



Oregon
Kate Brown, Governor

Parks and Recreation Department

State Historic Preservation Office

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OCT 24 2019

DEPARTMENT OF STATE LANDS



October 18, 2019

Bill Ryan
Deputy Director for Operations
Oregon Department of State Lands
775 Summer Street NE, Suite 100
Salem, OR 97301-1279

RE: State of Oregon Partial 404 Assumption – Cultural Resources Concerns

Dear Deputy Director Ryan,

Thank you for providing the Oregon State Historic Preservation Office (SHPO) the opportunity to comment on the Department of State Land's (DSL) consideration of partial assumption of the authority to administer permits for the discharge of dredge or fill materials under Section 404 of the Clean Water Act (404 assumption). We look forward to ongoing conversations and working closely with our many partners to ensure that Oregon's irreplaceable cultural resources and special places are given full consideration.

At present, Removal-Fill permit applications are reviewed for potentially significant impacts by both the U.S. Army Corps of Engineers (Corps) and Oregon's DSL. Some of the requirements for the two permitting processes are redundant, but some are not, and that is the crux of our concern. Because the Corps review under Section 404 is federal, it ensures that impacts to cultural resources are addressed through Section 106 of the National Historic Preservation Act; a review that is not required under state law. Importantly, DSL cultural resource staff only review activity that occurs on DSL-owned land.

Should DSL assume the permitting reviews under Section 404, the federal requirement to address impacts to cultural resources under Section 106 would vanish. This causes our office significant concerns, which are outlined below.

1. Above-Ground Historic Resources: Section 106 of the National Historic Preservation Act of 1966, as amended, requires that federal agencies take into consideration the effects of undertakings on historic properties. Historic properties include any building, site, object, structure, or district eligible for or listed in the National Register of Historic Places. Oregon Revised Statute (ORS) 358.653 requires that state agencies and political subdivisions of the state consult with the SHPO to avoid inadvertent damage to "real property of historic significance" owned by those agencies. With the exception of local land use and regulations (which would only apply to a small percentage of Oregon's significant above-ground resources), if DSL assumes partial 404 permitting authority, there would be no consistent



statewide consideration given to privately-owned historic properties impacted by projects that meet the partial 404 assumption requirements.

2. Archaeological Site Protection: Under federal laws and guidance (National Register Bulletin 15) an archaeological site need not be marked by physical remains if it is known to be the location of a prehistoric or historic event or pattern of events. Under Oregon state law, a site is defined by the presence of archaeological objects and the contextual associations with those objects, which places a heavier emphasis on the need to test and define a property in order to be considered a significant archaeological site and gain protection. The state's definition of a "significant archaeological site" conflicts with the federal definitions and standards, leaving many potentially historic sites outside of consideration, due to lack of identification.
3. Lack of Statewide Survey and Identification Efforts: Less than 13% of the state has been surveyed for the presence of significant archaeological sites. Further, most of these surveys have been on federal lands. For above-ground resources, a small percentage of the state has been surveyed. There are entire towns where no survey has been completed, and other communities where the last survey was conducted in the mid-1970s. Under Section 106, the federal agency, SHPO, and other consulting parties define appropriate identification and survey efforts based on the scope and scale of the undertaking. State laws do not include requirements for such identification efforts, so future survey opportunities on non-federal lands would be lost.
4. Tribal Consultation: The federal responsibility to conduct meaningful "government-to-government" consultation would be lost with partial 404 assumption. Section 106 requires federal agencies to consult with tribes on all undertakings that have the potential to effect historic properties. Sometimes consultation includes, not simply Oregon's nine federally recognized tribes, but those tribes with ceded lands, usual and accustom places, and special interests in the state (e.g. Nez Perce Tribe, Confederated Tribes of the Colville Reservation, Yakama Nation). Conversely, the state's tribal consultation policy only applies to Oregon's nine federally recognized tribes, potentially leaving sovereign nations out of the consultation process.
5. Interested Party Consultation: Section 106 is a consultation process that seeks to convene many groups with interests in undertakings and historic properties. However, unlike Section 106, the state's cultural resource laws do not afford local governments, historic preservation groups, and other interested parties with an interest in a project, or historic properties, an opportunity to comment on an undertaking.
6. Traditional Cultural Properties (TCPs) and Historic Properties of Religious and Cultural Significance to an Indian Tribe: Under Section 106, federal agencies are required to consult with Indian tribes on historic properties to which tribes attach "religious and cultural significance." Traditional Cultural Properties are places important for cultural continuation. However, while dozens of historically significant TCPs have been identified in Oregon, there is no statewide recognition given to these significant resources outside of federal law. Because ORS 358.653 has no rules, it has not been interpreted to include TCPs, and the definition of an "archaeological site" in ORS 358.905 omits the recognition of these important sites.

7. Defining the Area of Potential Effect (APE): Section 106 defines the APE as the geographic area within which an undertaking may have both direct and indirect effects. As currently interpreted, the APE under ORS 358.653 only considers the real property being impacted, not any potential auditory, visual, or atmospheric effects. No other state laws take these additional effects, which can be very damaging to historic properties, into consideration.
8. Age of Historic Properties: Under federal law, in order to be considered a historic property, a building, site, object, structure, or district has to be over 50 years of age, unless the property has exceptional historic significance. In Oregon, an archaeological object or site has to be 75 years or older, with no exceptions outlined in state law. Age provisions are similarly absent in ORS 358.653, leaving the definition of "real property of historic significance" unhelpfully opaque.
9. Adverse Effects and Mitigation: Section 106 outlines a clear process for mitigating adverse effects to historic properties. It requires the development of a legally binding Memorandum of Agreement among the federal agency, the SHPO, and other consulting parties to resolve adverse effects that cannot be avoided or minimized. However, state law does not outline a process for the resolution of adverse effects, nor does it address which parties need to be involved in consultation. In addition, state laws outline a mediation process (Dispute Resolution Commission) that does not currently exist (OAR 736-051-0040(1)).

We appreciate that DSL is making efforts to consult with and engage tribes, other interested parties, and the public. We look forward to hearing the results of these efforts and continuing to work with your office to address the concerns above. If you have questions regarding this topic, please contact Dennis Griffin, State Archaeologist, or Tracy Schwartz, Historian.

Sincerely,



Christine Curran
Deputy Director
Deputy State Historic Preservation Officer

CC: Eric Metz, DSL

APPENDIX H
EPA LETTER TO ADVISORY COUNCIL ON HISTORIC PROPERTIES (ACHP)



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

OFFICE OF WATER

The Honorable Aimee Jorjani, Chairman
Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001

Dear Chairman Jorjani:

It was a pleasure speaking with you recently about the Advisory Council on Historic Preservation (Council) and your important work. I also appreciated the opportunity to discuss EPA's role in reviewing and approving Clean Water Act (CWA) Section 404 program assumption requests.

On August 20, 2020, the State of Florida submitted a request to assume the CWA Section 404 program. EPA has determined that its approval of a state program would be a Federal undertaking pursuant to the National Historic Preservation Act (NHPA) and implementing regulations. Therefore, in accordance with the Council's regulations at 36 CFR Part 800, EPA plans to initiate a programmatic consultation under Section 106 of the NHPA on Florida's CWA Section 404 program assumption request. EPA anticipates inviting consultation with a number of parties, including the Council, the State Historic Preservation Officer (SHPO), the Florida Department of Environmental Protection (FDEP), the Seminole Tribe of Florida, the Miccosukee Tribe of Indians of Florida, and the Poarch Band of Creek Indians. We also anticipate developing a Programmatic Agreement, consistent with the Council's regulations.

EPA will issue a *Federal Register* notice soliciting public comment on Florida's proposed program and announcing and soliciting public comment on any potential effects on historic properties. Importantly, the SHPO and FDEP have already signed an Operating Agreement to provide for the protection of historic properties should EPA approve Florida's CWA Section 404 program assumption request. EPA envisions that the Programmatic Agreement will build upon the process set forth in the Operating Agreement. You will be receiving a formal letter initiating programmatic consultation from Jeananne Gettle, Director of EPA's Region IV Water Division.

EPA looks forward to coordinating with the Council on Florida's request to assume the CWA Section 404 program and consulting on future state or tribal CWA Section 404 program assumption requests. Please feel free to contact me, or have your staff reach out to Mindy Eisenberg, Associate

Director of the Oceans, Wetlands and Communities Division, at eisenberg.mindy@epa.gov should you have any questions about CWA Section 404 program assumption or EPA's position on NHPA Section 106 consultations.

Sincerely,

DAVID
ROSS

Digitally signed by DAVID
ROSS
Date: 2020.08.24
13:20:35 -05'00'

David P. Ross
Assistant Administrator



Oregon
Kate Brown, Governor

Oregon Coastal Management Program
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September 3, 2020

Attn: Eric Metz
Department of State Lands
775 Summer St NE # 100
Salem, OR 97301

Potential §404 Assumption & Oregon's Federal Consistency Authority

PURPOSE

The purpose of this memo is to outline the current state of Oregon Department of Land Conservation and Development's (DLCD) knowledge in regards to the legislative report on proposed Section 404 Assumption (Section 404 of the federal Clean Water Act) being prepared by the Oregon Department of State Lands (DSL). It offers key context and background on Oregon's federal consistency authority granted under the Coastal Zone Management Act (CZMA) of 1972 and the concerns associated with the potential loss of federal consistency authority in assumed areas. This memo explores possible alternatives for addressing these concerns and limitations that should be considered. Note that this memo serves as a *preliminary* assessment and recommendations from DLCD, with recognition that continued discussion and coordination between DLCD and DSL will take place through 2023. DLCD suggests that DSL consider this information for incorporation into its upcoming report to the Oregon legislature.

DLCD'S CURRENT UNDERSTANDING: §404 ASSUMPTION

Currently, applicants are required to go through two separate permit processes to obtain approval for development that has an impact on wetlands and waterways in Oregon – one process from the U.S. Army Corps of Engineers (Corps) and one process from the Oregon Department of State Lands (DSL). "Partial 404 assumption¹" (Section 404 of the federal Clean Water Act) would provide a process for applicants to obtain state and federal authorizations with a single permit issued by the DSL.

The goal of a single state permit process is to streamline development opportunities in Oregon (e.g., commercial, residential and industrial development within Urban Growth Boundaries (UGBs) while achieving the same outcome as two separate permits. The U.S. Environmental Protection Agency (EPA) requires that environmental protections under an assumed 404 program remain equivalent to or better than the federal program, with program results being regularly evaluated by EPA to ensure standards are being met.

DSL has provided that the proposed partial assumption process in Oregon's federally-approved coastal zone would only apply to lands within UGB's, with the caveat that areas within a 1,000 foot buffer around

¹ Partial 404 assumption is not currently approved by the federal government, but federal rulemaking is anticipated for fall 2020 allowing partial assumption.

§10 navigable waters and the maximum extent of tidal wetlands (50% exceedance) will remain under Corps jurisdiction.

DSL predicts approximately 10% of State 404 permits would take place in the coastal zone (based on historic Removal-Fill permits). DLCD-OCMP has conducted preliminary analysis to quantify the potential impacts of assumption on CZMA authority. This analysis is available later in this memo.

OREGON'S FEDERAL CONSISTENCY AUTHORITY & §404 REVIEW

Oregon's federal consistency authority is sourced from the CZMA which sets up a flexible and voluntary process for coastal and Great Lakes states to create state coastal management programs. OCMP was the second state program in the nation to become federally approved.

Within a state coastal program, federal consistency is governed by both federal regulations and state rules. Based on the type of federal activity and lead entity, different federal consistency review pathways and regulations exist –

Direct Federal Actions ([Title 15 CFR §930, Subpart C](#)): Under the current system, if a federal agency requires a 404 permit, OCMP treats the project as a direct federal activity under this section of the federal regulations. This pathway comes with a 60-day review timeline as well as no requirement for the federal entity to obtain any state or local permits. The federal entity does have to show consistency with the underlying enforceable policies including state and local permits.

Federal Permits for Non-Federal Entities ([Title 15 CFR §930, Subpart D](#)): This pathway is for non-federal entities applying for a federal permit. These reviews include a 6-month review period and may require extensive agency coordination to determine if consistency has been met with all of Oregon's enforceable policies. Under this subpart of the federal regulations, applicants are required to receive all state and local permits and disclose any anticipated impacts to coastal resources. Additional permit procedures have been created for particular Nationwide permits, including an advanced concurrence pathway that requires the Corps to automatically incorporate [Coastal Zone conditions](#) on associated permits².

Oregon State Federal Consistency Rules ([OAR 660-35](#)): These state Administrative Rules contain the requirement that federal permit reviews must have all state and local authorizations issued and submitted to OCMP prior to the issuance of a federal consistency decision. This requirement exists because issuance of the state and local authorizations is the only definitive way to determine consistency with the underlying enforceable policies³.

HISTORY OF DSL/DLCD COORDINATION FOR FC REVIEW

The Oregon Coastal Management Program (OCMP) is a networked program including state natural resource agencies and local governments within the coastal zone. DLCD is the lead agency within the network and coordinates federal consistency reviews pursuant to federal regulations.

² <https://www.oregon.gov/lcd/OCMP/Pages/Federal-Permit.aspx#42e76eb3-392d-4f73-8b22-cf88a0f626bf>

³ 660-035-0050(4): Evidence supporting consistency for federal license or permit activities: For activities located within the state's jurisdiction that require state or local permits or authorizations, the issued permit or authorization is the only acceptable evidence demonstrating consistency with the enforceable policies that the permit or authorization covers.

The Department of State Lands is a networked partner of the OCMP and plays a critical role in federal consistency reviews by providing necessary expertise and the review and issuance of Removal-Fill and Proprietary permits necessary to demonstrate consistency with the applicable enforceable policies pursuant to OAR 660-35.

ANALYSIS OF PARTIAL §404 ASSUMPTION IN THE COASTAL ZONE

DLCD-OCMP conducted a preliminary analysis using map layers provided by DSL⁴. The following analysis investigates 10-year historic DSL regulatory permit data (state-wide). All calculations should be regarded as approximations. Additional analysis will need to be conducted on historic permits issued by the U.S. Army Corps of Engineers to calculate more accurate impacts to Oregon’s federal consistency authority under an assumed 404 Program -

Metric	Number of Permits Issued
Total number of regulatory permits within the Coastal Zone ⁵ in assumable waters.	106
Total numbers of regulatory permits issued in high hazard zones within assumable waters.	
FEMA Significant Flood Hazard Area,	17
Tsunami Inundation Zone	41
Total numbers of regulatory permits issued in critical habitat areas within assumable waters. (habitats include forested wetlands and dunal wetlands)	4

**Assumable waters*: Within Urban Growth Boundaries, outside of Section 10 Navigable waters 1,000ft buffer and tidally influenced waters (“50% Exceedance” in web map).

ASSUMPTION OF SECTION 404 IS A FEDERAL ACTION

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-OCM of its request for a consistency determination if assumption is anticipated to take place following this legislative report.

Federal Action Review: Any 404 Assumption proposal through the EPA will be classified as a federal action under Title 15 CFR §930 Subpart C. This review pathway requires the federal agency taking an action (i.e. rulemaking) to submit a comprehensive consistency determination containing an enforceable policy analysis and a coastal effects evaluation. DLCD encourages DSL and EPA to begin early coordination for Federal Consistency Review under Subpart C (Federal Actions) of the federal regulations. As part of this federal action review, the EPA will need to submit a comprehensive consistency determination⁶ to DLCD-OCMP indicating how the action is consistent with the enforceable policies of the OCMP.

⁴ <https://maps.dsl.state.or.us/404Assumption/>

⁵ Based on total number of historical regulatory permits (11,170 permits state-wide), DSL predicts approximately 10% of the total historical permits State 404 permits would take place in Oregon’s federally approved coastal zone.

⁶ Additional information on the requirements of this consistency determination can be found in [Title 15 CFR §930.30](#)

CONCERNS RELATING TO 404 ASSUMPTION

DLCD-OCMP remains concerned that an assumed 404 program, as presented by DSL, would remove the federal nexus triggering Oregon's federal consistency authority under the CZMA. This is of particular concern given that the area under consideration in the coastal zone for partial assumption (i.e. UGB's) are the most likely locations for development.

Similar to Section 401 compliance, the authority held by the CZMA is not federally preemptable and therefore gives Oregon a stronger level of authority on complex and controversial projects. DLCD-OCMP is concerned that if Section 404 is assumed by the state, that the federal government will be able to preempt all state permits. Authorities granted under the CZMA and the Clean Water Act 401 program are the only authorizations that cannot be federally preempted under federal law.

DSL 404 assumption may also limit the OCMP's ability to implement enforceable policies (statewide planning goals, Oregon revised statutes, and local comprehensive plans and land use regulations) of the program. 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

INFORMATION NEEDS & QUESTIONS

DLCD-OCMP needs to have the following questions and information needs addressed to inform the analysis of the proposed partial assumption on Oregon's federal consistency authority-

1. How many historical Corps 404 permits have been issued in the area being proposed for partial assumption?
 - Conducting the same analysis as above using Corps permit metrics is critical to determining level of impact that assumption will have on Oregon's federal consistency authority.
2. How will this assumption process consider perpetual UGB updates and expansion?
3. Will state consistency be feasible due to DSL's jurisdictional constraints?
 - OCMP enforceable policies are sourced from a multitude of state natural resource agencies, local jurisdiction comprehensive plans and ordinances, as well as the Statewide Land Use Planning Goals. To maintain protections currently under the CZMA would require DSL to have the authority to holistically review permits through this lens.
4. How would assumed 404 permits translate into DSL's current permitting framework?
 - Would the current federal naming system and framework be translated into DSL's current permit system and would this change the way permits are reviewed?
5. Under an assumed program, are federal entities required to obtain a state-issued 404 permit for an applicable project?
6. How will 404 permits applied for by a federal entity be evaluated under the assumed program in a way that is equivalent to current standards?

ALTERNATIVES ANALYSIS

Alternative 1: Creation of a State Consistency Process

A more limited alternative (lower standard of protection) would be the creation of a new comprehensive state consistency process that encompasses the authority of all of the jurisdictions that OCMP sources

enforceable policies from. This option is anticipated to be costly and limited in regards to federal preemption.

1. DLCD believes that the **State Agency Coordination Agreement** between DLCD and DSL may be an appropriate mechanism to address any identified issues related to 404 assumption and OCMP's federal consistency review authority to ensure compliance with enforceable policies. However, this does not protect the state in a scenario where federal preemption can take place. DSL assumption would remove the federal nexus required for federal consistency review under the CZMA.
2. Another alternative could be the exploration of initiating **state consistency review**. There are other examples of coastal management programs that complete state consistency reviews to ensure compliance with coastal enforceable policies. Creation of a state consistency review process would require legislative changes and extensive rulemaking.
3. Other ways to address issues related to coastal policy compliance could be through **memoranda of agreements/understandings** or other formal coordination agreements.
4. Integrate OCMP enforceable policies into the State 404 permitting process. This would likely require extensive legislative updates granting DSL the authority to implement the policies of OCMP networked agency partners. (Examples of state legislation: North Carolina)
5. Creation of an **appeal process and associated oversight body** to assure that OCMP objections to DSL issuance has oversight if appealed.

Alternative 2: Proceed with Partial Assumption with Specific Exclusions in the Coastal Zone

Create a system that allows controversial, complex, or priority-activity projects to be evaluated by the Corps rather than fall under the DSL partial assumption process. A non-exhaustive list of potential exclusions have been outlined below. Additional considerations for exclusions will need to be evaluated and agreed upon by DLCD-OCMP and DSL prior to implementation -

- Any activity encountering **critical habitat** as described in DLCD-OCMP's Critical Habitat Mapping Tool⁷
- Projects proposed within the highest **hazard zones** (FEMA flood hazard areas, and tsunami inundation areas)
- Exclude specific projects that fall under special **authorities permitting federal preemption** (i.e. Energy projects under the Natural Gas Act)

Alternative 3: Exclude the Coastal Zone from the proposed 404 Assumption

As with any alternatives analysis, a "no change" alternative should always be considered. In this instance, this is the only alternative that meets the EPA requirement that state assumed programs meet an equivalent standard of protection given that without a federal nexus triggering Oregon's CZMA authority, assumed 404 permits would not receive any federal consistency review.

Alternative 4:

Oregon, via a joint agency letter vetted by the Governor's Office, may notify the EPA and NOAA regarding the inherent conflict between CZMA and state assumption of Section 404 of the CWA. The CZMA requires a federal nexus to trigger the authority to review an activity for consistency. Under an assumed 404 program, this nexus does not exist. Considering the federal government is encouraging state assumption of 404 authority, the EPA and NOAA should consider a reasonable pathway to assure that the required

⁷ <https://geo.maps.arcgis.com/apps/webappviewer/index.html?id=1b4a3202b66c4ab79b6907e7b4abf9db>

federal nexus for CZMA review is achieved or appropriately waived if federal authority is assumed by a state agency.

CONCLUSIONS

At this time, DLCD-OCMP, in coordination with DSL, considers Alternative 4 to be the best next step in this process. Given that the EPA has set the standard that assumption must provide equivalent protections for state resources, if the federal government is unable to provide helpful guidance on the issue of federal nexus, DLCD-OCMP does not believe an alternative exists with the same level of protections as granted by the CZMA. DLCD-OCMP also anticipates a need to further consult with networked agencies of the OCMP to identify additional concerns.

Thank you for coordinating on these efforts. Staff look forward to continuing to working toward a solution to these concerns.

Sincerely,



Patty Snow
DLCD Ocean and Coastal Services Division Manager

CC: Bill Ryan (DSL Deputy Director)
Kirstin Greene (DLCD Deputy Director)
Deanna Caracciolo (DLCD-OCMP Coastal State-Federal Relations Coordinator)
Heather Wade (DLCD-OCMP Sr. Coastal Policy Specialist)
Amanda Punton (DLCD-OCMP Natural Resources Specialist)



Oregon

Kate Brown, Governor

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October 29th, 2020

Eric Metz
Department of State Lands
775 Summer St NE #100
Salem, OR 97301

Dear Eric:

The purpose of this memo is to outline the Oregon Department of Environmental Quality's (DEQ) current state of understanding of the proposed Section 404 Assumption (Section 404 of the federal Clean Water Act (CWA)) identified by the Oregon Department of State Lands (DSL), as described in a report to the 2021 Legislative Assembly (required by HB 2436 (2019)). This memo will describe the current role and purpose of section 401 Water Quality Certification (WQC); DEQ's understanding of DSL's efforts for 404 assumption; the potential future state if 404 assumption is authorized; and current outstanding questions concerning DEQ activities that will need to be resolved. DEQ anticipates continued coordination with DSL as its proposal for 404 assumption is further developed and evaluated.

OVERVIEW

A state assumed 404 program must include a water quality review and certification process that is equivalent or more stringent than requirements currently established under the federal program. As such, review processes achieved via the CWA Section 401 State Water Quality review and certification process would need to be retained in an equivalent manner for state assumed permitting activities. Based on current estimates of what may be proposed by EPA for a partial 404 assumption program - and our understanding of a proposed Oregon program as presented by Department of State Lands - DEQ expects that rulemaking revisions and process modifications to its existing Section 401 WQC regulations and procedures would be necessary.

CURRENT PURPOSE and REQUIREMENTS of CWA SECTION 401 – State Water Quality Certification

Section 401 of the CWA requires any federally licensed or permitted activity that may have a discharge to waters of the United States (WOTUS) to obtain a water quality certification (WQC) from the state where the activity will occur. The certification ensures that the proposed project

will comply with the state's EPA approved water quality standards, programs & policies, including CWA Sections 301 – Treatment of Point Sources; 302 – Effluent discharges to waterways; 303 – Basin Planning, list of impaired waters and TMDLs; 306 – National Standards of Performance; and 307 – Toxic Pollutants and Pretreatment. Currently, the program is administered by DEQ through OAR 340 Division 48, and ORS 468B – Water Quality. A federal license or permit cannot be issued without 401 WQC issuance or waiver.

In contrast to the responsibilities of other state and federal regulatory programs, DEQ's WQC process identifies waterbodies (wetlands and waterways), potential water quality parameters affected by the proposal, and potential effects to beneficial uses that are expected from impacts to those waterbodies. If the proposed project does not comply with regulations or is not sufficiently protective, the WQC will identify conditions necessary which may include alternative methods or management practices. If protection of water quality standards, beneficial uses, and antidegradation cannot be assured, the application must be denied.

DEQ's regulatory responsibilities in issuing 401 WQC decisions are unique from other agencies. DEQ evaluates all proposed activities for compliance with water quality standards. Activities may be associated with, but not limited to, construction, development, dredging, aquaculture, utilities, pipelines, stream restoration, housing, LNG facilities, large bridges, commercial and industrial development, road construction/maintenance, post-construction stormwater management plan reviews and programmatic certifications covering multiple activities.

DEQ's 401 certification process work includes: application evaluation; identification of conditions which, if met, will result in project approval as well as achievement of state water quality protection regulations; technical assistance, including guidance documents that describe how to meet the identified conditions; and participation in pre-application meetings and site visits for some proposed projects. Site visits allow development of conditions that better reflect site specific conditions. 401 certification work also involves administrative tasks such as database management, responding to information requests and conducting research about best management practices and other technical aspects of proposed projects. DEQ conducts annual inspections throughout the state to ensure compliance and measure program effectiveness.

HISTORY OF AGENCY COORDINATION FOR 401 WQC

Currently, DEQ does not issue certifications for state permits, but does coordinate closely with Department of State Lands (DSL) on a project-by-project basis for projects requiring both a 404 Corps permit and a DSL permit. DSL is responsible for ensuring mitigation occurs for unavoidable impacts to state wetlands and waterways; an integral part in ensuring water

quality standards are not lowered by the construction of a project. DEQ performs the water quality review for most DSL jurisdictional projects, including pointing to specific conditions of the WQC that must be met by the applicant in order for the DSL permit to be valid.

DEQ's CURRENT UNDERSTANDING of §404 ASSUMPTION

Under current regulatory requirements, applicants must go through two distinct permit processes to obtain approval for development that has an impact on wetlands and waterways in Oregon – one process from the U.S. Army Corps of Engineers and one process from the Oregon Department of State Lands (DSL). State 404 assumption (Section 404 of the federal Clean Water Act) provides a process for applicants to obtain state and federal authorizations with a single permit issued by a delegated state authority. 'Partial assumption' has not yet been established by EPA, but is an anticipated mechanism by which a state would assume 404 responsibilities for a clearly defined subset of permit or project types.

INCORPORATING DEQ WQC REVIEW UNDER PARTIAL §404 ASSUMPTION

Because EPA requires that state regulations regarding assumption cannot be less stringent, only equal to or more stringent than the current federal regulations, a state 404 assumption program must implement water quality review and certification through a state permitting process. To do so, DEQ will need to make programmatic changes and revise its rules in OAR 340 Division 48 to create a process that aligns with a state permit program. Developing these rules would require resources and time before becoming operational.

DEQ anticipates that project review itself would be similar to the current 401 WQC process, although the agencies would need to work through several aspects that would be unique to a state assumed program. For assumed projects, DEQ currently foresees a process that would include:

- Receipt of applications by DSL and DEQ.
- DEQ coordination with DSL and review of the application.
- Public notice of the project, including coordination between DEQ and DSL on that public process.
- DEQ evaluation of any potential impacts to water quality due to the construction and operation of the project/facility. DEQ would review all potential impacts in a manner similar to how it currently conducts its 401 WQC evaluation, which includes and evaluation of all state water quality standards and reaching a conclusion that either degradation will not occur or that a condition can be crafted to avoid degradation, or will deny a project. DEQ anticipates that acquiring a state permit would be required to include an approved DEQ project review.

- DEQ currently, and would continue to ensure compliance through the review of:
 - Groundwater /drinking water impacts.
 - Post construction stormwater (encouraging LID) - ensuring all stormwater leaving the site is adequately treated for the life of the facility; this includes post construction operation and maintenance.
 - Cleanup issues – sediment that could contaminate surface water/groundwater, and monitoring where appropriate.
 - Compliance with Total Maximum Daily Loads.
 - Compliance with Three Basin Rule.
 - Buffers for wetland/stream protection.
 - Proposed best management practices to ensure they are appropriate and adequate.
 - Turbidity monitoring for in-stream work.
 - Upland disposal sites including coordination with DEQ's Materials Management Program.
 - NPDES – MS4 and 1200-C/Z programs, including the coordination with these program staff.
- DEQ would ensure appropriate public process opportunities occur to be consistent throughout the state and with DEQ agency requirements.

INFORMATION NEEDS, QUESTIONS RELATING TO 404 ASSUMPTION

In the absence of an established 404 partial assumption programmatic description as yet described by EPA, it is difficult to evaluate all potential implications of changes that may be necessary should the state pursue a partial assumption of the program. At a minimum, DEQ has determined that a 404 partial assumption program, as presented by DSL, would require DEQ administrative rule revisions. This rulemaking effort would require significant resources from DEQ's limited 401 program staff and would require a year or more to complete. DEQ would need to retain its current 401 WQC program and add new, but similar, processes to address permitting actions assumed by the state.

DEQ and DSL will need coordinate communication in order to avoid confusion as UGB boundaries change or for projects are very close to those boundaries.

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

In order to plan for and carry out programmatic changes and rule revisions, additional information and detailed process modifications will need to be developed. Examples of

questions, clarifications, and information gaps that may need to be addressed include, but are not limited to:

- What are the differences in jurisdictional determinations and exemptions between current practices by the Corps and under proposed 404 assumption by DSL? What new or revised processes will be required to ensure that water quality equivalency reviews are consistent statewide?
- What new or revised processes will be required to ensure consistent compliance assurance policies will occur statewide in a manner similar to how it is being achieved currently.
- Updated or enhanced IT systems may be necessary to incorporate new procedures, protocols, and processes. How will the information technology tools and needs be addressed for the involved agencies?
- Where will the revenue come from to fund this work? DEQ would need to ensure the current fee schedule is maintained in order to generate sufficient revenue to pay for water quality review efforts.
- Administrative rule changes will be required to provide equivalent water quality certification review, compliance assurance, and funding mechanisms. When will these need to be achieved by and what resources will be available to support this work?
- Would water quality review be a standalone process independently administered by DEQ as it is now, or would it become part of the state permit issued by DSL? Relatedly, will there be separate public notice processes or one joint public notice process administered by DSL?
- Will federal entities continue to be required to obtain a state-issued 404 permit for an applicable project under a state assumed (or partial assumed) program?

Thank you for coordinating on these efforts. DEQ staff look forward to continuing to work with DSL, other agencies responsible for companion processes, and stakeholders to identify regulatory solutions that are both efficient and protective of the environment.

Sincerely,



Steve Mrazik
Water Quality Manager
Northwest Region



89930

Federal Register / Vol. 81, No. 239 / Tuesday, December 13, 2016 / Notices

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OPPT-2013-0677; FRL-9956-01]

Receipt of Information Under the Toxic Substances Control Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is announcing its receipt of information submitted pursuant to a rule, order, or consent agreement issued under the Toxic Substances Control Act (TSCA). As required by TSCA, this document identifies each chemical substance and/or mixture for which information has been received; the uses or intended uses of such chemical substance and/or mixture; and describes the nature of the information received. Each chemical substance and/or mixture related to this announcement is identified in Unit I. under

SUPPLEMENTARY INFORMATION.

FOR FURTHER INFORMATION CONTACT: For technical information contact: Hannah Braun, Chemical Control Division (7405M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460-0001; telephone number: (202) 564-5614; email address: brown.hannah@epa.gov.

For general information contact: The TSCA-Hotline, ABVI-Goodwill, 422 South Clinton Ave., Rochester, NY 14620; telephone number: (202) 554-1404; email address: TSCA-Hotline@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Chemical Substances and/or Mixtures

Information received about the following chemical substances and/or mixtures is identified in Unit IV.:

A. *Ethanedioic acid* (CASRN 144-62-7).

B. *Octamethylcyclotetrasiloxane* (D4) (CASRN 556-67-2).

II. Authority

Section 4(d) of TSCA (15 U.S.C. 2603(d)) requires EPA to publish a notice in the **Federal Register** reporting the receipt of information submitted pursuant to a rule, order, or consent agreement promulgated under TSCA section 4 (15 U.S.C. 2603).

III. Docket Information

A docket, identified by the docket identification (ID) number EPA-HQ-OPPT-2013-0677, has been established for this **Federal Register** document, which announces the receipt of the information. Upon EPA's completion of its quality assurance review, the

information received will be added to the docket identified in Unit IV., which represents the docket used for the TSCA section 4 rule, order, and/or consent agreement. In addition, once completed, EPA reviews of the information received will be added to the same docket. Use the docket ID number provided in Unit IV. to access the information received and any available EPA review.

EPA's dockets are available electronically at <http://www.regulations.gov> or in person at the Office of Pollution Prevention and Toxics Docket (OPPT Docket), Environmental Protection Agency Docket Center (EPA/DC), West William Jefferson Clinton Bldg., Rm. 3334, 1301 Constitution Ave. NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the OPPT Docket is (202) 566-0280. Please review the visitor instructions and additional information about the docket available at <http://www.epa.gov/dockets>.

IV. Information Received

As specified by TSCA section 4(d), this unit identifies the information received by EPA.

A. *Ethanedioic Acid* (CASRN 144-62-7)

1. *Chemical Uses:* Ethanedioic acid is used as a rust remover; in antirust metal cleaners and coatings; as a flame-proofing and cross-linking agent in cellulose fabrics; as a reducing agent in mordant wool dyeing; as an acid dye stabilizing agent in nylon; as a scouring agent for cotton printing; and as a dye stripper for wool. Ethanedioic acid is also used for degumming silk; for the separation and recovery of rare earth elements from ore; for bleaching leather and masonry; for cleaning aluminum and wood decks; and as a synthetic intermediate for pharmaceuticals.

2. *Applicable Rule, Order, or Consent Agreement:* Chemical testing requirements for second group of high production volume chemicals (HPV2), 40 CFR 799.5087.

3. *Applicable docket ID number:* The information received will be added to docket ID number EPA-HQ-OPPT-2007-0531.

4. *Information Received:* EPA received the following information: Exemption Request.

B. *Octamethylcyclotetrasiloxane* (D4) (CASRN 556-67-2)

1. *Chemical Uses:* D4 is used as an intermediate for silicone copolymers and other chemicals. D4 is also used in

industrial processing applications as a solvent (which becomes part of a product formulation or mixture), finishing agent, and an adhesive and sealant chemical. It is also used for both consumer and commercial purposes in paints and coatings, and plastic and rubber products and has consumer uses in polishes, sanitation, soaps, detergents, adhesives, and sealants.

2. *Applicable Rule, Order, or Consent Agreement:* Enforceable Consent Agreement for Environmental Testing for Octamethylcyclotetrasiloxane (D4) (CASRN 556-67-2).

3. *Applicable docket ID number:* The information received will be added to docket ID number EPA-HQ-OPPT-2012-0209.

4. *Information Received:* EPA received the following information: Benthic sampling events update.

Authority: 15 U.S.C. 2601 *et seq.*

Dated: December 6, 2016.

Lynn Vendinello,

Acting Director, Chemical Control Division, Office of Pollution Prevention and Toxics.

[FR Doc. 2016-29889 Filed 12-12-16; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OW-2013-0710; FRL-9956-48-Region 5]

State Program Requirements; Approval of Program Revisions to Michigan's Clean Water Act Section 404 Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of decision.

SUMMARY: In a July 5, 2013, letter, the Michigan Department of Environmental Quality (MDEQ) requested that the Environmental Protection Agency (EPA) approve revisions to the State's Clean Water Act (CWA) Section 404 permitting program that resulted from the enactment of Michigan Public Act 98 (PA 98). CWA Section 404 requires permits for dredge and fill activities in wetlands subject to federal jurisdiction. A state CWA Section 404 program must be conducted in accordance with the requirements of CWA Section 404 and its implementing regulations. Any revisions to state CWA programs must be approved by EPA before the revision may be implemented. Substantial modifications to a state's CWA Section 404 program become effective upon EPA approval and publication of EPA's decision in the **Federal Register**.

EPA has reviewed the proposed revisions to Michigan's Section 404

program within the sections of the Michigan statute modified by PA 98 and has found a majority of revisions within PA 98 sections to be consistent with the CWA and approvable. Other revisions are inconsistent with the CWA and thus not approvable.

DATES: Pursuant to 40 CFR 233.16(d)(4), the following revisions to Michigan's CWA Section 404 program are approved and in effect upon publication of this notice.

FOR FURTHER INFORMATION CONTACT:

Melanie Burdick, Watersheds and Wetlands Branch (WW-16j), U.S. Environmental Protection Agency, Region 5, 77 W. Jackson Blvd., Chicago, Illinois 60604; call toll free: 800-621-8431, weekdays, 8:30 a.m. to 4:30 p.m. Central time; fax number: 312-697-2598; email address: burdick.melanie@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

This action applies to the MDEQ's CWA Section 404 program. Approval of these provisions affects those seeking CWA Section 404 dredge and fill permits from the State of Michigan.

B. How can I get copies of this decision and other related information?

Docket

EPA has established a docket for this action under Docket ID No. EPA-HQ-OW-2013-0710; [FRL 9956-48-REGION 5]. All publicly available materials related to this action are available either electronically through www.regulations.gov or in hard copy at the Water Docket in the EPA Docket Center, (EPA/DC) EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744. You may access this **Federal Register** document electronically from the Government Printing Office under the "**Federal Register**" listings at FDSys <http://www.gpo.gov/fdsys/>. Insert: EPA-HQ-OW-2013-0710; FRL 9956-48-Region 5 in the search field.

II. Background and Scope of MDEQ Program Revisions

Under Section 404 of the CWA, permits are required for activities involving discharges of dredged or fill material to waters of the United States, including wetlands, lakes and streams. Michigan assumed CWA Section 404

permitting authority for its inland waters and wetlands in 1984. A state-assumed CWA Section 404 program must be conducted in accordance with the requirements of the CWA and its implementing regulations at 40 CFR part 233 (33 U.S.C. 1344(h), 40 CFR 233.1). In February 1997, EPA received a request from the Michigan Environmental Council to either ensure that the administration of Michigan's Section 404 program was consistent with the CWA, or withdraw Michigan's authority to administer the Section 404 program. In response to the request, EPA initiated an informal review of Michigan's administration of the Section 404 program. This Program Review was completed in April 2008. The 2008 Program Review identified several deficiencies in Michigan's Section 404 program. In response to the 2008 Program Review findings, MDEQ proposed a list of corrective actions to address those deficiencies. These corrective actions included making changes to the State's statutes governing state administration of the Section 404 program. On July 2, 2013, Michigan enacted PA 98 which contained significant amendments to Parts 301 (Inland Lakes and Streams) and 303 (Wetlands Protection) of Michigan's Natural Resources and Environmental Protection Act. The statutory amendments included changes intended to address the legislative corrective actions identified in EPA's 2008 Program Review; changes to the definition of contiguous wetlands regulated by Michigan's Section 404 program; the addition of new exemptions from permitting; and changes to the requirements for mitigating the effects of filling wetlands and other waters of the United States. The program revisions resulting from enactment of PA 98 are described EPA's *Supporting document for EPA decision to approve/deny Michigan's section 404 program statute changes in Public Act 98* which can be found in the docket for this action which is available electronically through www.regulations.gov, Docket ID No. EPA-HQ-OW-2013-0710.

On July 5, 2013, the MDEQ submitted PA 98 to EPA as a proposed revision to its CWA Section 404 program and requested EPA approval of the revisions. Per the regulations at 40 CFR 233.16(d)(3), EPA held a public hearing on December 11, 2013, sought public comment, and consulted with the Corps of Engineers and the U.S. Fish and Wildlife Service on the program revisions contained in PA 98. (Note: The U.S. National Marine Fisheries Service

did not respond to EPA's request to consult.) The EPA also consulted with interested tribes per Executive Order 13175 and EPA policy.

In a letter to the MDEQ dated November 24, 2014, EPA requested clarification on the State's interpretation of a number of provisions within PA 98. The Michigan Department of the Attorney General responded to this request for clarification in a letter dated May 27, 2015. A copy of these letters can be found in the docket at: www.regulations.gov, Docket ID No. EPA-HQ-OW-2013-0710.

EPA has reviewed the proposed revisions within the sections of the Michigan statutes modified by PA 98, and has found a majority of the revisions to be fully consistent with the CWA and are approved. Other revisions are inconsistent and thus not approved.

III. Summary of Public Comments

The EPA solicited and received public comment on the proposed revisions to Michigan's Section 404 program resulting from PA 98 via testimony at a December 11, 2013, public hearing, electronically through www.regulations.gov, and by written submissions to the docket for this action. Through these efforts, EPA received a total of 286 comments. Of the 134 unique comments received: 82 expressed support of EPA approval of the proposed program revisions resulting from PA 98, 49 opposed EPA approval, and the remaining commenters did not express support for approval or disapproval of the revisions. The majority of commenters simply indicated whether they supported or did not support EPA approval of the program revisions in PA 98. While some commenters provided detailed rationale for their viewpoint, many did not. Most comments that supported approval of the program revisions in PA 98 also identified support for economic development in Michigan. Comments supporting approval of the revisions were from a diverse group of interests including agriculture, oil and gas, drain commissions, land development, home building, and manufacturing. Those commenters who expressed opposition to approval of the program revisions highlighted concern for environmental protection of rivers, lakes, and wetlands. These commenters felt that PA 98 did not adequately address the inconsistencies between Michigan's program and the CWA identified in EPA's 2008 Program Review and that additional provisions in PA 98 were inconsistent with the CWA requirements. Regardless of positions taken on EPA's approval of the

proposed program revisions, most commenters supported Michigan's retention of the CWA Section 404 permitting program. Consistent with Executive Order 13175 and EPA's policy on *Consultation and Coordination with Indian Tribes* (<http://www.epa.gov/tribal/consultation/consult-policy.htm>), EPA held government-to-government consultation teleconferences with four interested Michigan tribal organizations on January 23, 2014. EPA received written comments from two tribes. All public comments received, EPA's *Summary of Public Comments and Responsiveness Summary* and a summary of EPA's consultation with tribes can be found in the docket at: www.regulations.gov, Docket ID No. EPA-HQ-OW-2013-0710; [FRL 9956-48-REGION 5].

IV. Notice of Decision

Pursuant to 40 CFR 233.16(d)(4), EPA has reviewed the proposed revisions to Michigan's Section 404 program resulting from enactment of PA 98 for consistency with the CWA and its implementing regulations. Where EPA has determined that the proposed revisions meet the minimum requirements of the CWA and implementing regulations, EPA has approved the revisions which are in effect upon publication of this notice. EPA has disapproved those revisions that do not meet these minimum requirements.

EPA's review of the proposed revisions to Michigan's Section 404 program resulting from PA 98 does not constitute a comprehensive review of

the State's program for conformance with the CWA, but rather addresses only proposed changes to Michigan's program related to PA 98 ensuring their consistency with CWA Section 404 and its implementing federal regulations. Information about the proposed revisions to Michigan's Section 404 program pursuant to PA 98, the public hearing, EPA's response to comments and other supporting documents are available at: www.regulations.gov (insert: EPA-HQ-OW-2013-0710 in the search field).

I hereby provide public notice that EPA has taken final action on the proposed revisions to MDEQ's CWA Section 404 program as outlined in Tables 1–2 below.

TABLE 1—PROVISIONS OF PA 98 CONSISTENT WITH REQUIREMENTS OF CWA SECTION 404

PA 98 Provision—with descriptor	Decision
Sec. 1307 Permit Processing Timeframes	Approved.
Sec. 30101a. Statement of Purpose	Approved.
Sec. 30103(1)(d)(i) and (ii) Exemption for Maintenance of Agricultural Drains	Approved.
Sec. 30103(1)(e) Modification of Waste Treatment Exemption	Approved.
Sec. 30103(1)(f) Modification of Minor Drainage Exemption	Approved.
Sec. 30103(1)(g)(i)–(vi) and (viii) Modification of Drain Maintenance Exemption	Approved.
Sec. 30103(3) Definition of Agricultural Drain Added	Approved.
Sec. 30104 Changes in Michigan's Fee Requirements	Approved.
Sec. 30105(3) and (5) Modification of Public Notice Provisions	Approved.
Sec. 30105(8)(b) Modification of Maintenance and Repair of Existing Pipelines Provision	Approved.
Sec. 30105(9) Modification of Section Authorizing Conditions for a Minor Project Category or General Permit	Approved.
Sec. 30105(11) General Permit for Drain Activities	Approved.
Sec. 30305(2)(d) Modification of Exemption for Grazing	Approved.
Sec. 30305(2)(e) Modification of Exemption for Farming, Horticulture, Agriculture, Silviculture, Lumbering and Ranching.	Approved.
Sec. 30305(2)(h) Modification of Agricultural Drain Maintenance Exemption	Approved.
Sec. 30305(2)(i) Exemption for Drain Maintenance	Approved: EPA recommends the language is clarified.
Sec. 30305(2)(j) Modification of Road Maintenance Exemption	Approved.
Sec. 30305(2)(j) Deletion of Farm Production and Harvesting Exemption	Approved.
Sec. 30305(2)(k) Modification of Maintenance of Public Streets Exemption	Approved.
Sec. 30305(2)(l) Modification of Utility Line Maintenance Exemption	Approved: with the condition that the 2011 MOA will be revised.
Sec. 30305(2)(o) Deletion of Construction of Tailings Basin Exemption	Approved.
Sec. 30305(4)(a) Modification of Wetlands Incidentally Created as Part of Sand, Gravel or Mineral Mining Exemption	Approved.
Sec. 30305(8) Definition of Agricultural Drain	Approved.
Sec. 30306(1)–(6) Modification of Application Requirements and Fees	Approved.
Sec. 30306(7) Modification of Conditional Permits Under Emergency Conditions	Approved.
Sec. 30306b Modification of Application Fees and Other Requirements	Approved.
Sec. 30311(5)–(6) Consideration of Feasible and Prudent Alternatives	Approved.
Sec. 30311a Deletion of Former Sections 30311a(2)–(5) on Consideration of Feasible and Prudent Alternatives	Approved.
Sec. 30311d(5) Compensatory Mitigation Ratios	Approved.
Sec. 30311d(6) Conservation Mitigation Credits for Easements for Impacted Agricultural Sites	Approved: the provision for a "stewardship fund."
Sec. 30311d(7) Stewardship Fund	Approved.
Sec. 30311d(8)(a)–(e) Compensatory Mitigation Rulemaking	Approved.
Sec. 30311d(9)(a),(b), and (c) Rulemaking to Encourage Banks	Approved.
Sec. 30311d(10) Mitigation Bank Funding Program	Approved.
Sec. 30312(5) General Permit Authority	Approved.
Sec. 30312(6) General Permit for Blueberry Farming	Approved.
Sec. 30312(7) General Permit for Blueberry Farming	Approved.

TABLE 1—PROVISIONS OF PA 98 CONSISTENT WITH REQUIREMENTS OF CWA SECTION 404—Continued

PA 98 Provision—with descriptor	Decision
Sec. 30321(7) Defines Drains, Ditches, etc. as Not being Wetlands	Approved: the second sentence “A temporary obstruction of drainage . . . identified as a wetland pursuant to section 30301(2).”
Sec. 30328 State Program Limited to Navigable Waters and Waters of the U.S.	Approved.

TABLE 2—PROVISIONS OF PA 98 INCONSISTENT WITH REQUIREMENTS OF CWA SECTION 404

PA 98 Provision—with descriptor	Decision
Sec. 30103(1)(g)(vii) Modification of Drain Maintenance Exemption	Disapproved.
Sec. 30103(1)(m) Exemption for Controlled Livestock Access	Disapproved.
Sec. 30305(2)(m) Modification of Utility Line Installation Exemption	Disapproved.
Sec. 30305(2)(o) Exemption for Placement of Biological Residues in Wetlands	Disapproved.
Sec. 30305(4)(b) Modification of Exemption for Wetlands Created as a result of Construction or Operation of a Waste Treatment Pond or Storm Water Facility.	Disapproved.
Sec. 30305(4)(d) Modification of Exemption for Wetlands Created as a Result of Construction of Drains to Remove Excess Soil Moisture from Upland Areas Primarily Used for Agriculture.	Disapproved.
Sec. 30305(4)(e) Exemption for Wetlands Formed in Roadside Ditches	Disapproved.
Sec. 30305(4)(f) Exemption for Wetlands Created as a Result of Agricultural Soil and Water Conservation Practices	Disapproved.
Sec. 30305(5) Contiguous Waters as a Result of Excavation	Disapproved.
Sec. 30311(7) Consideration of Feasible and Prudent Alternatives	Disapproved.
Sec. 30311d(6) Conservation Mitigation Credits for Easements for Impacted Agricultural Sites	Disapproved: the statement: “protection and restoration of the impacted site.”
Sec. 30321(5) Definition of “Not Contiguous”	Disapproved.
Sec. 30321(6) Use of Drains to Establish Jurisdiction	Disapproved.
Sec. 30321(7) Defines Drains, Ditches, etc. as Not Being Wetlands	Disapproved: the first sentence “A drainage structure such as a culvert, ditch, or channel, in and of itself, is not a wetland.”

Authority: This action is taken under the authority of Section 404 of the Clean Water Act as amended, 42 U.S.C. 1344.

Dated: December 2, 2016.

Robert A. Kaplan,

Acting Regional Administrator.

[FR Doc. 2016–29888 Filed 12–12–16; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2015–0021; FRL–9955–75]

Pesticide Product Registrations; Receipt of Applications for New Active Ingredients

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has received applications to register pesticide products containing active ingredients not included in any currently registered pesticide products. Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA is hereby providing notice

of receipt and opportunity to comment on these applications.

DATES: Comments must be received on or before January 12, 2017.

ADDRESSES: Submit your comments, identified by the Docket Identification (ID) Number and the File Symbol of interest as shown in the body of this document, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.
- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001.
- *Hand Delivery:* To make special arrangements for hand delivery or delivery of boxed information, please follow the instructions at <http://www.epa.gov/dockets/contacts.html>. Additional instructions on commenting or visiting the docket, along with more

information about dockets generally, is available at <http://www.epa.gov/dockets>.

FOR FURTHER INFORMATION CONTACT:

Robert McNally, Biopesticides and Pollution Prevention Division (7511P), main telephone number: (703) 305–7090, email address: BPPDFRNotices@epa.gov; or Michael Goodis, Registration Division (7505P), main telephone number: (703) 305–7090, email address: RDFFRNotices@epa.gov. The mailing address for each contact person is: Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460–0001. As part of the mailing address, include the contact person's name, division, and mail code. The division to contact is listed at the end of each application summary.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

You may be potentially affected by this action if you are an agricultural producer, food manufacturer, or

APPENDIX L

CORPS ORGANIZATIONAL CHART

REGULATORY BRANCH DIRECTORY

CENWP-ODG - G2R1500			e-mail name
Bill Abadie Joe Jackson	4370 4374	Branch Chief Administrative Assistant – Team Leader	william.d.abadie daniel.j.jackson
CENWP-ODG-P - Portland Permits			
Jaimee Davis	4381	Section Chief	jaimee.w.davis
Melody White	4385	Regulatory Project Manager – Team Leader and ESA	melody.j.white
Carrie Bond	4387	Regulatory Project Manager – Team Leader	carrie.l.bond
Danielle Erb	4368	Regulatory Project Manager – WRRDA CWS	danielle.h.erb
Kinsey Friesen	4378	Regulatory Project Manager – ORM	kinsey.m.friesen
Jessica Menichino	4632	Regulatory Project Manager – ORWAP lead and Mit team	jessica.m.menichino
Caila Heintz	5113	Regulatory Project Manager	caila.m.heintz
Tom Sentner	4959	Regulatory Project Manager	thomas.sentner
Vacancy		Environmental Protection/Regulatory Assistant	
CENWP-ODG-L - Portland Policy and Compliance			
Kristen Hafer Ramona Tillery	4380 4373	Section Chief Administrative Support Assistant	kristen.a.hafer ramona.d.tillery
Joe Brock	4377	NEPA Subject Matter Expert	joseph.w.brock
Vacant	4337	Archaeologist	winston.s.zack
Benny Dean	541-465-6769	Regulatory Project Manager – ODOT	benny.a.dean
Brad Johnson	4383	Regulatory Project Manager – WRRDA Ports, Jurisdiction	brad.a.johnson2
Andrea Wagner	541-465-6882	Mitigation Program Manager - SFAM, Banks, etc.	andrea.r.wagner
Vacant	4379	Regulatory Project Manager - Enforcement	
CENWP-ODG-E - Eugene Section			
Melanie O'Meara Susan Faville	541-465-6765 541-465-6868	Section Chief, GIS/technology sme Administrative Support Assistant - KM	melanie.s.o'meara susan.e.faville
Vacant		Regulatory Project Manager – Team Leader	
Anita Andazola	541-465-6894	Regulatory Project Manager	anita.m.andazola
Maya Goklany	541-465-6877	Regulatory Project Manager – Mit team	maya.e.goklany
Vacant		Regulatory Project Manager	
North Bend Field Office			
Tyler Krug	541-756-2097	Regulatory Project Manager – Team Leader (ODG-E)	tyler.j.krug

Public Access Number: 503-808-4373

Web Site: <http://www.nwp.usace.army.mil/regulatory/>

E-mail: portlandregulatory@usace.army.mil

Block 300 Printer Names: [NWP-MC-01258364](#) or [NWP-MC-01258356](#)

Additional Phone Numbers:

OC –Misty: xt 4527

Security: xt 5155

SATO: 800-953-7286

ACE-IT 866-562-2348

Mailing Address #1:

USACE PORTLAND DISTRICT
ATTN: (Name) CENWP-ODG
P.O. Box 2946
Portland, Oregon 97208-2946

Mailing Address:

U.S. Army Corps of Engineers
Eugene Field Office
211 E. Seventh Ave., Suite 105
Eugene, Oregon 97401-2722

Mailing Address #2:

USACE PORTLAND DISTRICT
ATTN: (Name) CENWP-ODG
333 SW 1st Avenue
Portland, Oregon 97204-3440

Mailing Address:

U.S. Army Corps of Engineers
North Bend Field Office
2201 Broadway, Suite C
North Bend, Oregon 97459-2372

Building Location:

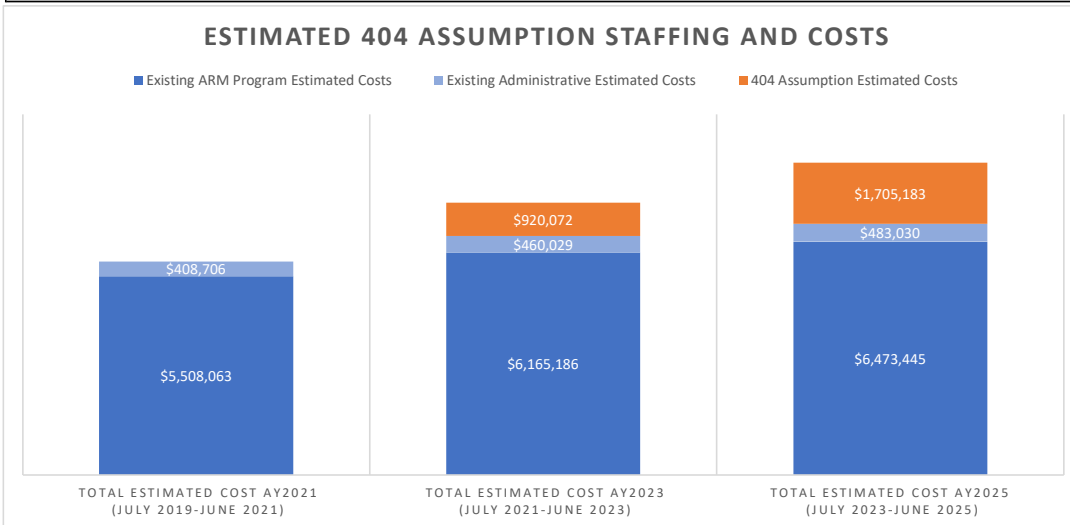
333 SW First Avenue
Regulatory Branch
Block 300 - 8th floor – NW corner
Portland, Oregon 97204-3495

Staffing: 21 and 5 vacancies

APPENDIX M

DSL ESTIMATED 404 ASSUMPTION STAFFING AND COSTS

This chart displays the breakout of estimated cost increases by program and appropriation year (AY). The tables below the chart show the estimated cost details by program and position title. All values for AY2025 were estimated using a 5% increase from the previous AY.



Program	Headcount	Total Estimated Cost AY2021 (July 2019-June 2021)	Total Estimated Cost AY2023 (July 2021-June 2023)	Total Estimated Cost AY2025 (July 2023-June 2025)
Existing ARM Program Estimated Costs	23	\$5,508,063	\$6,165,186	\$6,473,445
Existing Administrative Estimated Costs	3	\$408,706	\$460,029	\$483,030
404 Assumption Estimated Costs	9	\$0	\$920,072	\$1,705,183
Total Estimated Costs	35	\$5,916,769	\$7,545,287	\$8,661,659

ARM Program	Headcount	Total Estimated Cost AY2021 (July 2019-June 2021)	Total Estimated Cost AY2023 (July 2021-June 2023)	% of Increase AY21 / AY23	Total Estimated Cost AY2025 (July 2023-June 2025)	% of Increase AY23 / AY25
Natural Resource Specialist 3 (NRS3)	16	\$3,601,452	\$4,062,299	13%	\$4,265,414	5%
Natural Resource Specialist 3 (NRS3) LD*	1	\$214,905	\$236,047	10%	\$247,849	5%
Natural Resource Specialist 4 (NRS4)	3	\$787,650	\$868,869	10%	\$912,312	5%
Principal Executive Manager D	1	\$284,504	\$313,731	10%	\$329,418	5%
Principal Executive Manager E	2	\$619,552	\$684,240	10%	\$718,452	5%
Totals	23	\$5,508,063	\$6,165,186	12%	\$6,473,445	5%

Administration	Headcount	Total Estimated Cost AY2021 (July 2019-June 2021)	Total Estimated Cost AY2023 (July 2021-June 2023)	% of Increase AY21 / AY23	Total Estimated Cost AY2025 (July 2023-June 2025)	% of Increase AY23 / AY25
Administrative Specialist 1 (AS1)	1	\$157,839	\$173,577	10%	\$182,256	5%
Office Specialist 2 (OS2)	2	\$250,867	\$286,452	14%	\$300,775	5%
Totals	3	\$408,706	\$460,029	13%	\$483,030	5%

404 Assumption	Headcount	Total Estimated Cost AY2021 (July 2019-June 2021)	Total Estimated Cost AY2023 (July 2021-June 2023)	% of Increase AY21 / AY23	Total Estimated Cost AY2025 (July 2023-June 2025)	% of Increase AY23 / AY25
404 Program Manager SME (NRS 4)	1	\$0	\$209,664	N/A	\$220,147	5%
Endangered Species Act SME (NRS 4)	1	\$0	\$205,204	N/A	\$215,464	5%
Archaeologist SME (NRS 4)	1	\$0	\$205,204	N/A	\$215,464	5%
Biological Assessment Consulting Fees	N/A	\$0	\$300,000	N/A	N/A	N/A
Aquatic Resource Coordinators (ARC - NRS 3)	4	\$0	\$0	N/A	\$786,257	N/A
Support Services Specialist (OS2)	2	\$0	\$0	N/A	\$267,851	N/A
Totals	9	\$0	\$920,072	N/A	\$1,705,183	85%



Oregon

Kate Brown, Governor

Department of Fish and Wildlife

Wildlife Division

4034 Fairview Industrial Drive SE

Salem, OR 97302

(503) 947-6300

FAX: (503) 947-6330

Internet: www.dfw.state.or.us

November 25, 2020

Eric Metz
Oregon Department of State Lands
775 Summer Street NE, Suite #100
Salem, OR 97301



Dear Eric,

The Oregon Department of Fish and Wildlife (department) recently reviewed the draft Partial 404 Assumption Legislative Update (dated November 2020) and provides the following comments and recommendations:

The department acknowledges the Department of State Lands' (DSL) outreach and coordination efforts for taking the initial steps to consider compliance with the Federal Endangered Species Act (ESA). Due to the complexities of the ESA and uncertainties with implementation of 404 assumption, the department recommends that DSL initiate additional effort for proactive coordination with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services). Proactive and transparent coordination with the Services could help to facilitate the discussion, planning, evaluation and development of DSL's Endangered Species Act (ESA) compliance program. This proactive effort could include an opportunity to fully develop a Memorandum of Understanding with the Services that would articulate expectations and requirements for DSL's 404 Assumption to provide assurances for compliance with the ESA.

In addition, the language in the draft Partial Assumption Legislative Update portrays the department in an advocacy role. The department's role in this process is to function as a neutral technical advisor regarding fish, wildlife and their habitats. At this point in the planning process, there are still many uncertainties to adequately evaluate Oregon's proposed Partial 404 Assumption Program's potential effects on fish and wildlife resources. Therefore, the department recommends amending the language in the draft Partial Assumption Legislative Update in several places to reflect our role as a technical advisor to DSL.

The department looks forward to continuing to provide technical assistance regarding Oregon's fish, wildlife and their habitats, and collaborating with DSL on the proposed Partial 404 Assumption.

Eric Metz

Oregon Department of State Lands
Page 2

Thank you for the opportunity to comment on this draft Legislative Update.

Sincerely,

Jon Germond
Habitat Resources Program Manager
Oregon Department of Fish and Wildlife



Oregon
Kate Brown, Governor

Department of Geology and Mineral Industries
Mineral Land Regulation & Reclamation
229 Broadalbin Street SW
Albany, OR 97321-2246
(541) 967-2039
Fax: (541) 967-2075
www.oregongeology.org

December 7, 2020

Eric Metz
Department of State Lands
775 Summer St NE #100
Salem, OR 97301

Dear Eric,

The purpose of this memo is to outline the Oregon Department of Geology and Mineral Industries (DOGAMI) comments on the 404 Assumption Legislative Report to the 2021 Legislative Assembly prepared by the Oregon Department of State Lands (DSL; required by HB 2436 (2019)).

DOGAMI has no significant concerns regarding the report or the potential for DSL to assume the partial 404 authorities (Section 404 of the federal Clean Water Act) as described in the report. DOGAMI's regulatory authority for surface mining operations in Oregon comes from the Mined Land Reclamation Act which became effective on July 1, 1972. The Mined Land Reclamation Act is currently only applicable to uplands, however, HB 3601 passed in the 2011 legislative session resulting in the enactment of ORS 517.750(a)(B) & ORS 517.797 (see statutes copied below). These statutes provide a means, via a Memorandum of Agreement (MOA) between DSL and DOGAMI, for DOGAMI to be the sole permitting agency for surface mine sites that overlap the in-water/upland jurisdictional boundary. The DSL 404 Assumption Legislative Report notes that mining and activities associated with mining will be included within the scope of a Partial 404 Assumption. In terms of Partial 404 Assumption, the MOA between DSL and DOGAMI would be the vehicle to ensure proper regulation and reclamation of mine sites that overlap the in-water/upland jurisdictional boundary as described in ORS 517.797. DSL and DOGAMI started work on a MOA in 2012, however, the MOA was not completed.

All sites in the 100-year floodplain require either a native migratory fish passage facility or an exemption from those requirements from Oregon Department of Fish and Wildlife. Fish passage facilities require a connection to waters of the state and that generally results in floodplain sites having an overlap of the in-water/upland jurisdictional boundary that meets the applicability standard described in ORS 517.797. Many of the floodplain mine sites extend beyond the assumable water definition proposed in the DSL 404 Assumption Legislative Report. That does not appear to be an issue as the MOA could be written to address sites that extend outside the 404 assumable waters but still overlap the in-water/upland jurisdictional boundary.

Oregon Revised Statutes (ORS) referenced above:

ORS 517.750 Definitions for ORS 517.702 to 517.989. As used in ORS 517.702 to 517.989, unless the context requires otherwise:

(16)(a) "Surface mining" includes:

(B) Removal or filling, or both, within the beds or banks of any waters of this state that is the subject of a memorandum of agreement between the Department of State Lands and the State Department of Geology and Mineral Industries in which the State Department of Geology and Mineral Industries is assigned sole responsibility for permitting as described in ORS 517.797.

ORS 517.797 Memorandum of agreement with Department of State Lands regarding permitting.

(1) As used in this section, “surface mining” has the meaning given that term in ORS 517.750 and “waters of this state” has the meaning given that term in ORS 196.800.

(2) The Department of State Lands and the State Department of Geology and Mineral Industries may enter into a memorandum of agreement concerning surface mining as described in subsection (3) of this section.

(3) The memorandum described in subsection (2) of this section may assign sole responsibility for permitting to the State Department of Geology and Mineral Industries when the surface mining would otherwise be under the permitting jurisdiction of both the Department of State Lands and the State Department of Geology and Mineral Industries because:

(a) Part of the surface mining is located within the beds or banks of any waters of this state; and

(b) Part of the surface mining is located upland from the beds or banks of any waters of this state.

(4) Prior to any permitting pursuant to the provisions of subsection (3) of this section, the State Department of Geology and Mineral Industries shall consult with the Department of State Lands regarding any conditions necessary to protect the waters of this state. [2011 c.406 §1]

Please let me know if you have any questions.

Sincerely,



Vaughn Balzer
DOGAMI-MLRR
Floodplain Mining Reclamationist – Rules Coordinator



Oregon

Kate Brown, Governor

Department of State Lands

775 Summer Street NE, Suite 100

Salem, OR 97301-1279

(503) 986-5200

FAX (503) 378-4844

www.oregon.gov/dsl

October 4, 2019

State Land Board

Confederated Tribes of the Umatilla Indian Reservation (CTUIR)

ATTN: Chair Burke and Tribal Council

46411 Timine Way

Pendleton, Oregon 97801

Kate Brown

Governor

Bev Clarno

Secretary of State

RE: Inviting Tribal Input and Consultation on State 404-Assumption under HB 2436 (2019)

Tobias Read

State Treasurer

Dear Chair Burke and Tribal Council:

The Department of State Lands (DSL) is inviting your participation in our Partial 404-Assumption Stakeholder Working Group that will be meeting through the end of this year on October 8 and 25, November 6 and December 4 and 18. These meetings will continue into 2020 but there is no 2020 schedule established at this time. It is important to the Department to hear Tribal concerns and input, either through these meetings or through government-to-government consultation. I particularly want to apologize for the short notice. It only recently came to my attention that staff had failed to include the Tribes in our initial invitation list.

We have asked Ben Mundie, Reclamationist with Oregon Department of Geology and Mineral Industries, to reserve us a spot on the next LCIS Cultural Cluster meeting so we can present to Tribes the opportunity to consult individually with DSL on this project. We also want to make you aware of an opportunity for the Tribes to hear a presentation by Yvonne Vallette, EPA, on Partial 404-Assumption at the Fall 2019 OTEF Meeting, October 23-24, 2019, at the at the Sleep Inn, Kla-Mo-Ya Casino, 34333 Highway 97N, Chiloquin, OR, 97624. Her presentation is scheduled under "Wetlands" for 9:30-11:15am on Wednesday, October 23.

Project Background:

In the 2019 Regular Legislative Session HB 2436 was introduced and passed, and it may lead to the state being able to issue federal 404 permits for work in certain waters of the state and in assumable waters of the United States. The key elements of the bill are:

- DSL will prepare and submit a proposal, including recommendations, for legislation to be introduced during the 2020 regular session.
- Include provisions necessary for DSL to operate a 404 program only for:
 - ✓ Development activities—within Urban Growth Boundaries (UGB);
 - ✓ Mining and activities associated with mining; and
 - ✓ The creation and operation of mitigation banks.

- Collaborate with DOJ, DEQ, DLCD, ODFW, ODA, ODF, DOGAMI, NMFS, USFWS and EPA on the program elements.
- Recommendations, both in narrative form and the form of requested draft statutory language for the enactment of statutes or to amend Oregon Laws 2001, or any other statutes or Session laws to provide adequate legal authority for EPA to approve the partial assumption program.
- All other provisions DSL deems necessary to allow DSL to submit a complete application for partial assumption prior to the convening of the 2021 regular session (Feb-June 2021)

Your input will help us address any concerns you may have and will also strengthen both the cultural and natural resources components of the Partial 404-Assumption program. A schedule for the 2019 stakeholder meetings is attached.

If you have any questions, please contact our project manager, Eric Metz, Senior Policy & Legislative Analyst or Meliah Masiba, Senior Policy & Legislative Analyst.

Eric.Metz@dsl.state.or.us

503-986-5266

Meliah.Masiba@dsl.state.or.us

503-986-5308

404 Assumption Web Link:

<https://www.oregon.gov/dsl/WW/Pages/404PermitAuthority.aspx>

Sincerely,



Vicki L. Walker

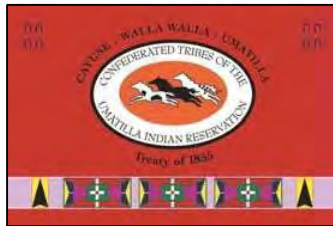
Director, Department of State Lands

Attachment: 2019 404-Assumption Stakeholder Meeting Schedule

cc: Eric Quaempts, Natural Resources Director
Carey Miller, Tribal Historic Preservation Officer

Department of State Lands
2019 404 Assumption Stakeholder Meeting Schedule
(The meetings are expected to continue in 2020; schedule not available)

10/8/2019	Oregon Association of Nurseries, Wilsonville
9:00a-noon	9751 Town Center Loop W, Wilsonville, OR 97070
10/25/2019	Department of State Lands, Salem (Lupine Room)
9:00a-noon	775 Summer St, NE Ste 100, Salem, OR 97301-1279
11/6/2019	Oregon Association of Nurseries, Wilsonville
9:00a-noon	9751 Town Center Loop W, Wilsonville, OR 97070
12/4/2019	Oregon Association of Nurseries, Wilsonville
9:00a-noon	9751 Town Center Loop W, Wilsonville, OR 97070
12/18/2019	Oregon Association of Nurseries, Wilsonville
9:00a-noon	9751 Town Center Loop W, Wilsonville, OR 97070



January 15, 2020

Vicki L Walker, Director
Oregon Department of State Lands
775 Summer Street NE, Suite 100
Salem, OR 97301-1279

Re: Oregon Partial Assumption of Section 404 of the Clean Water Act Authority

Dear Director Walker:

On behalf of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR), we write in response to the State of Oregon Department of State Lands (DSL) proposal for “Partial 404 Assumption” under the Clean Water Act. The CTUIR has numerous concerns regarding the proposal, including not but not limited to potential impacts to tribal rights and resources reserved under the CTUIR’s Treaty of 1855 (12 Stat. 945). We are also concerned about consistency and faithfulness to the federal Trust Responsibility owed to the CTUIR and other tribes. This Trust Responsibility is expressed within the Treaty, as well as in statutes, case law, executive orders and other authorities. Our concerns regarding this partial assumption also relate to many of the issues we raised when we met with DSL staff in 2012, and reiterated recently at the Natural Resources Workgroup and the Cultural Resources Cluster. This letter restates those issues and concerns and CTUIR DNR requests formal consultation on the proposed assumption of Section 404 of the CWA.

The CTUIR DNR appreciated DSL’s attendance at the Natural Resource Workgroup on November 19, and the Cultural Resources Cluster meeting on December 4, to listen to tribal concerns and answer questions. We understand that DSL does not plan to submit any legislative language in the 2020 legislative session due to the short time-frame prior to that short session. The CTUIR is encouraged that DSL will have more time for consultation with tribes regarding this legislative proposal. However, we hope that the state can share draft legislation with the tribes for our review soon as we anticipate consultation and resolution of all the tribal issues will likely be a lengthy process. Since the process for state delegation commenced decades ago, we expect DSL has already prepared at least some legislative concepts. The CTUIR hopes for robust tribal consultation on this matter through all of 2020.

At our meeting on December 3, you correctly noted that tribes are not “stakeholders” in this process. Equally, tribes are not “interested parties” as the Cow Creek is listed in the final legislative report. The tribal status is weightier than either stakeholders or interested parties. Tribes are co-managers of these resources to which we have constitutionally and statutorily protected rights. The fact that this is only a “partial assumption” of Section 404 responsibilities in no way lessens the tribal interests and concerns, and DSL’s obligations to the tribes. If

Oregon seeks a full delegation, this process would potentially become a template, making tribal input all the more important.

As you may recall, the CTUIR met with DSL in 2012 during the last round of discussions of assumption under § 404. The primary concerns the CTUIR DNR expressed regarded the federal Trust Responsibility, Treaty Rights, cultural resource concerns, and many other issues. Below is a summary of the issues and concerns the CTUIR provided to DSL in 2012, which remain valid, along with additional concerns from recent discussions:

1. **Federal Trust Responsibility:** The Federal government has a legal obligation to tribes to protect the rights and resources the United States holds in trust for the tribes, including resources the U.S. manages. This trust duty obligation imposes a fiduciary duty owed in conducting any federal action which relates to Indian Tribes. In carrying out its fiduciary duty, it is the government's responsibility "to ensure that Indian treaty rights **are given full effect.**" *NW Seafarms v. U.S. Army Corps*, 931 F.Supp. 1515 (W.D. Wash. 1996). This responsibility is the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the U.S. and the federally recognized tribes as codified in treaties, statutes, executive orders, and case law, as well as other sources. This is a fundamental issue. The state has no such Trust Responsibility under state law, however if you assume the 404 permitting duties we would hold you to that federal Trust Responsibility and the associated obligations. Under the existing § 404 permitting system, the Corps of Engineers has an obligation to uphold the Trust Responsibility in their regulatory process. How does the state propose to meet this obligation when implementing this delegation? Attached you will find a permit decision made by the Army Corps of Engineers regarding a dock proposed at the mouth of Willow Creek that we believe does an adequate job discussing and addressing impacts to treaty rights. The CTUIR DNR would expect the same level of thoroughness if and when DSL issues permits.
2. **Treaty Rights:** The CTUIR's Treaty of 1855 reserved into perpetuity our preexisting rights to fish at all usual and accustomed fishing areas, as well as retaining rights to hunt, gather, graze on unclaimed lands, as well as exercise those other rights not explicitly ceded to the U.S. in the Treaty. The Treaty also implicitly reserved water rights, rights that preexist Oregon's statehood, and rights which must be protected in any regulatory processes impacting water. To ensure treaty rights are preserved into perpetuity requires knowledge of these rights and the legal ability to protect them. It is unclear whether DSL is able to do either. While ensuring that treaty rights are upheld is related to the Trust Responsibility of the federal government, it is also a separate issue, because of the fundamental nature of the treaties themselves. Treaties are acknowledged as the supreme law of the land under Article VI of the U.S. Constitution, and take precedence over conflicting state laws. The state may not be able or willing to protect and uphold the CTUIR's Treaty Rights.

3. **Endangered Species Act (ESA):** The CTUIR is concerned that provisions of the ESA that govern Corps of Engineers permits may not apply to permits issued by DSL. Protection of ESA species is not only a treaty-related issue, but many species also have tribal religious and cultural significance. Protection of the endangered species and their habitat is of utmost concern to the CTUIR. The United States Fish and Wildlife Service and National Oceanic and Atmospheric Administration, Fisheries Service have a process and history of tribal involvement. Both the ESA protections and tribal consultation should be addressed in the legislative concept for the partial assumption.
4. **Sovereign Immunity:** States, like tribes, possess sovereign immunity from being sued, unless it is specifically waived. In the event the Corps of Engineers issues a permit that violates rights of the CTUIR, we can sue the Corps under the Administrative Procedures Act, a federal law that waives the sovereign immunity of the United States. However, it is unclear such an avenue is available to the tribe under Oregon State Law for DSL issuance of permits violating tribal rights. Additionally, the Corps of Engineers issues permits under their own regulatory authority as well as the National Environmental Policy Act (NEPA). The NEPA requires a thorough review of the impacts to a broad spectrum of resources. Oregon lacks a NEPA-like statute that considers direct, indirect and cumulative effects of permit actions. Such a legal standard should be built into the regulatory scheme.
5. **State Budget Vulnerabilities:** State agencies have budgets that are more vulnerable to changes in revenue and the political climate than the Corps of Engineers. How does the state propose to secure and keep sufficient funding to meet their obligations and not be subject to budgetary shortfalls? Further, the process of assumption of § 404 responsibilities is a significant undertaking unto itself. We do not believe that DSL has sufficient staff and resources to develop a process to even partially incorporate the § 404 functions in the two year time frame identified in its current planning effort. At a minimum, it would seem necessary to have at least one full-time employee working on this otherwise you have several employees attempting to add this additional task to their existing workload.
6. **Section 106 of the National Historic Preservation Act (NHPA):** Every element of the § 106 process is important, especially consultation with and the ability to involve the Advisory Council on Historic Preservation (ACHP). We are doubtful that DSL is able to create an equivalent process that includes all the elements of the NHPA and provides the necessary enforcement framework to support it. For example, for over a year, DSL and Oregon State Historic Preservation Office (SHPO) have disagreed over who is responsible to review DSL regulatory permits for cultural resource issues, resulting in neither DSL nor SHPO reviewing non-proprietary permits for cultural resource concerns. DSL has an archaeologist and the authority to review these permits for archaeology, but chooses not to do so. If DSL doesn't exercise the authority it has, why should the legislature give it more? And why and how would the public be assured that DSL would do so?

Further, DSL has communicated with the CTUIR that they do not believe they have any legal authority to deny or condition a permit based on impacts to cultural resources, citing May 3, 2019 email from Oregon Department of Justice, “ORS Chapter 196 gives DSL authority to deny a permit application when it will interfere with water resource values and navigation, fishing, and public recreation—but not to deny a permit (or condition a permit) as a result of interference with cultural resources.” The tribes have been pushing DSL to resolve this issue for several years through individual consultation and the Cultural Resources Cluster to no avail. Any delegation of § 404 authority would necessarily require the state to possess the authority to require addressing impacts to cultural resources. What has the state done to identify this necessary legal authority? The draft legislation that was on the DSL website only provided for adopting rules for implementing a process *equivalent* to § 106 of the NHPA, but if the state lacks the authority to deny or condition a permit due to impacts to cultural resources, the state would require more than rules, it would require legislation giving the state that authority to adopt those rules. Whether or not DSL achieves this delegation of § 404 authority, DSL needs the authority to condition permits on surveys and prevention of impacts to cultural resources.

7. **EPA/Corps Obligations Related to 404 Assumption:** The CTUIR anticipates that the EPA and the Corps will consult with the CTUIR regarding any proposed delegation of § 404 authorities. This is a non-delegable duty the federal government possesses under their Trust Responsibility and DSL should anticipate the time this would require in the DSL’s process. EPA has indicated this delegation is a transfer of permitting authority from the Corps to Oregon rather than a direct delegation from EPA to the state. However, since the initial delegation is from EPA, we anticipate EPA’s involvement.
8. **EPA’s Lack of Capacity to Review Applications:** The CTUIR remains concerned that EPA lacks the ability to adequately review permits for NHPA compliance if the Corps of Engineers is not conducting the review. The EPA cannot waive review of permits that may affect historic properties. However, EPA Region 10 does not have the experience or staff to review applications that may adversely affect historic properties. There is no EPA Region 10 archaeologist, whereas the Portland District of the Army Corps of Engineers has archaeologists and cultural resource professionals on staff.
9. **EPA/Corps Consultation Policy:** The process described in EPA and the Corps’ consultation policy is *not* equivalent to § 106 consultation. CTUIR will request formal consultation and ACHP involvement for review of this delegation.

The CTUIR DNR understands that this partial assumption of § 404 responsibilities would relate to development activities within Urban Growth Boundaries, mining and activities associated with mining, and the creation and operation of mitigation banks. The CTUIR DNR would like to know the geographic extent of this delegation. As noted above, limitation of the delegation to activities within existing UGBs may appear to limit the potential impacts to tribal treaty rights

CTUIR DNR Letter to DSL

Subject: Partial § 404 Assumption

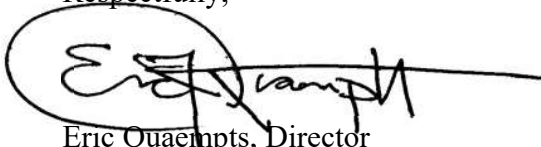
January 15, 2020

Page 5 of 5

and cultural resources; it does not. For example, Willamette Falls, an area of great significance for both exercising of treaty rights and the presence of cultural resources is within the UGB of Portland/Metro area. Further, mining occurs throughout the state, could this jurisdiction occur everywhere, including issuing § 404 permits for mining activities on federal lands adjacent to or within streams? While the UGB limitation is offers a significant limitation, the extension of the authority to mining and mitigation banks appears to contain no such territorial limitation.

Due to the depth and breadth of our concerns, the CTUIR requests formal government-togovernment consultation with DSL, including meetings with DSL staff, written responses to our concerns, and potentially meetings among our leadership. Please have your staff contact Audie Huber, Intergovernmental Affairs Coordinator, at 541-429-7228 or AudieHuber@ctuir.org to arrange our first meeting on this.

Respectfully,



Eric Quaempts, Director
Department of Natural Resources

Cc: Eric Metz, DSL Senior Policy and Legislative Analyst
Meliah Masiba, DSL Senior Policy and Legislative Analyst



Oregon

Kate Brown, Governor

Department of State Lands

775 Summer Street NE, Suite 100

Salem, OR 97301-1279

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www.oregon.gov/dsl

June 10, 2020

State Land Board

Kate Brown
Governor

Eric Quaempts, Director
Department of Natural Resources
Confederated Tribes of the Umatilla Indian Reservation
46411 Timine Way
Pendleton, OR 97801

Bev Clarno
Secretary of State

Dear Director Quaempts:

Tobias Read
State Treasurer

Thank you for your thoughtful and detailed letter dated January 15, 2020 regarding Oregon Partial Assumption of Section 404 of the Clean Water Act. I apologize for the delay in responding.

As you point out, the Oregon Department of State Lands (DSL) has been engaging and consulting on this general topic for nearly a decade. The issues throughout this time have not changed; however, we believe understanding has improved. DSL remains committed to robust, formal consultation with the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) throughout 2020, and beyond.

We have organized our responses to the issues and concerns in the order presented in your letter, as follows:

Comment #1 Federal Trust Responsibility

Federal Trust Responsibility: The Federal government has a legal obligation to tribes to protect the rights and resources the United States holds in trust for the tribes, including resources the U.S. manages. This trust duty obligation imposes a fiduciary duty owed in conducting any federal action which relates to Indian Tribes. In carrying out its fiduciary duty, it is the government's responsibility "to ensure that Indian treaty rights are given full effect." NW Seafarms v. U.S. Army Corps, 931 F.Supp. 1515 (W.D. Wash. 1996). This responsibility is the fulfillment of understandings and expectations that have arisen over the entire course of the relationship between the U.S. and the federally recognized tribes as codified in treaties, statutes, executive orders, and case law, as well as other sources. This is a fundamental issue. The state has no such Trust Responsibility under state law, however if you assume the 404 permitting duties, we would hold you to that federal Trust Responsibility and the associated obligations. Under the existing § 404 permitting system, the Corps of Engineers has an obligation to uphold the Trust Responsibility in their regulatory process. How does the state propose to meet this obligation when implementing this delegation? Attached you will find a permit decision made by the Army Corps of Engineers regarding a dock proposed at the mouth of Willow

Creek that we believe does an adequate job discussing and addressing impacts to treaty rights. The CTUIR DNR would expect the same level of thoroughness if and when DSL issues permits.

Response #1 Federal Trust Responsibility

DSL acknowledges the fiduciary duty that the federal government owes to the tribes with respect to rights and resources held in trust. As part of DSL's 404 initiative for partial assumption of the Section 404 program, DSL may consider rulemaking to address Tribal rights and resources held in trust. DSL will continue to discuss this issue with the CTUIR and seek feedback from the CTUIR.

Comment #2 Treaty Rights

Treaty Rights: The CTUIR's Treaty of 1855 reserved into perpetuity our preexisting rights to fish at all usual and accustomed fishing areas, as well as retaining rights to hunt, gather, graze on unclaimed lands, as well as exercise those other rights not explicitly ceded to the U.S. in the Treaty. The Treaty also implicitly reserved water rights, rights that preexist Oregon's statehood, and rights which must be protected in any regulatory processes impacting water. To ensure treaty rights are preserved into perpetuity requires knowledge of these rights and the legal ability to protect them. It is unclear whether DSL is able to do either. While ensuring that treaty rights are upheld is related to the Trust Responsibility of the federal government, it is also a separate issue, because of the fundamental nature of the treaties themselves. Treaties are acknowledged as the supreme law of the land under Article VI of the U.S. Constitution, and take precedence over conflicting state laws. The state may not be able or willing to protect and uphold the CTUIR's Treaty Rights.

Response #2 Treaty Rights

As is true of the federal government, DSL cannot guarantee the State's interpretation of the CTUIR's Treaty of 1855 will always coincide with the CTUIR's interpretation. DSL may consider rulemaking to expressly address impacts to treaty rights. DSL will continue to discuss this issue with the CTUIR and seek feedback from the CTUIR.

Comment #3 Endangered Species Act (ESA)

Endangered Species Act (ESA): The CTUIR is concerned that provisions of the ESA that govern Corps of Engineers permits may not apply to permits issued by DSL. Protection of ESA species is not only a treaty-related issue, but many species also have tribal religious and cultural significance. Protection of the endangered species and their habitat is of utmost concern to the CTUIR. The United States Fish and Wildlife Service and National Oceanic and Atmospheric Administration, Fisheries Service have a process and history of tribal involvement. Both the ESA protections and tribal consultation should be addressed in the legislative concept for the partial assumption.

Response #3 Endangered Species Act (ESA)

The US Army Corps of Engineers (Corps) consults with the US Fish and Wildlife Service and the National Marine Fisheries Service (the Services) under Section 7 of the ESA. Since issuance of a Corps permit is a federal action, Section 7 consultation is triggered. There is no

federal action when the state issues a State 404 permit, so Section 7 consultations do not occur.

For your information, EPA is currently seeking comment on Section 7 consultation for assumption. Please see the Federal Register notice at this address:

<https://www.federalregister.gov/documents/2020/05/21/2020-10913/request-for-comment-on-whether-epas-approval-of-a-clean-water-act-section-404-program->

The comment deadline is 7/6/2020.

The issue is whether EPA's decision to approve a state's 404 program is discretionary or nondiscretionary. If it determines that the action is discretionary, then EPA would be obligated to consult with the services on a state's 404 assumption application. Status quo would be for EPA to determine that its decision was nondiscretionary, and it would not consult with Services under Section 7.

DSL is developing a draft Memorandum of Agreement (MOA) with the Services, modeled after the MOA used by New Jersey and the 2014 model MOA developed for use in Oregon by EPA and the Services. The MOA process could eventually evolve into a Habitat Conservation Plan with an associated Incidental Take Statement or it could be used as part of the Section 7 consultation process.

A draft outline of how this might work is illustrated in Table 1 of the *Final Report on the State of Oregon's Proposed Assumption of Clean Water Act Section 404 Permit Authority and Integration of Endangered Species Act Requirements*:

www.oregon.gov/dsl/WW/Documents/Oregon404AssumptionFinalESARep03-12-2014.pdf.

Note that one change in the proposed model is that DSL now expects it will contract with the Oregon Department of Fish and Wildlife to provide technical expertise on ESA listed species and to provide recommendations to DSL staff on permit conditions.

Comment #4 Sovereign Immunity

Sovereign Immunity: States, like tribes, possess sovereign immunity from being sued, unless it is specifically waived. In the event the Corps of Engineers issues a permit that violates rights of the CTUIR, we can sue the Corps under the Administrative Procedures Act, a federal law that waives the sovereign immunity of the United States. However, it is unclear such an avenue is available to the tribe under Oregon State Law for DSL issuance of permits violating tribal rights. Additionally, the Corps of Engineers issues permits under their own regulatory authority as well as the National Environmental Policy Act (NEPA). The NEPA requires a thorough review of the impacts to a broad spectrum of resources. Oregon lacks a NEPA-like statute that considers direct, indirect and cumulative effects of permit actions. Such a legal standard should be built into the regulatory scheme.

Response # 4 Sovereign Immunity

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, including the CTUIR, intervened in the contested case pertaining to the proposed Coyote Island coal terminal. To the extent that the CTUIR would prefer to see any aspect of DSL's contested case authority clarified to ensure a tribe's ability to participate, DSL is open to considering rulemaking or statutory revisions as part of DSL's intent to prepare a draft legislative concept to implement partial 404 assumption.

DSL acknowledges the State does not have a precise analogue to NEPA. However, in reviewing removal-fill permit applications, DSL is required to consider the broad range of factors set forth in ORS 196.825(3), including the consideration of alternatives and the consideration of the effects of the removal or fill on "sound policies of conservation" and the "public health and safety." Again, if the CTUIR would prefer to see the considerations made by DSL in evaluating an assumed federal 404 permit application broadened, DSL may consider either rule changes, statutory revisions, or both.

Comment #5 State Budget Vulnerabilities

State Budget Vulnerabilities: State agencies have budgets that are more vulnerable to changes in revenue and the political climate than the Corps of Engineers. How does the state propose to secure and keep sufficient funding to meet their obligations and not be subject to budgetary shortfalls? Further, the process of assumption of § 404 responsibilities is a significant undertaking unto itself. We do not believe that DSL has sufficient staff and resources to develop a process to even partially incorporate the § 404 functions in the two-year time frame identified in its current planning effort. At a minimum, it would seem necessary to have at least one full-time employee working on this otherwise you have several employees attempting to add this additional task to their existing workload.

Response #5 State Budget Vulnerabilities

DSL has always been transparent about needing more staff to support a state-assumed 404 Program. Currently, we estimate needing at least three more staff: 404 Assumption Program Specialist; Archeologist/Cultural Resources Specialist; and a federal ESA-Compliance Specialist. As part of our strategic planning process, we are also studying new ways that we can fund the Aquatic Resource Management Program (ARM) so the Removal-Fill Program may become financially self-sustaining. Since the program began regulating the placement of fill in streams, in the late 1960s, it has grown in depth, jurisdiction and effectiveness. The state program has existed longer than the federal 404 Program. This is a rarity in state government and Oregon deserves recognition for this achievement.

Comment #6 Section 106 of the National Historic Preservation Act (NHPA)

Section 106 of the National Historic Preservation Act (NHPA): Every element of the § 106 process is important, especially consultation with and the ability to involve the Advisory Council on Historic Preservation (ACHP). We are doubtful that DSL is able to create an equivalent process that includes all the elements of the NHPA and provides the necessary enforcement framework to support it. For example, for over a year, DSL and Oregon State Historic Preservation Office (SHPO) have disagreed over who is responsible to review DSL regulatory permits for cultural resource issues, resulting in neither DSL nor SHPO reviewing non-proprietary permits for cultural resource concerns. DSL has an archaeologist and the authority to review these permits for archaeology but chooses not to do so. If DSL doesn't exercise the authority it has, why should the legislature give it more? And why and how would the public be assured that DSL would do so?

Further, DSL has communicated with the CTUIR that they do not believe they have any legal authority to deny or condition a permit based on impacts to cultural resources, citing May 3, 2019 email from Oregon Department of Justice, "ORS Chapter 196 gives DSL authority to deny a permit application when it will interfere with water resource values and navigation, fishing, and public recreation—but not to deny a permit (or condition a permit) as a result of interference with cultural resources." The tribes have been pushing DSL to resolve this issue for several years through individual consultation and the Cultural Resources Cluster to no avail. Any delegation of § 404 authority would necessarily require the state to possess the authority to require addressing impacts to cultural resources. What has the state done to identify this necessary legal authority? The draft legislation that was on the DSL website only provided for adopting rules for implementing a process equivalent to § 106 of the NHPA, but if the state lacks the authority to deny or condition a permit due to impacts to cultural resources, the state would require more than rules, it would require legislation giving the state that authority to adopt those rules. Whether or not DSL achieves this delegation of § 404 authority, DSL needs the authority to condition permits on surveys and prevention of impacts to cultural resources.

Response #6 Section 106 of the National Historic Preservation Act (NHPA)

DSL acknowledges that it currently has no authority to review and condition permits to protect cultural and historic resources. It would take legislation to grant authority to DSL and/or other state agencies to develop, by rule, a program equivalent to Section 106 of the Historic Preservation Act. In the Partial 404 Assumption Program report that DSL provides to the Legislature in the fall of 2020, we will lay out the options for the appropriate policy committee(s) to consider during the 2021 Regular Session. The program we will propose would help satisfy EPA's 404 assumption program requirements and it may go beyond EPA's explicit requirements for a state program.

Comment #7 EPA/Corps Obligations Related to 404 Assumption

EPA/Corps Obligations Related to 404 Assumption: The CTUIR anticipates that the EPA and the Corps will consult with the CTUIR regarding any proposed delegation of § 404 authorities. This is a non-delegable duty the federal government possesses under their Trust Responsibility and DSL should anticipate the time this would require in the DSL's

process. EPA has indicated this delegation is a transfer of permitting authority from the Corps to Oregon rather than a direct delegation from EPA to the state. However, since the initial delegation is from EPA, we anticipate EPA's involvement.

Response #7 EPA/Corps Obligations Related to 404 Assumption

EPA has indicated that it welcomes Tribal requests for consultation on Oregon's 404 assumption program proposal. This would occur at the Region 10 level as Region 10 will make the final decision on the adequacy of the state's application.

The Corps role is not as a decision maker, but as a partner. DSL will keep Tribes and interested parties informed on any MOA's or other agreements that are being developed between the Corps and DSL. Once such example is the MOA and associated maps that will set out state assumable vs. Corps retained waters under the state's 404 program.

Comment #8 EPA's Lack of Capacity to Review Applications

EPA's Lack of Capacity to Review Applications: The CTUIR remains concerned that EPA lacks the ability to adequately review permits for NHPA compliance if the Corps of Engineers is not conducting the review. The EPA cannot waive review of permits that may affect historic properties. However, EPA Region 10 does not have the experience or staff to review applications that may adversely affect historic properties. There is no EPA Region 10 archaeologist, whereas the Portland District of the Army Corps of Engineers has archaeologists and cultural resource professionals on staff.

Response #8 EPA's Lack of Capacity to Review Applications

EPA acknowledges that it has no Region 10 archeologists. The Corps staff conduct consultations on individual Corps permits. The state model would be similar. As EPA's staffing level is not anticipated to change, the State of Oregon would need to be adequately staffed to conduct permit-level consultations. The goal would be to make the state program equivalent to the Corps' existing 106 program.

Comment #9 EPA/Corps Consultation Policy

EPA/Corps Consultation Policy: The process described in EPA and the Corps' consultation policy is not equivalent to § 106 consultation. CTUIR will request formal consultation and ACHP involvement for review of this delegation.

Response #9 EPA/Corps Consultation Policy

This topic is addressed in our response to Comment #6.

Sincerely,



Vicki L. Walker
Director
Department of State Lands



November 25, 2020

Eric D. Metz, P.W.S.
404 Assumption Program Lead
Oregon Department of State Lands
775 Summer St., NE Suite 100
Salem, OR 97301-1279

Transmitted electronically to: eric.metz@state.or.us

RE: Comments on Draft Partial 404 Assumption Legislative Update

Dear Mr. Metz:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) has reviewed the Draft Partial 404 Assumption Legislative Update provided by the Department of State Lands (DSL) on October 29, 2020. We appreciate the substantial effort that has gone into developing the document. However, the CTUIR DNR finds that the report generally presents an overly optimistic assessment of the costs and benefits of partial 404 assumption. The report fails to adequately address or resolve many of the problems identified by the CTUIR and other stakeholders in the meetings over the last year. The CTUIR DNR requests that this report be modified to clearly identify all the known legislation and rulemakings that will be required to implement this proposed effort. Simply including the comments DSL has received on the proposal as an appendix, without explanation in the text of the report, will not provide an adequate understanding to the legislators of the many complex issues that will need to be addressed and resolved.

Introduction

The CTUIR is a federally-recognized Indian tribe, with a reservation in Northeast Oregon and ceded, aboriginal, and traditional use areas in Oregon, Washington, Idaho, and other Northwest states. In 1855, predecessors to the CTUIR—ancestors with the Cayuse, Umatilla, and Walla Walla Tribes—negotiated and signed the Treaty of 1855 with the United States. The Treaty is a contract between sovereigns and is “the supreme Law of the Land” under the United States Constitution. In the Treaty the CTUIR ceded millions of acres of land to the federal government, and in exchange received assurances that pre-existing tribal rights would be protected, and our interests would be respected, in perpetuity. A paramount objective in the Treaty was protecting and maintaining our tribal culture, traditions, and way of life, a duty the United States undertook in the form of the Trust Responsibility to honor the obligations of the Treaty. Fulfilling this role requires protection and maintenance of our essential cultural resources—which include not merely specific sites and locations, and any artifacts found there, but also the First Foods (water, fish, big game, roots, berries, and other plants) that have been and continue to be woven into the fabric of CTUIR members’ lives. This objective—protecting, maintaining, and perpetuating our culture—remains paramount for the CTUIR. The CTUIR has decades of experience working

with our Federal Trustees, protecting our rights under the Treaty of 1855. We do not have a similar history of working with the State of Oregon cooperatively protecting those rights because Oregon does not have that Trust Responsibility as co-signer of the Treaty.

Draft Partial 404 Assumption Legislative Update Report

The CTUIR has been meeting and discussing 404 assumption with DSL for over 20 years. Our most recent letter to DSL regarding this matter is dated January 15, 2020, and contains a concise summary of our concerns regarding the potential impacts of partial assumption on the interests of the CTUIR. While we recognize that our comment letter and DSL's response are attached to the report, our concerns are not explained in any detail in the report itself nor are any of DSL's responses to those concerns discussed. We believe that this fails to adequately inform the legislature of the status of this process or the full range of issues at stake. At a minimum, the report should lay out the nature and context of our concerns as well as the proposed solutions from DSL. Otherwise, the reader may be given the false impression that the concerns were either insignificant or satisfactorily addressed. Director Walker's letter specifically identified five separate rulemakings that may be necessary to resolve our concerns, including:

- a. The Trust Responsibility;
- b. Tribal Treaty Rights;
- c. State sovereign immunity;
- d. A NEPA analogue; and
- e. Implementation of the NHPA-like cultural resources legislation.

Each of these rulemakings will take time and money, as well as legislative authority, something that will be a necessary part of the assumption process and should be discussed, at least broadly, in the body of the legislative report itself. The report does not mention any rulemaking beyond the Environmental Protection Agency (EPA) rules to authorize partial assumption, with the exception of a sentence on page 70 in the draft legislation that authorizes rulemaking to implement an NHPA Section 106-like authority. We note that this Section 106 authority will require legislation as well as rulemaking authority. It is likely that waiving state sovereign immunity to be sued will also require legislation, as will assuming some duty similar to that of the United States Army Corps of Engineers (Corps) regarding Treaty Rights and the federal Trust Responsibility. It is unclear whether this will be in the assumption legislation or another piece of legislation, but this legislative language should be drafted as soon as possible to fit within the schedule for assumption.

As we and other participants noted in our last Assumption Workgroup call, both the Oregon Department of Environmental Quality letter of October 29, 2020 and the Oregon State Historic Preservation Office letter of October 18, 2019 should be included as attachments to the report. The report itself should also include a brief description of the issues raised in those letters and potential resolutions. It is not sufficient to merely attach the letters to the report without explanation.

As noted above, the CTUIR DNR believes that the report conveys an overly optimistic view of the assumption process. We have made revisions in mark-up to the draft report to give a more comprehensive compilation of the comments and concerns that have been raised at the 404 meetings between DSL, sovereigns, and stakeholders. We also recommend inclusion of a chart that broadly lays out the basic pros and cons of taking over the program from the Corps and EPA graphically.

Finally, we reviewed the “Other States” provision of the report and believe that more detail should be provided about the Michigan example. The report indicates Michigan has been under review for problems with implementation of their delegated authority for close to 25 years. EPA wrote a 111-page detailed report documenting the challenges and recommendations for resolving these problems in 2008. This report states that Michigan asserted it had authority to issue permits on Indian Lands, which is actually a matter over which EPA retains exclusive authority. The report essentially concludes that EPA and Michigan have “agreed to disagree” and would continue the dialog, but that this was not grounds to withdraw the delegation. The situation in Michigan illustrates that the process for EPA to initiate a 404 withdrawal hardly functions as a timely “check and balance” between state and federal authorities as mentioned on page 5 of the legislative report prepared by DSL. Certainly this type of lingering dispute in Michigan coupled with the inability of EPA to address it gives rise to serious concerns about whether such a delegation is practicable.

Conclusion

At the heart of our concerns is the potential that our Tribal rights and the crucial resources upon which those rights depend will inescapably receive less protection and will be subject to less oversight in a state-assumed 404 program than under the existing federal mechanisms. We are concerned that, in order to provide an equivalent level of protection and oversight within a state 404 program, new state laws will be required, multiple new rulemakings will have to occur, and state agencies will require additional permanent, long-term funding and other support. These efforts will be time-consuming and will need significant staff and funding to be successfully executed.

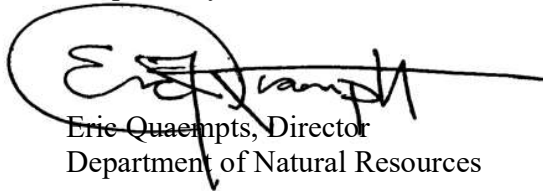
The federal government and its agencies have a clear legal obligation to honor and safeguard Tribal treaty rights and resources, and it has developed considerable infrastructure, including programs, staff and budgets to carry out that obligation. Furthermore, the federal obligation is not solely to apply and implement the federal Clean Water Act, but also many other laws and regulations that may come into play for actions in and near water. The federal government, through its history, expertise, scale, and familiarity, is able to oversee the 404 process in a manner that might be quite problematic for the state to try to duplicate given the state’s limited resources and staffing capacity.

Our concerns remain unresolved and we request meaningful changes and additions in the report to respond to and resolve these concerns. Doing so will help to ensure that the legislature has a full and accurate picture of what the partial assumption responsibilities entails, and what the

CTUIR DNR Letter to Eric Metz, Oregon DSL
Subject: Draft Legislative Report on DSL Partial 404 Assumption
November 25, 2020
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consequent costs are in terms of rule-making and funding. We understand that the proposed delegation is only a partial delegation of the 404 authority. Nevertheless, a partial delegation is a significant step towards a total delegation and our concerns need to be resolved now prior to any delegation. The CTUIR DNR looks forward to continuing to participate in the Partial 404 Assumption process and resolving those concerns. If you have any concerns, please feel free to contact Audie Huber, CTUIR DNR Intergovernmental Affairs Coordinator, at 541-429-7228. Thank you.

Respectfully,

A handwritten signature in black ink, appearing to read "Eric Quampts", is written over a circular stamp. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Eric Quampts, Director
Department of Natural Resources



**CONFEDERATED TRIBES OF
COOS, LOWER UMPQUA AND SIUSLAW INDIANS
TRIBAL GOVERNMENT**

1245 Fulton Avenue - Coos Bay, OR 97420

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November 25, 2020

Vicki L Walker, Director
Oregon Department of State Lands
775 Summer Street NE, Suite 100
Salem, OR 97301-1279

**RE: Comments and Request for Consultation on Oregon Department of State
Lands Proposed Partial 404 Assumption Under the Clean Water Act**

Dear Director Walker:

This letter is submitted on behalf of the Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians (“Tribe” or “CTCLUSI”) regarding the proposed partial assumption under Section 404 of the Clean Water Act (“CWA”) by the Oregon Department of State Lands (“DSL”) from the U.S. Army Corps of Engineers (“USACE”). This partial assumption has the potential to adversely impact Tribal resources currently protected under the federal process. The Tribe has numerous concerns regarding the proposal related to the Tribe’s cultural resources, water quality, and consultation related to federal trust responsibility. Accordingly, the Tribe provides the following comments and requests an opportunity to meet and consult with DSL about these concerns.

The Tribe is a federally recognized Tribal government. The history of CTCLUSI is wrought with struggle and loss; however, it is also filled with commitment and connection. Today, CTCLUSI continues a legacy of commitment to its people, land, water, and resources that has never diminished. What has changed over the 165 years are the institutions and these changes have been significant to how the Tribe is able to protect and steward these invaluable resources, which is foundational work set forth in the preamble of CTCLUSI’s constitution.

Currently, the 404 process is led by a federal agency. For Tribal Nations, this means that there are processes that include opportunities for meaningful engagement by Tribes. These include requirements for consultation and coordination under Executive Order 13175, the National Environmental Policy Act, the Endangered Species Act, and through the Section 106 process of the National Historic Preservation Act. Assumption of 404 authority by DSL will end the coordination with Tribe that is required to occur under these authorities. Moreover, a Coastal Zone Management Act (“CZMA”) consistency determination will not apply to a 404-permit issued by DSL.

The current State's statutes provide significantly less protection to cultural resources and sensitive information than federal laws. If DSL assumes 404 authority, the resulting permits are "de-federalized" and federal protections will largely not apply. There needs to be explicit changes to this proposal so that equivalent processes exist to identify, assess, and mitigate impacts to cultural resources.

1. Protections under federal cultural resource laws will be diminished by this proposal.

Section 106 of the National Historic Preservation Act of 1966 ("NHPA") requires that federal agencies take into account 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 ("National Register").

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 respectful government-to-government consultation with all Indian Tribes that attach cultural significance to historic properties. In other words, 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 DSL would end the Section 106 process because, by definition, an action by DSL is not a federal undertaking as defined by the NHPA. While the state does have cultural resource laws, these laws as pointed out in detail in the October 18, 2019 letter from the Oregon State Historic Preservation Office lack the level of protection afforded under state law. This would result in less protection for cultural resources, including:

- Traditional cultural properties ("TCPs") would not be given any level of protection that they have currently under Section 106. There is not equivalent protection for TCPs under state law. Statewide Planning Goals only protect those resources listed on the federal National Register of historic places with no consideration of those properties, including TCPs that are eligible for listing or recognized by the State Historic Preservation Office as eligible for listing
- ORS 358.653 discusses inadvertent damage to "real property of historic significance" on public lands but omits historic properties of significance on private lands that would apply under federal law.

- It is unclear how investigation and enforcement of burial violations afforded under NAGPRA would work under state regulations.
- An archaeological site under state definitions is not consistent with federal definitions – state law requires archaeological testing to confirm site significance through physical presence of archaeological objects unlike federal law guidance that considers all National Register Criteria.
- Most of the state has not been surveyed. Without the Section 106 process, there would be no state requirement to survey for above ground resources and very little subsurface testing even occurs as mostly pedestrian survey is conducted even when there is less than 30% ground visibility. Moreover, existing local surveys (relied upon by local jurisdictions are outdated and there is no requirement to update them).
- The State provides a weaker definition of historic resources. Historic resources under federal law are those resources that are older than fifty years in age, while state law only recognizes those resources that are older than seventy-five years.
- There is no state requirement for appropriate mitigation when adverse effects to a cultural resource occurs.
- There is no process in state to define a Area of Potential Effects (“APE”), which included both direct and indirect effects.

2. The State has no duty of consultation.

If DSL assumes 404 authority, the requirements to consult under federal Executive Order 13175 (“Order”) will no longer apply. That Order requires federal agencies to consult and coordinate with Tribes in a meaningful and appropriate way. Currently, USACE is required to consult prior to making a 404 determination, but the Order will not apply to DSL.

While we appreciate the relationship with DSL and its willingness to meet and consult with the Tribe, the legal requirement to consult as provided in the Order does not exist under state law. The Tribe is not an “interested party” or a “stakeholder” in this process. The Tribe as a sovereign nation carries much greater weight than either an interested party or a stakeholder and tribes are often provided only an opportunity to comment through the public process. This does not substitute for the requirements of the Order.

3. Tribal CWA authorities must be respected.

DSL’s authority under the CWA is limited to state waters. There must be clarification that the USACE, EPA, and Tribes retain CWA authority on Tribal lands and waters.

4. Endangered Species Act and Coastal Zone Management Act requirements cannot be weakened.

As with the requirements of Section 106 of the NHPA, the requirements of review under the Endangered Species Act (“ESA”) and CZMA will not apply to a state action. Protection of ESA species often involves species that have Tribal religious and cultural significance. Protection of the endangered species and their habitat is of utmost concern to the Tribe. Likewise,

concurrency review under the CZMA often ensures that sensitive coastal habitats are protected. Moreover, for CTCLUSI, CZMA concurrency review is one method to ensure that protections under the Coos Bay Estuary Management Plan Policy # 18, which requires the development of protections for cultural resources, has occurred. Weakening review under the ESA and CZMA is not acceptable.

5. State funding must be ensured.

Meaningful review of projects subject to the 404 process can be timely and expensive. DSL's funding is subject to approval by the State Legislature, which can be significantly impacted by statewide funding issues, such as we have seen recently with COVID and wildfires. DSL currently does not have sufficient staff and resources to meaningfully implement a 404 program. It is unclear what assurance there is that adequate funding will be provided and maintained to implement the program.

6. Additional areas of concern

A 2020 legislative report provided by DSL in July 2020 highlights several authorities that would no longer apply "because the Department would be processing and issuing 404 permits" and "not the USACE." CTCLUSI has serious concerns related to the protection of cultural resources, consultation; and authorities as highlighted above. Additionally, the Tribe is concerned with other components of the partial assumption including but not limited to:

- How is the state integrating scale of impact into the partial assumption process?
- How is the state tying partial assumption to existing certifications under other agencies such as ODEQ and ODOE?

We understand that the State is interested in aspects of the 404 assumption, which could provide greater certainty with respect to some parts of the permitting. However, without further clarity it is unclear how the agency will achieve equivalent results and more detail is needed to understand proposed processes such as agency coordination and statutory changes.

Conclusion

At this time, CTCLUSI would advise caution moving forward with this proposal without full consultation and endorsement by Tribal Nations in Oregon. Overall, we have identified serious concerns that moving forward with 404 assumption could harm natural and cultural resources of the Tribe. While there may be redundancies and opportunities for the State with respect to the assumption, we ask that the DSL consider our comments to ensure that CTCLUSI retains the rights and authorities to best care for Tribal homelands, resources, and people.

As stated above, we request government-to-government consultation with DSL to fully address these comments. Please contact either me at sscott@ctclusi.org or Roselynn Lwenya at rlwenya@ctclusi.org to further discuss our concerns and to coordinate a consultation meeting.

Sincerely,

A handwritten signature in dark ink, appearing to read "Stacy Scott", is positioned above the typed name.

Stacy Scott
Tribal Historic Preservation Officer
Confederated Tribes of Coos,
Lower Umpqua, and Siuslaw Indians

Cc: Eric Metz
Barbara Poage