

Surprising to see EPA now taking steps to make it easier for states to take over the Federal Government's dredge and fill permit responsibilities

Article By:

Jeffrey R. Porter

I'm surprised to see the Biden Administration EPA moving forward right now with a rule proposed during the Trump Administration to make it easier for states to take over responsibility for the permitting of "dredge and fill" activities regulated under Section 404 of the Federal Clean Water Act. Of course states already have that opportunity respecting discharges of "pollutants" to Waters of the United States under Section 402 of the Clean Water Act and all but three states, including the Commonwealth of Massachusetts, have availed themselves of that opportunity.

Why am I surprised? Because the Supreme Court's *Sackett* decision means that many wetlands are no longer within the reach of Section 404 of the Clean Water Act. In Massachusetts we have a comprehensive Wetlands Protection Act and implementing regulations which are applied by a very competent Department of Environmental Protection so the effect of *Sackett* won't be felt here in the same way it will be felt in many other states. But, since *Sackett* will dramatically decrease the reach of the Federal Government's Section 404 jurisdiction, I would think EPA and the Army Corps of Engineers would want to continue to be directly involved in the protection of the wetlands still subject to Federal Clean Water Act jurisdiction following *Sackett*, at least for now. The fact that EPA and several State Attorneys General disagree over *Sackett*'s impact, as evidenced by three currently stayed litigations in Kentucky, Texas and North Dakota, would seem to argue against delegation at this minute.

To those who say that the Federal Government won't delegate its authority unless it is satisfied that a state's program will be at least as stringent as the Federal program, I come back to several of the forty-seven states currently administering the Section 402 NPDES program and the obvious differences in how that program is administered depending on the state in which you live. Also, while the current EPA might be rigorous in its evaluation of any state's application to assume responsibility for Section 404 permits, one can easily imagine an Administration in which that rigor might be relaxed.

Having said all of that, I have to take issue with the Center for Biological Diversity's exclamation that it would be "reckless for the EPA to let any state take control." I'm happy to live in a state with environmental laws and regulators that are every bit as protective of the environment as the Federal law and regulators. That's why Massachusetts should be the forty eighth state delegated NPDES

authority but that's for another posting. I can't say whether or not that's currently the case in Florida, against which the CBD is currently litigating, (though I have my doubts). But no one can say that the Massachusetts regulators are "turning the keys over to special interests and developers."

One of the groups that has challenged the Florida approval, the Center for Biological Diversity, criticized the EPA's new proposed rule. "It's reckless for the EPA to let any state take control of the Clean Water Act's wetlands protection program after the Supreme Court took a wrecking ball to the act," Brett Hartl, the center's government affairs director, said in a statement Wednesday. "The EPA's meager standards won't prevent hostile, anti-environmental states like Texas and Florida from turning the keys over to special interests and developers."

©1994-2025 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. All Rights Reserved.

National Law Review, Volume XIII, Number 201

Source URL: <https://natlawreview.com/article/surprising-to-see-epa-now-taking-steps-to-make-it-easier-states-to-take-over-federal>