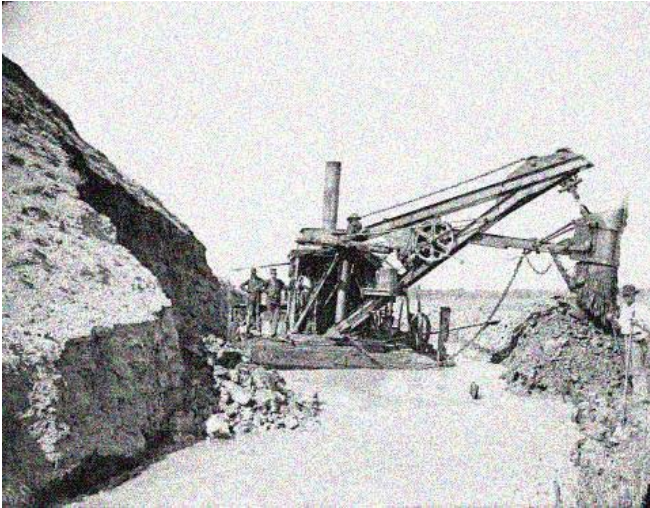

Assuming dredge- and-fill permits



A Water Policy
Interim Committee
report to the 65th
Legislature

Legislative Environmental
Policy Office

Water Policy Interim Committee members

Before the close of each legislative session, the House and Senate leadership appoint lawmakers to interim committees. The members of the WPIC, like the members of other interim committees, serve one 20-month term. Members who are reelected to the Legislature may serve again on an interim committee, if appointed, and are subject to overall term limits. This information is included to comply with 2-15-155, MCA.

| Senate members | House members |
|--|--|
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This report summarizes the work of the Water Policy Interim Committee specific to Senate Joint Resolution 2. Members received additional information and public testimony on the subject, and this report highlights key information and the processes followed by the WPIC. To review additional information, including written minutes, written public comments exhibits, and audio minutes, visit the WPIC website: www.leg.mt.gov/water.

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Appendix A: Joint Application for Proposed Work in Montana’s Streams, Wetlands, Floodplains, and Other Water Bodies (Department of Natural Resources and Conservation)

Appendix B: Annual Cost Estimate for Assumption of Section 404 Permitting Duties (Legislative Environmental Policy Office)

Appendix C: Draft legislation: Direct DEQ assumption of dredge and fill permitting

Introduction

The 2015 legislature passed Senate Joint Resolution No. 2, directing an appropriate interim committee to evaluate local, state, and federal permits for waterway projects and to determine if Montana has jurisdiction to regulate activities covered by the federal Section 404 permit required under the federal Clean Water Act. On May 18, 2015, the Legislative Council assigned this study to the Water Policy Interim Committee. This report was prepared by the WPIC to summarize its work on SJ2.

Findings

The committee reviewed relevant laws, policies, and legal decisions, examined other states' assumption efforts, and hosted numerous panel discussions as part of its work on SJ2. The committee's findings are as follows:

| SJ2 study findings |
|---|
| Congress passed the Clean Water Act in 1972, which mandates 404 permits for anyone placing dredged or fill material in a jurisdictional waterway. |
| Montana has previously explored assumption of the 404 program. |
| Placing fill in streams and wetlands impacts water quality, water quantity, flood protection, and wildlife habitat. |
| The U.S. Army Corps of Engineers administers the 404 program in Montana, which overlaps to varying degrees with seven other permissions that must be obtained from six federal, state, and local agencies for activities in a stream. |
| The federal Clean Water Rule – and appeals to it – may impact the jurisdictional reach of 404 program. |
| The Environmental Protection Agency has a process for a state to assume a Section 404 program. |
| A state-issued Section 404 permit must be at least as rigorous as a Corps-issued permit. |
| State assumption of the 404 program is uncommon; two states have assumed most 404 permitting functions, while at least seven other states have formally explored assumption of their 404 program. |
| EPA has convened an advisory subcommittee to study state jurisdiction of waters. |
| The cost to run a 404 program roughly equivalent to the Corps' is approximately \$1 million per year. |
| It may take up to five years for the Department of Environmental Quality to prepare a fully functioning Section 404 program. |

Recommendation

The Water Policy Interim Committee issues this report as a conclusion to the SJ2 study and its evaluation of permits for waterway projects and state assumption of federal section 404 permits.

The WPIC remains concerned over the implementation of the Clean Water Rule, as the final rule defining “water of the United States” reads in the Federal Register on June 29, 2015. Because of this concern, if the Clean Water Rule is eventually ruled enforceable, the committee recommends:

- the Department of Environmental Quality assume the federal Section 404 program by development of an adequate program description and a memorandum of agreement with the Environmental Protection Agency’s regional administrator and the Secretary of the Army,
- the DEQ apply for a federal Wetlands Development Grant to aid its work, and
- the Montana Legislature approve legislation providing an appropriation and adequate authority to carry out the program and meet the applicable requirements of the Section 404 program.

Legislation

The WPIC voted to advance LCwp81¹ to the 2017 Legislature, which directs the DEQ to assume the dredge and fill permitting program, if and when the U.S. Army Corps of Engineers and the EPA fully enforce the final rule defining “waters of the United States,” as published in the Federal Register on June 29, 2015.

¹ See Appendix C.

Assumption of federal Section 404 permitting

The Clean Water Act² requires “dredge and fill” permits for those placing material in certain waterways. States have sought to assume this program from the federal government, and Montana is no exception. Some view state assumption as a way to streamline regulations and avoid duplication of state or local requirements. Others view a robust Section 404³ program as a necessary way to maintain the nation’s water quality.

The Clean Water Act controls

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.” To do so, the act includes three major regulatory programs: establishing water quality standards⁴, issuing permits for discharging pollutants⁵, and issuing permits for placing dredged or fill material into a waterway. Specifically, 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.⁶

Montana has explored assumption at various times since the Section 404 permitting program began.

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.”⁷ 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.⁸ It was later determined the state of Montana didn’t have the authority or manpower to issue Section 404 permits.⁹

Effects of fill in waterways

Placing dredged or fill material in waterways may negatively impact water quality.¹⁰ It may also have other effects, such as:

- Direct loss of habitat

² 33 U.S.C. 1251 et seq.

³ Refers to the section of the Clean Water Act. Also 33 U.S.C. 1344.

⁴ 33 U.S.C. 1313.

⁵ 33 U.S.C. 1342.

⁶ The state of Montana must also certify all federal licenses or permits which may result in a discharge into navigable waters, such as hydropower licenses, which is known as the 401 certification process. See 33 U.S.C. 1341.

⁷ Legislative Environmental Policy Office memo, “Issues to Consider for State Administration of Section 404 Clean Water Act Permits (2014).”

⁸ Title 75, chapter 7, part 1, MCA.

⁹ Legislative Environmental Policy Office memo, “Issues to Consider for State Administration of Section 404 Clean Water Act Permits (2014).”

¹⁰ Testimony of geomorphologist Karin Boyd to WPIC, Sept. 3, 2015. Also Karin Boyd memo to WPIC, Sept. 3, 2015.

- Loss of water storage features
- Loss of natural water quality treatment
- Loss of natural flood protection

Construction in a waterway may also have other impacts.

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

“Locking a river” with bank armor or dikes has implications for river function, such as degrading riparian forests or healthy fish habitat. Floodplain dikes have blocked 89 miles of Yellowstone River side channels. These side channels are important habitat for certain fish species.

Negative effects on river habitat may influence endangered species-related actions by the federal government and how landowners use their property.

Today’s permitters: U.S. Army Corps of Engineers

Development in a waterway may potentially involve myriad local, state, and federal jurisdictions.

The U.S. Army Corps issues Section 404 and Section 10 permits for Montana waterways. The Rivers and Harbors Appropriation Act of 1899¹¹ requires a Section 10 permit for all work in, over, and under navigable waters.

Other federal laws must be considered during their permitting process, such as the National Environmental Policy Act, the National Historic Preservation Act, the Endangered Species Act, or the Wild and Scenic Rivers Act. Local floodplain authorities may need to be contacted. As such, the Corps may need to conduct its own NEPA analysis and consult with the U.S. Fish and Wildlife Service, state historic preservation offices, local officials, and others.¹²

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

Some activities are exempted from needing a permit. Normal farming and forestry activities are exempt from Section 404 permitting, as are maintenance of authorized fills, farm or stock ponds, irrigation diversions, temporary sediment basins, and temporary farm, forest, and mining roads.

¹¹ 33 U.S.C. 403

¹² Todd Tillinger (U.S. Army Corps of Engineers) presentation to WPIC, Sept. 3, 2015.

Role for conservation districts?

Montana offers a joint application,¹³ 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 standards for turbidity), 401 certification, and a land use license, lease, or easement (from the DNRC).

As referred to previously, some have compared the state’s 310 permitting program to the federal Section 404 permitting program. The two processes share some similarities, but also many differences. Table 1 highlights each program:

Table 1: 310 vs. 404 permits

| | 310 permit | 404 permit |
|--------------------------------|---|---|
| Related law | Montana Natural Streambed and Land Preservation Act | Clean Water Act |
| Authorizing body | Montana Legislature | Congress |
| What triggers a permit? | Any activity that physically alters or modifies the bed or banks of a perennially flowing stream. | Any activity that will result in the discharge or placement of dredged or fill material into waters of the United States. |
| Permit-issuing agency | Local conservation district supervisors | U.S. Army Corps of Engineers |

Not all applications lead to a permit. The Corps first makes a “jurisdictional determination,” to determine if the activity or waterway is subject to jurisdiction.

A Section 404 permit typically takes 30-120 days to issue, although this depends on the complexity of the project. Common, smaller activities may be covered through a streamlined “nationwide” permit. Larger and perhaps more complex “individual” permits necessarily take longer. The Corps issues 500-600 permits annually (see Table 2) charging \$10-\$100 for each.¹⁴

¹³ See Appendix A.

¹⁴ Email from Todd Tillinger, U.S. Army Corps of Engineers, July 13, 2016.

Table 2: Corps permit load in Montana

| | 2013 | 2014 | 2015 |
|--------------------------------------|------|------|------|
| Jurisdictional determinations | 626 | 660 | n/a |
| No permit required | 110 | 122 | 128 |
| Individual permits | 16 | 15 | 27 |
| Nationwide permits | 551 | 566 | 524 |
| Unauthorized activities | 10 | 15 | 27 |
| Non-compliance with permits | 4 | 4 | 2 |

The Corps maintains 10 full-time equivalent employees at its Helena and Billings offices at an approximate cost of \$1.34 million a year. The Corps in Montana is supported by its regional office in Omaha, for work such as maintenance of a permit database, providing legal support, and other activities.¹⁵

Wotus and the Clean Water Rule

The Corps and the Environmental Protection Agency proposed a definition of “waters of the U.S.”¹⁶ in an attempt to clear up confusion created by past U.S. Supreme Court decisions over what waters were and were not jurisdictional.¹⁷

Under the proposed Clean Water Rule, essentially eight categories of waters would be defined as jurisdictional:

- Navigable waters
- interstate waters
- territorial seas
- impoundments
- tributaries
- adjacent waters
- certain “isolated, other” waters that are unique (like prairie potholes)
- 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. It is assumed more permits would be required under this rule, including an increase the number of jurisdictional determinations.¹⁸

¹⁵ Todd Tillinger (U.S. Army Corps of Engineers) presentation to WPIC, Sept. 3, 2015.

¹⁶ 40 CFR 230.3

¹⁷ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 US 159 (2001) and *Rapanos v. U.S.*, 547 US 715 (2006)

¹⁸ EPA webinar presentation, Aug. 19, 2015.

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, challenged the rule in North Dakota federal court, which blocked the rule. The groups appealing the rule says the EPA is unnecessarily expanding the reach of the Clean Water Act.¹⁹ An appeal to the U.S. Supreme Court may be possible by summer 2017 at the earliest.²⁰

Process of assumption

Federal law and rules provide guidelines if a state or tribal government desires to assume a Section 404 permitting program.²¹

According to federal regulations,²² a state application must include a letter from the governor to the EPA with the following materials:

- Copies of all applicable state statutes and regulations.
- An attorney general's statement that state laws "provide adequate authority to carry out the program and meet the applicable requirements." A takings analysis is also required. State laws may have to be adjusted to meet federal standards.
- A program description including:
 - 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 the Environmental Protection Agency's regional administrator and the Secretary of the Army. The EPA sends the application to the Corps and U.S. Fish and Wildlife Service for comments.

The EPA has 120 days to review the application. If the EPA regional administrator approves the assumption, the agency publishes notice in the Federal Register. If

¹⁹ States' Motion for Preliminary Injunction, United State District Court for the District of North Dakota Southeastern Division, Aug. 10, 2015.

²⁰ Testimony of Jon Bennion, deputy attorney general, to WPIC, March 7, 2016.

²¹ Federal rule defines a state as "any of the 50 states...[and] also includes any interstate agency requesting program approval or administering an approved program," and a state program as one "which has been approved by the EPA." 40 CFR 233.2.

²² 40 CFR 233.10

program is not approved, the agency provides the state with a list of necessary revisions.

Federal oversight would continue

Even if a Montana state agency assumed the Section 404 program, the EPA would continue its oversight.

Every state-issued permit must meet 404(b)(1) guidelines found in the Code of Federal Regulations.²³ In effect, a state or tribal program must be at least as stringent as federal standards. A state Section 404 permit could be combined with a state permit. And a state must assume all of the Section 404 permitting authority.²⁴

Under federal rule, a state director may not issue a Section 404 permit if the state does not comply with federal 404(b)(1) guidelines. Federal rules gives the EPA authority “in conjunction with the Secretary (of the Army)” to develop these guidelines. The guidelines for permits²⁵ include a need to analyze potential impacts on:

- physical and chemical characteristics of the aquatic ecosystem (turbidity, current patterns, salinity)
- biological characteristics of the aquatic ecosystem (threatened and endangered species, food web)
- special aquatic sites (sanctuaries and refuges, wetlands, mud flats, vegetated shallows, coral reefs, riffle and pool complexes)
- human use characteristics (municipal and private water supplies, recreational and commercial fisheries, water-related recreation, aesthetics, parks, national parks and historic monuments, et al).

In addition, other evaluations and testing may be necessary, actions may be necessary to minimize adverse effects, and compensatory mitigation may need to be established for losses of aquatic resources (such as mitigation banks and in-lieu fee programs).

A state or tribe must transmit notice of every permit application to EPA for review. A state may not issue a permit to which EPA has objected to or placed requirements upon. The EPA requires an annual report from states and conducts periodic program review and evaluation of a state-assumed program.

Experiences in other states

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

²³ 40 C.F.R. 230.

²⁴ Excepting Section 10 waters (and adjacent wetlands) and waters on tribal reservations.

²⁵ 40 C.F.R. 230.

Michigan

Michigan assumed the Section 404 program in 1984. Legislation passed in 1979²⁶ and in 1994²⁷ aligned Michigan laws to federal standards. Under those laws, the Michigan Department of Environmental Quality accepts a joint application permit. This permit covers work in inland lakes and streams, wetlands, and Great Lakes submerged lands.²⁸ Fees range from \$50 to \$4,000, depending on the project.

Federal oversight remains in Michigan. 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.²⁹

In 2008, EPA comprehensively reviewed Michigan's 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.³⁰

New Jersey

New Jersey assumed the 404 program in 1994. Legislation passed in 1987 (State Freshwater Wetlands Protection Act) aligned state laws. The 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.³¹

Fees for a wetlands permit vary.³² A general permit is \$1,000, which a more complex individual permit ranges from \$2,000 for a home or duplex to \$5,000 plus \$2,500 per acre for other activities. Other fees may apply.

Like Michigan, federal oversight remains in New Jersey. The EPA reviews permits that deposit large amounts of fill into freshwater wetlands or state open waters, or any activity that reduces the ecological, commercial, or recreational value of more than 5 acres of wetlands or waters. The EPA also reviews certain culvert enclosure, and stream channelization.³³

²⁶ Geomare-Anderson Wetlands Protection Act

²⁷ Natural Resources and Environmental Protection Act, 1994 PA 451.

²⁸ Michigan Department of Environmental Quality, "Joint Permit Application," www.michigan.gov/documents/deq/General_Permit_Categories_360925_7.pdf.

²⁹ Ibid.

³⁰ Sharon R. Newlon, "The Past, Present, and Future of Wetland Permitting in Michigan," *Michigan Bar Journal* (June 2014).

³¹ Susan Lockwood, "Assumption, New Jersey Style," *National Wetlands Newsletter* (July/August 1994).

³² New Jersey Division of Land Use Regulation, "Regulatory Fee Schedule," www.state.nj.us/dep/landuse/download/lur_022.pdf

³³ State of New Jersey, "The United State Environmental Protection Agency and its relationship with the New Jersey Department of Environmental Protection & The Division of Land Use Regulation," www.state.nj.us/dep/landuse/lu_epa.html

Alaska and Oregon

At least seven other states have formally explored 404 assumption. The WPIC particularly studied the recent experiences in Alaska and Oregon.

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 toward the effort. The legislation anticipated an application submitted by the end of 2017.³⁴ However, in 2014 the legislature removed the funding and assumption efforts are now on hold.³⁵

The Oregon Department of State Lands submitted a complete application in 1995, continuing to study the issue until 2005. A legislative committee met in 2012 to consider the issue. Problematic issues included considerations related to endangered species. Oregon has a 1967 law that protects waterways and wetlands, and the Department of State Lands issues its own permits.³⁶

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

The Assumable Waters Federal Advisory subcommittee has been studying the issue of state jurisdiction and may make recommendations to National Advisory Council for Environmental Policy and Technology.³⁷ Jeff Tiberi, policy director for the Montana Association of Conservation Districts, has provided input to this group. The subcommittee also includes representatives from Alaska and Oregon.

Annual cost estimate

The federal government does not dedicate funding toward operation of a state-run Section 404 program. Therefore, the Montana Legislature would need to appropriate funds or authorize a program fee to assume the program.

WPIC staff calculated an annual cost estimate for a Section 404 permitting program,³⁸ assuming the state of Montana would mirror the Corps' program and provide a similar level of service. The Corps' annual cost was used as a starting figure with additions and subtractions made for a variety of factors (see Table 2):

³⁴ Alaska Department of Environmental Conservation presentation on 404 development program (Dec. 18, 2013).

³⁵ Testimony of Michelle Hale, Alaska Division of Water director, to WPIC, Jan. 11, 2016.

³⁶ Correspondence with and testimony of Eric Metz, Oregon Department of State Lands, to WPIC, Jan. 11, 2016.

³⁷ The National Advisory Council is subject to Federal Advisory Committee Act and offers independent advice to the EPA administrator.

³⁸ see Appendix B.

- The Corps' annual cost was *decreased* to adjust for a full-time state employee, rather than a federal employee
- *increased* to reflect amount of work performed by Corps' regional office;
- *decreased* to reflect Corps' continued regulation of Section 10 waters³⁹
- *decreased* to reflect that Montana could not assume 404 jurisdiction on Indian lands.
- *increased* to reflect implementation of the Clean Water Rule (if applicable).

The cost estimate also considered effects of nationwide permit requirements, certain federal land designations,⁴⁰ and existing DEQ staff expertise. The fiscal impact of these factors could not be determined.

Table 3. Annual cost estimate to run a Section 404 permitting program

| | |
|--|--------------------|
| Estimated cost for 10 FTE (using DEQ per-cost FTE estimate) | \$786,860 |
| Work performed at Omaha regional office (which would be brought into DEQ) | \$476,793 |
| Section 10 waters retained by Corps (assumes Corps will issue 404 permit) | (\$108,587) |
| Jurisdictional waters on Indian lands (estimated by proportional area of Indian reservations in Montana) | (\$70,817) |
| Other jurisdictional considerations (nationwide permit scheme, federal land designations, use of existing DEQ staff) | n/a |
| Annual cost to Montana to run a Section 404 program | \$1,084,249 |

Testimony to WPIC indicated the cost estimate may be too low, as some find the current Corps staffing level inadequate for timely permitting.⁴¹ 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 the current level of Corps service.⁴²

The DEQ estimated an application to assume the Section 404 program could be ready by Fall 2017 at the earliest, and that it would take 4-5 years to fully assume a Section 404 program. The department would need to hire 8-10 project managers, who would cross train with the Corps of Engineers. The project managers would be able issue permits 20-24 months after beginning work with the Corps.⁴³

Although federal funds are not available for day-to-day operations of a Section 404 program, the state of Montana could use a federal grant program to continue investigating assumption. Wetland Program Development Grants may be used to

³⁹ It is unclear if the Corps would also issue Section 404 permits on these Section 10 waters.

⁴⁰ National parks, wild and scenic rivers, et al.

⁴¹ Testimony of Rich McEldowney, Confluence, Inc., to WPIC, March 7, 2016.

⁴² Testimony of Tom Martin, Montana Department of Transportation, to WPIC, March 7, 2016.

⁴³ Testimony of Christian Schmidt, DEQ, to WPIC, May 2, 2016.

further explore assumption of 404 program.⁴⁴ The EPA accepts requests for proposals every two years; the next RFP will be in the spring of 2018.⁴⁵

The EPA Region 8 office issued 15 grants across the region, including six projects in Montana for developing an advanced wetlands geodatabase, developing wetland assessment and monitoring tools, for a wetland health monitoring program in Gallatin County, and for the DEQ's Wetland Program. Grants ranged from \$50,000 to \$240,000.⁴⁶

⁴⁴ Testimony of Kathy Hurd, EPA, to WPIC, Jan. 11, 2016.

⁴⁵ <https://www.epa.gov/wetlands/wetland-program-development-grants>

⁴⁶ Email from Penny Trujillo, EPA, March 1, 2016.

Revised: 6/5/15 (310 form 270). Form may be downloaded from: www.dnrc.mt.gov/licenses-and-permits/stream-permitting

AGENCY USE ONLY: Application # _____ Date Received _____
Date Accepted _____ / Initials _____ Date Forwarded to DFWP _____

This space is for all Department of Transportation and SPA 124 permits (government projects).

Project Name _____
Control Number _____ Contract letting date _____
MEPA/NEPA Compliance Yes No If yes, #14 of this application does not apply.

JOINT APPLICATION FOR PROPOSED WORK IN MONTANA'S STREAMS, WETLANDS, FLOODPLAINS, AND OTHER WATER BODIES

Use this form to apply for one or all local, state, or federal permits listed below. The applicant is the responsible party for the project and the point of contact unless otherwise designated. "Information for Applicant" includes agency contacts and instructions for completing this application. To avoid delays, submit all required information, including a project site map and drawings. Incomplete applications will result in the delay of the application process. Other laws may apply.

The applicant is responsible for obtaining all necessary permits and landowner permission before beginning work.

| ✓ | <u>PERMIT</u> | <u>AGENCY</u> | <u>FEE</u> |
|---|---|---|--|
| | 310 Permit | Local Conservation District | No fee |
| | SPA 124 Permit | Department of Fish, Wildlife and Parks | No fee |
| | Floodplain Permit | Local Floodplain Administrator | Varies by city/county (\$25 - \$500+) |
| | Section 404 Permit, Section 10 Permit | U. S. Army Corps of Engineers | Varies (\$0 - \$100) |
| | 318 Authorization 401 Certification | Department of Environmental Quality | \$250 (318); \$400 - \$20,000 (401) |
| | Navigable Rivers Land Use License, Lease, or Easement | Department of Natural Resources and Conservation, Trust Lands Management Division | \$50, plus additional fee |

A. APPLICANT INFORMATION

NAME OF **APPLICANT** (person responsible for project): _____

Has the landowner consented to this project? Yes No

Mailing Address: _____

Physical Address: _____

Day Phone: _____ Evening Phone: _____ E-Mail: _____

NAME OF **LANDOWNER** (if different from applicant): _____

Mailing Address: _____

Physical Address: _____

Day Phone: _____ Evening Phone: _____ E-Mail: _____

NAME OF **CONTRACTOR/AGENT** (if one is used): _____

Mailing Address: _____

Physical Address: _____

Day Phone: _____ Evening Phone: _____ E-Mail: _____

B. PROJECT SITE INFORMATION

NAME OF **STREAM** or **WATER BODY** at project location _____ Nearest Town _____

Address/Location: _____ Geocode (if available): _____

_____/4 ____/4 ____/4, Section _____, Township _____, Range _____ County _____

Longitude _____, Latitude _____

The state owns the beds of certain state navigable waterways. Is this a state navigable waterway? Yes or No. If yes, send copy of this application to appropriate DNRC land office – see Information for Applicant.

ATTACH A PROJECT SITE MAP OR A SKETCH that includes: 1) the water body where the project will take place, roads, tributaries, landmarks; 2) a circled "X" representing the exact project location. **IF NOT CLEARLY STATED ON THE MAP OR SKETCH, PROVIDE WRITTEN DIRECTIONS TO THE SITE.**

C. PROJECT INFORMATION

1. **TYPE OF PROJECT** (check all that apply)

- | | | |
|---|--|--|
| <input type="checkbox"/> Bridge/Culvert/Ford Construction | <input type="checkbox"/> Fish Habitat | <input type="checkbox"/> Mining |
| <input type="checkbox"/> Bridge/Culvert/Ford Removal | <input type="checkbox"/> Recreation (docks, marinas, etc.) | <input type="checkbox"/> Dredging |
| <input type="checkbox"/> Road Construction/Maintenance | <input type="checkbox"/> New Residential Structure | <input type="checkbox"/> Core Drill |
| <input type="checkbox"/> Bank Stabilization/Alteration | <input type="checkbox"/> Manufactured Home | <input type="checkbox"/> Placement of Fill |
| <input type="checkbox"/> Flood Protection | <input type="checkbox"/> Improvement to Existing Structure | <input type="checkbox"/> Diversion Dam |
| <input type="checkbox"/> Channel Alteration | <input type="checkbox"/> Commercial Structure | <input type="checkbox"/> Utilities |
| <input type="checkbox"/> Irrigation Structure | <input type="checkbox"/> Wetland Alteration | <input type="checkbox"/> Pond |
| <input type="checkbox"/> Water Well/Cistern | <input type="checkbox"/> Temporary Construction Access | <input type="checkbox"/> Debris Removal |
| <input type="checkbox"/> Excavation/Pit | <input type="checkbox"/> Other _____ | |

2. **PLAN OR DRAWING** of the proposed project **MUST** be attached. **This plan or drawing must include:**

- a plan view (looking at the project from above)
- dimensions of the project (height, width, depth in feet)
- location of storage or stockpile materials
- drainage facilities
- an arrow indicating north
- a cross section or profile view
- an elevation view
- dimensions and location of fill or excavation sites
- location of existing or proposed structures, such as buildings, utilities, roads, or bridges

3. **IS THIS APPLICATION FOR** an annual maintenance permit? Yes No
(If yes, an annual plan of operation must be attached to this application – see "Information for Applicant")

4. **PROPOSED CONSTRUCTION DATE.** Include a project timeline. Start date ____/____/____
Finish date ____/____/____ Is any portion of the work already completed? Yes No
(If yes, describe the completed work.)

5. **WHAT IS THE PURPOSE** of the proposed project?

6. **PROVIDE A BRIEF DESCRIPTION** of the proposed project.

7. **WHAT IS THE CURRENT CONDITION** of the proposed project site? Describe the existing bank condition, bank slope, height, nearby structures, and wetlands.

8. **PROJECT DIMENSIONS.** How many linear feet of bank will be impacted? How far will the proposed project encroach into and extend away from the water body?

9. **VEGETATION.** Describe the vegetation present on site. How much vegetation will be disturbed or covered with fill material during project installation? (Agencies require that only vegetation necessary to do the work be removed.) Describe the revegetation plan for all disturbed areas of the project site in detail.

10. **MATERIALS.** Describe the materials proposed to be used. Note: This may be modified during the permitting process. It is recommended you do not purchase material until all permits are issued.

| Cubic yards/Linear feet | Size and Type | Source |
|-------------------------|---------------|--------|
|-------------------------|---------------|--------|

11. **EQUIPMENT.** List all equipment that will be used for construction of the project. How will the equipment be used on the bank and/or in the water? Note: Make sure equipment is clean and free of weeds, weed seeds, and excess grease before using it in the water waterway. To prevent the spread of aquatic invasive species, to the extent practical, remove mud and aquatic plants from heavy machinery and other equipment before moving between waters and work sites, especially in waters known to be infested with aquatic invasive species. Drain water from machinery and let dry before moving to another location.

12. **DESCRIBE PLANNED EFFORTS TO MINIMIZE PROJECT IMPACTS.** Consider the impacts of the proposed project, even if temporary. What efforts will be taken to:

- Minimize erosion, sedimentation, or turbidity?
- Minimize stream channel alterations?
- Minimize effects to stream flow or water quality caused by materials used or removal of ground cover?
- Minimize effects on fish and aquatic habitat?
- Minimize risks of flooding or erosion problems upstream and downstream?
- Minimize vegetation disturbance, protect existing vegetation, and control weeds?

13. **WHAT ARE THE NATURAL RESOURCE BENEFITS** of the proposed project?

14. **LIST ALTERNATIVES** to the proposed project. Why was the proposed alternative selected?

APPENDIX A

D. ADDITIONAL INFORMATION FOR SECTION 404, SECTION 10, AND FLOODPLAIN PERMITS ONLY.

If applying for a Section 404 or Section 10 permit, fill out questions 1-3. If applying for a floodplain permit, fill out questions 3-6. (Additional information is required for floodplain permits – See “Information for Applicant.”)

1. Will the project involve placement of dredged (excavated) and/or fill material below the ordinary high water mark, in a wetland, or other waters of the US? If yes, what is the surface area to be filled? How many cubic yards of fill material will be used? Note: Wetland delineations are required if wetlands are affected.

2. Description of avoidance, mitigation, and compensation (see Information for Applicant). Attach additional sheets if necessary.

3. List the names and address of landowners adjacent to the project site. This includes properties adjacent to and across from the project site. (Some floodplain communities require certified adjoining landowner lists).

4. List all applicable local, state, and federal permits and indicate whether they were issued, waived, denied, or pending. Note: All required local, state, and federal permits, or proof of waiver must be issued prior to the issuance of a floodplain permit.

5. Floodplain Map Number _____

6. Does this project comply with local planning or zoning regulations? Yes No

E. SIGNATURES/AUTHORIZATIONS -- Each agency must have original signatures signed in blue ink.

After completing the form, make the required number of copies and **then sign each copy**. Send the copies with original signatures and additional information required directly to each applicable agency.

The statements contained in this application are true and correct. The applicant possess' the authority to undertake the work described herein or is acting as the duly authorized agent of the landowner. The applicant understands that the granting of a permit does not include landowner permission to access land or construct a project. Inspections of the project site after notice by inspection authorities are hereby authorized.

APPLICANT (Person responsible for project):
Print Name: _____

LANDOWNER:
Print Name: _____

Signature of Applicant Date

Signature of Landowner Date

*CONTRACTOR/AGENT:
Print Name: _____

Signature of Contractor/Agent Date

*Contact agency to determine if contractor signature is required.

Annual Cost Estimate for Assumption of Section 404 Permitting Duties

This memo is an estimate of annual costs for the state of Montana to run the federal section 404 permitting program under the Clean Water Act. This estimate makes many assumptions, including that the Montana Legislature desires to assume the 404 program and that the Environmental Protection Agency grants Montana that primacy.

The Clean Water Act requires section 404 permits for actions that place dredge or fill material into wetlands or other jurisdictional waters. Activities requiring a 404 permit include construction of dams, levees, highways, airports, and mining projects. Certain farming and forestry activities are exempt from permitting. According to the language of the Act, no discharge of dredge or fill material is allowed if “a practicable alternative exists that is less damaging to the aquatic environment,” or if the nation’s waters would be significantly degraded.

The Clean Water Act allows states to assume the 404 permitting program. To date, only the Michigan Department of Environmental Quality and the New Jersey Division of Land Use Regulation have assumed the program. In Montana, the U.S. Army Corps of Engineers issues 404 permits.

The Montana Legislature demonstrated its interest in assuming the section 404 program through its passage of Senate Joint Resolution 2 in 2015. If Montana is able to prove it will provide a level of resource protection equal to that provided by the federal agency, the state would presumably be allowed primacy. The state would likely assume the annual costs of the program.

Assumptions

This estimate is based on the following assumptions. These assumptions may be proven or disproven at the actual time the process is assumed.

1. **The Corps’ section 404 program costs are the starting point** for a cost estimate. The Corps reported its fiscal year 2015 costs as \$814,894 in salary

and benefits plus \$529,770 in overhead expenses for 10 full-time equivalents for employees in Billings and Helena.

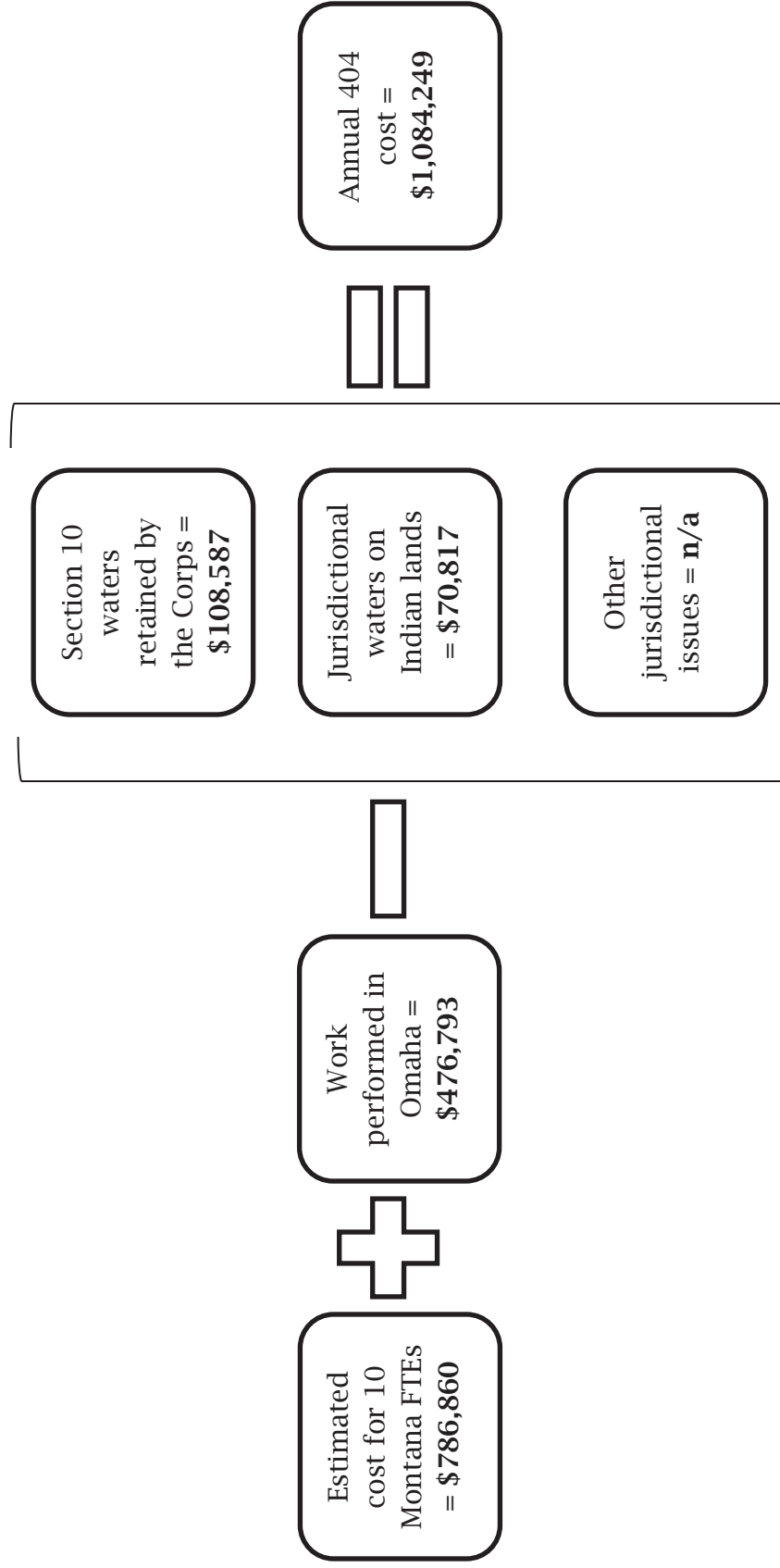
2. The Corps' costs must be adjusted to a figure **more reflective of Montana's cost per full-time equivalent**. For this estimate, the approved biennial appropriation for personal services for the Department of Environmental Quality's Permitting and Compliance Division works out to approximately \$78,686 per FTE. Therefore, the "estimated cost for 10 Montana FTEs" is \$786,860, as reflected in the calculation later in this memo.
3. **Some section 404 permitting work is performed at the regional Corps headquarters in Omaha, Nebraska**. This work should necessarily be added to Montana's annual cost estimate. Corps staff estimate that 90 percent of its overhead expenses are attributable to duties performed in Omaha. Therefore, the "work performed in Omaha" in the accompanying calculation is estimated at \$476,793.
4. **Montana would not assume jurisdiction over section 10 waters**, which are regulated by the Rivers and Harbors Act of 1899. A section 10 permit is required on navigable rivers for any work on, over, or under a waterway. This includes the placement of dredge or fill. A section 10 permit therefore duplicates the 404 permit in many instances. For the purposes of this estimate, it is assumed the Corps would retain section 10 and section 404 permitting authority over Montana's navigable rivers, which include the Missouri River, the Yellowstone River (downstream from Emigrant), and the Kootenai River (upstream from Jennings). The Corps estimates that about 14 percent of their workload over the past five years involved section 10 waters, which is reflected in the accompanying calculation.
5. **Montana could not assume 404 permitting jurisdiction over jurisdictional waters on Indian lands**. For the purposes of this estimate, it is assumed that 9 percent of the 404 permitting workload involves waters on Indian reservations, which is the approximate proportion of reservation land in Montana. While perhaps a crude measure, it is nevertheless reflected in the accompanying calculation.
6. It is unclear how **nationwide or regional general permits** would affect Montana's workload. These permits are meant to cover common activities within

a waterway. For example, dredging of no more than 25 cubic yards below the ordinary high-water mark is covered with a “minor dredging” nationwide permit. The accompanying calculation anticipates no more and no less state agency work related to nationwide or regional general permits.

7. It is unclear how **certain federal land designations** would affect Montana’s workload, such as federally designated critical resource waters, national parks, and wild and scenic rivers. The accompanying calculation does not anticipate federal jurisdiction over these waters and thus would not decrease the state’s annual cost.
8. **Existing expertise at Montana’s agencies** could be incorporated into an assumed 404 permitting program. For example, agency staff issuing short-term water quality turbidity authorizations (318 authorization) or Montana Stream Protection Act permits (SPA 124 permits) may or may not be utilized. However, the accompanying calculation does not account for such efficiencies.
9. Implementation of the **Clean Water Rule** is estimated to increase the 404 permitting workload. This rule was finalized in August 2015 but has since been blocked by various federal courts. The accompanying calculation adds 4 percent to the 404 workload, a figure provided to Legislative Environmental Policy Office staff by EPA experts at a 2015 webinar.

The Calculation

This annual cost estimate is highly variable. As indicated in the previous assumptions, the estimate could be even lower due to continued federal jurisdiction over certain waters (e.g., national parks) or DEQ staff efficiencies. Conversely, the estimate could increase, as it is presumed that a state 404 program would have some overhead costs, such as travel, equipment, office space, and so forth. Also, implementation of the Clean Water Rule might increase costs, as noted in the previous assumptions. Adding these factors could push this annual cost estimate to around \$1.2 million. Again, these figures are likely to vary, depending on the regulatory scheme adopted by the state and approved by the EPA.



**** Bill No. ****

Introduced By *****

By Request of the *****

A Bill for an Act entitled: "An Act directing the Department of Environmental Quality to take actions to assume the federal dredge and fill permitting program; and providing a contingent effective date."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. **Section 1. Department to assume federal dredge and fill permitting.** The department shall take all actions necessary to receive federal authorization pursuant to 33 U.S.C. 1344 to administer an individual and general permit program for the discharge of dredged or fill material into the navigable waters within its jurisdiction.

NEW SECTION. **Section 2. {standard} Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 75, chapter 5, part 2, and the provisions of Title 75, chapter 5, part 2, apply to [section 1].

NEW SECTION. **Section 3. {standard} Contingent effective date.** [This act] is effective on the date that the United States army corps of engineers and the environmental protection agency fully enforce the final rule defining "water of the United

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As of: October 17, 2016 (2:38pm)

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States, as it reads in the Federal Register on June 29, 2015.

- END -

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