



February 19, 2025

The Honorable Shelley Moore Capito  
Chairman  
Committee on Environment and Public Works  
U.S. Senate  
Washington, DC 20510

The Honorable Sheldon Whitehouse  
Ranking Member  
Committee on Environment and Public Works  
U.S. Senate  
Washington, DC 20510

Dear Chairman Capito, Ranking Member Whitehouse and Members of the U.S. Senate Committee on Environment and Public Works:

On behalf of Associated Builders and Contractors, a national construction industry trade association with 67 chapters representing more than 23,000 members, I thank you for holding the hearing, "[Improving the Federal Environmental Review and Permitting Processes](#)." ABC members play a significant role in building America's infrastructure and seek to inform the committee of legislative opportunities to responsibly streamline the Clean Water Act by eliminating persistent statutory barriers to state assumption and enhancing U.S. Army Corps of Engineers and U.S. Environmental Protection Agency processes.

## Background

Section 404 of the CWA prohibits the deposition of dredge or fill material into the waters of the United States without a permit. The U.S. Army Corps of Engineers exclusively administers Section 404 in every state except Michigan and New Jersey.

In 1977, Congress amended the CWA to provide for broad state assumption of Section 404 permitting, compliance and enforcement, recognizing the superior efficiency, consistency and transparency achievable via localized administration of wetland permitting. Forty-eight years later, only three states have assumed Section 404 permitting, contrary to congressional intent. The negligible assumption of Section 404 permitting by states may be attributable to the CWA providing the USACE with procedural and substantive advantages it fails to provide states, including:

- **Endangered Species Act Section 7 liability protection for incidental take of listed species.** On the other hand, state permittees must secure incidental take liability protection via comparatively time- and cost-intensive compliance with ESA section 10 conditions, including the preparation of habitat preservation plans.
- **No durational limit for permits.** In contrast, the CWA limits the duration of state issued permits to five years, requiring duplicative applications and determinations, unnecessarily complicating long-term project delivery.

The lack of state assumption of Section 404 permitting should concern Congress, as USACE completion of Section 404 permitting process averages nearly 800 days and nearly \$300,000 in applicant administrative costs per permit, frustrating action on America's critical housing and infrastructure priorities. In comparison, at the time of Florida's Section 404 assumption, Florida's

state-administered wetland program covered 86% of waters subject to concurrent USACE permitting and permitted in 17 days the same activity in the same waterway that USACE permitted in 300 days.

On Feb. 15, 2024, the U.S. District Court for the District of Columbia divested Florida's Section 404 authority, exemplifying persistent statutory barriers to state implementation, contrary to the CWA's explicit preservation of states' "primary responsibilities and rights" to ensure the integrity of water resources.

### **Recommendations To Enhance State Assumption of Section 404 Permitting**

Given that approximately 12 states currently administer local wetland programs not contemplated by USACE's nationally standardized program, encouraging state assumption would eliminate duplicative permitting, achieve decisional consistency and promote transparency by reducing points of contact for permittees.

Congress should enact amendments consistent with the following recommendations to vest states with increased Section 404 authority. The recommendations below improve transparency, consistency and efficiency by advancing localized administration of wetland permitting and reducing federal government overlap.

- **Authorize Endangered Species Act Section 7 liability protection to flow through state or tribal Section 404 enforcement agencies:** Congress should allow states to secure ESA Section 7 incidental take permits covering all state-administered Section 404 program permittees, subject to adequate state regulatory provision for subsequent species and site-specific U.S. Fish and Wildlife Service or National Marine Fisheries Service determinations.
- **Authorize states and tribes that assume Section 404 authority to issue permits of equivalent duration to USACE Section 404 permits:** Congress should ensure parity in the duration of permits issuable by USACE and state authorities by substituting the present five-year lifetime of state-issued permits under Section 404 with a provision that state permits may not exceed statutory or regulatory limitations governing the duration of permits issued by USACE.
- **Clarify that states and tribes may assume authority to issue Section 404 permits for discharges into a portion of assumable waters:** Congress should eliminate the current "all or nothing" assumption framework and afford states latitude to administer permitting for those activities and assumable waters they are best equipped to manage.
- **Authorize expenditure of EPA Wetland Development Grant Program funding to offset continuing state Section 404 implementation costs by supplementing state fee-for-service revenues:** In view of the potential for wider Section 404 assumption to relax demands on federal personnel and resources, Congress should at minimum eliminate present obstacles to expenditure of existing federal funding for state water quality programming on continuing administration of assumed programs.

## Conclusion

By advancing state assumption, Congress would provide permittees with a coordinated, predictable and transparent permitting process. This action would further empower the construction industry to plan and execute even the most complex projects while safeguarding our communities, maintaining a healthy environment and being good stewards of public funds.

ABC appreciates the opportunity to comment on today's hearing and looks forward to working with the committee during the 119th Congress. ABC is committed to building our nation's infrastructure projects with the highest standards of quality and safety to benefit the communities we all serve.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristen Swearingen". The signature is written in a cursive, flowing style.

Kristen Swearingen  
Vice President, Legislative & Political Affairs