SJ2 public comments (rec'd by LEPO) 4

MONTANA AUDUBON

PO Box 595, Helena, MT 59624
406-443-3949

www.mtaudubon.org

August 15, 2016

Mr. Jason Mohr
WPIC
PO Box 201704
Helena, MT 59620-1704

Dear Mr. Mohr,

Please accept these comments on behalf of Montana Audubon on the Water Policy Interim Committee draft report to the 65th Legislature titled *Assuming Dredge-and-Fill Permits*.

Montana Audubon is the coordinating entity for the nine Audubon Society Chapters in Montana. Currently there are approximately 5,600 Audubon members in the state. Although our membership is diverse, there is a consistent deep concern for the continuing loss of vital wildlife habitat in the state. Protection and enhancement of Montana's remaining wetlands and riparian areas is one of the priority issues for Montana Audubon. You may receive comments from other members of the Society.

Montana Audubon has a long history of working on projects covered by Section 404 of the Clean Water Act. That work has included providing comments on numerous 404 permits, mitigation programs, and various permit categories/types; as well as completing an analysis for the Montana Department of Environmental Quality in 2005, *Impacts of the 404 Permit Program on Wetlands and Waterways in Montana and Recommendations for Program Improvement*.

We do not have specific changes we are recommending in the draft report. However, we want to make it clear that we support Option 1 for this report, which calls for the report to conclude the SJ 2 study. We do not believe it makes sense for the state of Montana to assume the federal section 404 program or continue studying this topic for the following reasons:

1. The report does not uncover any substantiated proof regarding benefits for the state of Montana, its citizens, or streams and wetlands should Montana assume the federal 404 program. In addition, because of our experience with the 404 program, we anticipate future studies on the same topic will also be inconclusive.

2. If the state would assume the 404 program, there is no guaranteed federal financial support for the state program. Although there are potential grant programs that the state could apply for to assume the program, these sources of funding are not guaranteed. And yet, if the state assumes the program, the state of Montana must fulfill the requirements of the program without federal funding—anticipated to be more than $1 million.

3. Because assumption of the 404 program is a lot of work with no guaranteed federal funding, only two states have assumed the program. Why would Montana want to be the third state? With anticipated FY 2016-2017 revenues for the state of Montana lower than anticipated, it seems inappropriate for the state to take on a new program with no clearly identified benefits for its citizens or our state's streams and wetlands.

4. The report contains a general statement about how Montana might "streamline regulations" and "avoid duplication" if it assumed the 404 program but there is not proof given that either would occur. Curiously, the report seems to imply that because there is a joint application for several water/stream permits, that there is considerable duplication between the permits being issued. This is untrue.

5. Montana's Natural Streambed and Land Preservation Act covers largely different activities than section 404 of the Clean Water Act. Because of that fact, we are unclear about the role anticipated for Conservation Districts if the 404 program is assumed. The report really does not indicate the role that the Conservation Districts might play. The Army Corps of Engineers (Corps) employs professional engineers, hydrologists and biologists to ensure that the 404 program complies with the law. In general, Conservation Districts don't employee individuals with this expertise—so it is unclear how they could fulfill a meaningful role in the program.

6. It is certainly possible that the more than $1 million anticipated price tag on state assumption of the 404 program is not adequate. This budget anticipates hiring roughly the same number of experts to implement the program as the Corps does. In addition to just processing permits, the state also needs to anticipate oversight of the 58 Conservation Districts and their anticipated role in the program; conduct enforcement actions against individuals who don't comply with the program; complete annual reporting; and more.

In conclusion, we believe that the draft report reflects the findings of the SJ 2 study and that this report should complete the interim work of the Montana Legislature on studying 404 program assumption.

Thank you for the opportunity to comment on this draft report. Please contact me if you have questions about our comments.

Sincerely,

Amy Seaman
Associate Director of Conservation

Weyerhaeuser

SUSTAINABLE FORESTRY INITIATIVE

Location • PO Box 1990 • Columbia Falls, Montana, 59912

406-892-6368
brian.sugden@weyerhaeuser.com

July 29, 2016

Jason Mohr, Legislative Staff
Water Policy Interim Committee
P.O. Box 201704,
Helena, MT 59620-1704

Subject: SJ2 Comments

Dear Mr. Mohr and members of the Water Policy Interim Committee:

Please accept these comments on behalf of Weyerhaeuser Company (formerly Plum Creek) on SJ2 related to state assumption of 404 permitting in Montana. Weyerhaeuser owns 780,000 acres of commercial forestland in western Montana. While our silvicultural and road activities are exempt from 404 permitting under the Clean Water Act if we incorporate wetland Best Management Practices, we do need to obtain 404 permits from time-to-time. These instances typically involve streambank stabilization or bridges on cost-shared roads with the US Forest Service that receive significant non-forestry use. Stream restoration projects also commonly require 404 permits.

Our experience has been that we have been able to obtain permits from the Corps in a timely fashion, and our activities have not been delayed. Conditions of permits have been reasonable. In watching the WPIC testimony on potential state assumption, we do have concerns with Montana pursuing assumption of the program. These concerns include:

1. Montana would apparently have to assume all costs associated with the program. It is surprising that there would be no federal funding/grants for the state to administer the program, but apparently this is the case. The SJ2 report estimates the cost to Montana of around $1 million dollars annually. If there were 1000 permits issued annually under the program, this would mean a per-permit cost of about $1,000 each. Currently the Corps charges between 0-$100 for permits... apparently well below the administrative cost. Therefore, Montana would need to pay for this through the general fund, or substantially raise the cost of permits to applicants.

2. There is significant uncertainty regarding the scope of waters potentially affected by future permitting. This includes the ongoing litigation around the WOTUS rule, and the fact that the Corps would have to retain jurisdiction over certain waters ... such as those regulated by the Rivers and Harbor's Act, as well as waters that support federally threatened or endangered species.

3. Few obvious "synergies" or "economies of scale" are evident from state assumption. Stream project permitting for private lands is handled by local Conservation Districts, and agency projects through Montana FWP. By all accounts this existing process is working reasonably

well. But dredge-and-fill permits have a different focus, and given the decentralized nature of the existing stream permitting, it does not seem possible that CDs or FWP could absorb this additional duty. So the wetland permitting would likely fall to DEQ, and still would be an additional permit that some projects must obtain.

For all the reasons state above, we don't see an obvious reason for the state to assume this permitting. It is our opinion that WPIC should select Option #1 – Issue a report as a conclusion to the SJ2 study.

We think WPIC did a thorough job of re-exploring this topic of state assumption. We thought the testimony provided from Oregon, Alaska, EPA, MACD, and the Corps was helpful. It is our opinion that the testimony and research undertaken was well captured in the draft report that is currently out for public comment. We offer the following comments for consideration:

1. The draft report presents a reasonable analysis of issues and likely costs associated with state assumption of dredge-and-fill (404) permitting that is currently done by the Corps.

2. Page 6, Last Par. This paragraph mentions there are some exemptions to 404 permitting, including normal forestry activities. Later in that paragraph, it mentions that temporary forest roads are also exempt. The actual exemption extends all forest roads (permanent and temporary), and should be clarified in the draft report. Clean Water Act section 404(f)(1)(E) reads as follows:

> *(E) for the purpose of construction or maintenance or farm roads or forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained, in accordance with best management practices, to assure that flow and circulation patterns and chemical and biological characteristics of the navigable waters are not impaired, that the reach of the navigable waters is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized;*

3. The draft report does mention that the Corps would have to retain jurisdiction of certain waters, such as Section 10 waters regulated by the Rivers and Harbors Act. The draft report also mentions that there is a Federal Advisory Committee that is looking at the jurisdictional issues involved with assumption of 404 permitting. A key uncertainty that the draft report does not address that could be strengthened includes state waters that support federally Threatened or Endangered Species, where issuance of any dredge-and-fill permit would require consultation with the US Fish and Wildlife Service. It is our understanding from testimony presented to WPIC that the Corps would need to retain jurisdiction of all of these waters that support these listed species, or could have a downstream effect on the listed species. In Montana, this could be a sizeable number of stream miles, particularly with regard to bull trout in western Montana.

4. There is some discussion in the draft report on potential overlap between Montana 310 permitting and 404 permitting, presented in Table 1. This issue of synergies or streamlining in Montana permitting a very important consideration. It is our opinion that there are few synergies that could be obtained. Due to the complexities, it is probably unlikely that state assumption of 404 permitting could be pushed out to Conservation Districts, who are largely run by volunteers. Therefore, there is likely not the opportunity for "one stop shopping" of necessary permits without major restructuring of stream permitting in Montana.

We thank the staff and WPIC for considering these comments and for a thorough exploration of the topic. Again, or recommendation is that the study be concluded through selection of Option #1. Should we gain more clarity around WOTUS and some of the other issues, the topic of state assumption could be revisited in the future.

Regards,

Brian D. Sugden

Brian Sugden
Forest Hydrologist

From: Jim Lovell
To: Mohr, Jason
Subject: Comments on SJ2: Assumption of federal Section 404 permitting
Date: Friday, August 12, 2016 3:33:39 PM

Dear Jason,

I reviewed the SJ2: Assumption of Federal Section 404 Permitting draft report and have the following comments to offer.

1. The WPIC should consider the impact that charging permit application review fees will have on Montana citizens and businesses (financial burden) and whether assessing such fees might actually result in more illegal dredge/fill activities as potential permittees seek to avoid costly fees.
2. The State should further explore the opportunity (and cost) for increasing follow-up inspections and enforcement. This would help to improve the program vis-a-vis the Corps' current implementation.
3. If the State elects to assume responsibility for 404 permitting, it is highly recommended that a staff of qualified, multi-disciplinary project managers be hired to review and process permit applications. Lack of sufficient technical expertise to evaluate more complex permit applications is a major flaw in the current 404 program (and the 310 program as well).
4. The State should further consider subcontracting the 404 program to a private entity (for profit or not for profit). Several existing private enterprises already have the technical staffing and expertise needed to implement the program and may be able to do so within a shorter timeframe (20 to 24 months of training with the Corps seems excessive) and at less cost to the State of Montana.
5. I believe there may be an error in the estimate of annual costs for assuming the program. Appendix B of the report states the Corps of Engineers 2015 cost for operating the program included $814,894 in salary and benefits and $529,770 in overhead expenses. While the cost calculations account for reductions in salary and benefits costs due to lower State pay rates, the accompanying overhead expenses are omitted entirely from the cost calculations. I assume the State of Montana will incur similar overhead expenses (perhaps somewhat lower) than the Federal government, but I doubt overhead costs would be reduced to zero. This apparent omission could significantly affect annual cost projections and may influence the decision whether or not to assume responsibility for 404 permitting activities.

I thank you for the opportunity to comment and wish you success in finalizing the investigation.

Sincerely,
Jim Lovell

From: Lezlie Kinne
To: Mohr, Jason
Subject: CWA Comments
Date: Thursday, July 21, 2016 1:58:27 PM

Water Committee,

Lets look at the bigger picture here and how this will affect water users. Following comments are in the Progressive rancher...July & Aug. 2016

If an water user wants to divert water on his land ,but is applying for federal funding through EQUIP or any other Farm Bill Program, he would be required to get a CWA section 401 certification .

If a rancher is working to develop additional water sources on his Forest service or BLM grazing allotment, he would be required to get a CWA section 401 certification. Trying to maintain any water sources now is a nightmare. This would be separate from the BLM or FSNEPA or other permitting requirements.

If a municipality wants to drill wells for drinking water and is using federal funds to supply clean, safe drinking water to the citizens it would be required to get a Section 401 certification because the EPA believes that groundwater pumping can impact stream characteristics.

Concerns

This is the first step in advocating Federal oversight of a individual states ownership of water quantity. The water of the State of Montana has always been the state to manage as the state sees fit., with out the interference from the federal government .

The courts have recognized that a water right ,properly granted by the state is a private property right. The EPA will argue that these new requirements are not prohibiting the use of water , giving the State or Federal government the ability to condition the permit to meet some state or federal numeric standards simply based on water quantity. Also giving the state or Federal agency the ability to require a permit is giving them the chance to deny a permit.

Although the EPA's Draft Report claims that it is merely providing a a"flexible, no prescriptive framework" and it is not impinging on state management of water rights, there is a entire appendix called "Legal".

The CWA has been applied to "pollutants" bring added to water whether from a point source or a non-point s;ounce, the Draft Report advocates CWA control the over the use of the water itself. Under the is theory , a state of or federal permit would be required even if a water right is simply exercised.

These comments are found in the Progressive Rancher. They put my concerns so well I used most of it here. I urge the committee to read the full article as this is just the bare bones.

Sincerely

Lezlie Kinne

Water Commissioner.

From: Jeff Tiberi
To: Mohr, Jason
Subject: SJ2 Comments
Date: Monday, August 15, 2016 11:25:00 AM

Dear Mr. Mohr:

Thank you for seeking public comments regarding the draft report prepared for the WPIC concerning the 404 permit assumption study. We appreciate the WPIC's interest in public participation and willingness to seek input.

For more than 80 years, Montana's Conservation Districts have been helping to provide tools for landowners to better manage their soil and water. As the general understanding of ecology advanced, we, too, evolved over those decades to move to more broader vision of natural resource conservation. One aspect of nature provides a particularly powerful link to all conservation issues - water. Conservation Districts' already strong connection with water was increased significantly in the mid-1970's when the Legislature gave us responsibility for the 310 permit system. We've taken this responsibility seriously and have devoted tens of thousands of hours to do what's best for Montana. We've improved the process over the years, and tried to coordinate activities with landowners so that the 310 and 404 permit processes were more manageable. We obviously have a keen interest in how the 404 permit is managed, and have questions about its future.

The Montana Association of Conservation Districts has been the collective voice for Montana's 58 Conservation Districts for more than 75 years. With more than 400 locally elected and appointed officials, we represent the second highest number of elected officials in Montana. As you know, the 150 members of the Montana State Legislature quite often have a multitude of viewpoints. Our members are similar but obviously more numerous. We were pleased to be able to seek comments and input from the Districts to provide you feedback on this important issue.

Some Conservation Districts are not interested in taking on this responsibility. Some wanted more time to know what exactly this would mean for individual Districts. The most frequent comment we received from the Conservation Districts was the concern that this issue is not settled at the federal level. Districts noted the stay of the Clean Water Rule, or WOTUS, and the strong possibility that the rule would move to the US Supreme Court for their review. In addition, Districts mentioned a new Executive Branch leadership coming on board in Washington, D.C. in mid-January of 2017. The focus come January at the national level may be different from what we see today.

Given these two significant realities, MACD asks that the WPIC give serious consideration to Option 3 or Option 1.

Another comment that we received concerned the workload carried by Conservation Districts. As elected and appointed officials who serve without compensation, questions were raised about how much additional work our Supervisors and staff can carry. MACD has been eyeing this particular issue for a number of years, and it promises to stay on our agenda.

Here are a few individual quotes from Districts:

"The Missoula Conservation District does not support Conservation District

assumption of federal 404 permitting required under the federal Clean Water Act."

"The Big Horn Board is neither in favor of, nor opposed to, assuming the 404 responsibilities. They just need to know more and Option 3 seemed to be the best way to get more information."

"Current 404 permitting procedure threatens the ability for local working groups, watershed committees, conservation districts, private entities, and others to complete small restoration projects because permitting fees are outsized to overall project costs. Funders of these projects are unwilling to invest if permitting is consuming large portions of the budget."

Once again, we'd like to thank you for including us in your deliberations on this issue. We plan to attend the August meeting of the WPIC and will be available for questions.

Sincerely,

Jeff

Jeffrey Tiberi
Policy Director
Montana Association of Conservation Districts

c: MACD Board of Directors
Administrators

From: Peggy Trenk
To: Mohr, Jason
Subject: Fwd: Comments re: SJ2 on Behalf of the Treasure State Resources Association
Date: Monday, August 15, 2016 3:00:48 PM
Subject: Comments re: SJ2 on Behalf of the Treasure State Resources Association
Attn: Jason Mohr, Staff Liaison, Water Policy Interim Committee
Thank you, and the members of WPIC, for the opportunity to comment on the SJ2 study of the state assumption of the 404 permitting process. We appreciate the amount of work you and the committee have done on this study. We also appreciate the commitment of all parties to a timely and efficient permitting process.
The members of the Treasure State Resources Association are generally supportive of bringing the administration of permitting programs to the state and where appropriate, the local level. As with other programs over which the state has primacy, it allows for those most familiar with the landscape and local conditions to work with project applicants to arrive at a decision that is both workable and compliant with regulations. We have approached this study process with a similar mindset, listening to the public comment, staff reports, and committee discussion. At this point, however, we don't feel prepared to make a specific recommendation on any of the Options offered relative to next steps. The reasons include the following observations:
1. Discussion of the logistics of state assumption of the 404 permitting process has touched on the role of Conservation Districts. Our members have the greatest respect for the important work Conservation Districts now perform, largely with the assistance of volunteers and limited resources. We are concerned that while you and the committee have done an admirable job of estimating the costs associated with the state assumption of the program, there is not a clear picture as to the role of Conservation Districts, or the resources that would be made available to them for doing the work. That also raises a question as to how they will be able to balance new responsibilities with new duties. Agricultural interests, who work so closely with the Conservation Districts, could be negatively impacted by operational changes that are not adequately funded. We encourage the committee to exercise great caution in setting a course that could result in unintended consequences for both the districts, and landowners or other project applicants.
2. The other area for which we have a concern has to do with permitting processes over which the Department of Environmental Quality currently has direct responsibility. Some of our members have noted they have a good working relationship with the Army Corps of Engineers, but have experienced delays or other challenges working with related DEQ processes. That concern is not something new relative to permitting discussions. Nor is this comment intended as a criticism of DEQ. It is intended to again reflect a cautionary note about making changes that could impact current operations, without a more complete understanding of whether what may streamline one process might add challenges in another. We all have an interest in assuring timely and predictable permitting processes across the board. We should be sure that the foundation is solid, before

adding any other responsibilities.
In closing, I'd like to reiterate our appreciation for the intent of this study - which is to be forward-looking in terms of regulatory policy. As our comments reflect, our members do not feel we have enough information to select one of the five identified options. We did want to point out some areas of concern. Thank you again for the opportunity to comment.
Sincerely,
Peggy Trenk
Executive Director
Treasure State Resources Association
--
Peggy Olson Trenk
Executive Director
ptrenk@tsria.net
Cell: 406-461-9945
--
Peggy Olson Trenk
Executive Director
ptrenk@tsria.net
Cell: 406-461-9945
--
Peggy Olson Trenk
Executive Director
ptrenk@tsria.net
Cell: 406-461-9945