

Draft background of SJ2 report

The Clean Water Act

Congress passed the Clean Water Act in 1972. The act promises “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” The act requires permits for “the discharge of dredged or fill material into the navigable waters at specified disposal sites,” known as Section 404 permits.

Montana Gov. Tom Judge said in 1977 that 404 permitting requirements duplicate the Montana Natural Streambed and Land Preservation Act, also known as “310 permits.” A conservation district’s board of supervisors issues a 310 permit for any activity that physically alters or modifies the bed and banks of a perennially flowing stream.

Montana first explored assumption in 1980s.

Effects of fill in waterways

Wetland fill causes:

- Direct loss of habitat
- Loss of water storage features
- Lost natural water quality treatment
- Lost natural flood protection

Bank armor has impacts. 136 miles of Yellowstone River has bank armor. Bank armor includes rock riprap, flow deflectors, concrete riprap, car bodies, gabions, steel retaining walls. Armor can fail, abandoning armor material in channel and accelerating erosion, both of which create navigation hazards

“Locking a river” has implications for river function, including for maintaining riparian forests and healthy fish habitat. This may influence ESA listings and other landowner challenges.

Floodplain dikes have blocked 89 miles of Yellowstone River side channels.

Side channels are important habitat for certain fish species.

U.S. Army Corps of Engineers

The Corps issues 404 and Section 10 permits. The Rivers and Harbors Act (1899) requires a Section 10 permit for all work in, over, and under navigable waters.

Other federal laws must be considered during permitting, such as National Environmental Policy Act, National Historic Preservation Act, Endangered Species Act, Wild and Scenic Rivers Act.

The 404 program regulates the placement of dredged or fill material, such as rock, soil, vegetation, concrete, steel. Redeposit of dredged material is also regulated. Waste material is not considered fill material and not allowed.

Normal farming and forestry activities are exempt from 404 permitting.

Montana offers a joint application, which includes applications for a 310 permit, a 124 permit (issued by the Department of Fish, Wildlife, and Parks to government agencies for projects that may affect any stream, banks, or tributaries), local floodplain permit, a 318 authorization (a DEQ authorization for short-term water quality standard for turbidity), 401 certification (a DEQ certification), or a land use license, lease, or easement (from the DNRC).

Not all applications lead to a permit. The first step is a “jurisdictional determination” by the Corps. “Nationwide” permits, which cover common activities, may streamline the process.

The Corps issues 500-600 permits annually.

The Corps maintains 10 full-time equivalent employees at its Helena and Billings offices for \$1.34 million a year.

Certain support functions are performed at the Corps’ regional office in Omaha, such as permit database, legal support, et al.

The Clean Water Rule

The Corps and the Environmental Protection Agency proposed a definition of “waters of the U.S.” in an attempt to clear up confusion created by past U.S. Supreme Court decisions. (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 US 159 (2001); *Rapanos v. U.S.*, 547 US 715 (2006))

The Clean Water Rule includes six categories of waters (navigable, interstate, territorial season, impoundments, tributaries, and adjacent), and two more for certain “isolated, other” waters that are unique (like prairie potholes), and waters beyond “adjacent waters” that meet a “significant nexus” test. Exemptions would be provided for farming, ranching, forestry, water treatment systems, prior converted cropland, most ditches, irrigated areas that would revert to dryland, artificial lakes, reflecting pools, swimming pools, ornamental ponds, puddles, erosional features, groundwater, wastewater recycling structures, and stormwater control basins.

The EPA presented the Clean Water Rule to the Environmental Quality Council in July, 2014, amended the rule in 2015 primarily to clarify exemptions, and finalized the rule in August, 2015. Thirteen states, including Montana’s attorney general, challenged the rule in North Dakota federal court, which blocked the rule. Appeal to the U.S. Supreme Court is possible by summer, 2017.

Process of assumption

Every permit must meet 404(b)(1) guidelines (in Code of Federal Regulations), which ensures program will be at least as stringent as federal standards

State 404 program could be combined with a state permit. (Montana has a joint application form.)

Montana would have to take all of 404 permitting authority, except for those in Section 10 waters (and adjacent wetlands) and on tribal reservations.

Application (40 CFR 233.10) must include:

- Copies of all applicable state statutes and regulations.
- Attorney general's statement that state laws "provide adequate authority to carry out the program and meet the applicable requirements." Takings analysis. State laws may have to be adjusted to meet federal standards.
- Program description: scope and structure of program; permitting, administrative, judicial review, and other procedures; basic organization and structure of responsible agency; funding and manpower available; estimate of anticipated workload; copies of permit application forms, permit forms, and reporting forms; description of compliance evaluation and enforcement programs; description of waters over which the state assumes jurisdiction; identification of waters retained by Corps jurisdiction; best management practices for exemptions for farm roads, forest roads, and temporary mining roads.
- Memoranda or agreement with EPA regional administrator and Secretary of Army. EPA sends the application to Corps, U.S. Fish and Wildlife Service for comments.
- Final step: Letter from governor requesting approval, including all above materials.

After approval by EPA regional administrator, notice published in Federal Register. If program is not approved, EPA provides the state with a list of necessary revisions.

EPA requirements

State director may not issue permit if state does not comply with 404(b)(1) guidelines.

404(b)(1) gives EPA authority, "in conjunction with the Secretary," to develop guidelines. Guidelines (40 CFR Part 230) include potential impacts on physical and chemical characteristics of the aquatic ecosystem (turbidity, current patterns, salinity), potential impacts on biological characteristics of the aquatic ecosystem (threatened and endangered species, food web), potential impacts on special aquatic sites (sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, riffle and pool complexes), potential effects on human use characteristics (municipal and

private water supplies, recreational and commercial fisheries, water-related recreations, aesthetics, parks, national parks and historic monuments, et al), evaluation and testing (chemical, biological, and physical evaluation and testing), actions to minimize adverse effects, compensatory mitigation for losses of aquatic resources (mitigation banks and in-lieu fee programs).

The state must transmit notice of every permit application to EPA; EPA reviews permits. A state shall not issue a permit to which EPA has object or placed requirements upon.

EPA requires annual report from states and periodic program review and evaluation.

Experiences in other states

The EPA has authorized two states to assume 404 permitting: Michigan and New Jersey.

Michigan assumed the 404 program in 1984.

1979 legislation (Geomare-Anderson Wetlands Protection Act) aligned Michigan laws to federal standards.

The Michigan Department of Environmental Quality issues “303 permits” for work in a wetland. A 303 permit covers deposit of fill material in a wetland, dredging or removal of wetland soils or minerals, construction or operation of any use or development in a wetland, and draining a wetland.

Federal oversight remains. A separate Corps permit is necessary for traditional navigable waters (like the Great Lakes), connecting channels, and adjacent wetlands. The EPA reviews projects impacting critical environmental areas or discharges involving large quantities.

In 2008, EPA comprehensively reviewed Michigan program, identifying 20 corrective actions needed to maintain a program equivalent to federal standards. In 2009, the Michigan governor proposed relinquishing the program. The EPA is reviewing 2013 legislation meant to bring program back into compliance.

New Jersey assumed the 404 program in 1994.

1987 legislation (State Freshwater Wetlands Protection Act) aligned state laws.

New Jersey Division of Land Use Regulation issues a “wetlands permit,” which includes comprehensive activities for freshwater wetlands, wetland transition areas, or state open waters.

Federal oversight remains. EPA reviews permits that deposit large amounts of fill into freshwater wetlands or state open waters, or any activity that reduces the ecological,

commercial, recreational value of more than 5 acres of wetlands or waters. EPA also reviews certain culvert enclosure and stream channelization.

At least seven other states have formally explored 404 assumption. Officials in two states relayed their experiences to the WPIC.

In 2013, the Alaska Legislature directed their Division of Water to analyze assumption and to submit an application to the EPA. The legislature also appropriated \$1.5 million. The legislation anticipated an application submitted by the end of 2017. However, in 2014 the legislature removed the funding and assumption efforts are now on hold.

The Oregon Department of State Lands submitted a complete application in 1995, continuing to study the issue until 2005. Legislative committee met in 2012 to consider the issue. Outstanding issues include considerations related to endangered species. 1967 law protects waterways and wetlands; the Department of State Lands issues its own permits.

In testimony to the WPIC, officials from Alaska and Oregon suggested:

- Montana could benefit from assumption, but needs to determine where the state would have jurisdiction.
- Montana might consider an MOU with federal agencies to share information while pursuing assumption.
- Clean Water Rule would expand 404 jurisdiction.

Assumable Waters Federal Advisory subcommittee will study issue of state jurisdiction and make recommendations to National Advisory Council for Environmental Policy and Technology by September 2016. (Council is subject to Federal Advisory Committee Act; offers independent advice to EPA administrator.)

Cost estimate

WPIC staff calculated an annual cost estimate based on the following assumptions:

- Using the Corps' \$1.3 million annual cost as a starting place. Cost estimate calculated to mirror the Corps' program.
- Cost estimated *decreased* to adjust for the cost of full-time equivalent in DEQ Permitting and Compliance Division (as compared to a Corps FTE); to reflect amount of work performed by Corps' regional office; to reflect Corps' retention of Section 10 waters; to reflect Montana could not assume 404 jurisdiction on Indian lands.
- Considered effects of Montana adoption of nationwide permit requirements, certain federal land designations (national parks, wild and scenic rivers, et al), incorporating existing expertise at Montana agencies. *No effect* on estimate.
- Implementation of Clean Water Rule would *increase* estimate.

Federal Wetland Program Development Grants may be used to further explore assumption of 404 program.

Testimony to WPIC indicated annual cost estimate may be too low, as some find current Corps staffing level inadequate for timely permitting. And DEQ staff said a 404 program would require hiring staff with interdisciplinary expertise, which may not be reflected in the annual cost estimate. Other testimony indicated satisfaction with current level of Corps service.

DEQ staff will provide additional information related to assumption costs and timelines.