Clean Water Act: Improve Certainty and Efficiency in 404 Permitting

Clean Water Act ("CWA") Section 404 grants the U.S. Army Corps of Engineers ("USACE"), in coordination with the U.S. Environmental Protection Agency ("EPA"), the authority to issue permits for the discharge of dredged or fill material into Waters of the United States ("WOTUS") (referred to as a "404 permit"). To obtain a 404 permit, the CWA requires extensive evaluation of the environmental impacts of the project and project alternatives, any violation of environmental laws, potential degradation of WOTUS, and an applicant's attempts to minimize adverse project impacts. The CWA also requires compensatory mitigation to fully compensate for unavoidable adverse impacts to WOTUS. Examples of mitigation include wetland mitigation banks, in-lieu of fee programs, and permittee-responsible mitigation. EPA has broad and unchecked veto authority to prohibit, restrict, or deny a 404 permit regardless of any factual or scientific findings.

Lengthy permit timelines increase costs and delay projects. The application of outdated substantive requirements for 404 permitting, combined with EPA's authority to veto 404 permits, often results in a permitting timeline of 10 years or more. This lengthy timeline causes unnecessary expenditures by applicants and significantly delays the timely construction of water supply projects necessary to meet community needs. The permitting process is further delayed by the inefficient and costly process of determining compensatory mitigation requirements.

404 permit timelines can exceed 10 years

Broad veto authority allows for abusive and discretionary decision making. EPA has used its veto authority both before a 404 permit application has been filed (i.e., a "preemptive veto") and after a permit has already been issued (i.e., a "retroactive veto"). EPA's use of its veto authority is often politically motived. For example, in 2020, EPA revoked a veto it issued to a project in 2008. In late 2021 EPA reinstated its veto from 2008, underscoring the potential political nature of this regulatory tool. A veto eliminates any possibility for the applicant, USACE, EPA, and other project partners to come to a timely collaborative project solution that could meet local needs and adhere to permitting standards. Issuing a veto after a project has been fully vetted is both costly and time consuming. The unchecked ability of EPA to veto a 404 permit is an overreaching authority that serves no legitimate purpose and should be repealed by Congress. The 404 permitting requirements already provide sufficient opportunities to ensure that WOTUS are adequately protected. EPA's veto authority only serves to kill projects and allow for undue political influence.

We should take opportunities to streamline 404 permitting. The 404 permitting guidelines and regulations issued by EPA and USACE should be revised to focus on efficiency and to ensure that critical infrastructure projects like water supply reservoirs can be permitted within a reasonable timeframe so that projects are available in time to meet critical water supply needs.

- ***Reliance on applicant-provided information***. USACE and EPA should provide more deference to 404 permit applicants by using information prepared by applicants to comply with permitting requirements, such as information associated with project purpose, alternatives, and impact assessment. USACE and EPA would still verify the information provided.
- ***Use of existing data***. When existing, accurate, and reliable information is available to support a 404 permit application, it should be used to increase efficiency in the permitting process. Reputable Texas state agencies, like the Texas Water Development Board, can provide valuable information to support 404 permit applications. The use of existing information is also immensely important in reducing the expense required for and timely processing of applications. Forcing a new study that is no more accurate

nor defensible than work already completed in accordance with standards established by the National Environmental Policy Act and the CWA is an expensive and redundant waste of time.

- ***Mitigation to offset actual adverse impacts***. Existing compensatory mitigation requirements in 33 CFR 332, which were last updated in 2008, should be revised to only require mitigation necessary to offset actual unavoidable adverse impacts. Applicants should also be allowed to use the benefits of a project to offset adverse impacts. For example, the development of shoreline wetlands along a reservoir should be considered compensation for other wetland impacts. Mitigation should be viewed holistically and not focused narrowly. Moreover, given that limited options for mitigation exist in some project areas, regulations should be revised to allow the purchase of credits at a mitigation bank even if the project is outside of the mitigation bank service area.

Request for Congress:

- Eliminate EPA's broad "veto authority" for 404 permits by amending 33 USC 1344(c).

Requests for USACE and EPA:

- Revise and streamline the 404 permitting guidelines of the EPA and USACE found in 40 CFR 230 and 33 CFR 320, respectively, to ensure that critical water supply projects can be timely permitted and constructed to meet water supply needs.
- Revise USACE's compensatory mitigation requirements found in 33 CFR 332 to only require mitigation necessary to offset actual unavoidable adverse impacts and to allow applicants to use the benefits of a project to offset impacts.