

Kolanz: Environmental policy change has major implications for Colorado

By [John Kolanz](#) — November 1, 2018

The Trump Administration’s emphasis on state empowerment has garnered significant attention, particularly in the environmental arena. So it is somewhat surprising that a recent change in policy having major implications for state permitting authority under the Clean Water Act has gone relatively unnoticed. The process that precipitated this change actually began under the Obama Administration.

The CWA establishes two permitting programs: one that addresses effluent discharges, such as those from municipal or industrial wastewater-treatment plants (Section 402); and one that addresses the use of “fill” material to construct things such as dams or bridges, or to otherwise enable development in areas containing wetlands, streams, or other waters (Section 404). Section 404 permitting (often called “wetland permitting”) frequently presents issues for those in land or water development, agriculture, and extractive industries.

Congress initially placed both CWA permitting programs in the hands of federal agencies (the Environmental Protection Agency for Section 402 and the Army Corps of Engineers and EPA for Section 404), but included specific provisions in the Act to allow states to take over, or “assume,” these programs. Regulated interests, such as businesses, farms, and municipalities, typically favor state-run programs over federally run programs. Currently, 47 states (including Colorado) implement their own Section 402 permitting programs, but only two states — Michigan and New Jersey — implement their own Section 404 permitting programs.

While various obstacles account for this discrepancy, one of the biggest is the difficulty in identifying those waters a state can regulate when it assumes Section 404 permitting authority (known as “assumable waters”). This is because the CWA requires the Corps to retain authority over certain waters, but does not clearly identify those waters (known as “retained waters”).

Traditionally, when a state wanted to pursue Section 404 program assumption, it negotiated with the Corps over how to divide permitting authority. Regulations grant the Corps final say on the matter, so, as one might expect, the Corps has interpreted retained waters broadly. In fact, Minnesota recently evaluated potential Section 404 program assumption and estimated that the Corps would retain jurisdiction over 92 percent of total wetland acreage and 99 percent of total lake acreage in the state.

Creating and implementing a complicated permitting program requires a significant investment of time, money, and political capital. Given the Corps' traditional interpretation of retained waters, it is not surprising that most states have concluded that the return on Section 404 program assumption is insufficient to justify the investment.

In 2015, EPA assembled a group of stakeholders to recommend a way of identifying assumable waters that would remove this barrier to state Section 404 program assumption. In June 2017, this group, known as the Assumable Waters Subcommittee, provided its final recommendations to EPA.

While EPA has announced its intent to propose regulations in 2019 to address the subcommittee's recommendations, the Corps decided not to wait. It recently issued a policy memorandum adopting the subcommittee's recommendations.

These recommendations have profound implications for assumption of Section 404 permitting authority by Colorado. Under the previous approach, the Corps would retain jurisdiction over hundreds, if not thousands, of miles of streams in Colorado, along with wetlands adjacent to these streams, which can extend for miles.

In contrast, under the new approach, the Corps would retain jurisdiction over approximately 39 miles of the Colorado River from Grand Junction downstream to the state line and the portion of Navajo Reservoir lying within Colorado, along with adjacent wetlands out to a distance of 300 feet. In other words, under the new approach, Colorado could assume Section 404 permitting authority over virtually all waters in the state. This places Colorado in an almost unique position among all states in this regard.

Colorado's booming growth and its need to secure water to supply such growth will raise countless challenges, including Section 404 permitting issues that require an enlightened balance between development needs and environmental protection. Section 404 Program assumption could provide the autonomy to address those challenges in a more efficient manner, and in a way that accounts more effectively for Colorado's unique interests.

Colorado evaluated Section 404 program assumption in the early 1990s and concluded that it was not worth the investment. Given the new rules of the game, it is time to take another look.

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