

More states want power to approve wetlands development

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In 2020, Florida became just the third state—and the first in decades—to take over management of a key federal Clean Water Act program. Now, state rather than federal officials decide whether companies can dredge and fill wetlands and waterways for projects ranging from mining to housing developments to roads and bridges.

Several other [states](#) are looking to follow suit. They say state agencies can issue permits more efficiently than federal bureaucrats, speeding up crucial projects while still following federal law.

"Our economy is based on natural resource extraction and development," said Jason Brune, commissioner of the Alaska Department of

Environmental Conservation, which is pursuing a takeover of the program. "Having that predictability and consistency in a permitting process is incredibly important."

But [environmental groups](#) say state regulators are ill-prepared to take on this authority, claiming such efforts are thinly veiled attempts to rubber-stamp development with little regard for its ecological damage.

And some states recently have backed off their attempts to assume permitting control of the federal Clean Water Act program, known as Section 404, citing prohibitive cost estimates and murky jurisdictional guidelines.

"We have the Clean Water Act because states screwed it up the first time around," said Janette Brimmer, senior attorney with Earthjustice, a nonprofit environmental law group that has filed a lawsuit against Florida over the matter. "The only reason for these states to argue for [local control](#) is to have dirtier water."

Some critics fear that Florida's move could open the floodgates for more states to claim Section 404 authority, as Alaska, Minnesota and Nebraska are considering. But the hurdles that have mostly stymied such efforts for decades—steep costs, legal challenges and changing federal regulations—remain significant.

The outcome will determine who's in charge of protecting crucial waterways and millions of acres of wetlands.

Florida's takeover

The U.S. Army Corps of Engineers is in charge of the Section 404 program's day-to-day operations and permit decisions, while the U.S. Environmental Protection Agency develops criteria used in evaluating

permit applications and reviews individual applications with the authority to deny them.

States have long had the option to assume control of the Section 404 program, along with other components of the Clean Water Act. Michigan took over permitting in 1984, and New Jersey followed suit a decade later. While many states have considered taking control in the decades since, none did until Florida in 2020.

"There are a lot of states that looked at the 404 program and decided the costs were going to be too expensive," said Marla Stelk, executive director at the National Association of Wetland Managers, a nonprofit group that represents state and tribal regulators. "It requires a lot of extra staff and a lot of extra resources, but it can create a better, more efficient permitting process."

Under the Trump administration, [federal officials](#) encouraged states to apply for control. Florida's bid was approved just weeks before President Donald Trump left office. State officials hailed the move as a step toward local accountability and improved efficiency.

But critics say the transfer hasn't gone well. Florida initially asserted it could take on the program without needing additional money, but state lawmakers this year approved the agency's request to fund 33 new positions for water resource management.

"It's been a complete s— show," said Bonnie Malloy, a senior attorney with Earthjustice and a former staffer with the Florida Department of Environmental Protection. "The goal is, 'How quickly can we say yes to developers?'"

The agency would not provide an official for an interview. Former state Rep. Holly Raschein, a Republican who sponsored legislation

authorizing the transfer in 2018, defended the department's management.

"I believe in DEP and our ability to oversee these matters," she said. "We waded into this as the [guinea pig](#) for other states in the nation, and it doesn't surprise me that we're working this out. If people are expecting to have a perfect piece of public policy, good luck with that. DEP is right to ask for help if they need help."

Meanwhile, Florida is defying federal court rulings and directions from the EPA about which waters require a permit: Although federal District Court judges in Arizona and New Mexico struck down a Trump-era rule limiting the streams and waters protected by the Clean Water Act, Florida is still using the old Trump-era definition. Officials there say they're using that definition while they review the legal situation, according to E&E News.

Environmental watchdogs say Florida's defiance of the rule violates its obligation to run the Section 404 program at a standard that meets or exceeds federal protections. Earthjustice is leading a lawsuit claiming that Florida and the EPA made procedural mistakes in transferring authority, seeking to put the program back under federal purview.

In a statement, the EPA said that it still supports state efforts to pursue permitting control, commenting only that it would "continue to work with Florida to ensure consistency."

'We're open for business'

Other states also are considering taking over the program. Alaska lawmakers voted in 2013 to give [state regulators](#) the authority to pursue control, but the state put that on hold when a drop in oil revenues shrank its budget. Gov. Mike Dunleavy, a Republican, is seeking to revive that

effort.

He's pressing legislators to approve \$4.9 million to fund 28 positions at the Department of Environmental Conservation, which would begin a two-year process to take over Section 404.

"This is what my group of scientists thought would be needed," said Brune, the department's commissioner. "(That cost) is a drop in the bucket for a state that depends on natural resource extraction to show that we're open for business."

Many business and industry groups have supported Alaska's effort, citing lengthy wait times for federal permits.

But other Alaska groups fear the transition could be harmful. Guy Archibald, [executive director](#) of the Southeast Alaska Indigenous Transboundary Commission, a consortium of tribal nations, said that the state's funding and staffing estimates are so insufficient that they seem "designed to fail."

He said Alaska Natives fear that ineffective state oversight could harm water quality, which would destroy the subsistence lifestyle that many rely on.

"These wetlands provide the food security for many of our communities and villages," Archibald said. "Commercial foods are incredibly expensive and of poor quality."

At present, federal agencies issuing permits under the Section 404 program must first consult with affected tribes. Critics fear that a state takeover would push tribes to the sidelines.

"The state is under no obligation to consult with the tribes," Archibald

said, "and they will not do so."

Brune, though, said the state is committed to tribal consultation if it assumes control. He added that state oversight will allow the program to provide local accountability, with Alaska regulators who care about their state's waters.

Other critics fear that the state's true goal is to allow large-scale mining, saying such projects have a worrying track record of polluting waterways.

Nebraska also is moving toward a Section 404 takeover. Last month, Republican Gov. Pete Ricketts signed a measure authorizing the state Department of Environment and Energy to apply for control.

Jim Macy, the agency's director, said [state officials](#) will work to craft rules and develop a program before applying to the feds, a process that could take about two years. The agency did not provide details to Stateline on the extra staffing and costs needed to take on the program, but said that funding will be covered by permit fees from companies applying for development.

"The stakeholders that asked us to consider this thought that the state could develop a quality permit that would be more transparent and quicker to get," Macy said.

Nebraska state Sen. Dan Hughes, the Republican who sponsored the bill to authorize control, said federal regulators have been slow to issue permits.

"They're holding up construction," he said. "The contractors are more than willing to pay the additional costs for the state to hire more personnel to make the permits happen."

But some environmentalists in the state feel that timelier permits will come at the expense of the environment.

"Our Department of Environment and Energy is pretty much a rubber stamp," said George Cunningham, conservation committee chair of the Nebraska chapter of the Sierra Club. "The talent pool is really not there within the agency, and they would have to hire a significant number of folks with the right skill set to do this."

In Minnesota, state lawmakers are considering a proposal to fund developing a draft application for Section 404 control.

"Our regulatory programs already cover more waters than the federal government and are in many cases more restrictive," said Les Lemm, wetlands section manager with the Minnesota Board of Water and Soil Resources. "Many of our stakeholders feel [the federal permit program] is redundant and inefficient, with extra time and extra cost for the applicant."

Other efforts

Michigan was the first state to gain Section 404 authority in 1984. The state's wetland laws were written with the specific intent of taking over the program, said Anne Garwood, who supervises the wetlands, lakes and streams program at the Michigan Department of Environment, Great Lakes, and Energy. The state's program was designed to consolidate the permit process and provide faster permitting decisions.

The state spends more than \$12 million a year and has more than 80 staffers who work on Section 404 applications, she said. While Michigan has supported states that have pursued the program, Garwood said, some states haven't made the necessary commitments to running it.

"We are able to process applications faster because we have so many staff processing them," she said. "It is surprising when states say they could use substantially less than that. I don't know how you could do it with so few people."

Other states recently have abandoned their attempts to take over the program, mostly citing cost.

Indiana's effort ended in 2019. "Our attempt completely crashed and burned once we did the calculations of the fees that would be needed to support it," said Martha Clark Metter, assistant commissioner of the Office of Water Quality at the Indiana Department of Environmental Management.

Oregon shelved its effort in 2020 as lawmakers found other funding priorities such as wildfires and drought relief, said Barbara Park Poage, who served as the Section 404 analyst with the Oregon Department of State Lands.

Arizona also backed off its Section 404 efforts in 2019, citing the ongoing legal fight over the waterways covered by the Clean Water Act, as well as concerns about crafting a state replacement for the federal consultation over Endangered Species Act review. Those unanswered questions made it difficult to ensure that a state program would be more efficient, said Trevor Baggio, Water Quality Division director with the Arizona Department of Environmental Quality.

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