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Water Policy Interim Committee

64th Montana Legislature

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Dec. 15, 2015

To: Water Policy Interim Committee members

From: Jason Mohr, research analyst, LEPO

Re: SJ2 study of 404 permitting assumption

In September as part of Senate Joint Resolution No. 2 study (state assumption of federal 404 permitting), the committee has received a discussion of the 404 permitting process from the U.S. Army Corps of Engineers, how the permitting process meets the environmental standards of the Clean Water Act, and possible changes to the permitting process' jurisdictional reach (proposed Clean Water Rule).

For January, the committee will hear what steps the state of Montana must take to assume the 404 permitting process from the Environmental Protection Agency. Experts from Oregon and Alaska will also relate their experiences attempting to assume the 404 permitting process – and have suggestions for the state of Montana.

In order to give the discussion some context, the table on the next page summarizes key details about states that have assumed the 404 permitting process and two states that have attempted to do so (Alaska and Oregon).¹

¹ Other states that have or are exploring assumption include: Virginia, Maryland, Kentucky, Minnesota, Florida

State	Date of assumption	Issuing agency	Other name for 404 permit, if applicable	Related state law(s)	Notes
Michigan	1984	Department of Environmental Quality	A 303 wetlands permit (except for certain coastal wetlands) is a comprehensive permit covers activities such as deposit of fill material in a wetland; dredging or removal of wetland soils, minerals; construction or operation of any use or development in a wetland; draining a wetland.	Geomare-Anderson Wetlands Protection Act (1979)	Only a single permit needed for work in a wetland. Separate Corps permit required for activities in traditional navigable waters, including the Great Lakes, connecting channels, and adjacent wetlands. EPA reviews projects impacting critical environmental areas or involving large quantities of fill. EPA completed comprehensive review of Michigan program in 2008, finding 20 corrective actions necessary to maintain program equivalent to federal standards. In 2009, the governor proposed relinquishing to program to the EPA. The EPA is reviewing 2013 legislation meant to bring the Michigan program into compliance.
New Jersey	1994	Division of Land Use Regulation (Department of Environmental Protection)	Wetlands permit, which is a comprehensive program covered by a general permit (including underground utility lines, house additions, lake dredging, trails and boardwalks, etc.) or an individual permit (if the activity exceeds maximum limited allowed by a general permit) for freshwater wetlands, wetland transition areas, or state open waters.	State Freshwater Wetlands Protection Act (1987)	Some parts of New Jersey remain under federal jurisdiction, including "priority wetlands." EPA reviews all permits. Corps and USFWS review certain permits related to navigable rivers and threatened/endangered species. A freshwater wetlands permit may be issued without a federal 404 permit authorization, depending on the circumstances.
Alaska		Division of Water (Department of Environmental Conservation)			Senate Bill 27 (2013) directed state agencies to analyze assumption, to submit application to EPA. The bill also provided funding. Subsequent milestones were set, including cost-benefit analysis, draft statutes and regulations, meetings with other states, application development, and an application submittal target date of December 2017. The 2014 Legislature removed funding, although the enabling legislation remains. Assumption efforts on hold.
Oregon		Department of State Lands	Seeks to include 404 permitting into state's removal-fill permit.	Removal-Fill Law (1967) protects waterways and wetlands to conserve, restore and protect water resources for their contribution to aquatic life and habitats, fisheries, aquatic-based economies, tourism, public recreation, navigation, water quality, floodwater storage and other natural resource functions.	Submitted complete draft application to EPA in 1995. Continued study of assumption until 2005. Legislative 404 Assumption Committee met in 2012 to again consider issues; no subsequent action was taken. Department of State Lands has worked to resolve outstanding issues with NOAA Fisheries and USFWS regarding endangered species; this has not been resolved. Legislation may be proposed in 2017.
Montana					Senate Joint Resolution 2 (2015) assigned to WPIC.