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EXPANDING STATE ASSUMPTION OF CWA SECTION 404: NECESSARY, WISE AND WORKABLE

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INTRODUCTION

Under the Clean Water Act, states may seek to implement Section 404 that governs dredge and fill activities in wetlands and other waters. However, this program has fared poorly in comparison to state adoption of other parts of the Clean Water Act. While 45 states implement Section 402, the point source discharge program, only two states, Michigan and New Jersey, have adopted Section 404. And even for those states, maintaining their leadership role has been challenging. Two issues in particular have made assumption difficult. First, states are held to a higher standard for implementing Section 404 than other parts of the Act. Second, unlike other Clean Water Act programs, the U.S. Environmental Protection Agency's (EPA's) wetland grant program cannot be used to run state wetland programs; it can only be used to develop them.

Overall, states and tribes¹ play a major role in the implementation of Clean Water Act programs. (See http://www.ecos.org/section/states/enviro_actlist/states_enviro_actlist_cwa). It is clear that Congress envisioned that the states would play an active role in wetland management as well, and provided a legal mechanism by creating the state assumption process for Section 404 in 1977. However, Congress failed to provide funding,² and this is problematic for many states. This was demonstrated in Michigan this past February when the difficulties in balancing the state

¹ Tribes that have applied to be treated as a state for the purposes of implementing Clean Water Act programs

² States can use Section 106 funds, however, these funds are usually appropriated to other programs in other agencies or divisions of state government.

budget amid the current financial crisis led Michigan's Governor Jennifer Granholm (D) to announce that the state would hand wetland permitting responsibilities back to the federal government. Currently the issue is with the state legislature. For recent press coverage on this topic, go to: <http://aswm.org/swp/index.htm>.

STATES AND FEDERAL AGENCIES SHARE CRITICAL ROLES IN REGULATING WETLANDS

States and federal agencies can form successful partnerships. States are particularly well-equipped to address regional water management issues and to effectively interact with private landowners. Federal resource agencies play a critical role in maintaining a "level regulatory playing field" among the states and in helping to define common national goals under the Clean Water Act. Despite the apparent benefits of cooperative state/federal regulation of wetland resources, the Clean Water Act Section 404 wetland program continues to lag well behind other environmental program areas in terms of assumption of authority at the state or tribal level. While a number of states have strong wetland programs, only two states have assumed administration of Section 404. Instead other states have developed, or are developing, other types of cooperative permit programs, such as joint permitting, State Programmatic General Permits (SPGPs), or Regional General Permits (RGPs). For more information on Programmatic General Permits, visit: <http://www.aswm.org/swp/pgp/index.htm>. However, since the *Solid Waste Agency of Northern Cook County (SWANCC)* U. S. Supreme court decision of 2001 and *Carabell/Rapanos* in 2006, interest in state assumption has increased.

WHAT 'ASSUMPTION' MEANS FOR A STATE DREDGE AND FILL PERMITTING PROGRAM

Section 404(g) of the Clean Water Act allows a state to apply to the U.S. Environmental Protection Agency (EPA) to administer its own permit program for the regulation of dredge and fill activities in lieu of the permit program administered by the Corps of Engineers. The Section 404 state assumption program is administered by EPA, which provides overall program oversight on state programs to ensure compliance with federal standards. However, much of the day-to-day state/federal coordination occurs with the Corps, which continues to issue permits for wetlands in Section 10 waters.³ The Corps must retain jurisdiction in waters which are traditionally utilized to transport interstate or foreign commerce, such as major rivers, tidal or coastal waters, and adjacent wetlands. These are the waters regulated by the Corps under Section 10 of the Rivers and Harbors Act. Where a state 404 program is approved by the EPA, the Corps of Engineers suspends processing of 404 permits everywhere except Section 10 waters.

Section 404 provides for coordination with a number of other federal resources management programs. Because permits issued under a state-assumed program are issued under state law, other federal laws, such as Endangered Species Act (ESA), do not apply. Instead they are addressed through EPA oversight as required by the statute and regulations. (See fact sheets for

³ Kusler, Jon and Jeanne Christie. "Common Questions: State Wetland Regulatory Programs." ASWM. June 2006

more specific examples, under “Mechanisms for Coordination with Federal Laws, e.g. Endangered Species Act” at http://www.aswm.org/swp/assumption/factsheets_0509.pdf.

STATE/FEDERAL PARTNERSHIPS – SOMETIMES IT IS THE STATE THAT MUST STEP IN TO ENSURE THAT FEDERAL AGENCIES PROTECT WATER RESOURCES

Implementing the Section 404 program is a state-federal partnership. State assumption of Section 404 gives the state the leadership role in evaluating and issuing permits while EPA retains broad oversight authorities. The Clean Water Act provides EPA with the authority to review every permit if it has concerns over the state’s ability to implement the program consistent with the requirements of the statute. However, in addition to what has happened in Michigan and New Jersey is that the state runs the program on a day-to-day basis integrating wetland permitting with other Clean Water Act programs and providing a consistent, predictable program during times of jurisdictional uncertainty at the federal level. For example, following *Carabell/Rapanos*, the state of Michigan has asserted state jurisdiction in areas adjacent to the Great Lakes, where the Corps has not. In New Jersey the state law provided levels of protection at the time of assumption that the federal agencies would catch up to only years later. On the other hand, EPA retains the ability to place conditions on individual permits in addition to the protections provided by the states as part of its oversight role. It evaluates proposed state program changes to discourage those that might reduce protection and make the state ineligible to continue implementing the program. In Michigan and New Jersey, coordination and communication between states and federal agencies have provided the public with a predictable, locally responsive program that protects state and federal waters.

Flexibility and choice are key. Not all states may be interested in adopting the Section 404 program. In some places states pursue 401 certification conditioning federal permits; in others they have state programmatic general permits. But there are states that are interested in assumption. All choices should be equally viable for the states as long as these choices maintain a consistent basement level of protection, which is the federal program. States retain the authority to regulate waters and/or activities not regulated by Section 404, and most state definitions of waters are much broader than the Clean Water Act reaching to groundwater and manmade structures. See Definitions of Waters of the U.S. at: http://aswm.org/member/wetlandnews/may_09/definition_of_waters.pdf.

A strong commitment to a partnership approach by states and federal agencies will lead to stronger, more consistent, and predictable permitting nationwide.

EPA STUDY ON ‘WHAT STATES SAY ABOUT BENEFITS AND OBSTACLES’ OF STATE ASSUMPTION AND STATE FEASIBILITY STUDIES

Recently the Wetland Division at EPA gathered information about state efforts to assume Section 404. At ASWM’s state/federal coordination meeting and joint conference with Society of Wetland Scientists in May 2008, EPA’s Kathy Hurd and Jennifer Linn presented the results

of the study, “Pursuing Clean Water Act 404 Assumption: What States Say About Benefits and Obstacles.” The principal investigators interviewed staff in nine states: Florida, Kentucky, Maryland, Michigan, New Jersey, North Dakota, Oregon, Virginia, and Wisconsin about the states’ investigations (or pursuits) of state assumption of the 404 program. Of these, three states developed draft assumption requests, and several made statutory, rule, or programmatic changes. For a PowerPoint presentation with the complete study results, go to:
<http://www.aswm.org/calendar/state2008/hurld.pdf>.

Over the years many states have completed feasibility studies as part of their investigations on state assumption. Minnesota was one of these states. Minnesota’s Preliminary Assessment of SWANCC on Minnesota wetlands states, “State Assumption of the 404 program would be the most straightforward way to provide landowners with one-stop-shopping for waters and wetlands permits,” but three things would have to be done first.⁴ 1) “The state laws, the Wetland Conservation Act (WCA) in particular, would need some modifications to match the requirements of Sec. 404 in some limited areas.” 2) “Some portion of the USACOE personnel managing wetlands in Minnesota would need to be replaced using state funding as there would be additional training, project and program oversight, data management and federal coordination requirements placed on the state, and to a lesser extent, on local governments.” 3) “An agreement developed to take advantage of the opportunity to link the Federal Farm Program Swampbuster” provisions with the state-assumed 404 program so that agricultural landowners can realize similar benefits from better coordinated regulation.”⁵ For a link to Minnesota’s feasibility study on assumption, go to:
http://www.aswm.org/swp/assumption/404_assumption_feasibility_study_0509.pdf.

Florida also completed a feasibility study and evaluated state assumption. In October 2005 the Department of Environmental Protection gave its report to the Florida Senate, which evaluated “‘assumption’ of the federal program and expansion of the State Programmatic General Permit (SPGP).” The study concluded that Florida could not successfully pursue assumption unless there were changes made to the federal Clean Water Act, the federal Rivers and Harbors Act, and Florida law. The Florida DEP recommended further investigation of these changes and suggested that “an expanded SPGP can be pursued without changes to federal law. Under this option, the department issues permits on behalf of the federal government for projects of a defined and limited impact.”⁶ For the evaluation report, go to:
http://www.aswm.org/swp/assumption/consolidation_program.pdf.

ASWM will post additional state feasibility studies and state investigations of assumption at:
<http://aswm.org/swp/assumption/index.htm> in the coming weeks.

⁴ Minnesota Wetland Report 1999-2000, MN *Preliminary assessment of the impacts of the SWANCC v. USACOE and the State’s potential assumption of the Section 404 Waters/Wetland Regulatory Program* by John Jaschke, Land and Water Section Administrator, Board of Water & Soil Resources.

⁵ Minnesota Wetland Report (same)

⁶ Letter from Florida DEP to Florida Senate, October 3, 2005 accompanying the report, “Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759 (Chapter 2005-273, Laws of Florida)

NEW JERSEY'S JOURNEY TOWARD ASSUMPTION

After Michigan, New Jersey became the second state to assume the Section 404 wetlands program under the Clean Water Act in 1993. EPA's decision to approve the state's wetland program culminated in a nine-month negotiation process, which focused on the legal and regulatory requirements for state assumption. "While the assumption affects only New Jersey, the issues and problems that arose during the negotiation process may provide lessons for other states striving to eliminate regulatory inefficiencies while maintaining a high level of environmental protection," according to Susan Lockwood, who played a significant role in the state's assumption process.⁷

What prompted the state to look into assumption of the 404 program? "New Jersey's Freshwater Wetlands Protection Act⁸ required the State to pursue assumption. New Jersey's Act was started in response to dissatisfaction with the way the Corps was doing things," explains Lockwood. The inclusion of assumption within the state's law was a mechanism to get buy-in from the development community to support its passage of state law. The state had to satisfy a general need for the state law to be better than the Corps *at the time* the state assumed the 404 program. For example, the state issued general wetland permits annually between 1988 and 1992 for only 89 acres while Nationwide Permit 26 alone permitted the destruction of 394 acres of wetlands annually.⁹ The state's 404 program does not allow for self-regulation, for example, a person needs approval before conducting regulated activities in wetlands. Since 1993, the Corps' permitting criteria has become stricter.

The most prominent and only truly challenging factor in the state's assumption process was the Endangered Species Act (ESA). During the negotiation period, EPA said no, the state is not required to do formal Section 7 consultation, while FWS said yes, they are required. New Jersey was willing to work with FWS to coordinate with them and identify a process that could be completed within the required permitting timelines. The state did not complete formal consultation. Instead, it worked out a process involving a memo of understanding with FWS, which identifies every known occurrence of endangered species by county. The state identifies permits that would be at issue and circulates those permit applications to FWS for a screening. The screening process allows up to 20 days to determine whether there is a problem with the permit. If there is a discrepancy between the state and FWS on whether a permit should be denied because of ESA concerns, the EPA has the final say as an arbitrator. Most of the time, there is no disagreement.

⁷ Lockwood, Susan. "Assumption, New Jersey Style." National Wetlands Newsletter. July/August 1994

⁸ New Jersey's Freshwater Wetlands Protection Act states, "The Department and the Attorney General shall take all appropriate action to secure the assumption of the permit jurisdiction exercised by the United States Army Corps of Engineers pursuant to the Federal Act. The Department shall make an initial application to the United States Environmental Protection Agency for this assumption within one year of enactment of this act, and shall provide the Governor and the Legislature with a schedule therefore and a copy of the application and supporting material forwarded by the Federal government." (N.J.S.A. 13:9B-27)

⁹ Lockwood, Susan. "Assumption, New Jersey Style." National Wetlands Newsletter. July/August 1994

“Assumption makes the program stronger,” says Susan Lockwood of the New Jersey DEP. Were there any issues or questions about partial assumption that came up during the process? Yes—when the state pursued assumption, it realized that the New Jersey Freshwater Wetlands Act excluded the Pinelands and the Hackensack Meadowlands. The Corps declared that the Hackensack Meadowlands were not “assumable” waters because they were tidal and regulated under Section 10 of the Rivers and Harbors Act. However, the Pinelands were not tidal and would need to become part of the state’s 404 program; otherwise, New Jersey’s assumption would be partial, which is not allowed under the current federal regulations for the 404 program. (Note: partial assumption is allowed under Section 402.) The Pinelands Commission’s statute was more stringent than the state’s program, so the state had to put together a memo of understanding with the commission. When the commission reviews permits for activities in the Pinelands, the Pinelands Commission can determine whether an activity meets the criteria for one of the state’s adopted general permits. If an activity needs an individual permit, it may be denied because the Pinelands Commission generally does not allow for wetland impacts. If an individual permit is required for an activity that is permitted by the Pinelands Commission, the state processes the permit.

Lessons learned? Other states pursuing assumption can learn from New Jersey’s experience. Lockwood suggests that states keep in mind that the federal government is most comfortable with programs that are similar to the 404 program. Any state program that is equivalent but not necessarily identical to federal programs will receive the greatest scrutiny. Second, it’s important for states to keep extensive records on the program implementation. “New Jersey was able to answer criticisms because it could document that the specific projects that were criticized were not mismanaged.”

New Jersey did not have to change its Freshwater Protections Act (FWPA) in order to assume Section 404, but it did change its rules. The state had previously used a truncated definition of wetlands (borrowed from the federal definition), which had to be updated. The state wetland program was already fully funded, so as long as the wetland program would be in place, New Jersey would have the necessary funding to support the 404 program.

For additional background, see “Assumption, New Jersey Style” by Susan Lockwood: http://www.aswm.org/member/wetlandnews/may_09/assumption_nj_style.pdf.

KENTUCKY’S EXPERIENCE: TO ASSUME OR NOT TO ASSUME?

In late 2004, Kentucky’s Environmental and Public Protection Cabinet (EPPC) began discussions about pursuing assumption of the 404 program. By June 2005, with the help of an EPA wetland grant, EPPC had assembled a task force with meetings twice a month. The task force was designed to look at the big picture: should and could Kentucky assume the 404 program? One of the big issues was funding; another was Kentucky’s existing Water Quality Certification Program and what it would need to do to bring it to a level of equivalency with the federal program. “This was an enormous undertaking and an intense process,” explains Jennifer

Garland, FWS, who was supervisor of the Water Quality Certification Program in Kentucky at the time. It required a huge time commitment on the part of the task force members, attending 11 task force meetings with training on all aspects of the federal program. The Corps was helpful in this process and provided training on many aspects of the federal 404 program, including wetland delineation, public interest review, National Environmental Policy Act, etc. Additional speakers came to present on endangered species, stream restoration, historic preservation, aquatic functions and values, and other topics. The task force considered many questions, including “do we need to enact these (endangered species, historic preservation) to make the program equivalent?” Another question was what fees should be charged.

Then Secretary LaJuana S. Wilcher of the Kentucky Environmental and Public Protection Cabinet resigned in fall 2006. Secretary Wilcher had been a key supporter for the assumption investigation. In addition, the *Carabell/Rapanos* decision had just come out, creating uncertainty about the scope of federal jurisdiction. As a result Kentucky terminated its consideration of state assumption. The federal environment was “up in the air,” Garland says. And the lack of funding for the state to assume the 404 program was a significant issue. While the process did not result in state assumption of the 404 program, it dramatically increased awareness and understanding of the federal program and the issues surrounding it and laid the framework for future improvements to the state's Water Quality Certification Program.

For a PowerPoint presentation on the Kentucky Task Force on CWA Section 404 Program Assumption, go to: www.water.ky.gov/NR/rdonlyres/6E5749BB-FE49-4462-94BF-3926F3730ACB/0/404Greg_PeckJim_Giattinaassumption.ppt.

FACT SHEETS ON ASSUMPTION

ASWM has prepared fact sheets on state assumption available at: http://aswm.org/member/wetlandnews/may_09/factsheets_0509.pdf. Below is a selection of the information included in the fact sheets. Also see EPA's fact sheets on state assumption at: <http://www.epa.gov/owow/wetlands/facts/fact23.html>.

REQUIREMENTS FOR STATE ASSUMPTION

In order to be eligible to assume administration of Section 404, a state program must comply with specified criteria. These are the primary requirements:

- The state must have jurisdiction over all waters, including wetlands that are under federal jurisdiction.¹⁰ Dredge and fill activities in lakes, streams, and other waters defined in federal regulations must be regulated by the state in addition to wetlands.

¹⁰ Corps may retain jurisdiction over tribal lands where a state lacks jurisdiction.

- The state laws must regulate at least the same activities as those regulated under federal law. State regulations can be broader than federal regulations, but cannot exempt activities which require a federal permit.
- The state laws must ensure compliance with federal regulations, including the 404(b)(1) guidelines. State regulations can provide greater resource protection, but cannot be less stringent than federal regulations.
- The state program must have adequate enforcement authority. Under a state-assumed program, primary responsibility for enforcement rests with the state.

In short, a state must have the authority needed to assume responsibility for the entire Section 404 permit program. It is not possible to assume only a portion of the program.

MECHANISMS FOR COORDINATION WITH FEDERAL LAWS LIKE THE ENDANGERED SPECIES ACT

- Section 404 provides for coordination with a number of other federal resources management programs. Because permits issued under a state assumed program are issued under state law, federal coordination requirements do not apply in the same manner.
- However, an alternative mechanism is provided through the EPA oversight role. As noted above, EPA's regulations at 40 CFR §233.51 require EPA review of any permit application that may impact federally listed threatened or endangered species, within sites identified under the National Historic Preservation Act, or in components of or is located within the National Wild and Scenic River System, among other critical areas. EPA in turn is required to coordinate with other federal agencies such as the U.S. Fish and Wildlife Service.
- The comments provided to the state by the EPA represent the comments of the federal government, and the state cannot issue a 404 Permit if the EPA objects. Therefore, for example, should the U.S. Fish and Wildlife Service object to issuance of a permit due to concerns regarding a listed species, EPA may block issuance of the permit by the state.

SOME BENEFITS OF STATE ASSUMPTION OF SECTION 404

Based on the experience of Michigan and New Jersey, administration of the Section 404 program by qualified states and tribes offers several significant benefits in terms of overall program efficiency and water resource protection.

- Improved resource protection. Ultimately, the coordinated efforts of both state and federal agency staff, the use of state specific methods backed by federal scientific expertise, and a more efficient regulatory program will provide greater protection of wetlands and other water resources.

- Increased program efficiency. State program assumption greatly reduces the need for duplicative state and federal permits, and eliminates potentially conflicting permit decisions, conditions, and mitigation requirements.

SOME BARRIERS TO STATE ASSUMPTION OF SECTION 404

The fact that only two states have assumed 404 program administration also highlights that there are some significant limitations associated with this process. Two examples are below.

- Inability to assume administration of Section 10 waters. For coastal states in particular, the inability to assume administration of the 404 permit program in major waterways, tidal wetlands or coastal areas, which may include some of a state's most significant wetland resources, severely limits the appeal of the overall program, and may lead to a decision to forego state assumption.
- Inability to assume 404 authority in only one geographic portion of the state. Some states would prefer to administer a state 404 program only in certain geographic areas, such as the coastal zone, or in tidal wetlands, including a portion of Section 10 waters. There is currently no option for partial assumption of a state 404 program, based on a limited geographic area.

STATUTORY CHANGES TO THE CLEAN WATER ACT – ACTIONS TO SUPPORT STATES

- Authorizing funding for state administration of the Section 404 program at a level commensurate with that provided for administration of similar federal environmental permit programs. Federal funding is appropriate for any state wetland program which effectively protects waters of the U.S. These programs include full state assumption of the Section 404 Program, PGP's and RP's, and Section 401 Water Quality Certification Programs; Section 401 provides the state with the authority to condition Section 404 permit applications.
- Section 404 could be amended to allow for assumption of the permitting program, in a portion of Section 10 waters. Allowing a state and the Corps to negotiate an agreement for the state to administer the Section 404 Program in major waterways as well as tidal wetlands, coastal wetlands, and other wetlands adjacent to major waterways will make the program worthwhile to coastal states where these are among the most important wetland resources. States recognize the ongoing responsibility of the Corps to maintain interstate navigation in primary interstate waters, and can coordinate with the Corps of Engineers regarding impacts to Section 10 waters where the Corps retains responsibility.
- Section 404 could be amended to allow for partial assumption of the permitting program in specific geographic areas only. Some states have wetland programs that extend only to certain geographic areas, such as the Coastal Zone or coastal waters. Allowing a state to

assume administration of the Section 404 Program in areas where the state has such jurisdiction would reduce state/federal duplication in those areas and generally provide the other benefits of program assumption in at least a portion of the state. Partial adoption is allowed under Section 402.

FEDERAL ACTIONS TO SUPPORT STATES

There are administrative options that could be implemented by the resource agencies without congressional action.

- Corps Districts should be directed to support development of State PGPs and RPs with qualified states. State PGPs and RPs provide significant program benefits, and provide an option for partial assumption of responsibility for the Clean Water Act wetland permit program. Some states may eventually move from a PGP to full program assumption, or may complement a PGP in coastal areas with assumption in non-traditionally navigable waters.
- Federal agencies should recognize and accept the differing basis for state and federal wetland regulations in evaluating applications for program assumption. For example, state laws are not based on commerce clause responsibilities, and this will be reflected in the language of state regulations. Nonetheless, the resultant state regulations may be equally, if not more, stringent than the parallel federal regulations in terms of resource protection.

In approving state programs, it is essential that federal agencies ensure a consistent level of regulation among the states, and that all state programs address national wetland program goals. On the other hand, federal agencies should also recognize and accept appropriate differences in state policy, underlying land and water law, and distinctions based on the wetland resource present in a given state.

QUESTIONS FOR STATES CONSIDERING SECTION 404 PROGRAM ASSUMPTION

1. Why is the state interested in assumption, and how would the state/public benefit?
Review the potential benefits and limitations of assumption.
2. Does the state have the legal authority to meet all federal requirements? Are all waters and wetland regulated? Are all activities regulated?
3. Does the state have adequate enforcement capability?
4. Does the state have sufficient human and fiscal resources to maintain the program?
5. Does the state have the political support to maintain the program?

MATERIALS REQUIRED TO REQUEST APPROVAL OF A STATE PROGRAM

The Section 404 State Program Regulations define the materials that must be submitted to EPA to gain approval of a state program. This list is summarized at 40 CFR §233.10 as follows.

- (a) A letter from the Governor of the state requesting program approval.

- (b) A complete program description. This detailed description will include a full description of the state's permitting and enforcement programs, including regulatory authorities, staffing, organization, and basic procedures.
- (c) An Attorney General's statement as set forth in §233.12 – essentially certifying that the state has legal authority to meet all federal requirements.
- (d) A Memorandum of Agreement with the Regional Administrator or EPA.
- (e) A Memorandum of Agreement with the Secretary of the Army.

Summaries of all materials used in the state dredge and fill permit program will be useful in compiling this program description.

KEY RESOURCES TO HAVE ON HAND WHEN STATES CONSIDER 404 ASSUMPTION

1. Section 404 of the federal Clean Water Act
2. EPA's Section 404 State Program Regulations, at 40 CFR Part 233
3. EPA's Section 404 (b)(1) Guidelines, at 40 CFR Part 230
4. EPA's Clean Water Section 404 Program Definition and Permit Exemptions at 40 CFR Part 232
5. Any state statutes (drafts or adopted/passed into law) addressing the issuance of dredge and fill permits in lakes, streams and wetlands
6. Corps 1987 delineation manual and regional supplements, if available
7. June 5, 2007 EPA/Corp Memorandum regarding Clean Water Act jurisdiction following the U.S. Supreme Court's decision in *Rapanos v. United States* and *Carabell v. United States* (or other current information regarding the scope of federal jurisdiction)
8. EPA and/or American Rivers' wetland fact sheets on importance of headwater streams
9. CWA 404 abbreviations and acronyms
10. Endangered Species Handbook, FWS (1998)
11. Section 7 Handbook, FWS (for initial assumption discussion)
12. Endangered Species Act summary information specific to state with focus on section 7 consultation (get this from FWS)

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