

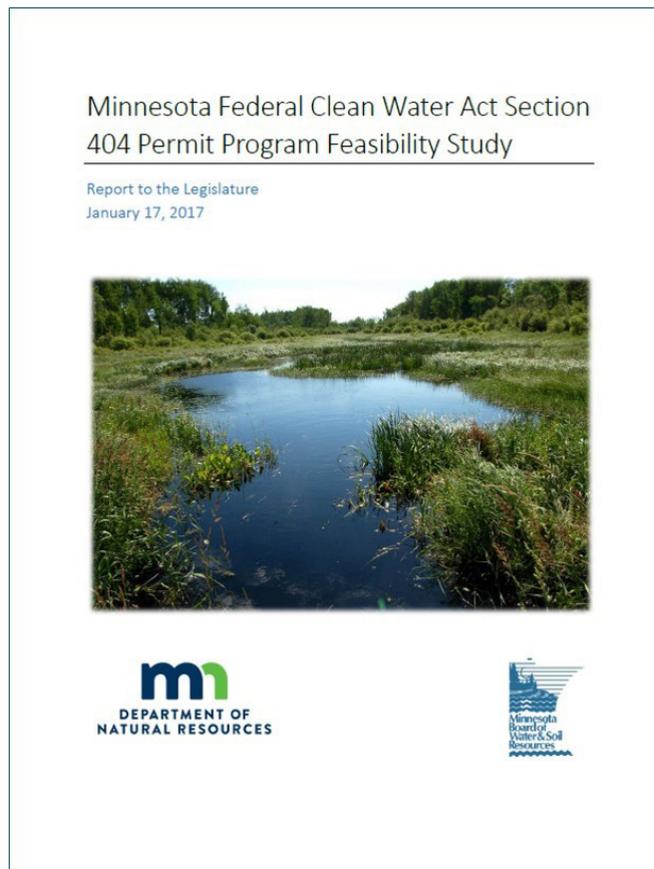
## EPA to revise Section 404 Assumption rules

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 the primary federal program regulating placement of fill material into rivers, streams, lakes and wetlands that are subject to federal jurisdiction for the purpose of maintaining the environmental quality of those waters and waters downstream.

In Minnesota, the program is administered by the U.S. Army Corps of Engineers with oversight by the U.S. Environmental Protection Agency (EPA).

Section 404(g) of the CWA allows states or tribes to apply to the EPA to administer their own regulatory program to meet Section 404 requirements (aka “404 assumption”). That change would eliminate the need for separate, federally-issued permits, resulting in a faster, more efficient process and improved government efficiency. In fact, it is the long-standing policy of Congress that the states implement the Section 404 program (33 U.S.C. § 1251(b)). However, due to multiple barriers to assumption, only two states — Michigan and New Jersey — have assumed implementation of the CWA Section 404 program since congress authorized it in 1977.

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. Consequently, the state should be a good fit for 404 assumption. Minnesota has explored 404 assumption in the past. The most recent reports are the most thorough and in-depth: the

“Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study” (January 2017) and the associated “Analysis of Retained and Assumable Waters in Minnesota” (May 2018). Despite the state’s comprehensive water/wetland regulatory program, 404 assumption in Minnesota has not been

feasible due to the same “barriers” experienced by other states. The most significant of these barriers pertains to what is known as “assumable waters.”

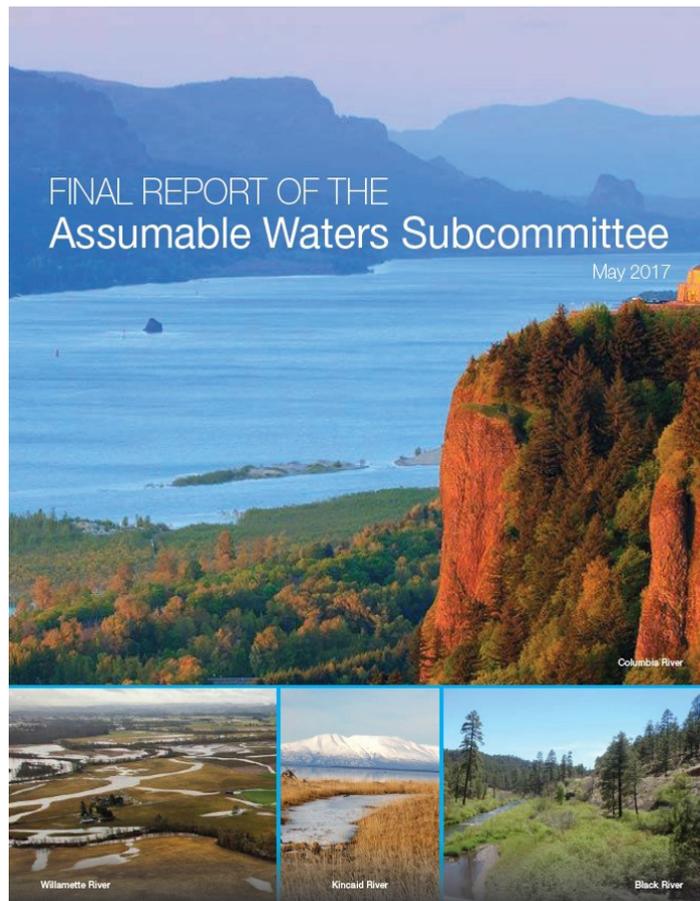
When a state assumes implementation of Section 404 of the CWA, not all waters and wetlands are assumable. The Corps retains permitting authority over certain waters and, under current EPA regulations, it is the Corps’ responsibility to determine which waters it will retain. The CWA provision identifying what waters are to be retained lacks clarity. Until recently, the Corps maintained an expansive interpretation, leaving relatively few waters that would be assumable by states or tribes. In addition, the Corps supported a case-by-case process for identifying some retained waters, thereby limiting much of the efficiency to be gained by state/tribal assumption.

The EPA has recognized that the assumable waters issue needed clarification. In June 2015, the EPA established

the Assumable Waters Subcommittee of the National Advisory Council for Environmental Policy and Technology (NACEPT) to “provide advice and develop recommendations on how the [EPA] can best clarify for which waters the state/tribe has CWA section 404 permit responsibilities, and for which waters the USACE retains CWA section 404 permit responsibility, under an approved state/tribal program.”

The subcommittee’s final report was completed in May 2017 and submitted to EPA Administrator Scott Pruitt on June 2, 2017. Implementing the Assumable Waters Subcommittee recommendations would result in a reasonable amount of waters for Minnesota to assume, using a process that provides certainty and is implementable on the ground. These recommendations would significantly improve the feasibility of 404 assumption.

The process and requirements for 404 assumption are established in EPA rules. This past summer, the EPA released its spring 2018 Regulatory Agenda, which indicated EPA’s intent to initiate rulemaking to update the 404 assumption regulations, specifically including the clarification of assumable waters. The agenda included



Link to the report here: <https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report>

the following abstract:

“CWA section 404(g) provides for state and tribes to assume administration of the dredged and fill permitting program for certain waters, and addresses the requirements for implementation and EPA oversight. This rule is intended to provide general updates to the 1988 regulations and provide clarity on specific issue(s) requested by the states and tribes. Specifically, states and tribes requested that the EPA clarify which waters the state/tribe has CWA section 404

permit responsibilities, and which waters the USACE retains CWA 404 permit responsibility, under an approved state/tribal program. In 2015, EPA convened a Federal Advisory Committee (FACA), comprised of state, tribal and other stakeholder representatives charging them with providing recommendations on how EPA could provide clarity on this issue. This rule is intended to provide clarity on which waters are assumable after consideration of the FACA recommendations and provide needed technical

corrections and updates to the 1988 regulations.”

In addition, the assistant secretary of the Army for Civil Works released a memorandum (dated July 30, 2018) that clarifies which waters the Corps would retain under state assumption. The memo is consistent with the Assumable Waters Subcommittee’s recommendations regarding the scope of retained waters. As a result, the subcommittee’s recommendations are in effect now, before formal incorporation into the new EPA rules.

However, in addition to incorporating the clarifications to assumable waters, the EPA rulemaking process is expected to allow for updates to other parts of the rule as well.

The EPA already has begun the outreach process by meeting with state agency representatives and soliciting comments prior to developing a proposed rule. Minnesota Board of Water and Soil Resources (BWSR) staff will be engaged in EPA’s rulemaking effort to provide feedback and perspectives from Minnesota.

Between the July 30, 2018, U.S. Army memo and the EPA rulemaking process now underway, the feasibility of 404 assumption in Minnesota looks to be improving significantly.