



Association of State Wetland Managers Clean Water Section 404 Assumption Series

Conducting State/Tribal and Federal Regulatory Crosswalks

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As part of the Clean Water Act Section 404 assumption application package, states and tribes are required to conduct an analysis that demonstrates the assumed program is consistent with and no less stringent than federal requirements. This analysis requires the state or tribe to do a comparison, often referred to as a “crosswalk,” of federal requirements with the state/tribal requirements. This can take different forms. The U.S. Environmental Protection Agency’s (EPA) assumption regulations establish the requirements for a complete program description, including the crosswalk portion that compares the federal and state/tribal legal authorities.

ASWM expects that guidance on how to conduct a regulatory crosswalk may be provided in a new, forthcoming [404\(g\) rule](#). The EPA website on assumption will also provide additional guidance. This document may be used by states and tribes exploring assumption prior to the release of the new 404(g) rule.

Where to Begin

When beginning a crosswalk, it is important to identify which staff need to be involved in the process. Crosswalk work must be led by wetland program staff who are knowledgeable of the state/tribal program and may require additional legal support. Staff must know what rules and statutes exist, as well as how those rules and statutes will need to be different under assumption. During the crosswalk development, the state/tribe will likely want to engage with regional EPA attorneys as well. Some states also include law students working to review the crosswalk documents during the process. For states/tribes that are seeking assumption, but do not have an existing regulatory program, legal counsel will play a much more significant role.

This “team” must know or learn every rule and statute that the program will operate under. In order to track this content, a spreadsheet is usually developed. The spreadsheet may track more general references or capture a line-by-line matchup of state/tribal and federal language. While the line-by-line match up may be conducted to ensure there are no gaps, the final crosswalk language is often more narrative. Once the comparison is complete, gaps must be identified and filled in by either identifying existing rules that were not considered or by committing to promulgate new rules.

Structuring the Crosswalk

The goal of the crosswalk is to demonstrate equivalent or greater protection by a state/tribal program. Analysis is often conducted sequentially, with either a side-by-side analysis or a more topical approach, with regulations and statute summarized by topic (sequencing etc.) or grouped by similar topics. While a line-by-line comparative approach is easier for attorneys, depending on the new 404(g) rule requirements, a more topical approach may be allowable (either in addition to or as a stand-alone) in the final package. Regardless of the final product, the crosswalk is a time-intensive, highly technical task. In recent years, Florida has conducted a more narrative approach, Oregon has taken a side-by-side approach and Minnesota is currently conducting a hybrid form of these approaches, including a summary of comparable state statute in explanatory text, with some side-by-side references. Looking to examples from Florida, Oregon and Minnesota (see [ASWM Assumption Examples Matrix](#)) may provide some assistance and avoid a state/tribe having to recreate the wheel.

Challenges Relating to Completing Regulatory Crosswalks

A challenge identified by some states is not knowing where to start. Another challenge is determining how detailed the crosswalk needs to be. What is equivalency? How does a state/tribe describe the effects of their regulations? Currently, the EPA does not offer formal guidance on how to conduct a crosswalk. The focus of the crosswalk is to show that the state/tribe's program is equivalent and at least as stringent as the federal program and how the state/tribe is going to change their program to bring it into compliance with the federal requirements. However, while it may be clear that some elements are not equivalent, what would be considered to be equivalent is up for interpretation. A state or tribe cannot negotiate being less stringent than the federal requirements, but to some extent, the state or tribe can negotiate how it will demonstrate its program is as stringent as the federal requirements.

Another challenge is the cost of conducting a crosswalk. The process is both time consuming and costly. Attorneys need to be involved and the earlier the better, as staff will need their legal expertise. If legal expertise is not available in-house, this will mean securing external legal assistance. Other challenges include not having buy-in from all stakeholders/sectors, perhaps not having an existing program to build on, and not having secure funding streams for the ongoing implementation of the assumed program until after the crosswalk is completed.

Addressing Uncertainty by Building on Existing Models

There is a degree of uncertainty for all states/tribes undertaking this analysis. Additional guidance is expected in the form of a [new 404\(g\) rule](#) and any additional documentation from the EPA in the coming year(s). While ASWM cannot provide answers to these questions, ASWM offers several examples of crosswalk documents in its [assumption examples matrix](#) to assist other states and tribes beginning to undertake this work. Additionally, ASWM's archived webinar on "[Conducting State/Tribal and Federal Regulatory Crosswalks](#)" serves as a valuable

source of information from three states that have undertaken the task: Florida, Oregon and Minnesota.

After the Crosswalk is Completed

Once the crosswalk is complete, a state/tribe may want to craft a more approachable public version for use as a communication tool. The primary crosswalk required by the EPA is very different from what the public will want/need. States may want to develop a matrix based on an assumed program and show how the program will be structured around federal regulatory requirements. Implementation of equivalency may require changes in staffing, responsibilities, additional training, changes in processes, development of new standard operating procedures and other tasks. There will be tasks that federal agencies did in the past that states will now have to undertake, which may also extend workload for existing staff members or require new staff.

Not a One and Done: Crosswalks are an Iterative Process

Conducting regulatory crosswalks is an iterative process, requiring many updates throughout the assumption process. The process often includes a combination of research, planning, workshops, rule writing, and public notice and adoption, which may be repeated several times. It is recommended that any time a change is made that the crosswalk is updated immediately to reflect the change, so that this information is not lost or confused over time. Because of its technical nature, the process of conducting crosswalks can be long, tedious and tiresome. However, it is the cornerstone for the assumable program and must be completed before trying to fill any gaps in the state/tribal program for assumption.

For more information about this document, contact:

Association of State Wetland Managers

www.aswm.org

(207) 892-3399