

Should Your State become Proactive in Regulating Aquatic Habitats?

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Background

- Physical alteration of aquatic habitats by placing fill or excavating material is a regulated activity in Waters of the United States under **Section 404** the Clean Water Act.
- The US Army Corp of Engineers (USACE) is the permitting authority.
- EPA makes the big policy calls.
- Some states also have regulatory programs; most don't.

Why should this matter to states?

1. Is your state satisfied with the way the federal government is running and interpreting the 404 program, meaning no permitting delays and agree with regulatory outcomes.
2. Are commercial, residential or industrial development, mining or energy development not constrained by the presence of wetlands, streams, lakes, ponds and tidal marshes?

Back to the Question: Should Your State be Passive or Proactive?

If you answered “**yes**” to one or both of these questions, then perhaps your state can take the passive approach.

If you answered “**no**” or “**I don’t know**” to either question, then your state should consider on of the proactive approach that will be presented.

**What are the top three ways a
state can be proactive?**

Number 3

Submit comments to the federal government and/or participate on advisory panels—examples, WSLCA, ACWA, ECOS and ASWM

- Effectiveness Rating—**Low to Medium**
 - + Puts comments on the record
 - + Shows that the state or state organization commenting is serious and paying attention
 - (-) No guarantee the federal agency will respond or listen
 - (-) Response will be aimed at a national audience and not at your state's issues in particular

Number 2

Develop a comprehensive state wetland program--
example, Oregon Removal-Fill Program

- Effectiveness Rating—**Medium to High**
 - + State will be a equal partner with the USACE and EPA on wetland regulation in the state
 - + State can influence how USACE regulatory program operates, e.g., IRT, SPGP and JPA
 - (-) State has no actual authority over issuance of 404 wetland permits
 - (-) Both state and federal wetland permits are required since both have jurisdiction

Number 1

Assume the CWA Section 404 Regulatory Program—
examples, Michigan and New Jersey

- Effectiveness Rating—**Very High**
 - + State is the major player in wetland permitting
 - + State can conduct advanced planning for regional economic development with no USACE 404 permit required
 - (-) No 404-specific federal funding
 - (-) Partial assumption not an option

Common Questions about 404 Assumption

- What is 404 assumption?
- Why would a state want to do it?
- What do other states think about it?
- How much would it cost?

What is 404 Assumption?

- A state-assumed Section 404 Program is one that is administered under state law; it is not a delegation of federal authority.
- The state must have laws in place that provide authority **equivalent** to federal requirements
- CWA Section 404(g) limits which waters states can assume
- EPA approves application and provides oversight

Why would a state want to do it?

- Improved resource protection
- Increased program efficiency
- Economic stimulus
- Integration of wetland management with state goals
- State-specific policies and procedures
- Greater regulatory program stability
- More responsive to state citizens

What do other states think?

EPA asked nine states in 2007.

1. Florida
2. Kentucky
3. Maryland
4. Michigan
5. New Jersey
6. North Dakota (WSLCA)
7. Oregon (WSLCA)
8. Virginia
9. Wisconsin (WSLCA)

What factors led you to consider assumption of the 404 program?

- Increasing permit review efficiency (streamlining, reducing redundancy, increasing responsiveness and improved customer service). (9)
- Protecting the resource (through a more consistent, thorough or stringent state program). (4)
- Achieving consistency in program administration; providing more certainty to applicants. (3)
- Being directed to by the state legislature, governor, or statute. (3)
- To help get a state wetland program approved (assumption helped in overcoming objections from regulated community that new state regulations would add another layer of regulation). (1)

How far did you get in the process?

- 9 of 9 consulted with stakeholders and developed initial resource estimates.
- 8 of 9 completed the above plus examined regulatory consistency.
- 7 of 9 completed the above plus proposed statutory, rule, or programmatic changes in order to move toward 404 equivalency.
- 5 of 9 completed the above plus made statutory, rule, or programmatic changes in order to move toward 404 equivalency.
- 3 of 9 completed the above plus developed a draft assumption request.
- 2 of 9 completed the above plus successfully assumed the 404 program.

What barriers did you identify to assuming the program?

- State's program not equivalent – particularly in regard to jurisdiction, enforcement penalties, standing provisions, and delineation methodologies. (4)
- Interested in partial assumption or incremental steps toward assumption. (4)
- Lack of implementation funding. (3)
- Working out an acceptable way to handle threatened and endangered species issues with USFWS / NMFS opposition. (3)
- State politics. (2)

What barriers did you identify to assuming the program?

- Would rather go beyond than replace USACE implementation of 404 – “if it ain’t broke, don’t fix it”. (2)
- Loss of key state staff who were driving the effort. (2)
- Environmental group opposition (due to fears that there was a greater chance for political interference in program implementation at the state and local levels). (1)
- Large amount of non-assumable* waters. (1)

* *Transport interstate or foreign commerce vs. navigable*

What barriers did you identify to assuming the program?

- Achieving the goals of assumption through other means, specifically an SPGP. (1)
- Jurisdictional uncertainties associated with Supreme Court decisions (since this state's program cannot be any more stringent than the federal 404 program). (1)
- Concern that opening up state program for legislative action could actually result in a weakened program, rather than strengthened program. (1)
- Lack of overwhelming support from the regulated community. (1)

Michigan and New Jersey

The Two States that have Assumed

What were the critical factors in your decision to assume?

- Streamlining the permit process.
- Being able to both enhance resource protection as well as reduce burden on the regulated community.
- Support from environmental groups and the public.
- Support from the governor; concern regarding potential actions of incoming governor might take to weaken state wetland protection.

What barriers were overcome to complete assumption?

- Length of time needed (4 years) to work through the assumption process with EPA, USACE, and USFWS.
- Working out legal language to show equivalency with federal 404 program requirements.
- Working through ESA issue with USFWS.
- Addressing environmental group concerns that state would not regulate as strongly as the feds.

What are the benefits of running the 404 program?

- From a resource perspective, the state-implemented program offers the same protections that the USACE-implemented program does for large projects - but the state offers more protection for small projects.
- This promotes avoidance and reduces cumulative impacts.
- Streamlined permitting.
- Program implementation consistency even in the face of jurisdictional challenges at the federal level.

What are the benefits of running the 404 program?

- Implementing 404 helps protect the state program from budget cuts and actions that would weaken the program (since this would make the program inconsistent with federal requirements).
- Having EPA as the “gorilla in the closet” in support of resource protection.

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What are the disadvantages of running the 404 program?

- Cost – it's a continuous process to explain to each new generation of state policy makers why implementing the program is beneficial and why the state should want to run the program without federal funding.
- When the state's jurisdiction is tied to federal jurisdiction, uncertainty over which waters are "Waters of the U.S." slows down the entire permitting process and starts to do away with the efficiencies gained by assumption.

Have funding and staffing requirements changed over time?

- The cost of implementing the program has increased significantly over time due to receiving more permit applications than the state anticipated.
- Enforcement actions increased due to an improved understanding, by both staff and the public, of what waters are regulated.
- Permit fees used to partially support the program but have been increased several times over the years and now support the entire program (New Jersey as of 2007).

Challenges funding the assumed program?

- Since more than half of the program funding comes from the state general fund (the other portion coming from permit fees), when the state has budget problems, the program can be impacted (Michigan).
- The home builders association has strongly objected to further increases in permit fees. and the state legislature has also balked at this option.
- All fines collected under the program go into the state general fund, not back to the program.

What advice would you give to States considering assumption?

- It's a good option for managing resources and integrating aquatic resource protection with other state programs.
- The combination of federal and state regulation can make for a more balanced, stable program.
- If a state is just looking to circumvent federal regulations, it's not going to work since the state program needs to demonstrate equivalency.

What advice would you give to States considering assumption?

- It's important to understand the scope of 404 – some states think it pertains only to wetlands and do not realize that it covers other waters.
- Enforcement is an important component to assumption – state's have more flexibility than the Federal government.
- The state has to be comfortable accepting a certain level of federal oversight - it's not an onerous level of oversight but some state legislators don't want any oversight.
- The program doesn't come with any federal funding – so states need to be prepared with their own funding sources.

What advice would you give to States considering assumption?

- 404 should not be viewed as a pollution control program; –it's a resource protection program thus the state agencies looking to assume 404 need to be able to work with their fish and game departments as well as other resources agencies to protect the resource.
- It may be easier to assume 404 if the state has an existing regulatory program but it is not an absolute necessity. Going through the SPGP process could be a good stepping stone to assumption.

What advice would you give to States considering assumption?

- If a state is not already implementing a regulatory program, it needs to think through the stages of how to go from “zero” to assumption.
- If there is no pre-existing wetlands permitting program, use the federal program as a model in order to develop your program; this will put you in a much better position to pursue assumption.

What advice would you give to States considering assumption?

- Do not tie your program too closely to the federal program in terms of jurisdiction so that any loss in jurisdiction at the federal level doesn't limit your jurisdiction at the state level.
- Use the strengths of 404 but allow flexibility in your own program authority to provide additional protections.
- Starting a state program from scratch may actually make assumption easier; proving equivalency for an existing program can be time consuming.
- Work closely with EPA as you develop your assumption request.

Current Status in Oregon

- Gap analysis completed
- Statutory changes completed
- Facilitated conversations between DSL, EPA, NMFS, and USFWS on ESA coordination are concluded
- Reaching out to the Tribes to develop a cultural resource protection program
- Working with partner agencies to update MOA's for assumption.

Current Status in Alaska

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- 2013 Alaska Legislature authorized (SB 27) 404 evaluation
- Cooperative multi-agency MOU signed November 2013
- Preliminary investigations--
- Cost/Benefits to the State
- Regulatory and statutory needs
- Compensatory mitigation strategy
- Defining assumable Waters of the US (mapping)
- SPGP development
- Statewide Wetland Program Plan scheduled for completion 2015

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