



ECOS

Resolution 24-1
Approved March 27, 2024
Austin, Texas

As certified by
Ben Grumbles
Executive Director

STATES AND CLEAN WATER ACT SECTION 404(c)

WHEREAS, the Environmental Council of the States (ECOS) represents states, territories, and the District of Columbia, and throughout this resolution the term “states” indicates states, territories, and the District of Columbia; and

WHEREAS, the Clean Water Act (CWA) does expressly “recognize, preserve, and protect the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources....” in CWA Section 101(b); and

WHEREAS, there is a continuing need for greater collaboration between and among federal agencies, state agencies, local governments, and public/private organizations and businesses; and

WHEREAS, CWA Section 401 grants states the authority and responsibility to issue certifications articulating project conditions necessary to ensure compliance with state water quality requirements; and

WHEREAS, CWA Section 401(a)(2) provides a process for neighboring jurisdictions to participate in the federal licensing or permitting process where the U.S. Environmental Protection Agency (U.S. EPA) determines that a discharge from an activity that is subject to CWA Section 401 certification from another jurisdiction may affect their water quality; and

WHEREAS, CWA Section 404 establishes a permitting program for the disposal of dredged or fill material administered by the U.S. Army Corps of Engineers (USACE), unless assumed by a state or tribe; and

WHEREAS, CWA Section 404(c) grants the U.S. EPA Administrator the power “to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and...deny or restrict the use of any defined area...as a disposal site, whenever he determines...that the discharge of such materials into such area will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas;” and

WHEREAS, in 1992, as directed by CWA Section 404(q), U.S. EPA and USACE executed a Memorandum of Agreement (“1992 MOA”) that outlines procedures for resolving potential disagreements between the agencies, including “elevation of specific individual permit cases...that involve aquatic resources of national importance;” and

WHEREAS, the CWA Section 404(c) veto is an important tool in protecting Waters of the United States when used appropriately; and

WHEREAS, states play the primary role in maintaining protection of waters and wetlands in the United States; and

WHEREAS, uncertainty related to the CWA 404(c) and 401(a)(2) processes can create inefficiencies and misunderstandings that adversely affect the state and federal coregulator relationship; and

WHEREAS, ECOS members have raised potential process improvements to U.S. EPA in recent, constructive discussions; and

WHEREAS, ECOS continues to encourage increased assistance and funding to states from U.S. EPA to support expanded responsibilities for wetland and watershed stewardship.

NOW. THEREFORE, BE IT RESOLVED, THAT ECOS:

Pledges to work with federal partners and others to reduce uncertainties and facilitate improved communication related to U.S. EPA's Section 404(c) power; and

Urges U.S. EPA to:

- engage with the state's environmental agency in which the Section 404 permit is to be issued prior to exercise of its Section 404(c) power, including documenting the rationale for any Section 404(c) veto, and provide the state with a meaningful opportunity to discuss and respond to U.S. EPA's concerns;
- defer to state permitting processes, where they exist, that protect the resources of concern consistent with the CWA or other federal controlling authorities where applicable, and constructively engage with states during these processes and before the final outcome; adhere to the process outlined in the 1992 MOA prior to issuing a proposed 404(c) determination;
- review, and, if needed, revise the existing 1992 MOA;
- communicate with the state's environmental agency about the use of the Section 401(a)(2) process, and notify a state if the process is not followed; and
- strive to ensure greater transparency with states with respect to the finality of decisions and any process or standard to revisit or reopen decisions.