The ECOS Proposal for Expanded State Assumption of the CWA §404 Program: Unnecessary, Unwise, and Unworkable

by Lance D. Wood

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Editors' Summary

The Environmental Council of the States (ECOS) recently proposed that Clean Water Act §404 be amended to "remove the barriers" to state assumption of the §404 program. ECOS' specific proposals are unnecessary, unwise, and unworkable. The best and most reliable approach for protecting aquatic resources involves a vigorous federal §404 program along with effective state use of state §401 water quality certifications, Coastal Zone Management Act consistency certifications, and supplemental state law to fill in any gaps in the federal program.

In an eight-page document dated June 18, 2008, the Environmental Council of the States (ECOS) put forward a proposal for legislative changes to the Clean Water Act (CWA) with "two interlocked parts."[1] First, ECOS proposes that the CWA be amended to "return the definition of 'waters of the United States' to the use and meaning before the various court cases,"[2] i.e., to restore CWA geographic jurisdiction to what it was before the U.S. Supreme Court decisions in *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* and *Rapanos v. United States*.[3] This legislative proposal is in keeping with similar proposals to restore the CWA's geographic jurisdiction that various stakeholders have advocated in recent years.

This Article addresses the second of ECOS' proposed interlocking legislative recommendations. This second part of the ECOS proposal apparently is intended to be a "quid pro quo" to encourage certain state interests, and perhaps the regulated public, such as developers, to consent to congressional restoration of the CWA's geographic jurisdiction. To this end, ECOS proposes that the CWA be amended to "remove the barriers" to state assumption of the §404 program, which regulates discharges of dredged or fill material into wetlands and other water bodies.[4]

This two-part ECOS proposal is remarkably similar to a decades-old proposal of the National Wetlands Policy Forum (Forum). During the 1980s, the membership of the Forum, which included both development and environmental interests, concocted a very similar "interlocked" quid pro quo agreement, whereby the development interests would agree to the environmentalists' goal of "no net loss of wetlands" in return for having the CWA §404 program transferred to the states through complete state assumption.

At that time, nobody else seemed willing to point out the fallacies, errors of judgment, and problems associated with the Forum's proposals for expanded state assumption of §404. Thus, I published an article in the *National Wetlands Newsletter* (*NWN*) entitled *The Forum's Proposal to Delegate Section 404 to the States: A Bad Deal for Wetlands*.[5] My article motivated the chairman of the Forum, then-Governor Thomas Kean of New Jersey, to publish a response entitled *A Reply to Mr. Wood*.[6] Governor Kean's article, in turn, inspired two

1. 33 U.S.C. §§1251-1387, ELR Stat. FWPCA §§101-607. Letter from R. Steven Brown, Executive Director, ECOS, with attachments (June 18, 2008) [hereinafter Letter from Brown].
2. Letter from Brown, *supra* note 1.
3. 531 U.S. 159, 31 ELR 20382 (2001); 547 U.S. 715, 36 ELR 20116 (2006).
4. State assumption is the process currently authorized by CWA §404(g) through (l), whereby a qualifying state can take over permitting responsibility for §404 for non-navigable waters and their adjacent wetlands, plus water bodies that qualify as navigable-in-law only because of "historic" navigation use. Thus far, only Michigan and New Jersey have assumed §404 responsibilities.
5. Lance D. Wood, *The Forum's Proposal to Delegate Section 404 to the States: A Bad Deal for Wetlands,* Nat'l Wetlands Newsl., July/Aug. 1989, at 2.
6. Thomas H. Kean, *A Reply to Mr. Wood*, Nat'l Wetlands Newsl., Nov./Dec. 1989, at 2.

rebuttals: my second article, entitled *Section 404 Delegation: A Rebuttal to Governor Kean*; and an article by the Public Intervenor of the State of Wisconsin's Department of Justice, Thomas J. Dawson, entitled *States Need Commitment, Leadership, and Backbone, Not Section 404*.[7]

Given the remarkable similarities between the new ECOS proposals for state assumption of §404 and the earlier Forum proposals, in my opinion those four articles are well worth re-reading. However, because most people interested in this subject cannot be expected to retrieve and read those earlier articles, I will repeat and update some of the objections to and problems associated with the proposals to greatly expand state assumption of §404, as now advocated by ECOS.

Twenty years ago some elements of the environmental community supported the Forum's proposals for expanded state assumption of §404 because they had lost confidence in the federally administered §404 program. That was hardly surprising given that the Ronald W. Reagan Administration had just spent eight years trying to dismantle the environmental protections for wetlands and other aquatic resources that the §404 program was created to provide. Similarly, in 2009 some environmentally responsible persons may have lost confidence in the federal §404 program, because for the last eight years the George W. Bush Administration did not administer that program to their liking. Nevertheless, during the 12 years that followed the Reagan Administration, the George H.W. Bush Administration and the William J. Clinton Administration restored and enhanced many of the environmental protections provided by the federal §404 program. Surely, in 2009, at the beginning of a new Administration, no one should give up on the federal §404 program, which in many respects remains strong, viable, and with great potential for protecting aquatic resources nationwide.[8] In my opinion, the environmental critics of the federal §404 program have many legitimate points to make about the program's shortcomings, especially during the last eight years. However, the most effective way to correct those shortcomings is to have the new Administration tackle and correct those problems in the federal §404 program rather than pass the problems-and the program itself-to the states.

Lest my criticisms of the ECOS proposals on state assumption be misunderstood, I have high regard for the ability of state governments to make major contributions to protecting aquatic resources, and I strongly support any and all state initiatives that would increase the overall level of legal protection for wetlands and other aquatic resources. I recognize that several states have adopted and implemented effective state programs that protect wetlands and other aquatic resources, often in close cooperation with the federal §404 program. Nevertheless, in my opinion, expanded state assumption of the CWA §404 program would generally be counter-productive to the goal of protecting aquatic resources, as this Article attempts to demonstrate.

I. "Opening Up" §404 to Amendment Is Not Necessary to Restore the CWA's Geographic Jurisdiction

It is not necessary to ask the Congress to "open up for amendment" CWA §404 (as ECOS has proposed) in order to seek statutory restoration of the CWA's geographic jurisdiction following the Supreme Court's *SWANCC* and *Rapanos* decisions. Restoration of the CWA's geographic jurisdiction can be achieved by a relatively simple and clean amendment to the CWA that clearly defines the term "the waters of the United States," a term that defines the geographic jurisdiction of every part of the Act. The existing §404 has no provision establishing that section's geographic jurisdiction, so there is no need to amend §404 to restore CWA geographic jurisdiction. However, the many subsections of the existing §404 do reflect the carefully balanced set of compromises that Congress enacted in the 1977 Amendments to §404. To open up §404 to amendment might well invite a large-scale "legislative feeding frenzy" as various development interests and their lobbyists would try to weaken the many substantive provisions of §404 that since 1977 have provided substantial nationwide legal protection for wetlands and other "waters of the United States." In fact, the ECOS proposal that Congress should amend §404 (to expand state assumption) while simultaneously changing the geographic jurisdiction of the CWA would seem to invite Congress to adopt a geographic jurisdiction for the §404 program that is different from, and probably much more limited than, the geographic jurisdiction of the rest of the CWA.

It is worth remembering that the George H.W. Bush Administration and the Clinton Administration successfully adopted and implemented "no net loss of wetlands" policies without having to agree to statutory amendment of §404 to encourage wholesale state assumption of that program, as the Forum's "interlocked" proposals referenced above had advocated during the late 1980s. Similarly, those in favor of protecting aquatic resources in the United States should not assume that dramatic "compromises" must be made now to persuade Congress to restore the geographic jurisdiction of the CWA. It might be easier and safer in 2009 to ask Congress to enact a "clean" and limited amendment to the CWA to restore that statute's geographic jurisdiction to its commonly understood pre-*SWANCC* scope rather than to complicate the amendment process with proposals intended to encourage greater state assumption of the §404 program. Once a legislative proposal goes beyond undoing the damage to CWA jurisdiction

7. Lance D. Wood, *Section 404 Delegation: A Rebuttal to Governor Kean,* Nat'l Wetlands Newsl., Jan.-Feb. 1990, at 2; Thomas J. Dawson, *States Need Commitment, Leadership, and Backbone, Not Section 404*, Nat'l Wetlands Newsl., Jan./Feb. 1990, at 4. Another "point/counterpoint" debate regarding expanding state assumption of the §404 program appeared in the *Natural Resources and Environment*, the magazine of the American Bar Association Section of Natural Resources, Energy, and Environmental Law, in which I published the following article: Lance D. Wood, *Section 404: Federal Wetland Regulation Is Essential*, Nat. Resources & Env't, Summer 1992, at 7.

8. This assertion is not meant to indicate that the federal government could not do better in its efforts to protect aquatic resources with the §404 program. A number of U.S. Government Accountability Office and congressional reports have suggested areas for improvement for the federal §404 program. However, the fact that the federal §404 program can be greatly improved does not lead to the conclusion that the entire §404 program should be devolved to the states.

done by the Supreme Court in recent years, the amendment process would be open to all manner of proposals that could subtly undermine protection of our aquatic resources.

Setting aside legislative strategy, however, it is worth the effort to examine the substantive wisdom of the ECOS proposal to strongly encourage full-scale state assumption of the CWA §404 program. Specifically, this Article will evaluate whether state assumption is necessary to achieve the alleged benefits that ECOS claims their proposal would produce. This Article also will assess whether the ECOS proposal for wholesale state assumption could achieve reliable, efficient, professional administration of the CWA §404 program and long-term protection for the waters of the United States, including wetlands.

II. ECOS' Proposal Is Premised on Fundamental Fallacies

When one considers the ECOS arguments advocating wholesale state assumption of the federal §404 program, anyone who is familiar with that program immediately notices a number of glaring fallacies. The most fundamental fallacy of the ECOS recommendations lies in the mistaken notion that the federal §404 program must be eliminated (through greatly expanded state assumption) in order to encourage the states to adopt and implement effective state programs protecting wetlands and other aquatic resources, i.e., that a strong federal §404 program and robust state programs cannot successfully co-exist. If the goal is really to protect wetlands and other aquatic resources, it makes no sense to sacrifice the one program that is in place and functioning nationwide (the federal §404 program), by turning that federal program over to the uncertain (and inconsistent) administration of the states, for reasons discussed below.

Underlying that first fundamental fallacy of the ECOS proposal are two additional fallacies: (1) that the primary reason why the states have been prevented from protecting their aquatic resources is that they have not been able to assume all of or certain component parts of the federal §404 program; and (2) that many state governments are eager to take over the §404 program so they can do a better job protecting wetlands and other aquatic resources than the federal agencies (in particular, the U.S. Army Corps of Engineers (the Corps), U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS), and the National Marine Fisheries Service (NMFS)) now do through the federally administered §404 program. The specious nature of those two notions is demonstrated by several facts.

First, every state has (and has always had) full state constitutional authority to adopt and implement whatever form of state regulatory program the state wants to protect its wetlands and other aquatic resources. Nevertheless, very few states had adopted effective programs before the federal §404 program was put in place. Even today relatively few states have adopted strong and effective state regulatory programs independent of the federal §404 program despite decades of encouragement and funding from EPA to achieve that result.[9] These facts raise serious questions about the political ability and will of the great majority of states to implement viable state-assumed §404 programs to protect wetlands and other aquatic resources.

Of course, it is argued that the existence of the federal §404 program has made states unwilling to duplicate regulatory burdens by enacting independent state programs. That argument is refuted by the fact that the Corps district offices are more than willing to minimize or eliminate any duplication between federal and state regulatory programs by using cooperative federal/state joint permit processing and by adopting and implementing state program general permits, as is discussed further below.

The notion that states have declined to adopt their own wetland protection programs because of concern about duplicating federal §404 efforts is also refuted by the following fact: in recent years, the Supreme Court and the U.S. Court of Appeals for the District of Columbia Circuit have reduced and impaired the geographic jurisdiction of the CWA, and the activities jurisdiction of the §404 program, respectively. Yet during this time period, very few states have amended their state programs to fill the void in regulatory protection for aquatic resources created by those court decisions, even though by definition there would be no duplication of effort for those areas where federal jurisdiction has been truncated.

Moreover, states need not assume the federal §404 program to leverage that program into greater protection for their wetlands and other aquatic resources. Ever since the enactment of §404 in 1972, all 50 states have had available to them at least one, and often two, legal authorities giving them the ability to "veto" the issuance of any proposed federal §404 permit authorization, or to impose conditions on any §404 permit authorization (including both individual standard permits and general permits). First, CWA §401 requires the issuance of a state water quality certification for every federal §404 permit authorization. Second, the Coastal Zone Management Act (CZMA) to date provides 34 coastal states and territories (out of 35 that are eligible under the CZMA) with a second authority allowing them to veto or impose conditions on virtually every federal §404 permit.[10]

Just in case any state government might not have understood how effective and powerful their state §401 water quality certification (WQC) authority is for purposes of, in effect, taking control over the federal §404 program, in April 1989, EPA published and distributed to the states a booklet that explains that subject in great detail: *Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes*.[11] That official EPA guidance document makes

9. EPA often provides funding, based on grant applications from the states, which assists states in developing state programs to regulate work impacting aquatic resources.

10. 16 U.S.C. §§1451-1465, ELR Stat. CZMA §§302-319. Illinois is the only eligible state that does not yet have a federally approved coastal zone plan under the CZMA.

11. Office of Water, U.S. EPA, Wetlands and 401 Certification: Opportunities and Guidelines for States and Eligible Indian Tribes (Apr. 1989)

clear that states may effectively control federal §404 program permitting by imposing virtually any degree of state protection for aquatic resources that the state desires to impose (over and above protection that the Corps would require) by using the state's §401 authority to veto or condition federal §404 permits.[12]

In addition to the §401 authority, the CZMA provides 35 states and territories that have ocean or Great Lakes coastal waters with a second powerful and effective authority for protecting aquatic resources through the federal §404 program. Using the CZMA, a state can veto or impose conditions on any federal §404 permit that would authorize an activity potentially affecting a state's coastal zone natural resources. Thus, both CWA §401 and the CZMA allow the states to utilize the existing federal §404 program to impose whatever additional protection the state wants for its aquatic resources. In addition, by utilizing these existing mechanisms to increase protection, the states do not have to shoulder the long-term financial, political, and litigation burdens inherent in assuming full responsibility for the §404 program through state assumption.

The availability of the §401 and CZMA authorities allowing a state to veto or condition any federal §404 permit demonstrates that no state needs to assume any or all of the federal §404 program if that state's goal is to protect its aquatic resources because the states already have the tools to accomplish that. In addition, if ECOS' assertions about the eagerness and ability of the states to protect aquatic resources by assuming all of the §404 program were true, one would assume that most states would already be using their §401 and CZMA veto and conditioning authorities over the federal §404 program to the fullest degree possible. I will defer to the environmental protection advocates in each of the 50 states to evaluate whether the states have actively pursued enhanced protection of wetlands and other waters by these means as much as they could, but so far as I can learn, few states pass that test.[13]

The facts cited above also present the following question: Given that every state can *protect* its aquatic resources to whatever extent it wants to using its own constitutional authority and using the state veto and conditioning authorities of §401 and the CZMA to control all authorizations under the federal §404 program, what is the real motivation behind, and the real incentive for, greatly expanded state assumption of the federal §404 program? The most logical answer is the following: To whatever extent one can imagine any long-term rewards that can be derived from state assumption, they can only go to development interests that hope to eliminate the legal protections for aquatic resources provided by the federal §404 program, replacing them with state laws and programs that over time can be politically controlled and weakened.

It is worth noting that two of the state governments that have most recently explored the feasibility of state assumption of the §404 program pursuant to the existing §404 state assumption authority, i.e., the existing §404(g) through (l), are the states of Kentucky and North Dakota. Anyone familiar with the motivations behind those two states' interest in state assumption will understand what I mean about the real incentives for state §404 assumption.[14]

III. State Assumption of the Federal §404 Program Is Unwise Because of the Following Legal, Institutional, and Political Realities

Reality #1: State assumption would eliminate the important protections that the federal environmental laws and federal environmental professionals provide for state aquatic resources.

Because every federal §404 permit authorization constitutes a "federal action," every federal §404 permit must comply with several important federal environmental laws, such as the National Environmental Policy Act (NEPA),[15] Endangered Species Act (ESA) §7,[16] the CZMA, CWA §401, the Fish and Wildlife Coordination Act,[17] the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act,[18] the Wild and Scenic Rivers Act,[19] the National Historic Preservation Act,[20] and others. Those federal laws are implemented not only by the Corps,

(EPA 843B89100), *available at* http://nepis.epa.gov/EPA/html/Pubs/pubtitleOW.htm. This publication may now be out of date in a few respects (a new, updated version is expected from EPA soon), but it still provides the states with a great deal of useful information regarding how to use §401 WQCs and the federal §404 program to protect aquatic resources. The power of the §401 tool was recognized and cited by the Supreme Court in *Public Utility Dist. No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 24 ELR 20945, (1994), and in *S.D. Warren Co. v. Maine Bd. of Envt'l Protection*, 547 U.S. 370, 36 ELR 20089 (2006). Another federal court decision reflecting the power of the §401 WQC is *American Rivers, Inc. v. Federal Energy Regulatory Comm'n*, 129 F.3d 99, 28 ELR 20258 (2d Cir. 1997).

12. So far as I know, the primary limitations on a state's ability to impose conditions on a federal §404 permit using state WQC or the CZMA are that the state's conditions must be reasonably related to the permitted activity, and must be reasonably enforceable, if the Corps is expected to enforce the permit condition. If a state places WQC or CZMA conditions on a Corps permit that the Corps determines to be unenforceable, then in effect the WQC or the CZMA consistency determination has been administratively denied and the permit cannot be granted. I have been told that some states are not satisfied with the way that some of the Corps' district offices have dealt with state §401 WQC conditions or with the way that state §401 conditions were addressed during the most recent promulgation of the nationwide general permits. If this is true, the quickest way to address that problem would be to ask the Corps and EPA Headquarters to publish a new Regulatory Guidance Letter clarifying the proper approach for implementing the states' §401 WQC conditions.

13. Of course, it may be that the relatively few states that have adopted and implemented strong non-CWA state programs to protect state aquatic resources do not feel the need to make full use of the §401 and CZMA authorities to control the federal §404 program.

14. I have been told by knowledgeable persons that one of the primary motivations for Kentucky's recent interest in state §404 assumption was to reduce the degree of environmental protection that the federal §404 program has provided for aquatic resources adversely affected by mountaintop removal mining. Similarly, I have been told that one of the primary motivations for North Dakota's interest in state assumption was to reduce federal regulation over the draining, filling, and farming of prairie pothole wetlands.

15. 42 U.S.C. §§4321-4370d, ELR Stat. NEPA §§2-209.

16. 16 U.S.C. §1536, ELR Stat. ESA §7.

17. *Id.* §§661-667e.

18. *Id.* §§1801-1884.

19. *Id.* §§1271-1287.

20. *Id.* §§470 to 470w-6.

but also by the federal environmental agencies that review every important federal §404 permit application, e.g., EPA, the FWS, and the NMFS. The federal §404 program is also rendered effective through enforcement actions taken by the Corps, EPA, the U.S. Department of Justice (DOJ), and by citizen lawsuits brought in the federal courts, sometimes with recovery of attorneys fees by successful environmental plaintiffs authorized by the Federal Equal Access to Justice Act[21] and similar authorities. None of those federal laws or protections apply to a state-assumed §404 program because, by definition, state-assumed §404 permits are state permits issued by state authorities and, thus, are not federal permits or federal actions. For that reason, state-assumed §404 permits do not trigger any of the federal environmental laws. Moreover, state permit requirements generally can be enforced only by the state[22] and reviewed only in the state courts.[23]

Reality #2: State assumption subjects aquatic resources to the vagaries of politically influenced state decisionmaking.

Regrettably, under our system of government it will never be possible to insulate all decisionmaking for the §404 program from "political interference," either at the federal or state level. However, experience has shown that the potential for improper political interference regarding day-to-day §404 permitting is much greater in a state-assumed §404 program as compared with the federal §404 program because of the structural differences between those two different approaches to administering §404.

To a remarkable degree, the vast majority of decisions made by federal officials and federal agencies as they implement the federal §404 program are free from "political" interference because the structure of the federal §404 program to a large degree "insulates" those permit decisions from politics and politicians. This fact may surprise some because the federal §404 program is administered by the Corps, which has the reputation of being highly responsive to direction from Congress and the executive branch regarding implementation of its water resource development activities, e.g., navigation and flood control projects, etc. Press coverage of the so-called "water resources development pork barrel" have created some unfavorable (and often inaccurate) public perception of the Corps as a professional agency. Nevertheless, since 1890 the Corps has rightfully taken pride in its non-political, professional, and even-handed implementation of its regulatory responsibilities, which are quite different from and independent of its water resource development activities.

The Corps is well-suited for fair and objective regulatory decisionmaking since it is one of the very few agencies of the federal government that has no political appointees; instead, the Corps is an agency made up entirely of career military officers and civilian civil service professionals, and headed by the Chief of Engineers, a three-star Army engineer general.[24] The great majority of the Corps' regulatory program professionals are biologists, but the Corps professionals who implement the regulatory program also include engineers, environmental attorneys, and other professional disciplines.

Almost all of the Corps' decisions on permit applications, jurisdictional determinations, and enforcement actions are made by the Corps' 38 district offices and 8 division offices located throughout the 50 states, each one headed by a career engineer Army officer. In addition, the §404 program decisions made by those Corps district and division offices are strongly influenced by and, in some respects, overseen by the regional offices of EPA, the FWS, the NMFS, and other federal natural resource agencies. As a general rule, the decisions of those career federal officials as they operate the federal §404 program from day to day are based on science, biological and engineering facts, and legal and regulatory requirements, rather than political influence or lobbying.[25] While some may allege that there are exceptions to the general rule, the vast majority of the §404 program decisions of Corps career officials are influenced to a very minimal degree (if at all) by corporate lobbyists or by local, state, or even federal elected officials because the institutional structure of the Corps in large measure insulates those career federal officials from lobbyists, politics, and politicians.

In contrast, experience to date indicates that a state-assumed §404 program will not be effectively insulated from the influence of state and local elected officials and, thus, will not be isolated from state and local politics or from the influence of economic interests that fund and lobby many state and local politicians (e.g., real estate developers, agri-business, mining interests, etc.). Thus far, two states (Michigan and New Jersey) have assumed the §404 program over non-navigable waters pursuant to §404(g) through (l). The experience in Michigan has demonstrated that at times state politics and state politicians interfere with effective state protection for aquatic resources in a state-assumed §404 program. Moreover, for political reasons, the limited degree of oversight that the EPA regional office in Chicago has been able to (or allowed to) provide for the Michigan state-assumed §404 program demonstrates that EPA oversight of a state-assumed §404 program often cannot and does not prevent or remedy

21. 5 U.S.C. §504 & 28 U.S.C. §2412(d).
22. State law could provide for citizen suits in the state courts, but relatively few states have been as supportive of the citizen suit concept as the federal law.
23. Under state assumption of the §404 program, EPA is supposed to provide oversight of the state permit process and "kick out" any state permit where the Corps should process a federal §404 permit. However, years of experience with the state-assumed §404 program in Michigan indicates that EPA oversight is often inadequate and that political considerations have often led EPA Headquarters to forbid the EPA Regional office to second-guess the state's decisions, even where the EPA Region disagreed with those decisions.
24. The non-partisan and non-political nature of the Chief of Engineers is ensured by the fact that a Chief of Engineers is selected by a merit process and appointed to serve the following Administration rather than the Administration that made the appointment. Policy guidance for the Corps Civil Works activities, including the regulatory program, comes from the Assistant Secretary of the Army (Civil Works), who is a political appointee in the Army.
25. Some may assert that there are exceptions to this general rule. However, given the fact that every year, nationwide, the Corps must make permit decisions regarding more than 90,000 different permit applications and projects and must make over 100,000 jurisdictional determinations, it is hardly surprising that at least a few of those decisions are criticized. As a general rule, the Corps takes pride in the effort that its professional staff makes to render the best, most objective and fair permit decisions that they can, based on the laws, regulations, and facts as they understand them. The Corps also tries to give its professional regulatory staff autonomy and protection from any sort of improper or political interference so that every permit decision will protect the overall public interest.

political interference or ensure consistent state protection for aquatic resources.[26]

Reality #3: ECOS' proposal that the federal government would pay for operation of the state-assumed §404 programs indefinitely, and ECOS' notion that federally funded state §404 programs would save the federal government money, are not realistic.

The ECOS proposals for greatly expanded state assumption of the §404 program are predicated on the notion that the federal government (through EPA grants) should pay for both development and operation of the expanded state-assumed §404 programs in as many of the states as can be persuaded to accept state assumption. The ECOS proposals also assume that the federal government will provide such funding to the states perpetually, to encourage the states to assume and maintain full responsibility for the §404 program in the future. In my judgment, given the extraordinary demands facing the federal budget for the foreseeable future, ECOS' proposal for a new, expensive, long-term federal obligation to the states is not likely to be acceptable to either Congress or the executive branch's Office of Management and Budget (OMB).

The ECOS proposal for federal funding also presumes that eventually the federally funded state §404 programs will save the federal government money since the federal agencies now running the federal §404 program would be downsized as the allegedly more efficient and cost-effective state-assumed programs are put in place. In my opinion, that assumption is entirely unrealistic because even if large-scale and expanded state assumption of the §404 program were to occur, it is highly improbable that any of the federal agencies could be downsized sufficiently to save the federal government much money for the following reasons.

Although EPA, the FWS, the NMFS, and other federal agencies devote substantial resources to implementing the federal §404 program, the Corps provides by far the greatest part of the personnel and monetary resources for administering the federal §404 program nationwide. To administer §404 and its other regulatory responsibilities, the Corps has developed substantial regulatory program components, primarily in its 38 district offices and 8 division offices throughout the United States, in addition to a small headquarters staff in Washington, D.C. Even if very large-scale state §404 assumption were to shift responsibility for much of the §404 program from the federal government to the states, all of those Corps offices would remain in place to implement the Corps' extensive military and civil works responsibilities nationwide. Thus, the Corps' "overhead costs" would not be substantially reduced even if some Corps regulatory program personnel were to be laid off or re-deployed. A partial listing of the Corps' many non-regulatory responsibilities includes military construction for the Army and the U.S. Air Force; dredging the navigation channels for the U.S. Navy and for commercial navigation; planning, building, and operating water resource projects for flood control, hydropower, navigation, shore protection, water supply, recreation, etc.; environmental restoration and abatement of hazardous waste; and real estate management and engineering services for the U.S. Department of Defense and other federal agencies, etc. In addition, as is discussed below, even if ECOS' proposals for expanded state §404 assumption were to be adopted and implemented, substantial numbers of Corps regulatory personnel would have to be retained to implement the Corps' other regulatory authorities (e.g., §§9 and 10 of the Rivers and Harbors Act of 1899[27] and §103 of the Marine Protection, Research, and Protection Act (Ocean Dumping Act)[28]).

In addition, the assertion by ECOS that the state-assumed §404 programs would be highly economical downplays the considerable overhead costs of setting up and maintaining as many as 50 different state §404 programs with new state §404 bureaucracies. Those state programs could not possibly save money because they could not benefit from the economies of scale and in-place structure of the existing federal §404 program. Further, large-scale state §404 assumption supposedly would require the hiring of much additional EPA staff needed to "oversee" the state-assumed programs and to allocate and distribute the federal funding for those programs year after year.

Reality #4: The federal government cannot allow the states to assume §404 authority over navigable-in-fact water bodies and their adjacent wetlands without jeopardizing vital federal constitutional and statutory interests and responsibilities relating to national defense, navigation, flood control, and water resource development in general.

Contrary to the assumptions of ECOS, it is doubtful that even the regulatory branches for most Corps offices could be downsized greatly if state assumption were to expand because a major part of the Corps' regulatory workload has always been, and remains, safeguarding all of the many navigable-in-fact waterways through the regulatory provisions of the Rivers and Harbors Act of 1899 and the Ocean Dumping Act. So long as the federal government continues to carry out its constitutional and statutory responsibilities for navigation, flood control, and water resource control and development in general, those Corps regulatory responsibilities cannot be transferred to the states.

Moreover, the Corps would still have to retain substantial §404 regulatory responsibilities in the navigable waters in order to protect essential federal interests in those waters. The necessity for the federal government to retain control over navigable-in-fact waters was explicitly recognized by Congress in 1977. When Congress enacted amendments to §404 in 1977, those amendments did not authorize the states to assume the §404 program in navigable-in-fact waters precisely because federal responsibilities for and prerogatives regard-

26. Space limitations do not allow this Article to provide specific examples of how political interventions and political interference with program professionals have reduced the effectiveness of the state-assumed §404 program in Michigan, but those factors have been well documented and widely acknowledged over the years. Thus far I have not been able to obtain much information regarding whether political interference has been a serious problem for the state-assumed §404 program in New Jersey, so I would be grateful for information on that subject.

27. 33 U.S.C. §§401, 403.

28. *Id.* §1413.

ing the navigable-in-fact waters made state §404 assumption of those waters undesirable and impracticable. It would be a surprising development if Congress were to abdicate its federal constitutional responsibilities for and control over the traditional navigable waters of the United States by following ECOS' recommendations and allowing the states to assume §404 permitting control over those waters now. Congressional approval of the ECOS proposal would give every state effective control over federal activities in the navigable waters and, thus, over federal water resource development projects in or proposed for those waters. Such state control over navigable waters would jeopardize essential federal functions such as national defense, protection of commercial navigation, and flood control.

While such concerns may seem merely academic to those with limited experience in this field, such questions of "practical federalism" are very real and important. Since I came to work for the Corps in 1976, I have seen states try to delay or disrupt dredging and related dredged material disposal activities that were urgently needed for national defense undertakings, and to prevent dredging and related dredged material disposal activities required to maintain interstate commercial navigation serving other states located upstream or downstream of themselves. In 1977, Congress anticipated such state-versus-state and state-versus-federal conflicts involving navigable-in-fact waters and, therefore, retained federal control over navigable waters by allowing the states to assume the §404 program only for non-navigable waters. In my opinion, Congress would be very short-sighted if it were to be misled to legislate differently today, notwithstanding the contrary proposals of ECOS.

Reality #5: When considered carefully, many of the specific ECOS proposals to encourage more state assumption in effect would weaken the legal and practical protections for aquatic resources provided by the federal §404 program while at the same time subject the regulated public to confusing and inconsistent regulatory requirements, both within a single state, and from one state to another.

ECOS proposes that a state should be allowed to assume responsibility for certain water bodies or types of water bodies but not others, or for activities authorized by general permits but not by individual permits. Such partial and spotty state assumption would create a confusing patchwork of regulation, which would make it difficult for either the Corps or the state to operate a coherent and efficient regulatory program. Moreover, such partial and spotty state assumption would confuse the regulated public since it would be difficult to know whether the state or the Corps must authorize particular activities or water bodies. Such partial state assumption would also make it virtually impossible for either the Corps or the state to understand or deal with cumulative adverse effects on aquatic resources from permitted activities.

Similarly, ECOS argues that the standards for state assumption should change so that a state-assumed program can be more or less whatever the state asserts would be "functionally equivalent" to the federal §404 program. Such an approach would allow a state to assume the §404 program on the basis of allegedly "good intentions," with no demonstrated, reliable regulatory standards, or any proven track record of actually protecting aquatic resources. Moreover, significant components of the regulated public, e.g., interstate pipeline companies, electric utilities, etc., operate in multiple states, where the inconsistent nature of the varying state §404 programs would in all likelihood create a regulatory nightmare for permit applicants.

IV. State Assumption Is Unnecessary

Even though I believe that increased state assumption of the §404 program, as proposed by ECOS, would present many problems and drawbacks, in fact I strongly support increased state action to protect aquatic resources and increased state involvement in the federal §404 program. As stated above, I advocate maximum use of state §401 water quality certification and CZMA authorities. In addition, I believe that every state should be encouraged to adopt and fund an effective state program to protect wetlands and other state aquatic resources independent of the federal §404 program to whatever extent that state's political and budgetary realities make that feasible. In every instance in which a state has adopted and implemented such an effective state program, the Corps has consistently demonstrated its willingness to minimize any duplication of regulatory effort between that state program and the federal §404 program and to minimize any duplication of regulatory burdens on the public. The Corps has done that by working cooperatively with the states to establish joint permit processing and, most importantly, state program general permits (SPGPs).

An SPGP is a form of Corps programmatic general permit authorized under 33 CFR §325.5(c)(3), which covers activities involving discharges of dredged or fill material that are also being effectively regulated by an ongoing, functioning state regulatory program. Such state-regulated activities can obtain expedited federal §404 authorization through the SPGP subject to necessary federal agency oversight and safeguards to ensure that the aquatic environment is being adequately protected. Among the examples of functioning SPGPs are those in Connecticut, Maine, Maryland, Massachusetts Minnesota, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia, and Wisconsin.

A comparison of the structure and functioning of an SPGP with either the existing state assumption of §404 in Michigan and New Jersey, or with the liberalized and expanded form of state assumption advocated by ECOS, reveals that the SPGP is clearly the superior approach.

A. An SPGP Provides Federal Oversight and Limits Political Interference

Under the federal §404 program using an SPGP, federal involvement and oversight (by the Corps district and division offices, the local offices of the FWS and the NMFS, and EPA's regional office) of state permit actions authorized under the

SPGP protect state regulatory programs from improper state political interference. Every SPGP has a "kick out" provision[29] that allows the Corps district office to require the processing of a federal §404 permit for a specific activity that would be covered by the SPGP, where circumstances warrant. Thus, if state politicians attempt to force state regulators to permit an activity not deserving a permit or to delete needed terms or conditions from the state permit, the Corps district office, on its own or at the request of the FWS, the NMFS, or EPA, can help. In such a circumstance, the Corps district is expected to come in and process a federal §404 permit for that proposed activity, notwithstanding the state permit authorization. Years of experience with the existing SPGPs in several states has proved this approach to be effective.

Compare: Under a state-assumed §404 program, the only possibility to remedy improper state political interference with a state permit application would be through the intervention of an EPA regional office (which is usually in some other state many miles away). Notwithstanding the very limited day-to-day EPA involvement in the state-assumed program proposed by ECOS, an EPA regional office would have to learn of the problem in time and be allowed to try to correct it. Experience in Michigan had shown that such EPA oversight and correction of political interference tends to be infrequent and inadequate.

B. An SPGP Provides Federal Law Protection and Enforcement

Under state assumption, virtually all legal protections of federal law are inapplicable to the state §404 permits, whereas all federal laws protecting the environment remain in effect under an SPGP. Under the federal §404 program using an SPGP, all of the federal environmental laws discussed above (NEPA, ESA §7, CWA, CZMA, etc.) apply to every permit authorization (since they provide a "federal trigger") along with any additional requirements imposed by state law. Moreover, those federal laws are enforced by the Corps, EPA, and the DOJ, with the assistance of the FWS and the NMFS, and by citizen lawsuits in the federal courts.

Compare: Virtually all federal laws protecting the environment and virtually all federal agency involvement in the §404 program are rendered inapplicable and unavailable under state assumption. None of the federal environmental laws apply to the state-assumed §404 permits, and none of the federal agencies are involved in the enforcement of those state law requirements, except for the minimal oversight of the state program that can be provided by one EPA regional office.

C. An SPGP Offers Greater Availability of Resources and Expertise

Under an SPGP, all of the resources and expertise of the Corps district and division offices, plus the FWS, the NMFS, and EPA regional staff, are involved in overseeing the SPGP and making sure that both the SPGP and the federal §404 program work to protect aquatic resources for the entire geographic area and/or set of activities subject to the SPGP.

Compare: Under state assumption, virtually all of those federal resources and personnel are no longer involved with the state permits of the state-assumed §404 program, so the considerable costs of operating the state permit program must be borne entirely by the state government. In addition, much of the federal expertise developed and accumulated from operating the federal §404 program since 1972 would be lost through the dismantling of the federal program. Even if the ECOS proposal for federal grants to fund operation of new and expanded state-assumed §404 programs were to become reality, such federal funding could be cut off at any time that federal budget limitations and shifting priorities so dictate.

D. An SPGP Provides a Federal Defense to Regulatory Takings Claims

Under the federal §404 program using an SPGP, any challenges to a permit denial or to permit terms or conditions based on an alleged "regulatory taking" would be brought in the federal courts and defended by the DOJ. The DOJ has had considerable success defending against such "taking" actions. Moreover, in the few circumstances where the Corps' denial of §404 permits have been determined to be compensable takings, compensation to the landowners has come from the federal judgment fund.

Compare: Under state assumption, if a permit applicant sues alleging a "regulatory taking" under either the U.S. Constitution or under the state constitution or state law, that action would have to be defended by the state, with state funds paying any judgments rendered by the courts. Many states have or are considering state property rights and takings laws that are very protective of private property owners and that effectively restrict the ability of state regulators to protect the environment. Concerns about subjecting the state's treasury to takings judgments would discourage states from assuming the §404 program, even if the ECOS proposals to increase state assumption were to be enacted. Even if a state were to assume the §404 program notwithstanding such state property rights laws, state regulators would be greatly restricted regarding what conditions they could place on state permits, or when (if ever) they could deny a permit.

E. An SPGP Provides ESA §7 Consultation

Under the federal §404 program using an SPGP, endangered and threatened species are protected in an efficient and workable manner using ESA §7 informal and formal ESA consultation.

29. Note that the existing state §404 assumption setup has a sort of "kick out" provision as well, but it has a very high bar. Moreover, it is not clear that the ECOS proposal for easier and expanded state assumption contemplates actual use of such a safety valve.

Compare: Under a state-assumed §404 program, ESA §7 consultation is not required or applicable, so landowners are subject to the criminal provisions of ESA §9 and the cumbersome and generally ineffective provisions of ESA §10. Subjecting landowners to the delays and difficulties of the backlogged ESA §10 procedures through state assumption would serve neither the public interest in protecting endangered species or their habitat nor the landowners' interest in receiving a timely and consistent environmental review. Both landowners and conservation interests understand that ESA §7 has proved greatly superior to ESA §§9 and 10 for both protecting endangered species and the legitimate interests of landowners.

V. Conclusion

The federal §404 program currently operates in 48 of the 50 states, and still protects many aquatic resources even in Michigan and New Jersey (the two states that have assumed certain §404 program responsibilities) because a state can only assume §404 permitting authority for non-tidal and non-navigable waters under existing law. Since implementing the federal §404 program nationwide in 1972, the federal government has devoted hundreds of millions of dollars worth of professional, science-based, and competent regulatory program services to all of the 50 states, thereby establishing a consistent federal "floor" of environmental protection for aquatic resources nationwide. While there is surely room for improvement, since 1972 the federal §404 program has provided substantial protection for wetlands and other aquatic resources through a permit process that requires avoidance and minimization of adverse effects and imposition of mitigation requirements for unavoidable impacts. The federal law currently provides every state the opportunity to take effective control over federal §404 program permitting by using the state's CWA §401 state water quality certifications and the CZMA to impose whatever degree of environmental protection (over and above the federal requirements) that the particular state chooses to adopt for its aquatic resources.

In addition, every state has independent constitutional authority to adopt a supplementary state regulatory program to provide greater levels of protection over aquatic resources, to cover aquatic resources or activities that may not be covered by federal jurisdiction, or for any other reason. To whatever extent decisions of the federal courts have restricted the geographic jurisdiction or activities jurisdiction of the federal §404 program, every state has independent constitutional authority to adopt a supplementary state regulatory program to fill in any gaps in federal protection created by those federal court decisions. If a state wants to adopt a state regulatory program but still avoid duplication with the federal §404 program, the Corps is ready and willing to eliminate or minimize such duplication using joint permit processing and state program general permits, as it has done successfully for decades nationwide.

The federal §404 program provides the resources, expertise, and enforcement of the Corps, EPA, the FWS, the NMFS, the DOJ, the Natural Resources Conservation Service, and the U.S. Geological Survey, all of which are lost to state conservation efforts if state assumption takes place. Given these facts, it would make little sense for any state in effect to banish the federal resources and federal environmental laws through state assumption of the federal §404 program.

Experience has shown that the best and most reliable approach for protecting aquatic resources involves a vigorous federal §404 program along with effective state use of state §401 water quality certifications, CZMA consistency certifications, and supplemental state law to fill in any gaps in the federal program. Thus, while I agree with ECOS' goal of restoring the geographic jurisdiction of the CWA, I believe that ECOS' "interlocking" proposals to encourage and increase state assumption of the federal §404 program would undermine the goal of reliable, long-term protection for the nation's aquatic resources.