

New Jersey's Assumed Wetland Program



State of New Jersey

Dept. of Environmental Protection

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Federal Clean Water Act—Assumption

- The Federal Clean Water Act Section 404(g)1 allows a State to “administer its own individual and general permit program” by submitting an application to the EPA.” This is commonly referred to as “**assuming**” the Federal permitting program.
- “**Assumption**” is not “**delegation**.” A delegated program uses the authority of the Federal government. With State “assumption,” the State already possesses its own authority to regulate all parts of the State and all activities that would be regulated under the Federal 404 program. EPA gives the State approval to operate the State program in place of the Federal program. When the State gives a permit approval, it is gives all that is needed to satisfy the Federal permitting program.

New Jersey's Freshwater Wetlands Protection Act N.J.S.A. 13:9B-1 et seq.

Effective July 1, 1987 and included the following provision:

“The Department and the Attorney General shall take all appropriate action to secure the assumption of the permit jurisdiction exercised by the United States Army Corps of Engineers pursuant to the Federal Act.”

Practical Reasons to Assume

- Eliminate confusion between the State wetland law and the ACOE's implementation of 404.
- Stream-line permitting process: Upon receiving a State permit, no requirement for an applicant to obtain a separate Federal permit for the same activity.
- State agency is more accessible to the public than a Federal agency. No Army Corps office in NJ.

Qualifying for Assumption

NJ's Statute contained almost all of the needed components for assumption:

- Regulate all discharges of dredge and fill
- Regulate all portions of the State
- No exemptions which are inconsistent with the Federal 404 exemptions
- Enforcement authority

Qualifying for assumption (continued)

- Authority to protect:
 - a. Federally listed T&E species;
 - b. Protect areas listed on, or eligible for listing on National Register of Historic Places*;
 - c. Protect Nationally-listed Wild and Scenic Rivers
 - d. Protect National Marine Sanctuaries;
 - e. Prevent toxic discharges in violation of State/Federal water quality standards; and
 - f. Protect commercial and marine fisheries.

What activities are “major discharges?”

- Draft General Permits
- Discharges with potential to affect federally-listed T&E species
- Discharges with potential for impacts on another state
- Discharges with toxic or hazardous substances
- Discharges in vicinity of public water intakes

“What activities are “major discharges?””

- Discharges to critical areas: National/state park; fish or wildlife sanctuary; site listed on National historic register; National wild and scenic river;
- Filling of 5 or more acres of wetlands;
- Significant reductions in ecological, commercial or recreational value of 5 or more acres;
- Culverts longer than 100 feet;
- Channelization of more than 500 feet of river or stream.

Changes to the Regulatory Process

- Permit applications for activities that meet the definition of a “major discharge” are sent upon receipt to the EPA for distribution and review by: EPA, Army Corps of Engineers, US Fish and Wildlife Service, and National Marine Fisheries Service.
- Permit applications in towns with identified federally listed threatened or endangered species are screened internally and if “potential to affect” sent to the U.S. Fish and Wildlife Service for review.

Additional Changes

- Had to change FWW rules to include protection for Historic Resources and had to include a review process into the wetland review process.
- Worked with the State Historic Preservation Office to identify categories of projects for which reviews are needed.
- The State's FWW rules require needed historic data for review by SHPO.



How Many Applications to EPA?

- The State processed a total of:
- FY 2017: 539 applications- 18 required EPA oversight (3%)
- FY 2016: 729 applications-24 required EPA oversight (3%)
- FY 2015: 682 applications-20 required EPA oversight (3%)

How Many Applications to USFWS?

- From July 1, 2014 through June 30 2017 (3 years), 302 projects triggered the need for the State to screen for threatened or endangered species. The details are as follows:
- 2017: 154 projects were screened. 60: No potential to affect the species;
94 required USFWS review.
- 2016: 101 projects were screened. 72 No potential to affect the species;
29 required USFWS review.
- 2015: 47 projects were screened. 13 No potential to affect the species
34 required USFWS review.

How Many Applications to SHPO?

- FY 2017: 434 (out of 539) sent for SHPO review
- FY 2016: 411 (out of 729) sent for SHPO review;
- FY 2015: 292 (out of 682) sent for SHPO review.

Funding

- Division of Land Use Regulation receives an annual appropriation as part of the State Budget process.
- The Division charges review fees for its permit applications. The revenue goes to the Treasury but is a consideration in the State appropriation process.

Funding continued

- Over the past few years, review fees have raised between \$2 and \$2.5 million per year.
- The overall budget for the Division of Land Use Regulation is approximately \$13 million (Source: State Treasury website)
- However, that total budget includes funding for the Coastal Review and Flood Hazard Area review programs, as well as the Tidelands program in addition to the FWW program.

NJ's Definition of Assumable Waters

- All waters of the United States, as defined at 40 C.F.R. Section 232.2(q), within the State of New Jersey will be regulated by NJDEP as part of their State Program, with the exception of those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary highwater mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, including wetlands adjacent thereto. **For the purposes of this agreement, the Corps will retain regulatory authority over those wetlands that are partially or entirely located within 1000 feet of the ordinary high water mark or mean high tide of the Delaware River, Greenwood Lake, and all water bodies which are subject to the ebb and flow of the tide.**

Assumable Waters continued

- State waters will generally be determined by superimposing Head of Tide data on the State's freshwater wetlands quarter quadrangles which are at a scale of one inch equals 1000 feet. A line will be established parallel to and 1000 feet from the ordinary high water mark or mean high tide of the waters described above. The Corps will retain jurisdiction over all wetlands which are waterward of, or intersected by, the jurisdictional line described above.

Assumable Waters conclusion

- Because the State regulates all wetlands/waters, it rarely has to determine whether a wetland is assumable or non-assumable. If there is any question or reason that it makes a difference to an applicant, the State either adds a permit condition informing the applicant of the need to obtain ACOE approval and/or contacts the ACOE in advance to determine whether they will or will not assert jurisdiction.

