

Minnesota Section 404 Assumption Feasibility Study

Prepared by: Minnesota Department of Natural Resources and the Minnesota Board of Water and Soil Resources

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Complete report available at:

http://www.bwsr.state.mn.us/wetlands/cwa_404/2015-17_CWA_404_Feasibility_Study.html

Executive Summary

This report fulfills the requirements of Laws of Minnesota 2015, Special Session Chapter 4, Section 137 – Federal Clean Water Act Section 404 Permit Program Feasibility Study (Appendix A). This law required the Minnesota Department of Natural Resources (DNR) and the Minnesota Board of Water and Soil Resources (BWSR) to, “. . . study the feasibility of the state assuming administration of the Section 404 permit program of the federal Clean Water Act.” The law was enacted largely due to concerns from segments of the regulated community over lengthy delays in obtaining Section 404 permits.¹ The law identified eleven specific topics to be identified and analyzed in the study. These are addressed in Section 3 of this report and summarized below.

Section 404 of the federal Clean Water Act (CWA) regulates the discharge of dredged or fill material into waters of the U.S. (33 USC §1344). It is administered by the U.S. Army Corps of Engineers (COE) (in Minnesota, the St. Paul District) with oversight by the U.S. Environmental Protection Agency (EPA)(Region 5, for Minnesota). Section 404(g) of the CWA allows states or tribes to apply to the EPA to administer their own state/tribal regulatory program(s) to meet Section 404 requirements, thereby eliminating the need for separate, federally-issued permits for projects affecting those waters covered by state assumption. This process is known as Section 404 Program assumption. Minnesota has a comprehensive state water/wetland regulatory program, embodied primarily in the Minnesota Wetland Conservation Act (WCA), the Public Waters Permit Program (PWPP) and state water quality standards.

The state of Minnesota has investigated Section 404 assumption several times previously, but the most recent comprehensive analysis was in 1993. Current state statutes contain authorization and direction to pursue assumption. However, the state has never applied for assumption for a variety of programmatic and budgetary reasons.

Summary of findings

The significant findings for each of the legislatively required study elements are summarized below.

(1) the federal requirements for state assumption of the (Section) 404 program:

¹ Testifying in favor of the legislation during the 2015 legislative session were representatives of the Minnesota Inter-County Association, the Association of Minnesota Counties, and the Minnesota Rural Counties Caucus. The Minnesota County Engineers Association also supported the proposal to conduct a Section 404 assumption feasibility study.

- The state must have comprehensive regulatory jurisdiction over waters covered by the CWA, however the COE must retain regulatory authority over certain waters – see (2).
- The state must regulate all activities covered under Section 404 of the CWA.
- The state permitting program(s) must be administered by a state agency or agencies.
- State permitting programs must have public notice provisions as specified for the Section 404 program.
- Under Section 404 assumption, state permits are subject to review by the EPA, which can require conditions or object to issuance of permits. (In the two states that have assumed the Section 404 program, the proportion of state permits actively reviewed by the EPA is relatively small.)
- The application process for Section 404 assumption is extensive and would require extensive coordination with the EPA and the COE. A dedicated FTE at a state agency would be required for two years or more to identify specific statute/rule changes, develop the required agreements with the EPA and COE, and prepare the assumption application package.

(2) the potential extent of assumption, including those waters that would remain under the jurisdiction of the United States Army Corps of Engineers due to the prohibition of 404 assumption in certain waters as defined in section 404(g)(1) of the federal Clean Water Act:

- The COE must retain Section 404 permitting authority over waters that are used as a means to transport interstate or foreign commerce and wetlands adjacent thereto (§404(g)(1) waters), as well as waters on tribal lands. The specific extent of these waters would be identified by the COE, St. Paul District through a Memorandum of Agreement (MOA) with the state.
- There is no guidance from the federal agencies on determining §404(g)(1) waters. Some interpretations of the federal statute would result in a limited number of the state's waters being assumable, creating little incentive for the state to pursue Section 404 assumption.
- Minnesota is currently represented on a national-level committee convened by the EPA to develop recommendations to the EPA for clarifying §404(g)(1) waters. However, the committee will not complete its work within the timeframe of this feasibility study and it is unclear if or when consistent federal guidance will be forthcoming.
- The St. Paul District of the COE has preliminarily informed the DNR and BWSR that the current position of COE headquarters, which the District is obligated to apply, is that the waters which would be retained by the COE include:
 - navigable waters under Section 10 of the Rivers and Harbors Act,
 - “traditionally navigable waters,” and
 - all wetlands adjacent to those waters using the current COE regulatory definition for determining jurisdiction.
- An analysis of the current COE position on COE-retained waters, including mapping of the approximate extent of COE-retained and state-assumable waters, will be completed by BWSR and the DNR and incorporated into this report as an appendix when it is completed. The results of this analysis will have significant implications for the potential benefits of state Section 404 assumption.

(3) differences in waters regulated under Minnesota laws compared to waters of the United States, including complications and potential solutions to address the current uncertainties relating to determining waters of the United States:

- Regulation of wetlands under state permitting programs in Minnesota is broader than CWA jurisdiction.
- There are gaps in state permitting program jurisdiction over other waters (non-wetland) compared to the CWA:
 - Incidental wetlands
 - Stream headwaters, i.e., tributaries having drainage areas < 2 sq. mi.
 - Non-wetland basins (lakes, ponds) not on the Public Waters Inventory
- Under Section 404 assumption, having comprehensive state permit program jurisdiction over all state waters would eliminate most issues associated with the current uncertainties over CWA jurisdiction. A state permit would confer Section 404 authorization whether the affected water is federally jurisdictional or not, without having to make a jurisdictional determination (except for waters for which the COE must retain regulatory authority – see study element (2)).

(4) measures to ensure the protection of aquatic resources consistent with the Clean Water Act, Wetland Conservation Act, and the public waters program administered by the Department of Natural Resources:

- Most aspects of Minnesota state regulatory programs are equivalent, though not necessarily identical to the CWA in terms of protecting aquatic resources. The scope of regulated activities under state programs is broader than CWA Section 404. However, certain parts of the state regulatory programs (including, but not necessarily limited to the items below) would require more detailed review with EPA if Minnesota elects to pursue Section 404 assumption.
- The following aspects of Minnesota state programs were identified as inconsistent with the CWA regarding protecting aquatic resources:
 - Some of the WCA exemptions that allow wetland impacts with no replacement or reporting have no counterpart in the CWA.
 - State permitting programs do not explicitly require consideration of impacts to federally listed threatened or endangered species, although some federally listed species are also listed under the Minnesota Endangered Species Act, which is a consideration under state permitting programs. Under Section 404 assumption, EPA cannot waive their review of state permits that may affect federally listed species and designated critical habitat and must coordinate with the USFWS and the COE. If Minnesota assumed the Section 404 program, it's likely that the state would need to implement a procedure to screen permit applications for both state and federally listed species, and notify EPA accordingly.
 - The state program requirements for where compensatory mitigation may be located (relative to the impact site) are not entirely consistent with the Section 404 watershed based approach.
 - The state program mitigation requirements for impacts to lakes and streams are vague compared to certain aspects of the Section 404 program.
 - The CWA contains provisions allowing citizens to commence civil suits in federal district court for alleged violations of the CWA. Minnesota's water regulatory programs have

no similar provisions. However, the Minnesota Environmental Rights Act (M.S. 116B) authorizes civil suits by state residents under certain circumstances for “the protection of the air, water, land, or other natural resources located within the state.”

- For purposes of this study, it is presumed that if Minnesota applies for and receives EPA approval to assume the Section 404 program, then the applicable regulations will be properly implemented, i.e., there should be no difference in the regulatory outcomes because of state assumption other than potential gains in permitting efficiency.

(5) changes to existing state law, including changes to current implementation structure and processes, that would need to occur to allow for state assumption of the 404 program:

- State permitting program jurisdiction would need to be expanded to cover some types of incidental wetlands, streams having a drainage area smaller than two square miles, and non-wetland water basins not on the Public Waters Inventory.
- Some WCA exemptions would need to be revised, and possibly eliminated.
- Because of the Section 404 assumption requirement that approved state programs be administered by a state agency or agencies, primary responsibility for WCA administration would need to be transferred from local governments to a state agency, likely BWSR. Two scenarios are evaluated: 1) full state implementation, where state agencies (DNR and BWSR) would manage the entire state wetland and waters permitting process, and 2) shared state-local implementation, where local governments would continue to have a role in WCA decisions through participation on technical evaluation panels, and possibly by continuing to have some level of permitting authority for some activities through a state-issued general permit(s). The second scenario has the advantage of being able to continue to utilize the considerable level of local expertise that has developed during the 25 years of WCA implementation.
- WCA and PWPP public notice procedures would need to be expanded.
- Additional aspects of Minnesota’s state regulatory programs, such as wetland replacement location and enforcement/penalties might require revision after more detailed review with EPA.

(6) new agency responsibilities for implementing federal requirements and procedures that would become the obligation of the state under assumption, including the staff and resources needed for implementation:

- BWSR (or another state agency, but BWSR is assumed to be the most practical choice based on current agency duties) would be required to take on additional responsibilities in implementing WCA due to the shift of primary responsibility from local governments. Approximately 23 additional BWSR FTEs would be required if some level of shared state-local WCA implementation were retained. Approximately 53 additional BWSR FTEs would be required for a complete shift of all local government WCA duties to BWSR (The DNR would continue its current WCA responsibilities for mining-related impacts and enforcement).
- Expanded state regulatory jurisdiction will require up to five additional state FTEs (DNR and/or BWSR) for administering the permitting program(s) and up to four new FTEs for enforcement.
- The state could adopt procedures for the Minnesota Pollution Control Agency (PCA) to review state permits for state water quality standard compliance. This would not be a new

responsibility since PCA already reviews Section 404 permits, but would entail a revised process. It is unclear whether MPCA staffing requirements would change under state assumption.

- For efficient permit processing, the state (presumed to be the DNR) would likely take on responsibility for screening permit applications for potential impacts to federally listed threatened and endangered species and for potential impacts to cultural/historic sites (1 - 2 FTE).
- The state agencies would likely develop a coordination process with the Minnesota tribes, in association with the EPA, for state permits issued on non-Indian lands that might affect downstream tribal waters (covered in aforementioned FTE estimates).
- States that assume the Section 404 program are required to submit an annual report to the EPA on program implementation. This would be a new responsibility, likely shared among state agencies (covered in aforementioned FTE estimates).
- Although not directly required for Section 404 assumption, developing and implementing an on-line permit application system for WCA would greatly facilitate state compliance with the EPA reporting requirement (especially under the “shared state-local” implementation scenario) as well as facilitate the required changes in public noticing of permit applications. Such a change might also help achieve one of the primary goals of assumption -- timelier permit decisions/issuance. Operating and maintaining the system would require 1.5 FTE at the state agency having primary implementation responsibility.

(7) the estimated costs and savings that would accrue to affected units of government:

- Costs and savings were analyzed for two Section 404 assumption scenarios: 1) shared state-local WCA implementation, where BWSR takes on primary responsibilities but local governments continue to have a substantial role, and 2) full state implementation, where all current local government WCA duties are shifted to BWSR. The staffing and cost/savings implications of both scenarios are shown in the following tables.

Current and projected LGU and state staffing under Section 404 assumption (in FTE)

Agency	Current FTEs	FTEs Under Section 404 Assumption			
		Shared State – Local Implementation		Full State Implementation	
		Projected	Change from Current	Projected	Change from Current
BWSR	15.0	37.6	22.6	68.4	53.4
DNR	18.8	30.3	11.5	30.3	11.5
MnDOT^a	2.0	0	-2.0	0	-2.0
MPCA	3.5	3.5	0	3.5	0
Total State Agency	39.3	71.4	32.1	102.2	62.9
Local Governments^c	58.7	36.1	-22.6	0 ^d	-58.7
Total State and Local	98	107.5	9.5	102.2	4.2
Change from Current		9.5		4.2	

^a The two current positions listed for MnDOT are COE project managers that MnDOT pays for. The indicated changes should be considered potential changes; MnDOT is not certain how staffing costs would be affected under Section 404 assumption.

^b The MPCA might require fewer staff under Section 404 assumption because fewer Section 401 certifications would be required. However, the extent of any potential staff reduction is unknown at this time because, 1) the extent of non-assumable waters, which would still require Section 401 certifications, is unclear; and 2) the state might elect to implement a water quality certification process for state permits, which would continue to require MPCA staff.

^c The estimated number of local government FTEs does not represent the actual number of local staff employed for WCA implementation, but rather the number of FTEs calculated to be needed to perform the specific duties that may be affected under Section 404 assumption.

^d Even under the full state implementation scenario, LGUs would in all likelihood continue to expend some staff time on WCA implementation in various forms. However, the actual extent can't be accurately estimated.

Current and projected annual LGU and state expenditures under Section 404 Assumption (in \$millions). Not included in the table is a projected one-time cost of approximately \$3.0 million for developing and deploying an on-line permitting and reporting system for WCA. (Apparent discrepancies in the "Total" and "Change" cells are due to rounding of the supporting figures.)

Agency	Current Costs	Costs Under Section 404 Assumption			
		Shared State – Local Implementation		Full State Implementation	
		Projected	Change from Current	Projected	Change from Current
BWSR^a	3.451	5.776	2.325	7.050	3.599
DNR	2.198	3.601	1.403	3.601	1.403
MnDOT^b	0.206	0	-0.206	0	-0.206
MPCA^c	0.361	0.361	0	0.361	0
Total State Agency	6.216	9.738	3.522	11.012	4.796
Local Governments	4.140	1.811	-2.329	0 ^d	-4.140
Total State and Local	10.356	11.548	1.193	11.006	0.656
Change from Current		1.192		0.651	

^a The cost figures for BWSR under the current and the shared state-local implementation scenario include the WCA-related portion of natural resource block grants provided to counties (\$1.906m), which would be eliminated under the full state implementation scenario. .

^b The changes associated with MnDOT should be considered potential changes; MnDOT is not certain how staffing costs would be affected under Section 404 assumption.

^c The MPCA might require fewer staff and thus reduced expenditures under Section 404 assumption because fewer Section 401 certifications would be required. However, the extent of any potential staff reduction is unknown at this time because, 1) the extent of non-assumable waters, which would still require Section 401 certifications, is unclear; and 2) the state might elect to implement a water quality certification process for state permits, which would continue to require MPCA staff.

^d Even under the full state implementation scenario, LGUs would in all likelihood continue to expend some staff time on WCA implementation in various forms. However, the actual extent can't be accurately estimated.

- State agency annual costs would increase under both scenarios while local government costs would decrease, mostly due to the required shift in permitting responsibility from local governments to a state agency (presumed in this analysis to be BWSR). A portion of the increased state agency cost is attributed to the need for additional state agency staff to administer permitting and enforcement for the required expanded state regulatory jurisdiction and for screening applications for endangered species and cultural/historic site impacts.
- Local governments would realize cost savings due to the shift in permitting responsibility to BWSR.
- Total annual implementation costs under Section 404 assumption are estimated to be somewhat higher than current levels under both the shared state-local and full state scenarios:
 - Expanded state regulatory jurisdiction would require additional staff
 - Under the shared state-local scenario, BWSR would require additional staff, but local governments would continue to have expenses related to permitting, although at a reduced level.
 - Under full state implementation, local government expenditures are assumed to be eliminated, but the cost for the additional state agency staff exceeds the local government savings. (In practice, local governments would likely still have some expenditures, but these would not be required under the full state assumption scenario.)
- There would be an estimated \$3 million one-time cost to develop an on-line permit application and reporting system for WCA.
- To the extent that Minnesota governmental units are often project sponsors who must apply for permits (mostly for transportation projects), they would realize cost savings by reduced permitting times that could occur under Section 404 assumption. The extent of such savings depends on inflationary factors for construction materials, fuel, labor, land, etc., which change over time. Accurately quantifying such savings exceeds the time and staffing capacity of this study.
- Permit applicants would realize cost savings under Section 404 assumption by not having to prepare separate state and federal (Section 404) permit applications and devote staff time to separate permit processes, except for projects involving waters for which the COE must retain regulatory jurisdiction.

(8) the effect on application review and approval processes and time frames:

- Based on past permitting data provided by the COE, St. Paul District for permits issued in Minnesota, projects that currently require a COE standard individual permit or a letter of permission (about 10% of all COE authorizations, or about 112 permits/year) would likely receive permit decisions faster under state assumption of Section 404. This assumes that:
 - Projects regulated under WCA receive permit decisions within the standard 60 to 120 day time frame stipulated under Minn. Statutes 15.99. (Note: under state assumption, WCA applications that receive a “default approval” under M.S. 15.99 would require a separate Section 404 authorization issued by the COE.) However, there are no data on actual WCA permitting time frames.

- EPA review of state permits under Section 404 assumption is limited to a relatively small proportion of all permits issued and the review can be accomplished within existing state permit program timeframes.
- State assumption of Section 404 would streamline permitting (for waters and activities that currently require a Section 404 permit) since projects would no longer require both a state and a federal permit, except in areas of the state where the COE must retain regulatory jurisdiction.

(9) alternatives to assumption that would also achieve the goals of regulatory simplification, efficiency, and reduced permitting times:

- Alternatives include:
 - increasing the number sector-specific COE project managers;
 - expanded regional general permits, including nationwide permits;
 - more special area management plans/comprehensive wetland protection and management plans;
 - expanding the WCA federal approvals exemption; and
 - developing programmatic general permits

All of the alternatives have certain benefits and drawbacks, as does Section 404 assumption. None of the options, including Section 404 assumption, fully remove federal government involvement in the regulation of aquatic resources. One distinct advantage of Section 404 assumption is that the state could unilaterally initiate the process -- the EPA must accept and act on state applications to assume the program, and if a state program meets the requirements for assumption, the EPA must approve it. All of the alternatives listed above rely on the COE, St. Paul District to take action to implement.

(10) options for financing any additional costs of implementation:

- Options include increased legislative appropriations to state agencies, permit fees, local tax/levy authorities, a dedicated tax on specified products or transactions and entirely novel sources of revenue. The option for local tax/levy authorities would only raise local revenue, which would be of limited use since the additional costs of Section 404 assumption occur at the state agency level.

(11) other information as determined by the board and commissioner:

- This section of the report focuses on the experience of other states that have either assumed the Section 404 program or have conducted significant investigations on assumption.
 - The two states that have assumed Section 404, Michigan and New Jersey, report that the program works very well, including expedited permit times, less permit redundancy, and good working relationships with EPA.
 - States that have investigated but not assumed Section 404 cite financial constraints, challenges with federal endangered species coordination, and lack of clarity on non-assumable waters (see item (2)).

Most significant findings relating to the feasibility of state assumption of the CWA Section 404 permitting program:

- Based on past COE permitting data, projects that currently require a COE standard individual permit or a letter of permission (about 10% of all COE authorizations, or about 112 permits/year) would likely receive permit decisions faster under state assumption of Section 404. Most projects (except in areas where the COE retains jurisdiction) would realize some permitting efficiency under state assumption by only having to obtain a single (state) permit, which would confer Section 404 authorization. Faster, streamlined permitting would achieve cost savings for the affected projects, although an accurate estimate could not be derived within the constraints of this study.
- The current COE position on waters that must remain under COE jurisdiction (i.e., not assumable by the state) and the lack of clear federal guidance on this issue is a significant impediment to assessing the feasibility of state assumption. Further coordination with the COE, St. Paul District and/or issuance of clear federal policy by EPA will be needed to determine if Section 404 assumption would result in any meaningful improvement in regulatory efficiency in Minnesota.
- To assume the Section 404 program, WCA would need to be amended to transfer primary permitting authority from local governments to a state agency, BWSR being the most likely candidate. However, it's likely that a shared state-local government implementation framework could be developed that would continue to provide a role for local governments in water/wetland regulation.
- State government would incur increased costs (between \$3.522m and \$4.796m) for water/wetland regulation due to the required shift in permitting authority from local governments to a state agency. Local governments should realize savings (between \$2.329m and \$4.140m). Overall costs would increase somewhat, primarily due to the requirement to extend state regulatory program jurisdiction to additional waters.