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[ISSUES TO CONSIDER FOR STATE ADMINISTRATION OF SECTION 404 CLEAN WATER ACT PERMITS]

The Environmental Quality Council in July 2014 requested information about Montana assuming control of administering permits for dredge and fill activities regulated by the federal government under Section 404 of the Clean Water Act. The EQC also asked for a proposed study resolution to discuss in September 2014.

Introduction

The Environmental Quality Council discussed proposed revisions to federal rules for administration of Section 404 of the Clean Water Act twice this interim. In July, the EQC asked staff for more information related to state assumption of the permitting program that is jointly administered by the U.S. Army Corps of Engineers and the Environmental Protection Agency.

Section 404 permits are required for actions that place dredged or fill material into wetlands and other waters of the United States as defined by law and rule. Activities that may be covered include filling in a wetland for development, constructing dams and levees, building highways or airports, or mining projects. Certain farming and forestry activities are exempt from permitting.¹

The program aims to prevent the placement of materials into wetlands and waterways if the water would be significantly degraded or if a practicable alternative exists that is less damaging to the aquatic environment. A permit applicant must make an effort to avoid impacts to wetlands, streams, and other aquatic resources, show that potential impacts are minimized, and provide compensation for unavoidable impacts.²

History

Significant amendments to the Federal Water Pollution Control Act of 1948 were passed in 1972 and became known as the Clean Water Act.³

By 1977, the requirements for dredge and fill permits were unpopular in Montana and other western states, according to a letter written by Montana Gov. Thomas Judge to the Senate Subcommittee on Environmental Pollution.

Judge called the 404 permit program “one of the most wasteful and bureaucratic programs ever perpetrated upon the people of this nation.”

“Above all, the program duplicates programs already administered locally or at the state government level, especially in Montana,” wrote Judge, who called for a repeal of the law, or at the least provisions allowing states to administer their own laws without hindrance from the federal government.⁴

Congress did pass amendments in 1977 that allowed states to administer their own individual and general permit programs in lieu of the federal program. The state program may provide greater resource protection than that required by federal law, but cannot be less stringent.⁵

¹ [EPA, Section 404 Permitting](#)

² Ibid.

³ [History of Clean Water Act](#), EPA

⁴ Gov. Thomas Judge letter, June 25, 1977

⁵ Clean Water Act Section 404 Program Assumption, A [Handbook](#) for States and Tribes, August 2011

Governor Judge cited a number of Montana laws that he said protected streams from “unwise disturbance” including the Natural Streambed and Land Preservation Act of 1975, which is commonly known as the 310 law administered by conservation districts.

A 310 permit is required for projects that create a “physical alteration or modification that results in a change in the state of a natural, perennial-flowing stream or river, its bed, or its immediate banks.”⁶

In 1978, a state Department of Natural Resources and Conservation (DNRC) employee determined that the 310 law and the 404 permit were duplicative and the state permit covered a broader array of construction activities on more streams than the federal law.⁷ But a few years later, in response to a request from the Flathead Conservation District, the DNRC concluded that laws at the time did not provide the state with adequate legal authority to assume the program, nor did the state have the staff or funding to do so.⁸

State assumptions of 404 permitting

Since 1977, only Michigan and New Jersey have assumed administration of the dredge and fill permit program. At least another eight states have investigated assumption to varying degrees, including Alaska, Florida, Kentucky, Maryland, Minnesota, North Dakota, Oregon, Virginia, and Wisconsin.

Alaska appears to be the most recent state to consider assumption with the passage of legislation in 2013 giving two agencies the authority to seek administration of the 404 permit program. Possible benefits of assumption include:⁹

- Increased program efficiency combined with state expertise would provide greater resource protection while increasing program efficiency;
- Elimination of overlapping programs and better coordination with existing programs;
- More flexible regulations, provided federal standards are met; and
- Increased public support for state review and local decision making.

However, given that only two states have assumed jurisdiction since 1977, it is apparent that states face significant challenges when seeking federal approval. Among those most cited are:

- Demonstrating state jurisdiction is equal in scope to the federal law regarding waters of the United States and proving that the state program is consistent with federal law;
- Providing adequate funding. The EPA estimates that a state will spend an average of \$225,000 just to investigate assumption of the program. If a state program is approved there is no federal funding available for administration.
- An inability to assume authority for projects in waters deemed navigable under section 10 of the Rivers and Harbors Act and adjacent wetlands. In Montana, the Army Corps would retain

⁶ Section 75-7-103, MCA

⁷ W.W. Rehmann correspondence, March 1, 1978.

⁸ Jack G. Thomas correspondence, Dec. 11, 1984.

⁹ Clean Water Act Section 404 Program Assumption, A [Handbook](#) for States and Tribes, August 2011

permitting authority for the Missouri River from Three Forks downstream; the Yellowstone River from Emigrant downstream to its confluence with the Missouri River; and the Kootenai River from the Canadian border downstream to Jennings, Montana , just upstream of Libby. Projects subject to the federal permit include excavation and depositing of materials in those waters.¹⁰

Montana snapshot

Appendix A is a general guide to stream permitting in Montana. As evidenced by the guide, work in and near streams may require more than one permit depending on the project and the location. A 310 permit is required for any project that physically alters or modifies a perennial-flowing stream or river, its bed, or its immediate bank. A 310 permit could be required for projects ranging from placing a culvert or irrigation diversion to improving fish habitat.¹¹

Fewer actions are subject to the federal 404 permit. The 404 permit covers only the discharge of dredged or fill material to a regulated water body.

An activity in a perennial stream that may require both a 404 permit and a 310 permit could include placement of riprap.

However the waters subject to the federal regulation extend beyond the perennial rivers and streams covered by the state permit. In addition to rivers and streams, waters of the United States covered by the 404 permit may include, but are not limited to wetlands, lakes, and ponds connected to a tributary system. Isolated waters and wetlands, as well as man-made ditches and channels, may be covered under certain circumstances as determined on a case-by-case basis.

For the period of 2003 through 2013, Montana's 58 conservation districts processed an average of about 1,400 applications a year for 310 permits.¹²

The Army Corps processes about 800 actions a year, though not all of those result in permits. Five project managers handle the workload.¹³

Next Steps

At its July meeting, the EQC asked for a draft study resolution to consider for introduction in the 2015 Legislature. That is included in **Appendix B**.

¹⁰ DNRC [Guide to Required Permits](#)

¹¹ The 310 permit applies to private people and nongovernmental entities. Another state law similar to the 310 law requires that projects proposed by governmental agencies, such as a state department or a city, must apply for a permit from the state Department of Fish, Wildlife, and Parks. This is commonly called the Stream Protection Act 124 permit. The statutes are located in Title 87, chapter 5, part 5 of the MCA.

¹² DNRC, Conservation Districts Bureau

¹³ Correspondence of Todd N. Tillinger, Montana Program Manager US Army Corps of Engineers, Aug. 19, 2014

If the EQC moves forward with studying state assumption, more analysis would be required to determine what changes are needed to state law. Input also would be needed from the regulated community, conservation districts, local governments, the Departments of Environmental Quality and Natural Resources and Conservation, the U.S. Army Corps of Engineers, the Environmental Protection Agency, and the public to determine potential benefits, disadvantages, and obstacles to state assumption of the dredge and fill permit program.

Questions that the EQC might consider include:¹⁴

- Why is the state interested in assumption and what would be the benefits of assumption?
- What are desired benefits of assumption?
- Does the state have legal authority to meet federal requirements and the ability to enforce the regulations?
- Is there adequate financial and political support?

A full consideration of 404 permit assumption may require months or even years to complete. If a state decides to apply for approval of a 404 permit program, the application requires:¹⁵

- A letter from the governor requesting program approval ;
- A complete program description;
- A statement by the attorney general that the state has legal authority to meet and enforce the requirements of federal law;
- Memorandums of understanding with the EPA regional administrator and the Secretary of the Army; and
- Copies of all applicable state laws and regulations.

More information

Appendix C is an overview of state assumption issues provided by the Association of State Wetland Managers.

Links

- Clean Water Act Section 404 Program Assumption, A [Handbook](#) for States and Tribes, August 2011
- [Michigan's](#) 404 Program
- [Assumptions, New Jersey Style](#)
- Virginia - [Study of the Costs and Benefits of State Assumption of the Federal Section 404 Clean Water Act permitting Program](#)
- [Minnesota](#) - Section 404 Assumption Feasibility Study
- Florida - [Evaluation of Assumption](#)
- Oregon – [404 Assumption Planning](#)
- Alaska – [404 Program Development](#)

¹⁴ Clean Water Act Section 404 Program Assumption, A [Handbook](#) for States and Tribes, August 2011

¹⁵ Ibid