

Board Resolution # 17-05

Federal Clean Water Act Section 404 Assumption Feasibility Study Report and Recommendations

WHEREAS, Laws of Minnesota 2015, Special Session Chapter 4, Section 137 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 (CWA) under 33 U.S.C. § 1344(g), and to report the study findings to the legislative policy and finance committees and divisions with jurisdiction over environment and natural resources by January 15, 2017; and

WHEREAS, the DNR and BWSR sought input from stakeholders representing a broad range of interests in state water/wetland policy and regulation in developing the study and in preparing the Section 404 Assumption Feasibility Study Report (Report); and

WHEREAS, the DNR and BWSR, in collaboration with the Minnesota Pollution Control Agency (PCA), have concluded the study and completed the Report; and

WHEREAS, the Report provides a comprehensive, factual review of the feasibility of potential Section 404 program assumption by the State of Minnesota that fully addresses the specific requirements of the 2015 legislation; and

WHEREAS, two key findings of the report are that:

- 1) The CWA provisions on state assumption stipulate that the U.S. Army Corps of Engineers (COE) must retain regulatory authority over certain waters described in the Act (non-assumable waters), with the COE charged with specifying which waters are non-assumable. There are differing interpretations among the states and the federal agencies regarding the CWA definition of non-assumable waters. The U.S. Environmental Protection Agency (EPA) has established a national subcommittee to provide advice and develop recommendations on how the EPA can best clarify which waters a state can assume. The subcommittee is expected to complete its work in 2017, but at this time it is unknown if or when revised guidance would be forthcoming. The COE, St. Paul District has informed the DNR and BWSR that the District will provide a formal letter to the State agencies that will clearly outline the COE interpretation in identifying non-assumable waters in Minnesota. This interpretation would have significant implications for the potential benefits of state assumption of the Section 404 Program--i.e. if relatively few waters would be assumable, or if the process for determining whether a specific water/wetland can be assumed is impracticable, there would be little to be gained in terms of regulatory efficiency by the state assuming Section 404. Identifying non-assumable waters, and consequently developing a clearer picture of the potential benefits of state assumption, would require additional coordination and analysis with the COE, St. Paul District.

- 2) Existing Minnesota water/wetland regulatory programs would require several changes, both statutory and programmatic, to align with the federal requirements for state assumption of the Section 404 permitting program. These changes are identified broadly in the Report, but extensive additional coordination would be needed with the EPA to identify all of the specific revisions required; and

WHEREAS, the DNR and PCA, as the state agencies that share regulatory responsibility for the state's waters and wetlands with BWSR, agree on the recommended next steps identified below that would address these two key findings regarding the potential state assumption of the Section 404 permitting program; and

WHEREAS, any agreement by the state of Minnesota to assume the Section 404 program would be contingent upon enactment of the necessary policy adjustments and the agencies receiving the necessary personnel and budgetary resources to support assumption as described in the application to the EPA.

NOW THEREFORE BE IT RESOLVED, that BWSR accepts the Section 404 Assumption Feasibility Study Report dated January 17, 2017 and recommends the following next steps regarding the potential assumption of the Section 404 permitting program by the State of Minnesota:

- 1) The DNR, BWSR and the PCA should work with the COE, St. Paul District to estimate and map the approximate extent of assumable and non-assumable waters in Minnesota, based on the forthcoming letter from the COE outlining their current position on non-assumable waters. This analysis should also include geo-referenced past permit data (to compare the locations of COE-permitted projects with the location and extent of assumable waters) and a description of the process by which the specific extent of retained waters would be identified for program implementation. This analysis should be prepared and distributed as an appendix to the Report.
- 2) If the results of step 1 suggest that relatively few waters in Minnesota would be assumable, or the process to identify them is impracticable, then pursuit of Section 404 assumption should not proceed unless and until:
 - a. the COE's position changes,
 - b. clarifying guidance is provided by EPA, or
 - c. the issue is otherwise addressed, such as through controlling court cases.

Such changes that occur within four years of this resolution should trigger a reevaluation under step 1, including an update or addendum to the corresponding Report appendix.

- 3) If the results of step 1, including any reevaluation triggered under step 2, suggest that a significant proportion of waters in Minnesota would be assumable, and the process to identify them is practicable, then the agencies should assess whether the identified extent of assumable waters and other relevant factors identified in the Report would combine to provide sufficient benefits to warrant state assumption. The agencies should then report to the legislative committees with jurisdiction with their recommendation regarding whether to apply for assumption and, if the agencies' recommendation is to pursue assumption, seek funding for an

agency position to coordinate with the federal agencies and develop an application to submit to the EPA.

Development of the application to EPA would initially consist of the following concurrent steps:

- a. In consultation with EPA, identify the specific statutory and programmatic changes necessary for state assumption and inform the legislative committees with jurisdiction of the statutory and budget adjustments necessary to support assumption of the Section 404 program.
- b. Develop a Memorandum of Agreement with the COE, St. Paul District, that includes the specific identification of non-assumable waters; and

BE IT FURTHER RESOLVED, that this resolution is effective immediately, upon signing by the board chair.



Date: January 25, 2017

Gerald Van Amburg, Acting Chair
Board of Water and Soil Resources

Attachments:

1. Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study, January 17, 2017.