

404 Assumption Advisory Committee Meeting

January 31, 2012
Department of State Lands
Salem, Oregon

Meeting Minutes

Presenters/technical advisors: Louise Solliday, DSL Director; Bill Ryan, Assistant Director, DSL Wetlands and Waterways Conservation Division; Eric Metz, DSL Southern Region Removal-Fill Program Manager and 404 Assumption Project Manager; Kirk Jarvie, DSL Regional Solutions Team Liaison; Kate Kelly, Director, Office of Ecosystems, Tribal & Public Affairs, Region 10 Environmental Protection Agency; Michael Szerlog, Aquatic Resources Unit, Region 10 EPA; and Yvonne Vallette, Aquatic Ecologist, Region 10 EPA.

Attendees

At 1:05 p.m., DSL Director Louise Solliday welcomed everyone to the meeting, and thanked them for offering their time to help the department work on the issue of assuming the federal 404 program. Self-introductions were made, and Louise reviewed the meeting agenda. She stressed that this is the start of a conversation, and that DSL has not decided one way or the other about pursuing assumption.

Louise explained that the role of the committee is: 1) to provide a “go or no-go” recommendation to the state on assuming the 404 program; and 2) provide input to DSL if the decision is to go forward with assumption. Reaching complete consensus on the next steps, including 2013 legislative actions, is a desirable outcome, but we realize that this may not be possible on all issues.

History of 404 Assumption:

Louise briefly described the history of the state’s interest in 404 assumption, which started in 1982:

- The 1985 Oregon Legislature made statutory changes that would allow the department to assume the 404 program.
- In 1995, DSL prepared a complete package for assumption, but for a variety of reasons, mainly focusing on Endangered Species Act consultation, the state did not pursue it.
- Work then began on developing a Statewide Programmatic General Permit (SPGP), which was finalized in 2005, but subsequently abandoned due to the difficulty of implementing ESA consultation with a streamlined permit process.
- The 2001 legislature passed legislation needed to implement 404 assumption, with the understanding that further legislative approval would be needed for implementation. If the state decides to pursue assumption, this “second set” of removal-fill statutes could take effect with legislative approval.

Because of this history of stops and starts, and much work over 30 years, Louise said DSL has been very cautious about pursuing 404 assumption again. However, recent conversations with the EPA related to ESA consultation have been encouraging. Since the EPA does not need to consult with the USFWS and NMFS at the time of program transfer, Louise thinks we now may be able to reach a workable solution to streamline the removal-fill permit process in Oregon without compromising environmental standards. Her primary goal is to design a process that is good for customers, good for the environment, and good for the regulatory agencies. Yvonne Vallette from the EPA said it is likely

that some type of “hybrid” ESA consultation model will be developed. Louise said her goal is to ensure permittees that once they’ve received a permit from DSL; they will not need further consultation.

There were many questions from the committee regarding budget issues; how state assumption will affect the U.S. Army Corps of Engineers’ permit program; and what waters would be regulated by the state and what would be regulated by the Corps. Louise pointed out that since we do not know exactly what will be pursued, it is impossible to establish a budget projection. Bill Ryan said he is working with the Corps to get a definitive list of Section 10 waters (federally navigable rivers, harbors and bays) to identify which ones would be exempt from state assumption.

404 Assumption – EPA Presentation: Yvonne Vallette gave a PowerPoint presentation that included:

Advancements in Oregon’s removal-fill program, and state alignments with the federal 404 program since the 1980s:

- Steps in the assumption approval process
- EPA and Corps roles in oversight and administration
- The permit process in state-assumed programs and EPA’s oversight role
- The permit process once assumed

There were many questions and concerns brought up by committee members, including:

- What are Section 10 “adjacent wetlands” and how are they defined?
- What agency would regulate which waters?
- Why weren’t the federal agencies invited to be part of the committee and to attend the meeting?
- Does the EPA have more political clout than DSL with the National Marine Fisheries Service? What happens when there is a disagreement over an ESA-related decision?
- What are New Jersey’s and Michigan’s biggest challenges with their assumption oversight? Note: New Jersey assumed the 404 program in 1994 and Michigan in 1984. They are the only two states who have assumed the federal program.
- How many more people will DSL need, and what are the costs to implement the 404 program?
- What is the current funding for the removal-fill permit program? Note: Louise said the total program costs are about \$5 million: 20% from permit fees and 80% from Common School Fund revenue.
- Are there opportunities to receive funds from the Corps if Oregon assumes the 404 program?
- Would the state program be stable, and could the state continue the program in this budget climate?

Michael Szerlog from the EPA said they would put together a fact sheet on what has worked well and what has been a challenge for New Jersey and Michigan. It also was suggested that it would be very helpful for the committee members to see a diagram or description of efficiencies that would be gained under state 404 assumption compared to how the process works now – a “compare and contrast” document taking people through what an applicant has to do now vs. what would be improved under 404 assumption.

Bill Ryan reiterated that the overall goal of state assumption is for the state to meet federal standards. It is *not* to relax environmental protections, but to make the permit process easier to navigate for applicants – i.e., to eliminate the need for project proponents to get two permits for the same water impacts.

There was quite a bit of discussion about who would regulate what – i.e., should the program be moved to DEQ, or should the Corps only regulate Section 10 waters, and the state regulate everything else, or should the state get out of the removal-fill regulatory business? Bill said there are many scenarios that could work, and the role of this committee is to help determine what will work best, including making no changes to the current processes.

The state's perspective: Bill provided additional information on why it makes sense for the state to assume the 404 program: it doesn't make sense for two agencies to regulate the same thing; DSL has better local connections; streamlining supports government efficiency goals; DSL already aligns its process and standards with the Corps; Oregon has 30 years of experience in working on 404 assumption and can build on that. He also said the main challenges are:

- 1) Complying with ESA consultation;
- 2) Funding; because there likely will not be additional funding available, the state needs to make sure we can successfully take on the program with no additional resources; and
- 3) Legislative approval.

Yvonne and other speakers indicated there will be much more work done to flesh out answers to many questions, and that DSL has set up a Web page which will accommodate additional information and meeting materials: http://oregonstatelands.us/DSL/PERMITS/404_assumption.shtml .

Bill went over the proposed timeline, which includes both a legislative timeline and a schedule for submitting the state application to the EPA. Many people commented that it is a very aggressive timeline, and if we don't know yet if the state will be submitting an application, why are we thinking of pursuing legislative action in 2012/2013 Louise responded that if DSL wants to submit legislation for the 2013 session, we must have a concept developed by April of this year. The governor needs to pre-session file the bill by December 2012. There are also other options for introducing legislation besides an agency-sponsored bill. Louise also said we can pull a bill from consideration at any time during the process and during the legislative session, and noted that with annual legislative sessions, we could target the 2014 session if we can't meet the 2013 timeline.

What agency should house an assumed 404 program? Louise said she has had discussions with DEQ director Dick Pedersen about the best place to house the state's removal-fill program – is DEQ a better fit? Her main priority is to make the program work, and if it involves moving it out of DSL that is what should be done. She noted the governor has not weighed in on the discussion yet. Many questions surfaced regarding such a move, including:

- DSL and DEQ statutes would have to be changed to accommodate the change in oversight of the permit program.
- Will Oregon ultimately have a dually regulated program (Corps and state); just Corps for some waters and just state for others; no state program; or some other combination?
- It would be good to have a comparison of programs in other states to see what works and what doesn't, and how they are structured.
- The Association of State Wetland Managers has a survey of state programs that will be shared with the group.
- A step-by-step comparison of efficiencies under assumption and how consultation would or could work would help determine if it's worth it to go forward with assumption.
- The Corps needs to be at the table.
- Regulatory streamlining must be viewed from the applicant's perspective as well as the regulators.
- The environmental community is concerned that streamlining equates to backsliding on environmental protections.

- There are concerns about funding: how would DEQ get funds for the program? Also concerns about an over-reliance on fees to cover program costs, and concerns about Common School Funds paying for the program.

Next Steps: Eric Metz, DSL's project manager on 404 assumption, went over proposed dates for the next meetings, and described how they will work: small groups will meet for the first two hours, then present their recommendations in the next two hours. All meetings will have specific topics to be determined beforehand, and will be held from 1:00 – 5:00 p.m. Proposed dates are: March 1, April 5, May 3, June 7, August 2, September 6, and October 4. Eric asked for a show of hands for how many people would commit to the timeline, and most raised their hands.

Eric reminded people to check out the Web page on 404 assumption planning: http://oregonstatelands.us/DSL/PERMITS/404_assumption.shtml. Meeting documents and other background information will be posted there on a regular basis.

The meeting adjourned at 3:10 p.m. Several people stayed afterwards to ask further questions of the panel.

Minutes taken by Julie Curtis, DSL Communications Manager