

DATE: July 11, 2019

TO: Wetland Study Council

FROM: Dan Helsel & Amanda Minks
404 Assumption Project Team Leads

SUBJECT: 404 Assumption Information

Thank you for your attention and participation during the 404 Assumption (404A) presentation at your inaugural Wetland Study Council (WSC) meeting on June 27, 2019. This memo is in response to the council request for additional information and your questions/comments. We look forward to reviewing this information with you and continuing to work with the council to evaluate the feasibility of 404A for Wisconsin at your next meeting on July 25.

1) Assuming jurisdictional determinations from ACOE

The WSC noted that delays in obtaining an Army Corp of Engineers (ACOE) jurisdictional determination (JD) can be significant since JDs requests without a permit application are a lower priority for the ACOE – often delaying a project 6 to 12 months waiting time. Recognizing that having certified/valid JDs during project design stages helps the applicant plan to meet the Federal and State standards, the WSC questioned whether Wisconsin could “assume” the JD for 404 permitting.

40 CFR § 233.1(b) states that “a State program must regulate all discharges of dredged or fill material into water regulated by the Stat under 404(g)(1). Partial State programs are not approvable under section 404.” With this language in federal code, Wisconsin would not be able to “partially assume” only the JD component of 404.

As noted in the presentation, the 404 Assumption feasibility study is considering the viability of 404 assumption as well as alternatives to Assumption that would still yield intended results. Alternatives DNR is currently exploring include:

- Feasibility and benefits of DNR staff completing and “certifying” preliminary JD reviews through a MOA with the ACOE;
- Staffing options that would allow ACOE to increase staff capacity to deliver these services more reliably; and
- Improved technology and guidance to help stakeholders make more appropriate predictions about jurisdictions.

2) Attorney General statement requirements

40 CFR §233.12(a) requires “Any State that seeks to administer a program under this part (i.e. §233) shall submit a statement from the State Attorney General (or the attorney for those State or interstate agencies which have independence legal counsel), that the laws and regulations of the State, or an interstate compact, provide adequate authority to carry out the program and meet the applicable requirements of this part.”

The AG office’s statement would enfold the requirements of §233.1(d) that states “Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.”

3) Estimated staffing resources needed for 404 Assumption

The WSC asked about the estimated resources needed to assume the 404 program and what other states have found. The table below summarizes this information from other state's 404A feasibility studies.

State	Existing Staff	Estimated Additional Staff	Wetlands Acres (millions)
Wisconsin (1993)	31	22	5.3
Wisconsin (current)	22	?**	5.3
Minnesota (2017)	98	4.2	10.6
Virginia (2012)	36	40	1.0
Alaska (2013)	?	29	174.0
Kentucky (2005)	5	13	0.3
Missouri (1986)	?	29	0.46
Maryland*	40	23	0.6
Tennessee*	?	16	0.79

* From Assoc. Of State Wetland Managers (ASWM) "Key Points from State Feasibility Studies"
 ** Staffing estimates will be provided in the feasibility study

For your convenience, the 404A feasibility studies/reports from which this information is pulled are linked below. Wisconsin's 1993 full, and 2001 incomplete assumptions studies are 11GB and 3GB in size and will be emailed separately to the WSC.

- Wisconsin: *1993 and 2001 studies transmitted in separate email due to documents size*
- Minnesota: https://www.aswm.org/pdf/lib/404_assumption_feasibility_study_0509.pdf
- Virginia: https://www.aswm.org/pdf/lib/va_study_state_assumption_2012.pdf
- Alaska: <https://dec.alaska.gov/media/6724/soa-effort-to-become-primary-404-agency.pdf>
- Kentucky: https://www.aswm.org/pdf/lib/404eppc_final_report.pdf
- Missouri: https://www.aswm.org/pdf/lib/feasibility_study_of_404_program_assumption_111986.pdf
- *ASWM (undated): https://www.aswm.org/pdf/lib/background_materials_5_11_10.pdf

4) Florida's Regulatory Crosswalk between State and Federal Programs

The WSC requested a copy of the Florida regulatory crosswalk table produced to compare the Florida's Environmental Resource Program (ERP) and Federal §404 Program requirements. We are working to complete a similar table that will compare Wisconsin's wetland program to the §404 program.

The WSC also requested some additional information on the comparison between state and federal general permits. We are working to update the crosswalk table between existing Wisconsin and Federal general permits and exemption and plan to have that table available to the WSC before your next meeting.



5) Attorney Analysis of 404A for Florida

It sounds like the department will set up a data management system for the WSC where we can easily share the reference and background materials we've collected regarding 404A. In the interim of that system, we thought the WSC might find the attached white paper by Attorney Jason Totoiu informative. We note that even with the uncertainties described by Attorney Totoiu document, Florida has publicly noticed draft codes and an applicant handbook that would create a 404A program in Florida. We've heard from a Florida DEP contact that negotiations with Federal agencies (FWS, EPA) about how to meet the requirements of the Endangered Species Act needs to be worked out before the state can move forward.



404 Assumption
Totoiu Florida.pdf

Florida Draft Rule 62-331 and Draft State 404 Applicant's Handbook for 404A

<https://floridadep.gov/water/water/content/water-resource-management-rules-development#erp>