THE TROUBLE WITH ASSUMPTIONS: AN ANALYSIS OF THE ONGOING STRUGGLES WITH §404 ASSUMPTION

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THESIS ABSTRACT

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The Clean Water Act's §404 allows states to assume control of wetland dredge-and-fill permitting from the Federal Government. However, since the bill was passed in the 1970's, only two states have successfully assumed control of the permitting program. Each state that has looked into assumption has run into barriers, issues, and problems that have prevented them from successfully assuming the program. I interviewed people involved with assumption at different levels of involvement, and this thesis seeks to provide a conflict management design system that will help states overcome some of the most pernicious issues.

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CHAPTER I

INTRODUCTION

To love a swamp, however, is to love what is muted and marginal, what exists in the shadows, what shoulders its way out of mud and scurries along the damp edges of what is most commonly praised. And sometimes its invisibility is a blessing. Swamps and bogs are places of transition and wild growth, breeding grounds, experimental labs where organisms and ideas have the luxury of being out of the spotlight, where the imagination can mutate and mate, send tendrils into and out of the water.

Barbara Hurd

Wetlands have long been a source of mystery. Neither water nor land, wetlands exist in an in-between place that is difficult to define and difficult to understand. Muted and marginal, there are few ecosystems that are as maligned as wetlands. For the better part of history, wetlands have been regarded as wastelands and breeding grounds for disease.[1] The total amount of wetlands in the United States from over 220 million acres to roughly 100 million acres over the past three centuries,[2] and this acreage continues to decrease despite recent efforts to stem the tide.[3] Human beings have done untold damage to the natural wetlands that helped regulate our watersheds, and many areas are undergoing massive reconstruction efforts to mitigate the damage caused by this prior destruction.

New Orleans, for example, drained the wetlands around its original settlements, partly to encourage development, and partly in response to an outbreak of yellow fever

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[1] Thomas E. Dahl and Gregory J. Allord, *Technical Aspects of Wetlands: History of Wetlands in the Conterminous United States*, March 7, 1997, http://water.usgs.gov/nwsum/WSP2425/history.html (accessed 2014 April).

[2] Jeffrey A. Zinn and Claudia Copeland, "Wetland Issues," *CRS Issue Brief for Congress*, April 20, 2005, http://assets.opencrs.com/rpts/IB97014_20050420.pdf (accessed April 2014).

[3] Ibid.

contracted from mosquitoes.[4] As the city grew, the city drained more and more wetlands to make room for suburban and industrial development, and tamed the Mississippi River by constructing over two-dozen dams.[5] These dams, along with other augmentations, like oil and gas pipeline canals, directly caused a disruption in wetland replenishment and further destroyed wetlands in and around New Orleans.[6] To compensate, Southern Louisiana needed over 2,000 miles of levees to perform the same flood-surge protection that its wetlands used to do – and used to do much better, as the city unfortunately learned from Hurricane Katrina.[7]

State attempts to assume control of the §404 permitting proposal fail again and again. I believe there are two main categories of reasons why the assumption proposals fail. First, there are a number of known, identified issues that bar successful assumption attempts. Second, there are unidentified or unacknowledged[8] issues that also act as barriers. While states actively engage to resolve the known, acknowledged issues, the unacknowledged barriers remain unresolved.

This paper suggests that the §404 permit process is designed in a way that sublimates meaningful participation, perhaps unconsciously, and allows the unknown barriers to remain undiscovered. This unconscious sublimation may be at the heart of

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[4] John Tibbetts, "Louisiana's Wetlands: A Lesson in Nature Appreciation," *Environmental Health Perspective*, 2006: A40-A43.

[5] Ibid., 4.

[6] Ibid.

[7] Ibid., 5.

[8] I use unacknowledged as a generalized term for factors that may be undiscovered; known, but unresolved; new; or perhaps characterized as less important than some of the larger issues.

what causes the assumption process to fail, because it creates large hurdles in the lead up to assumption. The current system does this because there are little to no options for stakeholder groups to appeal a permit after it has been granted, so assumption provides an opportunity for stakeholder groups to "perfect" what they see as an imperfect process. This scenario means that state agencies must create what is, in effect, a "perfect program" for most stakeholder groups in order to get buy-in. This buy-in, further, is vital for state agencies because assumption must pass through several legislative processes, and thus through public approval features, before it can be completed.

The paper will seek to analyze the known and unknown issues that States continually confront during the §404 assumption process, evaluate the systems currently used by States that may lead towards lack of resolution, and recommend systems that may improve upon the existing systems.

There are five sections to the paper. First, I will briefly review the history of wetlands and provide a broad overview of the assumption process. Second, I will explain some of the issues, both acknowledged and unacknowledged, that prevents successful §404 assumption proposals. Third, I will examine the processes currently in place for meaningful participation from states and stakeholder groups, and use examples to discuss newer conflict management design theories. And fourth, I will conclude with some recommendations for a system design and future steps.

CHAPTER II

A BRIEF HISTORY OF WETLANDS AND THE REGULATORY EFFORTS

Before beginning any analysis of dredge-and-fill permits and the Clean Water Act, it is important to give a brief history of wetlands in America. Throughout most of history, wetlands have been regarded as wastelands. The land was not viable for farming or animal grazing, and disease-bearing pests, like mosquitoes, propagated from its murky depths. The lands underneath the wetlands were often rich in nutrients, and people frequently sought to remove as many wetlands as they could in order to reach the rich land below. It was not until the past hundred years that we discovered the multitude of positive purposes that wetlands served, including flood control and water purification, medicinal plants, and endangered species habitats. Once these benefits were realized, states began inching their way away from the "no wetland is a good wetland" approach, and started building protective schemes to stem the destruction of wetlands.

Congress included a section covering wetland permits in the Clean Water Act of 1977 ("CWA"). This section, §404, created a permit system for any activity that would dredge or fill a wetland to make way for development. However, many states already had a permit system in place for dredge[9] and fill[10] activities. The Clean Water Act thus

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[9] Permits for the discharges of dredged or fill material into waters of the United States. 33 CFR 323.2(c) (2008). "[T]he term dredged material means material that is excavated or dredged from waters of the United States."

[10] Permits for the discharges of dredged or fill material into waters of the United States. 33 CFR 323.2(e)(1) (2008). "[T]he term fill material means material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States. (2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or

created duplicative permit systems where states and the Federal government each had permit requirements for the same activities. Congress included a provision in §404 of the Clean Water Act that allows states to "assume" control of dredge-and-fill permits from the Federal government that avoided this duplicative scheme.[11]

This provision, §404(g), allows states to assume control as the primary permitting authority for the "assumable waters"[12] within the state, rather than the Army Corps of Engineers ("Corps"), and thus remove the need for permittees to apply for both a state and a Federal permit for dredge-and-fill activities.[13] §404(g) provides a checklist by which states can prove to the Corps and to the United States Environmental Protection Agency ("EPA") that it has a permit program that is equivalent to the Federal program.[14]

This checklist is deceptively simple, and provides that the Governor of any state may submit an application for assumption to the EPA when it has:

(1) A full and complete description of the program, and

(2) A statement from the state Attorney General that the state laws have the adequate authority to enforce the program.[15]

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infrastructure in the waters of the United States. (3) The term fill material does not include trash or garbage."

[11] Permits for dredged or fill material. 33 U.S.C. 1344(g) (2014) (proposed legislation).

[12] Ibid., 1344(g)(1). "Assumable waters are all waters except for 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 high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto."

[13] Ibid.

[14] Ibid.

[15] Ibid.

EPA then has one hundred-twenty days to review the application, and determine whether the state has satisfied a second set of requirements.[16] This is a lengthier checklist that requires states to set a fixed term for permits, provide notice to other states and EPA, provide comment periods for the public, and, most importantly for this paper, assure compliance with the §404(b)(1) guidelines.[17]

Finally, if EPA determines that the state has proven its ability to run a permit program, the Administrator must approve the application and EPA and the Corps will immediately suspend their permitting authority and transfer it to the state – including any pending permit applications.[18]

This duplicative system remains in place in many cases, and creates extra regulatory hurdles for permit-seekers and government officials alike. Permit-seekers must gain permits from multiple state agencies for their developments – EPA and state agencies for most of its water permits, and the Corps for its dredge-and-fill activities. The government, in turn, must try to work with the other agencies to streamline the permit process as much as possible, or else risk political unpopularity (and potential funding implications from that).

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[16] Permits for dredged or fill material. 33 U.S.C.A. 1344(h)(1) (2014) (proposed legislation).

[17] Ibid. "(1) Not later than the one-hundred-twentieth day after the date of the receipt by the Administrator of a program and statement submitted by any State under paragraph (1) of this subsection, the Administrator shall determine[…]whether such State has the following authority with respect to the issuance of permits pursuant to such program: (A) To issue permits which-- (i) apply, and assure compliance with, any applicable requirements of this section, including, but not limited to, the guidelines established under subsection (b)(1) of this section, and sections 1317 and 1343 of this title."

[18] Ibid., § 1344(h)(2)(A), §1344(h)(5).

The Lead Up to State Assumption Packages

There are many reasons why a state would seek to assume control of dredge-and-fill permits. The primary reason, however, is that assumption allows a state to streamline its permit system for both wetland regulation and to ease the process for permit-seekers. Except for the navigable waters that remain in Federal jurisdiction, the rest of the water in a state are considered "waters of the state."[19] Assumption allows the state to take over the permitting authority for most of the waters within its boundaries, and thereby gives permit-seekers a "one stop shop" option when it comes to permits for construction. Dredge-and-fill permits are only one portion of a successful wetland protection scheme, and states typically have some sort of wetland regulation program in place already when they decide to assume dredge-and-fill.

When a state assumes control of dredge-and-fill permits from the Corps, it must develop a program that meets a long list of requirements. The initial requirement is that the program must cover all dredge-and-fill permits for all of the state's assumable waters; any proposed program that assumes only part of the state's assumable waters will be rejected.[20] The state program must also protect the waters to an equivalent level as the Federal program – it can be more protective than the Federal program, but cannot provide

[19] Definition of navigable waters of the United States. 33 C.F.R. § 329.4 (2014). "Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity."

[20] Purpose and scope. 40 C.F.R. 233.1(b) (1993). "[A] State program must regulate all discharges of dredged or fill material into waters regulated by the State under section 404(g)–(1). Partial State programs are not approvable under section 404."

any fewer protections for the waters.[21] However, as will often prove the case in §404 assumption, these two simple requirements lead into an increasing set of requirements and standards for the states.

How does a state show that it has a program that is equivalent to the Federal program? First, the state must create a program description. This program description must include, substantively, "the extent of the State's jurisdiction, scope of activities regulated, anticipated coordination, the scope of the permit exemptions (if any), and permit review criteria."[22] Furthermore, it must discuss the administrative and judicial review system, the agency organization, provide a description of the funding available and how it will be allocated, and then include copies of the forms and permits that the state will use in its permitting regime.[23] Finally, it must also outline the compliance and enforcement programs and how the State will engage with the Corps and the EPA.[24]

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[21] Ibid., § 233.1(d). "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."

[22] Program description. 40 C.F.R. 233.11(a) (2014). "The description should include extent of State's jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, and permit review criteria"

[23] Ibid., § 233.11(b-f). "(b) A description of the State's permitting, administrative, judicial review, and other applicable procedures; (c) A description of the basic organization and structure of the State agency (agencies) which will have responsibility for administering the program. If more than one State agency is responsible for the administration of the program, the description shall address the responsibilities of each agency and how the agencies intend to coordinate administration and evaluation of the program; (d) A description of the funding and manpower which will be available for program administration; (e) An estimate of the anticipated workload, e.g., number of discharges. (f) Copies of permit application forms, permit forms, and reporting forms."

[24] Ibid. § 233.11(g). " A description of the State's compliance evaluation and enforcement programs, including a description of how the State will coordinate its enforcement strategy with that of the Corps and EPA."

Here, again, we see that the two initial requirements, a full and complete program description and approval from the state Attorney General, have expanded into over a dozen clarifying requirements. It is no wonder that states are often confused as to how to create a program that will meet every statutory requirement, when each requirement often creates a hydra of new qualifications.

And even if the state is successful with its assumption proposal, both of the primary Federal agencies continue to play a role in dredge-and-fill permits.[25] EPA retains its veto power, and the Corps still issues permits for non-assumable waters.[26] Both agencies define the scope of what are considered assumable waters within the jurisdiction,[27] and EPA reviews the State program annually to assure performance.[28]

While the lead up to assumption has hurdles particular to each state, there are a few general obstacles that most states must overcome before assuming. Almost all of the assumption proposals have failed before submission, and continue to fail. This suggests that there are not just individual problems in each proposal, but that there are also larger problems that exist in the process universally. Some of these larger problems are well known to EPA and states alike.

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[25] Memorandum of Agreement with Regional Administrator. 40 C.F.R. 233.13 (1994). Memorandum of Agreement with the Secretary. 40 C.F.R. 233.14 (1994).

[26] Ibid.

[27] *Civiletti Memorandum*, 43 Op. Atty. Gen. 197 (1979). Robert W. Page and Rebecca W. Hanmer, *Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency Concerning the Determination of the Section 404 Program and the Application of the Exemptions Under Section 404(F) of the Clean Water Act*, http://water.epa.gov/lawsregs/guidance/wetlands/404f.cfm (accessed March 2014).

[28] Memorandum of Agreement with Regional Administrator. 40 C.F.R. 233.13(b)(1) (1994).

CHAPTER III

IDENTIFIED ISSUES WITH ASSUMPTION

The issue at the heart of assumption, and the issue that overarches many of the others, is that there is no clear guidance for the states to follow. The regulatory guidelines set out in § 404 create stopping posts along the way to assumption, but the states are left to map out their own route from post to post. Additionally, states can draw only limited knowledge from watching others go through the same process, because the wetlands in each state vary drastically in both composition and amount. Alaska, for example, is roughly 43% wetland and its wetlands also contain a layer of permafrost.[29] It is unique both in the amount of wetland area it has and the biomes present in its wetlands, so the assumption program it develops must respond to Alaska's individual needs.[30] While it can take some guidance from the Federal regulations and the assumption efforts of other states, Alaska will need to create a unique program to suit its unique needs.

Oregon has a long history with assumption, and presents an interesting study of the issues a state comes across during the program development process. There are three major issues that have frustrated Oregon's attempts, in particular: the Endangered Species Act (ESA),[31] Tribal relations and concerns, and what are called "adjacent waters." "Adjacent waters" is a simplified term for the jurisdictional overlap that occurs between

[29] Anonymous, interview by Aileen Carlos, , *Alaska Department of Environmental Conservation*, (May 8, 2014).

[30] Ibid.

[31] Congressional findings and declaration of purposes and policy. 16 U.S.C.A. § 1531 (2014).

the states and the Corps with navigational waters because of § 10 waters.[3233] Section 10 waters refers to §10 of the Rivers and Harbors Act of 1899, which grants the Corps full authority over the "navigable capacity of any water of the United States."[34]

In addition, a few of the larger procedural problems with dredge-and-fill assumption are well known and cause issues for most all of the states: the state must assume control over dredge-and-fill permitting in all of its jurisdiction at once, it must secure implementation funding for the program, and it must garner public and political support for the endeavor. In the next sections, I will look at each of these issues in-depth.

The Current Regulatory Guidelines Are Not Clear Enough to Provide Clear Guidance for States

As noted earlier, the state's requirements for assuming permitting control comes from the language of the Clean Water Act itself. The § 404(b)(1) guidelines provide a frame into which the state can fit its program. To fill in the spaces between the regulations, the states often reach out to U.S. E.P.A. and the Corps for advice. U.S. E.P.A. provides guidance and clarification for the states, but cannot do much in the lead up in the package beyond advise.[35] The Corps also provides advice, and the experience of

[32] Leah Stetson, "Expanding the States' Role in Implementing CWA § 404 Assumption," *Association of State Wetland Managers*, November 18, 2010, http://www.aswm.org/pdf_lib/expanding_states_role_implementing_cwa_section_404_assumption_111810.pdf (accessed March 2014), 1.

[33] Deposit of refuse in navigable waters generally. 33 U.S.C.A. § 407 (2014).

[34] Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in. 33 U.S.C.A. § 403 (2014).

[35] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (May 6, 2014).

running dredge-and-fill permits for years. This dual consultation[36] process ostensibly helps states create a proposal that is both in compliance with the CWA's requirements, and would function as well as the Corps', once approved.

Yet while this process helps clarify the process, it also creates issues for the states. When states go to the Corps for help in structuring their dredge-and-fill program, the Corps would like to see their system replicated by the state.[37] However, it is EPA that is the approving authority for an assumption proposal, not the Corps.[38] While the Corps' model would function well, it presupposes that the Corps program is the best program that would work for the state, and subverts the innovation that a state could bring to an assumed program by building the new model off of the status quo.

What would help the states and tribes most is adding clarity to the regulations, which both EPA and the Corps have been trying to do so. Most of the regulations were written in 1988, and are "bare bones."[39] Regulatory clarity and better communication from the Federal Government, in general, would help clarify what the states and tribes should do; however, these agencies cannot do more without statutory changes.[40] "I would really like to see the regulations revised," said one EPA employee.[41] "I would like clarity on a few issues – whether that's in regulations or whether that's in

[36] I do not mean consultation as the term of art, but rather as the act of working with another jurisdiction for guidance.

[37] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (May 6, 2014).

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Ibid.

guidance…there doesn't have to be a prescribed process, but states need to have some kind of process."[42]

If the states had a frame of a process to go by, it would diminish some of the burdens on the state – namely, the time and money it takes to research new procedures.[43] However, a state must still have the flexibility to create a program that is tailored to its unique wetlands and political environment. "If you could piggyback off of another state's work, it would make it easier for other states to follow, but the cookie cutter approach to §404 just won't work," said an EPA employee.[44] There is no single approach that has or has not worked, when it comes to the states that have pursued assumption; and each state has different motivations, different wetlands, and different programs in place, so there is no one approach that works.[45] Additionally, many states have developed a wetland program without trying to meet the requirements of assumption, and must retrofit their existing programs rather than create a new program from scratch.[46]

The question then becomes how EPA and the Corps can guide the states when there is no one-size-fits-all approach. One answer is that the states are beginning to guide each other as they work through their proposal development. Alaska, for example, is hoping to become a leader for wetland protection, as it has such a large amount of the

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[42] Ibid.

[43] Ibid.

[44] Anonymous, interview by Aileen Carlos, *Alaska Department of Environmental Conservation*, (May 8, 2014).

[45] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (May 6, 2014).

[46] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

nation's wetlands and is building its wetland regulatory program from the ground up.[47] Oregon is also leading the way in program development through its extensive and long-term research into its assumption packages.[48]

The Association of State Wetland Managers ("ASWM") also helped fill in the gap between regulation and understanding by creating documents that help states that wish to assume. The documents were created with two purposes in mind: (1) to help a state or tribe interested in assumption navigate the murky waters, and (2) to discourage states that are interested in assumption because they want to get rid of Federal oversight and install a different level of protection provided to wetlands than is set forward by the CWA right now.[49] "By that, I mean less protection," said the interviewee from ASWM.[50] The documents also help provide state workers with a quick way to debrief their governor about assumption, without spending too much time and effort in research.[51]

This is not to suggest that EPA and the Corps are not making efforts to clear the regulatory morass. Both agencies have released guidance and reference documents to help clarify the regulations and respond to legal uncertainties, but guidance is often less-than reassuring for some states and tribes looking to assume. Said one interviewee, "[R]ather than getting the CWA fixed, they've been issuing guidance. The issue is that

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[47] Anonymous, interview by Aileen Carlos, *Alaska Department of Environmental Conservation*, (May 8, 2014).

[48] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (April 25, 2014).

[49] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[50] Ibid.

[51] Ibid.

guidance isn't set in stone…since [guidance] can be changed, it does not provide consistency."[52]

However, changing the CWA is not as simple as recognizing the issues and quickly stitching them up. It would take an act of Congress to change the language of the CWA, and once opened, the Act would be vulnerable to political attacks from multiple angles. Even if the positive changes could be adopted, an unlikely situation with the current political climate, it is an extraordinary risk to take – and one that many stakeholders would not support. As one EPA employee said, "With amending the CWA, there's such division about what waters should be regulated. If we go to Congress and say, "We'd like to fix these things," everyone is terrified that that little window would cascade into a lot of unfriendly changes to other parts of the Act."[53] While regulatory amendments are dangerous, it seems clear that some will need to happen eventually. Until then, the states, agencies, and groups working with wetlands will need to fill in those gaps.

Equivalency Does Not Mean Equal, But What Does It Mean

When a package is completed, EPA must look at the state's proposals and determine whether the state can provide "equivalent protection" as the Federal program; but what sounds simple on paper is not so in practice.[54] Equivalency causes issues at

[52] Anonymous, interview by Aileen Carlos, *Fond du Lac Band*, (May 13, 2014).

[53] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[54] Purpose and Scope. 40 C.F.R. 233.1(d) (2014). "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."

several different levels for the state, because it is difficult to define without simplifying it to mean "equal."

First, equivalency means that the state must build up its wetland regulation department, structurally. Most states must create a new infrastructure for compliance and enforcement, or expand existing infrastructure so it can enforce the new influx of permits. The practical side of this requirement is that the state must either hire new employees to staff the enforcement and compliance office, or train existing employees to perform the tasks – all at the expense of the state.[55] Again, there are very few states that are building a program from the ground up.[56] Almost every state that looks at assumption already has a pretty cohesive wetlands program in place, so the state is trying to mold the assumption proposal around a program that already exists.[57]

Second, a state has to demonstrate to EPA that its laws and regulations are equivalent to the Federal scheme, and if they are not, the state must make them so through statutory and regulatory amendments.[58] Such amendments require the support of political allies, key stakeholder groups, and the public support. This requires more investment into stakeholder meetings, legal meetings, and lobbying for the amendments.

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[55] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (April 29, 2014). Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[56] Alaska is the only cited example of a state that is looking at assumption as its first institutional wetland program. It currently works with SPGPs and water quality standards through the Corps.

[57] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[58] Environmental Protection Agency, *State or Tribal Assumption of the Section 404 Permit Program*, http://water.epa.gov/type/wetlands/outreach/fact23.cfm (accessed August 2014).

Because of this process, equivalency is often the catalyst behind many of the substantive issues that assumption draws up, like tribal relations and endangered species protection.

Third, equivalency causes an issue for state innovation, because it is difficult to determine what is equivalent when the state program does not replicate the Federal program. EPA authorities identified one of the major issues of assumption as the presumption that "equivalency means equal."[59] EPA has stressed in its communications with states that a successful assumption proposal package does not need to look exactly like the Federal package, yet this assurance falls shy of comforting the states. One interviewee pointed out that while the Office of Water may be confident in the state's innovation, it is very hard for legal counsel to evaluate anything but "exactly the same as."[60] And once the package changes from "exactly the same as," it is viewed with more skepticism.

For one, the assumption package must look equivalent enough to EPA legal counsel to get approval, yet these attorneys have no basis on which to compare the state's proposal *except* the existing Federal regulations.[61] The two successful assumption packages were approved decades ago, and were built under different laws and different regulations; neither the states nor EPA counsel can look to them as anything but persuasive guidance. So the states need to build a program that will look equivalent to the Federal scheme to the attorneys in Washington, D.C. who have likely never seen any

[59] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (May 6, 2014).

[60] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[61] Ibid.

proposal in their lifetime. The question that states have to answer is how do you create the equivalent to the 404(b)(1) guidelines without passing the 404(b)(1) guidelines? "Equivalency is an issue that is challenging for all parties," said one interviewee, "Not only do the states have to come up with an equivalent program with very few examples to work off of, but almost anyone at EPA doing the review of a program application is probably looking at the first application they have ever seen. The only thing that they have to compare it against is the CWA itself."[62]

Further compounding this issue is that states can rarely look to each other for guidance when it comes to innovative design for wetland protection. Generally speaking, if a state is trying to innovate in a particular aspect of wetland protection, the mere thought of innovation means that the state might be the leader in protecting that aspect of wetland protection. To unpack that statement, an interviewee gave the example of Maine trying to protect vernal pools.[63] The Governor reached out to her to discover what other states were doing to protect vernal pools so that Maine could enhance its existing protections.[64] What she found was that Maine was the only state that protected vernal pools, and was itself the frontrunner. So while states are generally shy to move beyond what is happening in other parts of the country, wetlands are so distinct in each state that it is difficult to avoid becoming the innovator.[65]

Although it seems ironic that innovation is something to shy away from, no state wants to run the risk of harming either wetlands or private property rights, or put itself at

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] Ibid.

an economic disadvantage versus other states.[66] Therefore, new ideas are generally regarded with a great deal of skepticism from the regulated community and regulators alike.[67] Said one interviewee, "When North Carolina wanted to do an enhancement and go out and evaluate where they wanted to do stream restoration for mitigation in the future, nobody liked this. It was a really tough road with a lot of opposition, but now, years later, they're the standard that everyone else is held to."[68] It is difficult to go forward with any innovation because stakeholders are nervous that the innovation will not work, or that the state is giving itself an economic disadvantage because it is regulating an area that other states do not regulate.[69] This brings us back to the economic versus environment paradigm that plays a role in many wetland decisions.

It Is Difficult, If Not Impossible, to Clearly Define "Adjacent Waters"

Possibly the most major roadblock to assumption is the unclear jurisdiction over the "adjacent waters" to navigable waters. There is a line between which waters are covered by Federal acts, and thus cannot be delegated, and which waters are under state jurisdiction. There is no hard-and-fast definition of the boundaries in either guidance documents or in regulations, so states and the Corps must create a method by which they divvy up the contested waters.

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[66] Ibid.

[67] Ibid.

[68] Ibid.

[69] Ibid.

Section 10 of the Rivers and Harbors Act grants the Corps full and unassumable authority over the "navigable capacity of any water of the United States."[70] The Clean Water Act also reserves certain waters to the exclusive jurisdiction of the Federal Government, including any water that has been, could be, or used to be used for navigation or interstate commerce, waters subject to the ebb and flow of the tide, and all waters and wetlands "adjacent to" any of the jurisdictional waters.[71] While some bodies of water are easily defined as navigable, or adjacent to navigable waters, there are many waters that are not easily discernible.

There are a multitude of definitions that conflict and overlap with one another that make it difficult to define waters that fall into the grey area. At any point, a water may be defined as navigable, adjacent, or isolated, and the determination can change depending on the agency answering the question. This is because the definition of navigability changes depending on the regulation that you check, the agency that you speak with, and if the Supreme Court decided a case dealing with navigability recently.[72]

Oregon's Corps offices try to navigate this by looking at the existing regulations and Supreme Court cases to get guidance on what is a navigable water and what is an adjacent water.[73] While there are some cases, like the Columbia River, where navigability

[70] Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in. 33 U.S.C.A. § 403 (2014).

[71] Definitions. 40 C.F.R. 230.3 (1993) (Proposed Regulation).

[72] I will not go into great detail regarding the issues that resulted from the *Rapanos* and *SWANCC* decisions, but for further reading, refer to the Association of State Wetland Manager's excellent summaries. *SWANCC*: http://www.aswm.org/wetlands-law/swancc-decision; *Rapanos*: http://www.aswm.org/wetlands-law/rapanos-carabell/2505-updated-handbook-helps-navigate-post-rapanos-clean-water-act.

[73] Anonymous, interview by Aileen Carlos, *Army Corps of Engineers*, (May 19, 2014).

is easy to define, other types of waters, like tidal waters, whose boundaries are difficult to define.[74]

When it comes to the undefined waters, the Corps must determine which adjacent waters still have enough of an impact on a navigable waterway that the Corps must retain jurisdiction. This process became more complicated when the Supreme Court overrode the Corps and EPA's interpretations of navigable waters and adjacent wetlands in the cases of *Rapanos v. United States*[75] and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[76] ("SWANCC"). The Court complicated both the determination of what waters are considered "adjacent to" navigable waters and also what waters are covered by the scope of the Clean Water Act.[77]

In both cases, the Supreme Court substituted its own definition of navigable waters and adjacent wetlands in the place of the agreed-upon definitions of the Corps and EPA, and created confusion in both the regulated bodies and the regulating authorities.[78] Thus, the Corps and EPA were left with a regulatory "quagmire" following the rulings,

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[74] Ibid.

[75] *Rapanos v. U.S.*, 126 S. Ct. 2208 (The Supreme Court, June 19, 2006). "…*only* those wetlands with a continuous surface connection to bodies that are "waters of the United States" in their own right, so that there is no clear demarcation between "waters" and wetlands, are "adjacent to" such waters and covered by the Act."

[76] *Solid Waste Agency of Northern Cook County*, 121 S. Ct. 675 (The Supreme Court, January 9, 2001). "We found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands "inseparably bound up with the 'waters' of the United States." (citing *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 155 (1985)).

[77] Peg Bostwick, *Salameander: Navigable, Adjacent, Assumable Waters? We need to distinguish between assumable and jurisdictional waters of the United States.*, October 13, 2013, http://aswm.org/wordpress/salameander-navigable-adjacent-assumable-waters/ (accessed April 2014).

[78] Ibid.

and had to create new regulations that reflected the Court's holdings. This quagmire also served to undermine the confidence of states and tribes that wished to assume.[79] Now, those that wish to assume had to build a program based on the current Corps regulations, but also work with the knowledge that the Supreme Court could change the scope of that jurisdiction at any point.[80] "We've been reluctant to jump into regulating the Federal program," one interviewee said, "because you may be working one way and have to change the way you're working. We don't want to backpedal, and we want to be as protective as possible."[81] And, the interviewee continued, "The Supreme Court doesn't know a wetland from a hole in its head."[82]

States have reacted in different ways to this new complication. For example, Oregon and the Corps have completed extensive mapping of the State's waterways to determine the navigability of each waterway, but determining adjacency and, subsequently, jurisdiction, is not as simple as mapping it out.[83] What often results is that the Corps must determine the boundaries of these waters on a case-by-case basis [84] Therefore, the scope of §404 programs is not easily definable. The Corps cannot transfer control of navigable waterways, and the states need clarity on where navigable waters end and assumable waters begin to develop its enforcement regime.[85] This contrasts with

[79] Anonymous, interview by Aileen Carlos, *Fond du Lac Band*, (May 13, 2014).

[80] Ibid.

[81] Ibid.

[82] Ibid.

[83] Memorandum of Agreement with the Secretary. 40 C.F.R. §233.14 (1994).

[84] Ibid.

[85] Permits for dredged or fill material. 33 U.S.C.A. § 1344(g) (2014).

what states want – as one of their primary motivations for assumption is to make the permit process easier for applicants to predict.

Additionally, states cannot look to the successful §404 programs because both Michigan and New Jersey determined the scope of the assumable waters before the *Rapanos* and *SWANCC* decisions changed the definition of navigable waters, and so were able to assume permitting before the regulatory environment became so convoluted.[86] As one interviewee put it, "§ 404 Assumption is much more difficult now than it was in the 1980s and 1990s, because of how much the program has changed from court cases, and legal challenges."[87] Michigan, for example, had a system based on "connection by flowing water,"[88] and New Jersey used a brightline rule to define adjacent wetlands as those within 1,000 feet of navigable and tidal waterways.[89] While both states will have to work with the Supreme Court holdings, the process will be through revisions, rather than creating an all-new program and thus will not resemble what a state would have to do to create a simplified way to deal with adjacent waters.[90]

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[86] Bostwick, *Salameander: Navigable, Adjacent, Assumable Waters? We need to distinguish between assumable and jurisdictional waters of the United States.*

[87] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (April 25, 2014).

[88] "What's Assumable?," *Oregon Department of State Lands*, March 1, 2012, http://www.oregon.gov/dsl/PERMITS/docs/404_assumwaters_present_030112.pdf (accessed March 2014).

[89] Ibid.

[90] For a glimpse at Michigan's process of amending its wetlands program to comply with *Rapanos* and *SWANCC*, see: Michael H. Perry, "2013 Public Act 98 Significantly Changes Michigan's Wetlands Protection Program," *FraserTrebilcock Blog*, August 16, 2013, http://www.fraserlawfirm.com/resources/blog/2013-public-act-98-significantly-changes-michigans-wetlands-protection-program/ (accessed June 2014).

EPA and the Corps drafted a new rule, now in the comment period, which tries to clarify the Supreme Court rulings and the day-to-day of wetlands permitting. The new rule makes changes to the definitions of significant nexus, defines tributaries, and redefines neighboring waters.[91] Adjacency is currently defined as "bordering, contiguous or neighboring," and the proposed rule would expand the definition to specify that "neighboring" means "waters located within the riparian area or floodplain or a water identified in paragraphs (a)(1) through (5), or waters with a shallow subsurface hydrologic connection or confined surface hydrologic connection to such a jurisdictional water."[92] It would also change "adjacent wetlands" to the more expansive "adjacent waters," to include the other bodies of water that are connected to waters of the U.S.[93]

To work with the inconsistencies and overlaps, states can assume joint control of some waters along with the Corps – which means that the parties must determine how joint jurisdiction will work for issuing permits.[94] However, this coordination does not always create a solution that is palatable to the regulated audience. In fact, this

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[91] *Federal Register*, "Proposed Rule: Definition of "Waters of the United States" Under the Clean Water Act.," April 26, 2014.

[92] For a discussion of the new rule, see: Margaret N. Strand, *Clean Water Act Jurisdiction Proposed Rule Released: Would Expand Federal Jurisdiction over STreams and Wetlands*, April 4, 2014, http://www.mondaq.com/unitedstates/x/304682/Environmental+Law/Clean+Water+Act+Jurisdiction+Proposed+Rule+Released+Would+Expand+Federal+Jurisdiction+over+Streams+and+Wetlands. Last updated April 4, 2014. (accessed May 2014).

[93] Ibid.

[94] The Association of State Wetland Managers; The Environmental Council of the States, "Clean Water Act Section 404 Program Assumption: A Handbook for States and Tribes," *Oregon Department of State Lands*, August 2011, http://www.oregon.gov/dsl/PERMITS/docs/cwa_section_404_program_assumption.pdf (accessed March 2014), 31.

jurisdictional difficulty was another reason why Oregon halted its assumption process.[95] Much of Oregon's water is held in big, navigable rivers that could not be assumed from the Corps' jurisdiction, and is currently permitted through a "joint permit" process, that streamlines the multiple agency permits for applicants.[96] The Corps and the Oregon Department of State Lands worked together to create a permit that would simplify the application process, and currently use a joint application that allows applicants to fill out a single application for both agencies' requirements.[97] Assumption does not eliminate the need for some joint jurisdiction, and the post-assumption model did not improve enough upon the current model to justify the change, and the assumption plans were scrapped.[98]

Before the new rule was promulgated, EPA suggested several options for Oregon's newest attempt towards: (1) negotiate a fixed distance from a navigable/tidal waterway, like the New Jersey program, (2) continue with case-by-case analyses with defined parameters, like Michigan's "continuous source connection," (3) limit it to wetlands within 100-year floodplain of navigable or tidal waterway, (4) map tidal wetlands, or (5) create a novel solution. Oregon cannot follow Michigan or New Jersey exactly, however, because Oregon's unique hydrology means that its wetlands often span for miles and cannot be easily defined.[99] DSL has been working with the Corps to create a plan for how the agencies can work together to define assumable waters without a case-

[95] Stetson, "Expanding the States' Role in Implementing CWA § 404 Assumption," 5.

[96] Anonymous, interview by Aileen Carlos, *Department of State Lands*, (April 29, 2014).

[97] Ibid.

[98] Ibid.

[99] Ibid.

by-case analysis, and as of April 2014, DSL has requested clarification from the Federal EPA as to which waters are assumable.[100]

The Only Funds Available for Wetland Regulation Are for the Development of a Program, Not the Implementation of One

The financial cost of implementing a new program is extravagant, and is often difficult, if not impossible, for states to manage without Federal assistance. The Federal government provides grants for the development of a wetland program, but these grants do not continue once a program is implemented.[101] However, the state absorbs responsibility for a large number of new tasks immediately upon assumption, and must hire or train staff to handle the permits and both endeavors cost the state enormously.[102] For example, when Virginia examined assuming §404, its research found that the program would cost the state an additional $4 million per year beyond the cost of its existing wetlands program to increase its staff and administrative resources.[103] It would have had to more than double the size of its existing program, without including indirect costs like rent.[104]

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[100] See Appendix 1 for the letter.

[101] United States Environmental Protection Agency, *Water: Wetlands Program Development Grants*, http://water.epa.gov/grants_funding/wetlands/grantguidelines/ (accessed March 2014).

[102] Anonymous, interview by Aileen Carlos, , *Department of State Lands*, (April 29, 2014).

[103] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (May 8, 2014);Virginia Department of Environmental Quality, "Study of the Costs and Benefits of State Assumption of the Federal § 404 Clean Water Act Permitting Program," *Association of State Wetland Managers*, December 2012, http://www.aswm.org/pdf_lib/va_study_state_assumption_2012.pdf (accessed May 2014).

[104] Ibid.

In an EPA report, members of EPA's Wetlands Division interviewed nine states,[105] and found that the lack of implementation funds is a "threshold barrier to assumption."[106] Seven out of the nine states recommended that EPA provide Federal funding for implementation.[107] Once the development stage is completed, states are generally left to their own devices when it comes to funding.[108] Virginia,[109] Florida,[110] and Minnesota,[111] for example, have all pointed to lack of Federal funding in the implementation phase as one of the major roadblocks to dredge-and-fill assumption.

In general, states fund about 80% of the process, and the Federal government gives about 20%.[112] The issue is not that states cannot, or will not, make the investment,

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[105] Florida, Kentucky, Maryland, Michigan, New Jersey, North Dakota, Oregon, Virginia, and Wisconsin.

[106] Kathy Hurld and Jennifer Linn, "Pursuing Clean Water Act 404 Assumption: What States Say About the Benefits and Obstacles," *Association of State Wetland Managers*, May 30, 2008, http://www.aswm.org/pdf_lib/hurld.pdf (accessed May 2014).

[107] Ibid., 13.

[108] Stetson, "Expanding the States' Role in Implementing CWA § 404 Assumption."

[109] Virginia Department of Environmental Quality, "Study of the Costs and Benefits of State Assumption of the Federal § 404 Clean Water Act Permitting Program."

[110] Florida Department of Environmental Protection, "Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)," *Association of State Wetland Managers*, September 30, 2005, http://www.aswm.org/pdf_lib/consolidation_program.pdf (accessed March 2014)., 9

[111] Minnesota Department of Natural Resources Division of Waters, "State of Minnesota Federal Section 404 Assumption Feasibility Study," *Association of State Wetland Managers*, August 31, 1989, http://www.aswm.org/pdf_lib/404_assumption_feasibility_study_0509.pdf (accessed March 2014), 7.

[112] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

but rather that the cost share is incredibly important to have as an incentive when convincing legislators to move forward.[113] When a program is trying to be developed and trying to prove it can work, the state needs to prove that the program is financially worth doing.[114]

Some states work around the lack of implementation funding by having specific taxes or revenues set aside for their program, like Alaska and Oregon.[115] Alaska's funding is coming from the tax on resource extraction, primarily mining, oil, and natural gas development, and Oregon's DSL is a land management agency that generates revenues from state lands.[116][117] These states are able to build a budget based on these revenues, but for states with budgets based on fees, it is difficult to ask them to fund the whole program on fees alone.[118] Said one interviewee involved with Virginia's assumption program, "Our permit fees are hefty and fund about 40% of our programs. There's no way we could have increased our fees. Nor would our permittees want to pay an increased cost, because the corps permits are free."[119]

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[113] Ibid.

[114] Ibid.

[115] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (April 25, 2014).

[116] Anonymous, interview by Aileen Carlos, *Alaska Department of Environmental Conservation*, (May 8, 2014).

[117] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (April 25, 2014).

[118] Ibid.

[119] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (May 8, 2014).

But there are also down sides to programs that are funded through taxes and revenues. In Alaska, there are fears that the resource-based revenue will promote development, because the government is paid by development.[120] "It is a legitimate concern," said an interviewee working on Alaska's program.[121] They are trying to mitigate fears by completing resource data collection to identify the critical, valuable wetlands, and then set those aside and make sure there is no development there.[122] "What we've been trying to tell people is that Alaska has about 65% of the nation's wetlands; and 43% of our state is considered a wetland.[123] We don't have a lot of information about the wetlands that we have, but we also want to find the lower-value wetlands and say that if we're going to develop, we want to develop here first."[124]

Each state looking to assume must assess its ability to fund the implementation of the program, and each avenue carries with it different concerns. Every person interviewed for this project cited the lack of implementation funding as a major roadblock to assumption, and both EPA employees interviewed placed it in their "wish list" for regulatory amendments.[125]

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[120] Anonymous, interview by Aileen Carlos, *Alaska Department of Environmental Conservation*, (May 8, 2014).

[121] Ibid.

[122] Ibid.

[123] Ibid.

[124] Ibid.

[125] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (April 25, 2014). Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (May 6, 2014).

Assumption Removes the Protection of the Endangered Species Act

The ESA is commonly perceived as the strongest environmental protection statute in the Federal government, and imposes strict requirements on any discretionary agency action undertaken.[126] Among these requirements is the § 7 duty to consult with the U.S. Fish and Wildlife Service ("USFWS") and NOAA Fisheries when an agency action may affect a listed species.[127] The purpose of § 7 consultation is to ensure that the proposed Federal action will not jeopardize a species, either by direct impact or by adversely impacting its critical habitat.[128]

However, this duty to consult only applies to Federal actions, and does not carry over to states. Additionally, with assumption, EPA determined that it is not required to consult with the Services when it transfers permitting authority to a qualified state, and this is because when EPA determines that a state's application meets the §404(g) guidelines, EPA is compelled to approve the application.[129] Because it is compelled to approve the application, it is not a discretionary agency action that would trigger §7(a)(2)'s consultation and no-jeopardy requirements.[130] But while § 7 consultation does not apply to either the states or to the transfer of authority from EPA, states are still required to provide some protections for endangered species and EPA still has the

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[126] The Endangered Species Act. "Interagency Cooperation."16 U.S.C.A. §1536 (2014).

[127] Ibid.

[128] Ibid., § 1536(a)(2) "[N]ot likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."

[129] Peter S. Silva, "Letter from EPA Regarding Endangered Species Act Consultation," *Oregon Department of State Lands*, December 27, 2010, http://www.oregon.gov/dsl/PERMITS/docs/404_epa_reply_on_esa_consult.pdf.

[130] Ibid., Citing 551 U.S. 644, at 673.

responsibility to review permits for "[d]ischarges with reasonable potential for affecting endangered or threatened species as determined by USFWS."[131]

Despite those assurances, the interplay between states and endangered species protection remains a major roadblock for the assumption process, as states must find a way to provide equivalent protection to the ESA without having the actual strength of ESA backing it. Michigan and New Jersey were able to overcome the roadblock by instituting additional measures. Michigan, for example, screens the permit applications it receives for impacts to endangered species, and publishes a public notice for EPA and the USFWS to review.[132] New Jersey similarly engages with USFWS early on in the application process to ensure protection.[133] In Oregon's prior attempts, however, the differences between the ESA and the State's own endangered species protection program had not been reconciled, largely because of the extent of protected anadromous fish habitat in the state.[134] Additionally, since Oregon believed that its program would be subject to consultation before approval, it ceased its efforts towards assumption.[135] Once

[131] Ibid., Citing 40 C.F.R. 233.50(b).

[132] The Association of State Wetland Managers; The Environmental Council of the States, "Clean Water Act Section 404 Program Assumption: A Handbook for States and Tribes," 27.

[133] Ibid.

[134] Ibid.

[135] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

EPA clarified that it would not need to consult with the services to approve a package, Oregon reopened its assumption investigation.[136]

The states, however, still face issues when it comes to endangered species protection. First, when a state is creating its equivalent endangered species program, it must be very creative. States need to figure out how to comply with § 7 so as to avoid prosecution from the Services and from third-party citizen suits, like environmental advocates.[137] However, states cannot simply recreate § 7, because states are not a Federal agency and are not subject to §7 regulations.[138] Therefore, states like Oregon are looking to follow § 10, but that section of the ESA does not have as much history and case law to follow as a guideline for states.[139] Section 10 of the ESA requires an incidental take permit when a non-Federal action will jeopardize an endangered species or its critical habitat.[140] Section 10 also requires the creation of a habitat conservation plan that outlines how the project will mitigate and minimize the harm to endangered species and critical habitat.[141] These incidental take permits and habitat conservation plans allow a landowner to "legally proceed with an activity that would otherwise result in the illegal take of a

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[136] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (April 29, 2014); Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[137] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (April 29, 2014).

[138] Ibid.

[139] Ibid.

[140] U.S. Fish and Wildlife Service, "Habitat Conservation Plans: Section 10 of the Endangered Species Act," *U.S. Fish and Wildlife Service*, December 2005, http://www.fws.gov/endangered/esa-library/pdf/HCP_Incidental_Take.pdf (accessed August 2014), 1.

[141] Ibid.

listed species."[142] These standards may seem easy enough to replicate, but there are few concrete examples that a state can follow to recreate § 10, and most of those interviewed said that there are not clear precedents for states, either practically or legally.[143]

So while the clarification from EPA helped states remove one layer of uncertainty, it did not help figure out what to do with compliance with the ESA.[144] "That's why EPA tried to work with the services to ID potential procedures to consider for Department of State Lands ("DSL") to comply with ESA. Back in March, they finalized their reports. There's still no "easy button," but they looked at all the tools available and developed what they thought was a logical approach."[145]

Oregon intends to develop a memorandum of agreement between its DSL and the Services that would outline a coordination that would allow the Services to be part of DSL's decisionmaking process.[146] DSL is hoping that this would allow time to work out the issues with the process while it works on a Habitat Conservation Plan that would outline the checks and balances of how species would be protected, and authorize takes

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[142] Ibid.

[143] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (April 29, 2014). Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014). Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (April 25, 2014).

[144] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (April 25, 2014).

[145] Ibid.

[146] Ibid.

from the Services for DSL's program.[147] It is seen as a huge undertaking, but DSL believes that it is the only way the state can have liability coverage from citizen-suits.[148]

But the purpose of developing a strong program is not to obtain liability coverage, although this is a benefit, but to protect endangered species. Section 7 protections ensure strong protections for endangered species, and Oregon would like to see those extended as much as environmental advocates and other stakeholder groups.[149] Oregon is working with the Regional EPA to put together a proposal on how the state will ensure ESA compliance.[150] DSL is hoping to receive an EPA grant to do a pilot study and take the proposal and put it into action by running a simulation.[151] This pilot study would allow interested, and invested, a stakeholder to see the post-assumption protection scheme before assumption is actually approved.[152] DSL plans to conduct the study on a voluntary basis, hire biologists, and review applications in the same manner as the Corps.[153] The intended outcome of the study is to see how much time and effort is necessary to maintain an equivalent program and test its efficacy.[154]

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[147] Ibid.

[148] Ibid.

[149] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014); Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (April 25, 2014).

[150] Ibid.

[151] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[152] Ibid.

[153] Ibid.

[154] Ibid.

The outcome of this test is intended to build trust with the regulated community and with stakeholders interested in protecting endangered species.[155] As mentioned in depth in the political momentum section, one of the largest issues for states looking to assume is building trust with the Services, the stakeholders, and the regulated community.[156] DSL believes that one of the first things it needs to do is prove that it understands the process as well as the Services.[157] To do that, DSL believes cannot merely show a theory or proposal, but provide proof of actual behavior for the stakeholders and the Services to evaluate. [158]

Tribes Are Sovereign Entities Similar to States, Themselves, and Cannot be Combined with Other Stakeholder Groups

The interaction between tribal communities and assumption is significant, and is complex enough to merit its own research. I have neither the cultural authority to presume to speak for any tribal entity, nor the right to do so, and so I will only briefly outline some of the issues that tribes may face from assumption, and some of the ways that a state could approach creating a partnership with the tribes.

To begin, there are two separate realms of issues for tribes when it comes to assumption. The first realm is when a state approaches the tribal entities within the state for feedback and comment on an assumption proposal. The second is when the tribe, itself, is acting as a regulating authority. Both realms have complexities for the tribes and the states that newer processes might help eliminate.

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[155] Ibid.

[156] Ibid.

[157] Ibid.

[158] Ibid.

Tribes as a regulated body worry about being recognized as a sovereign partner to states, rather than a stakeholder group, and that the same level of protections afforded by the ESA and the Cultural Resources Act will continue under state management. Neither of these issues is a quick fix for any state that wishes to assume. Oregon shifted its approach towards its tribes, starting with a webinar held on May 9, 2014.[159] A Department of State Lands employee noted that the department is trying to build a network with the tribes slowly, and are focusing on a long-term engagement strategy.[160]

DSL began a meaningful shift in its tribal relations a few years ago, when an employee wrote a paper looking into the deficit of what state regulation could do for tribes versus what Federal regulation could do for them.[161] DSL was in the process of developing its most recent assumption program, and reached out to the tribes this year for a webinar specifically designed to solicit feedback on how best to communicate with the tribes.[162] DSL presented the program to about twenty-five tribal representatives and state and Federal employees.[163] DSL aimed to get the representatives' feedback, gauge their interests, and then develop a strategy based on the entire scope of their interests –

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[159] Oregon Department of State Lands, "Tribal Webinar: Summary ," *Oregon Department of State Lands*, May 9, 2014, http://www.oregon.gov/dsl/PERMITS/docs/Tribal%20Webinar%20notes%205_9_14%20%283%29.pdf (accessed May 2014).

[160] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[161] Ibid.

[162] Oregon Department of State Lands, "Tribal Webinar: Summary."

[163] Oregon Department of State Lands, "OR 404 Assumption and Tribal Engagement Webinar Participants," *Oregon Department of State Lands*. http://www.oregon.gov/dsl/PERMITS/docs/Webinar%20Participants.pdf (accessed May 2014).

including the geographic location of the interests and the particular topics of interest.[164] DSL employees had an idea about some of the tribal issues from the previous assumption attempts, but wanted to hear from the tribes about how to deliver §106 protection, and how to protect the endangered fish species.[165]

One DSL employee was frank, and said, "I have no background in tribes, so this is me and my learning curve."[166] The webinar was geared towards educating the state employees on how and when to communicate with the tribal entities.[167] The ultimate goal of this webinar was to create a system of communication that would lead to a memorandum of agreement, or a "tribal collaborative plan" that describes a working mechanism for where and when the tribes can give their input.[168] Right now, for example, now, tribes can make comments on the website.[169] However, after the webinar, DSL learned that many of the tribes represented would prefer to hear important news from the state directly, through a face-to-face interaction.[170] While webinars and other electronic methods of communication were sufficient for minor updates, any information more important than that merits a face-to-face meeting.[171] Through this webinar, DSL confirmed the tribal concerns surrounding the Endangered Species Act and the Cultural

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[164] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[165] Ibid.

[166] Ibid.

[167] Ibid.

[168] Ibid.

[169] Ibid.

[170] Oregon Department of State Lands, "Tribal Webinar: Summary."

[171] Ibid.

Resources Act.[172] But some of the information gained from the webinar was new to DSL, and that was exactly the point of the meeting.

What DSL recognized before this webinar is that it was not necessarily seeking feedback on a particular issue, like endangered species protection, but on how to restructure an entire existing relationship surrounding endangered species protection.[173] "[Assumption] is an administrative way of restructuring government," continued the DSL employee.[174] Assumption's impact goes beyond a single project, like a contract or a grant application, and is actually the Federal government delegating Federal power to the state and completely restructuring the existing governmental structure overnight.[175]

To repeat an important point from earlier, DSL recognized that there was a huge learning curve, when it came to the tribes and their issues.[176] DSL already knew that it could not approach "tribal issues" as if all tribes spoke in one voice, but learned that the way to think about tribes is not as a large stakeholder groups, but as nine sovereign governments in addition to Oregon.[177] As an interviewee from Alaska said, "I think the biggest tribal concern is the loss of government-to-government relationship."[178]

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[172] Ibid.

[173] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[174] Ibid.

[175] Ibid.

[176] Ibid.

[177] Ibid.

[178] Anonymous, interview by Aileen Carlos, *Alaska Department of Environmental Conservation*, (May 8, 2014).

Post-assumption, it is a three-party tier of sovereign entities interacting with the state, the tribes, and the Federal government.[179] The tribes are not a stakeholder group, but akin to a government agency, which means that DSL must have the same level of institutional agreement as it would have with the Services or the Corps.[180] As with these Federal agencies, DSL recognized that it needed to institutionalize the government-to-government relationship for all of their future meetings.[181] "I know we have meetings, but I don't know how effectively DSL is using them to institutionalize that relationship and get information about the wetland and waterway program," said one DSL employee.[182]

DSL has changed its perspective of assumption to a long-term, institutionalized goal, and so is able to concentrate on restructuring the government relationship.[183] Going forward, it will be looking to institutionalize the wetland program with the tribal programs and restructure the government processes.[184]

There are several additional issues that arise when the tribes look to assume control over its own wetland permitting. Tribes, as the regulating authority, have the additional burden of having to prove its statehood to EPA – essentially prove that it exists

[179] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[180] Ibid.

[181] Ibid.

[182] Ibid.

[183] Ibid.

[184] Ibid.

and has the ability to govern itself.[185] A tribe must also work with the ongoing changes brought by Supreme Court cases and changing EPA guidelines, which impacts not only their ability to permit, but also in their ability to prove that they exist as a functioning government in the eyes of the Federal Government.[186]

For this process, called treatment in the same manner as a state ("TAS"), the tribe would have to prove that they are a tribe, prove that they have jurisdiction, and then demonstrate that they can assume the wetlands program.[187] The *SWANCC* and *Rapanos* cases made it more difficult for tribes to assume, because the way the holdings impacted Federal jurisdiction then impacted the scope over which the tribe had to prove jurisdiction to gain statehood in the eyes of the Federal Government.[188] One interviewee's tribe is hesitant to start this TAS process because it may need to backpedal or adjust their proposal, if Federal jurisdiction changes again.[189] It creates tension between the tribes and the Federal government when the tribes do not know what is for certain, and what they will be required to do to gain recognition as a sovereign government.[190]

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[185] Anonymous, interview by Aileen Carlos, *Fond du Lac Band*, (May 13, 2014).

[186] Ibid.

[187] "Procedural Steps for Processing Tribal Applications for TAS Eligibility for the Clean Water Act Water Quality Standards and Certification Programs," *Environmental Protection Agency*, http://www.epa.gov/tribalportal/pdf/tas-strategy-attach-a.pdf (accessed June 2014).

[188] Anonymous, interview by Aileen Carlos, *Fond du Lac Band*, (May 13, 2014).

[189] Ibid.

[190] Ibid.

This interviewee also said that the uncertainty trickles down to their permit applicants, because some back off from a project due to the uncertainty of the program, since the applicants cannot trust that the circumstances will not change in the midst of a project.[191] These changes increase costs for applicants in two ways: either by forcing the applicants to make changes to their plans, or by delaying the permit approval (thereby drawing out the length of the project).[192] Many applicants would prefer to receive a quick rejection rather than a long, drawn out yes.[193]

The changing scope of the Federal program means that the tribes are nervous to begin the TAS process, knowing that the requirements may change at any time, and the permit applicants are nervous to work with the tribes for the same reason. Both entities worry about the cost and time involved with these processes, especially when there is not a set timeline for the projects.

Wetland Regulation Conflicts with Private Property Rights

A question that remains is how to balance the protection of wetlands with the protection of property rights. Both state and Federal agencies have implemented mitigation measures that attempt to slow the destruction of wetlands,[194] but these efforts are limited due to the fact that most wetlands are not in the hands of the government, but in those of private property owners.[195] Over seventy-five percent of the remaining

[191] Ibid.

[192] Ibid.

[193] Ibid.

[194] See Environmental Protection Agency, "Compensatory Mitigation," *Water: Wetlands*, http://water.epa.gov/lawsregs/guidance/wetlands/wetlandsmitigation_index.cfm (accessed June 2014).

[195] Zinn and Copeland, "Wetland Issues," 3.

wetlands are in the hands of private parties,[196] which means that any protection of wetlands invariably imposes on a property owner's right to do what she wishes with her land.[197] However, these regulations are vital to both conserve the remaining wetlands and to rebuild lost wetland areas. Wetlands provide crucial services to a thriving ecosystem, acting as flood and pollution control, for example, and support a diverse array of plant and animal life.[198]

One popular method, as mentioned before, is wetland mitigation. Corresponding with George W. Bush's "No Net Loss" approach to wetlands, the Corps and EPA rolled out a National Wetlands Mitigation Action Plan in 2002,[199] and incorporated the plan into Final Compensatory Mitigation Rule.[200] The plan ostensibly allows permit applicants to avoid or replace any wetland destruction that results from their project. It seems like a win-win situation – the project can go forward without causing too much harm to the environment. As one interviewee said, "There are sociological and philosophical hurdles with wetlands, and mitigation is seen as the solution for that…It scares people that

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[196] Ibid.

[197] Ibid.

[198] Ibid.

[199] "National Wetlands Mitigation Action Plan," *Environmental Protection Agency*, December 24, 2002, http://water.epa.gov/lawsregs/guidance/wetlands/upload/2003_07_10_wetlands_map1226withsign.pdf (accessed June 2014).

[200] Army Corps of Engineers and Environmental Protection Agency, "Compensatory Mitigation for Losses of Aquatic Resources; Final Rule ," *Federal Register*, April 10, 2008, http://water.epa.gov/lawsregs/guidance/wetlands/upload/2008_04_10_wetlands_wetlands_mitigation_final_rule_4_10_08.pdf (accessed July 2014).

[projects] can have a large impact and that the regulations are confusing and complicated."[201]

While mitigation seems like the ideal solution on paper, there are no studies to show whether or not it actually works on the larger scale.[202] "In some areas, [mitigation has] worked better, and I don't think anyone has a handle on what, nationally, the scorecard really is."[203]

While government entities have been trying to figure out a way to work within that balance, legal challenges against regulation have been largely, and notably, successful.[204] These legal successes mean that the balance between protection wetlands and property rights is ever changing. "The whole takings area is getting murkier," said one interviewee, "Private property rights wax and wane with respect to the most recent decisions."[205] And when rights are unclear, they are hard to defend.

The crux of the issue becomes: how do property owners build without harming wetlands, and how can wetlands be protect without harming business? "There's this paradigm in peoples' minds that you have to choose environmental protection or economic growth," said one interviewee.[206] Indeed, many view regulations as an

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[201] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[202] Ibid.

[203] Ibid.

[204] Infra "It is Difficult, if not Impossible, to Clearly Define 'Adjacent Waters.'"

[205] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[206] Ibid.

impediment to the growth of the economy, although this idea does not hold up under some analyses and studies.[207]

It is certain, though, that the impact wetland regulation *can* have on economic growth is extraordinary. Highway projects were cited as one example.[208] Highway improvement projects have long timelines that may not take wetland areas into consideration until late in the process.[209] Once confronted with it, though, the cost of mitigation can hold up the project, or postpone it altogether until an alternative option is created.[210]

This type of regulatory impact is considerably larger than other environmental statutes, except perhaps the Endangered Species Act. For example, with the Clean Air Act, new anti-air pollution standards may force a permit applicant to make changes to their projects, but these are often incremental chances like adding an apparatus to cars.[211] These incremental changes are at a minimal cost to the public. However, if the applicant has an area of land with a large wetland, and wants to do something that involves destroying or filling that wetland, the cost of that action can be very significant.

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[207] Naveena Sadasivam, *Underwater: Why the EPA is struggling to combat pollution*, July 27, 2014, http://www.salon.com/2014/07/27/under_water_why_the_epa_is_struggling_to_combat_pollution_partner/; http://www.ft.com/cms/s/2/8e42bdc8-0838-11e4-9afc-00144feab7de.html#slide0 (accessed July 2014).

[208] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[209] Ibid.

[210] Ibid.

[211] Ibid.

When it comes down to it, the current opinion of wetland regulation seems to be that it unduly imposes on private property rights and economic growth. As one interviewee said, "You can evaluate, you can mitigate, you can say no. But that can have a pretty devastating impact on an individual person's ability to continue. It's the public's view of wetlands and the public's view of the individual's responsibility to protect or to not protect the wetland, and there's not a lot of social pressure right now to protect the wetlands."[212]

Obtaining and Maintaining Political Buy In Is Difficult, Through the Lens of Oregon's Attempts

It is vital to remember, though, that assumption is, at its core, a political process. A state will only look into assumption at the request of its Governor, and the Attorney General's memo must assure EPA that the laws of the state can provide equivalent protection as the Federal program. What is implicit in this requirement is that the laws of the state must be amended if the existing laws are not "equivalent." Assumption must have enough political popularity to spur the Governor's request, and then maintain enough political momentum to pass the needed amendments through the legislature and the public. While the lead up to assumption typically allows the state time to address the major public and political concerns about assumption, it is difficult to maintain the political momentum throughout the entire process.

Oregon, for example, began its first foray into assumption in 1995 and spent the next several years building public support for state assumption and the legislative

[212] Ibid.

changes needed to meet equivalency.[213] The state convened meetings with stakeholders, conducted outreach, and asked the constituents about what kind of wetland program they would like – a State Programmatic General Permit, assumption, or for permitting to remain with the Corps.[214] Most chose to go towards state oversight, because although the Corps had always done a good job, the issues at hand during that session – notably, the listing of many salmon species – led the stakeholders to believe that the state could better protect its own waters.[215] "[Assumption] was seen as good for the salmon, because it would give the state more control over the outcome and the activities occurring in the salmon streams. That's why we got everyone, from the fisherman to the environmentalists, on board, because everyone perceived that it would be a better deal than relying on the Federal government." said one state worker involved with this process.[216]

The argument that states can take closer care of their resources than a Federal agency is especially strong when it comes to wetland regulation. "The states are in charge of the other parts of the CWA, by and large, so that you have the situation now with a Federal agency that issues no other part of the CWA," said one interviewee, "They've just got this one piece of the CWA, and while the divisions do a great job and the people do a great job, they've got this one little piece of the CWA and may miss the bigger

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[213] Oregon Department of State Lands, *404 Assumption Planning*, http://www.oregon.gov/dsl/PERMITS/Pages/404_assumption.aspx (accessed March 2014).

[214] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[215] Ibid.

[216] Ibid.

picture and may miss the larger importance that may come into play with the permits. It inhibits good, consistent, repeatable decisions."[217]

In Oregon, the initial momentum for assumption was lost because of concerns regarding ESA consultation.[218] Once EPA clarified that states did not need to consult, and then Oregon picked its assumption efforts back up in 2001.[219] This time, the momentum lasted to pass the bill[220] for the necessary amendments through both houses, but it needed one more act to get permission from the legislature to start assumption.[221] However, the political momentum died while DSL was working on the resolution, and the efforts ceased to be a priority. "What we lacked is that it was not a priority of the state. It was something that the stakeholders went along with, but it's got to be a top priority for the state. It can't be carried forward by an agency, it has to be taken by the state," said one interviewee.[222] Agencies are more susceptible to changes over time and political agendas

[217] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[218] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[219] Ibid.

[220] Senate Bill 172. Oregon Legislative Assembly, "Summary of Major Legislation," *Oregon Legislature*, 2001, https://www.oregonlegislature.gov/citizen_engagement/Reports/2001SummaryOfLegislation.pdf (accessed August 2014), 85. "SB 172 revises state law to make it compatible with Federal requirements as a step toward allowing the Division of State Lands (DSL) to assume administration of the Federal Clean Water Act dredge and fill permitting program."

[221] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[222] Ibid.

than the state at large, and so if the state loses interest in assumption, the package fails.[223] "The moral of the story," continued the interviewee, "is that if you've gone to the trouble of moving forward with an initiative like this, the state cannot let the momentum fall apart."

Since it is a political decision, ultimately, the states need to get broad support and address the separate stakeholder groups' interests and concerns. Generally speaking, developers would like to keep the comfort of the status quo, and need reassurance that the difficulty of getting a permit will not increase.[224] Environmental advocates are concerned about the loss of Federal protection, and the comfort of the strong Federal environmental statutes.[225] Environmental advocates fear that even if the state has a program that is "equivalent to" the Federal program on paper, the process will not be "equivalent to" in application.[226]

It is difficult to build trust in an unknown, untested process; yet establishing those trusted relationships is critical for achieving assumption.[227] "There is a 'chicken before the egg' issue with getting the stakeholders on board," said one interviewee.[228] The stakeholders want an assurance that the state program will be protective enough to ease

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[223] Ibid.

[224] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (April 29, 2014).

[225] Ibid.

[226] Ibid.

[227] Ibid.

[228] Ibid.

their concerns about losing Federal jurisdiction, but the state cannot create a program without first getting stakeholder buy in.[229]

Additionally, there are not a lot of motivations to get the other Federal agencies to work with the state on assumption, because, from their perspective, assumption creates the risk of losing funding, jobs, and creates uncertainty for the areas under Federal protection.[230] A lot of negotiations have to happen between the state and the Federal agencies to figure out the legislation and how the state can replace the legislation that disappears when the assumption package is approved.[231] Once the package is approved, the permits become state actions, and regulations like the Cultural Resource Act and the ESA do not apply, so the Federal agencies want to make sure their interests are still protected post-assumption – whether that be their employees or their former jurisdiction.[232]

DSL is now taking a long-term view towards assumption.[233] It has made assumption an institutionalized agency goal to work towards over the next few years.[234] It is engaging with development and environmental stakeholder groups to discuss regulatory streamlining, and meeting with Federal agencies to study what their portion

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[229] Ibid.

[230] Ibid.

[231] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[232] Ibid.

[233] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[234] Ibid.

would look like, how their offices work.[235] DSL would try to replicate the Federal manner of operation whenever possible, as concerned to staff and administrative roles.[236]

"The first time, it got kicked off by the hit over the head of the legislature with the mandate to assume it or lose it," said one state employee.[237] "This time, it's been institutionalized, which is more realistic…you don't have this massive ground swelling of support, but it's done more rationally now and making incremental progress."[238] Oregon is looking into creating programs for ESA compliance, tribal consultation, and to answer the question of whether the program is really going to provide improved regulatory streamlining without compromising protection.[239] Oregon is also working in hand with the regional and Federal EPA, and nonpartisan groups like ASWM to help work through difficult conversations.[240] EPA and ASWM, particularly, have assisted many states in their assumption attempts.[241] "There are a lot of parties that are involved in the state process that they work with and need to negotiate with, and when the states get into areas that are problematic, that's when they call for help," said one member of ASWM.[242]

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[235] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (April 29, 2014).

[236] Ibid.

[237] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[238] Ibid.

[239] Ibid.

[240] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (April 25, 2014).

[241] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[242] Ibid.

Going forward in the assumption process, DSL has identified a few criteria to succeed in assuming.[243] First, the assumed program needs to provide regulatory streamlining.[244] If it is just as onerous as the current program or worse, it is not worth it to the regulated community.[245] Second, the assumed program cannot lower the environmental bar.[246] It must be at least as protective as the Federal program, or it is not worth it to the environmental and tribal communities.[247] Third, Oregon needs to have the resources available to implement it appropriately, or it is not worth it for the Federal agencies to collaborate.[248] And fourth, Oregon must gain the broad stakeholder support; otherwise it will not last through the entire process.[249]

[243] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (April 29, 2014).

[244] Ibid.

[245] Ibid.

[246] Ibid.

[247] Ibid.

[248] Ibid.

[249] Ibid.

CHAPTER IV

MEANINGFUL PARTICIPATION

Despite all of the setbacks and roadblocks, though, states continue to explore §404 assumption, but the question remains: how do they make it work? Each state interested in assumption undertook an extensive development phase where it engaged with stakeholders, legislators, and the Federal government to identify issues, roadblocks, and potential solutions. Oregon, for example, engaged in a ten-year outreach program to focus groups in order to build public support for assumption, yet it halted its assumption process several times, most recently in 2012.[250] On paper, the states appear to be doing everything they can to make it work, so why isn't it working? There are a few ways that I believe a study of conflict resolution can help.

First, I believe that the frame of reference for public engagement in assumption should be shifted. As is, the parties approach each other as if this were a typical environmental conflict. I would argue that assumption is such a massive undertaking, and lasts for so many years, that it is more akin to an institution, and should address conflicts the way and institution would address conflict with its constituents.

Second, the way that dredge-and-fill permitting is currently designed means that many advocates cannot contest a permit, once it is approved. As such, they have little to gain from any process designed by the state, because they feel they cannot have any "real" impact on the outcome. I would argue that while it seems as if there are no outright conflicts, outwardly, the lack of meaningful participation post-assumption disincentivizes

[250] Oregon Department of State Lands, *404 Assumption Planning*.

parties from participating, either in the lead up to assumption or in the lead up to a permit.

Third, this lack of opportunity to meaningfully impact a permit decision means that the assumption package is the only time where certain advocates can speak up for a better process, and, as such, demand a "perfect package" before they will support the measure.

Fourth, this means that while the parties may not actively undermine the state's assumption efforts, there are also few positive reasons for the parties to participate. What I would suggest is an institutional redesign so that the state can install public engagement measures and flexibility akin to an institution in conflict, and proceed from there.

Shift the Frame of Reference of Assumption from a Project to an Institution Based on Collaborative Governance Designs

When it comes to conflict resolution and public participation, one of the first issues that the states come up against is that their existing procedures are, generally speaking, sufficient for any other project. Oregon, for example, convened public stakeholder meetings, held "cluster" meetings with smaller contingencies of stakeholders, and invested time, money, and effort into discovering the stakeholder issues.[251] A member of the Association of State Wetland Managers, which acts as an expert resource for all states looking into assumption, said:

> I think most states take public involvement very seriously. Many of these groups exert a great deal of political clout, and so in a pragmatic sense the states will view it as something they must do. There may be different levels of sophistication about how they might engage the public and how to make that meaningful and successful, but I think that any state that engages in the assumption process

[251] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

> recognizes that they need to get good stakeholder support to get the support of the legislature and make the changes that they may need to have.[252]

The current functions are being used either because it is how the states perform public participation normally, or because it is how the Corps or EPA does public participation for its processes. Indeed, some entities think the Federal process works well.[253] When guidance is created, the public and wetland authorities can comment on it.[254] The Association of State Wetland Managers compiles comments and supplies the comments to the Federal Government.[255] The problem, as one interviewee put it, is not with the process itself, but whether the Federal Government takes heed of the comments.[256]

However, there are different opinions as to whether this is the cause of the communication breakdown. Another interviewee said, "I do think that you have several sectors, whether they're tribal, business, or environmental, that have expectations that the Act either can or cannot deliver on."[257] For example, she continued, there is an executive order to consult with the tribes, and some tribes interpret that as EPA must consult with them on each and every permit, whether or not it is practical.[258] The interviewee questioned whether those tribes could, or would want to, consult on each and every

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[252] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[253] Anonymous, interview by Aileen Carlos, *Fond du Lac Band*, (May 13, 2014).

[254] Ibid.

[255] Ibid.

[256] Ibid.

[257] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (May 6, 2014).

[258] Ibid.

permit due to the time, manpower, and money that would require.[259] For this interviewee, there was a question of whether the issue was a matter of not being heard, or whether some parties wanted a chance to have two bites at the same apple.[260] She believes that most of the stakeholders' concerns are being met, and that the processes to review and appeal are sufficient, if not.[261]

So what this becomes is that some parties believe that the system is not functioning, and is not addressing their needs appropriately, and some parties believe that it is functioning, and is addressing needs appropriately. The existence of this conundrum suggests that the existing systems for public engagement, while good, could be improved. The structure upon which states are currently basing their approach might be ill-suited for assumption, and so any system based on these approaches would suffer from the same flaws. The states would benefit from reassessing their systems of public engagement to ask why they are using particular methods, and whether they are actually the most effective. It often takes a crisis situation for people and institutions to consider changing its design.[262] Even then, the focus is on changing small, discrete issues rather than the design of the system itself.[263] There is a comfort in the status quo, from every level of the system.[264] Although it would be an overstatement to say that the state of assumption

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[259] Ibid.

[260] Ibid.

[261] Ibid.

[262] William L. Ury, Jeanne M. Brett and Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (Cambridge: The Program on Negotiation at Harvard Law School, 1993), 65-66.

[263] Ibid., 66.

[264] Ibid.

efforts is in "crisis," it is evident that there are long-term, pernicious issues that continually disrupt the efforts.

Many interviewees reflected dissatisfaction with the way the § 404 regulations are structured, and cited the regulations as the cause of the most issues for them.[265] From straightforward concerns, like funding, to more nuanced concerns, like relationships and support, the existing structure of the Federal assumption program and regulations creates issues. As a DSL interviewee said, "Without the funding and without the institutionalization of § 404 right from the beginning, it's done something that is sometimes fatal in the course of government relations in that it forced states to ask the question of the legislator's and the governor of "Should we do this?"[266] When confronted with such scrutiny from the legislature and state government, the assumption package must hold tight under extreme pressure. It is not surprising, then, that the weaker points of the package often undermine a package that is cohesive, overall.

The issues are not with individuals, but with the entire system of assumption and public engagement. As noted in an interview with DSL, any assumption effort must be able to maintain itself through years and changing political environments.[267] Therefore, the changes to assumption must be at the level of the system itself, because the individuals involved often do not stay with proposal throughout its entire lifespan. The project must be institutionalized so that it can survive the "changing of the guards." Most

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[265] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[266] Ibid.

[267] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

dispute resolution literature, however, focuses on how the *individual* can change and adapt to become better at conflict resolution, but how can an institution, altogether?[268]

The first step is to design a system that would be flexible enough to respond to each state's need. According to some research, designing a flexible conflict management system begins with a longitudinal study and look into the lifecycle of a particular system.[269] With assumption, the studies already exist in varying forms and documents – as states, the Federal government, and the Association of Wetland Managers have examined the flaws of assumption since the CWA was passed. What remains now is to formalize the analysis into a suggestion for a system redesign.

Changing the frame of reference for assumption from a short-term project to a long-term institution will allow states to design a system that will build stronger relationships with stakeholders that may allow it to sustain positive political momentum throughout the life cycle of a proposal. The "permanence" of an institution may also allow the state to create a "learning institution," which Peter Senge describes as an "organization where people continually expand their capacity to create the results they truly desire, where new and expansive patterns of thinking are nurtured, where collective aspiration is set free, and where people are continually learning to see the whole together."[270]

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[268] Khalil Z. Shariff, "Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization," *Harvard Negotiation Law Review*, Spring 2003.

[269] Cathy A. Constantino and Christina Sickles Merchant, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organizations* (San Francisco: Jossey-Bass, 1996).

[270] Peter M. Senge, *The Fifth Discipline: The Art and Practice of the Learning Organization* (New York: Doubleday, 1990), 3.

Put a more concrete way, a learning institution design lets states move away from the standard procedures in place right now, and allows the flexibility to create new processes that are responsive to individual stakeholder groups' needs while perpetuation the state's ultimate goal. An institution can greater bear the weight of the "wobbly" moments in assumption, and allow the state to work its way through the issues. Oregon is already starting to move towards institutionalizing its assumption program, and its tribal webinar was the first step in designing a system of interaction with stakeholders that is responsive to that group's desires.[271]

The Participants Are Not Satisfied with the Current Process, Yet Still Demand a "Perfect Package" during Assumption

A major issue running through the interviews and through research is that there are varying parties, at varying levels of power, that may undermine an assumption proposal – whether consciously or not. I believe that this is because some parties do not trust either the government or do not trust the permit process itself, which leads to a slew of issues that a state must confront in the lead up to assumption. This is because the proposal process is the first, and perhaps the only, opportunity for parties to have a chance to contest a permit process that they see as flawed, and so it provides an opportunity for stakeholder groups to "perfect" what they see as an imperfect process. As one interviewee noted earlier, assumption is actually an administrative way of restructuring the government.[272] The restructuring gives parties the chance to ask for their

[271] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014). Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (April 29, 2014).

[272] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

"perfect package," and some demand it of the state before they will sign over their trust and political approval, and the state is left spinning its wheels while it tries to satisfy them.

This reaction may very well be on the subconscious level, due to a theory called reactive devaluation.[273] Reactive devaluation is when the very offer of a proposal diminishes its appeal in the eyes of the recipient, and is heightened when that proposal comes from someone the party sees as an "adversary."[274] While the government is not an adversary in any sense of the term, one interviewee pointed out that "[t]here are many folks who have an enormous distrust in Federal agencies or state regulatory agencies that are going to be involved with the actions on their land. Not everyone believes that, but there is a section of society who does believe that, and they are very vocal."[275]

It is not just that the proposals might be seen as a compromise, although that may also impact a party's reaction, because a university study found that when a participant was given multiple compromise options in a listed form, only the offered compromise diminished in its attractiveness in the eyes of the participant.[276] The change in the assessment appeared to be a direct consequence of the fact that the plan had been promoted.[277]

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[273] Shariff, "Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization."

[274] Lee Ross, "Reactive Devaluation in Negotiation and Conflict Resolution," in *Barriers to Conflict Resolution* (New York: W. W. Norton & Company, 1995).], 28.

[275] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[276] Ross, "Reactive Devaluation in Negotiation and Conflict Resolution," 33.

[277] Ibid.

However, reactive devaluation is not always a detriment to a process. Reactive devaluation may be a natural response to a viewpoint contrary to our own.[278] When presented with a viewpoint contrary to our own, we are apt to read more closely into the opinion or offer to detect any "fine print" that might harm our interests.[279] In simpler terms, it may be that we are wont to negatively judge any offer that comes from a source that we view negatively.[280]

For those parties that are comfortable with the status quo, any sort of change may cause them to sacrifice some of their benefits.[281] A party that has been successful in the current procedure will not want to see change.[282] In most conflict systems, like environmental mediation, the stakeholders might be brought to the table for fear that the new system will ignore their interests.[283] However, due to its heavy reliance on political popularity this option may not be feasible for assumption. And it is important to keep in mind that some of these reactions are either subconscious or unacknowledged. For example, several interviewees noted that the Corps and other Federal agencies are perceived as working against assumption, because there is no benefit for them with assumption – they only stand to lose in an assumption scenario.[284] However, when I

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[278] Ibid, 34.

[279] Ibid.

[280] Ibid.

[281] William L. Ury, Jeanne M. Brett and Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, 74.

[282] Ibid.

[283] Ibid.

[284] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

interviewed a member of the Corps about whether the Corps members were nervous about assumption, she said,

> To some degree, I think that's something that pops in peoples' minds. What does this mean? How many actions does this take away from our permitting ability? What does that leave the Corps with doing at the end? I don't know that we are necessarily having discussions about "No, we don't want to lose this part of it," but there are conversations that are happening internally and how we would move around the workload.[285]

Part of reactive devaluation is this loss aversion – we are more averse to conceding a loss than attracting a gain.[286] It does not help even if the "loss" is an option from which the party would benefit, like how the states may be able to strengthen environmental protections under assumption. Ross wrote, "The very act of framing a proposal in a manner that invites the other side to give up some things it values in order to receive some other things it also values may leave the recipients of the proposal convinced that the loss in question will not be commensurate with the gain."[287] The comfort of the status quo combined with loss aversion means that there might be a "better off" result if the perceived costs of the status quo are lower.[288] As such, parties in the assumption process may approach any new ideas with suspicion that is difficult to alleviate with compromises from the states, because even the compromises could be seen as inferior to the status quo.

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[285] Anonymous, interview by Aileen Carlos, *Army Corps of Engineers*, (May 19, 2014).

[286] Ross, "Reactive Devaluation in Negotiation and Conflict Resolution," 37.

[287] Ibid.

[288] William L. Ury, Jeanne M. Brett and Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, 74.

Lastly, the receipt of a compromise may change the parties' "aspiration or comparison level."[289] What this means is that the fact that the government offers a concession might alter the parties' perception about what they would be able to achieve through further negotiation.[290] All of these factors add to the complexity and frustration that a government faces with assumption.

However, despite the issues that states confront with assumption – both procedural and substantive – assumption is a surmountable goal, and one that is still desirable for many states. But how do the states balance moving forward with assumption and satisfying stakeholders? As one interviewee pointed out, "[Public participation] has been a big issue up here. As we're going forward, we've been trying to figure out the best amount of public involvement. There are folks who want to see more and folks who don't want to see more. It's a tightrope."[291] And, as another interviewee put it, "Well, if you ask that question…then there are hundreds of questions you need to ask, and you need to find the money. And that's what kills it almost every time. It's really, really challenging."[292]

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[289] Ross, "Reactive Devaluation in Negotiation and Conflict Resolution," 37.

[290] Ibid.

[291] Anonymous, interview by Aileen Carlos, *Alaska Department of Environmental Conservation*, (May 8, 2014).

[292] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

Redesign Public Engagement to Focus on Institutionalizing Relationships to Overcome Reluctance

But there does need to be change in assumption procedures, because several interviewees noted that they typically received little-to-no public feedback during the permit review period.[293] This means that the only method by which third parties can contest a permit is very rarely used. "Typically, we don't get comments from anyone," said one interview.[294] "Sometimes, an adjacent water or land owner will call to get more details about what a project may do and if it will affect their land."[295] Although the interviewee went through the standard procedures for soliciting public feedback, and published notices in newspapers, his largest showing of public interest consisted of six people, only two of whom spoke.[296]

The interviewee expressed frustration that more people did not attend these public meetings, as he tries to use feedback when he is designing a permit for an applicant.[297] What this interviewee would like the most from public comments is to help hone the restrictions.[298] For example, the interviewee would like to know whether they should have the permit applicants modify techniques, or if there are more things that they can do

[293] Anonymous, interview by Aileen Carlos, *Alaska Department of Environmental Conservation*, (May 8, 2014).

[294] Ibid.

[295] Anonymous, interview by Aileen Carlos, *Fond du Lac Band*, (May 13, 2014).

[296] Ibid.

[297] Ibid.

[298] Ibid.

to protect wetlands and keep the water quality in good condition.[299] He adds variances into individual permits if the band wants to be more protective, and personally examines the permitted activities when he feels that more scrutiny is needed.[300] He believes that he sees so few participants both because of the culture of his Band and because people largely do not know much about wetlands, and are unlikely to feel passionate about actions affecting a wetland unless it directly affects their land, as well.[301]

This lack of participation creates an issue for states, because to address the stakeholders' needs and gain political buy in, the state needs to assure that the stakeholders are speaking. If the stakeholders are not participating in the current permit process, it will be difficult for the state to assure them that their voices will matter post-assumption if the process remains predominantly the same.

To be clear, I am not suggesting that the state add more public engagement to their already over-burdened budgets, but to redesign systems that are not working, and tailor the ones that are to the states unique needs through a focused, collaborative process with key stakeholders. States must design processes that both engage the stakeholders during the lead up process to design a system that will encourage meaningful public involvement, as well as mitigate the reactive devaluation and loss aversion that results from instituting a change.

States can overcome initial reluctance to new procedures by demonstrating them, using leaders as examples, promoting the new system through stakeholder-to-stakeholder

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[299] Ibid.

[300] Ibid.

[301] Ibid.

communication, setting clear goals, providing incentives for participating, and publicizing the early successes.[302] In fact, some of these steps are already being used by Oregon. Specifically, as mentioned in the Endangered Species Act section, DSL and EPA are working together to create a project that can go through a trial run and show both the Federal agencies and the stakeholders that Oregon's process will work.[303]

Make Sure the State Is the Clear Leader in All Interactions

Leadership is crucial for setting and maintaining clear ground rules, building trust, facilitating dialogue, and exploring mutual gains in a collaborative design process.[304] It is also important to clearly define the roles at the outset of a collaborative process, as it is imperative that the stakeholders understand what role the leader plays, which in assumption will be that the state will always act as the leader and maintain decisionmaking authority.[305] It is important to make this clear, because while the leader should involve the parties in the system from the outset to diagnose issues and design the new system, the stakeholders must understand that the final design will be created by the state.[306]

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[302] William L. Ury, Jeanne M. Brett and Stephen B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, 75.

[303] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (April 25, 2014). Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[304] Ansell and Gash, "Collaborative Governance in Theory and Practice," 554.

[305] Ibid., 565. Citing Bradford.

[306] Ury, Brett and Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, 69

In the Ury design, there are preemptive questions that the institution must ask before creating a new system.[307] The first question, who are the parties involved, has already been addressed well in the realm of assumption.[308] However, a secondary question to this is: what is the relationship of the parties? Defining the relationship between the parties involved is a vital step for states to consciously consider – especially with relationships that are seldom evaluated.[309] With assumption, a small but important step is for the state to establish itself as the leader of the process. While some relationships are easy to define, like stakeholder to government, other relationships involved in assumption are less easy to define. For instance, EPA is almost always involved in any state assumption attempt, but it is not the leader of the project.[310] EPA representatives act as guides and mentors for the states, but try to keep their role as purely advisory.[311] However, it may be confusing for a stakeholder who is sitting in the room with representatives from both the state and Federal branches, so it is vital that the states establish their leadership in these scenarios.

The ideal leader in a collaborative process is the "steward of the process"[312] who must protect and promote the created process.[313] For example, once DSL began this

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[307] Ibid., 24.

[308] Ibid., 24.

[309] Ibid., 24.

[310] Anonymous, interview by Aileen Carlos, , *Environmental Protection Agency*, (May 6, 2014).

[311] Ibid.

[312] Ansell and Gash, "Collaborative Governance in Theory and Practice," 554. Citing Chrislip and Larson.

[313] Ibid.

process by engaging with the Oregon Tribes to discover their preferred process, it should protect and promote the system they create in response to that preference. A successful collaborative leader, or leaders, should have four basic skills: (1) the ability to promote broad and active participation, (2) ensure broad-based influence and control, (3) facilitate productive group dynamics, and (4) extend the scope of the process.[314] For most states, the resource agencies already possess the first two qualities. In Oregon, DSL is working to address the last two as it works through institutionalizing the assumption process. While this type of collaborative leadership is likely to be time, resource, and skill intensive, most states going through assumption have already invested, or are prepared to invest years of effort towards the endeavor.[315] What is left is to assure that the investment successfully achieves the states' goals.

It is also important to note that instead of devising a process that would accomplish all of these tasks, at once, states should treat assumption as an ongoing, growing institution, and create flexible mechanisms by which they can look back and assess their system for what did not work and immediately adjust. This issue right now, as one interviewee said, is that

> [States] try to put all of the accountability into the front end, and no adaption and accountability into the back end. They try to figure out everything that could possibly go wrong when the straw man is put out, because they're afraid they're not going to be able to commit to or require folks to improve things or make things better as time goes on. And so you see enormous energy put into what the thing is supposed to do and be and how it's supposed to work and all of that. And

[314] Ibid. Citing Lasker and Weiss.

[315] Ibid. Citing Huxham and Vangen.

> then once people start doing it, many times there's been very little review and attention given to things.[316]

A redesign of the system would give the states a chance to reassess their public involvement systems and work towards building strong relationships based on a strong organizational design. One of the ways to combat reactive devaluation in a process is to involve the stakeholders in the earlier stages of a program and get them involved in designing the process, as Oregon is now doing with its tribes.[317] The idea is to elicit the parties' values and preferences before making any sort of proposal of a solution, and then explicitly link the content of the solution to those preferences.[318] Reducing reactive devaluation can also be as easy as debriefing and warning the parties that it might happen, because if the parties are aware of the phenomenon it sometimes weakens the reaction.[319]

It would further reduce reactive devaluation if the state founded subsequent designs and proposals on those values and preferences, as well as explicitly linking the content. It is not only important to seem like you are getting the protection that the party needs, the party must also get it. For example, now that DSL is aware that most of the Oregon Tribes would prefer face-to-face interaction, it is important to found the next set of stakeholder meetings and interactions on the Tribes' expressed values to foster further collaboration.[320]

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[316] Anonymous, interview by Aileen Carlos, *Association of State Wetland Managers*, (May 15, 2014).

[317] Ross, "Reactive Devaluation in Negotiation and Conflict Resolution," 39

[318] Ibid.

[319] Ibid., 40.

[320] Oregon Department of State Lands, "Tribal Webinar: Summary."

An effective system design is also vital to discover which outcome the state and the stakeholders are looking for – like in Virginia, the state wanted to create a "one-stop shop" for its permit applicants without raising permit prices higher than they already were.[321] For Virginia, the state programmatic general permit route worked much better for this goal than full-on assumption, because anything further would have cost the key stakeholders too much money and lost the political support the state would have needed to pass assumption.[322]

Further, there are unique issues that come with each state that can only be addressed if they are uncovered through effective public engagement. Alaska has communities without electricity or running water, so relating important information via the Internet cannot, and likely will not, reach the communities that need the information.[323] Alaska must also work with the fact that the construction window coincides with the fishing season for tribal communities, so there are not many opportunities for all concerned parties to meet at the same time.[324] Officials are working to figure out the best ways to communicate with these remote villages, and are hoping to develop a program where permit applicants are involving the public as they are going through the planning stages, rather than when the project is planned and ready for

[321] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (May 8, 2014).

[322] Ibid.

[323] Anonymous, interview by Aileen Carlos, *Alaska Department of Environmental Conservation*, (May 8, 2014).

[324] Ibid.

deployment.[325] And, again, how Oregon discovered that most of the participants would prefer face-to-face interactions.[326]

That is not to say that engaging collaboratively with stakeholders will work for all stakeholders and all issues. Studies show that environmental groups are notoriously wary of collaborative processes, which is thought to be because "their constituency is so large and diffuse, conservation advocates are routinely at a disadvantage in contests with representatives of relatively more cohesive and more easily organized economic interests."[327] Skeptical stakeholder groups need reassurance that they will receive some benefit from participating, and will "opt out" of a process if it seems as if their input is ceremonial or simply advisory.[328]

But skeptical stakeholders can be encouraged to participate if they believe that their goals are dependent on cooperation from other stakeholders, and if they trust that they can achieve their goal through collaboration.[329] This particular idea might apply equally to both skeptical stakeholder groups *and* the state – neither achieves their goal without cooperation from the other. The state needs the stakeholders in order to pass the legislative amendments, but other stakeholders do not have the same axe over their heads. Environmental groups, for example, gain little from either the status quo or from assumption, because they have little chance to appeal or contest a decision no matter what the outcome. The only advantage they have in negotiating is the chance to create a

[325] Ibid.

[326] Oregon Department of State Lands, "Tribal Webinar: Summary."

[327] Ansell and Gash, "Collaborative Governance in Theory and Practice," 552.

[328] Ibid.

[329] Ibid., 552.

new process that would allow more meaningful feedback that the current program. So if the state can create a system that would meet a skeptical stakeholder's goal, then that stakeholder will cooperate more.

An advantage that assumption has going into any procedure that would incentivize reluctant stakeholders is, interestingly enough, the very fact that the current structure does not provide environmental groups an alternative venue for protecting their interests. Ansell and Gash wrote that shy stakeholders will avoid working with other parties if there is a better alternate venue available to them, but while environmental groups could petition EPA to review a permit decision, or file a lawsuit once a project has begun, these options only become available much later in the process than most conservationists would prefer.[330] As such, states could bring these skeptical stakeholders to the table by stressing the fact that the parties would independently benefit from assumption and are interdependent on each other to assure that this happens. As Chrislip and Larson wrote, "The first condition of a successful collaboration is that it must be broadly inclusive of all stakeholders who are affected by or care about the issue."[331]

Once the skeptical stakeholders are involved, it is important to diminish any potential antagonism that may exist between the parties by taking positive steps to bolster the low levels of trust between the state and these stakeholders.[332] As the interviewee from Alaska said,

> As far as it goes for the proposal, we're trying to figure out how to engage with the public, how far to go, how much to do, and how to inform the public about

[330] Ibid., 553.

[331] Ibid., 556. Citing Chrislip and Larson.

[332] Ibid., 553.

> why they should be here. I don't think Alaska is unique in that we have both sides of the spectrum represented in the public. Everywhere I've been has about 50-50. How do we gauge that and assure that people who show up for workshops and meetings aren't swayed one way or the other.[333]

As stated above, displaying good practices, like Oregon's plan for endangered species, and publicizing early successes can achieve this by showing the stakeholders that Oregon intends to convert the feedback it gets from its stakeholders into newer, more effective processes. An important part of any collaborative process, especially one intended to design a system, is that "broad participation is not simply tolerated but must be actively *sought*."[334]

This design, though based on collaboration, is not intended to suggest a consensus decision, but that the rules surrounding consensus-building are apt to help stakeholder groups talk and for more effective public involvement. The critiques from Coglianese and others – that consensus decisions can lead to the "least common denominator" outcomes, and sometimes result in stalemates – is accurate for consensus.[335] Coglianese himself admits, though, that the consensus-building approach (or any serious engagement with stakeholders) will promote learning and the exchange of ideas.[336]

It is important to note that consensus can sometimes become the predominating goal of processes, and so the leader must keep a clear vision of the goal – which is the

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[333] Anonymous, interview by Aileen Carlos, *Alaska Department of Environmental Conservation*, (May 8, 2014).

[334] Ansell and Gash, "Collaborative Governance in Theory and Practice," citing Reilly (2000), 556.

[335] Cary Coglianese, "The Limits of Consensus. The Environmental Protection System in Transition: Towards a More Desirable Future," *Environment* 41, no. 3 (1999), 31.

[336] Ibid., 31.

creation of a new system of permitting wetlands.[337] Consensus building tends to squash innovation in the search for agreement, and that is the least helpful response for assumption.[338] In a process where the parties are already nervous about innovation, the process must be designed so as to encourage, rather than stifle, the development.

An Institutional Approach to Assumption May Prevent This Type of Attitude by Creating a Flexible, Long-Term Relationship with a Conflict Management System

Oregon, in fact, is going through a dramatic change in the way it is engaging with its stakeholders, and is doing so in an incremental way. DSL has quietly "institutionalized" its assumption efforts, and by changing that frame of reference has changed the outlook for all of its employees and constituents.[339] While DSL continues to work on Oregon's assumption package and hopes to one day assume, its approach is less geared towards pushing a project through while it is politically in vogue, but based on winning over constituents as it creates a package that earns their trust.

Oregon could take this frame of reference a step further, and create mechanisms based on that of an institution, and start by identifying these markers: membership, scope, centralization, control and flexibility.[340] The first step is identifying the state's core

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[337] Ibid.

[338] Ibid.

[339] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[340] Shariff, "Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization."

constituent group that is involved in assumption.[341] As stated before, most states have identified the key stakeholder groups throughout the years.

Next, identify the scope of the state's jurisdiction, or, since it may be simpler in assumption, the area of concern.[342] This is at issue with assumption, especially as applied to the scope of the adjacent waters. The next fact, centralization, is where the activities take place in the institution.[343] Here, there key point of centralization may be to define which roles will be played by whom, and offer a chance to centralize most of the water activities into one state agency.

After that, define the control for the institution.[344] Where is the decisionmaking authority Located? In the current model of water permitting, the authorities are all over the place. EPA has some, Corps of engineers has some, and then the states have some, so defining the control is important for clarity. Many states have already done this, and Oregon has gone a step further with the streamlining it has done with the Corps.[345]

Last, and most important for developing a new assumption system, is flexibility. This asks whether the institution has the flexibility for change.[346]

Shariff argues that there are two broad types of flexibility – the first is to have the frame, but have "escape clauses" when needed, and the second creates an institution that can

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[341] Ibid.

[342] Ibid.

[343] Ibid.

[344] Ibid.

[345] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (April 29, 2014).

[346] Shariff, "Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization."

change and adapt with changing circumstances.[347] Both methods of flexibility are helpful for assumption, and exist in some form. As mentioned earlier, some regulating authorities seek public feedback during the permit consideration period, because that would allow them to create stricter permit regulations, when necessary, and provide an escape from the standard permit.[348] The second type of flexibility is perhaps what the EPA yearly review was originally intended to be, as one interviewee alluded.[349] This interviewee said that the original intention behind the review was to allow the states to modify their program from year-to-year, but this has not been carried through.[350]

One way to maintain flexibility throughout the life of an institution is to build in "loop backs" that allow time and space for the state to reassess what has been going well so far, and to redesign anything it needs to go forward. If a state builds on the relationships it develops with the stakeholders, and institutes "stopping points" to reassess and loop back, if needed, it can continue with the forward momentum of assumption without losing steam.

One method of looping back is the "adaptive management approach," developed by Bennear and Coglianese.[351] This is a method by which parties use prospective

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[347] Ibid.

[348] Anonymous, interview by Aileen Carlos, *Fond du Lac Band*, (May 13, 2014).

[349] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (May 6, 2014).

[350] Ibid.

[351] Lori Snyder Bennear and Cary Coglianese, "Measuring Progress: Program Evaluation of Environmental Policies," *Environment* 47, no. 2 (March 2005), 25. This is not to be confused with other versions of adaptive management.

analytical models combined with retrospective analytical models to inform policy development.[352]

Prospective analytical models address the foreseeable aspects of policy deliberations – such as risk analysis, cost-efficacy, and cost-benefit analysis – that come before a policy is adopted.[353] These models help policymakers understand the ramifications of taking action, and provide answers to questions from those outside the decisionmaking process. Prospective analytical models are frequently used in business, economic, and policy decisions.[354]

Retrospective analytical models, on the other hand, look back on specific decisions to determine the outcome, issues, and actual costs created by it.[355] The retrospective analysis seeks to do a program evaluation that determines the actual impact of a policy decision or implementation strategy after adoption.[356] It identifies the structures that worked, and those that did not, so that future policy deliberations can be amended to incorporate effective procedures.[357] EPA ostensibly goes through

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[352] Ibid.

[353] Ibid.

[354] For an example, see Environmental Protection Agency, "Second Prospective Study - 1990 to 2020 ," *Benefits and Costs of the Clean Air Act*, http://www.epa.gov/cleanairactbenefits/prospective2-2.html (accessed July 2014).

[355] Bennear and Coglianese, "Measuring Progress: Program Evaluation of Environmental Policies," 27.

[356] Ibid.

[357] Ibid.

retrospective reviews,[358] yet the version of retrospective review at the regulatory level seems to differ from the model recommended by Bennear and Coglianese.

Moving back to the Bennear and Coglianese adaptive management approach may help the ongoing issues with §404 assumption, because the model, as defined, creates an ongoing, continually interactive model for states to evaluate the benefits, pitfalls, and relationships engaged in the assumption process. There are several reasons why a continually interactive model would assist with assumption.

First, it provides a flexible structure that is maybe more adaptable, as agencies uncover structures that do not work as well. It also allows states to confront issues that have appeared since the last evaluation – like if stakeholders are still not participating. For example, as Alaska was developing its program, it was releasing new information through a website and an RSS feed, but the Department of Environmental Conservation realized that many of its key constituents did not have reliable access to the internet, and thus would not receive the updates.[359] He is in the process of developing options for how to reach even the most isolated communities.[360]

Second, it diminishes some of the need for a "perfect" program, because it both presents an opportunity to improve upon existing structures and provides an opportunity for feedback later on in the program. As stated earlier, some of the skeptical stakeholders

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[358] For an example, see Environmental Protection Agency, "EO 13563 Progress Report, January 2014," *Final Plan for Periodic Retrospective Reviews of Existing Regulations* , January 2014, http://www.epa.gov/retrospective/documents/eparetroreviewprogressrpt-jan2014.pdf (accessed July 2014).

[359] Anonymous, interview by Aileen Carlos, *Alaska Department of Environmental Conservation*, (May 8, 2014).

[360] Ibid.

do not trust the assumption process and do not believe it can protect their interests. The only method for states to earn their trust is to prove that the program can work. While Oregon develops its ESA test-project, it will be helpful to integrate opportunities for feedback during the process so it can improve the program where needed, immediately.

Finally, it might eliminate one issue that Oregon cited – that it had to redo many of the same stakeholder meetings and issue identification meetings when Oregon dropped, and then restarted the Assumption program.[361] Ideally, a retroactive analysis program will provide at-the-moment reactions and critiques of a structure, then keeps those reactions for future reference. If, at the time that the program was dropped, Oregon had built in retroactive analysis, then Oregon would have had a ready-made list of problems it made in the last attempt and would not have the frustration of "reinventing the wheel."[362]

The issue with an adaptive management approach, and the institutional approach in general, is the money involved. As noted before, the Federal funding for state assumption is largely limited to the development phase, rather than the implementation of the program.[363] States therefore engage heavily in the prospective aspect of assumption to assess potential roadblocks, but have little funding left over if the assumption attempt

[361] Anonymous, interview by Aileen Carlos, *Oregon Department of State Lands*, (May 6, 2014).

[362] Ibid.

[363] Environmental Protection Agency, *Wetlands Program Development Grants*, http://water.epa.gov/grants_funding/wetlands/grantguidelines/index.cfm (accessed July 2014).

fails.[364] For example, Florida released its feasibility study in 2005, which reported the results of its extensive prospective analysis and identified hurdles that it would need to overcome in order to continue the assumption process.[365] However, there is no indication that it incorporated a retrospective analysis into its own process. Retrospective analysis may be both too costly and therefore politically unpopular to engage in without being able to predict the benefit of it.

However, states could benefit from retrospective analysis to identify where certain processes could be improved or changed. An ongoing process of evaluation that assesses both the potential issues and the actual issues that the state encountered along the way would help streamline the future proposal development discussions and save money as time goes on. Many of the issues described above require an ongoing dialogue with several Federal agencies, state agencies, and stakeholder groups, so incorporating new engagement methods may help create new solutions. Additionally, these ongoing relationships mean that it is vital to have a system that allows the state to recognize when something is not working, then reassess and redesign. If retrospective analytical models are combined with both the institutional model and the relationship dynamic change that occurs then, it is possible that assumption proposals could better weather the storms.

[364] See, e.g., Virginia Department of Environmental Quality, "Study of the Costs and Benefits of State Assumption of the Federal § 404 Clean Water Act Permitting Program."

[365] Florida Department of Environmental Protection, "Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)."

CHAPTER V

CONCLUSION

The issues that frustrate assumption attempts are long-standing and pernicious. Issues like lack of funding and clear guidance have existed since the Clean Water Act was drafted, despite hundreds of good people working together to study and try to overcome them. Assumption has brought together a small, tight-knit group of wetland advocates who strive to overcome the obstacles with which the unclear guidelines have left them. This group works together to get advice and brainstorm ways to work through the issues that continually arise.

Many of the stakeholders groups involved with §404 assumption are less inclined to work towards a completed assumption package because the completed §404 program, as directed through the current legislative documents, leaves little to no space for meaningful participation during the actual permitting process. This design may sublimate concerns that need to be drawn out of the stakeholders in order to design an assumption process that will survive the political process, and the years post-assumption.

This system also works against the state, because it makes the assumption development phase the only opportunity that some stakeholders have to present the majority of their arguments before the package is completed, and the system is once again closed against them. A system that allows stakeholder groups to continue to provide meaningful feedback to the states after assumption would alleviate the pressure of creating a "perfect package." Additionally, it would allow the states to discover and respond to issues along the way and improve upon the system.

Assumption cannot be viewed as a short-term project that can be solved within a few months, or years. These conversations extend for years, and so the relationships built should be addressed like an institution, rather than a set of disparate groups who come together for only a brief time. Oregon is already on the path of institutionalizing its system, and I would recommend expanding their tribal approach to encompass their other stakeholder groups. Alaska, too, is reaching out to its constituents to design its public engagement system to respond to the individual needs of its communities. I believe that any state that seriously considers assumption must first look at its goals, and look at its unique considerations, then begin to build relationships with the constituents as the process continues.

These mechanisms and designs may help states work through the issues while waiting for the regulatory changes that likely need to happen. While these changes may not be possible for years, due to the unpredictable political environment, assumption will always be a struggle without the clarification. Every person interviewed, when asked what they would change about assumption, answered that they would like to amend the regulations. And it is likely that any adjustments to the program would require amendments to the CWA itself, because guidance, though helpful, is changeable.

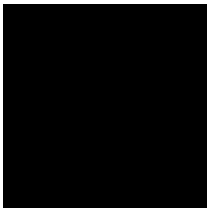
But one thing to keep in mind is that though assumption is difficult, and will likely remain so for years to come, was expressed by one interviewee when she said,

> I think just one thing for people to remember is that this is something that states choose to take on, they don't have to take it on…and anecdotally, whatever route the state takes, every state that has taken a serious look at assumption has streamlined their wetland program. There have been improvements, no matter what outcome.[366]

[366] Anonymous, interview by Aileen Carlos, *Environmental Protection Agency*, (May 6, 2014).

APPENDIX

LETTER TO EPA FOR CLARIFICATION ON ASSUMABLE WATERS



April 30, 2014

Nancy K. Stoner
Acting Assistant Administrator for Water
U.S. Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, NW (4101M)
Washington, DC 20460

Via email to: stoner.nancy@epa.gov

Dear Acting Assistant Administrator Stoner:
Re: Assumable Waters under Clean Water Act Section 404
In the rule proposed by the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps) regarding the scope of the definition of "waters of the United States," a statement in the preamble explains that the rule does not affect the scope of waters subject to state assumption in accordance with §404(g). 79 Fed. Reg. 22,188, p. 22,200 (April 21, 2014). The undersigned organizations appreciate that such language was included in the proposed rule addressing this critical aspect of state §404 program assumption.
We agree with the preamble statement in the rule that "[c]larification of waters that are subject to assumption by states or tribes or retention by the Corps could be made through a separate process under section 404(g)" (ibid). We recommend that steps to further clarify the scope of assumable and non-assumable waters be initiated in a timely manner. We are concerned that states currently considering assumption are having difficulty making progress because of the current uncertainty.
We would appreciate the opportunity to actively engage in a discussion with EPA to address this issue. Our organizations recognize that any steps toward clarification must be undertaken thoughtfully in accordance with the provisions of §404(g), and without altering the existing state 404 programs in Michigan and New Jersey.

Clear identification of assumable and non-assumable waters has been made more difficult by legal decisions that address terms such as "navigable" and "adjacent." Nonetheless, Congress intended that states be able to assume regulatory responsibility for the majority

of waters within their boundaries. Clarification of assumable waters will help to facilitate state assumption where it is desired – providing benefits to the public, the resource, and the state and Federal agencies.

Under §404 of the Clean Water Act – all waters regulated by the Corps or by a state/tribal program – are deemed "waters of the United States." We believe that "other waters," as well as some portion of both "navigable waters," and "adjacent wetlands" may be administered by a state or tribe in accordance with 404(g). We look forward to discussions with EPA to explore this very important area of public policy.

Our goal is to work collaboratively to discern the criteria that will be used by a state/tribe, EPA, and the Corps to identify assumable/non-assumable waters pursuant to §404(g). We would also like to reach agreement on how to formalize these criteria (e.g., Memorandum of Understanding). Several steps may be needed to address both the immediate concerns of states pursuing assumption and the needs of those that may do so in the future.

Our organizations are committed to supporting state efforts to assume the Section 404 program by identifying issues and working with partners to resolve them. See, for example, ECOS Resolution #08-3 on State Delegation of the Clean Water Act Section 404 Permit Program – originally approved in 2008 – was on April 2, 2014 reaffirmed, with the addition of the following language: "[NOW, THEREFORE, BE IT RESOLVED THAT THE ENVIRONMENTAL COUNCIL OF THE STATES] Encourages U.S. EPA to work with states to bring clarity and certainty to the identification of assumable and non-assumable waters."

We look forward to a timely and productive discussion with you. Please contact Jeanne Christie of ASWM at 207-892-3399 or jeanne.christie@aswm.org, to discuss this request. Thank you again for your attention to this matter.

Sincerely,

Alexandra Dapolito Dunn	Sean Rolland	Jeanne Christie
ECOS	ACWA	ASWM

Cc: Ken Kopocis, EPA
Benita Best-Wong, EPA
Jim Pendergast, EPA
Bill Ryan, OR DSL
Ben White, AK
Eric Metz, OR DSL
Ginger Kopkash, NJ
Bill Creal, MI

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