# Partial 404 Assumption
# Legislative Update

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*Oregon Department of State Lands*

**PARTIAL 404 ASSUMPTION LEGISLATIVE UPDATE**
December 2020

**Project Team**

Bill Ryan, Deputy Director
Eric Metz, Senior Policy and Legislative Analyst/Project Manager
Meliah Masiba, Senior Policy and Legislative Analyst
Barbara Poage, 404 Assumption Program Analyst
Andrea Celentano, Policy and Legislative Analyst
Michele Weaver, ODFW ESA Liaison

**Contact**

Bill Ryan, Deputy Director
Oregon Department of State Lands
bill.ryan@dsl.state.or.us

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**APPENDICES**

## ACRONYMS FOR 404 ASSUMPTION REPORT

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| **ACHP** | Advisory Council on Historic Preservation |
| **AARP** | Advanced Aquatic Resource Protection Plan |
| **ASWM** | Association of State Wetland Managers |
| **BA** | Biological Assessment |
| **BO** | Biological Opinion |
| **Corps** | US Army Corps of Engineers |
| **CWA** | Clean Water Act |
| **CZMA** | Federal Coastal Zone Management Act |
| **DEP** | Florida Department of Environmental Protection |
| **DEQ** | Oregon Department of Environmental Quality |
| **DLCD** | Oregon Department of Land Conservation and Development |
| **DOGAMI** | Oregon Department of Geology and Mineral Industries |
| **DSL** | Oregon Department of State Lands |
| **EGLE** | Michigan Environment, Great Lakes and Energy |
| **EPA** | US Environmental Protection Agency |
| **ESA** | Endangered Species Act |
| **HAGLU** | House Agriculture and Land Use Committee |
| **HB** | House Bill |
| **LD** | Limited Duration |
| **MOA** | Memorandum of Agreement |
| **NACEPT** | National Advisory Council for Environmental Policy and Technology |
| **NEPA** | National Environmental Policy Act |
| **NHPA** | National Historic Preservation Act |
| **NMFS** | National Marine Fisheries Service |
| **NOAA** | National Oceanic and Atmospheric Administration |
| **NRS** | Natural Resource Specialist |
| **NWP** | Nationwide Permit |
| **ODFW** | Oregon Department of Fish and Wildlife |
| **SHPO** | Oregon State Historic Preservation Office |
| **SLOPES** | Standard Local Operating Procedures for Endangered Species |
| **SME** | Subject Matter Expert |
| **The Services** | US Fish and Wildlife Service and National Marine Fisheries Service |
| **UGBs** | Urban Growth Boundaries |
| **USFWS** | US Fish and Wildlife Service |

**EXECUTIVE SUMMARY**

In Oregon, most projects that involve earthmoving or discharge of material in wetlands, rivers, and lakes require permits from the US Army Corps of Engineers (Corps) to comply with Section 404 of the Clean Water Act (CWA) and also a permit from the Oregon Department of State Lands (DSL) under Oregon's Removal Fill Law. This dual permitting process has been identified as costly and inefficient by applicants. Section 404(g) of the Clean Water Act gives states and Tribes the option of assuming, or taking over, the permitting responsibility and administration of the Section 404 permit program for certain waters. An assumed program must be consistent with and no less stringent than the requirements of the Clean Water Act and associated regulations. A 2018 Legislative Working Group was convened which recommended the state explore the possible streamlining benefits of partial 404 assumption.

Through the enactment of HB 2436 (Chapter 652, Oregon Laws 2019) (Appendix A) the Legislature directed DSL to study partial 404 assumption, limited to certain activities and geographic areas, as follows:

> *(4) The proposal shall include provisions necessary for the Department of State Lands to assume authority to administer permits for the discharge of dredge or fill materials under Section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended) only for:*
>
> *(a) Development activities within an acknowledged urban growth boundary;*
> *(b) Mining and activities associated with mining; and*
> *(c) The creation and operation of mitigation banks.*

HB 2436 directed DSL to submit recommendations for statutory changes needed to support partial assumption for consideration in advance of the 2020 session of the Oregon Legislature. DSL's ability to put forward recommended statutory changes is dependent on Environmental Protection Agency (EPA)'s release of the revised 404 assumption rule, known as the CWA 404(g)

rule. At this writing, the rule is still pending, and it is unknown if partial assumption will be allowed.

DSL convened a workgroup to help answer the overarching question of, *would partial assumption of Section 404 of the federal CWA result in streamlining, efficiency, predictability, and improved customer service without compromising resource protection?* From this workgroup process, a considerable amount of new information has been identified. This report highlights the further exploration and additional stakeholder and tribal input received from December 2019-December 2020.

As noted above, a state assumed program must be no less stringent than the CWA and associated regulations. This is known unofficially as the "equivalence" standard. The CWA specifies the components required of a state assumed program to demonstrate equivalent protection of wetlands and other waters. However, there are other federal protections and processes that are triggered by a federal 404 permit action that are not triggered by a state assumed 404 permit. The absence of these federal protections under a state assumed 404 program has been identified as a significant concern by workgroup members as described below.

Outside of specific statutory changes that would be needed to move forward with partial 404 assumption, this report outlines the work that has been done, discusses barriers that remain, and suggests possible solutions.

**Key Summary of Findings**

**Benefits**

- Partial assumption would remove some existing barriers to economic development opportunities in Oregon (e.g., commercial, residential, and industrial development) within Urban Growth Boundaries (UGBs).
- Applicants (development) would benefit from having one regulatory entity rather than two, including greater certainty regarding scope and schedule of regulatory review and permit conditions.
- Local governments would be able to work in partnership with the state to conduct advanced aquatic resource planning to further streamline development permitting processes at the local level.
- State regulations regarding protections of water have historically been more consistent than federal regulations, so applicants would have more certainty regarding permit requirements and processes.
- More local control and accessibility. As a state agency, DSL staff are more accountable and accessible to Oregonians than federal agencies.
- A state assumed program would have greater flexibility and opportunity to improve processes, because the program would not need to be consistent across 50 states as the Corps program must.

**Issues with a Clearer Path Forward**

- Assumable vs. Retained Waters: DSL and the Portland District Corps have reached an informal understanding of the general extent of what waters are assumable by the state and which waters would be retained by the federal government. A map is available on DSL's website: https://maps.dsl.state.or.us/404Assumption/
- Endangered Species Act Compliance: Due to a 2020 decision by EPA (Appendix F), a Section 7 consultation would be part of EPA's potential approval of Oregon's 404 assumption program and would include a biological opinion and an incidental take permit. DSL with assistance from Oregon Department of Fish and Wildlife (ODFW) would develop an ESA process that is consistent with, and no less protective than, the requirements outlined in the CWA currently implemented and administered by the Corps.

**Key Issues from Loss of a Federal Nexus (state issued permit instead of a federal permit)**

- National Environmental Policy Act (NEPA): A state 404 permit would not trigger a federal NEPA process, and Oregon has no state equivalent to NEPA. NEPA review requires a broader review of environmental impacts than is currently considered by DSL. To mitigate this, the Legislature could choose to broaden the factors DSL considers in making permit decisions through statutory changes to ORS 196. Rulemaking may also be needed to expand the information that DSL requires and evaluates. The Legislature may also consider making changes beyond ORS 196 to address environmental issues beyond the Removal Fill Law. This could include developing a State equivalent to NEPA.
- National Historic Preservation Act (NHPA) Section 106: DSL currently has no authority to review and condition permits to protect cultural and historic resources. It would take legislation to grant authority to DSL or other state agencies to develop a program equivalent to Section 106 of the federal NHPA. To help resolve this issue at the federal level, EPA is willing to initiate consultation under Section 106.
- Tribal Treaty Rights: Through treaties with the federal government, some Tribes within Oregon reserved in perpetuity certain pre-existing rights such as fishing at all usual and accustomed fishing areas, and they retained rights to hunt, gather, and graze on unclaimed lands. Without a federal permitting nexus, the treaties would not be enforceable. The Oregon Department of Justice (DOJ) has identified legislation and rulemaking as possible ways to mitigate this issue.
- Federal Trust Responsibility: There is a federal legal obligation owed to all Tribes (both those with and without treaties) by federal agencies in conducting any action which may impact rights and resources of Indian Tribes. This is a fiduciary duty of the United States that cannot be waived or delegated and involves upholding all legal obligations to the Tribes whether they involve those rights under treaty, statute, regulation, executive order, court order, or any other legal authority. Under the existing 404 permitting system, the Corps implements this obligation to uphold the Trust Responsibility in their regulatory process. DSL acknowledges the fiduciary duty that the federal government

owes to federally recognized Tribes with respect to rights and resources held in trust. As part of an initiative for partial assumption of the Section 404 program, DSL would examine legislation and rulemaking to address tribal rights and resources held in trust.

**Lack of a Federal Nexus Affects Other State Authorities**

- Federal Preemption: Certain federal regulatory authorities, for example the Federal Energy Regulatory Commission (FERC), have the authority to preempt local regulations under certain conditions. In Oregon, Coastal Zone Management Act federal consistency review conducted by the Department of Land Conservation and Development (DLCD) and 401 Water Quality Certifications issued by the Department of Environmental Quality (DEQ) are both federal processes implemented by state authorities and cannot be federally preempted. When 404 authority is assumed, the state loses the required federal nexus, and therefore neither DLCD nor DEQ would be able to stop an energy project regulated by the Federal Energy Regulatory Commission should FERC decide to preempt local regulations.
- Coastal Zone Management Act (CZMA): During the workgroup process DLCD identified issues outside of federal preemption, including concerns with federal consistency determinations under the Oregon Coastal Management Program (OCMP). DLCD provided written comments to DSL describing different options for moving forward. Options include:
    - Creation of a state level consistency process.
    - Proceeding with partial assumption with specific exclusions in the coastal zone.
    - Excluding the coastal zone from the proposed partial assumption.
    - Asking EPA to coordinate with NOAA to allow states to maintain existing authorities.
- State 401 Water Quality Certification: Per Section 401 of the CWA, DEQ reviews 404 permits to ensure the discharge of material into waters of the U.S. meets state water quality standards. DEQ is already working on a parallel process for 401 certification due to the recent retraction by the Trump administration of “waters of the United States” jurisdiction and the charge of Oregon HB 2250 (2019) to maintain water quality protections.

**Resource Needs**

DSL estimates the following resource needs (see 404 assumption table in Appendix M):

- To continue work to address remaining issues and prepare a 404 assumption package - $920,072. This includes:
    - Three (3) Natural Resource Specialist (NRS) 4 limited duration positions (program manager, ESA specialist, cultural resources specialist) for two years ($620,072); and

- Funding to hire a consultant to prepare a biological assessment ($300,000).

- For implementation and operation of an assumed program - $1,705,183 per biennium. This includes seven (7) technical staff (includes the three NRS 4's plus four additional NRS 3 permit coordinators) and an additional two (2) administrative support staff.

Depending on 404 program design and how remaining issues are addressed, it is possible that other state agencies (DLCD and DEQ) may also need additional resources. Discussion of estimated costs to DSL and possible costs to other agencies are discussed later in the report.

## WORKGROUP PROCESS (OCTOBER 2019-DECEMBER 2020)

From October 2019 to December 2020, the Department convened monthly meetings to explore partial assumption. Regular attendees include representatives from the federally recognized Tribes in Oregon, local governments, state and federal agencies, environmental and conservation organizations, professional associations representing development, agricultural and mining interests, Oregon mitigation bankers, private environmental consultants, public utilities, the League of Women Voters, and special districts. Stakeholders and Tribes who participated in the workgroup and interested parties are listed in Appendix B. Workgroup meetings were held on the first Wednesday of every month and were facilitated by DSL staff. The meetings have been well attended by 30-40 people out of roster of approximately 100. Meeting recordings and notes are available on the Department's website: https://www.oregon.gov/dsl/WW/Pages/404PermitAuthority.aspx

### Summary of Workgroup Feedback and Interests

The following is a summary of comments and feedback received from workgroup members. For detailed comments see Appendices N through Q.

Development consultants and representatives of mining and industries believe the benefits of partial assumption would include: 1) less risk because the developer would only need to deal with one permitting agency rather than two; 2) lower costs, as the developer would only have to go through one application process rather than two; and 3) a quicker response time, which would be an additional cost savings. All these aspects would enable developers to market their properties at more affordable prices, especially in the smaller Willamette Valley cities. Affordable and readily available supplies of land and construction materials for homes, roads, bridges, and highways are necessary, in their view, and lead to quality infrastructure and housing.

Local governments in the southern Willamette Valley expressed a need for greater regulatory certainty due to the high percentage of wetlands in their UGBs. Some city-members of the Cascades West Council of Governments, specifically, Adair Village and Harrisburg, stated that their city would rather deal with one, rather than two regulatory agencies. As the central

coordinating agency for wetland permits, those cities believe that DSL would offer "one stop shopping" for needed regulatory approvals, and thus create more certainty, long term, for advanced planning.

Tribal governments and some environmental groups have asked, *why should the state greatly expand its capacity when it already exists at the federal level?* They are concerned with the high cost of assuming the 404 program and lack of federal funding to support assumption. They also raised concerns about the risks of giving up federal programs that have a long track record of effectiveness including Section 7 under the ESA, NEPA, Section 106 of NHPA consultation, DEQ-issued 401 Water Quality Certifications, and DLCD's Federal Coastal Consistency Authority in the coastal zone.

Tribes also highlighted the loss of the federal nexus that results from the Corps issuing a permit as reducing their ability to engage in the permitting process. A state-issued 404 permit severs their ability to hold the federal government accountable for honoring tribal treaty rights and for honoring the federal government's trust responsibility to the Tribes. The Tribes point out that the trust responsibility is a fiduciary duty of the United States that cannot be waived or delegated to a state. It involves upholding all legal obligations to the Tribes whether they involve those rights under treaty, statute, regulation, executive order, court order, or any other legal authority.

There is no consensus in the 2019-2020 workgroup, either for or against partial assumption. There is consensus that barriers still exist. DSL has recommended that workgroup members submit written testimony to the House Agriculture and Land Use Committee (the Committee). If the Legislature directs DSL to proceed with partial assumption, DSL will continue to work to resolve the issues that remain.

**BACKGROUND TO CURRENT 404 ASSUMPTION ANALYSIS**

Under the federal CWA, states may seek to implement a state-equivalent Section 404 program that governs discharges in wetlands and other waters. Unless a state assumes CWA § 404, the Corps regulates those waters and reviews the related permits at the federal level. State assumption of the 404 program allows a state or Tribe to regulate those waters—including streams and wetlands—and assume the jurisdictional responsibility to condition, approve, or deny permits for Section 404-regulated discharges, rather than the Corps. EPA must determine that the state's program provides protections to waters that are at least equivalent to the protections provided by the 404 program. Where a state or tribal 404 program is approved by the EPA, the Corps suspends processing of 404 permits and the state permit provides the necessary authorization under Section 404. While Section 404 is often described as a wetlands program, it applies to all federal waters, including assumable streams and rivers. Non-assumable waters that the Corps retains include Section 10 Rivers and Harbors Act navigable waters, waters subject to the ebb and flow of tide shoreward to their mean high-water mark, and wetlands adjacent to those waters.

See the Department of State Lands' on-line 404 map for a depiction of these assumable and non-assumable waters in Oregon: https://maps.dsl.state.or.us/404Assumption/

ORS 196.795 (Appendix C) Provides DSL with authority to pursue streamlining efforts, to

- Reduce paperwork
- Eliminate duplication
- Increase certainty
- Enhance resource protection

Statutory changes related to a potential 404 program were made in 1989[1] and 2001[2]. Neither change was incorporated into currently operative law. Instead, both changes are intended to become operative should the state request and EPA grant authority to DSL for 404 assumption, allowing the Department to administer permits for the discharge of dredged or fill material under Section 404 of the federal CWA.

Among the 404 assumption issues discussed by the 2018 Legislative Working Group, convened by the Committee, were the current dual permitting system and overlapping state and federal jurisdictions; timeline for potential assumption; state staffing capacity for ensuring ESA and NHPA compliance; and stakeholder desire to maintain existing removal-fill exemptions for farming, ranching, and forestry activities if the state were to assume.

The Legislative Working Group ultimately recommended "partial assumption" to establish a state-led process for obtaining 404 permits only in UGBs, or for specific activities (mining and mitigation banks). Included in the Working Group's definition of partial assumption were:

- Development activities within an acknowledged UGB. "Development activities" includes dredging, filling, grading, paving, excavating, and other activities related to man-made changes to improved or unimproved real estate (does not include farming, ranching, or forestry activities).
- Mining and activities associated with mining. "Mining and activities associated with mining" includes any activity involving extraction of material from the ground that is subject to regulation by the Oregon Department of Geology and Mineral Industries (DOGAMI), the processing or manufacturing of the materials, mining relocation activities, and voluntary restoration activities associated with a mining operation.
- The creation and operation of mitigation banks.

HB 2436 (2019) directed DSL to submit recommendations for statutory changes needed to support partial assumption for consideration in advance of the 2020 session of the Oregon Legislature. DSL's ability to put forward recommended statutory changes is dependent on EPA's

[1] Section 2, chapter 45, Oregon Laws 1989

[2] ORS 196.795 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 196 or any series therein by legislative action

release of the revised 404 assumption rule, known as the CWA 404(g) rule. At this writing, the rule is still pending, and it is unknown if partial assumption will be allowed.

Outside of specific statutory changes that would be needed to move forward with partial 404 assumption, this report describes the work that has been done, discusses barriers that remain, and suggests possible solutions. Due to the high level of staff effort needed to produce a complete 404 assumption application, the earliest that DSL could return to the Legislature with proposed statutory changes, would be the 2023 session.

**WOULD PARTIAL ASSUMPTION RESULT IN REGULATORY STREAMLINING?**

HB 2436 originated from a 2018 Working Group process that identified the current dual permitting process as costly to applicants. These costs were described as resulting from the delays and uncertainty that comes from being regulated by two separate entities with different timelines and processes. Once an assumed program is in place, the streamlined permitting process would benefit applicants as there would be one key regulatory entity rather that two, and greater certainty regarding scope and schedule of regulatory review and permit conditions. Partial assumption would remove some existing barriers to business opportunities in Oregon (e.g., commercial, residential, and industrial development) within UGBs and waters of the U.S. and state would still be protected through the Department's equivalent program.

DSL's rules allow local governments to make long range plans for development, mitigation, and protection of wetlands based on preliminary reviews of wetland jurisdiction, mitigation options and an alternatives analysis. An approved Advanced Aquatic Resource Plan (AARP) provides regulatory certainty from DSL by front-loading much of the environmental analysis up front, prior to an applicant coming to the Department. This significantly streamlines the permit process by reducing the amount of analysis required when an applicant with a specific development project comes to DSL. The Cascades West Council of Governments worked with DSL and the Corps to develop an AARP several years ago. Unfortunately, when the time came to finalize the agreement, the Corps decided to not issue a complementary federal programmatic approval process. This greatly reduced the value of the AARP because the front-loaded, streamlined regulatory approval process would only apply to DSL Removal Fill permits and not to Corps 404 permits. Under a state assumed 404 permit program, DSL could develop an AARP without the need for authorization from the Corps.

Certainty and predictability regarding permitting process, schedule, and conditions are of great value to permit applicants. While there have been changes to both federal and state regulations pertaining to wetlands and other waters over the decades, Oregon's regulations have historically been more consistent than federal regulations. Under an assumed program applicants would likely have more certainty over time regarding permit requirements and processes.

A state assumed program would also provide Oregonians with greater local control and accessibility. As employees of a state agency, DSL leadership and staff tend to be more accountable and accessible to local governments than their counterparts at the Corps. The state can also be more flexible and nimbler in addressing challenges and improving processes. When the EPA or Corps want to make a change, they must do so in the context of a nationwide program serving 50 states.

**Federal Oversight Provides A Safeguard to State Environmental Standards**

EPA has the authority to initiate formal state 404 program withdrawal proceedings should a state program be administered in a way that provides lesser protections than the federal CWA. Over the long term, policy at both the state and federal levels can shift towards decreased or increased protection of natural resources. EPA requires that environmental protections under a state assumed 404 program remain equivalent to or better than those in the existing CWA Section 404 program, so there is no reduction in resource program protection. State 404 programs are regularly evaluated by EPA to ensure standards are being met. See the Michigan discussion in "Other States," for an example of how this process has worked in Michigan.

**ASSUMABLE VS. RETAINED WATERS**

Non-assumable waters that the Corps would retain include Section 10 Rivers and Harbors Act navigable waters, and waters subject to the ebb and flow of tide shoreward to their mean high-water mark, including wetlands adjacent thereto (1,000-foot setback from either side of the channel). DSL and the Portland District Corps have reached an informal, working understanding of the general extent of assumable vs. retained waters. An on-line map on DSL's website shows the status (Appendix D): https://maps.dsl.state.or.us/404Assumption/

This is the first time DSL and the Corps have been able to reach any kind of agreement, and it is largely due to new federal policy issued by the Corps on July 30, 2018. This is another example of a major new policy shift in 404 assumption that has made it easier for states to assume. In 2015, EPA established the Assumable Waters Subcommittee within the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and develop recommendations regarding the meaning of Section 404(g) and thus the scope of waters and adjacent wetlands that may be assumed by a state or Tribe. The NACEPT Subcommittee issued a Final Report in May 2017. The Subcommittee report cited several possible reasons why so few states have assumed the Section 404 program, one of which was the difficulty in ascertaining those waters that are retained waters. The Subcommittee noted that this area of uncertainty has stifled the interests of several states in recent years.

EPA intends in its 404(g) rulemaking to address the Subcommittee report and clarify the waters for which a state or Tribe could assume responsibility as well as the procedures related to state assumption under Section 404(g) in a rulemaking process.

Additionally, in 2018, the Corps found that there was a need to clarify this issue and did not want the states to wait until the 404(g) rule was finalized. For this reason, R.D. James, Assistant Secretary of the Army (Civil Works) signed the memo and immediately enacted the policy change (see Appendix E) following the recommendations in the May 2017 NACEPT policy committee report.

**FEDERAL ENDANGERED SPECIES ACT COMPLIANCE (ESA)**

Due to a recent decision by EPA (Appendix F), the Section 7 consultation would be part of EPA's potential approval of Oregon's 404 assumption program and would include a biological opinion and an incidental take permit. DSL would develop an ESA compliance process in partnership with ODFW for state-404 permits that is consistent with and no less protective than the requirements outlined in the CWA and is currently implemented and administered by the Corps. Consultation would result in programmatic consultation documents (i.e., similar to the National Marine Fisheries Service Standard Local Operating Procedures for Endangered Species (SLOPES)) and individual consultations.

Once the 404(g) rule is finalized, and if the Legislature directs DSL to pursue 404 assumption, DSL and ODFW would start consulting with the US Fish and Wildlife Service and the National Marine Fisheries Service (Services) to begin the development of an ESA compliance program. DSL would prepare a biological assessment which will describe the potential actions of 404 assumption, evaluate the potential effects on ESA listed species and critical habitat, and describe the proposed ESA compliance program. EPA would then consult with the Services and the Services would issue a programmatic biological opinion (BO). The BO and incidental take statement will include the program requirements, terms, and conditions necessary to ensure the state program offers the same level of protections currently provided through the Corps 404 permitting program.

ODFW has also drafted a Memoranda of Agreement (MOA) to describe the potential agreement and working partnership between DSL, EPA, and the Services to process, review, and maintain ESA compliance with the Department's 404 permit program.

**NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)**

Oregon has no equivalent to NEPA. What Oregon does have is a set of 19 Statewide Land Use Planning Goals that apply to local and state agencies, administered under the overall guidance of DLCD. The goals express the state's policies on land use and related topics, like citizen involvement, housing, and natural resources. More information can be found here: https://www.oregon.gov/lcd/op/pages/goals.aspx.

Oregon's state level planning policies and environmental protections do not require DSL to considered all of the elements in a NEPA review. Specific concerns from stakeholders fall into

one of three categories: (1) the State's removal-fill law and the state land use planning laws do not cover the breadth of resource concerns that must be considered in a NEPA review (such as impacts to cultural resources), and NEPA reviews are project-specific and planning reviews are not; (2) a NEPA review is required to consider direct, indirect, and cumulative impacts, while the State's removal-fill law is less specific about consideration of indirect and cumulative impacts; and (3) NEPA provides an independent pathway for appeal to a federal court of a 404 permit decision in the event a party believes NEPA requirements are not being upheld.

The EPA does not require states that want to assume to have their own NEPA process. Workgroup members including Tribes and environmental organizations indicated that, without a state NEPA equivalent, 404 assumption would result in a reduction of environmental protections. To achieve NEPA equivalence for a DSL assumed 404 program, the factors DSL considers in making wetlands and waterways permit decisions could be broadened. This could consist of two parts: (1) statutory changes to include factors that DSL may not presently consider (such as cultural resources, or project-level impacts, rather than just removal-fill impacts); and (2) rulemaking to expand the information that DSL requires and evaluates, such as whether the proposed removal-fill "conforms to sound policies of conservation." Neither of these solutions change the fact that state 404 permits do not trigger NEPA but would support state equivalency and enhance resource protection.

Input received from Tribes and other Workgroup members, including the League of Women Voters, have indicated that they would consider the loss of NEPA reviews by the Corps to be a net lessening of environmental protections. To respond to this concern, the Legislature could consider creating a state policy equivalent to NEPA outside of ORS 196. As reported by the federal Council on Environmental Quality, twenty jurisdictions have established state or local NEPA-like environmental reviews, since NEPA was passed in 1969.

**SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT (NHPA)**

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires that federal agencies consider the effects of their undertakings on historic properties and afford the Advisory Council on Historic Preservation (ACHP) an opportunity to comment. Historic properties include prehistoric or historic sites, districts, buildings, structures, objects, landscapes, or properties of traditional religious or cultural importance listed on or eligible for listing on the National Register of Historic Places.

NHPA also requires that federal agencies consult with Indian Tribes when tribal cultural or historic resources may be adversely affected by agency actions. Section 106 requires federal agencies to consider the effects of federal undertakings on a Tribe's cultural resources and to consult with the affected Tribe regardless of the location of the historic property.

This review process requires government-to-government consultation with all Indian Tribes that attach cultural significance to historic properties. Section 106 review is an avenue to

identify historic properties potentially affected by an undertaking, assess its effects, and seek ways to avoid, minimize, or mitigate any adverse effects.

Under NHPA and Section 106, Tribes must be given a reasonable opportunity to identify their concerns and to participate in the resolution or mitigation of adverse effects from the project even if the agency fails to involve the Tribe on its own volition. Further, if an agency has not contacted an Indian Tribe for consultation the Tribe may directly request involvement as a consulting party.

Assumption of the 404 permitting process by the state would remove the federal nexus required to trigger the Section 106 process because, by definition, an action by DSL is not a federal undertaking as defined by the NHPA.

The state does have cultural resource laws These laws, as pointed out in detail in the 10/18/2019 letter from the Oregon SHPO, are not equivalent to federal law. Oregon's SHPO has also raised concerns about the scope of work that DSL and the state may need to take on if it assumes the program (Appendix G).

Outside of SHPO, review of DSL's removal-fill permit decisions takes place under Oregon's Administrative Procedures Act (ORS Chapter 183) and DSL's removal-fill statutes. ORS 196.835 provides:

> "Any person aggrieved or adversely affected by the grant of a permit by the Director of the Department of State Lands may file a written request for hearing with the director within 21 days after the date the permit was granted. If the director finds that the person making the written request has a legally protected interest which is adversely affected by the grant of the permit, the director shall set the matter down for hearing within 30 days after receipt of the request."

Federally recognized Tribes have previously participated in contested case proceedings pertaining to DSL's removal-fill permit decisions. For example, four federally recognized Tribes intervened in the contested case pertaining to the proposed Coyote Island coal terminal. To the extent that a federally recognized Tribe would prefer to see any aspect of DSL's contested case authority clarified to ensure a Tribe's ability to participate, DSL would examine rulemaking or statutory revisions as part of the effort to prepare a draft legislative concept to implement partial 404 assumption.

At the federal level, EPA sent a letter dated 8/24/2020 to The Honorable Aimee Jorjani, Chairman, Advisory Council on Historic Preservation (Appendix H), stating that it intended to initiate programmatic consultation pursuant to Section 106 of the NHPA on the State of Florida's Section 404 program request. Note that this is a recent change in policy for EPA and postdates the letter that Oregon SHPO sent to DSL on October 18, 2019. At the time that letter was received by DSL, there was no path for assuming states to comply with the NHPA.

EPA has now recognized that its approval of a state program would be a federal undertaking pursuant to the NHPA and implementing regulations. EPA anticipates inviting consultation with the Florida Department of Environmental Protection (DEP), the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, and the Parch Band of Creek Indians. EPA states that it anticipates developing a programmatic agreement, consistent with the Council's regulations.

If EPA chose to use the same process that they are currently using in Florida, EPA would invite consultation with the nine federally recognized Tribes in Oregon.

The outcome of EPA's consultation with the Council could result in a programmatic agreement but that is not certain. Once the process is complete, DSL would look to the Florida assumption effort as a potential model to address tribal concerns in Oregon.

Due to the complex and specialized issues around the NHPA, DSL believes the Department would need additional staff resources to continue to pursue partial 404 assumption. This would include a full time Oregon SHPO archeologist to participate in the consultation process, help develop DSL's program, and then provide on-going technical expertise to operate a 404 partial assumption program.

**TRIBAL TREATY RIGHTS, TRUST RESPONSIBILITY, AND SOVEREIGN IMMUNITY**

Through treaties with the federal government, some Tribes within Oregon reserved in perpetuity certain pre-existing rights such as fishing at all usual and accustomed fishing areas, and they retained rights to hunt, gather, and graze on unclaimed lands. Treaties also implicitly reserve water rights. Without a federal nexus, the treaties would not be enforceable regarding a state assumed 404 permit.

Separate but related to the duty to protect Treaty Rights is the Trust Responsibility, which is a federal legal obligation owed to all Tribes (both those with and without treaties) by federal agencies in conducting any action which may impact rights and resources of Indian Tribes. This is a fiduciary duty of the United States that cannot be waived or delegated and involves upholding all legal obligations to the Tribes whether they involve those rights under treaty, statute, regulation, executive order, court order, or any other legal authority. Under the existing 404 permitting system, the Corps implements this obligation to uphold the Trust Responsibility in their regulatory process.

DSL acknowledges the fiduciary duty that the federal government owes to federally recognized Tribes with respect to rights and resources held in trust.

Additionally, states, like Tribes, possess sovereign immunity from being sued, unless it is specifically waived. In the event the of a federally issued permit that violates the rights of a Tribe, the tribal government can sue the federal agency under the Administrative Procedures Act, a federal law that waives the sovereign immunity of the United States.

Note that currently there is no known solution for the loss of a federal nexus. The state cannot take the federal government's place in any legal agreements it has with the Tribes. There may be a case-by-case solution if EPA chooses to federalize a permit and the Corps would then issue that permit. This is not a programmatic solution and would only occur under extraordinary circumstances. The same applies to possible NEPA actions that the Corps may have taken, were the permit to be federal. If directed to continue partial 404 assumption efforts, DSL would examine legislation and rulemaking as means to address tribal rights and resources issues.

## LACK OF A FEDERAL NEXUS AFFECTS OTHER STATE AUTHORITIES

### Federal Preemption, Coastal Zone Management Act (CZMA), and CWA 401 Certifications

DLCD through the Oregon Coastal Management Program (OCMP) and DEQ are concerned that if Section 404 is assumed by the state, the federal government will be able to preempt or overrule state permits. Authorities granted under the CZMA and the CWA section 401 program are the only state authorizations that cannot be federally preempted under federal law.

DEQ is specifically concerned that if Section 404 is assumed by the state, the federal government will be able to preempt state permits and thereby limit the state's ability to protect water quality standards.

DLCD submitted a memo to DSL dated 9/3/2020 (Appendix I) outlining a preliminary assessment of partial 404 assumption on agency operations. The memo included recommendations from DLCD and recognition that continued discussion and coordination between DLCD and DSL will need to take place if 404 assumption efforts continue.

In addition to the issue of federal preemption, DLCD outlined issues with the OCMP and CZMA in relation to federal consistency determinations. DLCD stated that EPA's decision to approve or deny a state request to assume the Section 404 permit program requires EPA to prepare a consistency determination because state assumption of 404 would have reasonably foreseeable effects on the coastal resources within Oregon's coastal zone. DLCD will notify EPA and NOAA of its request for a consistency determination if assumption is anticipated to take place.

DSL 404 assumption may also limit the OCMP's ability to implement enforceable policies of the program (e.g., statewide planning goals, Oregon revised statutes, and local comprehensive plans and land use regulations). DLCD will need to coordinate with other networked agency partners to determine how this change may impact those agencies and their respective coastal policies and authorities

Options suggested by DLCD to resolve OCMP concerns include:

- Creation of a state consistency process.

- Proceeding with partial assumption with specific exclusions in the coastal zone.
- Exclusion of the coastal zone from the proposed assumption.
- Asking EPA to coordinate with NOAA to allow states to maintain existing authorities.

In the absence of an established 404 partial assumption programmatic description described by EPA, it is difficult to evaluate all potential implications of changes that may be necessary should the state continue to pursue partial assumption of the program. In a letter to DSL dated 10/29/20 (Appendix J), DEQ determined that at a minimum, a 404 partial assumption program would require DEQ administrative rule revisions. Depending on the design of an assumed program, it is also possible DLCD would need additional staff resources to support enhanced coordination under an assumed 404 program.

**EXPERIENCES OF OTHER STATES**

Only two state 404 programs currently exist - Michigan and New Jersey. Michigan assumed Section 404 permitting authority for inland waters and wetlands in 1984. New Jersey assumed the program in 1994. Based on long-term interactions between DSL staff and Michigan and New Jersey staff, DSL can report that both the New Jersey and Michigan programs have been and remain popular with permit applicants (Kim Fish, Michigan Environment, Great Lakes and Energy (EGLE); and Susan Lockwood, New Jersey Department of Environmental Protection, personal communication).

The national Association of State Wetland Mangers (ASWM) has held numerous webinars this past year on various 404-assumption topics. DSL has been one of the most active participants and presenters at these ASWM meetings and webinars. Other than Oregon, DSL is aware of two other states actively pursuing 404 assumption, Florida, and Minnesota.

**Florida:** In August 2020, the State of Florida submitted its complete application for full 404 Assumption to EPA. After making 404 Assumption one of the state's top priorities, Florida dedicated 3-5 full-time staff positions for three years to develop the state's application. The state will dedicate additional resources to implement the program.

**Michigan:** From 1984 up to about 1995, Michigan's program ran smoothly overall. Then conflicts arose concerning whether Michigan's regulatory laws were consistent with changes in the CWA and therefore continued to meet the equivalency standard.
In 1997, EPA received a request to review Michigan's 404 program from the Michigan Environmental Council, which EPA treated as a petition to withdraw the program approval. From 1997 to 2008, when it ultimately issued its report, EPA conducted a comprehensive review of the Michigan CWA 404 program. The report identified several deficiencies that EPA and Michigan intended to resolve. The report can be found here:
https://www.michigan.gov/documents/deq/wrd-epa-mi_558424_7.pdf

In 2011, the Michigan's Wetlands Advisory Council (WAC) prepared a summary of changes needed in the Michigan 404 program. For example, the scope of farming exemptions allowed under Michigan law were broader than under EPA's regulations at 40 CFR Part 232 Section 232.3. Other inconsistencies pertained to exemptions for road maintenance, pipeline maintenance, and the fact that Michigan allowed an exemption for construction of iron and copper mining tailings basins and water storage areas. No such exemptions exist under federal law. In August 2012, the WAC issued its final report unanimously recommending that Michigan retain its 404 program. More details about this process, and how Michigan funds its program, can be found here:
https://www.michigan.gov/egle/0,9429,7-135-3313_3687-229608--,00.html

Michigan's Legislature has made several changes since 2011, and EPA did not finish its review of Michigan's enabling legislation (Public Act 98--2013) until 2016. Here is the federal docket for that review (see also Appendix K):
https://www.regulations.gov/document?D=EPA-HQ-OW-2013-0710-0112

Not all, but most of the discrepancies, were rectified. As of the posting date of the EPA docket (Federal Register Number 2016-29888), fourteen provisions remained disapproved. The bottom line is that Michigan continues to operate an assumed program but has ongoing negotiations with EPA to maintain equivalence.

**Minnesota:** Minnesota is projecting that the earliest it will submit a complete application to EPA would be late 2021.

**New Jersey:** New Jersey built its wetland program with the intention to assume the 404 program. It took four years to accomplish this task and since then, New Jersey's program has remained in compliance with EPA's requirements.

## WHAT WILL 404 ASSUMPTION COST?

### Staffing Evaluation

To prepare a complete 404 assumption application and obtain Legislative approval to assume, DSL will need to prepare a comprehensive staffing elevation. This is a requirement in the 404-assumption application and necessary to prove to EPA that Oregon can successfully take on the program. DSL has prepared an initial evaluation based on the best available information and workgroup feedback. The biggest challenge in preparing this evaluation is that neither DSL nor the Corps track staff time in the processing of a permit, nor is time tracked on specific tasks. Absent this data, DSL must exercise best professional judgement based on decades of experience working in tandem with the Corps on wetland and waters regulation.

The Portland District Corps and DSL each have staff who review permit applications, verify jurisdictional delineations, conduct compliance and enforcement, and perform other functions.

During approximately the same time from 2017-2019 (state and federal fiscal years differ) the Corps processed approximately 705 permit applications under Section 404 and DSL processed approximately 759 removal-fill permit applications.

At this writing, the Corps has twenty-one (21) technical and management-level staff (Appendix L) who perform the work of the Regulatory Branch. DSL has twenty-three (23) technical and management-level staff (Appendix M) who perform the work for the Removal-Fill Program. The organizational structures are different; however, both programs are lean Adding any new work to either program would require additional staff.

To implement partial assumption, DSL will need to add federal ESA compliance and cultural resources coordination to its responsibilities. Due to their complexity, each of these program components will require a dedicated Subject Matter Expert (SME). There is also an administrative and management component to operating an assumed program. This will require a dedicated SME to lead the DSL 404 assumption program and coordinate with other state and federal agencies, especially EPA, which will provide on-going oversight for the life of the program. A total of three SMEs is estimated to be needed.

In addition to the three SME's, DSL estimates four additional permitting coordinators, and two support staff would be needed to support the increased workload. This would bring DSL's Removal-Fill Program staff total from 23 to a projected maximum of 30 (see Appendix M for a cost comparison).

**Estimate of Costs**

DSL estimates the following resource needs (see 404 assumption table in Appendix M):

- To continue work to address remaining issues and prepare a 404 assumption package - $920,072. This includes:
    - Three (3) Natural Resource Specialist (NRS) 4 limited duration positions (program manager, ESA specialist, cultural resources specialist) for two years ($620,072); and
    - Funding to hire a consultant to prepare a biological assessment ($300,000).

- For implementation and operation of an assumed program - $1,705,183 per biennium. This includes seven (7) technical staff (includes the three NRS 4's plus four additional NRS 3 permit coordinators) and an additional two (2) administrative support staff.

To help evaluate the full costs to the state, DSL reached out to the other natural resource agencies most likely to be affected by assumption of the 404 program: ODFW, SHPO, DLCD, DEQ and DOGAMI. In making budget projections of the total cost to the state of an assumed program, it is important to note that Oregon's networked natural resource agency-system of government, requires coordination among individual agencies. Budgeting is decentralized.

ODFW and SHPO responded that the specialist positions for ESA coordination and cultural resources that DSL has already identified would cover their needs. It is expected that DSL would enter into liaison agreements with these two agencies.

Without providing specific numbers at this time, DEQ responded that there are three factors to consider:

1. DEQ's immediate and near-term capacity is significantly limited as they engage in evaluation of other proposed programmatic changes. This compromises DEQ's ability to determine implications for how 401 Certification activities may need to be modified to accommodate state partial 404 assumption.
2. Temporary or limited-duration resource needs to ramp-up for 404-assumption implementation (e.g., rulemaking, policy development, one-time systems modifications, etc.), if/when decision is made to pursue this change.
3. The potential need for ongoing additional resources to manage modified workload under as assumed 404 program. DEQ cannot evaluate those potential resource needs until the program is more developed.

DLCD responded that there may be a need for both limited duration and new permanent positions to administer an alternative, state-based program, depending upon the option(s) selected. To determine the resource need, DSL needs to get back to DLCD on the questions raised in its letter and to initiate discussions between EPA and NOAA. If the Legislature directs DSL to continue pursuing assumption, it will work DEQ and DLCD to develop a detailed workplan so these agencies can quantify their staffing needs, with precision.

**ADDITIONAL CONSIDERATIONS**

The Corps Portland District and DSL have a good working relationship and have developed a shared standard permit form for individual permits. The Joint Permit Application (JPA) is successful and valued by applicants because it consolidates information on one form that both agencies accept. The state and federal joint general permit processes focused on a single activity (e.g., restoration) have also worked, when limited to a specific geographic area.

Another tool that DSL used on a trial basis, was a State Programmatic General Permit (SPGP). SPGP's are not a substitute for 404 assumption and they work best when limited to activities covered by the Corps' nationwide permit program (NWP). NWPs are focused, well defined, and limited in scope. Unlike 404 assumption, where the state is the administrator, an SPGP is a Corps permit, and the Corps makes the policy decisions about the scope and substance of the state's role.

There are some other Corps streamlining programs that can be used to help align with DSL's streamlining programs, e.g., Special Area Management Plans and associated General Permits. To date, those Corps tools have not been used in Oregon. One constraint is that neither the Corps nor DSL receive separate, dedicated funding to develop and implement streamlined

permitting options. The Corps Portland District is willing to consider such a program in the future, but only if the streamlined program will result in less Corps staff time being expended on permit reviews, thus recouping the cost by spending less staff time reviewing permit applications.

**CONCLUSION**

There is substantial overlap between the Department of State Lands Removal Fill and the U.S. Army Corps of Engineers CWA 404 permit programs protecting waters of the U.S. and State of Oregon. The federal CWA allows states to assume 404 permit responsibilities provided there is no reduction in protections of waters. Workgroup members representing local governments and development interests believe a state assumed 404 program would provide significant streamlining of the regulatory process and thereby facilitate economic development and provision of housing. There are other benefits which are listed under Key Summary of Findings. Workgroup members representing Tribes and conservation organizations are concerned that an assumed program would not provide the same level of protections as the current combined state and federal regulatory process. There are also concerns that the state will be taking on additional expense by performing analyses and coordination that are currently performed by the Corps.

As we head into the 2021 Legislative Session, there are still many issues to address. Achieving the goal of a streamlined removal-fill permitting process that will support economic development and affordable housing will require the investment of additional time and resources.

Recent changes in EPA and Corps policies have resulted in clearer paths to achieve equivalence to the CWA. These include conceptual agreement with the Corps Portland District regarding what waters are assumable and the willingness to use a predictable and mappable buffer distance to identify non-assumable "adjacent wetlands". These changes also include EPA's recent recognition of the need, when deciding whether to approve a state's 404 assumption application, to perform Section 7 consultation to obtain ESA compliance. That ESA consultation process would provide a much needed mechanism for state-issued permits to provide ESA coverage. EPA is also now consulting with the Advisory Council on Historic Preservation (Council) each time it reviews a state 404-assumption application. We anticipate that if Oregon applies, EPA will consult with the Council, Oregon's SHPO, DSL and the Oregon Tribes which should help to address concerns regarding cultural resources protections.

Protection of tribal interests was identified as a priority issue by the workgroup. Principal concerns include providing protections to cultural resources in the absence of a federal nexus triggering NHPA compliance, and the ability of the state to emulate or integrate similar or improved processes and protections that are available to Tribes because of their unique relationship with the federal government. The lack of a federal nexus providing authority to

other federal environmental programs implemented by the State is also an area of concern e.g., CWA 401 certification and CZMA consistency review.

There is also uncertainty regarding whether the EPA 404(g) rule, which is currently under review, will allow partial assumption as defined by Oregon. The draft 404(g) is anticipated to be released in the coming months. DSL will keep HAGLU appraised of key developments.

DSL will look to the Committee for additional direction on how to proceed.

# Enrolled
# House Bill 2436

Introduced and printed pursuant to House Rule 12.00. Presession filed (at the request of House Interim Committee on Agriculture and Natural Resources)

CHAPTER 000652

AN ACT

Relating to removal-fill laws; creating new provisions; amending ORS 196.643; and declaring an emergency.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1. (1) As used in this section:**

**(a)(A) "Development activities" includes dredging, filling, grading, paving, excavation and other activities related to making man-made changes to improved or unimproved real estate.**

**(B) "Development activities" does not include farming, ranching or forestry activities, or activities that would otherwise be considered development activities under subparagraph (A) of this paragraph if the activities are associated with:**

**(i) Farming, ranching or forestry activities; or**

**(ii) Activities by a district organized under ORS chapter 545, 547, 552, 553 or 554, including activities that occur outside the district's boundaries but that are related to the district's operations.**

**(b) "Mining and activities associated with mining" includes any activity involving extraction of materials from the ground that is subject to regulation by the State Department of Geology and Mineral Industries, the processing or manufacturing of the materials, mining reclamation activities and voluntary restoration activities associated with a mining operation.**

**(2) The Department of State Lands shall develop a proposal, including recommendations for legislation to be introduced during the 2020 regular session of the Legislative Assembly, for partial assumption by the department of the authority to administer permits for the discharge of dredge or fill materials under section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended).**

**(3) In developing the proposal, the Department of State Lands shall collaborate with the Department of Justice, the Department of Environmental Quality, the Department of Land Conservation and Development, the State Department of Fish and Wildlife, the State Department of Agriculture, the State Forestry Department, the State Department of Geology and Mineral Industries, the National Marine Fisheries Service, the United States Fish and Wildlife Service, the United States Environmental Protection Agency and representatives of any other state or federal agency as the Department of State Lands determines is necessary for developing the proposal in a manner that will satisfy federal and state legal requirements.**

**(4) The proposal shall include provisions necessary for the Department of State Lands to assume authority to administer permits for the discharge of dredge or fill materials under section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended) only for:**

**(a) Development activities within an acknowledged urban growth boundary;**

**(b) Mining and activities associated with mining; and**

**(c) The creation and operation of mitigation banks.**

**(5)(a) The proposal shall include:**

**(A) Recommendations, in both narrative form and in the form of requested draft statutory language, for the enactment of statutes, or for the amendment or repeal of ORS 196.600 to 196.905, section 2, chapter 45, Oregon Laws 1989, sections 1 to 14, chapter 516, Oregon Laws 2001, or any other statutes or session laws, as necessary to demonstrate that the statutory laws and regulations of the State of Oregon provide adequate legal authority for the state to receive a grant of authority from the United States Environmental Protection Agency to implement the program for partial assumption; and**

**(B) Any other provisions that the department determines are necessary to provide the Legislative Assembly the opportunity, during the 2020 regular session of the Legislative Assembly, to take all actions necessary to allow for the department to formally submit to the United States Environmental Protection Agency a complete application for partial assumption, such that the United States Environmental Protection Agency may have the opportunity to review and consider approval of the application before the convening of the 2021 regular session of the Legislative Assembly.**

**(b) The recommendations required under paragraph (a) of this subsection must include recommendations on the amendments to statutes and session laws necessary to ensure that, if any of the amendments to ORS 196.800, 196.810, 196.825, 196.850, 196.895, 196.905, 196.990, 390.835, 421.628 and 459.047 by sections 1 to 10, chapter 516, Oregon Laws 2001, or the repeal of section 2, chapter 45, Oregon Laws 1989, by section 13, chapter 516, Oregon Laws 2001, become operative, the operation will not result in permitting or regulatory requirements pursuant to ORS 196.600 to 196.905 on and after the operative date that exceed the permitting or regulatory requirements pursuant to ORS 196.600 to 196.905, as in effect on the effective date of this 2019 Act, for activities for which the Department of State Lands is not directed to propose assumption of authority to administer permits as described in subsection (4) of this section.**

**SECTION 2. Section 1 of this 2019 Act is repealed on January 2, 2021.**

**SECTION 3.** ORS 196.643 is amended to read:

196.643. (1) A person who provides off-site compensatory mitigation in order to comply with a condition imposed on a permit in accordance with ORS 196.825 (5), an authorization issued in accordance with ORS 196.800 to 196.905 or a resolution of a violation of ORS 196.800 to 196.905 may make a payment for credits to **an approved mitigation bank with available credits or to** the Oregon Removal-Fill Mitigation Fund. [*when:*]

[*(a) Credits from an approved mitigation bank are not available; or*]

[*(b)(A) Credits from an approved mitigation bank were not available in a region at the time the first payment for credits was made to the Oregon Removal-Fill Mitigation Fund; and*]

[*(B) The expenses associated with a Department of State Lands mitigation bank project in the region in accordance with this section and ORS 196.650 have not been fully recovered by the Department of State Lands.*]

(2) Any payments for off-site compensatory mitigation made to the Oregon Removal-Fill Mitigation Fund under subsection (1) of this section must be sufficient to cover the costs and expenses of land acquisition, project design and engineering, construction, planting, monitoring, maintenance, long-term management and protection activities, administration and other costs and expenses related to the off-site compensatory mitigation, which may vary depending on the region of this state where the off-site compensatory mitigation is conducted, and shall be calculated by the Department of State Lands as follows:

(a) If the off-site compensatory mitigation project and project costs and expenses are identified at the time of payment to the Oregon Removal-Fill Mitigation Fund, the department shall calculate the payment based on the actual costs and expenses of the off-site compensatory mitigation.

(b) If the off-site compensatory mitigation project and project costs and expenses are not identified at the time of payment to the Oregon Removal-Fill Mitigation Fund, the department shall calculate the payment based on the estimate of costs and expenses for off-site compensatory mitigation, as set forth in rules adopted by the department, for the region of this state where the department, to the greatest extent practicable, determines the off-site compensatory mitigation may be conducted.

(3) No later than December 1 of each year, the Director of the Department of State Lands shall submit to the Legislative Assembly and the State Land Board a detailed report that specifies:

(a) The costs and expenses related to off-site compensatory mitigation, including variations and trends in costs and expenses over time.

(b) Efforts undertaken by the department to reduce the costs and expenses specified in paragraph (a) of this subsection.

(c) Efforts undertaken by the department to improve efficiencies of the department related to off-site compensatory mitigation.

(d) The effectiveness of the July 2010 "Oregon Rapid Wetland Assessment Protocol" of the department in protecting the functions and values of wetlands through off-site compensatory mitigation.

**SECTION 4. Notwithstanding any other law limiting expenditures, the limitation on expenditures established by section 1 (1), chapter _____, Oregon Laws 2019 (Enrolled House Bill 5035), for the biennium beginning July 1, 2019, as the maximum limit for payment of expenses from fees, moneys or other revenues, including Miscellaneous Receipts, but excluding lottery funds, federal funds and funds described in section 2, chapter _____, Oregon Laws 2019 (Enrolled House Bill 5035), collected or received by the Department of State Lands, for Common School Fund programs, is increased by $355,776.**

**SECTION 5. This 2019 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect on its passage.**

**Passed by House June 30, 2019**

Timothy G. Sekerak, Chief Clerk of House

Tina Kotek, Speaker of House

**Passed by Senate June 30, 2019**

Peter Courtney, President of Senate

**Received by Governor:**

8:45 A.M., July 09, 2019

**Approved:**

9:18 A.M., August 9, 2019

Kate Brown, Governor

**Filed in Office of Secretary of State:**

8:21 A.M., August 12, 2019

Bev Clarno, Secretary of State

# 404 ASSUMPTION WORKGROUP ROSTER
# OCTOBER 2020

| NAME | AFFILIATION | PHONE | E-MAIL |
|---|---|---|---|
| **MEMBERS** | | | |
| BRIAN LATTA | CITY OF DALLAS | 503-831-3500 | BRIAN.LATTA@DALLASOR.GOV |
| PAT HARE | CITY OF ADAIR VILLAGE | 541-745-5507 | PAT.HARE@ADAIRVILLAGE.ORG |
| KAITLIN LOVELL, SCIENCE MANAGER | PORTLAND BUREAU OF ENVIRONMENTAL SERVICES | 503-823-7032 | KAITLIN.LOVELL@PORTLANDOREGON.GOV |
| JERRY SORTE | CITY OF CORVALLIS | 541-766-6416 | JERRY.SORTE@CORVALLISOREGON.GOV |
| SUSAN MORGAN, POLICY MANAGER, NATURAL RESOURCES & REVENUE | ASSOCIATION OF OREGON COUNTIES | 541-430-0004 (CELL) | SMORGAN@OREGONCOUNTIES.ORG |
| LAUREN SMITH, LEGISLATIVE AFFAIRS MANAGER | ASSOCIATION OF OREGON COUNTIES | 503-585-8351 | LSMITH@OREGONCOUNTIES.ORG |
| RICH ANGSTROM, PRESIDENT | OREGON CONCRETE & AGGREGATE PRODUCERS ASSOCIATION, INC | 503-588-2430 | RICH.ANGSTROM@OCAPA.NET |
| DAVE HUNNICUT, EXECUTIVE DIRECTOR | OREGONIANS IN ACTION | 503-620-0258 | DAVE@OIA.ORG |

| NAME | AFFILIATION | PHONE | E-MAIL |
|---|---|---|---|
| ELLEN MILLER, GOVERNMENT AFFAIRS ASSOCIATE | OREGON HOME BUILDERS ASSOCIATION | 503-378-9066 X 108 | ELLEN@OREGONHBA.COM |
| EVYAN JARVIS | OXLEY AND ASSOCIATES INC. | | EVYANJARVIS@OXLEYANDASSOCIATESINC.COM |
| MARY ANNE COOPER, PUBLIC POLICY COUNSEL | OREGON FARM BUREAU | 503-399-1701 | MARYANNE@OREGONFB.ORG |
| SAMANTHA BAYER, ASSOCIATE POLICY COUNSEL | OREGON FARM BUREAU | 503-399-1701 | SAMANTHA@OREGONFB.ORG |
| APRIL SNELL, EXECUTIVE DIRECTOR | OREGON WATER RESOURCES CONGRESS | 503-363-0121 | APRILS@OWRC.ORG |
| RAY FIORI | OREGON WETLANDS MITIGATION BANK | 541-760-1777 | RAYF@OREGON-WETLANDS.COM |
| JENNIE MORGAN, STORMWATER PROGRAM MANAGER | ROGUE VALLEY SEWER SERVICES | 541-779-4144 | JMORGAN@RVSS.US |
| JOHN VAN STAVEREN | PACIFIC HABITAT SERVICES, INC. | 503-570-0800 | JVS@PACIFICHABITAT.COM |
| JULIE WIRTH-MCGEE | AKS ENGINEERING & FORESTRY | 503.400.6028 EXT. 417 | WIRTHMCGEEJ@AKS-ENG.COM |
| EMMA CHAVEZ | OREGON CASCADES WEST COUNCIL OF GOVERNMENTS | 541-812-0849 | ECHAVEZ@OCWCOG.ORG |
| JUSTIN PETERSON | OREGON CASCADES WEST COUNCIL OF GOVERNMENTS | | JPETERSON@OCWCOG.ORG |
| HILARY NORTON | CITY OF HALSEY | | HILARY@CITYOFHALSEY.COM |

| NAME | AFFILIATION | PHONE | E-MAIL |
|---|---|---|---|
| PEGGY LYNCH | LEAGUE OF WOMEN VOTERS OF OREGON | 541-745--1025 | PEGGYLYNCHOR@GMAIL.COM |
| LAURA KENTNESSE | LEGISLATIVE POLICY & RESEARCH OFFICE (LPRO) ANALYST | 503-986-1731 | LAURA.KENTNESSE@OREGONLEGISLATURE.GOV |
| BOB SALLINGER, CONSERVATION DIRECTOR | PORTLAND AUDUBON | 503-380--9728 | BSALLINGER@AUDUBONPORTLAND.ORG |
| ANN WITSIL, INTERIM EXECUTIVE DIRECTOR | THE WETLANDS CONSERVANCY | 503-227-0778 | ANNWITSIL@WETLANDSCONSERVANCY.ORG |
| MAUREEN MINISTER | PORT OF PORTLAND | 503-415-6000 | MAUREEN.MINISTER@PORTOFPORTLAND.COM |
| MIKE ELIASON, GENERAL COUNSEL & DIRECTOR OF GOVERNMENT AFFAIRS | OREGON FORESTS AND INDUSTRY COUNCIL | | MIKE@OFIC.COM |
| MATT PAROULEK | PORT OF PORTLAND | | MATTHEW.PAROULEK@PORTOFPORTLAND.COM |
| IVO TRUMMER | PORT OF PORTLAND | 503-415-6018 | IVO.TRUMMER@PORTOFPORTLAND.COM |
| JIM MCCAULEY, LEGISLATIVE DIRECTOR | LEAGUE OF OREGON CITIES | 503-588-6550 | JMCCAULEY@ORCITIES.ORG |
| TRACY RUTTEN | LEAGUE OF OREGON CITIES | 503-588-6550 | TRUTTEN@ORCITIES.ORG |
| JON GERMOND | ODFW | 503-947-6088 | JON.P.GERMOND@STATE.OR.US |
| JOY VAUGHAN | ODFW | 503-947-6089 | JOY.R.VAUGHAN@STATE.OR.US |
| NANCY TAYLOR | ODFW | | NANCY.C.TAYLOR@STATE.OR.US |

| NAME | AFFILIATION | PHONE | E-MAIL |
|---|---|---|---|
| ANNALISA BHATIA | DEQ | 503-734-4080 | BHATIA.ANNALISA@DEQ.STATE.OR.US |
| SARA SLATER | DEQ | 541-633-2007 | SARA.SLATER@STATE.OR.US |
| RIAN VANDEN HOOFF | DEQ | 503-229-5988 | HOOFF.RIAN@DEQ.STATE.OR.US |
| STEVE MRAZIK | DEQ | 503-229-5379 | STEVE.MRAZIK@STATE.OR.US |
| VAUGHN BALZER | DOGAMI | 541-967-2082 | VAUGHN.BALZER@STATE.OR.US |
| MIKE POWERS | ODA | 503-986-4761 | MPOWERS@ODA.STATE.OR.US |
| JUDITH CALLENS | ODA | 503-986-4558 | JUDITH.H.CALLENS@STATE.OR.US |
| BRADLEY LIVINGSTON, WETLANDS PROGRAM COORDINATOR | ODOT | 503-986-3062 | BRADLEY.F.LIVINGSTON@ODOT.STATE.OR.US |
| JOHN RAASCH | ODOT | 541-986-3370 | JOHN.RAASCH@STATE.OR.US |
| HEATHER WADE | DLCD | 503-934-0400 | HEATHER.WADE@STATE.OR.US |
| DEANNA CARACCIOLO | DLCD | 503-934-0026 | DEANNA.CARACCIOLO@STATE.OR.US |
| PATTY SNOW, COASTAL PROGRAM MANAGER | DLCD | 503-934-0052 | PATTY.SNOW@STATE.OR.US |
| AMANDA PUNTON | DLCD | 971-673-0961 | AMANDA.PUNTON@STATE.OR.US |
| KEN YATES | OWRC | 503-363-0121 | KENY@OWRC.ORG |

| NAME | AFFILIATION | PHONE | E-MAIL |
|---|---|---|---|
| JAY WALTERS | ODF | 503-645-7387 | JAY.K.WALTERS@OREGON.GOV |
| KYLE ABRAHAM | ODF | 503-945-7473 | KYLE.ABRAHAM@OREGON.GOV |
| DENNIS GRIFFIN | OPRD | 503-986-0674 | DENNIS.GRIFFIN@OREGON.GOV |
| MARK LANDAUER, GOVERNMENT AFFAIRS | SPECIAL DISTRICTS ASSOCIATION OF OREGON | 503-896-2338 | MLANDAUER@SDAO.COM |
| SETH BARNS | OREGON FOREST & INDUSTRY COUNCIL | 503-779-4509 | SETH@OFIC.COM |
| AMBER AYERS | MULTNOMAH COUNTY DRAINAGE DISTRICT | 503-281-5675 | AAYERS@MCDD.ORG |
| SUNNY SIMPKINS | MULTNOMAH COUNTY DRAINAGE DISTRICT | 503-281-5675 | SSIMPKINS@MCDD.ORG |
| STEVE ALBERTELLI | PACIFICORP | 541-776-6676 | STEVE.ALBERTELLI@PACIFICORP.COM |
| ARIEL NELSON, LOBBYIST | LEAGUE OF OREGON CITIES | 541-646-4180 | ANELSON@ORCITIES.ORG |
| ERIC NOLL, LOBBYIST | CITY OF PORTLAND, OFC OF GOVERNMENT RELATIONS | 503-823-6726 | ERIC.NOLL@PORTLANDOREGON.GOV |
| SHARLA MOFFET | OREGON BUSINESS & INDUSTRY | 503-588-0050 | SHARLAMOFFETT@OREGONBUSINESSINDUCTRY.COM |
| PHIL WARNOCK | OREGON CASCADES WEST COUNCIL OF GOVERNMENTS | 541-924-8474 | PWARNOCK@OCWCOG.ORG |
| JASON ROBISON, NATURAL RESOURCES DIRECTOR | COW CREEK BAND OF UMPQUA TRIBE OF INDIANS | 541-677-5575 | JROBISON@COWCREEK.COM |

| NAME | AFFILIATION | PHONE | E-MAIL |
|---|---|---|---|
| HEATHER BARTLETT, ENVIRONMENTAL SPECIALIST | COW CREEK BAND OF UMPQUA TRIBE OF INDIANS | 541-672-9405 | HEATHER.BARTLETT@COWCREEK.COM |
| JEREMY JOHNSON | COW CREEK BAND OF UMPQUA TRIBE OF INDIANS | 541-677-5575 | JJOHNSON@COWCREEK.COM |
| AUDIE HUBER | CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION | 541-276-3165 | AUDIEHUBER@CTUIR.ORG |
| ERIC QUAEMPTS | CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION | 541-429-7362 | NATURALRESOURCES@CTUIR.ORG |
| ROBERT BRUNOE, NATURAL RESOURCES GENERAL MANAGER | CONFEDERATED TRIBES OF WARM SPRINGS RESERVATION | 541-553-2015 | ROBERT.BRUNOE@CTWSBNR.ORG |
| CHRISTIAN NAUER, ARCHEOLOGIST | CONFEDERATED TRIBES OF WARM SPRINGS RESERVATION | 541-553-2026 | CHRISTIAN.NAUER@CTWSBNR.ORG |
| ERICA MALTZ, NATURAL RESOURCES DIRECTOR | BURNS PAIUTE TRIBE | 541-573-8021 | ERICA.MALTZ@BURNSPAIUTE-NSN.GOV |
| CALLE HAGLE, WILDLIFE PROGRAM MANAGER | BURNS PAIUTE TRIBE | 541-573-8021 | CALLE.HAGLE@BURNSPAIUTE-NSN.GOV |
| MIKE WILSON, NATURAL RESOURCES DIRECTOR | CONFEDERATED TRIBES OF GRAND RONDE | 503-879-2380 | MIKE.WILSON@GRANDRONDE.ORG |

| NAME | AFFILIATION | PHONE | E-MAIL |
|---|---|---|---|
| BRIECE EDWARDS, MANAGER, HISTORIC PRESERVATION | CONFEDERATED TRIBES OF GRAND RONDE | 503-879-5211 | BREICE.EDWARDS@GRANDRONDE.ORG |
| JESSE BEERS, DIRECTOR, CULTURAL RESOURCES | CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA, AND SIUSLAW INDIANS | 541-888-1319 | JBEERS@CTCLUSI.ORG |
| STACY SCOTT, TRIBAL HISTORIC PRESERVATION OFFICER | CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA, AND SIUSLAW INDIANS | 541-888-7513 | SSCOTT@CTCLUSI.ORG |
| CARTER THOMAS | CONFEDERATED TRIBES OF THE COOS, LOWER UMPQUA, AND SIUSLAW INDIANS | 541-751-3282 | CTHOMAS@CTCLUSI.ORG |
| MIKE KENNEDY, NATURAL RESOURCES MANAGER | CONFEDERATED TRIBES OF SILETZ INDIANS | 541-444-2532 EXT. 1232 | MIKEK@CTSI.NSN.US |
| ANDREA SUMERAU, ENVIRONMENTAL PROTECTION SPECIALIST | CONFEDERATED TRIBES OF SILETZ INDIANS | 541-444-2532 | ASUMERAU@CTSI.NSN.US |
| DARIN JARNAGHAN, NATURAL RESOURCES DIRECTOR | COQUILLE INDIAN TRIBE | 541-756-0904 | DARINJARNAGHAN@COQUILLETRIBE.ORG |
| KASSANDRA RIPPEE, TRIBAL HISTORIC PRESERVATION OFFICER, ARCHEOLOGIST | COQUILLE INDIAN TRIBE | 541-796-0904 EXT. 1216 | KASSANDRARIPPEE@COQUILLETRIBE.ORG |

| NAME | AFFILIATION | PHONE | E-MAIL |
|---|---|---|---|
| PERRY CHOCKTOOT, DIRECTOR, CULTURE AND HERITAGE DEPT. | KLAMATH TRIBES | 541-783-2219 EXT. 140 | PERRY.CHOCKTOOT@KLAMATHTRIBES.COM |
| WILL HATCHER | KLAMATH TRIBES | 541-783-2219 | WILL.HATCHER@KLAMATHTRIBES.COM |
| MITCH SPARKS, DIRECTOR | LEGISLATIVE COMMISSION ON INDIAN SERVICES | 503-986-1067 | LCIS@OREGONLEGISLATURE.GOV |
| **STAFF/ADVISORS** | | | |
| BILL RYAN | DSL-DEPUTY DIRECTOR | 503-986-5259 | BILL.RYAN@DSL.STATE.OR.US |
| ERIC METZ, PWS, SENIOR POLICY & LEGISLATIVE ANALYST | DSL-404 ASSUMPTION PROGRAM TEAM LEAD | 503-986-5266 | ERIC.METZ@DSL.STATE.OR.US |
| MELIAH MASIBA, SENIOR POLICY & LEGISLATIVE ANALYST | DSL-POLICY ADVISOR | 503-986-5308 | MELIAH.M.MASIBA@DSL.STATE.OR.US |
| BARBARA POAGE | DSL-404 ASSUMPTION ANALYST | 503-986-5268 | BARBARA.POAGE@DSL.STATE.OR.US |
| BETHANY HARRINGTON | DSL-RESOURCE COORDINATOR | 541-325-6171 | BETHANY.HARRINGTON@DSL.STATE.OR.US |
| ANDREA CELENTANO | DSL-POLICY ANALYST | 503-986-5217 | ANDREA.CELENTANO@DSL.STATE.OR.US |
| DANA HICKS | DSL-PLANNING & POLICY | 503-986-5229 | DANA.HICKS@DSL.STATE.OR.US |
| MICHELE WEAVER | ODFW 404 PROGRAM DESIGNEE | 503-947-6254 | MICHELE.H.WEAVER@STATE.OR.US |

| NAME | AFFILIATION | PHONE | E-MAIL |
|---|---|---|---|
| KRISTEN HAFER, POLICY AND COMPLIANCE SECTION CHIEF | US ARMY CORPS OF ENGINEERS REGULATORY PROGRAM, PORTLAND DISTRICT | 503-808-4380 | KRISTEN.A.HAFER@USACE.ARMY.MIL |
| YVONNE VALLETTE, PWS, AQUATIC ECOLOGIST | ENVIRONMENTAL PROTECTION AGENCY OREGON OPERATIONS OFFICE | 503-326-2716 | VALLETTE.YVONNE@EPAMAIL.EPA.GOV |
| DOLORES WESSON | EPA HQ | 202-566-2755 | WESSON.DOLORES@EPA.GOV |
| LAUREN KASPAREK | EPA HQ | 202-564-3351 | KASPAREK.LAUREN@EPA.GOV |
| SIMMA KUPCHAN | EPA HQ | | KUPCHAN.SIMMA@EPA.GOV |
| ROSELYNN IWENYA | EPA HQ | | IWENYA.ROSELYNN@EPA.GOV |
| PATRICK JOHNSON | EPA REGION 10 | 206-553-6905 | JOHNSON.PATRICK@EPAMAIL.EPA.GOV |
| JESSE RATCLIFFE | OREGON DEPARTMENT OF JUSTICE | 503-947-4549 | JESSE.D.RATCLIFFE@STATE.OR.US |
| TED BRIGHT | DSL-IT SPECIALIST | 541-986-5309 | EDUARD.BRIGHT@DSL.STATE.OR.US |
| PETER RYAN | DSL-JURISDICTIONAL COORDINATOR, SPEAKER ON 50% EXCEEDANCE DATA | 541-986-5232 | PETER.RYAN@DSL.STATE.OR.US |
| **INTERESTED PARTIES** | | | |
| CAREY MILLER | CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION | | CAREYMILLER@CTUIR.ORG |

| NAME | AFFILIATION | PHONE | E-MAIL |
|---|---|---|---|
| BRENT HALL | CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION | | BRENTHALL@CTUIR.ORG |
| ASHLEY MORTON | CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION | | ASHLEYMORTON@CTUIR.ORG |
| DAVID HAIRE | CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION | | DAVIDHAIRE@CTUIR.ORG |
| CHRIS MARKS | CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION | | CHRISMARKS@CTUIR.ORG |
| CARL MERKLE | CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION | | CARLMERKLE@CTUIR.ORG |

**196.795 Streamlining process for administering state removal or fill permits; application for state program general permit; periodic reports to legislative committee.** (1) The Department of State Lands shall continue to pursue methods to streamline the process for administering permits for the removal of material from the bed or banks of any waters of this state or for filling the waters of this state, reducing paperwork, eliminating duplication, increasing certainty and timeliness and enhancing resource protection. The efforts of the Department of State Lands shall include but need not be limited to applying to the United States Army Corps of Engineers for a state program general permit as authorized in federal regulations implementing section 404 of the Federal Water Pollution Control Act, and section 10 of the Rivers and Harbors Act of 1899, as amended. In conjunction with these activities, the Department of State Lands may continue to investigate the possibility of assuming the federal regulatory program under 33 U.S.C. 1344(g) of the Federal Water Pollution Control Act.

(2) The department shall report periodically to the appropriate legislative committee on the progress in implementing subsection (1) of this section. [1995 c.474 §1; 1997 c.116 §1; 1999 c.59 §53; 2007 c.354 §2]

**Note:** 196.795 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 196 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

**Note:** Sections 1 and 2, chapter 652, Oregon Laws 2019, provide:

**Sec. 1. Proposal for partial state assumption of permit authority.** (1) As used in this section:

(a)(A) "Development activities" includes dredging, filling, grading, paving, excavation and other activities related to making man-made changes to improved or unimproved real estate.

(B) "Development activities" does not include farming, ranching or forestry activities, or activities that would otherwise be considered development activities under subparagraph (A) of this paragraph if the activities are associated with:

(i) Farming, ranching or forestry activities; or

(ii) Activities by a district organized under ORS chapter 545, 547, 552, 553 or 554, including activities that occur outside the district's boundaries but that are related to the district's operations.

(b) "Mining and activities associated with mining" includes any activity involving extraction of materials from the ground that is subject to regulation by the State Department of Geology and Mineral Industries, the processing or manufacturing of the materials, mining reclamation activities and voluntary restoration activities associated with a mining operation.

(2) The Department of State Lands shall develop a proposal, including recommendations for legislation to be introduced during the 2020 regular session of the Legislative Assembly, for partial assumption by the department of the authority to administer permits for the discharge of dredge or fill materials under section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended).

(3) In developing the proposal, the Department of State Lands shall collaborate with the Department of Justice, the Department of Environmental Quality, the Department of Land Conservation and Development, the State Department of Fish and Wildlife, the State Department of Agriculture, the State Forestry Department, the State Department of Geology and Mineral Industries, the National Marine Fisheries Service, the United States Fish and Wildlife Service, the United States Environmental Protection Agency and representatives of any other state or federal agency as the Department of State Lands determines is necessary for developing the proposal in a manner that will satisfy federal and state legal requirements.

(4) The proposal shall include provisions necessary for the Department of State Lands to assume authority to administer permits for the discharge of dredge or fill materials under section 404 of the Federal Water Pollution Control Act (P.L. 92-500, as amended) only for:

(a) Development activities within an acknowledged urban growth boundary;

(b) Mining and activities associated with mining; and

(c) The creation and operation of mitigation banks.

(5)(a) The proposal shall include:

(A) Recommendations, in both narrative form and in the form of requested draft statutory language, for the enactment of statutes, or for the amendment or repeal of ORS 196.600 to 196.905 [series became 196.600 to 196.921], section 2, chapter 45, Oregon Laws 1989, sections 1 to 14, chapter 516, Oregon Laws 2001, or any other statutes or session laws, as necessary to demonstrate that the statutory laws and regulations of the State of

Oregon provide adequate legal authority for the state to receive a grant of authority from the United States Environmental Protection Agency to implement the program for partial assumption; and

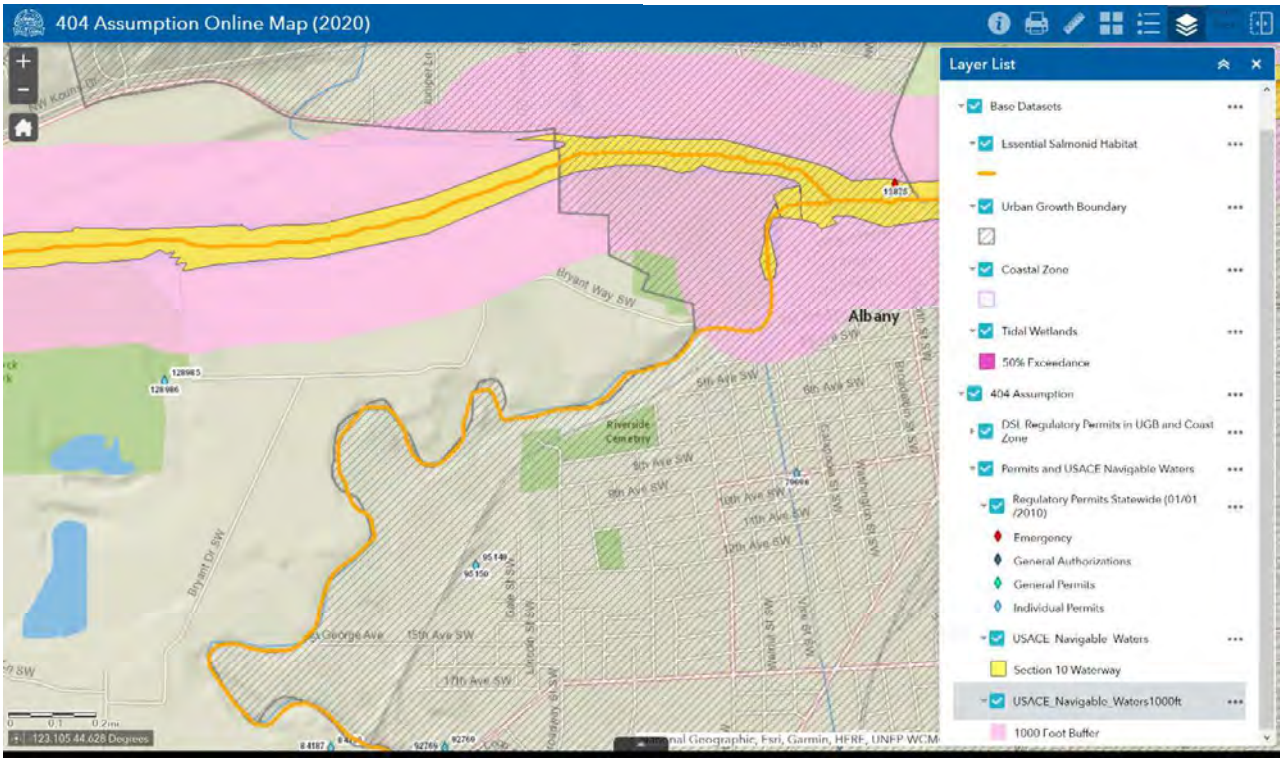
(B) Any other provisions that the department determines are necessary to provide the Legislative Assembly the opportunity, during the 2020 regular session of the Legislative Assembly, to take all actions necessary to allow for the department to formally submit to the United States Environmental Protection Agency a complete application for partial assumption, such that the United States Environmental Protection Agency may have the opportunity to review and consider approval of the application before the convening of the 2021 regular session of the Legislative Assembly.

(b) The recommendations required under paragraph (a) of this subsection must include recommendations on the amendments to statutes and session laws necessary to ensure that, if any of the amendments to ORS 196.800, 196.810, 196.825, 196.850, 196.895, 196.905 [renumbered 196.921], 196.990, 390.835, 421.628 and 459.047 by sections 1 to 10, chapter 516, Oregon Laws 2001, or the repeal of section 2, chapter 45, Oregon Laws 1989, by section 13, chapter 516, Oregon Laws 2001, become operative, the operation will not result in permitting or regulatory requirements pursuant to ORS 196.600 to 196.905 on and after the operative date that exceed the permitting or regulatory requirements pursuant to ORS 196.600 to 196.905, as in effect on the effective date of this 2019 Act [August 9, 2019], for activities for which the Department of State Lands is not directed to propose assumption of authority to administer permits as described in subsection (4) of this section. [2019 c.652 §1]

**Sec. 2.** Section 1 of this 2019 Act is repealed on January 2, 2021. [2019 c.652 §2]

**APPENDIX D**
**DSL PARTIAL 404 ASSUMPTION INITIATIVE INTERACTIVE MAP**

https://maps.dsl.state.or.us/404Assumption/



**APPENDIX E**
**CORPS MEMO RE: ASSUMABLE WATERS**

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108

30 JUL 2018

MEMORANDUM FOR COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS

SUBJECT: Clean Water Act Section 404(g) — Non-Assumable Waters

1. Congress enacted Section 404(g) of the Clean Water Act (CWA) to allow states and tribes to take an active role in the permitting of dredge and fill operations within their jurisdiction of governance, with one exception: the Corps must retain exclusive permitting authority over certain waters. The waters over which the Corps must retain permitting authority, referred to as non-assumable or "retained" waters, are "... those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto ..." 33 U.S.C. § 1344(g). The Corps provides to states and tribes that are seeking to administer a dredge and fill program under CWA Section 404 an identification of these waters over which the Corps would retain authority.

2. In 2015, the Environmental Protection Agency (EPA) established the Assumable Waters Subcommittee within the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and develop recommendations regarding the meaning of Section 404(g) and thus the scope of waters and adjacent wetlands that may be assumed by a state or tribe. The NACEPT Subcommittee issued a Final Report in May 2017.[1] Though many states have shown interest in assuming the Section 404 program, only two states have done so. The Subcommittee report cited a number of possible reasons why so few states have assumed the Section 404 program, one of which may be the difficulty in ascertaining those waters that are retained waters. The Subcommittee noted that this area of uncertainty has stifled the interests of several states in particular in recent years. Further, I have personally heard from state officials who – but for this uncertainty – would pursue Section 404(g) assumption on behalf of their state. While EPA intends to address the Subcommittee report and clarify the waters for which a state or tribe could assume responsibility as well as the procedures related to state assumption under Section 404(g) in a rulemaking process, assumption of the Section 404

[1] The Army has not previously taken any formal position on the recommendations contained in this report.

program by states and tribes is not dependent upon and need not await the completion of any such rulemaking..

3. The Subcommittee's majority – formed of all 21 members aside from a Corps technical representative – recommended a policy under which, when a state or tribe program is approved by EPA under Section 404(g), the waters retained within the Corps' permitting authority would be limited to waters regulated under Section 10 of the Rivers and Harbors Act of 1899 (RHA), less those waters that are jurisdictional under the RHA due solely to historical navigability and with the addition of wetlands adjacent to other retained waters.[2] For ease of implementation, the Subcommittee's majority recommended using existing RHA Section 10 lists of waters as a starting point, which could be amended by the Corps as appropriate following consideration of the RHA case law and relevant factors set forth in the RHA Section 10 regulations. The majority also recommended that the agencies clarify that the Corps would retain administrative authority over all wetlands adjacent to retained navigable waters landward to an administrative boundary agreed upon by the state or tribe and the Corps. The majority's discussion provides considerations that may be useful to the state or tribe and the Corps as they evaluate the appropriate administrative boundary suited to the particular circumstances of the state or tribe, including state or tribal regulatory authority, topography, and hydrology.

4. I have reviewed the Subcommittee's findings and recommendations and believe that the majority's recommendations reflect an appropriate apportionment of responsibility between the states and tribes and the Federal government for the regulation of waters under a program administered by a state or tribe pursuant to Section 404(g). In my view, implementing Section 404(g) in this manner adheres to the language of the statute and the intent of Congress when enacting this provision.

5. Therefore, subject to further proceedings by EPA and the Corps, it is appropriate for the Corps to retain the following categories of waters for permitting under Section 404(g) of the Clean Water Act:

a. waters that are jurisdictional under Section 10 of the Rivers and Harbors Act of 1899, *provided that* —

[2] The Assumable Waters Subcommittee report noted that the scope of retained waters defined by the parenthetical of Section 404(g)(1) is similar to the scope of Section 10 waters under the RHA, except for the deletion of historical-use-only waters and the addition of adjacent wetlands.

- retained waters include tidal waters shoreward to their mean high water mark, or mean higher high water mark on the west coast, and

- retained waters do not include those waters that qualify as "navigable" solely because they were "used in the past" to transport interstate or foreign commerce; and

b. wetlands adjacent to waters retained under a. above, landward to an administrative boundary agreed upon by the state or tribe and the Corps.

For ease of implementation and to provide transparency to states, tribes and the public, the Corps will use existing RHA Section 10 lists of waters as a starting point, which could be amended by the Corps as appropriate consistent with applicable regulations and case law.

6. Nothing in this memorandum affects the scope of "waters of the United States" under the CWA, as this memorandum addresses only the division of responsibility between the Corps and a state or tribe that assumes the Section 404(g) program. Further, this memorandum is not intended to address future decisions to be made by EPA under Sections 404(g) or 404(h). Any final decisions pertaining to a specific application for state or tribe assumption under 404(g) will be made at a later time and may be made case-by-case to take into account context-specific information. No rights are created and no obligations are imposed through this guidance memorandum.

R. D. James
Assistant Secretary of the Army
(Civil Works)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

# Memorandum on Endangered Species Act Section 7(a)(2) Consultation for State and Tribal Clean Water Act Section 404 Program Approvals

Pursuant to Section 404 of the Clean Water Act (CWA), 33 U.S.C. 1344, the U.S. Army Corps of Engineers (Corps) is authorized to permit the discharge of dredged or fill material into "waters of the United States." States and federally recognized tribes may assume authority to implement the CWA Section 404 permitting program within their respective jurisdictions from the Corps by submitting a request to the U.S. Environmental Protection Agency (EPA or Agency), as Congress authorized the EPA Administrator to approve program transfers from the Corps to the states and tribes. In the past, EPA has taken the position that such program transfer decisions do not involve an exercise of discretion warranting consultation under Section 7 of the Endangered Species Act (ESA), 16 U.S.C. 1536, meaning EPA would not need to consult with the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (hereafter referred to as "the Services") when acting on an assumption application from a state or tribe. EPA has reconsidered its prior position, articulated in 2010, that the decision to approve a state or tribal CWA Section 404 program does not trigger ESA Section 7 consultation. Going forward, EPA has determined that it should consult with the Services under Section 7 of the ESA if a decision to approve a state or tribal CWA Section 404 program may affect ESA-listed species or designated critical habitat.

## I. Background

To assume the CWA Section 404 permitting program, states and tribes must develop permit programs for discharges of dredged or fill material consistent with the requirements of the CWA and implementing regulations at 40 C.F.R. part 233 and submit a request to assume any such program to EPA. States and tribes must administer and implement programs that are consistent with and no less stringent than the requirements of the CWA and implementing regulations. 40 C.F.R. 233.1(d). The Administrator "shall approve" an assumption request if the state or tribal program satisfies the requirements of the CWA Section 404(h)(1). 33 U.S.C. 1344(h)(2)(A). If the Administrator fails to make a determination within 120 days of receiving the request, the program shall be deemed approved. 33 U.S.C. 1344(h)(3).

Section 7 of the ESA directs each federal agency to ensure, in consultation with one or both of the Services, as appropriate, that "any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence" of listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. 1536(a)(2). ESA Section 7 consultation is not required if the agency determines that an action will not affect listed species or designated critical habitat. ESA Section 7 applies to "all actions in which there is discretionary Federal involvement or control." 50 C.F.R. 402.03.

In December 2010, EPA articulated its position that ESA Section 7 consultation is not applicable to CWA Section 404 program transfer decisions. EPA stated at that time that a 2007 U.S. Supreme Court decision from another context, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) ("*NAHB*"), controlled the inquiry. In *NAHB*, the Supreme Court held that because the transfer of CWA National Pollutant Discharge Elimination System (NPDES) permitting authority to a state "is not discretionary, but rather is mandated once a State has met the criteria set forth in Section 402(b) of the CWA, it follows that a transfer of NPDES permitting authority does not trigger Section 7(a)(2)'s consultation and no-jeopardy requirements." 551 U.S. at 673. The Supreme Court held that "[w]hile EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out Section 402(b)'s enumerated statutory criteria, the statute clearly does not grant it the discretion to add an entirely separate prerequisite to the list. Nothing in the text of Section 402(b) authorizes the EPA to consider the protection of threatened or endangered species as an end in itself when evaluating a transfer application." *Id.* at 671.

EPA evaluated this decision in response to a December 6, 2010 letter sent to the Agency by the Environmental Council of the States (ECOS) and the Association of State Wetland Managers (ASWM) asking whether EPA must conduct an ESA Section 7 consultation prior to approving or disapproving a Section 404 program request. The Agency responded to ECOS and ASWM in a December 27, 2010 letter ("2010 Letter"), see Docket ID No. EPA–HQ–OW–2020–0008, stating that, as in the CWA Section 402(b) context, when considering a CWA Section 404 program transfer request, EPA is only permitted to evaluate the specified criteria in CWA Section 404(h) and does not have discretion to add requirements to the list in CWA Section 404(h), including considerations of potential impacts to endangered and threatened species through ESA Section 7 consultation with the Services.

EPA stated in the 2010 Letter that although there are some differences between CWA Sections 402 and 404, the Supreme Court's reasoning in *NAHB* applies to EPA's approval of a CWA Section 404(g) permitting program. Section 404(h)(2) of the CWA states that if the Administrator determines that a state program submitted under CWA Section 404(g)(1) has the authority set forth in CWA Section 404(h)(1), then the Administrator "shall approve" the state's application to transfer the CWA Section 404 permitting program. The 2010 Letter acknowledged that "there are some differences between § 402(b) and § 404(h)," but concluded that those differences did not render EPA's action approving a state CWA Section 404 program a "discretionary federal action." The letter did not address the specific differences between the approval requirements of the CWA Section 402 and 404 programs that EPA now recognizes are relevant to the applicability of ESA Section 7. The 2010 Letter concluded that EPA's decision as to whether to approve a state CWA Section 404 program action is non-discretionary and ESA consultation is not required.

In July 2019, EPA received a request from the Florida Department of Environmental Protection (FDEP) asking EPA to engage in an ESA Section 7 consultation with the Services in connection with EPA's initial review of Florida's request to assume the CWA Section 404 program. FDEP provided a white paper asserting that ESA Section 7 consultation is required in the CWA Section 404 assumption context based on the unique statutory text of CWA Section 404 and its associated legislative history, which, in FDEP's view, differs in critical respects from other state delegation programs administered by EPA to which ESA Section 7 does not apply. FDEP stated that EPA's position was articulated in a two-page letter a few weeks after receiving the ECOS and ASWM letter and failed to acknowledge the critical distinctions between the statutory text of CWA Section 404 and the Section 402 program at issue in *NAHB*. FDEP also questioned the 2010 Letter's reliance on the legislative history of CWA Section 404

to support the non-discretionary nature of a state assumption decision, arguing that the legislative history supports the opposite conclusion.

The white paper explained that when a state or tribe administers the CWA Section 404 program, permittees must avoid adverse impacts to listed species or otherwise seek an incidental take permit under ESA Section 10, which involves a burdensome process for both permit applicants and government agencies. The white paper characterized the lack of incidental take coverage in state- or tribe-assumed programs as a significant hurdle to establishing an effective and efficient CWA Section 404 program in Florida and estimated that approximately ten percent of CWA Section 404 permits issued in Florida require some form of incidental take coverage.

The white paper viewed a one-time ESA Section 7 programmatic consultation in connection with EPA's initial review of an assumption application as an efficient and legally-defensible approach to resolving the lack of incidental take coverage for permittees and permitting agencies. An ESA Section 7 consultation on EPA's potential approval of Florida's program would allow the Services to issue a programmatic biological opinion and a programmatic incidental take statement, which could identify procedural requirements for state permitting under CWA Section 404 needed to support the Services' determination that assumption would not result in jeopardy to any listed species. Subject to the Services' incidental take statement and provided these requirements are followed, FDEP stated that this process would bring state CWA Section 404 permits within the ESA Section 7(o)(2) exemption from take liability.

## II. Public Comment

On May 21, 2020, EPA initiated a 45-day public comment period through an announcement in the Federal Register titled "Request for Comment on Whether EPA's Approval of a Clean Water Act Section 404 Program Is Nondiscretionary for Purposes of Endangered Species Act Section 7 Consultation" (Docket ID No. EPA-HQ-OW-2020-0008). EPA sought public comment regarding whether to reconsider its position that it lacks discretionary involvement or control within the meaning of 50 C.F.R. 402.03 when acting on a state or tribal application to administer the CWA Section 404 program sufficient to trigger ESA Section 7 consultation requirements. EPA identified the positions articulated in the FDEP white paper, as well as other considerations that may be relevant to this issue, and requested comment on whether EPA can and should engage in an ESA Section 7 consultation with the Services in connection with EPA's initial review of a state or tribal request to assume the CWA Section 404 program. The public comment period closed on July 6, 2020, and EPA received comments from a variety of stakeholders.

Several commenters stated that EPA's decision regarding a request to assume the CWA Section 404 permit program involves an exercise of discretion warranting consultation under ESA Section 7. These commenters recommended that EPA engage in a single ESA Section 7 programmatic consultation with the Services in connection with EPA's initial review of an assumption application. The commenters said that this process would enable the Services to issue a programmatic biological opinion and a programmatic incidental take statement, which could identify procedural requirements for state and tribal CWA Section 404 permits. They indicated that this approach could support a determination on the part of the Services that assumption would not result in jeopardy to any listed species and would ensure that activities authorized under state- or tribal CWA Section 404 permits would not be liable for incidental take as long as the terms and conditions of permitting are met.

Other commenters agreed that EPA's approval of a state or tribal CWA Section 404 permitting program is discretionary and thus triggers the requirements for consultation under Section 7 of the ESA. However, the commenters expressed concern about how states or tribes would ensure that the ESA's requirements are being applied at the project-specific level. These commenters said that EPA's consultation regarding whether to approve or disapprove an assumption request does not alleviate ESA liability concerns related to actions authorized by future state or tribal CWA Section 404 permits.

Certain commenters asserted that the Supreme Court's decision in *NAHB* applies to EPA's approval of CWA Section 404 programs, in addition to its approval of CWA Section 402 programs, and therefore EPA lacks discretion to consult under ESA Section 7 in approving state or tribal requests to assume permitting authority under CWA Section 404. These commenters argued that EPA's role under both the CWA Section 402 and 404 programs is limited to determining whether states and tribes have the legal authority Congress has specified; if the criteria are satisfied, EPA lacks the discretion to deny an application. The commenters also expressed concern that, as a practical matter, the agencies will spend significant time and resources collecting data and conducting analyses for a consultation but may not ultimately provide states and private landowners with incidental take protection under the ESA.

**III. ESA Section 7 Applies to CWA Section 404 Program Assumption Decisions**

Following the release of the May 2020 Federal Register Notice and its review of public comments, EPA has reconsidered the position articulated in the 2010 Letter to ECOS and ASWM. EPA concludes that the Agency's decision as to whether to approve a state or tribal request to assume the CWA Section 404 permit program involves an exercise of discretion warranting consultation under ESA Section 7 if EPA determines that such an approval action may affect a listed species or designated critical habitat. EPA's current view is that the *NAHB* decision, while informative, does not control in the CWA Section 404 program assumption context because Congress established a framework in which ESA concerns could be addressed when delegating authority to the Agency to transfer permitting responsibility from the Corps to individual states and tribes. That ability is absent in the list of factors Congress instructed EPA to consider when authorizing states to take on NPDES permitting authority.

For example, CWA Section 404(h)(1)(A) requires the Administrator to determine whether a state or tribe seeking CWA Section 404 program assumption has the authority to issue permits which apply and assure compliance with the CWA Section 404(b)(1) Guidelines. Those Guidelines include a provision that prohibits the permitting of a discharge if it jeopardizes the continued existence of endangered or threatened species or results in the likelihood of the destruction or adverse modification of designated critical habitat. 40 C.F.R. 230.10(b)(3). EPA's regulations state that in determining compliance with the CWA Section 404(b)(1) Guidelines, where ESA Section 7 consultation occurs, the Services' conclusions "concerning the impact of the discharge on threatened and endangered species and habitat shall be considered final." 40 C.F.R. 230.30(c). The CWA Section 404(b)(1) Guidelines were first promulgated in 1975, including the current prohibition on issuing permits jeopardizing threatened or endangered species, *before* Congress enacted CWA Section 404(g). 40 Fed. Reg. 41,292, 41,296 (Sept. 5, 1975). Thus, Congress was aware when requiring state or tribal program compliance with the CWA Section 404(b)(1) Guidelines that the no jeopardy mandate would apply to all permits issued by states and tribes.

Unlike the statutory construct governing EPA's delegation of NPDES program authority under CWA Section 402, EPA is required to seek and consider comments from the Services when deciding whether to approve a state or tribal request to assume the CWA Section 404 permitting program. Under CWA Section 404(g)(2), EPA must provide the Services with an opportunity to comment on a state or tribal

program submission. CWA Section 404(g)(2) provides that within ten days after receipt of a program assumption submission, EPA shall provide copies of the program application to the Corps and FWS. EPA extended that statutory direction to NMFS by regulation. 40 C.F.R. 233.15(d). CWA Section 404(h)(1) directs EPA to consider comments submitted by the Corps and FWS when determining whether a state or tribe has the requisite authority and meets the CWA statutory requirements with respect to implementing the CWA Section 404 program. EPA's regulations make clear that EPA should provide heightened attention to comments from the Services, providing that in issuing its approval or disapproval of a state or tribal program, EPA shall provide a responsiveness summary of significant comments received and its responses. EPA "shall respond individually to comments received from the Corps, FWS, and NMFS." 40 C.F.R. 233.15(g).

By requiring EPA to consider the Services' comments before deciding to approve an assumption request, and requiring states and tribes to comply with the CWA Section 404(b)(1) Guidelines when issuing permits under an assumed program, the CWA provides EPA with discretionary involvement and control that triggers the need for ESA Section 7 consultation when EPA's action may affect listed species. EPA has discretion regarding *the extent to which* it takes into account the Services' comments and can do so with an eye towards ensuring compliance with the CWA Section 404(b)(1) Guidelines. States and tribes are not required to consult on their individual permitting decisions, see 16 U.S.C. 1536(a)(2), so the program approval stage provides the most reasonable and efficient point in which to help ensure a process is in place to consider potential adverse impacts to species resulting from those permitting decisions. EPA has discretionary authority at that stage to shape program implementation to ensure compliance with the CWA Section 404(b)(1) Guidelines. This discretionary authority is unique to the transfer of CWA Section 404 permitting authority. There is no requirement in CWA Section 402 for EPA to take into consideration the views of the Services, and there is no corollary in the CWA Section 402 program to the CWA Section 404(b)(1) Guidelines. These provisions in CWA Section 404 provide discretion to EPA that is not present in the Section 402 context.

The legislative history of CWA Section 404 supports the argument for consultation. According to the Senate Report accompanying enactment of the assumption authority:

> The committee amendments relating to the Fish and Wildlife Service are designed to (1) recognize the particular expertise of that agency and the relationship between its goals for fish and wildlife protection and the goals of the Water Act, and (2) encourage the exercise of its capabilities in the early stages of planning. By soliciting the views of the principal Federal agencies involved in the review of these programs at an early stage, objections can be resolved that might otherwise surface later and impede the operation of a State program approved by the Administrator. This consultation preserves the Administrator's discretion in addressing the concerns of these agencies, yet affords them reasonable and early participation which can both strengthen the State program and avoid delays in implementation. That is, early participation in the development and design of programs, guidelines, and regulations should serve to reduce the emphasis now placed on the review by the Fish and Wildlife Service of individual applications for permits under the Water Act.

S. Rep. 95-370, at 78 (1977). The report expresses a preference for early engagement with FWS at the program approval stage with the goal of reducing engagement at the individual permitting stage while preventing comments at the permitting stage that might lead to a permit objection.

While the legislative history does not specifically mention ESA Section 7 consultation, Congress used the phrase "consultation" at the developmental stage of state programs while recognizing EPA's "discretion" in considering the FWS's comments and ensuring efficient and effective program implementation following approval. Ensuring that federal decisions contemplate, where appropriate, potential impacts to listed species at a stage where those impacts can be most efficiently addressed is one of the hallmarks of the ESA Section 7 consultation process. The legislative history therefore supports programmatic consultation more so than suggesting that formal consultation is not required.

In *NAHB*, the Supreme Court held that ESA Section 7 consultation on an NPDES program transfer could impose conditions beyond those found in Section 402(b). 551 U.S. at 663-664. The Court stated that "[w]hile EPA may exercise some judgment in determining whether a State has demonstrated that it has the authority to carry out Section 402(b)'s enumerated statutory criteria, the statute clearly does not grant it the discretion to add another entirely separate prerequisite to that list." *Id.* at 671. In the CWA Section 404 context, however, an ESA consultation will not impose an entirely separate condition. Instead, ESA consultation will fulfill Congress's statutory directive that the Services provide input on a state program prior to EPA's approval. By allowing for consideration of the views of the Services through their comments and incorporation of the no jeopardy requirement from the CWA Section 404(b)(1) Guidelines, the statute provides authority for EPA to consult and consider protection of listed species in the approval decision.

In *NAHB*, the Supreme Court found that the canon against implied repeals supports the interpretation that the transfer of CWA Section 402 programs was a non-discretionary agency action. This reasoning is not applicable in the CWA Section 404 assumption context. The Court stated: "An agency cannot simultaneously obey the differing mandates set forth in Section 7(a)(2) of the ESA and the Section 402(b) of the CWA, and consequently the statutory language – read in light of the canon against implied repeals – does not itself provide clear guidance as to which command must give way." 551 U.S. at 666. In the CWA Section 402 context, the Court found that approval of the state's permitting authority was non-discretionary and "comports with the canon against implied repeals because it stays Section 7(a)(2)'s mandate where it would effectively override otherwise mandatory statutory duties." *Id.* at 670. CWA Section 404 is distinguishable from CWA Section 402 because Congress required EPA to solicit comment from the FWS at the program approval stage and because the statute incorporates the jeopardy prohibition by reference to the CWA Section 404(b)(1) Guidelines. Here, ESA Section 7(a)(2)'s mandate does not override EPA's statutory duties but instead fits into the existing statutory structure.

## IV. Implementation

On August 20, 2020, EPA received a request from the State of Florida to assume administration of the CWA Section 404 program. For Florida and other states and tribes seeking to assume the CWA Section 404 program, EPA intends to engage in a one-time ESA Section 7 programmatic consultation with the Services in connection with the initial review of an assumption request if a

decision to approve a state or tribal CWA Section 404 program may affect ESA-listed species or designated critical habitat. To initiate consultation, the Agency will submit a biological evaluation to the Services, which evaluates the potential effects of EPA's potential approval of an assumption request on ESA-listed species, proposed species, designated critical habitat, and proposed critical habitat (50 C.F.R. 402.12). A biological evaluation also considers whether EPA's approval of an assumption request is likely to adversely affect any species or habitat.

For Florida and other states and tribes seeking to assume administration of the CWA Section 404 permitting program, EPA's engagement in a one-time ESA Section 7 programmatic consultation with the Services in connection with the initial review of an assumption application would allow one or both of the Services, as appropriate, to issue a programmatic biological opinion and programmatic incidental take statement for the state or tribal permitting program. The biological opinion and incidental take statement could establish additional procedural requirements and permitting conditions or measures that help ensure the state or tribal permitting program and individual permits issued pursuant to that program, as well as EPA's approval of that program, do not result in jeopardy to any listed species. This process, assuming compliance with any applicable permit conditions or measures, would extend ESA Section 9 liability protections to individual permits issued pursuant to the state or tribal program and place state and tribal CWA Section 404 permitting on equal footing with the Corps' permitting program. This streamlined permitting process would reduce costs and duplication of effort by state or tribal and federal authorities and facilitate more effective and efficient state and tribal CWA Section 404 programs. This programmatic consultation approach will ensure that listed species are protected while avoiding additional ESA Section 10 processes to obtain similar liability protections.

EPA disagrees with the comments stating that EPA's consultation regarding whether to approve or disapprove a request to assume the CWA Section 404 program does not alleviate existing ESA liability related to actions authorized by future state or tribal CWA Section 404 permits. The Services are required, as part of formal consultation, to prepare an incidental take statement if such take is reasonably certain to occur and will not violate ESA Section 7(a)(2). 50 C.F.R. 402.14(g)-(i). If, pursuant to the ESA regulations, the Services provide an incidental take statement, then "any taking which is subject to a statement as specified in [50 C.F.R. 402.14(i)(1)] and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the [ESA], and no other authorization or permit under the [ESA] is required." 50 C.F.R. 402.14(i)(5).

At the individual permit level, the CWA Section 404(b)(1) Guidelines prohibit discharges that will likely jeopardize the continued existence of endangered or threatened species, or result in the likely destruction or adverse modification of habitat designated as critical for these species as determined by the Services. See 40 C.F.R. 233.20; 40 C.F.R. 230.10(b)(3). EPA anticipates that states and tribes may develop different program structures and coordination mechanisms to meet these requirements and any conditions of a programmatic incidental take statement, depending on factors such as the structure and expertise of the state and tribal agencies, provisions of state and tribal law, previous coordination among state or tribal and federal agencies, the number of ESA-considered species and extent of critical habitat, and other factors. States and tribes maintain the existing flexibilities in developing their CWA Section 404 programs to meet these requirements.

EPA's determination that CWA Section 404 provides the requisite discretionary involvement or control for the ESA to apply to EPA's approval of a state or tribal CWA Section 404 program does not modify or alter the application of the ESA to other EPA actions not analyzed here, such as actions under the CWA (other than state assumption of CWA Section 404 programs), Safe Drinking Water Act, the

Resource Conservation and Recovery Act, or other statutes implemented by EPA. For example, there are significant differences in how the CWA Section 402 and 404 programs operate, legally and procedurally, and nothing in this memorandum modifies established precedent and procedures for the NPDES permitting program. Likewise, EPA's determination that EPA has the discretion to consult on CWA Section 404 program approvals does not apply to actions by other federal agencies. EPA and other federal agencies must evaluate each federal activity considering the relevant implementing statute and the relevant factual situations to determine if the ESA consultation requirement attaches.

DAVID ROSS Digitally signed by DAVID ROSS Date: 2020.08.27 13:35:21 -05'00'

David P. Ross, Date
Assistant Administrator