.R. 233.1(b).

Partial assumption would give states flexibility to work with the USACE and EPA to determine those portions of the Section 404 program that each state is best positioned to administer. In other words, partial assumption would avoid the current “all or nothing” approach to 404 assumption and would allow states to apply for assumption of the 404 program that is workable for that state.

Text: Add the following language at the end of CWA Section 404(g):

(4) A program submitted by a State under this subsection may provide for partial or complete assumption of the Secretary’s authorities and responsibilities under subsection (a) and (e).

Amendment B - Duration of State 404 Permits

Purpose: The CWA does not limit the duration of a 404 permit issued by the USACE, but currently mandates that states only issue Section 404 permits “for fixed terms not exceeding five years.” See 33 U.S.C. § 404(h)(1)(A)(ii). This inequity creates a barrier for states assuming the Section 404 program as many large infrastructure and other projects often take more than five years to complete. This limitation creates unnecessary uncertainty without increasing environmental protection. The following change would align state 404 permitting with 33 C.F.R. 325.6, which governs “durations” of USACE 404 issued permits and does not impose specific time limits.

Text: Amend CWA Section 404(h)(1) to read as follows:

(h) Determination of State's authority to issue permits under State program; approval; notification; transfers to State program

(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine, taking into account any comments submitted by the Secretary and the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, pursuant to subsection (g) of this section, whether such State has the following authority with respect to the issuance of permits pursuant to such program:

(A) To issue permits which--

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(i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title;

(ii) for general permits, are for fixed terms not exceeding five years; and

(iii) for an individual permit, is for a fixed term not exceeding any period of time or other statutory or regulatory limitation than would be applicable if the permit were issued by the Secretary; and

(iiiiv) can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the permit;

(II) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(III) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.

Thank you for your consideration of these suggestions. We look forward to working with you to incorporate these important amendments into the Water Resources Development Act legislation your Committee is working to advance through Congress, or other future opportunities to improve this process for our members. Please feel free to contact me if you have any questions.

Sincerely,



Donald S. Welsh
Executive Director