

Chapter 9

States' Roles and State Programs

Although the Corps of Engineers and the Environmental Protection Agency jointly administer the Clean Water Act Section 404 program, States play a vital role in the protection of wetlands. States can protect wetlands by: (1) creating their own State laws, regulations and programs to protect wetlands, which can be more stringent and regulate more wetlands than the Section 404 program; (2) assuming authority from the Corps of Engineers to administer the federal Section 404 permit program, or streamlining permitting under that program through the implementation of a State programmatic general permit; (3) “vetoing” or imposing conditions on Section 404 permits through the Clean Water Act Section 401 certification process; and (4) preventing the issuance of a Section 404 permit for activities that violate State plans under the Coastal Zone Management Act.

State Authorities

- State Wetland Protection Programs
- 404 Assumption or Programmatic General Permits
- 401 Certification
- Coastal Zone Management Act Certification

State programs to protect wetlands are especially important to address wetlands or activities that are outside the jurisdiction of the Section 404 program. See Chapters 4 and 5, *supra*.

I. State Programs

A. Federal/State Relationship

The Clean Water Act, like most federal environmental laws, adopts a **cooperative federalism** approach, recognizing “the primary responsibilities and rights of States to prevent, reduce and eliminate pollution...” See [33 U.S.C. § 1251\(b\)](#). The statute explicitly provides that the Clean Water Act does not pre-empt State or local water pollution control programs, and recognizes that States and local governments can establish programs that are **more restrictive** and **regulate more waters and activities**

than the federal program. See [33 U.S.C. § 1370](#). Section 510 of the statute provides:

Except as expressly provided in this chapter, nothing in this chapter shall

(1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce

(A) any standard or limitation respecting discharges of pollutants,
or

(B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or

(2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

Id. Under this **floor preemption** approach, programs of states and local governments can be **more restrictive**, but **not less restrictive**, than the federal program.

In theory, therefore, states can provide vital protection for wetlands by addressing waters and activities that **are not** regulated under the Section 404 program, or by imposing additional limits on activities that **are** regulated under that program. However, a recent study prepared by the Environmental Law Institute found that over 2/3 of states have enacted laws that **could limit** the authority of states to regulate waters that are not regulated under the Clean Water Act. See [Environmental Law Institute, *State Constraints: State-Imposed Limitations on the Authority of Agencies to Regulate Waters Beyond the Scope of the Federal Clean Water Act \(May 2013\)*](#). Many of those laws were not targeted specifically at wetlands regulation, but apply broadly to state environmental regulation or state regulation of a range of activities. According to the ELI report, thirteen states have adopted laws that require that state regulations must be “no more stringent than” federal regulations. *Id.* at 1. Twenty-three other states have adopted laws that prohibit states from adopting regulations that are more stringent than federal regulations **unless** certain requirements are met. *Id.* at 13-14. In addition to those limitations, the report notes that twenty-two states have adopted laws that could limit state protection of wetlands because the laws require state officials to compensate landowners for reductions in property value caused by regulation or require state officials to assess their actions for takings implications or other impacts on private

property rights. *Id.* at 24. The report suggests that those laws could chill state regulation of activities in wetlands that are not regulated under federal law. *Id.*

Although many states have laws that **could** limit the authority of the states to regulate activities that are not regulated under the Clean Water Act, half of the states have adopted laws and regulations that provide some protection to wetlands that are not regulated under the Clean Water Act and many states have adopted laws that require permits for activities that are not regulated under the Clean Water Act despite the limits identified in the ELI report. In fact, the ELI report noted that 17 states that had enacted laws that **could limit** state regulation of waters and activities that are not regulated under the Clean Water Act nevertheless regulated those activities. *Id.* at 2. Those programs, and state programs that provide additional protection to wetlands that are already regulated under the Clean Water Act, are described in the next section.

Research Problems

State Laws: Using the tools that you learned in your legal research class regarding researching state laws, see if you can answer the following questions. When answering the questions, please provide citations to support your answers.

1. When will a government action constitute a “taking” under Texas law?
2. In Mississippi, when a state action prohibits or severely limits the right of a landowner to conduct forestry or agricultural activities on forest or agricultural land (but does not result in a taking), the landowner may still sue for compensation in an inverse condemnation action. What level of reduction in property value triggers that right under Mississippi law? Is the landowner entitled to compensation if the government is acting to prohibit a nuisance by the landowner?
3. Does Idaho law place any limits on the authority of state agencies to adopt rules to protect wetlands and waters that are more stringent than the rules adopted by the federal government? If so, please describe the general limits.

B. A Survey of State Programs

While the Clean Water Act **allows** states and local governments to administer their own programs to protect wetlands and water quality, it does not **require** them to do so. Nevertheless, according to a report prepared by the Environmental Law Institute in 2008, twenty three states have enacted laws and regulations to require state **permits** for dredge and fill activities in wetlands and other waters in the state. See [Environmental Law Institute, *State Wetland Protection: Status, Trends & Model Approaches 9* \(March 2008\) \[hereinafter “ELI State Wetland Protection Report”\]](#). Eight of those states limit the permit requirement to activities in coastal and tidal wetlands, while the other fifteen regulate activities in freshwater wetlands as well as in coastal, tidal and shoreline areas. *Id.* at 10. In states with their own wetlands permitting programs, a discharge may often require **both** a **federal** and **state** wetlands permit. If

the Corps and the state have not streamlined the permitting process through a State Programmatic General Permit, see *infra*, the project developer will need to obtain permits from both the Corps and the state. As noted in Chapter 6, if the Corps completes its review of a section 404 permit and issues the permit before other agencies (including the state) have completed their reviews, the Corps will normally condition the permit on approval by the other agencies. See [33 C.F.R. § 325.2\(d\)\(4\)](#).

In light of the fact that state programs can regulate waters that are outside of federal jurisdiction, six states regulate “geographically isolated” wetlands, such as the wetlands at issue in the *Solid Waste Agency of Northern Cook County* case, although some of those programs are not permitting programs. See [ELI State Wetland Protection Report](#) at 11.

States with permit programs for freshwater, coastal and tidal wetlands	States with permit programs for coastal and tidal wetlands only	States with programs for geographically isolated wetlands
Connecticut, Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, and Virginia	California, Delaware, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Washington	Indiana, North Carolina, Ohio, Tennessee, Washington, and Wisconsin

Id. While some of the states with wetlands permitting programs have adopted dedicated wetlands permitting programs, other states rely on a patchwork of laws, such as water pollution laws, growth management laws, shoreline management laws, and other laws, to regulate activities in wetlands. *Id.* at 11. In most states, permits are issued by a state agency, but some states have created programs that authorize local agencies to administer wetlands permit programs. *Id.*

Regardless of whether states have adopted state wetlands **permitting** programs, every state has adopted a definition of “waters” (by legislation or regulation) that includes wetlands, and forty-two states have adopted statutory or regulatory definitions for “wetlands.” *Id.* at 15, 18.

State wetlands programs are often similar to the federal program in many respects. For instance, most states delineate wetlands using the 1987 Corps delineation manual, although eighteen states rely on other delineation criteria or guidelines, in addition to, or instead of, the Corps manual. *Id.* at 19-20. Regarding mitigation, thirty six states have adopted legislation or policies to authorize and regulate mitigation for impacts to wetlands or other aquatic resources. *Id.* at 23. Twenty-two states specifically authorize or require mitigation banking through legislation, regulations or guidance. *Id.* at 26. Eighteen states specifically address “in lieu fee mitigation” through legislation,

regulations or guidance. *Id.* at 28. Although only fourteen states have adopted statewide goals regarding wetland restoration, most of those states have adopted a “no net loss” goal, similar to the federal goal, or a goal of restoring a specific amount of wetland acreage within a specific time-frame. *Id.* at 47.

State wetland programs are also similar to the federal program in that several agencies are usually involved in wetland regulation, management or protection in each state. *Id.* at 32. In twenty-six states, two resource or environmental agencies oversee wetland activities, with one agency generally focusing on regulatory activities, while the other focuses on non-regulatory activities. *Id.* at 32. In eleven states, authority over wetlands is divided among three or more agencies. *Id.* at 33. In twelve states, though, a single state agency administers all of the wetland programs in the state. *Id.* at 32.

Not surprisingly, the scope of activities regulated, the resources dedicated to wetlands regulation, protection and restoration, and the level of monitoring and enforcement of state wetland protection laws vary greatly from state to state. Only sixteen states have monitoring and/or assessment programs that focus on wetlands, and only eight states implement a program to recruit community members as volunteer monitors for wetlands. *Id.* at 42, 44. The level of wetland protection afforded by states is often constrained by the level of funding available for wetland protection activities. Most states rely on federal grants and general state appropriations to fund wetland programs, but more than half of the states rely, in part, on fees, and fifteen states rely, in part, on dedicated state appropriations. *Id.* at 36.

State Programs - Resources

[Association of State Wetland Managers \(ASWM\) Website](#)

[State Wetland Programs - Reports and Guidance from ASWM](#)

[State Wetland Program Summaries - ASWM](#)

[State Wetland Program Summaries - Environmental Law Institute \(ELI\)](#)

[State Wetland Protection: Status, Trends and Model Approaches - ELI](#)

[State Constraints Report - ELI](#)

[EPA web site for State, Tribal and local Initiatives](#) (financial assistance, program descriptions, etc.)

Research Problems

State Laws: When answering the following questions, please provide citations to support your answers.

1. How does the Minnesota Water Pollution Control Act define “waters of the state”? Which agencies make “determinations” regarding projects that result in fill, excavation or drainage of wetlands under the state’s Wetland Conservation Act? Which state agency is responsible for enforcing the state laws preserving and protecting groundwater quantity, wetlands and public waters?
2. What activities require a permit under Georgia’s “Coastal Marshlands Protection Act of 1970”? Who issues the permits? How are “marshlands” defined under that Act?

Interviews



Alexandra Dunn, Executive Director and General Counsel of the Environmental Council of the States responds to the following questions:

- Are there regional or other variations in the attitudes that States take toward wetlands regulation? ([YouTube Video](#))
- Do many States operate their own State wetland permitting programs and could you describe them generally? ([YouTube Video](#))
- What are the most effective tools that States are using to protect wetlands? ([YouTube Video](#))
- What are the greatest impediments to wetland protection in the States? ([YouTube video](#))
- What is the Association of Wetlands Managers and what role do they play in wetland protection? ([YouTube Video](#))



Jan Goldman Carter, Senior Manager and Counsel for the National Wildlife Federation's Wetlands and Water Resources Program, discusses the variety State wetland protection programs and the political pressure on State programs ([YouTube Video](#)) .

II. State Assumption of the Section 404 Program and State Programmatic General Permits

A. Assumption of the 404 Permitting Program

In addition to preserving the authority of states to administer their own state wetland protection programs, the Clean Water Act, like most federal environmental laws, authorizes states to take over and administer the federal wetlands permitting program in lieu of the Corps of Engineers.

Pursuant to Section 404(g) of the Clean Water Act, a state can **assume** the authority to issue permits for the discharge of dredged or fill material into waters regulated under the Clean Water Act **other than traditional navigable waters or waters seaward of the high water mark**. See [33 U.S.C. § 1344\(g\)](#). In 2018, the Corps issued a [memorandum](#) to clarify the extent of non-assumable waters. EPA's regulations also authorize tribes to assume that authority within their jurisdiction. See [40 C.F.R. § 233.2](#) (defining "state" to include "indian tribe"). In order to assume authority to administer the Section 404 permitting program, a state must enact laws and regulations to create a program that meets several requirements outlined in the statute that are designed to ensure that the state has the same authority to administer the Section 404 permitting program as the Corps would have. See [33 U.S.C. § 1344\(h\)\(1\)](#). The requirements of the state program must be at least as stringent as, and may be more stringent than, the federal requirements. See [40 C.F.R. § 233.1\(c\)-\(d\)](#). Although the Corps administers the Section 404 permitting program, Congress gave EPA, rather than the Corps, the authority to review applications by states to assume Section 404 permitting authority. If EPA determines that the state program meets the requirements of the statute, the agency will approve the program and the state will assume authority to issue Section 404 permits in lieu of the Corps. See [33 U.S.C. § 1344\(h\)\(2\)](#). The Corps will, however, continue to have authority to issue permits for discharges into traditional navigable waters and waters seaward of the high water mark. In addition, to the extent that the state program is more stringent than the federal program, those more stringent provisions can only be enforced by the state and are not subject to federal oversight and enforcement. See [40 C.F.R. § 233.1\(c\)](#).

The rest of the state program is, however, subject to federal oversight. After EPA approves a state's request to assume Section 404 permitting authority, the state must still provide EPA notice and an opportunity to comment on individual and general permits that the state reviews or prepares. See [33 U.S.C. § 1344\(j\)](#). EPA can, however, waive its authority to review categories of discharges in the state, by adopting

Resources

[EPA State Program Rules - 40 CFR Part 233](#)
Michigan MOA w/ [EPA](#) and [Corps](#) for assumption and [Michigan program regs.](#)
New Jersey MOA w/ [EPA](#) and [Corps](#) for assumption and [N.J. program regs.](#)
Florida MOA w/ [EPA](#) and [the Corps](#) for assumption and [Florida program regs.](#)
[ASWM web page re: assumption](#) and [Handbook for States/Tribes re: assumption](#)

regulations to waive the authority. *Id.* § 1344(k)-(l). If EPA doesn't waive its authority to review permits issued by the state, EPA solicits comments from the Corps, the Fish and Wildlife Service and the National Marine Fisheries Service when determining whether to submit comments to the state and when framing comments for the permit. See [40 C.F.R. § 233.50\(b\)](#). If EPA objects to a permit that the state plans to issue, the state cannot issue the permit unless EPA withdraws its objection. See [33 U.S.C. § 1344\(j\)](#). If the state does not deny the permit or revise it to address EPA's objections, the state loses the authority to issue that permit and the Corps processes that permit application. *Id.*

While a State is administering the Section 404 permitting program, EPA also retains the authority to bring enforcement actions, just as it would if the Corps were administering the program. See [33 U.S.C. § 1344\(n\)](#). Finally, if EPA determines that a state that has assumed authority to issue Section 404 permits is not administering the program in accordance with federal standards, the agency can, after notice and a hearing, withdraw the state's authority to administer the program. *Id.* § 1344(i).

Although the Clean Water Act authorizes states to assume Section 404 permitting authority in lieu of the Corps, only three states have done so. Michigan assumed authority for the program in 1984, see [40 C.F.R. § 233.70](#), New Jersey assumed authority for the program in 1994, see [40 C.F.R. § 233.71](#) and [Florida assumed authority for the program in 2020](#). See [85 Fed. Reg. 83553 \(Dec. 22, 2020\)](#). Shortly after Florida assumed authority to issue Section 404 permits, the Center for Biological Diversity sued EPA, alleging that the agency violated the Clean Water Act and the APA when it approved the assumption. See [Center for Biological Diversity v. Wheeler](#), No. 21-cv-119 (D.D.C., Jan. 14, 2021).

B. State Programmatic General Permits

States that do not assume Section 404 permitting authority from the Corps can still play a greater role in the administration of the federal program and streamline permitting for developers in the state through a State Programmatic General Permit. As noted in Chapter 6, *supra*, Section 404(e) authorizes the Corps of Engineers to issue general permits “on a state, regional or nationwide basis for any category of activities involving discharges of dredged or fill material if the Secretary determines that the activities in such category are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” See [33 U.S.C. § 1344\(e\)](#).

<p style="text-align: center;">Resources</p> <p>ASWM Website re: SPGPs</p>

Pursuant to that authority, the Corps has issued ***programmatic general permits*** in

several states that provide that persons who obtain a permit under the state wetlands permitting program do not have to apply for an individual Section 404 permit from the Corps as long as they comply with the terms of the programmatic general permit. See, e.g. [Department of the Army Programmatic General Permit, State of Maryland - MDSPGP-4 \(Oct. 1, 2011\)](#). The general permit only applies to specific categories of activities in the state (i.e. discharges in a specific region, discharges that have impacts below a specific threshold, discharges associated with specific types of activities) and the Corps issues the permit pursuant to the normal general permitting procedures described in Chapter 6 after the Corps determines that the activities in the permit are similar in nature and will cause only minimal adverse effect on the environment. See [33 U.S.C. § 1344\(e\)](#). The programmatic general permit, therefore, streamlines the permitting process in those states for persons engaged in the activities authorized by the permit. Like other general permits, programmatic general permits are issued for a five year term, but can be revoked if the Corps determines, after opportunity for a public hearing, that the activities authorized by the permit have an adverse effect on the environment or are more appropriately authorized by individual permits. *Id.*

When the Corps issues a programmatic general permit, the permit will include conditions that specify whether, and to what extent, the Corps, EPA and other federal agencies will review or comment on the use of the general permit by a discharger. See, e.g. [MDSPGP-4](#), *supra* at 6-9. For activities that have very little impact, the permit may provide very limited federal review. *Id.* The states for which the Corps has issued programmatic general permits are listed below.

States with Programmatic General Permits

- [Connecticut](#) (all waters)
- [Delaware](#) (all waters)
- [Louisiana](#) (limited waters)
- [Maine](#) (all waters)
- [Maryland](#) (all waters)
- [Massachusetts](#) (all waters)
- [New Hampshire](#) (all waters)
- [New Jersey](#) (all waters)
- [North Carolina](#) (coastal zone)
- [Pennsylvania](#) (all waters)
- [Rhode Island](#) (all waters)
- [Utah](#) (limited waters)
- [Vermont](#) (all waters)
- [Virginia](#) (limited waters)

Questions and Comments

1. Why do you think that more states have not assumed administration of the Section 404 permitting program from the Corps, when so many states have taken over the Clean Water Act Section 402 permitting program and other federal environmental permitting programs? What are the benefits and disadvantages of taking over the federal program? See [Association of State Wetland Managers, Clean Water Act Section 404 State Assumption \(2010\)](#).
2. What are the similarities and differences between assumption of the Section 404 permitting program and a statewide programmatic general permit?
3. For a more detailed examination of state assumption of the Clean Water Act 404 program, see Lance D. Wood, *The ECOS Proposal for Expanded State Assumption of the CWA §§ 404 Program: Unnecessary, Unwise and Unworkable*, 31:3 Nat'l Wetlands Newsletter 13 (2009); Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 Md. L. Rev. 1242 (1995). Professor Jonathan Adler explores whether federal regulation has "crowded out" state wetlands regulation in *When is Two a Crowd? The Impact of Federal Action on State Environmental Regulation*, 31 Harv. Envtl. L. Rev. 67 (2007).

Research Problems

State PGPs: State PGPs can be found on the Corps' websites for the Division in which a State is located or on the website of the State agency that regulates water quality. Please answer the following questions regarding the PGPs of Louisiana and North Carolina.

1. Does the Louisiana Programmatic General Permit apply to the discharge of dredged or fill material into waters outside of the Louisiana Coastal Zone? Would minor road crossings that cause the loss of less than .5 acres of special aquatic sites be regulated as Category I or Category II activities under that permit?
2. What activities are authorized by the North Carolina Programmatic General Permit? Does the permit impose any limits on mechanized land-clearing activities in waters or wetlands?

Interview



Alexandra Dunn, Executive Director and General Counsel for the Environmental Council of the States, discusses impediments to assumption by States of the 404 permitting program. ([YouTube Video](#))

III. 401 Certification

While states can adopt their own state wetlands permitting programs, assume the federal permitting program and streamline regulation through state programmatic general permits, almost half of the states do not take those approaches and rely solely on the Clean Water Act Section **401 certification** process to regulate wetlands in their state. According to a 2008 ELI report, 22 states do not have any wetlands regulatory program and rely solely on the 401 certification process to regulate wetlands. See [ELI State Wetland Protection Report](#) at 13. An additional 15 states regulate coastal wetlands, isolated wetlands, or other subcategories of wetlands through a state permitting program, but rely on section 401 certification as the primary form of regulation for other wetlands in the state. *Id.* Thus, section 401 certification is probably the most important tool in the Clean Water Act for state regulation of wetlands.

Section 401 of the Clean Water Act provides:

Any applicant for a Federal license or permit to conduct any activity ...which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate ... that any such discharge will comply with [state water quality standards and several other requirements of the Clean Water Act] ... No license or permit shall be granted until the certification required by this section has been obtained or has been waived ... No license or permit shall be granted if certification has been denied by the State ...

[33 U.S.C. § 1341\(a\)\(1\)](#). In light of that requirement, whenever a person applies to the Corps for a Section 404 permit, or whenever a person applies for **any** Federal license or permit that results in a discharge into the navigable waters (including jurisdictional wetlands), they must provide the permitting or licensing agency with a certification from the State that the activity to be authorized by the permit complies with state water quality standards and other requirements of the Clean Water Act. The state can (1) **certify** that the discharge meets the state standards and requirements; (2) **deny certification**; or (3) **attach comments or conditions** to any permit that the Corps

issues to ensure that the discharge complies with state water quality standards and “appropriate requirement[s] of state law”. *Id.* § 1341(d). The Corps (or other permitting or licensing agency) cannot issue the permit unless the State certifies that the activity complies with the state standards or waives its right to certify. *Id.* § 1341(a). If a state fails or refuses to act on a request for 401 certification within 60 days after receiving the request, the state waives its right to veto or condition the permit. See [33 C.F.R. § 325.2\(b\)\(1\)\(ii\)](#). Any conditions that the state attaches to a 401 certification become conditions of the federal permit or license. See [33 U.S.C. § 1341\(d\)](#).

In deciding whether to certify a discharge, deny certification or include conditions in the permit for the discharge, states can consider not only the immediate effects of the discharge on water quality in the state, but the longer term effects of the activity authorized by the discharge on water quality. See [40 C.F.R. § 121.2\(a\)\(3\)-\(4\)](#); [33 C.F.R. § 320.3\(a\)](#); [PUD No. 1 of Jefferson County v. Washington Department of Environmental Quality](#), 511 U.S. 700 (1994).

As a result, even when a state does not have a state wetlands permitting program, they can exert some control over discharges into wetlands in their state, as long as the discharges require a Section 404 permit (or other federal permit or license), and as long as the state’s water quality standards or “other appropriate requirements of state law” provide protection for wetlands. The 2008 ELI report found that states rarely deny or waive 401 certification, although they may frequently include conditions in their certifications. See [ELI State Wetland Protection Report](#) at 15. The number of 401 certifications issued each year by states varies greatly, from Connecticut, issuing fewer than 20 certifications per year, to California, issuing more than 1000 certifications per year. *Id.* States that have their own state wetland permitting and regulatory programs generally rely less frequently on Section 401 certification to protect wetlands.

As noted above, in determining whether to grant, deny or condition 401 certification for a discharge into wetlands, states focus on whether the discharge violates state **water quality standards** and other appropriate requirements of state law. The Clean Water Act requires **states** to establish water quality standards, which are reviewed and approved by EPA, for the waters in the state that are regulated under the Act. See [33 U.S.C. § 1313](#). Water quality standards generally include **use designations** for waters in the state and **water quality criteria** to protect the various uses of water. See [40 C.F.R. § 131.3\(i\)](#). The standards are set at levels to “protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.” *Id.*

Regarding use designations, states can establish a range of acceptable uses for waters in the state, including recreation, drinking water supplies, fishing, and others. See [40 C.F.R. § 131.10](#). Water quality criteria are then established for each use, or for all waters in the state, to ensure that the waters can be used for the designated uses. [Id. § 131.11](#). The criteria may be specific **numerical limits** on pollutant levels in a body of water or they may be **narrative criteria** that don’t include specific numerical limits. *Id.* States assign use designations to each body of water in the state that is regulated

under the Clean Water Act (and can assign different use designations for different segments of the water), and the water quality criteria that apply to the assigned use, or to all waters in the state, set the pollution limits for that body of water (or segment of the body of water). See [40 C.F.R. § 131.10](#). Georgia's water quality standards are linked [here](#) as an example.

As noted above, every state has adopted a definition of "waters" that includes wetlands. However, most states have not adopted water quality standards that are specifically designed to provide protection to wetlands (i.e. by designating uses for wetlands or developing specific criteria for wetlands). According to the Environmental Law Institute's 2008 50 state survey, only 13 states have adopted water quality standards that are specifically targeted at protecting wetlands. See [ELI State Wetland Protection Report](#) at 37. That doesn't mean that water quality standards in the other states might not provide protection to wetlands and might not be used as the basis for denying or conditioning 401 certification for a discharge that affects wetlands. Indeed, other water quality standards may provide incidental protection to wetlands, even though they were not adopted with that specific goal in mind. For instance, water quality standards that are not wetland-specific often include limits to address flood control, sediment trapping, habitat protection, pollution control, shoreline protection, and maintenance of stream flow. *Id.* at 38.

While a variety of water quality standards may provide incidental protection to wetlands, wetland-specific water quality standards can be a more effective way to provide wetland protection and to serve as a basis for denial or conditioning of 401 certification. EPA published guidance in 1990 to assist states in developing water quality standards specifically targeted to protect wetlands. See [U.S. Environmental Protection Agency, EPA 440/S-90-011, Water Quality Standards for Wetlands: National Guidance \(July 1990\)](#). Frequently, whether a state adopts wetland-specific water quality standards depends on the broader range of tools that the state uses to protect wetlands. Most of the states that **have** adopted wetland-specific water quality standards do not have a permitting program that applies to all wetlands in the state and **rely heavily** on the Section 401 certification process to regulate wetlands. *Id.* at 37. Similarly, many of the 37 states that have **not** adopted wetland-specific water quality standards **do not rely** primarily on the 401 certification process to protect wetlands. *Id.* at 39.

While the Section 401 certification process primarily protects the interests of the state where a discharge of dredged or fill material will occur, the statute also authorizes EPA to notify other states about potentially permitted discharges if the agency determines that the discharge may affect the water quality in the other states. See [33 U.S.C. § 1341\(a\)\(2\)](#). Based on recommendations from the state and EPA, the federal permitting agency may then include conditions in the federal license or permit necessary to meet water quality standards in the other states or may deny the permit if it is not possible to condition the permit to meet those standards. *Id.*

Questions and Comments

1. **Water Quality Standards:** In addition to designated uses and water quality criteria, state water quality standards usually include provisions to ensure compliance with a state “anti-degradation policy.” The anti-degradation policy is designed to maintain existing water uses and a level of water quality necessary to protect and maintain existing water uses. See [40 C.F.R. § 131.12](#). In [PUD No. 1 of Jefferson County v. Washington Department of Environmental Quality, 511 U.S. 700 \(1994\)](#), the Supreme Court held that a state can deny 401 certification or condition it on compliance with any one of the three components of water quality standards - uses, criteria, or standards necessary to comply with an anti-degradation policy.
2. **Appropriate requirements of state law:** Section 401 authorizes states to deny or condition permits on compliance with “appropriate requirements of state law.” While the Supreme Court, in the *PUD No. 1 of Jefferson County* case, held that water quality standards were “appropriate requirements of state law”, the Court refused to “speculate on what additional state laws, if any, might be incorporated” by that language.
3. **Amendments to the Section 401 regulations:** At the same time that the Trump Administration was narrowing the federal jurisdiction over “waters of the United States”, arguing that the move protected States’ rights, the Administration reduced States’ control over federally permitted projects in “waters of the United States” by making significant changes to the regulations implementing Section 401 of the Clean Water Act. See [85 Fed. Reg. 42210](#) (July 13, 2020). The new rules (1) require States to take action within 1 year of notification, regardless of whether permit or license applications are complete, and do not authorize any tolling of the time period; (2) provide that the certification decision must be based on the **discharges** from a proposed activity, rather than the water quality effects of the **activity as a whole**; (3) restrict the conditions that may be included in certifications by States; and (4) limit enforcement of conditions in certifications to federal agencies. *Id.* States, environmental groups, and Native American tribes filed several lawsuits challenging the rules. See, e.g. [In re Clean Water Act Rulemaking](#), No. 20-04636 (N.D. Cal., Oct. 30, 2020) (consolidating several lawsuits filed in the court); [Delaware Riverkeeper Network v. U.S. Environmental Protection Agency](#), No. 2:20-CV-3412, (E.D. Pa., July 13, 2020); [South Carolina Coastal Conservation League v. Wheeler](#), No. 2:20-cv-03062-DCN (D.S.C., Aug. 26, 2020). Shortly after President Biden took office, he directed EPA to review the rule changes, see [Executive Order 13990](#), and on June 2, 2021, the agency announced that it intended to reconsider and revise the rule. See [86 Fed. Reg. 29541](#) (June 2, 2021). In addition, the Administration filed motions in several of the lawsuits seeking a remand of the rule without vacatur, alleging that the agency identified “substantial concerns with a number of provisions of the 401 Certification Rule that relate to cooperative federalism principles and CWA

Section 401's goal of ensuring that states are empowered to protect their water quality". See Morgan Conley, [EPA Urges Courts to Remand Water Rule As It Retools Regs](#), Law 360, July 2, 2021.

401 Certification Resources

[401 Certification and wetlands - EPA](#)

[Water Quality Standards for Wetlands - EPA](#)

[EPA Guidance on Water Quality Standards for Wetlands](#)

[Section 401 Certification Handbook for States and Tribes \(EPA\)](#)

[EPA Guidance on Setting Nutrient Criteria for Wetlands in WQ Standards](#)

[ASWM report on Section 401 Certification Best Practices for States](#)

Water Quality Standard Regulations - [40 CFR Part 131](#)

[Water Quality Standards](#) - EPA Web Page

[Water Quality Standards Handbook - EPA](#)

Research Problems

State Laws: When answering the following questions, please provide citations to support your answers.

1. What agency is responsible for adopting water quality standards in the State of North Carolina? How are wetlands defined by regulation for purposes of that law?
2. What agency is responsible for adopting water quality standards in the State of Wyoming? How are wetlands defined by regulation for purposes of that law?

Interview



Alexandra Dunn, Executive Director and General Counsel for the Executive Council of the States, discusses the way in which States use the 401 certification process to protect wetlands. ([YouTube Video](#)).

IV. Coastal Zone Management Act Certification

In addition to the tools outlined above, some states can also utilize the Coastal Zone Management Act's certification process to protect wetlands in the state. Under the Act, coastal states (states that border the Atlantic, Pacific and Arctic Oceans, the Gulf of Mexico, the Long Island Sound, or one or more of the Great Lakes) prepare coastal zone management plans, which are reviewed and approved by the Secretary of Commerce. See [16 U.S.C. § 1455](#). Approved programs are eligible for federal funding to assist in implementation of the programs. *Id.* Twenty-nine states have approved coastal zone management programs. See [U.S. Department of Commerce, National Oceanographic and Atmospheric Administration, State Coastal Management Program Manager and Federal Consistency Contacts](#). The states with approved programs are: Alabama, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Virginia, Washington, and Wisconsin. *Id.*

To ensure consistency with the state programs, any person who applies for a federal permit or license to conduct an activity that will affect land or water use or natural resources of the coastal zone must provide, as part of the permit or license application, "a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program." See [16 U.S.C. § 1456\(c\)\(3\)\(A\)](#). Consequently, if a proposed discharge of dredged or fill material will affect the land, water or resources of the coastal zone in a state with an approved coastal zone management program, the applicant for a section 404 permit will need to submit a certification from the state that the discharge complies with, and is consistent with, the state's coastal zone management program. If the applicant does not submit the certification, the Corps will not issue the Section 404 permit. See [33 C.F.R. § 325.2\(b\)\(2\)\(ii\)](#). Pursuant to this authority, therefore, a state could refuse to certify a discharge that would harm wetlands in the coastal zone if the discharge was not consistent with the state's program or did not comply with the program.

Hypothetical

The State of Colorado does not have any laws that require persons to obtain permits from the State to undertake activities that impact wetlands in the State. Assume, for purposes of this question, that Colorado does not issue Clean Water Act Section 402 permits and that those permits are issued by EPA. The City of Alamosa, Colorado is upgrading its sewage treatment plant and has applied to EPA to amend its permit under Section 402 of the Clean Water Act to discharge treated wastewater into the Rio Grande River. The State of Colorado is concerned that high levels of nutrients and chlorine discharged from the sewage treatment plant might harm the freshwater wetlands that are located downstream of the treatment plant, adjacent to the Rio Grande River. Will the city be required to obtain a permit or other approval from the State of Colorado as part of the Section 402 permit process? Is there any action that Colorado can take to limit the amount of nutrients or chlorine that the plant will be allowed to discharge under its Section 402 permit? Could the State rely on a local ordinance of the City of Alamosa that limits the amount of nutrients that are discharged into the Rio Grande River?

The Rio Grande River flows south from Colorado into New Mexico. If the state of New Mexico is also concerned about the levels of nutrients and chlorine that will be discharged by the treatment plant, is there any action that it can take to limit the amount of nutrients or chlorine that the plant will be allowed to discharge under its Section 402 permit? With what success? It is not necessary to provide specific state statutory provisions to answer these questions.

Chapter Quiz

Now that you've finished Chapter 9, why not try a CALI lesson on the material at <http://www.cali.org/aplesson/10758> It should only take about 15 minutes.

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