

# Development of the Minnesota Application for Clean Water Act Section 404 Assumption

## Project Work Plan

Updated October 19, 2020

### Project Overview

Section 404(g) of the Federal Clean Water Act allows states to apply to the Environmental Protection Agency (EPA) to administer a state water and wetland regulatory program that meets Section 404 requirements (aka “404 assumption”), eliminating the need for separate, federally-issued permits for projects affecting those waters covered by state assumption.

### Purpose

The primary purpose of this project is to comply with Laws of Minnesota 2019, 1st Special Session, Chapter 4, Article 1, Section 2, Subd. 9(a) (2019 legislation), which directs the Environmental Quality Board (EQB) to begin to assemble the materials required for a State 404 assumption application. This legislation was passed by the legislature and signed into law by Governor Walz on May 24, 2019. The full text of the 2019 legislation is as follows:

*\$200,000 the first year is from the environmental fund to begin to develop and assemble the material required under Code of Federal Regulations, title 40, section 233.10, to have the state of Minnesota assume the section 404 permitting program of the Federal Clean Water Act. The Board may execute contracts or interagency agreements to facilitate developing the required agreements and materials. By February 1, 2021, the board must submit a report on the additional funding necessary to secure section 404 assumption and the additional funding needed to fully implement the state-assumed program to the chairs and ranking minority members of the legislative committees and divisions with jurisdiction over the environment and natural resources. This is a onetime appropriation.*

A secondary purpose of this project is to fulfill the requirements of a 2019 U.S. Environmental Protection Agency (EPA) Wetlands Program Development Grant (EPA Grant) to the Minnesota Board of Water and Soil Resources (BWSR). This grant provides up to \$300,000 to supplement the 2019 legislative appropriation to develop a substantially complete draft application for 404 assumption. Work under the grant will continue beyond the February 1, 2021 legislative report and will be governed by the timelines and requirements of the grant agreement.

### History of 404 Assumption in Minnesota

While Minnesota has explored the issue dating back to 1989, the most comprehensive analysis of 404 assumption was the “Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study,” (Feasibility Study) an interagency report from BWSR, the Department of Natural Resources (DNR), and the Pollution Control Agency (PCA) issued on January 17, 2017 in fulfillment of Laws of Minnesota 2015, Special Session Chapter 4, Section 137. The agencies completed a follow-up “Analysis of Retained and Assumable Waters in Minnesota” on May 3, 2018, which was not favorable for the feasibility of 404 assumption in Minnesota. Both of these studies were funded by the legislature and can be viewed on the 404 Assumption page of the BWSR website.

In June of 2015, 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 the EPA Administrator on June 2, 2017. Implementation of the Subcommittee’s majority recommendations would significantly improve the feasibility of 404 assumption in Minnesota. On August 7, 2018, the U.S. Army released a memorandum (dated 7-30-18) that clarifies the waters that would be retained by the COE under state assumption consistent with the Assumable Waters Subcommittee’s majority recommendations. This memo significantly changed the conclusions of the May 2018 Minnesota Assumable Waters Analysis, making 404 assumption more feasible.

In addition, BWSR and DNR have similar, existing statutory authority to pursue 404 assumption. Both Minn. Stats. §§ 103G.2375 and 103G.127 provide the agencies with the authority, through rulemaking, to regulate “the discharge of dredged and fill material into the waters of the state as necessary to obtain approval from the United States Environmental Protection Agency” to administer the section 404 the permit program.

More recently, on April 1, 2019, Minnesota Governor Tim Walz signed Executive Order 19-17, “Continuing Wetland Protection, Enhancement, and Restoration.” Among other things, the order requires all responsible departments and agencies to “pursue opportunities to improve the effectiveness of the State’s wetland and related water resource protections,” and to “...collaborate with federal agencies, local governments, and private sector organizations to:

- i. Coordinate implementation of wetland and related water resource regulatory and restoration programs.
- ii. Pursue simplification and cost-effectiveness measures to benefit landowners, permit applicants, local governments, and agency operations.”

While the Governor’s executive order does not specifically address 404 assumption, this project provides an opportunity to pursue refinements to the state programs consistent with the directives of the order. The Feasibility Study, Minnesota assumable waters analysis, and the work of the Assumable Waters Subcommittee will also inform the work on this project.

For more information on 404 assumption, see the Wetlands page of the BWSR website at: <http://www.bwsr.state.mn.us/wetlands/index.html>.

## Scope

Minnesota has a comprehensive and mature state water/wetland regulatory program, embodied primarily in the Wetland Conservation Act (WCA) administered by BWSR, the Public Waters Permit Program (PWPP) administered by the DNR, and state water quality standards administered by the PCA. This project will involve these programs in developing and assembling the primary elements of program submission required for state assumption of the Federal Clean Water Act Section 404 permitting program (404) under Section 404g of the Clean Water Act in accordance with 40 CFR § 233, as amended.

Work associated with this project is limited to the tasks and deliverables outlined in this work-plan. Any additional tasks related to 404 assumption that may be funded or directed by the legislature or the agencies will fall outside the scope of this work plan. In addition, a decision to finalize and submit the

draft 404 assumption application developed through this project will be made by the Minnesota legislature and the Governor's office.

## Process

This project will involve several agencies and will include coordination with numerous organizations and stakeholders, which will require a clear understanding of roles and responsibilities. Completion of this project will follow a process similar to that used to develop the Feasibility Study and will utilize existing agency structures and coordination mechanisms where possible.

## Agency Roles and Responsibilities

EQB is responsible for transferring funding to BWSR for completion of the work required by the 2019 legislation. EQB is also responsible for accepting from BWSR and subsequently submitting "a report on the additional funding necessary to secure section 404 assumption and the additional funding needed to fully implement the state-assumed program to the chairs and ranking minority members of the legislative committees and divisions with jurisdiction over the environment and natural resources" by February 1, 2021 in fulfillment of the 2019 legislation (or as amended).

BWSR is responsible for accepting and managing state funds transferred from EQB and federal funds provided through the EPA Grant, including the reimbursement of expenses incurred by DNR and PCA for work associated with this project. Interagency agreements will be developed to facilitate the work and reimbursements. BWSR will be responsible for adhering to all timelines and limitations associated with the 2019 appropriation and EPA Grant funds.

BWSR is also responsible for completing, or coordinating and ensuring the completion of, all tasks identified in this work plan, including specific deliverables in accordance with agreed-upon project timelines. BWSR will provide a project coordinator to serve as the primary staff person responsible for completing project tasks and coordinating interagency work based on direction from the project management team. BWSR staff will also serve as subject-matter experts for legislative presentations and hearings.

DNR and PCA will be responsible for completing various specific task components related to each agencies' programs as identified by the project management team. While the BWSR project coordinator is expected to handle the majority of workload for each agency, it is expected that the primary roles of DNR and PCA program staff will specifically be to provide timely information and direction; feedback and concurrence on proposed statute, rule, and procedural changes affecting their agencies; and assistance in assembling 404 assumption application materials relating to their agencies and programs. As needed, DNR and PCA staff may also serve as subject-matter experts on issues relating to their programs for stakeholder meetings and legislative presentations and hearings. DNR and PCA staff will be responsible for tracking their time spent working on the project and providing that information to BWSR for reimbursement in accordance with the interagency agreements.

## Project Management Team

A core project management team consisting of staff from BWSR, DNR, and PCA will be responsible for general project oversight, interagency coordination, providing direction to the BWSR project coordinator, and coordinating project work within their respective agencies. Project management team members may also participate in completion of project tasks, and additional state agency staff members and staff from federal or local units of government will be consulted or included as needed. Project

management team members will also serve as liaisons to their respective agency leadership, particularly regarding any issues that may require high level decisions or consensus, and for reporting to and coordinating with EQB on tasks relating to the 2019 legislation.

Such a project management team was established and utilized for completion of the Feasibility Study. This project will utilize that same project management team structure.

### Stakeholder Coordination

This project will utilize the existing list of contacts from the Feasibility Study and ongoing WCA rulemaking to obtain feedback and inform on project progress. Invitations to participate in the Feasibility Study were sent to numerous organizations and associations representing various interest sectors, including agriculture, business/industry, environment/conservation, local government, and others. Based on the response, a general stakeholder contact list of over 90 individuals was developed. These individuals were invited to provide feedback and perspectives related to 404 assumption and the Feasibility Study, consulted on relevant issues, and kept informed of Study progress and outcomes. The contact list will be reviewed and updated as necessary, and any organization or individual can request to be added to the list.

Consistent with the Feasibility Study stakeholder process, a smaller (12-20 member) advisory committee will be utilized for regular, active participation to ensure productive, workable meetings. All stakeholders will be invited to the meetings and have the opportunity to provide input. However, primary participation at these meetings will be through the core advisory committee. An effort will be made to maximize consistency with the membership of the Feasibility Study core study planning group to provide for an informed review process. The 404 assumption project will be covered in a minimum of three meetings of the core advisory committee.

Stakeholder involvement may also be coordinated with the WCA rulemaking advisory committee process for topics relevant to WCA. In addition to the stakeholder coordination described above, other organizations or units of government may be directly contacted for input and advice regarding items of particular relevance to them, and agency staff may present updates and information directly to an organization when requested. Minnesota's Tribal Nations will also be consulted during completion of the project.

### Tasks

Substantial coordination with EPA regional and headquarters staff will occur throughout the process and for each project task. BWSR will be primarily responsible for completing, or ensuring the completion of, each task. However, DNR and PCA will provide information, review draft work-products, and provide feedback and direction on issues related to their respective programs. The following tasks are as described in the Wetland Program Development Grant application approved by EPA:

Task 1: State Statute and Rule Changes. This task will begin with a comprehensive comparison of state regulations, including wetland mitigation and banking, to the 404(b)(1) Guidelines and relevant requirements of the Federal Mitigation Rule to identify gaps and ensure at least an equivalent level of protection. It will also include a review of state program jurisdiction compared to the applicable federal definition of waters regulated under 404 to ensure at least equivalent jurisdiction. Specific state statute, rule, and/or policy language will then be developed to address any identified gaps in protection.

Task 2: Program Implementation Structure. This task will focus on the permitting structure and procedural aspects of the state programs. It will address the implementation of new or modified statutes, rules, and policies identified in Task 1, the approval/permitting process and structure of state program implementation, and the process for coordination with EPA and the Corps under 404 assumption. This task will result in an analysis that will describe the relationship between the PWPP, WCA, and state water quality standards in a comprehensive assumed program and identify any recommendations for statute, rule, or policy changes necessary to implement this structure. This task will include significant stakeholder coordination, including consultation with local governments.

Task 3: Staffing and Funding. This task will identify the specific number and type of staff needed to implement the programs as laid out in Task 2 in comparison to current staffing of relevant state regulatory programs. A general description of duties will be provided for existing and additional staff. The task will also specifically identify the amount and potential source(s) of additional state funding needed for any additional staffing capacity.

Task 4: Complete Regulatory Program Description. In accordance with 40 CFR § 233.11, a complete description of the state's regulatory programs will be assembled, including copies of all relevant statutes, rules, and procedures (as modified by the results of Tasks 1 through 3). The program description will include the State Wetland Bank and In-Lieu Fee Program.

Task 5: Memorandum of Agreement with the Secretary of the Army. This task will build upon a previous interagency cooperative effort between BWSR and the Corps' St. Paul District to identify and map Section 10 waters in Minnesota. This mapping effort will form the basis of an identification of Corps-retained waters and wetlands, following the Assumable Waters Subcommittee majority recommendations and the Department of the Army's 7-30-18 memo. In addition, the MOA will contain procedures for projects that overlap Corps-retained and state-assumable waters and other information as required by 40 CFR § 233.14.

Task 6: Memorandum of Agreement with the EPA Regional Administrator. Develop a Memorandum of Agreement between the relevant State of Minnesota agencies and the U.S. Environmental Protection Agency in accordance with 40 CFR § 233.13.

Task 7: Draft Application for 404 Assumption. Using the products of tasks 1 through 6, assemble the primary elements of 404 assumption program submission identified in 40 CFR § 233.10. This assemblage will constitute a draft application for 404 assumption that will allow for informed decision-making by state agency leadership, the state legislature, and the Governor. The letter from the Governor and State Attorney General's Office statement will be added after the decision has been made to submit the 404 assumption application.

Task 8: Summary Report and Recommendations. A brief summary report about Minnesota's experience with the 404 assumption application development process will be assembled. The report will include the identification of obstacles/unforeseen issues that arose and how they were addressed, lessons learned, and recommendations for other states who may consider pursuing 404 assumption. This information will also be provided to EPA throughout the process to inform the 404 assumption rule revisions.

## Approximate Activity Schedule

The schedule below is based on the projected schedule associated with the EPA Grant application. It lays out the approximate start and end date (in terms of months) for each project task, except certain tasks are expected to extend beyond calendar year 2021. In addition, the timeline for completion of all tasks is expected to be adjusted based on the complexity and amount of work associated with them, legislative action, and/or other factors. The hiring of a project coordinator to focus solely on this project will ensure that tasks will be completed as timely and efficiently as possible. This project will also involve substantial stakeholder coordination, which will occur regularly throughout the schedule.

Activities and Milestone Schedule																								
Activities	2020												2021											
	J	F	M	A	M	J	J	A	S	O	N	D	J	F	M	A	M	J	J	A	S	O	N	D
Task 1: State Statute and Rule Changes																								
Task 2: Program Implementation Structure																								
Task 3: Staffing and Funding																								
Task 4: Complete Regulatory Program Description																								
Task 5: MOA with the Secretary of the Army																								
Task 6: MOA with the EPA Regional Administrator																								
Task 7: Draft Application for 404 Assumption																								
Task 8: Summary Report and Recommendations																								

While the 2019 legislation only requires submittal of “a report on the additional funding necessary to secure section 404 assumption and the additional funding needed to fully implement the state-assumed program,” developing these funding estimates will require a greater understanding of the state regulatory and implementation structure that would be necessary under 404 assumption. Consequently, developing funding estimates included in Task 3 will utilize information obtained through work on other tasks, most notably Tasks 1 and 2.

## Deliverables and Timelines

This project will develop and assemble the primary elements of program submission required for state assumption of the Federal Clean Water Act Section 404 permitting program (404) under Section 404g of the Clean Water Act (404 assumption) in accordance with 40 CFR § 233, as amended. The application package will include the identification of the specific state statute changes and the agencies’ budgetary requirements and implementation structures necessary to implement the assumed program. Deliverables will consist of three work products:

- 1) 2021 Report to the Legislature.
  - a. By December 16, 2021, BWSR will provide EQB with a draft report on the additional funding necessary to secure Section 404 assumption and the additional funding needed to fully implement the state-assumed program.
  - b. By January 4, 2021, BWSR will provide EQB with a final report containing the following:
    - i. An estimate of the additional funding necessary to secure section 404 assumption.

- ii. An estimate of the additional funding needed to fully implement the state-assumed program that will include information on the impacts to affected state and local levels of government.
- iii. An explanation of how the above estimates were derived.
- iv. A summary of progress made in developing and assembling the application material required under 40 CFR § 233.10 to have the state of Minnesota assume the section 404 permitting program of the federal Clean Water Act.
- v. Documentation that the commissioners of DNR and PCA were consulted on the findings and conclusions of the report.

BWSR staff will present the findings and content of the report at the January EQB Board meeting and as needed at subsequent legislative meetings or hearings. EQB will submit the final report to the chairs and ranking minority members of the legislative committees and divisions with jurisdiction over the environment and natural resources by February 1, 2021. Submittal of this report to the legislature, including any related testimony, fulfills the requirements of the 2019 legislation.

Optionally, as a supplement to the report, BWSR, DNR, and PCA may choose to provide the legislature with agency recommendations on 404 assumption and/or related interagency regulatory coordination issues.

- 2) Draft Application for 404 Assumption. In accordance with the approved schedule under the EPA Grant, BWSR will assemble a draft application for 404 assumption that includes the primary elements of 404 assumption program submission identified in 40 CFR § 233.10. The draft application will be developed as part of Task 7, utilizing work-products of Tasks 1-6. BWSR will submit the draft application package to the Governor and the chairs and ranking minority members of the Minnesota House of Representatives and Senate committees and divisions with jurisdiction over the environment and natural resources according to and in fulfillment of EPA Grant requirements and timelines. The timing or content of the draft application may be modified based on direction from the legislature and/or agreement with EPA.
- 3) Summary Report and Recommendations. A brief summary report about Minnesota's experience with the 404 assumption application development process will be assembled in accordance with Task 8. Completing this report, in combination with the draft application for 404 assumption, will fulfill the requirements of the EPA Grant.