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**Testimony of David K. Paylor  
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**United States House of Representatives**

**Committee on Transportation and Infrastructure  
Subcommittee on Water Resources and Environment**

**Regarding**

**State Assumption of Clean Water Act Section 404**

Good Morning Mr. Chairman and Members of the Subcommittee. I am pleased to present testimony today regarding the benefits associated with state assumption of Section 404 of the Clean Water Act (CWA), and to discuss the administrative and financial barriers that make the process prohibitive.

My name is David Paylor and I'm the Director of Virginia's Department of Environmental Quality (VDEQ). During my six years as VDEQ's Director I've had the opportunity to work with the administrations of two Virginia governors to protect our natural resources while providing efficient regulatory programs that are responsive to the regulated community. I'm also a former president of the Environmental Council of the States (ECOS) and I currently serve as Vice-Chair of the ECOS Water Committee. ECOS is the national non-profit, non-partisan association of state and territorial environmental agency leaders. Today I am testifying on behalf of both ECOS and the Virginia Department of Environmental Quality.

Congress passed the Clean Water Act (CWA) in 1972 and it is the primary federal law governing water quality in the United States. The U.S. Army Corps of Engineers administers the Section 404 program for EPA through the issuance of permits for activities in jurisdictional waters of the United States. When Congress passed the CWA, it included a provision whereby states may seek to implement certain parts of the Act,

including Section 402, the point source discharge program, and Section 404, which regulates the discharge of dredged or fill material into waters of the United States, including wetlands. Currently, only Michigan and New Jersey have assumed Section 404. This is in contrast to the forty-five states that have assumed Section 402. This disparity is evidence of financial and administrative barriers that are specifically associated with Section 404 assumption.

There are significant potential benefits to a state administered Section 404 program. States are well-positioned to provide a consistent, streamlined regulatory program that is protective of a state's unique wetland and stream resources. Most states define their waters more broadly than the Clean Water Act and include isolated wetlands, ephemeral streams and groundwater. During times of jurisdictional uncertainty at the federal level, such as in the wake of the *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC") decision<sup>1</sup>, states are able to maintain a consistent and predictable definition of the waters they regulate. This consistency provides stability to the regulated community and encourages trust between the government and private land owners. In addition to consistency, a state administered Section 404 program provides the public with an efficient and streamlined one-stop shopping experience, effectively removing the duplication of effort and regulatory uncertainty that often occurs with parallel state and federal programs.

While states are able to provide consistency, efficiency and enhanced resource protections through stewardship of the Section 404 program, ECOS has identified substantial financial and administrative barriers facing states that seek to assume the program. Among the most significant of these barriers:

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<sup>1</sup> The Court held that the Corps' assertion of jurisdiction over isolated waters on the basis of the "migratory bird rule" exceeds the authority granted under Section 404(a) of the CWA. The Court based its decision on the CWA alone, thereby avoiding the constitutional question of whether the regulation was within Congress' power under the Commerce Clause. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)

- Funding is not currently available from the federal government for implementation of the Section 404 program. The Section 404 program is transferred to a state through primacy, more commonly called “Section 404 assumption”. The Section 404 assumption process differs from the transference of Section 402 of the CWA, which is *delegated* to states by the EPA. This distinction between assumption and delegation renders states seeking to implement 404 ineligible for federal funding. While there are federal funds potentially available for a state’s development of the 404 program, it is the implementation phase that is financially challenging as the state hires new staff, funds new training programs, and expands administrative resources in advance of assumption. ECOS supports U.S. Congressional action to authorize funding for states that assume the Section 404 permitting program and to make the existing U.S. EPA wetland grant program available for both development and implementation activities.
- There is uncertainty regarding the criteria for assessing a state’s legal authority to assume administration of the Section 404 program. The basic foundations of parallel state and federal regulations are different, even though the goals of those regulations are shared. The CWA relies heavily on the authority of the federal government to regulate interstate navigation and interstate commerce while states regulate their water resources based on the constitution and laws of the state. The rules require that the state administered Section 404 program is no less stringent than the federal program. ECOS supports this requirement, but suggests that EPA provide guidance to states about available flexibility in meeting the requirement while taking into account differing wording and underlying constitutional authority for state programs. This would help to reduce the uncertainty and difficulty of assessing parity by directly comparing the language of two different regulations.
- The Section 404 assumption process provides no phased assumption option to states. The requirement of states to assume the entire program all at once creates a complex and lengthy process that can last up to two years with no

certainty that EPA will approve the request. ECOS suggests a process that allows a state to assume the program in phases. A phased assumption would allow the Corps to maintain any projects that are in process while new applications would go to the state. A phased approach would also lighten the financial and administrative burden on states to provide the resources for an “overnight transfer” up front.

- The Section 404 program does not include an option for partial assumption by states. For instance, states cannot seek to assume the 404 program for only specific geographic areas or certain types of activities; they must assume the entire program. A partial assumption allowance would enable states to choose those portions of the program that they are best positioned to administer. Under a partial assumption scenario workload division could be structured around categories like impact thresholds, or specific responsibilities like jurisdictional determinations versus permit processing. The specifics of the workload division could be based on a state’s unique aquatic resources or workload and administrative factors. Though not part of the assumption process, there is one currently available option for states to share Section 404 responsibilities with the Corps. States can pursue development of a State Programmatic General Permit (SPGP) with the Corps. A robust state programmatic permit program, like the successful SPGP program that Virginia has administered over the past twelve years, provides a working example of how dividing Section 404 regulatory workload between a state and the Corps can provide a more streamlined and consistent permitting process to the regulated public while maintaining wetland and stream protection.

In Virginia, Section 404 assumption has been a recurring discussion since 2000, and has been driven, in part, by the Tulloch ditching decision<sup>2</sup>, the Wilson case<sup>3</sup>, and the

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<sup>2</sup> The Court held that the Tulloch rule exceeded the Corps’ and EPA’s authority under the CWA because the “incidental fallback” of material associated with excavation activities was not a “discharge of dredged or fill material” within the meaning of the statute. *American Mining Congress v. U.S. Army Corps of Engineers*, 951 F. Supp. 267 (D.D.C. 1997)

limitations of the Corps' jurisdiction over isolated wetlands and excavation in wetlands and other waters resulting from these court cases. The Virginia Water Protection Permit (VWP) Program was first enacted in May 1992 to serve as the Commonwealth's nontidal wetlands program and Section 401 Certification process. In 2001, the program was expanded into a nontidal wetlands regulatory program independent of Section 401 Certification, including an SPGP and general permits for development, mining and linear transportation projects. However, Virginia's program still operates in parallel with the Corps' Section 404 program, creating some unnecessary duplication of effort.

Virginia's SPGP was first released in 2001 and expanded in 2007 and 2012. Virginia's SPGP has reduced regulatory duplication for projects that qualify for the SPGP, but there is still a "two-stop shopping" experience for the regulated community for projects that are beyond the SPGP thresholds of 1.0 acre of wetland impacts and 2000 linear feet of stream impacts. Two regulatory frameworks can create confusion for the regulated community because of differing timeframes and the absence of a single point of contact for permits. Through the development and ongoing evolution of Virginia's SPGP, the Corps and VDEQ identified and implemented impact thresholds that capture the majority of the permit load for residential development in Virginia and allow VDEQ to serve as the sole point of contact to the regulated community for those projects. Virginia's experience with the SPGP has shown that by working closely with the Corps it is possible to develop a state programmatic permit that is structured to divide responsibilities and workloads to best utilize the strengths of both the state and federal programs. Virginia has found that administering a well developed SPGP provides many of the benefits that are not currently available through the 404 assumption process due to the lack of a partial 404 assumption option.

VDEQ has evaluated the costs and benefits of pursuing Section 404 assumption in the past and is currently preparing an updated 2012 study at the request of Virginia's

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<sup>3</sup> The Court held that CWA jurisdiction over isolated water bodies based on their potential, as opposed to actual, connections with interstate or foreign commerce was invalid because it exceeded Congressional intent (emphasis added). *United States v. Wilson*, 133 F. 3d 251 (4th Cir. 1997)

General Assembly. These studies require VDEQ to perform a thorough accounting of the Agency's and the Corps' respective workloads, existing staff and information technology resources. VDEQ used those data to project the funding required to successfully assume the Section 404 program from the Corps. Both studies include extensive stakeholder input from the regulated community, state resource agencies, federal agencies and environmental conservation groups. Both the 2006 and the 2012 assumption studies identified several of the same anticipated benefits and concerns.

The potential benefits identified by Virginia's assumption studies are in line with other states' findings as set out in the ECOS resolution broadly adopted by the states. Namely, that assumption of the Section 404 program could provide a consistent, streamlined permitting process with a single point of contact and broader resource protection than the CWA. Virginia regulated stakeholder's voiced appreciation of VDEQ's statutory timeframes that make us more responsive and lead to consistently quicker permit processing times than the Corps. VDEQ, if adequately funded, would provide that same level of customer service while administering the assumed federal program and providing equivalent environmental safeguards.

Virginia's analysis of the costs revealed that the single largest impediment to Virginia's assumption of the federal program is the expense of acquiring the staff, administrative resources and information technology infrastructure needed to handle the expanded workload. Projections are that implementing the program would require VDEQ to roughly double its existing work force at a projected additional cost of approximately 3 million dollars per year. Some of this cost could be defrayed through the phasing in of key personnel with the full workforce coming on line towards the end of the assumption process. More prohibitive is the anticipated need for approximately 2 million dollars in the first year of assumption and approximately 1.5 million dollars in year 2 and year 3 for the development of a database and other computer resources to process the tracking and reporting requirements of the assumed program. For a point of comparison, VDEQ estimates that based on average salaries, the number of full time

employees and administrative costs, the Corps Norfolk District that currently administers Virginia's Section 404 Program has an annual budget of 7.3 million dollars.

The stakeholders also identified the anticipated cost of implementing the program as their main concern. They warn that without adequate money, and absent federal assistance, the assumed program might not be funded to the level required to maintain the level of service and efficiency that VDEQ brings to its own permitting program. In Virginia, conservation groups expressed concern that state assumption would result in the loss of a permitting process with dual agency oversight, providing greater assurance of environmental protections.

The Environmental Council of States (ECOS) issued Resolution Number 08-3 in 2008, and reaffirmed it in 2011, supporting delegation of Section 404 responsibilities to states that demonstrate a robust commitment and capacity to protect wetlands. The ECOS resolution:

Encourages U.S. EPA to develop clear guidelines and processes for state assumption of Section 404 of the Clean Water Act that will encourage states to apply for and assume regulatory responsibility over this important natural resource program;

Supports U.S. Congressional action to authorize and appropriate adequate funding for states that assume the Section 404 permitting program and to broaden the eligibility of the existing U.S. EPA wetland grant program for both development and implementation activities; and

Supports a simplified and more flexible process for state assumption of the Section 404 Permit Program, including partial assumption of program responsibilities, in order to improve effectiveness and provide more efficient and effective permitting for applicants while maintaining protection of wetlands in the United States.

ECOS is committed to the idea that there is an untapped potential for strong state programs to further increase wetland program efficiency, and to integrate the best of state and federal programs to more effectively manage wetlands and other waters for the future.

The goal of protecting the nation's wetlands and streams can be best realized through a process that is consistent, efficient and responsive to the unique features and qualities of the individual states. The Clean Water Act's Section 404 state assumption authority provides the mechanism for individual states to realize enhanced water resource protection while providing a streamlined regulatory program with a single point of contact. States can and do define their jurisdictional waters more broadly than the federal government and implement regulations protective of water resources such as groundwater, ephemeral streams and isolated wetlands that the federal program does not address. Currently, these benefits are realized by only two states, due mainly to the prohibitive costs and complexities involved with the assumption process. Congress could encourage state assumption by making federal funds available for states to implement the program, as is the case for Section 402 delegation. Congress could further encourage state assumption by simplifying the application process and allowing for both phased and partial assumption of the program in accordance with a state's available financial resources and water protection goals. The integration of the best elements of the state programs with the base level protections provided by the Clean Water Act and EPA is the best way forward to increased national resource protection and wetland program efficiency. Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to present my testimony to you today and will be happy to answer any questions that you have.