

Department of State Lands
Oregon's 404 Assumption Efforts and Program Implications

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How Do State and Federal Regulatory Programs Compare?

Wetlands and waterways in Oregon are protected by both state and federal laws, but there are key substantive differences:

- The current state program operating under the state removal-fill law regulates both removal and fill activities in wetlands and waterways, and provides additional coverage for “gaps” in federal regulation such as isolated wetlands. The federal program regulates fill only.
- The state has a robust and flexible compensatory mitigation program.
- The state has a nationally recognized public information program that provides maps of wetlands (Local Wetlands Inventories) to assist in local planning, and many other educational opportunities and tools to help applicants comply with the law.
- The state's compliance and enforcement program for unauthorized activities gives the Department authority to resolve violations expeditiously with a variety of administrative remedies that may or may not involve the assessment of civil penalties.
- The US Army Corps of Engineers (Corps) administers federal permitting program under Section 404 of the federal Clean Water Act (CWA) and Section 10 of the Rivers and Harbors Act (Section 10) but the US Environmental Protection Agency (EPA) has the lead for enforcement.
- EPA can assess much larger penalties than the state, but EPA has limited enforcement staff in Oregon to accomplish this work.

What Does 404 Assumption Mean?

The federal CWA 404 Program would be transferred to the State of Oregon by the EPA. If the state assumes the 404 program, only a state permit will be required in waters subject to 404 jurisdiction, which includes most wetlands. Applicants would still need permits from both DSL and the Corps in federally navigable rivers, harbors and bays subject to Section 10 of the Rivers and Harbors Act.

Any state that seeks to have the 404 program transferred must submit to the EPA the following supporting documents:

- A letter from the Governor of the State of Oregon requesting program approval
- A complete program description of how the state regulates its wetlands and waterways
- A state Attorney General's statement confirming the equivalency of the state program equivalency to the federal program
- A Memorandum of Agreement with the EPA Region 10 Administrator in Seattle
- A Memorandum of Agreement with the Portland District Corps of Engineers
- Copies of all applicable state statutes, regulations and administrative procedures

History and Background of 404 Assumption in Oregon

Oregon has long had an interest in 404 assumption. The most recent effort, conducted by the Department between 1995 and 2005, resulted in the submission in December 1995 of a complete draft application package to the EPA with all the documents listed above. During the same period the Department conducted a considerable amount of 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 or federal permitting program, the public would choose the state program.

The Department also initiated EPA-required legislative changes to the Removal-Fill Law (SB 172--2001 Legislative Session). However, the legislative changes enacted by SB 172 are operative only upon further legislative approval (see section 11, chapter 516, Oregon Laws 2001).

To date the Department has not requested such approval due in large part to federal Endangered Species Act (ESA) compliance. Up until now EPA needed to consult at the time of program transfer with the US Fish and Wildlife Service and the National Marine Fisheries Service. In light of the state's experience in consulting on the SPGP (discussed below under Other Efforts to Streamline State and Federal Permitting) DSL concluded that consultation on the federal 404 program would have made it difficult or impossible for the state to administer the program. EPA has since determined that such consultation is not required.

New Developments in 404 Assumption since 2005

On December 27, 2010, the EPA sent a letter to the Environmental Council of the States and the Association of State Wetland Managers stating that EPA would not need to conduct a consultation on the assumed program at the time of program transfer. In addition, EPA has further advised the Department that it will not consult on state-issued 404 permits. This means that non-federal applicants would not be able to use Section 7 of the ESA for compliance as there would be no "federal nexus," in other words; there is no federal lead agency. Non-federal applicants may elect to apply for a permit under Section 10 of the federal ESA for "incidental" take of listed species, or applicants can rely on take avoidance by complying with state permit conditions. Applicable programmatic consultations may also be followed to avoid take. EPA and the Department will be exploring this issue in more depth as part of the state's application process.

Other Efforts to Streamline State and Federal Permitting

In 2005, the Corps and the Department cooperated on streamlining the permit process with the implementation of the State Programmatic General Permit (SPGP). It became apparent the SPGP was too unwieldy due to federal Endangered Species Act consultation requirements. Other state-initiated streamlining has been more successful:

- Development of "The State Water-Related Permits User Guide" by the Water-Related Permit Process Improvement Team (WRPPIT) in 2008
- Major revisions to Division 85 Oregon Administrative Rules governing removal-fill permits, which simplified language while preserving statutory requirements (2009)
- Exemption from regulation of several voluntary habitat restoration activities (2010)
- Conversion of the Department's general authorizations (GAs) to notice-based verifications and alignment of the GAs with the Corps' Nationwide Permit Program
- Publishing the Removal-Fill Guide (RFG) designed to help applicants better understand the permit process (2011)

Differences between the State and Federal Permitting Timelines

The Department issues four types of authorizations:

- Individual Permits are decided in 120-days
- General Permits are decided in 40-days
- General Authorization notices are reviewed in 30-days
- Emergency Permits can be issued immediately.

The Corps issues the following:

- Individual Permits are decided in 120-180 days
- Regional General Permit time frames vary
- Nationwide Permits are issued faster than any other type
- No Emergency Permits are issued

There are ancillary federal process steps that can add many months to the Corps' permit (not needed under 404 assumption--but compliance with all applicable laws are still required):

- Section 7 of the ESA
- Section 106 of the National Historic Preservation Act
- National Environmental Policy Act (not applicable to state permits)
- Department of Environmental Quality Section 401 water quality certification
- Department of Land Conservation and Development Coastal Zone consistency determination

Bottom Line

- State assumption of the 404 program means only a state permit would be needed in Section 404 waters, which includes most wetlands.
- Applicants would assume responsibility for federal ESA compliance.
- An assumed state 404 program would continue to maintain state water quality standards, Coastal Zone Management consistency, and cultural and historic resources coordination, eliminating the need for redundant federal permit processing steps.
- DSL could opt out of regulating federally navigable rivers, harbors and bays subject to Section 10 of the Rivers and Harbors Act, or it could decide to keep regulating activities in those waters. Opting out would reduce DSL workload and reduce duplication. The Department is currently evaluating the pros and cons of opting out.

Additional Information:

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EPA 404 Assumption: <http://www.epa.gov/owow/wetlands/facts/fact23.html>