

TESTIMONY
OF
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On House Bill 2436-1
Before the House Committee on Agriculture and Land Use
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Good afternoon, Chair Clem and members of the Committee. I am Eric Metz, Senior Policy and Legislative Analyst with the Department of State Lands and I'm here to talk to you today about Oregon creating a partial assumption program for the Federal Clean Water Act, section 404 permit.

The Federal Clean Water Act (CWA) provides states and tribes the option of assuming administration of the CWA section 404 permit program in certain waters within state or tribal jurisdiction. Oregon would like to pursue this option and HB2436 directs DSL to develop a proposal, including recommendations for legislation to be introduced during the 2020 regular session, for partial assumption. The bill further directs DSL to evaluate any other provisions that DSL determines are necessary to allow the DSL to formally apply for partial assumption.

For now, I will just briefly share some background and information on partial 404 assumption.

What is Partial 404 Assumption?

Currently the Portland District Corps of Engineers (Corps) and DSL each have overlapping jurisdiction over wetlands and waters in Oregon. The Corps regulates waters of the United States under Section 404 of the Clean Water Act and DSL regulates waters of the State under the Removal-Fill Law. Oregon applicants need to obtain both permits; one from the Corps and one from DSL, placing redundant state and federal permit requirements on the applicant.

Partial 404 assumption means that the state would be able to issue a single permit for both Waters of the State and Waters of the United States. As proposed now, agricultural and forestry activities would be excluded from the partial 404 assumption program at the request of those industries.

Why does Oregon want Partial 404 Assumption?

Streamlining. By issuing a single state permit for each eligible project, DSL can provide increased consistency in regulatory requirements and more timely and predictable regulatory outcomes for applicants.

Accountability. The new 404 program administered by DSL will be directly accountable to applicants and sister state agencies through the legislative process. The federal program does not offer the same direct accountability to Oregonians.

Jurisdictional Clarity. The current efforts of the Environmental Protection Agency (EPA) and the Corps to roll back federal jurisdiction under the “WOTUS” rule is only the latest iteration of changes that have been occurring since the early 1970’s. Just the opposite is true for the state. Wetlands and waters jurisdiction have been and will likely continue to be more consistent and stable so applicants will know what to expect when entering the permit process.

Why is Now the time for Partial 404 Assumption?

The Federal Government is rolling back its CWA jurisdiction and is inviting states to fill in the gaps. As a result, EPA and the Corps are providing incentives to assume the 404-permitting authority by making the path to assumption simpler and clearer.

- Based largely on the recommendations of state, tribal and legal wetland experts, EPA and the Corps have clearly defined what waters the states and tribes can assume. This is a welcome development. Up until now, there’s been a great amount of uncertainty about where and when states can issue 404 permits.
- EPA is being very proactive. For example, it is revising its state/tribal assumption regulations and may provide incentives, such as partial 404 assumption, to encourage more states to assume.
- Oregon’s efforts to design and build a partial 404 assumption program will help inform EPA’s rulemaking process and may facilitate EPA’s acceptance of this new approach. The EPA has been very forthcoming and encouraging in recent discussions with Oregon regarding a partial assumption program.

What are the Implementation Phases?

Collaborative conversations with EPA and other Oregon stakeholders have led to emergence of the following strategy to implement partial 404 assumption in Oregon.

2019 Session

- DSL is looking for Legislative direction to develop a comprehensive list of proposed statutory changes needed to satisfy EPA requirements. HB 2436-1 provides that direction and an appropriation to complete this task.
- DSL would use the appropriation to hire additional staff to:
 - Work closely with the Oregon Department of Fish, the US Fish & Wildlife Service and the National Marine Fisheries Service to resolve the remaining questions about Endangered Species Act compliance

- Work closely with the State Historic Preservation Office and the Corps to develop a Tribal consultation process comparable to Federal Historic Preservation Act consultations conducted by the Corps.
- Work closely with the Department of Land Conservation and Development to sort out State Coastal Zone Management authorities
- Working closely with the Department of Environmental Quality to sort out the Section 401 Certification process
- Work closely with the Department of Energy to sort out how applicants will obtain site certificates from the Energy Facility Siting Council (EFSC)
- Address any other issues that need to be in the state's application for partial 404 assumption

2020 Session

- The legislature considers, and potentially adopts, the proposed statutory changes to allow Oregon to come into EPA compliance.
- With stakeholder input, DSL continues to resolve remaining questions and concerns, with a goal to submit a complete state 404 application to the EPA during the fall of 2020.
- After assessing staffing levels needed to deliver excellent results, DSL presents resource needs for partial 404 assumption.

2021 Session

- EPA would approve the application in late 2020 or early 2021.
- The legislature could then issue a final approval for partial 404 assumption during the 2021 legislative session and may also need to provide additional funding for program staffing.
- If partial 404 assumption were approved, DSL would use the remainder of 2021 to prepare program rollout.

2022 Session

- The partial 404 assumption would take effect in January of 2022.

In closing...

Thank you for the opportunity to provide testimony today. I am happy to take any questions you may have. Bill Ryan, Deputy Director of Operations at DSL, who will have overall responsibility to run this program, is also in the room if you would like to address any questions to him as well. Thank you.