

Annual Cost Estimate for Assumption of Section 404 Permitting Duties

This memo is an estimate of annual costs for the state of Montana to run the federal section 404 permitting program under the Clean Water Act. This estimate makes many assumptions, including that the Montana Legislature desires to assume the 404 program and that the Environmental Protection Agency grants Montana that primacy.

The Clean Water Act requires section 404 permits for actions that place dredge or fill material into wetlands or other jurisdictional waters. Activities requiring a 404 permit include construction of dams, levees, highways, airports, and mining projects. Certain farming and forestry activities are exempt from permitting. According to the language of the Act, no discharge of dredge or fill material is allowed if “a practicable alternative exists that is less damaging to the aquatic environment,” or if the nation’s waters would be significantly degraded.

The Clean Water Act allows states to assume the 404 permitting program. To date, only the Michigan Department of Environmental Quality and the New Jersey Division of Land Use Regulation have assumed the program. In Montana, the U.S. Army Corps of Engineers issues 404 permits.

The Montana Legislature demonstrated its interest in assuming the section 404 program through its passage of Senate Joint Resolution 2 in 2015. If Montana is able to prove it will provide a level of resource protection equal to that provided by the federal agency, the state would presumably be allowed primacy. The state would likely assume the annual costs of the program.

Assumptions

This estimate is based on the following assumptions. These assumptions may be proven or disproven at the actual time the process is assumed.

1. **The Corps’ section 404 program costs are the starting point** for a cost estimate. The Corps reported its fiscal year 2015 costs as \$814,894 in salary

and benefits plus \$529,770 in overhead expenses for 10 full-time equivalents for employees in Billings and Helena.

2. The Corps' costs must be adjusted to a figure **more reflective of Montana's cost per full-time equivalent**. For this estimate, the approved biennial appropriation for personal services for the Department of Environmental Quality's Permitting and Compliance Division works out to approximately \$78,686 per FTE. Therefore, the "estimated cost for 10 Montana FTEs" is \$786,860, as reflected in the calculation later in this memo.
3. **Some section 404 permitting work is performed at the regional Corps headquarters in Omaha, Nebraska.** This work should necessarily be added to Montana's annual cost estimate. Corps staff estimate that 90 percent of its overhead expenses are attributable to duties performed in Omaha. Therefore, the "work performed in Omaha" in the accompanying calculation is estimated at \$476,793.
4. **Montana would not assume jurisdiction over section 10 waters**, which are regulated by the Rivers and Harbors Act of 1899. A section 10 permit is required on navigable rivers for any work on, over, or under a waterway. This includes the placement of dredge or fill. A section 10 permit therefore duplicates the 404 permit in many instances. For the purposes of this estimate, it is assumed the Corps would retain section 10 and section 404 permitting authority over Montana's navigable rivers, which include the Missouri River, the Yellowstone River (downstream from Emigrant), and the Kootenai River (upstream from Jennings). The Corps estimates that about 14 percent of their workload over the past five years involved section 10 waters, which is reflected in the accompanying calculation.
5. **Montana could not assume 404 permitting jurisdiction over jurisdictional waters on Indian lands.** For the purposes of this estimate, it is assumed that 9 percent of the 404 permitting workload involves waters on Indian reservations, which is the approximate proportion of reservation land in Montana. While perhaps a crude measure, it is nevertheless reflected in the accompanying calculation.
6. It is unclear how **nationwide or regional general permits** would affect Montana's workload. These permits are meant to cover common activities within

a waterway. For example, dredging of no more than 25 cubic yards below the ordinary high-water mark is covered with a “minor dredging” nationwide permit. The accompanying calculation anticipates no more and no less state agency work related to nationwide or regional general permits.

7. It is unclear how **certain federal land designations** would affect Montana’s workload, such as federally designated critical resource waters, national parks, and wild and scenic rivers. The accompanying calculation does not anticipate federal jurisdiction over these waters and thus would not decrease the state’s annual cost.
8. **Existing expertise at Montana’s agencies** could be incorporated into an assumed 404 permitting program. For example, agency staff issuing short-term water quality turbidity authorizations (318 authorization) or Montana Stream Protection Act permits (SPA 124 permits) may or may not be utilized. However, the accompanying calculation does not account for such efficiencies.
9. Implementation of the **Clean Water Rule** is estimated to increase the 404 permitting workload. This rule was finalized in August 2015 but has since been blocked by various federal courts. The accompanying calculation adds 4 percent to the 404 workload, a figure provided to Legislative Environmental Policy Office staff by EPA experts at a 2015 webinar.

The Calculation

This annual cost estimate is highly variable. As indicated in the previous assumptions, the estimate could be even lower due to continued federal jurisdiction over certain waters (e.g., national parks) or DEQ staff efficiencies. Conversely, the estimate could increase, as it is presumed that a state 404 program would have some overhead costs, such as travel, equipment, office space, and so forth. Also, implementation of the Clean Water Rule might increase costs, as noted in the previous assumptions. Adding these factors could push this annual cost estimate to around \$1.2 million. Again, these figures are likely to vary, depending on the regulatory scheme adopted by the state and approved by the EPA.

