

Water-Related Permits

For projects proposed in wetlands or other waterways in Oregon, there are three primary agencies from whom authorization is required: US Army Corps of Engineers for federal Clean Water Act (CWA) Section 404 permit, the Oregon Department of Environmental Quality (DEQ) for federal CWA Section 401 Water Quality Certification, and Oregon Department of State Lands (DSL) for state Removal-Fill permit.¹ In addition, there are several key state agencies (e.g., Oregon Department of Fish & Wildlife (ODFW), Water Resources Department (WRD)) that function as review and commenting entities to the permitting agencies. The intersection of the three permit processes is referred to as the 404/401/Removal-Fill nexus.

In its deliberations, the Water-Related Permits Work Group (subcommittee of the Advisory Committee on Regulatory Permitting (ACRP)) identified a range of problems and concerns with “water permit” processes from the regulated community perspective. Many of the identified problems manifest themselves as the regulated community navigates the nexus of the Section 404, 401 and Removal Fill permit processes. Among the problems identified by the ACRP Work Group were (paraphrased):

- Often the sequential nature of these permits can result in redundancy and multiple commenting opportunities by agencies.
- The jurisdictional boundaries between the involved agencies are not well understood by regulated public; overlapping authorities can be confusing and inefficient for all parties.
- The role of non-regulatory agencies in the processes is unclear.
- Expectations and timelines of the agencies and their processes can be unclear.
- Comments from agencies late in the permit processes can result in costly delays and/or redesigns.
- There is reluctance by agencies to accept work reviewed/approved by other agencies.
- Agency staff attitudes: not sensitive to the impacts their decisions have on Oregonians’ livelihoods.

Though not specifically stated by the ACRP Working Group, additional concerns within the same vein and known to the agencies through other regulated community inputs include:

- Increasing complexity of the laws and rules providing for environmental protection
- Federal regulatory processes are not necessarily reflective of, or sensitive to, Oregon’s priorities; economic, environmental, or otherwise.
- The laws and attendant programs, some created 30+ years ago, were not necessarily created with a customer service focus or with emphasis on inter-agency cooperation.

After issuance of the ACRP Work Group report August 2004, representatives of the key state water agencies (DEQ, ODFW, WRD, DSL) and Governor’s Office Special Projects Coordinator met through the Fall of 2004 to explore potential solutions to the identified problems within the rubric of the 404/401/Removal-Fill nexus. The deliberations considered certain work efforts already underway by member agencies to streamline the 404/401/R-F nexus and identified additional opportunities to improve the efficiency or otherwise provide better customer service within the programs. Concepts being explored, or already being moved forward, include:

- **User’s Guide:** Develop comprehensive guide for users to more easily understand and negotiate water-related permit agencies & processes; clearly define who the

¹ In addition, some local jurisdictions choose to regulate activities in water via Goal 5 and Goals 15-19 of their Comprehensive Plan.

players are and when, where and how they engage in the processes; and, provide specific resources to prepare applications that meet both the applicant's needs and agencies' requirements.

- **Inter-agency coordination enhancements:** Several means to improve coordination between the state water agencies so as to create a more collaborative team approach continue to be explored. The end goal is to have more consistent, better integrated, and ultimately, more timely feedback to permit applicants.
- **Development of additional Programmatic Water Quality Certifications:** Programmatic Water Quality Certification (WQC) was denied or partially denied by DEQ for 12 federal Nationwide Permit (NWP) types. These activities, otherwise eligible for expedited federal processing as a NWP, are now subject to individual review by DEQ. The completion of programmatic certifications for remaining NWPs, as applicable, would result in expedited federal authorizations.
- **State Programmatic General Permit (SPGP; ongoing effort):** The US Army Corps of Engineers is anticipated to issue shortly a State Programmatic General Permit (SPGP) to DSL covering 8 types of water-related projects. For these 8 project types, DSL will become the applicant's one-stop water permit shop; no additional federal 404 authorization, 401 Water Quality Certification, ESA compliance or Coastal Zone Certification will be required.
- **404 Assumption (ongoing effort):** DSL is seeking State assumption of the federal Section 404 permit program. If successful, Assumption will allow DSL to function as the "one-stop water permit shop" for all projects in Oregon's "Section 404" waters; no federal authorization would be required and Assumption would allow DSL and DEQ to coordinate directly on the issuance of Water Quality Certifications. EPA must approve 404 Assumption.

Among the identified needs to implement these actions are:

- Funding for DEQ staff to develop additional Programmatic Water Quality Certifications
- Funding for development of user's guide
- Legislative support of HB 2082 for 404 Assumption
- Implementation mechanism (MOA, statute, other) for redefinition of the state water agencies' relationships in more collaborative, efficient and accountable ways.

By implementing these actions it is not the intent to lower the "environmental protection bar" for Oregon's development interests, but rather, make it easier for those development interests to meet their needs in a manner reflective of Oregon's environmental priorities.

The collaboration between the ACRP Water Permits Working Group and the four water-related state permitting agencies serves as a good case study for active listening by agencies to their customers concerns and inter-agency collaboration to begin addressing those concerns.