



Conducting Clean Water Act § 404 Assumption Crosswalks

ASWM Assumption Webinar Series

Presenters:

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WHAT IS A STATE/TRIBAL AND FEDERAL CROSSWALK?

Part of the CWA Section 404 assumption application package requires states/tribes to conduct an analysis

Demonstrate the assumed program is consistent with and no less stringent than – not necessarily the same as -- the federal requirements.

Aka a “crosswalk,” of federal requirements with the state/tribal requirements.

EPA’s assumption regulations establish the requirements for a complete program description, including the crosswalk portion that compares the federal and state/tribal legal authorities.

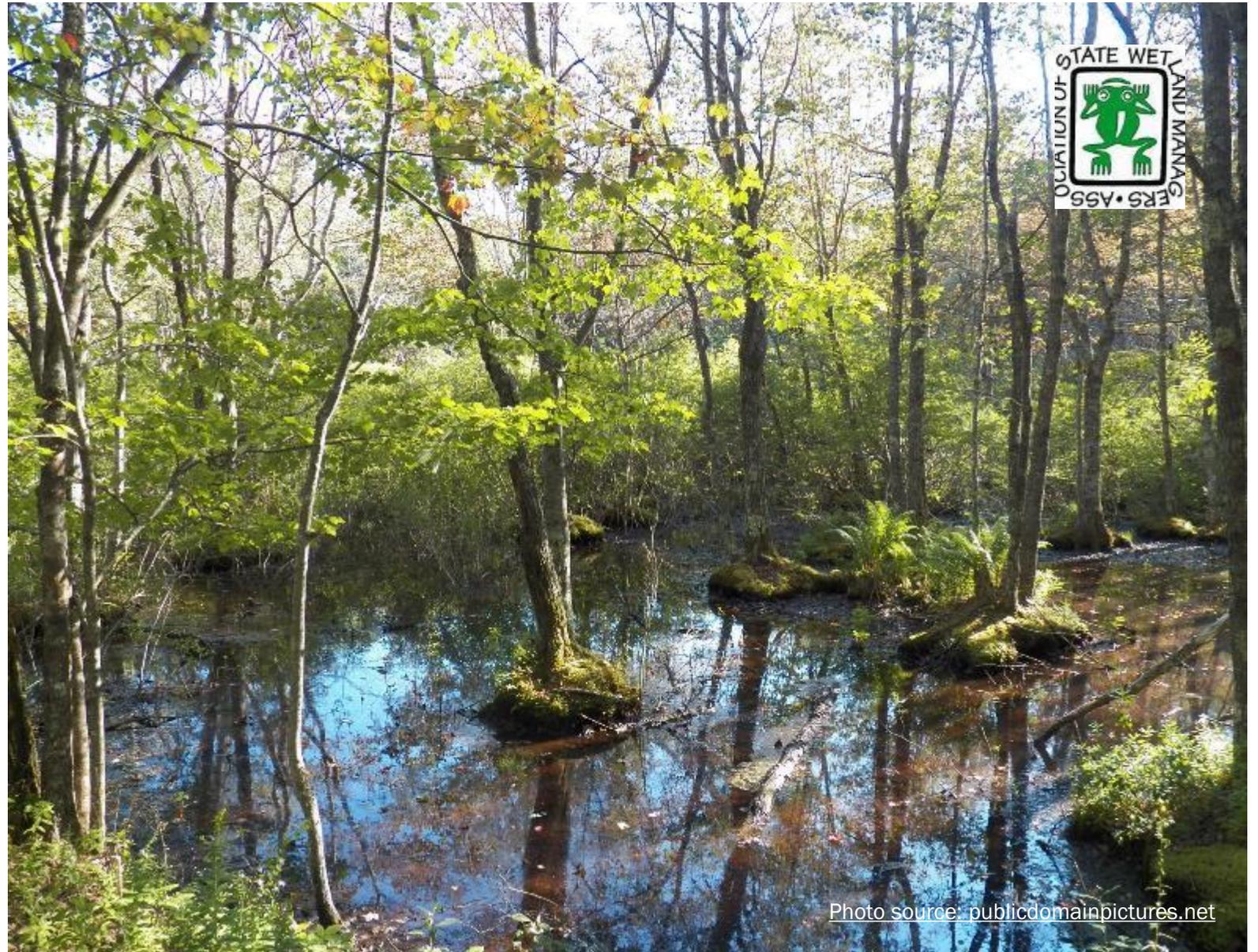


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WHERE TO BEGIN

- Identify which staff and supports need to be involved in the process.
- Engage with regional EPA attorneys
- For states/that do not have an existing regulatory program, legal counsel plays more significant role.
- Know or learn all rules and statutes that the program will operate under.
- In order to track comparison content, a spreadsheet is usually developed
- Once the comparison is complete, this will help staff identify the gaps that will then need to be filled in by existing rules that weren't considered or by committing to promulgate new rules.





STRUCTURING THE CROSSWALK

- Analysis is often conducted sequentially
- Either a side-by-side analysis or a more topical approach, with regulations and statute summarize by topic (sequencing etc.) or grouped by “like topics”
- Developing 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
 - Minnesota is currently conducting a hybrid form of these approaches

NOT A ONE AND DONE: CROSSWALKS ARE AN ITERATIVE PROCESS

- An iterative process
- The process often includes a combination of research, planning, workshops, rule writing, public notice and adoption, which may be repeated several times.
- Pro Tip: Any time a change is made, update the crosswalk immediately to reflect the change, so that this information is not lost or confused over time.
- Conducting crosswalks can be “long, tedious and boring”



COMMUNICATING CROSSWALK RESULTS

- The primary crosswalk required by EPA is very different from what the public will want/need.
- A public version for use as a communication tool.
- Implementation of equivalency may require changes in staffing, responsibilities, needs for training, changes in processes, development of new standard operating procedures and other tasks.
- ASWM has assembled examples of how to share this information



COMMON CROSSWALK CHALLENGES

- Not knowing where to start
- Determining how detailed the crosswalk needs to be
- Interpreting what is equivalent
- Cost of conducting a crosswalk
- Not having buy-in from all stakeholders/sectors
- If not having an existing program to build on
- Not having secure funding for implementation



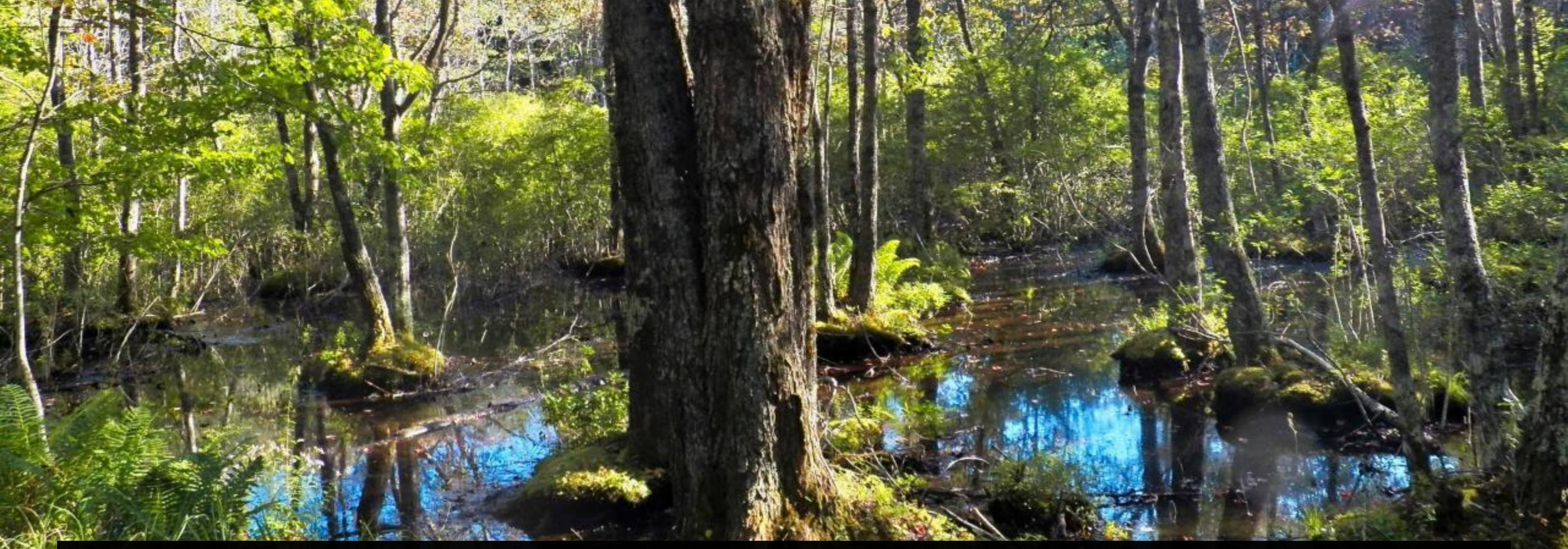
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BUILDING ON EXISTING EXAMPLES

- Uncertainty for all states/tribes undertaking this analysis.
- Additional guidance is expected from EPA in a **new 404(g) Rule** and additional documentation
- ASWM offers several examples of crosswalk documents in its **Assumption Examples Matrix**
- Next – Sharing experiences from three states that have undertaken the task: Florida, Oregon and Minnesota.



Photo Source: Pixabay free images



STATE PANEL

- Florida Department of Environmental Protection
- Oregon Department of State Lands
- Minnesota Board of Water and Soil Resources

FLORIDA

HEATHER MASON

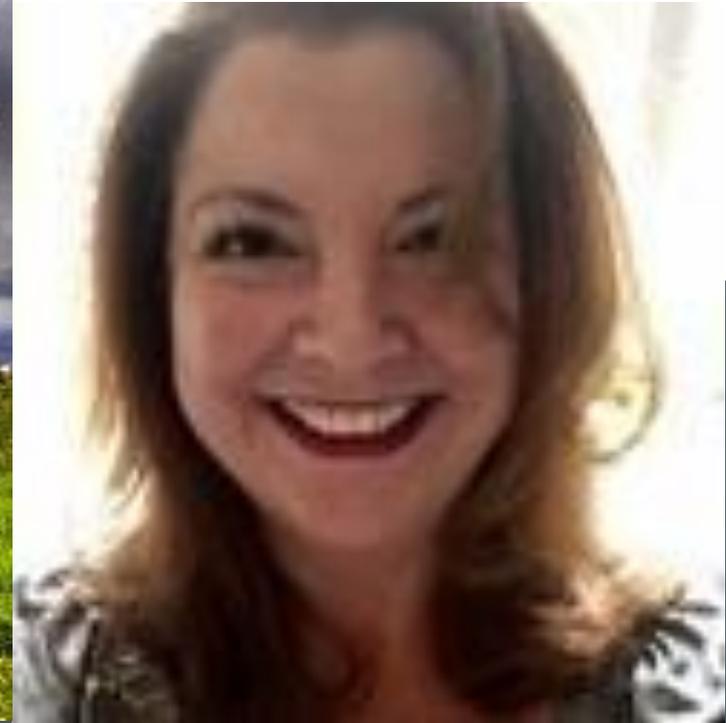
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OREGON

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OF STATE LANDS



OREGON CROSSWALK

RECENT EFFORTS

- State considering assumption for streamlining, reduced costs & effort – 20 years
- 2012 - DSL & DOJ create regulatory crosswalk, first draft
- 2018 Legislative working group convened to look at feasibility of state assumption – determined only partial assumption feasible (UGBs, mitigation banks, mining)
- 2019 hb2436 directs DSL to study partial assumption
- 2020 (December) DSL findings Report to Oregon legislature
- 2021 awaiting direction from legislature (404 assumption “shelved”; awaiting 404(g) Rule, partial assumption allowed?)



MINNESOTA

LES LEMM AND KEN POWELL

BOARD OF WATER AND SOIL
RESOURCES



MINNESOTA CROSSWALK

RECENT EFFORTS

- 2017 Feasibility Study
- 2018 Analysis of Retained Waters
- 2019 State Legislation & EPA Grant
 - Develop and Assemble Materials to Assume 404
 - Report to legislature on funding to secure assumption and implement state-assumed program (Feb. 2022)
 - Draft application & associated materials





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**PANEL
DISCUSSION:**

**When in the exploration process did you do the crosswalk work?
How did you approach doing an assumption crosswalk?**

Responsible Agency	Provision Citation (40 CFR §...)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency (Less, Equally, or More Restrictive).
		saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.				
	230.4	Organization	Not Applicable			
BWSR, DNR (While some content of section address functions carried out by PCA, those functions as they relate to this section underly the	230.5 <i>General Procedures to be followed</i>	<i>General procedure to be followed.</i> In evaluating whether a particular discharge site may be specified, the permitting authority should use these Guidelines in the following sequence: (a) In order to obtain an overview of the principal regulatory provisions of the Guidelines, review the restrictions on discharge in §230.10(a) through (d), the measures to minimize adverse impact of	Sequence of review. Prescribes general guidelines to be used in sequence: <ul style="list-style-type: none"> • Obtain overview by reviewing guidelines • Determine whether General Permit is applicable. If not: • Consider alternatives • Delineate site • Evaluate nonliving site characteristics • Evaluate special and critical characteristics w\regard to living communities and human use 	BWSR: MN Rule 8420.0255 (General Application Procedures) MN Rule 8420.0305, 0310, 0315, 0320, 0325, 0330 (Application Requirements). MN Statutes	BWSR: WCA rules prescribe specific procedures and requirements for Local Government Units (LGUs) to accept, review, notice and make decisions on projects that impact wetlands. Those procedures include consideration of alternatives and delineation of wetlands. Decisions on impacts to wetlands must be based on specified standards for different application types (replacement plan, exemption, wetland boundary/type, banking plan, no-loss) and application procedures.	This section prescribes order that “these” guidelines “should” be used in. We do not use these guidelines. Also, “should” does not indicate requirement. WCA and PWWPP: Sequencing provisions ensure execution of a

Provision Text	Applicable State Law Text & Assessment of Equivalency
<p>(b) Possible loss of values: The discharge of dredged or fill material in wetlands is likely to damage or destroy habitat and adversely affect the biological productivity of wetlands ecosystems by smothering, by dewatering, by permanently flooding, or by altering substrate elevation or periodicity of water movement. The addition of dredged or fill material may destroy wetland vegetation or result in adnouncement of succession to dry land species. It may reduce or eliminate nutrient exchange by a reduction of the system’s productivity, or by altering current patterns and velocities. Disruption or elimination of the wetland system can degrade water quality by obstructing circulation patterns that flush large expanses of wetland systems, by interfering with the filtration function of wetlands, or by changing the aquifer recharge capability of a wetland. Discharges can also change the wetland habitat value for fish and wildlife as discussed in subpart D. When disruptions in flow and circulation patterns occur, apparently minor loss of wetland acreage may result in major losses through secondary impacts. Discharging fill material in wetlands as part of municipal, industrial or recreational development may modify the capacity of wetlands to retain and store floodwaters and to serve as a buffer zone shielding upland areas from wave actions, storm damage and erosion.</p>	<p>DNR: Minn. Stat. 103G.005, subd. 15, 15a., and 19. DNR: These subdivisions are definitions for Public waters, Public water wetlands, and Wetlands, respectively. Minn. Rules 6115.0170, Subp. 31 thru 31b. Defines Public Waters, Public waters wetlands, and Public waterbasins, all which may consist of wetlands as described in 230.41. Minn. Rules 6115.0190, Subp. 1 It is the goal of the DNR to limit the placement of any fill into public waters in order to minimize change or damage to the environment. Minn. Rules 6115.0190, Subp. 3 It is prohibited to fill in posted fish spawning areas. Minn. Rules 6115.0190, Subp. 5 Permits are required for the placement of fill in public waters, and projects must be the minimum impact solution to the specific problem, adverse impacts to the physical or biological character of the waters must be mitigated These are the specific standards for Issuing permits to fill in public waters.</p>
<p>230.42 (a) Mud flats are broad flat areas along the seacoast and in coastal rivers to the head of tidal influence and in inland lakes, ponds, and riverine systems. When mud flats are inundated, wind and wave action may resuspend bottom sediments. Coastal mud flats are exposed at extremely low tides and inundated at high tides with the water table at or near the surface of the substrate. The substrate of mud flats contains organic material and particles smaller in size than sand. They are either unvegetated or vegetated only by algal mats.</p>	<p>BWSR: See Subpart E response DNR: NA</p>

Add hyperlinks, color code by program/resource type





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**PANEL
DISCUSSION:**

**What challenges did you encounter doing the
crosswalk preparation or analysis?**



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**PANEL
DISCUSSION:**

**What did your state's crosswalk find?
Were there gaps that needed to be filled or inconsistencies?
If so, how did you fill them?**



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**PANEL
DISCUSSION:**

What lessons learned would you want to impart to other states or tribes preparing to develop an assumption crosswalk?



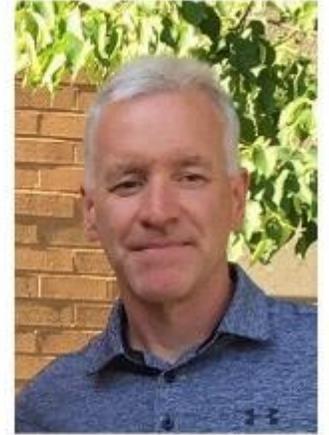
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Q&A with Panelists