STATES ASSUMING RESPONSIBILITY OVER WETLANDS: STATE ASSUMPTION AS A REGULATORY OPTION FOR PROTECTION OF WETLANDS

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Abstract—While States have initiated their own wetland protection schemes for decades, Congress formally invited States to join the regulatory game under the Clean Water Act (CWA) in 1977. The CWA Amendments provided two ways for States to increase responsibility by assuming some administration of Federal regulatory programs: State programmatic general permits and State assumption. States are also active in conservation programs such as preserving and managing wetlands. State programmatic general permits (SPGP) allow a State to become the sole permit issuer under an existing State-permitting program for projects that have similar characteristics and will have low environmental impacts. SPGP have gained popularity whereas, in contrast, State assumption has been less popular with only two States adopting such a program. In most instances, State assumption grants more permitting authority to States but also places a heavier burden on the State with a stricter application and approval process, a greater funding obligation, and a larger regulatory responsibility.

INTRODUCTION

Last year, the Fish and Wildlife Service reported that the rate of U.S. wetland loss has slowed to a rate 60 percent below that experienced in the 1970s and 1980s. Jamie Clark, Director of the Fish and Wildlife Service, explained that the study shows that our Nation's efforts to restore and protect wetlands are making a difference. At a time when many Federal regulatory programs are criticized as too expansive, these protective efforts are increasingly occurring at the State level. Many States maintain wetland protection schemes, and their legislatures continue to consider methods of increasing control over State wetlands. Combine this factor with express invitations from the U.S. Congress and the Executive Branch, and the signs indicate that the momentum behind the State initiatives will likely continue.

While States have initiated their own wetland protection schemes for decades, Congress formally invited States to join the regulatory game under the Clean Water Act (CWA) in 1977. The CWA Amendments provided two ways for States to increase responsibility by assuming some administration of Federal regulatory programs: State programmatic general permits and State assumption. State programmatic general permits (SPGP) allow a State to become the sole permit issuer under an existing State-permitting program for projects that have similar characteristics and will have low environmental impacts. But, Federal control is maintained for permitting other projects. SPGP have gained popularity, with 27 States holding permits of this type. In contrast, State assumption has been less popular, with only two States adopting such a program. In most instances, State assumption grants more permitting authority to States: States may issue individual permits for projects that do not have to meet the general permit requirements of similar nature and low environmental impacts. But, State assumption also places a heavier burden on the State with a stricter application and approval process, a greater funding obligation, and a larger regulatory responsibility.

This paper reviews the two regulatory options available to States under the CWA, focusing on the advantages and disadvantages inherent in each. It explores the reasons why States may choose to adopt Federal regulatory responsibilities and presents a guide for States considering one or both of these regulatory options.

EVOLUTION OF WETLANDS REGULATION

In the 1700s, 221 million ac of wetlands existed in the United States. A 1995 inventory showed < 101 million ac remaining. Historically, a wetland was considered a nuisance, believed to inhibit navigation and provide habitat for little more than mosquitoes. Thus, the Federal government encouraged draining and filling of wetlands throughout the 1800s. Under the Swamp Lands Acts, the Federal government granted 15 Western States almost 65 million ac for "swamp reclamation," making drainage and filling wetlands a national policy.

In the late 1960s, the Federal government took greater notice of the benefits of wetlands. It began regulating the filling and dredging of wetlands under the authority of the Rivers and Harbors Act of 1899, which prohibited excavation from or fill to any navigable water of the United States without a recommendation by the Chief of Engineers and authorization from the Secretary of the Army. The Corps also began to consider the ecological benefits of wetlands and to make more protective decisions regarding permits.

In 1972, Congress enacted the Federal Water Pollution Control Act (Clean Water Act, CWA) to eliminate the discharge of pollutants in the waters of the United States, including wetlands, by 1985. Pursuant to this goal, the CWA prohibits all persons from discharging pollutants into waters of the United States unless they have obtained and are operating within the strictures of certain permits. If the pollutants involve dredged or fill material, the permits are issued by the Corps with the EPA maintaining a supervisory role.

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The CWA Section 404 is the primary Federal regulatory program providing protection for the Nation's remaining wetlands. The EPA and the Corps jointly administer the program. The Corps' responsibilities include day-to-day program administration, individual permit decisions, jurisdictional determinations, development of policy and guidance, and enforcement. The EPA's responsibilities include development and interpretation of guidelines for the environmental criteria used in evaluating permit applications, identifying certain exempt activities, reviewing and commenting on individual permit applications, exercising the authority to veto Corps' permit decisions, and overseeing administrative responsibilities of the State assumption program.

The section 404 process includes a public notice and comment period. After receiving public comments, the Corps evaluates the application to decide if it contributes to conservation, economics, aesthetics, fish and wildlife values, flood protection, general public welfare, historic values, recreation, land use, water supply, water quality, and navigation. A public hearing may be held, or the Corps may grant or deny the application outright. An application for an individual permit must meet the requirements of a comprehensive inquiry through the Corps' public interest review and its analysis of compliance with the EPA guidelines. The EPA guidelines seem to require a rigorous examination of the availability of practicable alternatives, and prohibit the authorization of any project that would result in significant adverse impacts. In reality, the Corps denies < 10 percent of individual permit applications.

The CWA also authorizes general permits on a State, regional, or national basis. Rather than applying for an individual permit, a person may qualify to discharge dredged or fill material into waters of the United States under one of these permits issued for projects with small impacts. General permits decrease the administrative burden for the Federal and State regulatory agencies but have come under increasing criticism because of the potential to greatly contribute to overall loss of wetlands, little by little.

Some argue that the CWA was enacted precisely because the individual States lacked the political will to clean up their waterways and protect key resources. But, 5 years after its enactment, Congress amended the CWA authorizing substantial State regulatory participation. The amendments authorized States to take over the section 404 permitting program from the Corps and also provided for general permits to relieve pressure created by expanded Federal jurisdiction and, in part, as an acknowledgment of a practice that the Corps already was performing.

One of the reasons Congress amended the CWA was to address concerns that the section 404 program was too overwhelming for the Army Corps of Engineers to manage and that funds were insufficient. Reduction of Corps workload was a primary reason for providing delegation to the States. Even though parts of the legislative history confirm Congress' intent to delegate a greater responsibility to the States, it also indicates concern for the performance of State programs. Advocates argue that States occupy the best position to take the lead in wetlands protection because States tend to be more responsive than Federal agencies to local needs but are still removed from the influences of local politics, providing better protection than local governments.

In addition to the congressional invitation of 1977, the Executive Branch has encouraged reducing Federal involvement and replacing Federal wetlands regulators with States. Specifically, the Bush Administration preferred a minimum level of Federal involvement, citing Federal regulatory programs as burdensome. The Clinton Administration called for greater State action in its Wetlands Policy of 1993. Two of the five principles for the Federal Wetlands Policy directly related to States increasing their responsibilities: avoidance of duplication between regulatory agencies and expansion of partnerships with State and local governments.

States were given alternative opportunities to respond to pressures on wetlands. Since the passage of the CWA, States were encouraged to establish their own conservation and permitting programs and to work as partners with the Corps in order to manage wetland areas. Some State programs predated the Federal protections of wetlands, and many took action in favor of their coastal wetlands prior to extending protection to upland wetlands. Other States joined programs sponsored by the Federal government that combine Federal, State, local, and private efforts at restoring and preserving wetlands.

States may also protect against the filling of wetlands through the CWA Section 401 water-quality certification and under the consistency determinations of the Coastal Zone Management Act. Under the CWA Section 401, a State may veto or condition a Federal licensed or permitted activity that may degrade water quality or aquatic habitat, including wetlands. It requires that an applicant for a Federal permit for activities that may result in a discharge into navigable waters must receive a certification from the State to insure compliance with State water-quality requirements. Section 401 gives State water-quality control over a wide range of activities for which they otherwise might lack such authority, including wetlands preservation, protection of wildlife habitat, and protection of aesthetic and recreational values of waterways. It also allows States to limit impacts on wetlands without running its own regulatory program or operating under an SPGP or assuming section 404 authority from the Corps.

A State may also use the consistency requirement under the Coastal Zone Management Act to limit Federal permitted activities, which affect wetlands in a coastal zone. If a State has an approved coastal zone management program, then an applicant for a Federal permit whose activity may affect any land or water use or natural resource in the coastal zone, must obtain certification from the relevant State coastal resources agency that the permitted activity complies with the State program and will be conducted in a manner consistent with the program. A State may specifically designate wetlands as regulated areas if they fall within the State's coastal zone. For fill activities in these wetlands, the State may deny certification if it finds the activities inconsistent with its program. Generally, a project cannot continue without such certification. But State wetland

protection schemes have powerful 404 alternatives. As regulatory tools, SPGP and State assumption must be analyzed and adapted to further wetlands protection, in addition to trying to simplify the permitting process.

STATE PROGRAMMATIC GENERAL PERMITS

The State programmatic general permit is one type of general permit issued by the Corps. Today, the Corps uses general permits to authorize 80 percent of the regulated activities. The Secretary of the Army issues general permits on a programmatic, regional, or nationwide basis. To qualify for a general permit, the project must meet the following requirements: (1) the activities authorized under the general permit must be "similar in nature;" (2) the activities may cause only minimal adverse environmental effects when performed separately; (3) the activities may have only minimal cumulative adverse effect on the environment; (4) the permit must be based on EPA guidelines; (5) the permit must be limited to a 5-year life span; (6) the Secretary can revoke or modify the permit if the authorized activities have an adverse impact on the environment, or such activities are more appropriately authorized by individual permits.

The general programmatic permit furthers the idea that State and Federal regulatory programs should complement rather than duplicate one another. Corps regulations define programmatic permits as "a type of general permit founded on an existing State, local, or other Federal agency program and designed to avoid duplication with that program." Under the SPGP, the Corps in effect delegates to a State the primary responsibility under section 404 for permit review of the activities meeting the requirements of the SPGP. As a general permit, the SPGP must comply with the congressionally mandated requirements set forth in section 404(e).

Before authorizing an SPGP, the Corps must analyze the State program upon which it is based. Often, because of the limited scope of some State programs, an SPGP will not necessarily cover the entire State in question. Instead, the Corps refers to any general permit program based on a State program to assure the protection of wetlands as an SPGP.

The programs tend to follow two models in practice: those using fixed criteria and those using a process of consultation and review. The SPGP using fixed criteria called the "New England model," requires the State to place potential section 404 permit applications in one of three categories: the nonreporting, screening, or individual permit categories. If the State places a permit application within the nonreporting category, the applicant does not have to inform the Corps of the activities. Instead, the applicant is only responsible for meeting State requirements: a State permit, State water-quality certification, and a consistency concurrence, if the project is in the coastal zone. An activity with higher impacts may fall in the screening category, which requires an interagency screening, or the individual permit category, which requires an applicant to go through the Corps' individual permit application process.

The second type of SPGP uses a consultation and review structure. When a State agency receives an application for a State permit, it conducts a site visit of the area and produces a field report or evaluation. The State then produces public notices of permit applications, putting the Corps and other Federal resource agencies on notice. One of these agencies or the State agency may request that the Corps require the applicant to seek an individual permit. If not, the State agency can issue the permit. This consultation and review process is often criticized for increasing the workload and delays but potentially provides a better review of the project site and more accurate prediction of impacts.

States with SPGPs cite greater control over wetlands as a reason to take on this authority. Through an SPGP, the State can control the permitting of those actions with minimal impacts, does not have to rely on the Corps, and avoids duplication for these permit applications. Finally, the SPGP gives States an alternative avenue to control the fate of their wetlands other than by assuming the 404 permitting process.

The SPGP is a win-win for the Corps as well. By giving the State the authority to review and issue or deny these permits, the Corps can reduce duplication between State and Federal regulatory programs and reduce the Corps' regulatory workload without compromising, at least from the Corps' perspective, the overall effectiveness of section 404 and section 10 permit review in protecting wetlands. In addition, most SPGPs specifically exclude activities affecting sensitive areas such as endangered species habitat or historic properties and provide for kick-out provisions if necessary.

STATE ASSUMPTION

The second option for States is State assumption of the Corps' permitting authority. Many States perceive that SPGPs provide adequate control of State wetlands without assuming the responsibility offered under State assumption whereas others view SPGPs as merely a stepping stone to assumption, which can offer a State more regulatory authority than a general permit.

Unlike SPGPs, the CWA and accompanying regulations specify the requirements for assuming section 404 authority. The EPA must approve a State's application to assume the 404 permitting program. The statute requires the Governor of the applicant State to submit a description of the program to the EPA, along with a statement from the State attorney general that the laws of the State "provide adequate authority to carry out the described program." A State must submit to the EPA Regional Administrator the following six items: (1) a letter from the Governor of the State requesting approval of the State program; (2) a complete program description; (3) an attorney general's statement confirming that the laws of the State provide adequate authority to carry out the described program; (4) a memorandum of agreement with the EPA Regional Administrator; (5) a memorandum of agreement with the Secretary of the Army; and (6) copies of applicable State statutes and regulations, including those governing applicable State administrative procedures.

The attorney general's statement must also include certification that each agency responsible for administering the State program has full authority to administer the

program within its category of jurisdiction. In addition, the State as a whole must have full authority to administer a complete State program. Finally, the statement should include a legal analysis of the likelihood of a constitutional taking as a result of the successful implementation of the State's program.

In order to assume, the State will enter memorandums of agreement (MOA) with both the EPA and the Corps. The MOA with the EPA must set out State and Federal responsibilities for program administration and enforcement including provisions specifying classes and categories of permit applications for which EPA will waive Federal review authority and provisions addressing EPA and State roles and coordination with respect to compliance monitoring and enforcement activities. The MOA with the Secretary of the Army must include a description of the waters of the United States within the State over which the secretary retains jurisdiction and an identification of all general permits issued by the secretary, the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program, and a plan for transferring responsibility for these general permits to the State.

The program description must include various essential elements in order to be approved. First, the description must explain the State's permitting, administrative, judicial review, and other applicable procedures. In addition, it must include a description of the funding and manpower available for program administration, a description of how the State will coordinate its enforcement strategy with the Corps and EPA for nonassumable waters or projects, a comparison of State and Federal definitions of wetlands, and the extent of the State's jurisdiction, scope of activities regulated, anticipated coordination, and the scope of permit exemptions, if any. The EPA distributes the State's program submission to the Corps, Fish and Wildlife Service, and the National Marine Fisheries Service. EPA has up to 120 days to approve or disapprove the State's program. Once the EPA approves the State application, the Corps transfers to the State those permit applications for projects in the State's jurisdiction.

The EPA retains oversight authority and receives copies of all permit applications. The State must notify the EPA of any action that it takes with respect to such applications. The EPA Administrator provides copies of the application to the Corps, the Department of Interior, and the Fish and Wildlife Service and must notify the State within 30 days if the administrator intends to comment on the State's handling of the application. The State must then await comment before it may issue the permit. If the EPA objects to the application, the State may not issue the proposed permit but may request a hearing before the EPA or alter the permit to accommodate the EPA objections. If the State does not request a hearing, the EPA transfers authority to issue the permit to the Corps. Once in the Corps' hands, jurisdiction remains there.

Finally, the statute requires that EPA review any revisions to the State wetlands program, determine whether such revisions are substantial or not substantial, and approve or disapprove the revisions. The EPA also maintains the authority to withdraw approval of the program. If the administration of the State program does not meet EPA guidelines, the EPA may take corrective action and may, within a reasonable time, withdraw approval of the program and redirect authority to the Corps.

MICHIGAN AND NEW JERSEY ASSUMPTION PROGRAMS

Two States, Michigan in 1984 and New Jersey in 1994, have assumed permitting authority with mixed results. An analysis of these two programs provides a look at permitting under State assumption.

Michigan began wetland permitting even prior to congressional authorization for State assumption of section 404 authority. In 1955, the Michigan State legislature passed the Great Lakes Submerged Lands Act, authorizing the Michigan Department of Natural Resources (MDNR) to regulate dredge, fill, and construction activities in the State's coastal zone. In 1972, the Michigan legislature acted again by passing the Inland Lakes and Streams Act authorizing the State to regulate activities occurring up to the ordinary high-water mark on Michigan's inland wetlands. Four years later, Michigan developed a MOA with the Corps for a Joint Public Notice System to expedite the issuance of wetland permits. When congressional authorization for assumption followed the next year, Michigan was well placed to assume the wetlands permitting program. The State then passed the Goemaere-Anderson Act of 1980, forming the framework for assumption and expanding the State's wetland permitting requirements to include those wetlands, which were not subject to section 404 jurisdiction.

The MOA between the EPA and Michigan named the MDNR as administrator of the Michigan wetlands program. The program's procedures are similar to those under the CWA. The Michigan DNR has 14 districts in 3 regions to handle State permitting, mitigation matters, wetland delineation, and enforcement. Upon submission of a completed application, the MDNR has 90 days to issue a determination on the proposed project; if the MDNR fails to issue a determination within that time frame, the proposed project is considered approved.

Prior to assumption, New Jersey's wetlands scheme was comprised of four acts. First, the Hackensack Meadowlands Development Commission of 1968 set up a permitting scheme for activities within district boundaries. The Wetlands Protection Act of 1970 regulated activities within the coastal and estuarine wetlands and required applicants to obtain permits from the New Jersey Department of Environmental Protection (NJDEP). In 1979, the New Jersey legislature enacted the Pinelands Protection Act to regulate wetlands and other areas within the Pinelands National Reserve. Finally, in 1987, the legislature passed the Freshwater Wetlands Protection Act developed specifically with assumption in mind. The act created the State's wetland regulatory program and allowed the State to create buffer areas adjacent to designated wetlands that are subject to active regulation.

New Jersey assumed 404 authority in the spring of 1994. The NJDEP was named as the State authority over the program. The MOA with the EPA requires the State to submit

monthly and yearly reports to the EPA for review. The NJDEP is not subject to strict 90-day time constraints like the Michigan DNR. The program requires the NJDEP to act "in a timely manner"; in practice, permit processing often takes up to 4 months.

FEDERAL PERMITTING VERSUS ASSUMPTION

Improving the efficiency of permitting is a high priority for those States considering assumption. The Corps is often criticized for slow responses on permits. States can impose a strict time limit on their permitting agencies, as Michigan has done by requiring turn around by the MDNR in 90 days. States also can provide more manpower than the Corps, evidenced by Michigan's creation of 13 field offices throughout the State, as compared with 4 Corps offices. With more field offices, decisionmakers can be more readily available to applicants and can be closer to the wetlands actually under their jurisdiction.

An element of improving efficiency of the 404 program is to reduce the ever-present regulatory duplication. Under a State-assumed program, paperwork for the applicant is reduced, and the State agency becomes directly responsible for the application. By reducing duplication, the State can also increase predictability of the application process. A State can also consolidate several different wetland statutes to reduce the burden on the regulated public and streamline the process.

Finally, advocates argue that wetlands will receive better protection under an assumed program for three reasons. First, the State is in a better position to address regional and local concerns about the conservation and use of wetlands resources. Assumption supporters claim that State agency regulators are more familiar with the treatment and use of the regulated lands. Also, because the State assumes permitting authority over a smaller square acreage of wetlands than the Corps had been responsible for, a State can potentially provide closer examination of cumulative impacts. Advocates also claim that a State regulator will be more aggressive than its Corps predecessor, and a State can avoid the inconsistency problems that often plague Corps regulators.

Once State policymakers determine that State assumption and SPGPs are a better alternative for wetlands protection in their State, they must determine which alternative to employ in their State. An analysis of the advantages and disadvantages to each alternative is essential to this determination.

Control Over Wetlands Decisions

States that have taken over some aspect of the Federal regulatory program, and those considering such action indicate that increased control over permitting decisions regarding State wetlands is a driving force in seeking more regulatory authority. But "control" over permitting decisions hinges on several factors: jurisdiction, Federal oversight, and flexibility of the program.

Jurisdiction

Jurisdiction of an SPGP varies according to the State program upon which it is based. An SPGP generally covers wetlands, waters, and activities within the Corps' Section 404 and Section 10 jurisdiction that are regulated by a State wetlands program. Therefore, a State can design its SPGP to best match its regulatory program but can also amend this underlying program to alter its jurisdiction. SPGPs do not include those activities and areas that are considered to be of national or international concern and many exclude specific activities that have a potentially higher impact, such as new or expanded marinas, projects requiring an environmental impact statement, and wetlands fills over specific acreage. A comparison of the underlying State programs reveals the degree to which SPGPs can differ.

For instance, the Maryland SPGP covers only section 404 activities affecting < 5 ac of nontidal wetlands based upon the jurisdiction of the Maryland Nontidal Wetland Protection Act. The North Carolina SPGP applies to all section 404 and section 10 activities that receive prior approval from the State based on the State's Coastal Area Management Act permit, a State dredge and fill permit, or a section 401 State water-quality certification when there is a discharge into U.S. waters. But the North Carolina SPGP only applies to its 20 coastal counties. Finally, the Massachusetts PGP applies to section 404 and section 10 activities that receive prior State approval under the Wetland Protection Act Final Order of Conditions, a Public Waterfront Act waterways license or permit, a section 401 State water-quality certification, or a State coastal zone consistency determination. Also, jurisdiction under the PGP is expressly limited to wetland fills less than or equal to 1 ac in size. Finally, these programs expressly exclude activities affecting navigation, national wildlife refuges, forests, parks, components of the National Wild and Scenic River System, and threatened or endangered species and their critical habitats.

The MOA between Michigan and the EPA divided jurisdiction as follows: Michigan acquired responsibility for all activities, which require dredging, placement of fill, or construction in inland waterways; the Corps (Detroit District) maintained jurisdiction over activities, which require dredging, placement of fill, or construction in the Great Lakes coastal areas, connecting waters, navigable waterways and those wetlands adjacent to navigable waterways, and under other specific circumstances. Similarly, New Jersey gained permitting authority over freshwater wetlands except that a 1,000-ft boundary from the mean high water line of navigable waterways was established as the jurisdictional boundary between "adjacent" and "nonadjacent" wetlands.

As the above examples show, the two States that assume section 404 permitting authority have jurisdiction over a greater acreage of State wetlands. This does not necessarily benefit the States, however. Jurisdiction under State assumption can be changed if a State fails to meet EPA guidelines. Thus, even though a State begins its 404 authority responsible for a large number of wetlands, the Corps can reassume permitting authority over certain areas.

Whereas SPGPs can also be subject to change, especially because they must be reapproved every 5 years, they offer more flexibility. A State can easily create a second SPGP to include wetlands in a different part of the State if it wishes authority over a greater number of acres. Even a State with

an assumption program can create an SPGP to streamline routine permits with minimal impacts. New Jersey attempted to create such a general permit for the formation of cranberry bogs in wetlands. Ultimately, the general permit was rejected for lack of safeguards to pinelands in New Jersey, but the option remains even under a State-assumed permitting program.

Federal Oversight

The Corps views both the SPGP and State assumption as successful programs because they lower the workload of the Corps. Developers approve of such programs because they believe that passing authority to States may be the only way to reel in the numerous Federal regulatory arms. But, SPGPs and State assumption do not automatically shift all decisionmaking ability to the State level. Some of the control a State might gain from creating an SPGP or assuming 404 permitting authority is tempered by the remaining Federal oversight with these programs.

Under an SPGP, the Corp generally turns over to the State the primary responsibility for individual permit review of the activities included in the SPGP. This allows a State to streamline permitting applications and approval for more routine wetland disturbances but the EPA 404(b)(1) guidelines provide that an SPGP "may be revoked or modified by the Secretary of the Army if, after opportunity for public hearing, the Secretary determines that the activities authorized by such general permit have an adverse impact on the environment or such activities are more appropriately authorized by individual permits." States also object to the Corps' authority to override State decisions on a case-by-case basis. The Corps retains authority to review PGP applications individually and determine on a case-by-case basis whether or not the concerns for the environment require that the Corps override the permit and require an individual application and review. This discretionary authority is often incorporated as a condition to the programmatic permit.

Similar Federal oversight exists under State assumption. After assumption, the EPA monitors the effectiveness of the State program on individual and overall levels. The State must submit to the EPA a copy of each individual permit application and proposed general permit. The EPA may transfer permits to the Corps when deemed necessary. It also requires annual reports to evaluate the State's administration of the program. State assumption documents can also specify certain oversight authority with other Federal agencies such as the Corps or Fish and Wildlife Service. For instance, the MOA between New Jersey and the Fish and Wildlife Service specified that activities suspected of being in close proximity to sensitive areas will be cleared by the Fish and Wildlife Service.

Even with these disadvantages of Federal oversight, the State does gain more control. A State better controls the timing of permitting decisions, the execution of onsite evaluations, the drafting of permit conditions, and establishes rapport with the public, which helps to maintain public support for State wetland programs. Finally, the State may be able to benefit from the mandatory Federal oversight. When a State is faced with a tough political decision, it can remove itself from the equation and shift the decision to the Corps, leaving the Federal agency to take the resulting "heat" from an unpopular permitting decision.

Flexibility

A final element of a State's control over its regulatory decisions under an SPGP or assumed program is flexibility. Ideally, a State could experiment with parts of the program until it best fits the State's regulatory program already in existence and the State's wetland needs. Unfortunately, a number of States cite lack of flexibility as a reason not to partake in the SPGP or assumption alternatives.

Application procedures for the SPGP are less rigid than assumption, and SPGPs provide a greater potential for streamlined permit review. An SPGP can cover a limited area in the State, such as the North Carolina SPGP that covers 20 coastal counties, or can be statewide for particular activities. The SPGP process also allows delegation of a partial program to a State. The State may assume management in the form of a pilot program on a small basis before implementing the program across the State. This allows a State to institute higher levels of regulatory oversight for more fragile areas. For instance, Florida recently developed an SPGP for a single watershed.

Funding

Congress relied on a State survey when providing for State assumption in the CWA Amendments of 1977. The survey revealed that States were interested in assumption but only if adequate funding was available. Interestingly, Congress has never provided such funding and does not appear to consider it necessary. Lack of funds continues to be a top deterrent for States considering assumption of the 404 program. The State agency must incur a large share of the workload from the Corps including project review, impact assessment, program enforcement and administration, and the assumption of new responsibilities for compliance with certain Federal statutes.

With an SPGP, States do not face the heavy funding burdens associated with assumption of the section 404 program. Because the SPGP is based on a State regulatory program already in place, the State has already expended most of the necessary funding. Its earlier investment in the regulatory program will pay off when operating under an SPGP. If additional funds are necessary and a State cannot immediately fund the program, it can phase into operation under an SPGP, lessening problems with start-up funding. Or, a State can use an SPGP to strengthen an existing regulatory program, using Federal funds to complement a program limited by the shortage of State funds.

Permit Review

Both the SPGP and assumption alternatives offer a State a way to change permit reviews and procedures and offer more predictability in the permitting process. Because the Corps is criticized for delayed permit review, States often seek to simplify permitting procedures and streamline application review and negotiations.

The SPGP expedites review of permit applications. An SPGP can require accelerated action by those Federal

agencies that maintain veto or supervisory power. These Federal agencies must meet State timelines that are often shorter than the Federal counterparts. For example, the North Carolina SPGP provides the Corps 45 days to distribute the SPGP application materials to Federal agencies to comment and develop a coordinated Federal agency position. The SPGP allows for extension of this peer review period, but it is discouraged. Similarly, the Maryland SPGP offers a 45-day limit to the Corps but provides that the Corps or the Maryland Department of Natural Resources may extend the 45-day limit to complete the review. Finally, in New Hampshire and Massachusetts, the Corps coordinates with the Federal resource agencies through meetings about every 3 weeks to review projects in the SPGP screening category.

Operating under an SPGP also simplifies the permitting process for applicants and avoids potential inconsistencies in Federal and State approaches. Properly implemented, a State can provide protection to wetlands while facilitating minor development proposals. This bolsters the theory that wetlands regulation is developing into a land use practice and that the historical land use actor, the State, can best define such policies.

Under State assumption, the State can design its permitting procedures as long as it continues to meet EPA requirements. States can limit delays in reviewing applications and provide an avenue for better communication between State regulators and permittees and greater predictability in the application process.

Protection

Protection of wetlands remains a thorny issue in both State and Federal regulatory programs. There is a constant struggle to determine if the ability to provide adequate protection for wetlands is at the Federal or the State level. If a State decides to participate in regulation under an assumed program or an SPGP, which alternative best protects wetlands?

SPGP proponents cite increased protection of wetlands as a benefit. Primary State control allows for increased recognition of local differences in wetland conditions and community needs. And it provides review to those smaller *de minimis* impacts that are usually never reviewed. A movement is gaining momentum to formulate an SPGP that replaces Corps nationwide permits. This may be a result of continuing criticism over the lack of examination of NWP activities. Prior to the rise of SPGPs, in order to review NWPs, States had to rely upon their authority to deny section 401 water-quality certification to the Corps for an NWP.

This approach supports delegating the NWP review to a State under an SPGP because the Corps does not exercise review over nationwide permit activities. This allows the Corps to rely on a strong State program to take up the slack and allows a State to protect against the dangers of unregulated NWP activities. Under these circumstances, an SPGP can provide a more streamlined review of minimal impact activities that is better tailored to a State's particular circumstances.

The Corps' New England Division is attempting this approach. It has revoked several nationwide permits and delegated those responsibilities to various States in its region. The New Hampshire and Massachusetts SPGPs have assumed many of these responsibilities but still ensure at least some form of Federal review for impacts over 3,000 or 5,000 ft^2, respectively. These may represent an acceptable compromise between State protection and more thorough Federal permit review.

Because the SPGP generally applies at the State government level, the effectiveness of the program is limited to that of the State agencies involved. Thus, SPGPs are criticized for restricting local and regional involvement. In addition, SPGPs may actually lower the amount of oversight of wetlands by authorizing a State agency to substitute its discretion in categorizing activities as those with minimal impacts. Even small activities that have minimal impacts cause loss of wetlands. While Corps oversight is present for certain permit applications, the goal of reduction of duplication and Corps workload may override the need for adequate supervision. In testimony last year, a Corps representative stated that "[p]rogrammatic general permits allow the State or local agency to take the lead in working with the applicant and reduce duplication among programs. If enough of these programmatic general permits are developed, the long-range benefit will be a significant workload reduction for the Corps regulatory program." The primary goal, wetlands protection, is pushed aside in favor of lessening duplication and lowering the workload for the Corps.

State assumption has the potential to improve protection for wetlands. States may offer more in-depth knowledge of local and regional wetlands values and functions than Federal agencies. In addition, a State may provide better enforcement and may even create a program more stringent than the Federal one. At a minimum, the State permits must comply with the requirements of the CWA, its regulations and the EPA 404(b)(1) guidelines, but this does not limit a State as it may adopt more stringent requirements. For example, a State may choose to require individual permits to regulate isolated wetlands less than an acre in size, often authorized under NWP 26 that would otherwise receive no review. In 1984, the Detroit District of the Corps transferred a majority of nationwide permits to the MDNR. The result is that the Detroit district no longer issues NWPs in areas that are under State jurisdiction in Michigan. There is no NWP equivalent in Michigan, a significant change as a result of the assumed program.

These benefits, however, may be outweighed by the substantial political pressure a State agency can experience when making permitting decisions previously made by the Corps. Michigan and New Jersey have both experienced some political challenges to their regulatory authority.

Michigan's program has been cited as a success as the first assumed program in the Nation. It has lowered the workloads of both the EPA and the Corps, and both agencies believe that the MDNR is doing an adequate job. The Michigan program claims greater enforcement of permitting violations than its Corps predecessor. However,

wetland protection advocates support Corps regulation and cite great wetland losses due to the lack of political willpower and enforcement mechanisms at the State level. One commentator remarked that “in a large part because of its permanence, the Michigan assumption is widely regarded by conservationists to have been ultimately a disaster.”

Two examples can place this remark into context. First, the EPA overruled its own regional office objection to a permit to build a 267-acre gold course and housing development. In 1991, the Michigan DNR was set to issue a permit, but the EPA regional office objected. After meetings between the State, developer, and EPA regarding modifications, EPA Administrator William Reilly withdrew the regional office’s authority. An EPA representative explained that the action was “to send a signal to the States that, if they follow the proper procedures and are qualified and capable, EPA is not going to interfere.” It did leave tension between the MDNR, which was poised to issue a permit, and the Regional EPA.

Second, the changes in the program in recent years have caused strife within the program. Some cite Governor John Engler’s guidance as weakening the program. In 1991, Governor Engler issued Executive Order 1991–31, which abolished some State agencies and reorganized others, such as the MDNR. After litigation, the Michigan Supreme Court upheld the restructuring in House Speaker v. Governor, affirming the executive’s right to make such changes. In 1994, the principal changes set forth in the 1991 Order were codified through statute, but, in 1995, Governor Engler issued Executive Order 1995–18, further reorganizing Michigan’s environmental agencies. The National Wildlife Federation and State conservation organizations challenged the 1991 and 1994 orders for restructuring as violations of the State’s assumption requirements, suing the EPA for failing to withdraw approval of Michigan’s program due to substantial revision. The District Court for the Western District of Michigan, however, dismissed the claim, finding no subject matter jurisdiction.

The Michigan program remains in effect, but also in flux as a result of the recent restructuring challenges. Its experience shows that even at the State level, a wetlands regulatory program may be subject to political whims. Also, it highlights the hoops that a State must jump through to attain and maintain an assumption program.

The New Jersey program has received favorable reviews from the Federal agencies and many State conservationists for its protection of wetlands. The program, however, faces similar executive difficulties as the Michigan program. For instance, conservationists in New Jersey have been vigilant in opposing Governor Whitman’s attempts at creating a general permit for cranberry bog conversions. Like the struggles with reorganization of the Michigan program, New Jersey’s program is also still subject to the impulses of State political pressures and executive branches.

The experiences of these two States can assist other States in determining if State assumption can help them protect their wetlands.