

Information sources and notes from a review of other states' efforts on Section 404 assumption

By Heidi Affi, MPCA Intern, Dec. 2015

VIRGINIA

- http://www.deq.virginia.gov/Portals/0/DEQ/LawsAndRegulations/GeneralAssemblyReports/404_Feasibility_Study_2012.pdf : Study of the Costs and Benefits of State Assumption of Federal 404 Clean Water Act Permitting Program (Feasibility report)
 - benefits:
 - individual state control of water resources and a streamlined regulatory program
 - drawbacks:
 - increased costs and staffing & lack of funding for operation and administration
 - long application time
 - amendments to existing state law/programs
 - complexities in adhering to 404 assumption standards as state and federal authorities are different
 - lack of partial assumption
 - section 10 navigable waters are under Corps jurisdiction (rivers and harbors act)
 - goals could be met by an adequately funded state program
 - **DEQ assesses the current wetlands program including regulatory structure; jurisdictional scope; permit processing procedures; compliance mechanisms; existing staff; existing workloads; and cost analysis of permitting fees, salaries, and other expenditures. DEQ assessed the respective permit workloads for the VWP program and the corps' norfolk district for the period from calendar years 2010 through 2011, including permit types and processing timeframes. DEQ incorporated existing workload analysis data. DEQ analyzed operations reports for both programs to identify areas where effort is duplicated, where the Corps is performing duties that DEQ is not, and where the DEQ's jurisdiction exceeds the Corps', as with isolated wetlands and excavation in jurisdictional waters. (5-6)**
 - "in lieu of [assumption], or until a stable funding mechanism is identified, the commonwealth could explore working with the corps to renegotiate and expand the SPGP to provide resource protection as well as consistency, timeliness and certainty to a broader group of projects" (15).

MONTANA

- <http://leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Meetings/September-2014/404-clean-water-act-issues.pdf> : Issues to consider for State Administration of Section 404 Clean Water Act permits
 - benefits of program:
 - increased efficiency combined with greater resource protection the the state
 - elimination of overlapping programs
 - more flexible regulations
 - increased support for state review and local decision making

- challenges:
 - demonstrating state jurisdiction is equal in scope to the federal law regarding waters of the US and proving state program is consistent with federal law
 - providing adequate funding for administration and operation
 - Section 10 Rivers and Harbors jurisdiction.
- **Need to determine whether the state has adequate enforcement capability, enough public support, and the legal authority to meet federal requirements.**

MINNESOTA

- http://www.aswm.org/pdf_lib/404_assumption_feasibility_study_0509.pdf : State of Minnesota 404 Assumption Feasibility Study (1989)
 - **“The cost to the State without federal funding, the reportability by the State to the U.S. environmental protection agency and the program controversy with the public prevented the proposed legislation from being officially introduced during the session” (ii).**
 - includes requirements from the federal gov’t if MN would assume 404
 - desire to have a 401 similar program within the assuming agency
 - disadvantage noted from losing 401 requirements if the state assumes 404 (6)
 - topics explored:
 - types of activities and resources involved
 - federal conditions for state assumption
 - costs for state administration
 - alternative funding strategies
 - appropriate roles for state agencies and local units of government
 - necessary changes in current state law.
- <http://www.senate.leg.state.mn.us/departments/scr/report/bands/ENV.HTM> : American Indian Communities in Minnesota, Environmental Law on American Indian Reservations
 - “treatment as a state” (TAS) granted by EPA to an individual tribe through the rulemaking process
 - “Many tribes have been granted ‘treatment-as-a-state’ status with respect to funding components of various statutes, while a few have received ‘treatment-as-a-state’ status with respect to regulatory standards. No Minnesota tribe has yet implemented a regulatory program” (<http://www.senate.leg.state.mn.us/departments/scr/report/bands/ENV.HTM>)
 - **no tribes in MN have applied for Sec. 402 or Sec. 404 permitting authority under CWA**

NEW JERSEY

- http://www.aswm.org/pdf_lib/assumption_nj_style.pdf : Assumption, New Jersey Style
 - preexisting state wetland program: Freshwater Wetland Protections Act. “The FWPA mirrors §404, incorporating the terms, definitions, review criteria, and conditions for permit approval similar to those of the federal program. Furthermore, the law seeks to modify

- those parts of the CWA that were perceived to be responsible for continuing losses of wetlands in New Jersey” (6)
- assumption process: views of the regulated community, MOA’s overseen by EPA and by Corps, dealing with ESA
- opposition
 - state program less stringent than federal
 - no compliance with ESA, section 7
 - **complication with state exemptions and “projects that were grandfathered in under the state law, and the belief that additional enforcement staff would be necessary upon assumption” (7) *******
 - “Determine who will support and who will oppose assumption, and try to address reservations early in the process. Talk to all of the federal agencies directly. While EPA can be helpful, agreement with EPA is no substitute for direct experience with the other agencies” (7)

MICHIGAN

- http://www.oregon.gov/dsl/PERMITS/docs/404_michigan_program_eval_051308.pdf : Results of the EPA Region 5 review of Michigan department of Environmental Quality’s Section 404 Program
 - Analysis of Legal authorities
 - Jurisdiction, permit exemptions, permitting authorities, compliance with 404(b)(1) guidelines, enforcement concerns, Indian lands, effect of newly-promulgated rules, notice of which legal provisions constitute Michigan’s program
 - Assessment of program administration
 - Assessment of 404 program implementation for compliance with the state program regulations: permit requirements, program operation, & federal oversight. wetland identification (very fleshed out) and enforcement and compliance review.
 - Responsiveness Summary of comments
 - Summary of comments from the public with responses by EPA, summary of comments from FWS and responses by EPA, and summary of comments from FSR and responses by EPA.
 - **Findings: pretty much summarizing the conclusions and recommending/giving corrective actions. see pages 98-107**
- https://www.michigan.gov/documents/mdard/Commission_statement_in_support_of_continued_404_assumption_442696_7.pdf : Michigan’s clean water act section 404 program
 - Financial pressures and jurisdictional uncertainties make it difficult for the EPA to review 404 violations in Michigan.
 - Especially after the Rapanos case, there is much confusion about jurisdiction and jurisdictional language.
 - **Highlights lack of wetland enforcement** in section 5 (except for Michigan)
- http://water.epa.gov/type/wetlands/upload/MI-2011-MOA_04.pdf : Memorandum of Agreement between the Michigan Department of Environmental Quality and the United States Protection Agency, Region 5
 - establishes:

- authorities
 - compliance monitoring and enforcement
 - federal permit of permit applications and waiver of review
 - coordination with other states and tribes
 - permit processing and federal comment
 - reporting, program review and oversight
 - Modifications.
- Heavily focuses on the relationship between the EPA and MDEQ, allowing state to have most of the power until there are violations, comments, or jurisdictional barriers.

FLORIDA

- http://www.aswm.org/pdf_lib/consolidation_program.pdf : Florida Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759
 - 759 mandates the DEP to report on the federal and state statutory changes that would be required to maximize consolidation of federal and state wetland permitting programs (2)
 - explores two options:
 - 404 assumption
 - expanded State programmatic general permits
 - has requirements for federal changes if the state is to assume 404, necessary changes in state statutes, and additional comments are made in recognition of funding and the ESA
 - Florida’s wetland protection program is a dredging and filling permitting program in all wetland and surface waters, including waters no longer subject to federal jurisdiction under the SWANCC decision. “It also covers activities that impact the flow of water, such as storm water, across the surface of the land” (3)
 - **the plan as of now is to essentially review and expand the SPGP program while working with the Florida legislature to appropriate more funding to the DEP that would make full 404 assumption possible, including the assumption of federal wetlands (404(g)).**

ALASKA

- http://dec.alaska.gov/water/wetlands404/docs/SoA_Effort_to_become_primary_404_agency.pdf : The State of Alaska’s Effort to Become the Primary Agency for Section 404 Permits
 - “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” (2)
 - Alaska currently operates a 401 program through 404.
 - Pro-assumption argument:
 - “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” (6).

- **sees no NEPA review as a benefit to assumption**
- Downsides to assumption are what other states report on in addition to unclear jurisdiction between the state and the corps.
- recognizes SPGPs as an alternative
- http://dec.alaska.gov/water/wetlands404/docs/404_Assumption_MOU.pdf : Memorandum of Understanding between Corps, EPA, and the State of Alaska for 404 assumption study

GENERAL

- <http://www.aswm.org/wetland-programs/regulation/s-404-assumption>
- http://www.aswm.org/pdf/lib/CQ/swancc_6_26_06.pdf
- http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf
- <http://www2.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf>
- http://online.nwf.org/site/DocServer/Wetlands_Report_July_2009.pdf?docID=10661 : Protecting and restoring the Kidneys of the Great Lakes (2009)
 - key findings (taken directly from slide 3)
 - All four states have a very high percentage of applications approved.
 - While all states have developed wetland condition assessment programs, Ohio’s is likely one of the most sophisticated programs in the country.
 - Wetland inventories are still not complete in most of the states.
 - **Statutory and/or rulemaking restrictions and exemptions pose challenges to coverage of some isolated wetlands.**
 - **Statutory gaps in coverage of drainage activities remain in Ohio and Wisconsin.**
 - **Exemptions for agricultural, forestry, and some drainage activities remain problematic, and losses associated with these activities are generally not tracked.**
 - In spite of reasonable siting priority language in statutes or rules, mitigation sometimes occurs far removed from impact sites, and the quality of mitigation projects is not always regularly tracked.
 - Restoration efforts have been increasing, in recent years, and all states have some type of wetlands restoration or broader Great Lakes restoration strategy in place or development, and have made some efforts at identifying potentially restorable wetlands.
 - Public notice and participation procedures vary, ranging from online notices and other announcements in Michigan and Ohio to more restricted announcements in Minnesota, to lack of pre-decision notices in Wisconsin.
 - suggestions for state programs focus on:
 - exemptions
 - ensure adequate funding (specific to 404 in Michigan but also generally for the possibility of 404 assumption)

- increase protocol of isolated wetlands
 - fill statutory gaps related to drainage in wetlands
 - mitigation as part of permits
 - Particular specifics about state assumption of 404 are out of reach for this report but the general critique of state programs demonstrates that 404 cannot be assumed by a few states on basis other than funding. There are statutory gaps, lack of enforcement strength, and even lack of public comments.
- http://www.aswm.org/state_meetings/2008/hurld.pdf : Pursuing Clean Water Act 404 Assumption: What states say about the benefits and obstacles
 - steps states have taken to assess 404 assumption:
 - consult stakeholders and developed initial resource estimates
 - examined regulatory consistency
 - proposed statutory, rule, or programmatic changes (or made them)
 - developed draft assumption requests
 - recommendations to EPA:
 - provide federal funding for implementation
 - expand EPA regional staff/resources to support assumed programs
 - provide detailed guidance on steps needed for assumption (particularly regarding endangered species act)
 - develop clearer/easier ways to step up to assumption
- <http://www.ncleg.net/documentsites/committees/BCCI-6626/2-27-14%20Committee%20Meeting/2-27-14%20Expanding%20State%27s%20Role%20with%20CWA.pdf> : Expanding the states' role in implementing 404 assumption
 - two main difficulties:
 - states are held to a higher standard when implementing 404 compared to other parts of the clean water act
 - no funding
 - “lack of political will, lack of funding, uncertainty on how to address other federal requirements, especially the Endangered Species Act (ESA), and jurisdictional issues, e.g. Section 10 waters, post-Rapanos uncertainty over isolated wetlands and headwater streams” (1)
 - some states may chose 401 or SPGPs or RGP (general permits)
 - summaries of state studies and state assumptions
 - trouble with adjusting state law to comply with federal standards, avoid partial assumption, & endangered species protections
 - **if a state has an established wetland program that directs it to 404 assumption, it has necessary funding for 404 assumption: “The state wetland program was already fully funded, so as long as the wetland program would be in place, New Jersey would have the necessary funding to support the 404 program” (7)** Despite this, New Jersey has had to hire some employees on EPA funding.
 - Benefits:
 - improved resource protection
 - increased program efficiency

- effective allocation of state and federal resources
- improved integration with other state programs
- use of state-specific resource policies and procedures
- increased regulatory program stability
- increased public support (9)
- barriers:
 - meeting program requirements
 - inability to assume administration of Section 10 waters of the Rivers and Harbors Act and wetlands adjacent to these waters
 - inability to assume 404 authority in only one geographic portion of the state
 - need for alternative coordination with other federal resource programs
 - lack of dedicated federal funding specifically for Section 404 Program administration
 - lack of detailed guidance from EPA on steps needed to assume 404 Program
 - uncertainty with inconsistent legal opinions at federal level in defining CWA waters
 - lack of political will within a state to deal with additional responsibilities of 404 assumption
- requirements:
 - jurisdiction
 - state laws must regulate at least the same activities as those regulated under federal law
 - ensured compliance with federal regulations (cannot be less stringent)
 - the state must have adequate enforcement authority.
- recommended changes to CWA 404 to support states:
 - funding
 - cooperation between corps and states for section 10 (rivers and harbors act) waters
 - Partial assumption in specific geographic areas only.