Final Report

On the State of Oregon's Proposed Assumption of Clean Water Act §404 Permit Authority and Integration of Endangered Species Act Requirements

U.S. Environmental Protection Agency

Produced in collaboration with representatives from:
NOAA's National Marine Fisheries Service,
United States Fish & Wildlife Service, and
Oregon Department of State Lands

March 12, 2014

Acknowledgements

The Environmental Protection Agency (EPA) thanks the following stakeholders for participating in the conversations around §404 assumption and Endangered Species Act (ESA) integration in Oregon as well as their time in producing this report:

Marc Liverman and **Jeff Lockwood**, NOAA's National Marine Fisheries Service
Joe Zisa, U.S. Fish & Wildlife Service
Bill Ryan, Oregon Department of State Lands

Additionally, EPA thanks Bob Wheeler and Claire Turpel from Triangle Associates, Inc. for their time in facilitating meetings of the federal and state agencies to produce this report.

INTRODUCTION

In 2012 and into 2014, representatives from the West Coast Regional Office of NOAA's National Marine Fisheries Service (NMFS) and the Oregon State Office of the U.S. Fish & Wildlife Service (USFWS) met with a representative from Region 10 of the Environmental Protection Agency (EPA) to develop a process to address concerns related to the Endangered Species Act (ESA) with a proposal by the Oregon Department of State Lands (DSL) to assume permit authority under §404 of the Clean Water Act (CWA). The federal agencies discussed how to transfer permit authority to the State of Oregon (State) while maintaining protection for federally listed threatened and endangered species and their dependent water bodies in a State-led program. A representative from DSL participated in all but the first meeting to clarify the State's intent to assume §404 permitting authority and discuss how the State could maintain or improve the current permitting process while providing good government for the citizens of Oregon. The conversation evolved to include merits of the current §404 permitting program, desires and needs for the current State program, and expectations for a future State-assumed program.

The participants identified several steps needed to address integration of ESA considerations into a State-led program. These steps include:

1. Developing a common program **vision** and **goals,**
2. Considering potential **approaches** to integrating ESA compliance into the State's proposed assumption of the §404 program, and
3. Formulating **conclusions** on a potential path forward.

Meeting participants included:

Name	Affiliation
Marc Liverman	NOAA's National Marine Fisheries Service
Jeffrey Lockwood	NOAA's National Marine Fisheries Service
Bill Ryan	Oregon Department of State Lands
Yvonne Vallette	Environmental Protection Agency, Oregon Operations Office
Joe Zisa	US Fish & Wildlife Service
Bob Wheeler	Triangle Associates, facilitation team
Claire Turpel	Triangle Associates, facilitation team

BACKGROUND

The Federal Clean Water Act (CWA) provides states or Tribes the option of assuming administration of the CWA §404 permit program (§404) in certain waters within state or tribal jurisdiction. In §404 Oregon assumption, the federal §404 permitting authority would be transferred from the U.S. Army Corps of Engineers – Portland District (the Corps), to the State upon approval by EPA. In order to assume the §404 program, a state program must meet the requirements laid out in 40 Code of Federal Regulations (CFR) 233.1 – 233.51, and the state program must be consistent with and no less stringent than the federal §404 program requirements. While a state assumed program must address other federally protected resources such as endangered species and cultural resources, it does not have the benefit of utilizing the consultation/coordination processes found under federal authorities such as §106 of the National Historic Preservation Act, §7 of the Endangered Species Act (ESA), and the Fish and Wildlife Coordination Act (FWCA). These consultation/coordination processes are the forums established for federal agencies to address these protected resources. Because there are no equivalent consultation/coordination requirements outlined for states, alternative mechanisms must be considered in order for states to be able to make timely and appropriate permitting decisions while complying with the statutory requirements of a §404 assumed program.

VISION AND GOALS

The federal agencies (EPA, NMFS, and USFWS) and the Oregon Department of State Lands (DSL) developed an overall vision and a list of common goals they collectively would like to achieve if the State assumes the §404 program.

Vision

To provide continued or improved protection for threatened and endangered species and the aquatic resources that support those species, whether or not there are changes to the current §404 permitting program. This includes recovery of those species while maintaining consistency and regulatory streamlining for applicants as well as a reasonable level of good government for the citizens of Oregon.

Goals

- Regulatory Streamlining: Create regulatory streamlining to improve permitting certainty for applicants and agencies.
- Species Protection
  - Improve protection for threatened and endangered species and their dependent water bodies at the state level by meeting the level of conservation required by federal law at a minimum.
  - Protect ecosystems and support the recovery of threatened and endangered species and the habitats that support them, with respect to both ecological outcomes and regulatory efficiency.
- Process Improvements
  - Determine how to use DSL's removal authority to address issues not fully addressed by the Corps' ESA program (i.e., floodplain disturbance, mining, development, and over-water structures).
  - Maintain or decrease workload for NMFS and USFWS (collectively, the Services); an assumed State §404 program should not rely more heavily on the Services' existing staff.
  - Enhance relationships between the Services and the State and take fuller advantage of an integrated approach between the use of regulatory tools and watershed enhancement projects.
  - Maintain program consistency for applicants, the Services, and resource protection, including during the transition from the old to new program.
  - Maintain the current flexibility to make changes to the §404 program, as warranted by advances in knowledge of species and habitat conditions (adaptive management).
  - Increase flexibility to use in-lieu fee and mitigation opportunities to incorporate ESA considerations.
  - Address ESA and CWA issues before permit issuance.
  - Assist agencies in meeting timeline requirements and performance metrics.
  - Establish a review process for permit applications that includes all agencies.
  - Look for ways to integrate FWCA and ESA issues more efficiently.
- Good Government
  - Establish consistent and well-defined communication, coordination, collaboration, and transparency between agencies, and between agencies and the public.
  - Support sustainable economic development and use of private property.
  - Maintain consultation-equivalency with respect to ecological outcomes and regulatory efficiency.
  - The same "equivalency or better" standard applied to ESA issues will be applied to issues relating to the FWCA, and will be applied in collaboration with the Services.
  - Ensure no conflict of interest within DSL as the permitting authority.
  - Address tribal concerns for the different agencies' processes in the appropriate forum(s).

POTENTIAL APPROACHES

The following outlines the possibilities of potential ESA integration approaches that were considered through the facilitated conversations. These approaches are briefly described and discussed below.

1. **DSL develops a coordination process via a memorandum of agreement, a coordination process that is the functional equivalent of the inter-agency §7 consultation process that exists now. This includes the Services' involvement on ESA issues and assumes that DSL would maintain similar resources in the State program**.
   a. Description: Develop a memorandum of agreement (MOA) between EPA, NMFS, USFWS, and DSL outlining an inter-agency coordination process for reviewing and commenting on state permit applications, similar to the approach utilized in New Jersey's assumed program. While there would not be formal ESA compliance, the Services would produce consultation-equivalent findings with obligations for DSL.
   b. Pros: Allows Services to be actively engaged in the State's permitting program to address ESA and other issues, including those not fully addressed by the Corps' ESA program (i.e., floodplain mining, development, and over-water structures). Consultation-equivalency through the MOA could allow DSL to maintain ecological outcomes. With an appropriate MOA, the risk of adverse ESA enforcement actions could be reduced.
   c. Cons: Coordination with the Services is legally not the same as ESA §7 consultation. Agencies could be liable for permitting actions that allow incidental take, as could individuals or entities undertaking the actions (with enforcement by the Services or through a citizen lawsuit). While there is no ESA incidental take statement to provide coverage through a State-issued permit to the applicant or any agency, that risk could be reduced with an appropriate MOA. Neither DSL nor the Services may be able to successfully implement the MOA with current resources. Successfully implementing the MOA will require additional training, expertise, and resources.

2. **DSL develops a state programmatic general permit which includes §7 consultation.**
   a. Description: A state programmatic general permit (SPGP) is a type of time-limited programmatic general permit that is administered by a state agency and designed to eliminate duplication of effort between the Corps and states. It is also designed to make the permitting process more efficient with flexibility for a geographic region. The Corps has the authority to issue general permits for any category of projects that are substantially similar in nature and result in no more than minimal adverse effects on the environment. If there are no re-initiation triggers, the Corps can re-issue the SPGP without additional consultation. For other states interested in §404 assumption and without the history of attempting an SPGP, development of an SPGP may provide a "try it before you buy it" opportunity.
   b. Pros: Provides a venue for ESA §7 consultation and incidental take coverage for the State and applicants for a range of activities that could be permitted by the State. This will offer incidental take coverage for actions within the scope of the SPGP. An SPGP can cover activities in both §404 waters and in non-assumable waters including waters subject to §10 of the River and Harbors Act of 1899. An SPGP improves NMFS's efficiency because it requires regional approval, not national.

c. Cons: The inherent nature of an SPGP limits the type and size of activities under §404 to be permitted. Additional requirements of an SPGP (including ESA screening and permit conditions) may not result in anticipated permitting efficiencies for DSL or the Corps that are commensurate with the level of effort needed to develop an SPGP. The State's experience with an SPGP in 2006 for eight categories of activities provided no significant efficiencies for either the Corps or DSL, although this could have been avoided by using the existing NMFS programmatic consultation. The State may need to overcome the skepticism from the 2006 SPGP effort to convince stakeholders (including other resource agencies) that this approach is worth considering again. An SPGP is not the equivalent of §404 assumption because it only allows the State to cover specified activities in certain geographic areas.

3. **EPA voluntary §7 consultation.**
   a. Description: EPA voluntarily consults with the Services under §7 of the ESA as part of their review/approval of DSL's 404 assumption package submission.
   b. Pros: Provides a mechanism to the §7 consultation process and could possibly provide some limited take protection for an assumed program by a state.
   c. Cons: EPA's process for approving an application for §404 assumption does not provide additional time for a lengthy ESA consultation process. The potential scale and scope of developing a biological evaluation that considers all aspects of an approved state program are likely to be cost prohibitive. ESA consultation outcomes can result in a limited duration and scope of incidental take associated with issuance of state permits, while still requiring additional ESA requirements of the State that could more readily be achieved by implementing the first approach (utilizing an MOA to engage the Services' involvement under an assumed program).

4. **§6 conservation agreement with the State.**
   a. Description: Expands the Services' agreements with the State to advance conservation and recovery efforts in the State.
   b. Pros: Provides a mechanism for the Services to engage directly with the State on ESA matters.
   c. Cons: Uncertain how expansive §6 agreements can be and the extent of ESA liability protection for DSL's regulatory program. Likewise, it is unknown how to issue take authorization for a regulatory program; there are not many precedents.

5. **§4.d. Protective Regulations.**
   a. Description: Write a rule that defines a set of actions that if followed, are not considered a take.
   b. Pros: Would augment DSL's current program allowing ESA concerns to be a basis for permit denial.
   c. Cons: Would likely result in many DSL permit denials, then requiring applicants to seek §404 authorization from the Corps through §7 consultations and incidental take coverage. As a stand-alone approach, this would provide no efficiency or certainty for permittees or DSL's assumed program. This approach would only be applicable to threatened species, not endangered species.

6. **Statewide Habitat Conservation Plan.**
   a. Description: Develop a state-wide multi-species Habitat Conservation Plan (HCP) for DSL's regulatory program.
   b. Pros: This is the only other regulatory mechanism available under ESA providing incidental take coverage for a state program. Would provide legal liability coverage for take of listed species for DSL and DSL permit holders that might occur incidental to issuance of permits by the State in their assumed program. Development of an HCP would be done in partnership with the Services and could be done as a programmatic evaluation of how well DSL's assumed program addresses ESA issues. Competitive grants are available from the Services to help fund the development of HCPs.
   c. Cons: Development of a multi-species, state-wide HCP would take time and money to complete, and also would need to comply with the National Environmental Policy Act.

The State of Oregon's Likely Path Forward

In considering the options described above, there is not any single approach that would provide the level of ESA integration or liability protection needed for a state-assumed program in the near term. However, there are some advantageous components in several of the evaluated approaches that could be considered as either a combined or phased approach that would provide a step-wise forum for DSL to begin building ESA considerations into an assumed program.

Summary: EPA will continue to work with DSL towards assuming §404 permitting authority, using a two-phased strategy to integrate ESA compliance into DSL's fill and removal permitting program.

Phase 1: Develop a coordination process outlined in an MOA between EPA, the Services, and DSL to build the foundation of an ESA compliant program within DSL. While there would not be formal ESA compliance, the Services would produce consultation-equivalent findings with obligations for DSL.

Phase 2: Develop a state-wide, multi-species HCP after DSL's assumed program has been implemented for several years. This allows DSL time to develop and test ESA integration processes and procedures, which can then be evaluated by the Services for consideration of a §10 permit to DSL authorizing the incidental take of listed species associated with their state permitting decisions.

Presumed next steps:

- DSL must make a decision to invest resources to take the next steps towards assuming the §404 program, including developing an MOA with the Services.
- DSL and EPA would work with the Services to develop an MOA.
- DSL would submit to EPA a request to assume the §404 program; the request would include an MOA.

- EPA would make a decision whether DSL assumes the §404 program. At that point, the State would enact legislation to formally assume the §404 program.

Once the potentially ESA-compliant pieces of DSL's permitting program have been developed and the State can demonstrate proficiency in addressing ESA issues, additional measures can be developed through an HCP to ensure that the effects of any authorized incidental take under DSL's assumed program will be adequately minimized and mitigated to the maximum extent practicable under the terms of a §10 permit issued by the Services to DSL. State-wide and multi-species HCPs have become more common than in the past, removing some of the uncertainty associated with undertaking such a large-scale effort in Oregon. In addition, funding for HCP development is available to states through a nationwide competition under the Habitat Conservation Planning Assistance Grants Program implemented by USFWS. Though this grant program requires a minimum 25% match of non-federal funds for approved projects, it could provide the needed resources for the State to undertake a state-wide, multi-species HCP for their assumed permitting program.

Sections to Include In Potential MOA

- Parties to MOA
- Dates & Schedule
- Transitional Steps
- Procedure
- Inter-Agency Coordination

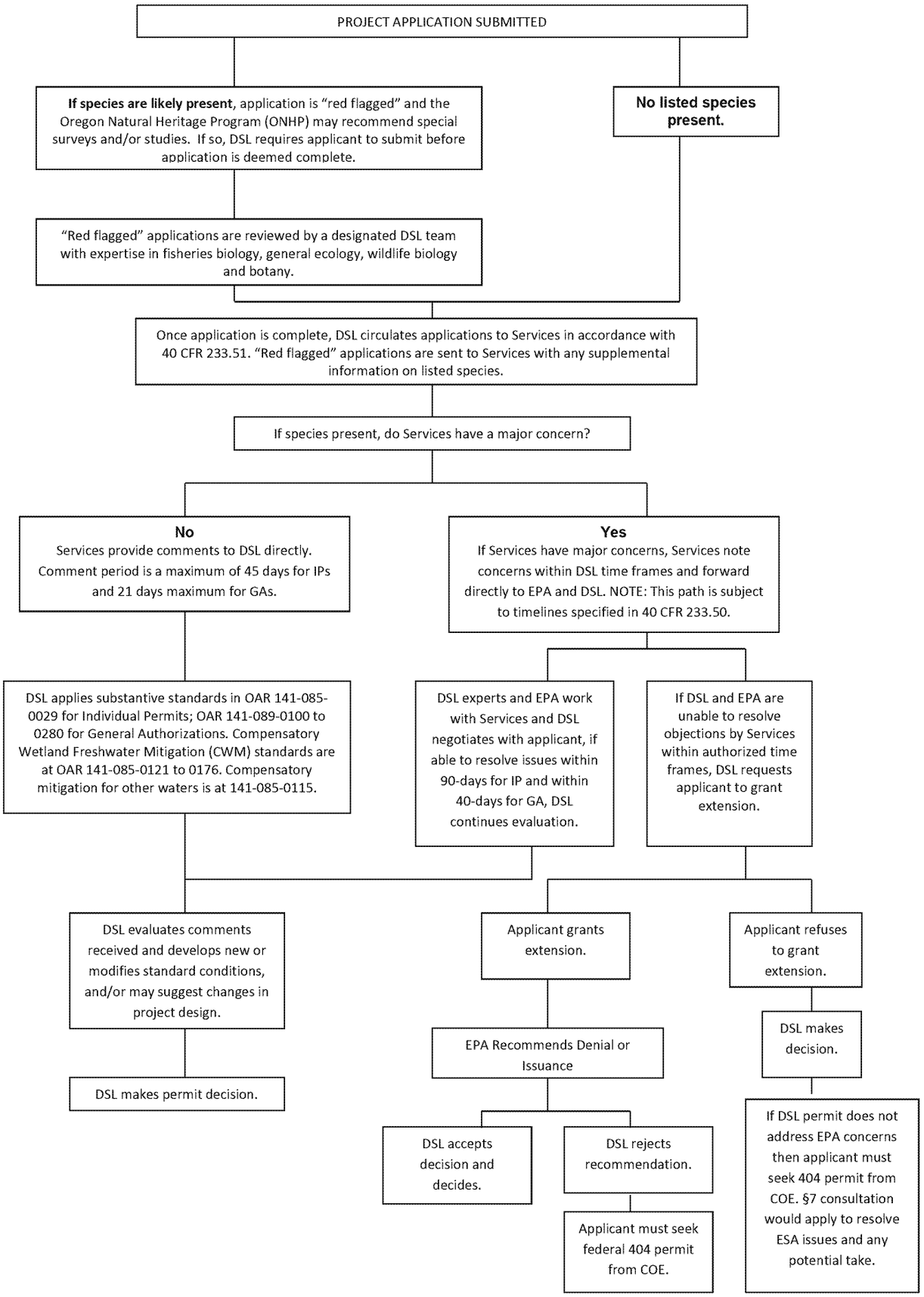
Approval Motion for this Report

At the final meeting, all agencies' representatives agreed by consensus to this report using the following motion:

Given the different perspectives on the State's assumption of §404 permitting and the understanding that the State of Oregon intends to assume the §404 program as allowed for under the Clean Water Act, the representatives from NOAA's National Marine Fisheries Service, the U.S. Fish & Wildlife Service, the Environmental Protection Agency, and the Oregon Department of State Lands agree that this report accurately reflects the facilitated meetings to develop this document over the past two years about the State of Oregon assuming §404 permitting authority while maintaining or improving protection for the ESA-listed species and their habitat.

Appendices

Draft Flowchart of Potential ESA Integration under State-Assumed Program (page 9)
New Jersey MOA as an example for the Oregon MOA (attached)

DRAFT Outline of Potential ESA Integration under Assumed Program

Note: The final outcome of the State assumed program may look different than the outcome outlined below, but this shows a potential approach.