



SPGP's and 404 Assumption: Oregon's Experience

Eric Metz, PWS, Marsh MD Wetland Consulting

marshdr@comcast.net/503-999-7028

Barbara Poage, Oregon Department of State Lands



Historical Perspective: States are Newcomers; Only Three have Assumed

- ▶ The Corps of Engineers (Corps) role in protecting the country's water resources has evolved from the 1880s to present.
- ▶ Within its current regulatory program, the Corps has authority over work on structures in navigable waterways under Section 10 of the Rivers and Harbors Act of 1899 and over the discharge of dredged or fill material under Section 404 of the Federal Water Pollution Control Act Amendments (Clean Water Act or CWA) of 1972.
- ▶ Approximately 100 years later, Congress gave states and tribes the ability to assume the 404 Program through CWA amendments in 1977 and 1987; years after the other programs were established.
- ▶ There is no federal funding for assumption, because it was not included in the EPA Water Pollution Control (Section 106) grant allocations.
- ▶ Since assumption is administered under state law, there is no federal nexus for state-issued permits; this has been a challenge in Oregon.



Oregon's Recent Investigations into Partial 404 Assumption

- In 2017-2018, the Oregon Legislature formed a study group that identified challenges with the duplicate state/federal permit process in Oregon
- There was only political support for partial assumption because the agricultural community and small woodlot/rural landowner wanted to see the entire proposal, as approved by EPA, before signing on
- These groups were also concerned that the enforcement on agricultural and rural developments may increase under state assumption
- Partial assumption is limited to Urban Growth Boundaries, mitigation bank development and surface mining, such as gravel extraction



DSL Convened a Group of Diverse Stakeholders in 2019-2020: Issues

- The revised 404(g) rules were not and are still not released
- Not known if partial assumption will be allowed and/or in what form
- EPA did find a path for compliance with the Federal Endangered Species Act—solving a huge issue
- EPA and the Corps also found a solution for identifying assumable waters and adjacent wetlands—solving another huge issue
- EPA also said it will consult with the Advisory Council on Historic Preservation, but outcome still uncertain
- No change in federal funding options for assumptions; still an issue



Key Issues: Loss of Federal Nexus

- ▶ National Environmental Policy Act (NEPA)
 - ▶ State does not have standing or capacity to conduct a NEPA analysis
- ▶ National Historic Preservation Act (NHPA)
 - ▶ State does not have the standing or capacity to conduct an NHPA analysis
- ▶ Tribal Treaty Rights
 - ▶ State does not have Treaties with the Tribes
- ▶ Federal Trust Responsibility
 - ▶ State cannot uphold federal legal obligations owed to Tribes



Key Issues: Loss of Federal Nexus

- ▶ **Coastal Zone Management Act (CZMA) (DLCD)**
 - ▶ CZMA consistency review not triggered by state permit
 - ▶ State's coastal zone management agency does not have similar authority under current state law
- ▶ **State 401 Water Quality Certification (DEQ)**
 - ▶ DEQ cannot issue 401 certification on state permits
- ▶ **Concerns**
 - ▶ **These federal authorities cannot be overridden by other federal laws**
 - ▶ **the State would lose the ability to object to a 404 permit**



Where Did the Stakeholders Land?

- Most were neutral
- Local governments, wanting to build out their UGB's, were supportive
- Tribes listed many well-justified concerns about the lack of a federal nexus for a state-issued 404 permit
- Environmental groups and other public interest groups were skeptical and/or opposed; they thought assumption was not worth investing additional state funding
- Those that clearly benefit, the applicants, are only one voice



Resource Needs

- ▶ Prepare 404 Assumption application package (\$970,000)
 - ▶ 3 Natural Resource Specialists
 - ▶ Consultant for biological assessment : \$300,000
- ▶ Implementation and operation (\$1,705,183 per biennium)
 - ▶ 7 technical staff
 - ▶ 2 administrative support staff
- ▶ Additional agency resources needed for DEQ and DLCD (not identified)



Next Steps?

- ▶ DSL submitted report to Legislature in 2020:
- ▶ <https://www.oregon.gov/dsl/WW/Documents/LegislativeUpdate-December2020.pdf>
- ▶ Still waiting for feedback from members who sponsored bill (HB 2436) requiring DSL to conduct this study
- ▶ Did receive initial feedback in December that the shortage of affordable housing is a nonpartisan issue in the state
- ▶ All the easily developable land in the Willamette Valley is taken
- ▶ What's left is flat and wet (likely impacting wetlands)



SGPG: What's in it for the state and what's in it for the Corps? Applicants?

- ▶ The potential benefits of SPGPs and Regional General Permits for the Corps are that Corps staff are freed up to work on larger projects.
- ▶ Low impact projects consume a large share of Corps staff time in all districts.
- ▶ States usually have more natural resources staff deployed in multiple field offices, and this is a benefit both for the states and the Corps.
- ▶ Issuing both state federal authorizations provides more direct quality control over how state statutes and polices are applied
- ▶ Another great outcome is that streamlining the permit process benefits applicants.



Collaborative State/Federal Partnership Essential for Success

- ▶ Under an SPGP or other Regional General Permit (s), success requires a solid partnership between the State and the Corps.
- ▶ State agencies and the Corps divvy up categories of activities, such as residential development and stormwater management facilities.
- ▶ Senior state and federal managers should be on the same page regarding the scope of the SPGP..
- ▶ **Based on Oregon's experience, if this is not the case, proceed cautiously, reboot the process or put it on hold.**
- ▶ Cooperation is also needed for 404 assumption; states regulate in assumable federal waters and the Corps regulates in non-assumable federal waters; this makes data sharing essential.



Don't Do What Oregon Did: Follow the KISS Design Principle

- KISS (keep it simple stupid)--Build a simple system without overly complicating it.
- Other general permit models in other states and Corps Districts have been very successful by keeping it simple.
- DSL created eight categories to match up with its own general permits and authorities.
- Impact thresholds were up .5 acres of fill in wetlands and discharges/excavations in other waters could not exceed 1,000 cubic yards.
- Should have just used the Corps NWP categories and impact thresholds (may have required statutory changes).



Oregon's Challenges for Future SPGPs; Individual Reviews Still Needed

- Wetland mitigation frequently requires case-by-case review.
- The nine federally-recognized Tribes in Oregon are very engaged, and the Corps has a full-time archeologist who conducts historic/cultural resource consultations and can impose mandatory permit conditions.
- Oregon's DSL does not have this authority or the capacity.
- Multiple federally listed endangered species inhabit state and federal waters; requiring individual consultations with the National Marine Fisheries Service ((NMFS) and the US Fish and Wildlife Service; programmatic consultations are limited.
- Oregon Department of Environmental Quality (DEQ) still requires individual consultations for Nationwide Permits.



Conclusion



- SPGPs can be useful tools, both for the Corps and the state.
- States with existing wetland programs are in a stronger position to take on an SPGP.
- States without existing wetland programs should not shy away, but will need to carefully evaluate staff needed and training required