



Aquatic Resource Management

404 Assumption

Wetlands and waterways in Oregon are protected by both state and federal laws. Projects impacting waters often require both a state removal-fill permit issued by the Department of State Lands (DSL), and a federal permit issued by the U.S. Army Corps of Engineers (Corps).

The Corps administers the federal program under Section 404 of the federal Clean Water Act and Section 10 of the Rivers and Harbors Act. The U.S. Environmental Protection Agency (EPA) has the lead for enforcement under the federal Clean Water Act.

The Clean Water Act has a provision enabling states to “assume” Section 404 regulation provided the state has a waterways and wetlands regulatory program equivalent to the federal program.

Oregon has long had an interest in 404 assumption. In 1995, the state submitted a complete draft application package to the EPA. Between 1995 and 2005, DSL conducted outreach, including focus groups, to assess public support for state assumption. The message consistently conveyed by the public was that, given a choice between the state and federal permitting programs, the public would choose the state program.

A key benchmark was achieved in 2001 when Senate Bill 172 was enacted. The bill made changes in Oregon’s removal-fill law to allow DSL to assume the program; however, additional legislative approval is needed to allow state assumption.

Oregon renews effort to assume 404 regulation

In 2012, DSL initiated a second effort to examine the benefits and risks of 404 assumption. If Oregon assumed the federal 404 program:

- Only a state permit would be needed in Section 404 waters, which includes most wetlands.
- The state would work cooperatively with the National Marine Fisheries Service, the U.S. Fish and Wildlife Service and the Environmental Protection Agency to ensure that state-issued permits are compliant with the federal Endangered Species Act.
- All standards such as state water quality standards, Coastal Zone Management consistency, and cultural and historic resources coordination would be maintained, eliminating the need for a redundant federal permit process.



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- DSL would work cooperatively with the Corps and EPA to identify federal waters that are assumable by the state.

An advisory committee composed of a wide variety of public interests – tribes, government agencies, wetland consultants, environmental organizations and agricultural groups – was established in January 2012 to provide input on the process.

After a year of meetings and consultation with key groups it became obvious there were significant issues related primarily to protection of cultural resources and federal ESA compliance under state assumption.

The committee disbanded in early 2013 to allow DSL to further research 404 assumption and make decisions based on the likelihood it would be successful after more than two decades of intermittent work.

The future of 404 assumption

The Department of State Lands is currently participating as a member of the Assumable Waters Subcommittee of the National Advisory Council for Environmental Policy and Technology (NACEPT). The subcommittee is providing advice and developing recommendations for NACEPT on how the EPA can best clarify for which waters a state or tribe could assume 404 regulatory responsibilities, and for which waters the Corps would retain 404 regulatory responsibility.

It is anticipated that once the federal agencies issue guidance on this topic, DSL will re-engage the Portland District Corps of Engineers on state assumption of the 404 Clean Water Act.

Federal agency information:

EPA 404 Permit Program:

<https://www.epa.gov/cwa-404/section-404-permit-program>

Corps Regulatory Program:

<http://www.nwp.usace.army.mil/Missions/Regulatory/Jurisdiction.aspx>

For more information and historical documents, contact:

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