ECOS

THE
ENVIRONMENTAL
COUNCIL OF
THE STATES

50 F Street, NW
Suite 350
Washington, D.C. 20001

Tel: (202) 266-4920
Fax: (202) 266-4937
Web: www.ecos.org

Richard Opper
Director, Montana Department of Environmental Quality
PRESIDENT

Thomas Burack
Commissioner, New Hampshire Department of Environmental Services
VICE PRESIDENT

Teresa Marks
Director, Arkansas Department of Environmental Quality
Secretary-Treasurer

Michael J. Linder
Director, Nebraska Department of Environmental Quality
PAST PRESIDENT

R. Steven Brown
Executive Director

July 22, 2011

Nancy K. Stoner
Acting Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
Washington, D.C.
(via email)

Subject: Progress Report and Recommended Actions to Further Clarify Section 404 Assumption Application Requirements and Implementation by States and Tribes

Dear Ms. Stoner:

In the spring of 2010, the Environmental Council of States (ECOS) convened a small workgroup to identify opportunities to streamline the application process for state and tribal assumption of the Section 404 program. While the Clean Water Act has provided a mechanism for EPA to approve assumption of Section 404 by states or tribes since 1977 – with the potential to significantly reduce state/federal regulatory duplication – only two states have completed the assumption process. Steps to encourage greater state/tribal assumption of the 404 program could help to increase the overall efficiency of the program.

The workgroup included ECOS, the Association of State Wetland Managers (ASWM), representatives of five states (KY, IN, NJ, MI, VA), one tribe (Fond du Lac) and EPA staff serving in an advisory capacity. The workgroup has met monthly since May of 2010 through June 2011. ECOS is pleased to report that the Assumption workgroup is reaching the completion of its work on this project, and has taken a number of steps to support states and tribes in §404 program assumption. The workgroup has completed the following actions:

- Development of a draft §404 assumption handbook for states and tribes. This document provides interested states and tribes with an introduction to §404 program assumption, basic requirements for assumption, and potential program benefits. The draft handbook is now posted on the ASWM website for general review and comment. We appreciate the thorough review of an early draft by EPA staff.
- Clarification of requirements regarding consultation under §7 of the Endangered Species Act at the time of state/tribal 404 program assumption. ECOS contacted EPA in December, 2010 regarding the applicability of §7 consultation requirements, and received a response from Mr. Peter Silva, Assistant Administrator of EPA, explaining that EPA's transfer of the §404 program to a state or tribe does not require §7 consultation. Mr. Silva also described the EPA regulatory requirements that safeguard listed species.
- Identification of other potential barriers to §404 assumption. The group determined that some barriers are beyond the control of the states or the federal agencies at this time, or will require action by Congress (e.g. partial assumption and delegation of a portion of Section 10 waters). However, the workgroup agreed that it would be feasible for EPA and other federal agencies to facilitate 404 assumption by addressing the following issues:

1. *Clarification of requirements for public participation during the regulatory process in a state/tribal administered 404 program.* Specifically, the workgroup was unable to interpret EPA's requirement regarding citizen suit standing at the time of program assumption by a state or tribe. Therefore, the workgroup requests that the EPA clarify this issue through development of an interpretive rule or other appropriate means. We anticipate that the interpretation will be consistent with citizen suit requirements followed in administration of the §402 NPDES program.

2. *Development of implementation guidance to supplement the existing state program assumption rules.* Based on the workgroup discussion, there appears to be continued uncertainty regarding the comparison between state and federal requirements during the evaluation of a state or tribe's legal authority to assume administration of the Section 404 program. The rules require that a state program be no less stringent than the federal program in terms of resource protection. We support this requirement, but suggest that EPA also explain in staff guidance the flexibility that is available in meeting this requirement, taking into account differing wording and underlying constitutional authority for state programs.

We would also appreciate your assistance in working with the Corps of Engineers to identify options for "phasing in" a state or tribal 404 program following approval of that program by EPA. States and tribes are concerned with the difficulty of "overnight transfer" of the entire program. The existing rules are silent on this issue, but it is logical to anticipate a schedule for program transfer that allows the Corps to complete processing of applications that are in process, while shifting new applications to a newly approved state/tribal program. Responsibility for compliance and enforcement for previously issued permits should also be addressed.

3. *Continued support for state/tribal requests for dedicated federal funding to implement state/tribal wetland programs.* We appreciate the grant support that the federal government has provided for development of state and tribal wetland programs, but ASWM and ECOS again recognize that the lack of any federal financial support for state or tribal implementation of the Section 404 program is a major impediment to program assumption. The perception in many states is that a cooperative state/federal 404 partnership should be financially supported in part with federal funds, as are other "delegated" programs. Enabling EPA's wetland program development grants to be used for implementation as well as development would be one way to begin providing federal financial support for operation of state Section 404 programs.

4. *Targeted training and outreach.* The workgroup suggests 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.

ECOS and ASWM agree that there is an untapped potential for strong state and tribal programs to further increase wetland program efficiency, and to integrate the best of state and federal programs as we manage wetlands and other waters for the future. Should you have questions regarding the ECOS Assumption Workgroup recommendations, please contact either R. Steven Brown (ECOS) at 202-266-4929

(sbrown@ecos.org) or Jeanne Christie (ASWM) at 207-892-3399 (jeanne.christie@aswm.org). Again, we thank EPA for its participation in the workgroup and for its ongoing support.

Sincerely,

R. Steven Brown

Cc: Workgroup members
Denise Keener, EPA OWOW