

The State of Alaska's Effort to Become the Primary Agency for Section 404 Permits¹

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In 1977, Congress amended the federal Clean Water Act (CWA or Act) to provide a legal mechanism for states to assume the Act's section 404 dredge and fill permit program, which regulates the discharge of dredge and fill material into wetlands and other waters of the U.S. With over 174 million acres of wetlands in Alaska, Alaska's stake in administering the section 404 Program of the CWA is unlike that of any other state.

Earlier this year, the Alaska legislature passed Senate Bill (SB) 27, which gives the Alaska Department of Environmental Conservation (DEC) and Alaska Department of Natural Resources (DNR) the statutory authority to evaluate and seek assumption of the section 404 Program from the U.S. Environmental Protection Agency (EPA).

This presentation will provide an overview of SB 27; the current section 404 Program; state assumption of the section 404 Program, including the application process and components, the benefits and barriers to state assumption, and alternatives to state assumption; and future decision points.

Overview

Approximately 65% of the nation's wetlands are located in Alaska.² Alaska's wetlands cover approximately 174 million acres, or about 43% of Alaska's surface area, as compared to wetlands covering only 5.2% of the surface area in the lower 48 states.³ Alaska's wetlands include tundra, permafrost areas, marshes, bogs, and similar areas.

Recognizing the importance of state control over Alaska's wetlands, in his January 16, 2013 State of the State address, Governor Sean Parnell called for the state to assume primacy for dredge and fill permitting under the section 404 Program, a program currently administered in Alaska by the U.S. Army Corps of Engineers (Corps). The following day, Governor Parnell transmitted two bills to the legislature – Senate Bill 27 and House Bill 78 – that would establish state authority to develop and

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² Wetlands help maintain water quality by slowly filtering excess nutrients, sediments, and pollutants before water seeps into rivers, streams, and underground aquifers. They also offer a breeding ground and/or habitat for fish, wildlife, and plants.

³ Hall, Frayer and Wilen, *Status of Alaska Wetlands* at 3 (1994).

implement a state-run section 404 program for dredge and fill activities in state waters and wetlands, in accordance with section 404 of the CWA.⁴ As he explained in his letter to the legislature:

This change will limit federal overreach in Alaska by giving the State authority to make jurisdictional determinations, timely process permits, and allow responsible resource development. Removing a significant amount of wetlands from federal authority also reduces the number of projects requiring an expensive and time-consuming federal National Environmental Policy Act (NEPA) process, since there would be few “major federal actions” associated with these projects.

On May 21, 2013, Governor Parnell signed SB 27 into law, giving DEC and DNR authority to evaluate the costs and benefits of state assumption of the section 404 Program, and to submit an application for assumption to EPA.

Senate Bill 27

“An Act establishing authority for the state to evaluate and seek primacy for administering the regulatory program for dredge and fill activities allowed to individual states under federal law and relating to the authority; and providing for an effective date.”

SB 27 provides authority for the state to evaluate and seek to develop a program for the regulation of dredge and fill activities in waters and wetlands located within the state, in accordance with the regulating program allowed states under section 404 of the CWA. SB 27 also provides funding to DEC and DNR for the staffing needed to pursue assumption.

SB 27 is divided into five sections:

Section 1 provides legislative findings for the bill, including recognition that there are thousands of waterbodies and millions of acres of wetlands within the state. The findings further state that individual states are allowed to assume primacy to regulate dredge and fill activities under 33 U.S.C. § 1344 and that this is consistent with congressional intent in 33 U.S.C. § 1251 that the states to have the primary responsibilities and rights in regulating activities involving lands and waters within their respective states. The findings note that other states have assumed or continue to evaluate obtaining primacy for regulating dredge and fill activities under 33 U.S.C. § 1344 and that DEC and DNR have substantial expertise such that they could ably regulate these types of activities. The findings also recognize that there are benefits to the state for DEC and DNR to assume the dredge and fill permitting responsibilities.

Section 2 amends AS 44.37.020 to provide that DNR, in coordination with DEC, may take action necessary to administer and enforce any authorized dredge and fill permitting program allowed under 33 U.S.C. § 1344, including the adoption of regulations under AS 44.62 (Administrative Procedure Act).⁵

⁴ 33 U.S.C. § 1344.

Section 3 amends AS 46.03.020 to provide that, notwithstanding any other provision of law, DEC may take all actions necessary to receive federal authorization of a state program for DEC and DNR to administer and enforce a dredge and fill permitting program allowed under 33 U.S.C. § 1344.

Section 4 directs DEC, in coordination with DNR, to continue to evaluate the potential benefits, costs, and consequences to the state of assuming primacy of regulating dredge and fill activities under 33 U.S.C. § 1344, and to take reasonable steps to assume primacy. DEC would also have the authority under Section 4 of the bill to file an application with EPA seeking federal approval of a state-run section 404 program. Section 4 of the bill also provides that DEC and DNR may adopt regulations under AS 44.62 that are necessary to obtain federal approval of and to implement a state program for the regulations of dredge and fill activities under 33 U.S.C. § 1344.

Section 5 provides for an immediate effective date.

The Section 404 Program of the CWA

The CWA, enacted in 1972, is the primary federal law governing pollution control and water quality of the Nation's waterways.⁶ The Act's objective is to restore and maintain the chemical, physical and biological integrity of the nation's waters.⁷

Section 404 of the CWA regulates the discharge of dredged or fill material into the nation's waters and wetlands, requiring a section 404 permit issued by the Corps before dredged and fill material may be discharged in waters of the U.S. While section 404 is often described as a wetlands program, it applies to all waters of the U.S., not just wetlands. The regulated activities typically requiring a section 404 permit under the CWA include:

- Discharging dredged or fill material in waters of the U.S., including wetlands;
- Site improvement fill for residential, commercial, or recreational development;
- Construction of revetments, groins, breakwaters, levees, dams, dikes, and weirs; and
- Placement of riprap and fill material for roads, airports, or buildings.

⁵ AS 44.37.020 is amended by adding a new subsection to read:

(c) The Department of Natural Resources in coordination with the Department of Environmental Conservation may take actions necessary to administer and enforce any dredge and fill permitting program allowed under 33 U.S.C. § 1344 (sec. 404, Clean Water Act), including the adoption of regulations under AS 44.62 (Administrative Procedure Act).

⁶ 33 U.S.C. § 1251 *et seq.* The Act has been amended numerous times and given a number of titles and codification. It was originally enacted as the Water Pollution Control Act in 1948 (P.L. 80-845), and was completely revised by the 1972 amendments, the Federal Water Pollution Control Act Amendments (P.L. 92-500). The 1972 amendments gave the Act its current form.

⁷ 33 U.S.C. § 1251.

Current State Wetland Management

While the state does not currently have a section 404 program, the state does regulate discharges to surface waters and wetlands within its boundaries, including through section 401 water quality certifications of section 404 permits under the CWA. Section 401 of the Act provides states with the legal authority to review an application or project that requires a federal license or permit (in this case, a section 404 dredge and fill permit) that might result in a discharge into a water of the U.S.

As part of the current section 404 permitting process, an applicant must apply for and obtain a Certificate of Reasonable Assurance from the DEC to conduct a regulated activity. DEC reviews the project as described in the Corps' project public notice; coordinates with other state and federal agencies and local governments; reviews any public comments; and either approves, approves with conditions, waives, or denies the project based on compliance with the CWA, state water quality standards, and other applicable state laws. Any conditions imposed by the State through its section 401 certification automatically become conditions of the section 404 permit issued by the Corps.

Additionally, several local governments have developed wetlands management plans for their jurisdictions.⁸

State Assumption of the Section 404 Program

The 1977 amendments to the CWA gave states the ability to assume section 404 permitting authority from the Corps over the state's navigable waters,⁹ except for the following waters over which the Corps retains permitting authority as provided in section 404(g)(1) of the Act:¹⁰

- waters subject to the ebb and flow of the tide (e.g., coastal waters);
- waters currently used for interstate/foreign commerce;

⁸ See ***Useful Links/Resources*** at the end of this article.

⁹ The 1972 Act made no provision for transferring section 404 permit responsibilities to the states.

¹⁰ Section 404(g)(1) provides:

The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program.

- waters susceptible to use for interstate/foreign commerce; and
- wetlands adjacent to the above-described waters.

The primary requirement for assuming the section 404 program is that the state program may not adopt requirements that are *less stringent* than the requirements of the CWA and accompanying regulations.¹¹ In addition, the state must demonstrate to EPA that its program:

- has an equivalent scope of jurisdiction for those waters they may assume;
- regulates at least the same activities as the federal program;
- provides for public participation;
- is consistent with the CWA section 404(b)(1) Guidelines, which are the environmental criteria used by EPA and the Corps in evaluating permit applications; and
- has adequate enforcement authority.

The specific materials which the state must submit to EPA for state approval are set forth in section 404(g) and EPA regulations (40 CFR §§ 233.10 – 233.14) as follows:¹²

1. A letter from the Governor of the State requesting program approval.
2. A complete program description, including but not limited to the scope and structure of the State's program; its permitting, compliance, and enforcement program; its regulatory authorities, staffing, organization, and basic procedure; the waters of the U.S. over which the state intends to assume jurisdiction under the approved program; and copies of permit application forms, perform forms, and reporting forms.
3. An Attorney General's statement essentially certifying that the state has adequate legal authority to carry out the program and meet applicable federal requirements.
4. A Memorandum of Agreement with the Regional Administrator of EPA.
5. A Memorandum of Agreement with the Secretary of the Army.

Assumption of the section 404 program does not give a state sole section 404 permitting authority over all its waters. Even after state section 404 program approval, the Corps would continue to issue permits for dredge and fill activities in the non-assumable waters over which it retains jurisdictions, as described in section 404(g)(1).

EPA's Role in Assumption

EPA is responsible for approving a state assumption program, and once approved, provides overall program oversight on state section 404 programs to ensure compliance with federal standards. An approved state section 404 Program is operated under the provisions of EPA's section 404 State

¹¹ 40 CFR § 233.1(d).

¹² See also 40 CFR §§ 233.11 - 233.14.

Program Regulations, found at 40 CFR Part 233. These regulations define not only the process for requesting approval of a state program, but also the operation of a state program. As noted in the preamble to these regulations, the relationship between the EPA and the state in an assumed program is intended to be a partnership.

Under a state-assumed program, EPA must receive copies of all permit applications submitted to the state, and retains the ability to file objections and veto permits. While all permit applications received by the state are subject to review by EPA, EPA typically waives review of all but a small percentage (2-5% on an annual basis). However, if EPA does review a project and objects to issuance of a permit, the state may not issue a section 404 permit unless the objection is resolved. States must also provide EPA with an annual report that summarizes permitting and enforcement actions taken during the year.

Why § 404 Assumption is Important to the State

Almost half of Alaska is considered wetlands – 65 % of the nation’s wetlands are in Alaska. With wetlands so omnipresent in Alaska, most major projects – and a very large number of minor projects, like housing pads – require section 404 permitting. Yet in recent years, and more recently with federal sequestration, the Corps is experiencing budget cuts and staff reductions which results in delays in permit issuance. In Alaska, with a very narrow window for construction, such delays can and do result in project delays of a year or more.

State assumption of the section 404 program gives Alaska, not the Corps or EPA, the leadership role in evaluating and issuing dredge and fill permits in “assumable waters” of the state. With a state-run section 404 program, two agencies – DEC and DNR – that have a long history of successful interaction – will run the program, rather than the four currently involved: The Corps, EPA, DEC, and DNR. Two vs. four simply means less bureaucracy.

Benefits of § 404 Assumption

A state-run section 404 program offers several significant benefits in terms of overall program efficiency and wetland resource protection. These include the following:

- Regulatory integration. A state-run program enables the state to integrate a dredge and fill permit program with other state regulatory permit programs, including Alaska’s section 402 NPDES program. In essence, “one-stop permitting.” This is also consistent with both DEC and DNR’s emphasis in recent years on permit reform which result in faster, more streamlined permitting practices which place more emphasis on results and less on cumbersome processes.
- Increased program efficiency. A state-run program reduces duplicative state and federal permitting requirements; eliminates potentially conflicting permit decisions, conditions, and mitigation requirements; and enables the state to integrate the dredge and fill program and other related land and water management programs.

- Increased flexibility. Under a state-run program, the state has a degree of flexibility in the selection of policies and procedures that are best suited to the needs of the state, provided that the basic federal requirements are met.;
- Timeliness. Due to increased program efficiency, time frames may be reduced and permits may be issued faster under a state-run program.
- Cost savings for applicants in permitting major new projects. The total cost for the wetland permit application process for permits issued to state transportation agencies, local governmental agencies, and private industry can be significantly reduced by reducing the time and uncertainty involved in the permitting process.
- Improved resource protection. The State is in the unique position of being able to balance its citizens' needs with their use of land and water resources – and, consequently, to maintain productive natural resources while considering industrial growth and development, while still providing the protections provided by the CWA.
- Increased consistency and public support. Alaska is better positioned than the federal government to create a consistent and sustainable permitting program across the state. State permit staff are often more readily accessible to the public than their federal counterparts. Overall public support for wetland regulation is increased by more consistent decision making among state and federal agencies, and by policies and procedures tailored to the needs of the state.
- Increased regulatory program stability. Under a state-run program, the appeals process is generally timelier and less apt to stall projects needlessly and indefinitely. In addition, judicial proceedings relating to permitting will generally be decided by Alaska courts instead of outside federal courts.
- No NEPA review. Permits issued under a state-run section 404 program are state permits issued under state law. For this reason, the provisions of other federal laws that apply to federal permits such as National Environmental Policy Act (NEPA), do not apply.

Potential barriers to § 404 Assumption

The fact that only two states (Michigan and New Jersey) have assumed the section 404 program from EPA since 1977 is a reflection of the potential barriers and challenges faced by any state considering assumption.¹³ Potential barriers to section 404 assumptions include the following:

- Difficulty in meeting section 404 program requirements. The current section 404 program regulations are complex, including on matters of jurisdiction, activities regulated, permit review criteria, and permit exemptions. In order to obtain EPA approval, a state's regulatory

¹³ The State of Oregon has been considering state assumption of the section 404 program since 1995. Other states which have considered assumption include Virginia, Maryland, and North Dakota.

authority must include all activities regulated under section 404 and must be consistent with the section 404(b)(1) Guidelines and all other parts of the section 404 program. And once approved, a state is expected to respond to future changes in federal law or regulations with parallel changes in state regulatory provisions as needed.

- Need to demonstrate jurisdiction over all assumable waters of the U.S. In order to administer the section 404 program, a state must – at a minimum – have regulations in place that provide the state with jurisdiction over all waters of the U.S., except those non-assumable waters under section 404(g) over which the Corps retains jurisdiction.
- Potentially uncertainty regarding the percentage of waters which may remain under Corps jurisdiction. The section 404(g) limitation of assumable waters precludes state assumption of waters in tidal areas, waters currently used (or susceptible to use) in interstate/foreign commerce, and adjacent wetlands. For Alaska, the uncertainty of the extent of the Corps' jurisdiction over non-assumable waters may be an impediment to program assumption.¹⁴
- Lack of dedicated federal funding for state section 404 program administration. States administering the section 404 program receive no federal funds specifically dedicated to support the implementation and administration of a state section 404 program, meaning the state must bear the cost of hiring new staff, funding new training programs, and expanding administrative resources and capacity in advance of assumption, and continue to bear the cost of administration of the assumed program.
- No partial assumption. Under current EPA regulations, no partial state assumption of the § 404 program is allowed. It is “all or nothing.”

State Programmatic General Permits

One alternative to state assumption of the section 404 program is issuance and administration of what are known as State programmatic general permits (SPGPs), in partnership with the Corps. These permits are general permits for dredge and fill actions that are similar in nature and have minimal individual or cumulative effects. Existing law and SB 27 provides the state with authority to explore and pursue both this option and section 404 assumption. This alternative does not require EPA approval.

Decision Points

Alaska is still early in the process of fully understanding the costs and benefits of section 404 assumption. With passage of acts like the Endangered Species Act and with numerous court decisions about the section 404 program over the past decades, the landscape for assuming a section 404 program has changed significantly since Congress passed the 1977 amendment that enables states to

¹⁴ In Michigan and New Jersey, program benefits to the state from section 404 assumption were viewed as outweighing any limitations.

assume the program. The process for assumption is complex, and the process for determining whether and how to assume the program is equally complex. This perhaps explains why only two states – Michigan and New Jersey - have successfully assumed the section 404 program.

Much work lies ahead. It is likely that SB 27 will not be the last section 404 legislation that comes before legislature as the state researches statutory requirements and as the state determines the resources and the number of positions that will be required to run a state section 404 program. By the Fiscal Year 2016 budget cycle, DEC and DNR expect a decision point regarding whether to advance the primacy effort to filing an application with EPA.

Useful Links & Resources

The following reports describe wetlands in Alaska:

- Alaska Wetlands Initiative
http://water.epa.gov/grants_funding/wetlands/facts/upload/alaska.pdf
- Status of Alaska Wetlands (Hall et. al., 1994)
<http://www.fws.gov/wetlands/Documents/Status-of-Alaska-Wetlands.pdf>
- Environmental Law Institute, State Wetland Protection – Status, Trends, & Model Approaches: Alaska Profile http://www.eli.org/pdf/core_states/Alaska.pdf

See the links below for specific information on Section 404 permit application and issuance process.

- Corps Regulatory Division Main webpage
<http://www.poa.usace.army.mil/Missions/Regulatory.aspx>
- Corps FAQ on "Do I need a permit?"
<http://www.poa.usace.army.mil/Missions/Regulatory/FAQ.aspx>
- Corps listing of permit Public Notices
<http://www.poa.usace.army.mil/Missions/Regulatory/PublicNotices.aspx>

See links below for specific information regarding state assumption of the 404 Permit Program.

- US EPA, *The States' Choice: 404 Permit Program* (Oct. 1980)
- US EPA, *State or Tribal Assumption of the Section 404 Permit Program*
<http://water.epa.gov/type/wetlands/outreach/fact23.cfm>
- The Association of State Wetland Managers, Inc. and The Environmental Council of the States, *Clean Water Act Section 404 Program Assumption: A Handbook for States and Tribes* (Aug. 2011) http://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf

Several local governments have developed local wetlands management plans. See the links for the following communities.

- Anchorage wetlands - <http://www.muni.org/Departments/OCPD/Planning/Projects/Pages/AnchorageWetlandsManagementPlan.aspx>
- Juneau wetlands - http://www.juneauwatersheds.org/watershed_library.html
- Kenai Borough wetlands - <http://www.kenaiwetlands.net/>
- Homer wetlands - <http://www.cityofhomer-ak.gov/planning>
- Mat-Su wetlands - http://www.matsugov.us/docman/doc_download/3768-final-mat-su-borough-wetlands-mgt-plan

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