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Subject: State Assumption of the 404 Permitting Program

Tate,

Below is a recent BNA article regarding the ability of states to assume permitting authority for section 404 dredge-and-fill permits under the Clean Water Act. Thought it might be of interest. Happy to answer any questions you've got.

Cheers,
Owen

After 40 Years, Shared Water Pollution Permits Still Puzzle States

By Amena H. Saiyid | August 25, 2017 6:56PM ET

- States interested in taking over dredge-and-fill programs await EPA guidance
- Army Corps remains at odds with states and EPA over permitting authority

(BNA) — Several states want to issue water pollution permits that for decades have been controlled by the federal government, but a recent report highlights how they're being hindered by confusion over costs and even which waters are eligible for state oversight.

At issue are dredge-and-fill permits needed before mining, construction, and some farming activities can be carried out in and near federally protected waters.

In most of the country, those permits are issued by the U.S. Army Corps of Engineers, which uses the permits to ensure these federal waters aren't polluted by commercial and agricultural activity.

But the process can take years, and some states want to take over the permitting role to speed up the process, end duplication with state permits, and provide consistency for the companies that need the permits before excavating in or around some wetlands or water bodies.

Lingering Uncertainty

Congress gave states the right to take over these permitting duties 40 years ago, and the the actual dredge-and-fill permit requirements are identical whether administered by a state or the federal government. But only two states—Michigan in 1984 and New Jersey in 1994—have actually assumed permitting responsibilities from the federal government, though seven additional states have explored the notion.

One of the biggest lingering issues facing those states is a lack of clarity over which types of federally protected waters they can assume control over and which ones must remain under the purview of the corps. (New Jersey worked out a compromise to clarify its role in permitting on federal waters and wetlands before taking over responsibility in 1994. But the corps doesn't want to follow that approach now.)

The Environmental Protection Agency asked an advisory committee to answer the question of exactly which federal waters would be covered, but the panel recently failed to reach a consensus.

The corps dissented from an approach endorsed by other federal and state agencies—and backed by the National Wildlife Federation—that would have made clear that states could issue permits over navigable waters covered under the Clean Water Act of 1972, even while the corps retained permitting authority over major water bodies that transport people and goods that are covered under the Rivers and Harbors Act of 1899.

That ongoing uncertainty, combined with a tough budget environment for state environmental agencies, has discouraged states like Alaska and Oregon from following through on their desire to take the lead on dredge-and-fill permitting.

Of the seven state agencies contacted by Bloomberg BNA since the May release of the panel's report, Arizona was the only one to report active discussions with its state legislature on assuming the permitting program.

Arizona Eyes Faster Permitting

Obtaining a dredge-and-fill permit from the corps can take anywhere from six months to several years, depending on the complexity of the permit, the location of the project, and whether endangered species could be affected, according to Neal McAliley, an attorney at Carlton Fields in Miami, who has sought permits for clients.

For a state to take over permitting from the corps, it needs funding, legislative backing, and EPA approval. The actual cost of assuming the dredge-and-fill program varies by state, but Virginia in 2012 estimated the cost of staffing and operating a permitting program to be about \$3.4 million a year.

Arizona regulators remain interested in assuming the program and are talking with state lawmakers about legislation to expedite the process, according to a state water official.

"The interest we have in obtaining the Section 404 [of the Clean Water Act] dredge-and-fill permit program is that we will be able to have a more consistent environment to do business," Trevor Baggio, water quality division director for the Arizona Department of Environmental Quality, told Bloomberg BNA. "We can provide a faster service than the corps."

Construction and mining are the main industries that obtain those permits in Arizona. The state's efforts are backed by Phoenix-based Freeport-McMoRan, spokesman Eric Kenner told Bloomberg BNA in an email. That company is the world's largest producer of molybdenum, which is used as an alloy in steel manufacturing, and second largest producer of copper.

Don Taylor, chief operating officer for Arizona Mining Inc., wouldn't speculate on the impact on his company's operations until Arizona actually enacts changes, but he told Bloomberg BNA that any change to streamline the permitting process and ensure more consistent communication with regulators would be a positive for all businesses that deal with the issue.

Baggio said funding is not as much of an issue for Arizona as it is for other states because it charges fees for Clean Water Act discharge permits, a process that would continue if Arizona assumes the dredge-and-fill program.

Interest Remains, But ..

While Arizona is still working to take over the permitting process, the interest of several states has been dampened by confusion over which waters they would assume and which would be retained by the corps.

Congress authorized states in 1977 to take over permitting of waters and wetlands covered by the Clean Water Act, but not those that fall under the Rivers and Harbors Act, which includes major rivers and lakes where transportation of goods and people takes place.

States have been confused over whether that's the final word, so the EPA attempted to clear up that situation by asking its National Advisory Council for Environmental Policy and Technology (NACEPT) to weigh in. But the corps didn't agree with the rest of the panel.

The corps insisted that it retain permitting authority over a category of navigable waters—including small ponds like Minnesota's Bah Lakes—that go beyond major arteries used for transporting goods. The corps also wanted to retain authority over wetlands adjacent to major rivers on a case-by-case basis.

State assumption was a bipartisan compromise Congress enacted to protect states' traditional land-use authorities while extending federal standards to many waters that were not regulated, according to Virginia Albrecht, special counsel to Hunton & Williams LLP, who served on the advisory panel.

"It's a mystery why the corps representative on [a NACEPT panel] refused to implement this clear congressional intent," Albrecht told Bloomberg BNA in an email.

The corps deferred all next steps to the EPA, which told Bloomberg BNA that it is still reviewing the report, but remains committed to giving states an opportunity to be equal regulatory partners.

States Need Funding

Montana's interest in assuming dredge-and-fill permitting waned because the advisory committee didn't provide the steps necessary for takeover and because its state Legislature didn't back the effort, Jeni Garcin, spokeswoman for the state Department of Environmental Quality, told Bloomberg BNA.

Florida and Virginia environmental officials told Bloomberg BNA that the subject wasn't on the agency's radar screen, while Maryland failed to respond. Other states remain interested, but they can't pursue the takeover because of tight budgets.

In Alaska, the current budget climate doesn't support taking over program, Michelle Hale, water division director for Alaska's Department of Conservation, told Bloomberg BNA in an email.

Oregon's interest has been tempered since it discovered it may run afoul of Endangered Species Act protections for the state's salmon species, Bill Ryan, deputy director of Oregon Department of State Lands, told Bloomberg BNA.

The corps consults with other federal agencies to make sure no permitted activity threatens salmon. If the state takes over the permitting program, it would need legislative permission and funding to set up another regulatory program to deal with any harm to the salmon caused by dredging and filling of streams, a move for which there is "neither appetite nor budget" in Oregon, Ryan said.

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For More Information

The report on state assumption is available at <http://src.bna.com/rNh>



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