

# Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study

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Report to the Legislature  
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## 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.<sup>1</sup> 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:

- 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

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<sup>1</sup> 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.

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
<b>BWSR</b>	15.0	37.6	22.6	68.4	53.4
<b>DNR</b>	18.8	30.3	11.5	30.3	11.5
<b>MnDOT<sup>a</sup></b>	2.0	0	-2.0	0	-2.0
<b>MPCA</b>	3.5	3.5	0	3.5	0
<b>Total State Agency</b>	39.3	71.4	32.1	102.2	62.9
<b>Local Governments<sup>c</sup></b>	58.7	36.1	-22.6	0 <sup>d</sup>	-58.7
<b>Total State and Local</b>	98	107.5	9.5	102.2	4.2
<b>Change from Current</b>		9.5		4.2	

<sup>a</sup> 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.

<sup>b</sup> 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.

<sup>c</sup> 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.

<sup>d</sup> 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
<b>BWSR<sup>a</sup></b>	3.451	5.776	2.325	7.050	3.599
<b>DNR</b>	2.198	3.601	1.403	3.601	1.403
<b>MnDOT<sup>b</sup></b>	0.206	0	-0.206	0	-0.206
<b>MPCA<sup>c</sup></b>	0.361	0.361	0	0.361	0
<b>Total State Agency</b>	6.216	9.738	3.522	11.012	4.796
<b>Local Governments</b>	4.140	1.811	-2.329	0 <sup>d</sup>	-4.140
<b>Total State and Local</b>	10.356	11.548	1.193	11.006	0.656
<b>Change from Current</b>		1.192		0.651	

<sup>a</sup> 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. .

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

<sup>c</sup> 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.

<sup>d</sup> 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.

## List of Acronyms

ASWM	Association of State Wetland Managers
BWSR	Minnesota Board of Water and Soil Resources
COE	U.S. Army Corps of Engineers
CWA	U.S. Clean Water Act
DNR	Minnesota Department of Natural Resources
ECOS	Environmental Council of the States
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act (Federal)
FTE	Full Time Equivalent
GP	General Permit
LGU	Local Government Unit - responsible for administering the Wetland Conservation Act
LOP	Letter of Permission
MNDOT	Minnesota Department of Transportation
MPCA	Minnesota Pollution Control Agency
NEPA	National Environmental Policy Act
NHIS	Natural Heritage Information System
NMFS	National Marine Fisheries Service
NWP	Nationwide Permit
PWI	Public Waters Inventory
PWPP	Minnesota Public Waters Permit Program
TEP	Technical Evaluation Panel
USFWS	U.S. Fish and Wildlife Service
WCA	Minnesota Wetland Conservation Act

## Chapter 1. Introduction

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 identified eleven specific topics to be identified and analyzed in the study. These are addressed in Section 3 of this report.

### 1.1. Overview of Clean Water Act Section 404 Assumption

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 (and in all states that have not assumed the program – see below) the Section 404 Program is administered by the U.S. Army Corps of Engineers (COE) 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 state/tribal regulatory program to meet Section 404 requirements, thereby eliminating the need for separate, federally-issued permits. This process is known as Section 404 Program assumption. The assumption process was created as part of the 1977 amendments to the CWA. These amendments also included the establishment of congressional policy that the states implement the Section 404 permit program.<sup>2</sup>

As summarized in “*Section 404 Program Assumption: A Handbook for States and Tribes*” (Association of State Wetland Managers and the Environmental Council of States, 2011), when states or tribes assume the Section 404 Program:

- *The state or tribe agrees to conduct its own permit program in accordance with the requirements of the CWA and associated regulations. This means that the state or tribe may impose more stringent requirements, but not less stringent requirements (40 CFR 233.1(d)). Permits issued by an approved state/tribal program provide the necessary authorization under §404. The Corps suspends processing of federal permits (including Nationwide or Regional General Permits) in state/tribal §404 assumed waters. The state or tribe may adopt Nationwide Permits, or may develop its own General Permit categories for its program. The state/tribe also assumes primary responsibility for enforcement of the CWA. An annual report of program activities is provided to the EPA.*
- *The EPA directly reviews permit applications defined in advance in a Memorandum of Agreement (MOA) with EPA, and may object to issuance of a permit where federal guidelines are not met, or if the permit is subject to an interstate dispute. The EPA review also provides for coordination*

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<sup>2</sup> 33 U.S.C. § 1251(b)



*with other federal programs, including the Corps, U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS). Input from the EPA helps to ensure that baseline §404 requirements are consistently enforced on a national basis. A state/tribe cannot issue a permit under §404 if EPA objects to issuance of the permit and the state has not taken steps required by the EPA Regional Administrator to eliminate the objection. In addition, the EPA reviews the state's annual program performance, and provides federal technical assistance. EPA also retains the right to take enforcement action on any §404 violation, although the primary responsibility for enforcement rests with the state/tribal §404 program.*

- *The Corps retains jurisdiction over waters which are, or could be, used as a means to transport interstate and foreign commerce, all waters subject to the ebb and flow of the tide, and wetlands adjacent to these waters (e.g. tidal waters, the Great Lakes and major river systems). This does not preclude operation of a state/tribal program in such waters, but such state permits do not provide §404 authorization. For a full description of the waters over which the Corp retains jurisdiction, please see "MOA with the Secretary of the Army" in the Special Topics section.*

It's important to understand that when a state assumes the federal Section 404 program, the state does not administer Section 404 and does not issue Section 404 permits. Rather, the state issues permits under the state's own regulatory program, which has been approved by EPA to meet Section 404 requirements.

The ASWM/ECOS handbook on state assumption also summarizes the potential and realized benefits from state assumption as well as the challenges and obstacles cited by the states:

Benefits of Section 404 assumption:

- *Elimination of a high percentage of duplication in state/tribal and federal permitting programs*
- *Reduced costs for permit applicants, resulting from reduced duplication, as well as often faster state/tribal permit processes*
- *More effective resource management at the landscape/watershed level, drawing on localized expertise and integration of wetland management with other state or tribal land use management and natural resource programs*
- *Incorporation of state or tribal goals and policies into the overall permit process, and*
- *Improved consistency and stability in the regulation of dredge and fill activities across multiple levels of government.*

Challenges and obstacles to Section 404 assumption:

- *The need to meet §404 requirements with a parallel state or tribal program that regulates a wide range of waters – lakes, streams and wetlands – with stringent regulatory criteria*
- *Provision of a compliance and enforcement program consistent with the federal program*
- *Financial cost to the state or tribe*
- *Necessity of broad public and political support for this shared approach.*

More recent challenges to state assumption include lack of clarity over waters that are not assumable by states or tribes (see Section 3.2) and federal Endangered Species Act coordination.

To date, two states (Michigan and New Jersey) have assumed the Section 404 Program. Other states, including Minnesota on at least two previous occasions, and some tribes have investigated assumption, but none have submitted an application. Section 3.11 and Appendix \_\_\_ provide information on other states' Section 404 assumption investigations.

## 1.2. Water/Wetland Regulations in Minnesota

Alterations to lakes, rivers, streams and wetlands in Minnesota are regulated by a mix of programs administered by federal, state and local governments. The main water/wetland regulatory programs in Minnesota are described briefly below. For more information on these programs, see "*Wetlands Regulations in Minnesota*."<sup>3</sup>

- Federal
  - CWA Section 404 – Regulates the discharge of dredge or fill material into waters of the U.S.; administered by the COE with oversight by the EPA
  - Section 10 of the Rivers and Harbors Act – Regulates structures and work in navigable waters; administered by the COE
  - Wetland conservation provisions of the Federal Farm Bill (Swampbuster) – Not a true regulatory program, but imposes restrictions on wetland drainage as a condition of retaining farm program benefits; administered by the U.S. Department of Agriculture's Natural Resources Conservation Service and Farm Services Agency
- Federal – State
  - CWA Section 401 – Authorizes state agencies to impose conditions or prevent issuance of Section 404 permits to ensure compliance with state water quality standards; administered by the Minnesota Pollution Control Agency (MPCA)
- State
  - Public Waters Permit Program (PWPP) – regulates alterations to the course, current or cross section of public waters and public waters wetlands; administered by the DNR
  - Water quality standards – regulates point source and non-point source discharges and physical alterations of wetlands. Generally applied through other regulatory programs, such as National Pollutant Discharge Elimination System (NPDES) permits or Section 404 permits. Administered by the MPCA.
- State - Local Government
  - Wetland Conservation Act (WCA) – regulates draining, filling, and in some cases excavation in all wetlands exclusive of public waters wetlands; administered by local governments with oversight from the BWSR. Note: In state statute and rule,

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<sup>3</sup> Wetlands Regulations in Minnesota, v.2. 2016. Minnesota Board of Water and Soil Resources and Minnesota Department of Natural Resources. Available at:

[http://www.bwsr.state.mn.us/wetlands/Wetlands\\_Regulation\\_in\\_Minnesota.pdf](http://www.bwsr.state.mn.us/wetlands/Wetlands_Regulation_in_Minnesota.pdf)

authorizations under WCA to impact wetlands are not referred to as “permits” – impacts are authorized under exemptions, no-loss determinations and wetland replacement plans. However, for the purpose of simplicity, this report often generically refers to WCA authorizations as permits.

- Local Government – Some local governments (counties, cities, townships, watershed districts, watershed management organizations) have wetland protection ordinances or rules.

Figure 1.1 illustrates the jurisdiction of the various programs on a hypothetical waterbody in Minnesota while Figure 1.2 shows regulatory program jurisdiction over a variety of waters. More information on the scope of jurisdiction for the various programs is provided in Section 3.3.

The fact that nearly all waters/wetlands in Minnesota are regulated under state statutory authorities (independent of federal jurisdiction) is a key factor in the feasibility of Section 404 assumption. However, see Section 3.5 regarding changes to existing Minnesota laws that would likely be needed to assume Section 404.

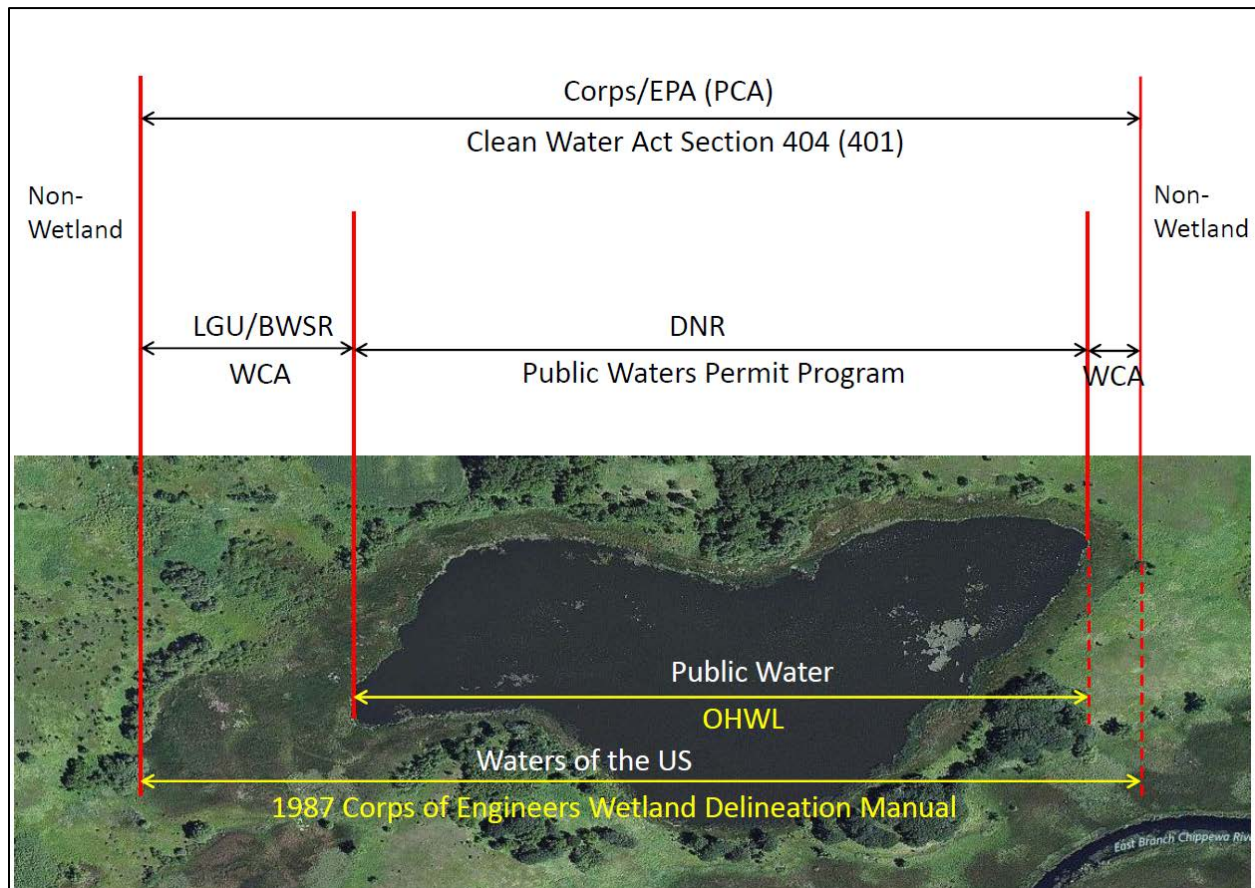


Figure 1.1. Jurisdiction of the main federal and state water/wetland regulatory programs in Minnesota. Both the WCA and the Section 404 Program use the 1987 Corps of Engineers Wetland Delineation Manual to determine the regulated wetland boundary. The Public Waters Permit Program regulates to the Ordinary High Water Level. This example assumes the wetland is federally jurisdictional and has also been identified as a public water on the Public Waters Inventory.

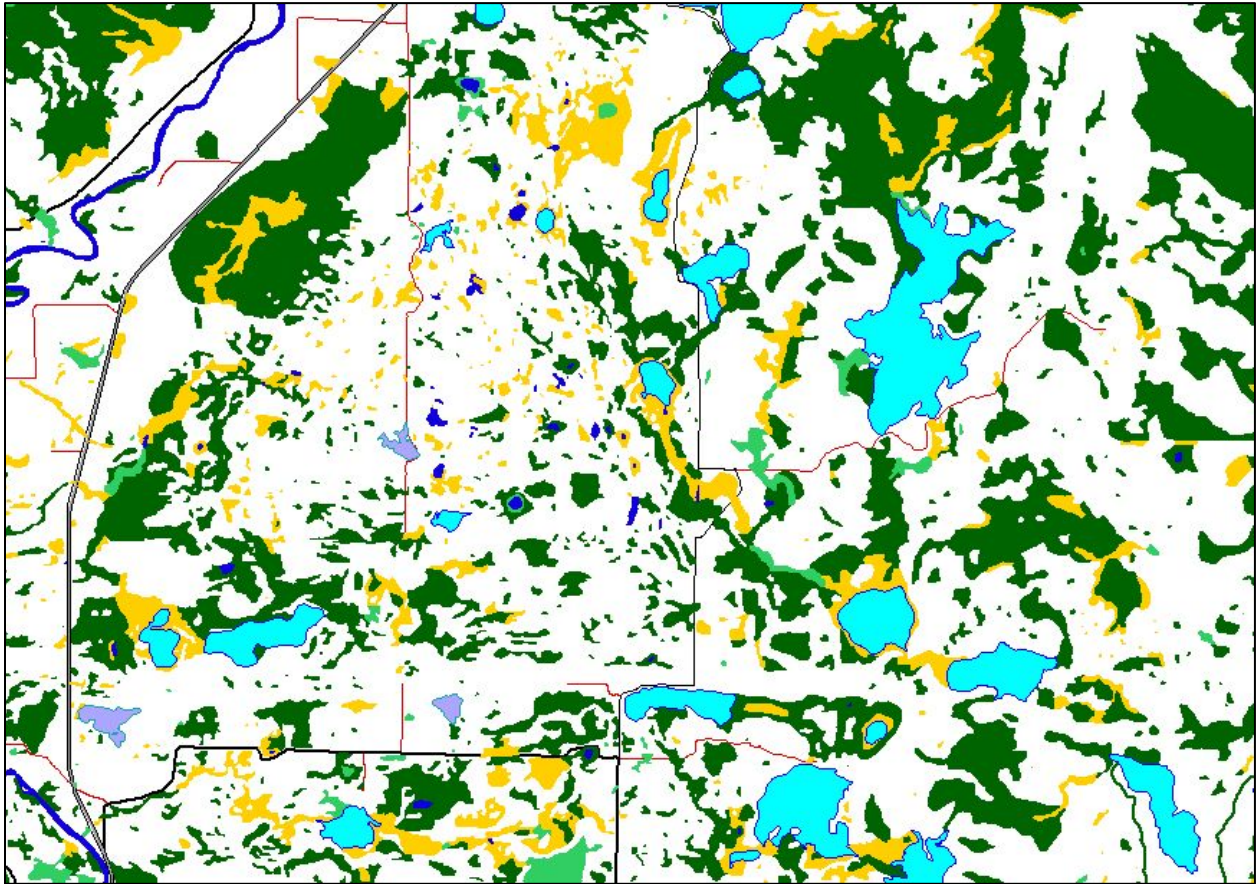


Figure 1.2. Area of Aitkin County showing all waters and wetlands. Watercourses and light blue basins are public waters under DNR jurisdiction. All other colored areas are WCA wetlands under local government jurisdiction. Federal jurisdiction under the CWA would apply to most of the watercourses and to some of the waterbasins and wetlands, depending on their connection to navigable waters. State water quality standards would apply to all waters shown.

### 1.3. Assumption Feasibility Study Process

As stipulated by the authorizing law, this study was conducted jointly by the DNR and BWSR. Because the Minnesota Pollution Control Agency (MPCA) has a significant role in the federal regulatory process through CWA Section 401 state water quality certification, that agency was also included in planning and conducting the feasibility study. The COE and the EPA were consulted as needed. Consistent with the requirement of the authorizing law to involve stakeholders, invitations to participate in the study were sent to numerous organizations and associations representing various interest sectors, including agriculture, business/industry, environment/conservation and local government. Based on the response, a general stakeholder list of over 90 individuals was developed. From this list, a 15-member Core Feasibility Study Planning Group was formed, incorporating all of the main interest sectors, to allow for more manageable discussion. The Project Work Plan, which is included in this report as Appendix B, provides additional detail on the study structure and stakeholders.

The Core Planning Group met four times to identify their goals, interests and concerns regarding Section 404 assumption, to learn more about the assumption process and requirements, to assist with developing the plan of study, and to provide feedback on study report drafts. One of the meetings involved presentations from and questions/discussion with representatives from state agencies in Michigan and New Jersey that implement the assumed Section 404 program in those states, and from Oregon, which has investigated assumption over many years but has so far elected not to submit an application for assumption. All stakeholders were invited to the meetings, and most meetings were attended by 15 – 30 stakeholders in addition to the Core Planning Group.

Part (a)(7) of the feasibility law required an analysis of, “the estimated costs and savings that would accrue to affected units of government.” To conduct this fiscal analysis, BWSR contracted with Dr. Steve Taff, Professor Emeritus (retired), Department of Applied Economics, University of Minnesota. In addition to analyzing the fiscal impacts of changes in regulatory responsibility on affected units of government, Dr. Taff evaluated the potential financial implications of Section 404 assumption on government units as permit applicants, generally for transportation projects.

## Chapter 2. Background and Current Issues Related to Section 404 Assumption in Minnesota

This study is not Minnesota's first investigation of Section 404 assumption. State agencies and the legislature have taken various actions related to assumption dating back to at least 1989. This section describes prior activities in the state related to assumption and characterizes the current interests and expectations of Minnesota stakeholders regarding wetland/water permitting, which were instrumental in passing the law requiring the current study.

### 2.1. Previous Actions Related to Section 404 Assumption in Minnesota

The first clearly documented activity pertaining to Section 404 assumption in Minnesota was a feasibility study conducted by the DNR in 1989.<sup>4</sup> One of the main findings of the study was that assumption would have cost the state at least \$1 million per year beyond the then-current state expenditure on wetland regulation. However, this study was conducted prior to passage and implementation of the Minnesota Wetland Conservation Act (WCA), which greatly expanded state regulation of wetlands.

When the Wetland Conservation Act was passed in 1991, it contained several provisions regarding §404 assumption (Minn. Laws 1991, Chapter 354, Article 9). Section 1 of Article 9 established authority for the DNR to adopt rules "as necessary to obtain approval" for assumption. That provision was amended in 1996, but remains in statute:

Minnesota Statutes 103G.127 PERMIT PROGRAM UNDER SECTION 404 OF FEDERAL CLEAN WATER ACT. Notwithstanding any other law to the contrary, the commissioner, with the concurrence of the Board of Water and Soil Resources and the commissioner of agriculture, may adopt rules establishing a permit program for regulating 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 permit program under section 404 of the federal Clean Water Act, United States Code, title 33, section 1344. The rules may not be more restrictive than the program under section 404, or state law, if it is more restrictive than the federal program.

Section 3 of Article 9 of WCA was more direct:

Subd. 2 [INTENT.] The legislature intends that as expeditiously as possible the state obtain approval from the administrator of the United States Environmental Protection Agency to administer the section 404 program in this state.

Subd. 3 [REQUIREMENTS.] (a) By February 1, 1993, the commissioner of natural resources shall:

- (1) Adopt rules under section 1 that provide adequate authority for administering the section program;
- and

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<sup>4</sup> Minnesota Department of Natural Resources, Division of Waters, August 31, 1989, State of Minnesota Section 404 Assumption Feasibility Study as Pursuant to U.S. EPA Agreement Grant No. X-814966-01-0, Federal Catalog No. 66-505.

- (2) After consulting with the attorney general, report to the environment and natural resources committees of the legislature on existing laws that are inconsistent with the authority necessary for administering the section 404 program.
- (b) By March 1, 1993, the governor shall make the submission to the administrator of the United States Environmental Protection Agency required in United States Code, title 33, section 1344(g), to obtain authority to administer the section 404 program

Accordingly, in 1993 the DNR prepared and submitted to the legislature a report, "Assumption of the Section 404 Program" (February 1, 1993, MnDNR, Division of Waters). The report noted that FY92-93 state budget reductions precluded development of rules that would allow §404 assumption. The report also detailed five areas of concern:

- (1) Single state agency needed to assume the §404 program: Communication received from USEPA suggested that the WCA framework of implementation by local governments would not likely be approved for §404 assumption.
- (2) WCA exemptions subject to §404 provisions: Many of the activities exempted under WCA were not exempt under §404.
- (3) Wetland definition: Communication received from USEPA indicated that the state definition of "wetland" was not entirely consistent with that of the Clean Water Act.
- (4) Ditch maintenance: Assumption of §404 would require that the state regulate ditch maintenance activities that were exempt under state law.
- (5) Cost of implementation: Cited previous cost estimates and noted that no federal funds were available for implementation.

Minnesota Laws 2000, Chapter 382, Section 19 directed BWSR and the DNR to produce a report to the legislature on improving wetland regulatory programs. The final report<sup>5</sup> contains the following under the heading of "Ideas for Future Short Term Action:"

*"3. Start the process of state 404 Assumption (and Federal Farm program delegation to the state via contract) to achieve greater regulatory simplification."*

No specific actions were taken to implement that "idea," although a number of other measures were implemented through subsequent legislation and agency policies to simplify and consolidate state wetland regulation.

In 2012, another statute provision was enacted authorizing adoption of rules to assume the §404 program, but with BWSR having the lead rather than the DNR:

*Minnesota Statutes 103G.2375 ASSUMPTION OF SECTION 404 OF FEDERAL CLEAN WATER ACT. Notwithstanding any other law to the contrary, the Board of Water and Soil Resources, in consultation with the commissioners of natural resources, agriculture, and the Pollution Control Agency, may adopt or amend rules establishing a program for regulating 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, in whole or part, the permitting and wetland banking programs under section 404 of the federal Clean Water Act, United States Code, title 33, section 1344. The rules may not be more restrictive than the program under section 404 or state law.*

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<sup>5</sup> Wetland Regulations Legislative Report, January 12, 2001

Note that, as compared to Minn. Stat. § 103G.127, the above authority granted to BWSR does not allow for the adoption of rules more restrictive than state law, which would preclude Section 404 assumption without changes to state statute.

Also in 2012, the Executive Director of BWSR sent a letter to Congressman Bob Gibbs, Chairman of the House Subcommittee on Water Resources and Environment, which had held a hearing on state assumption (Appendix C). The letter contained four main recommendations:

1. *Remove barriers to §404 assumption*
2. *Allow for formal recognition of state programs*
3. *Allow for partial assumption*
4. *Provide federal funding for implementation*

Congress has not taken any action to date as a result of that hearing, although sporadic conversations about revisions to §404 assumption requirements continue at the federal level.

This study is the result of a law passed in 2015 (Appendix A) in response to renewed interest in state assumption of the Section 404 Program by segments of the regulated community. 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.

## 2.2. Current Stakeholder Interests and Expectations

At the first Core Study Group/Stakeholder meeting, the participants were asked to identify their expectations for the feasibility study and their desired outcomes relating to wetland/water permitting in the state. The responses can generally be characterized along two main themes: 1) efficient and timely permitting that is well coordinated between state and federal programs (less redundancy), and 2) effective protection of water/wetland resources. Some respondents objected to the requirement to obtain two permits, federal and state, for the same resource impact (see Figure \_ illustrating regulatory program jurisdictions in Minnesota). Others cited published studies suggesting that redundant federal and state permitting programs leads to more effective regulation and better resource protection (see Section 3.4). Stakeholders who apply for permits emphasized reducing permit delays, while other stakeholders emphasized the value of checks and balances in the Section 404 process to help ensure effective protection of water/wetlands resources. In that regard, a number of stakeholders who regularly apply for permits perceived that the federal Section 404 process often results in unnecessary permitting delays compared to state permit programs (WCA and the Public Waters Permit Program). A key factor in pursuing state assumption for these stakeholders was the potential for reducing or eliminating lengthy permitting delays. The potential effects of assumption on permitting timeframes is analyzed in Section 3.8. Section 3.9 describes a variety of alternatives to assumption that would, to varying degrees also address the main interests expressed by stakeholders.



## Chapter 3. Required Study Elements

This chapter of the Section 404 Program Assumption Feasibility Study Report addresses each of the eleven topics identified in the law requiring the study.

### 3.1. Federal requirements for state assumption of the 404 program

The procedures and requirements for states to assume the Section 404 Program are found in the Code of Federal Regulations, Title 40, Chapter 233 (40 CFR 233), which is included in this report as Appendix \_\_\_. The most notable provisions are summarized below. Additional details and guidance can be found in a 2011 handbook on Section 404 assumption published by the Association of State Wetland Managers and the Environmental Council of the States, which included as Appendix \_\_ of this report. Section 3.5 of this report addresses areas where current State of Minnesota regulatory provisions are not consistent with the federal requirements for state assumption.

- Comprehensive jurisdiction and regulation – States assuming the Section 404 Program must have independent regulatory jurisdiction (derived from state authority) over all waters that would be regulated under the CWA, except waters for which the COE must retain jurisdiction under §404(g)(1) of the Act (see Sections 3.2 and 3.3). States must regulate all discharges of dredged or fill material into those waters, other than discharges specifically exempted from Section 404,<sup>6</sup> i.e., “partial assumption” is not allowed. The federal requirements stipulate that the state regulatory program may be more “stringent” or have a broader scope, but may not be less “stringent” than the federal program. Where an approved state program has a greater scope than required by federal law, the additional coverage is not part of the federally approved program and is not subject to federal oversight or enforcement. (40 CFR §233.1)
- State agency administration – The federal requirements for state assumption are based on administration of the state regulations by a *state-level* agency or agencies. State permit decisions and other aspects of program administration are to be the responsibility of the “State Director,” defined as, “the chief administrative officer of any State or interstate agency operating an approved program, or the delegated representative of the Director. If responsibility is divided among two or more State or interstate agencies, Director means the chief administrative officer of the State or interstate agency authorized to perform the particular procedure or function to which reference is made.” (40 CFR §233.2) This has implications for Minnesota because WCA is administered by local governments with BWSR oversight. In response to inquiries made specifically for this study, officials from EPA Region 5 (which encompasses Minnesota) and EPA Headquarters, including an EPA staff attorney confirmed that program administration and permit decisions by local government officials do not comply with the federal requirements for Section 404 program assumption (Appendix F). However, as discussed elsewhere in this report, opportunities exist for local governments in Minnesota to continue to have a role in water/wetland regulation if the state assumed the Section 404 program.

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<sup>6</sup> see 40 CFR §232.3 for Section 404 exemptions

- Application process for state assumption – A state application to assume the Section 404 Program is submitted to the appropriate EPA Regional Administrator. In Minnesota’s case, this would be the administrator of EPA Region 5 in Chicago. The application package consists of the following (40 CFR §233.10 - 14):
  - A letter from the governor requesting program approval.
  - A complete description of the state regulatory programs to be approved. Under the current regulatory structure in Minnesota, these would be the Public Waters Permit Program<sup>7</sup>, the Wetland Conservation Act<sup>8</sup> and Permit to Mine Program.<sup>9</sup>
  - A statement from the attorney general that applicable state laws and regulations provide adequate authority to implement a qualifying program(s).
  - A Memorandum of Agreement between the state and the EPA Regional Administrator specifying certain implementation details, including general state and federal responsibilities, classes of permit applications that are waived from EPA review, state reporting on program implementation, and compliance monitoring and enforcement responsibilities.
  - A Memorandum of Agreement between the state and the Secretary of the Army (acting through the Corps of Engineers) that identifies which waters the Corps would retain jurisdiction over, describes procedures for transferring pending Section 404 permit applications to the state, and provides a plan for state implementation of any general permits currently issued by the Corps.
  - Copies of all applicable state statutes and regulations.

Upon receipt of a complete application, the EPA undertakes a review process involving other federal agencies (COE, USFWS, NMFS) and the public. The EPA must make a decision to approve or disapprove within 120 days of receiving a complete application, unless extended by mutual agreement with the state (40 CFR §233.15). The EPA has determined that a decision on a state application for Section 404 assumption does not constitute a major federal action affecting the environment that would require preparing an Environmental Impact Statement under the National Environmental Policy Act (see discussion below). Similarly, the EPA has determined that decisions on state assumption applications do not require Section 7 consultation under the Endangered Species Act (see discussion below). If Minnesota elected to pursue assumption of the Section 404 Program, responsibility for preparing/compiling the application package would presumably fall to BWSR and/or the DNR, as the agencies administering the main applicable state regulatory programs. The application process, including the required statute and rule revisions (see Section 3.5) would require a dedicated state staff position and would take at least two years to complete.

- Indian lands/Federal lands – States do not assume Section 404 administration on Indian lands. The COE retains administration of the Section 404 Program on all lands within the exterior

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<sup>7</sup> Minn. Statutes 103G and Minn. Rules Chapter 6115

<sup>8</sup> Minn. Statutes 103A, 103B, 103F, 103G and Minn. Rules Chapter 8420

<sup>9</sup> Minn. Statutes 93.44 to 93.51 and Minn. Rules Chapters 6130 and 6132

boundaries of Indian reservations (unless the Tribe has itself assumed the Section 404 Program) (40 CFR §233.1). Implications of state assumption on Indian lands are discussed further in Section 3.2.4. The federal regulations on Section 404 assumption do not prohibit states from assuming Section 404 authority on federal lands (national forests, national parks, national wildlife refuges), provided the state has regulatory program jurisdiction.

- Federal review of state permits – When a state assumes the Section 404 Program, the EPA has responsibility for reviewing permit applications submitted under the applicable state regulatory program(s) and for coordinating with other federal agencies (USFWS and the COE). The EPA may waive their review requirement for certain categories of permit applications, which is to be described in a Memorandum of Agreement executed between the EPA and the state.<sup>10</sup> For permit applications for which the EPA has not waived their review, the EPA has 90 days to review the application and respond to the state. The EPA may submit comments and recommendations and may also object to permit issuance or require permit conditions. If the EPA objects to a permit or requires permit conditions, the state permit decision must ultimately satisfy the EPA’s concerns, following established coordination/resolution procedures, including the possibility of a public hearing. If the EPA’s concerns are not addressed in the state permit decision to the EPA’s satisfaction, the applicant must apply for a separate Section 404 permit through the COE (40 CFR §233.50 – 51). In such cases, the COE would first determine if the state permit applies to waters that are jurisdictional under the CWA. If not, a separate Section 404 permit would not be required.
- Public notice requirement – For each permit application received, a state that has assumed the Section 404 Program must send a public notice to the following specified parties, providing a reasonable period of time for submitting comments:
  - The applicant;
  - Any agency with jurisdiction over the activity or the project site, whether or not the agency issues a permit;
  - Owners of property adjoining the property where the regulated activity will occur;
  - All persons who have specifically requested copies of public notices;
  - Any State (or Tribe) whose waters may be affected by the proposed dischargeA notice for each permit must also be provided by some other manner aimed at covering the area affected by the proposed project, such as publication in a local newspaper. Although the federal regulations refer to mailing public notices and publication in a newspaper, email distribution and/or some form of internet-based publication may meet these requirements (40 CFR §233.32).
- Changes to state laws and rules – Once a state has assumed the Section 404 Program, any subsequent changes to the applicable state regulatory programs may trigger a re-evaluation of the program by the EPA. Any changes to federal regulations may require states that have

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<sup>10</sup> For Michigan, a state which has assumed the Section 404 Program and which is in the same EPA region (Region 5) as Minnesota, the EPA has waived their review of all permit applications involving less than an acre of wetland/water impact and less than 1,000 ft. of stream. There is no assurance that similar limits would apply to Minnesota under state assumption.

assumed the Section 404 Program to revise their state authorities to maintain consistency (40 CFR §233.16).

- Enforcement – States assuming the Section 404 Program must have enforcement authority to (40 CFR §233.41):
  - immediately restrain unauthorized activities;
  - enjoin any threatened or continuing violations;
  - recover civil penalties and seek criminal remedies at specified dollar amounts, although the EPA may approve a state program that lacks authority to recover the specified amounts if the program incorporates, “an alternate, demonstrably effective method of ensuring compliance which has both punitive and deterrence effects;”
  - require monitoring and reporting by permittees and conduct on-site inspections, in accordance with Section 308 of the CWA.
- Annual Report to EPA – A state that has assumed the Section 404 Program must submit an annual report to the EPA Regional Administrator evaluating the state’s administration of its regulatory program(s), including identifying problems and providing recommendations for solutions. The report must address the following (40 CFR §233.52):
  - an assessment of the cumulative impacts of the state’s permit program(s) on the integrity of state-regulated waters;
  - identification of areas of particular concern and/or interest;
  - the number and nature of individual and general permits issued, modified, and denied;
  - number of violations identified and number and nature of enforcement actions taken;
  - number of suspected unauthorized activities reported and nature of action taken;
  - an estimate of extent of activities regulated by general permits;
  - the number of permit applications received but not yet processed.

Questions have been raised in Minnesota and elsewhere about the application of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) to state applications for Section 404 assumption.<sup>11</sup> Specifically, does the EPA decision to grant or deny a state assumption application constitute a major federal action affecting the environment, thus requiring review under NEPA (environmental assessment or environmental impact statement)? Similarly, does the EPA decision on a state application for assumption have the potential to affect federally listed threatened or endangered species and therefore require consultation with the USFWS under Section 7 of the ESA? According to the EPA the answer to both of these questions is no. Regarding NEPA, an EPA representative responded to this question by reporting that the decision to grant or approve a state assumption application does not, on its own, have any effect on the environment and is therefore not subject to NEPA review.<sup>12</sup> As far as the ESA, the EPA assistant administrator, in a letter (12/27/2010) to the Environmental Council of the States and the Association of State Wetland Managers explains that if a state applies to assume the

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<sup>11</sup> The discussion here is focused only on the application of these federal laws to the process of a state or tribe applying to assume the Section 404 program. The application of federal laws, including other laws such as the National Historic Preservation Act to state permits after a state has assumed Section 404 is discussed in several other sections of this report.

<sup>12</sup> Personal communication, Kerryann Weaver, EPA Region 5, Chicago

Section 404 program and the state program meets the applicable requirements, then under the assumption regulations EPA has no discretion in their decision – they *must* approve the application. Therefore, approval is not a “discretionary federal action” subject to Section 7 consultation under the ESA.

3.2. 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.

### 3.2.1. Non-assumable waters

When a state or tribe assumes administration of Section 404, the assumption authority does not apply to all waters; the COE retains permitting authority over certain waters. The specific waters that a state or tribe may *not* assume, and for which permitting authority must be retained by the COE, are defined in a parenthetical within the first sentence of Section 404(g)(1) of the 1977 amendments to the Clean Water Act:

“...other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto...”<sup>13</sup>

The legislative history behind §404(g)(1) indicates that the language originated as a proposal to limit the jurisdiction of the COE by defining the term “navigable waters” under Section 404 to mean the same as the term had been used under Section 10 of the Rivers and Harbors Act of 1899 (Section 10), except that it excluded the “historical use” test.<sup>14</sup> Ultimately, the language that was passed into law in 1977 did not reduce the geographic jurisdiction of Section 404 over certain waters, but rather allowed states and tribes to assume the primary responsibility for regulating those waters. The 1977 amendments also inserted provisions clearly stating that it is the policy of Congress for the states to implement the permit program under Section 404 of the Federal Clean Water Act.<sup>15</sup>

The 404(g)(1) limitations on the extent of assumption are essentially determined in two parts: 1) certain navigable *waters*, and 2) adjacent *wetlands*. The limitations, and specifically the lack of a clear and consistent interpretation of them, present several significant challenges for states and tribes considering assumption.

#### 3.2.1.1. Navigable waters

When a state or tribe assumes administration of the 404 permitting program, Section 404(g)(1) defines the waters which must be retained by the COE to include those waters “...which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport

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<sup>13</sup> 33 U.S.C. § 1344(g)(1)

<sup>14</sup> See Committee on Public Works and Transportation, H.R. Rep. No. 94-1107, to accompany H.R. 9560, at 23 (May 7, 1976).

<sup>15</sup> 33 U.S.C. § 1251(b)

*interstate or foreign commerce...*<sup>16</sup> These criteria are not consistent with how the COE regulatory programs currently define various categories of regulated waters. For example:

- Navigable waters, as regulated by the COE under Section 10, include those waters “...that are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce.”<sup>17</sup>
- Waters of the United States, as defined in COE regulations, include “all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce...”<sup>18</sup>
- EPA and COE guidance issued after the Rapanos decision in 2006 defines jurisdictional “traditional navigable waters” to “include all of the navigable waters of the United States, defined in 33 CFR Part 329 and by numerous decisions of the federal courts, plus other waters that are navigable-in-fact...”<sup>19</sup> The definition of “navigable-in-fact” comes from a long line of U.S. Supreme Court cases, which are summarized in Appendix D of the Rapanos joint agency guidance.

These differences present challenges in defining and identifying the waters to be retained by the COE as none of them appear to be entirely consistent with the criteria of § 404(g)(1). It is also logical that the waters that must be retained by the COE for program *administration* is a smaller subset of the waters that are *jurisdictional* under Section 404 – assumption by a state or tribe does not change *what* is regulated, just *who* implements the regulation. However, determining the specific extent of assumption can create complications, particularly for states such as Minnesota that contain a significant number of waters. In addition, court cases and programmatic changes have resulted in differing uses, interpretation, and importance of terms now, compared to the period of time leading up to the 1977 legislation allowing for 404 assumption.

In comparing the definition of navigable waters for purposes of Section 10 jurisdiction (for example) with the waters that must be retained by the COE under Section 404 assumption, note that retained waters do not include those waters that are navigable due to past use. In general, it is reasonable to conclude that those waters which must be retained by the COE are essentially Section 10 waters minus those deemed navigable solely based on historic use. However, there are varying interpretations of the language contained in statute and other regulations, and the potential relevance of subsequent court cases, as they apply to Section 404 assumption.

#### 3.2.1.2. Adjacent wetlands

For Minnesota, a state with vast, interconnected wetland resources, identifying which wetlands would be retained by the COE for program implementation (and thus the extent to which state assumption would apply) is a significant factor in determining the structure and resources necessary for both the

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<sup>16</sup> 33 U.S.C. § 1344(g)(1)

<sup>17</sup> 33 CFR § 329.4

<sup>18</sup> 33 CFR § 328.3(a)(1)

<sup>19</sup> [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/jd\\_guidebook\\_051207final.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/jd_guidebook_051207final.pdf)

state and federal programs, as well as the overall benefits that would accrue from assumption. It is probably the most significant factor affecting the feasibility of Minnesota assuming Section 404. Similar to defining retained navigable waters, there is currently a lack of federal guidance to determine which adjacent wetlands must be retained by the COE for purposes of Section 404 assumption.

A simple reading of the §404(g)(1) statute language could lead to the interpretation that all “adjacent” wetlands should be retained by the COE, and are thus not assumable by the State. However, it can be argued that this interpretation is not consistent with the history and purpose of 404(g)(1). For example:

- In 1977, in response to a question on the floor of the House of Representatives, Congressman Don H. Clausen, the ranking minority member of the Subcommittee on Water Resources of the House Committee on Public Works and Transportation and one of the drafters of the 1977 CWA amendments,<sup>20</sup> explained that, for the purposes of 404 assumption, the word “adjacent” means “immediately contiguous to the waterway.”<sup>21</sup>
- As the Section 404 regulatory program evolved, the term “adjacent” was more heavily scrutinized and litigated, and as a result, carries greater weight and importance today for purposes of determining Section 404 jurisdiction. Interpreting retained waters to be the same, or nearly the same, as jurisdictional waters leaves little for a state to assume, leaving no incentive for Section 404 program assumption, contrary to the policy of Congress referenced in section 3.2.1.
- Michigan and New Jersey (the only states to assume Section 404) have differing methods to determine which waters are retained by the COE, neither of which include all adjacent wetlands.

It is important to note, however, that our understanding of congressional intent is limited, as is the history of application, since only two states have assumed the Section 404 program and others that investigated Section 404 assumption have had differing experiences. As such, it remains unclear as to which wetlands (and to what extent) should be retained by the COE. Assuming a known set of retained navigable waters can be identified, it could be extremely difficult to determine the specific extent to which wetlands are retained by the COE (vs. those assumable by the state) without consistent and implementable guidance.

### 3.2.2. Michigan and New Jersey

Michigan’s MOA with the COE merely restates the §404(g)(1) language, and identifies the waters retained by the COE in an attachment:

*“Consistent with the provisions of Section 404(g) CWA, all waters within the State of Michigan shall be regulated by DNR as part of this state program OTHER THAN those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water*

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<sup>20</sup> See 122 Cong. Rec. 16539 (in reference to H.R. 9560).

<sup>21</sup> 123 Cong. Rec. 38972 (Dec. 15, 1977).



*mark, including wetlands adjacent thereto. These waters are specifically identified in ATTACHMENT A – “Navigable waters of the United States in U.S. Army Engineer District, Detroit, November 1981”, attached to this Memorandum of Agreement, which will be regulated by DNR and COE under applicable state and Federal statutes.”<sup>22</sup>*

New Jersey also restates the statute, but specifies a 1,000 foot administrative boundary for retained adjacent wetlands.

*“All waters of the United States, as defined at 40 CFR section 232.2(q), within the state of New Jersey will be regulated by NJDEPE as part of their State Program with the exception of those waters which are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, including wetlands adjacent thereto. For the purposes of this agreement, the Corps will retain regulatory authority over those wetlands that are particularly or entirely located within 1,000 feet of the ordinary high water mark or mean high tide of the Delaware River, Greenwood Lake, and all water bodies which are subject to the ebb and flow of the tide.”<sup>23</sup>*

### 3.2.3. Assumable Waters Subcommittee

The challenges discussed above are well recognized. In April of 2014 (during promulgation of the new, proposed Federal Clean Water Rule), the Environmental Council of the States, the Association of Clean Water Administrators, and the Association of State Wetland Managers sent a joint letter to the EPA recommending that “steps to further clarify the scope of assumable and non-assumable waters be initiated in a timely manner.” The letter cited concerns that “states currently considering assumption are having difficulty making progress because of the current uncertainty.” The letter further outlined the challenge and need for clarity as follows:

*“Clear identification of assumable and non-assumable waters has been made more difficult by legal decisions that address terms such as “navigable” and “adjacent.” Nonetheless, Congress intended that states be able to assume regulatory responsibility for the majority of waters within their boundaries. Clarification of assumable waters will help to facilitate state assumption where it is desired – providing benefits to the public, the resource, and the state and federal agencies.”*

In 2015, partly in response to the above request by the state associations, 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 U.S. Environmental Protection Agency (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

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<sup>22</sup> Memorandum of Agreement between the State of Michigan and the Department of the Army (1984).

<sup>23</sup> Memorandum of Agreement between the State of New Jersey and the Department of the Army (1993).

an approved state/tribal program.”<sup>24</sup> The Charge to the Subcommittee also identified a lack of clarity as a challenge to states:

*“When a state or tribe considers assuming such responsibilities, among the first questions that needs to be answered is for which waters will the state or tribe assume permitting responsibility and for which waters will the USACE retain permitting authority. States have raised concerns to the EPA that section 404 of the CWA and its implementing regulations lack sufficient clarity to enable states and tribes to estimate the extent of waters for which they would assume program responsibility and thus calculate associated program implementation costs. The lack of clarity on these questions has been identified by the states as a challenge to pursuing assumption as envisioned under the CWA.”<sup>25</sup>*

In further recognizing the importance of this issue to states and tribes considering assumption, the Subcommittee’s charge also includes:

*“Specifically, this effort will address the states’ request to provide clarity on this issue enabling them to assess and determine the geographic scope and costs associated with implementing an approved program.”<sup>26</sup>*

The State of Minnesota is represented on the Assumable Waters Subcommittee by Les Lemm, Wetlands Section Manager with BWSR. The Subcommittee is expected to complete its work in 2017, however, its role is only to develop recommendations. Those recommendations will be provided via a final report to NACEPT, which will consider the report in providing advice and recommendations to EPA on how to clarify which waters are assumable by a state or tribe.

#### 3.2.4. Other non-assumable waters

In addition to certain waters and wetlands discussed above, the state may not assume permitting authority for projects on lands for which it does not have jurisdiction, such as Indian lands.

Minnesota has 12 federally recognized Indian reservations (including the Minnesota Chippewa tribe, which is a federally recognized tribal government for six member tribes). Most of the reservations are found in northern Minnesota, with the Red Lake Indian Reservation being the largest. The federally recognized reservations, including acres of tribal land for each, are:<sup>27</sup>

##### Anishinaabe Bands (Chippewa/Ojibwe)

- Bois Forte (Nett Lake) - 29,116.25 acres
- Fond du Lac - 11,072.38 acres
- Grand Portage - 39,274.34 acres

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<sup>24</sup> <https://www.epa.gov/cwa-404/assumable-waters-sub-committee>

<sup>25</sup> id.

<sup>26</sup> id.

<sup>27</sup> <http://www.house.leg.state.mn.us/hrd/pubs/indiangb.pdf>

- Leech Lake - 14,855.02 acres
- Mille Lacs - 4,369.27 acres
- White Earth - 63,625.16 acres
- Red Lake - 806,698.49 acres

#### Dakota Communities (Sioux)

- Lower Sioux - 1,729.62 acres
- Prairie Island - 2,601.36 acres
- Shakopee-Mdewakanton - 1,797.39 acres
- Upper Sioux - 857.14 acres

The federal government owns about 7 percent of the land area in Minnesota, or 3.4 million acres. Almost all federal land in Minnesota is natural resource land, primarily forest acreage in the Chippewa and Superior National Forests. Other federal lands are mainly in national wildlife refuges (including waterfowl production areas), national parklands, and Indian reservation lands.<sup>28</sup> The federal regulations on Section 404 assumption do not prohibit states from assuming Section 404 authority on non-Indian federal lands, provided the state has regulatory program jurisdiction. The Minnesota DNR generally requires public water permits for activities affecting public waters on federal lands. To date, however, the state has not asserted WCA jurisdiction for activities affecting wetlands on federal lands. The extent to which Minnesota would assume Section 404 authority on federal lands would require additional discussion.

#### 3.2.5. Process for determining the extent of assumption

A complete application to the EPA for Section 404 program assumption must include a Memorandum of Agreement (MOA) between the state and the COE<sup>29</sup> that defines the waters for which the COE will retain regulatory authority and addresses other procedural issues. The specific requirements of the MOA are established in 33 CFR § 233.14 as follows:

*“Memorandum of Agreement with the Secretary.*

*(a) Before a State program is approved under this part, the Director shall enter into a Memorandum of Agreement with the Secretary. When more than one agency within a State has responsibility for administering the State program, Directors of each of the responsible agencies shall be parties of the Memorandum of Agreement.*

*(b) The Memorandum of Agreement shall include:*

*(1) A description of waters of the United States within the State over which the Secretary retains jurisdiction, as identified by the Secretary.*

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<sup>28</sup> Minnesota House of Representatives Research Department, <http://www.house.leg.state.mn.us/hrd/pubs/ss/sssoland.pdf>

<sup>29</sup> The MOA is developed between the state agency director(s) and the Secretary of the Army, acting through the Chief of Engineers for the Corps.

*(2) Procedures whereby the Secretary will, upon program approval, transfer to the State pending 404 permit applications for discharges in State regulated waters and other relevant information not already in the possession of the Director.*

*Note: Where a State permit program includes coverage of those traditionally navigable waters in which only the Secretary may issue section 404 permits, the State is encouraged to establish in this MOA procedures for joint processing of Federal and State permits, including joint public notices and public hearings.*

*(3) An identification of all general permits issued by the Secretary the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program, and a plan for transferring responsibility for these general permits to the State, including procedures for the prompt transmission from the Secretary to the Director of relevant information not already in the possession of the Director, including support files for permit issuance, compliance reports and records of enforcement actions.”*

While the regulations lay out the general content of the MOA, they do not prescribe a process or timeline to create it. The requirement to address these issues through an MOA clearly implies that there would be state and federal collaboration during its development, but the authority to identify retained waters ultimately falls to the COE. The regulations also do not identify procedures for resolving disputes between a state or tribe and a particular COE District, should they arise.

It would be important to involve the EPA in the development of the MOA for their guidance and concurrence, as the MOA would affect the structure and extent of the state program that the EPA must ultimately approve.

The MOA should also address other procedural issues related to program implementation in assumed vs. retained waters that are not identified in the regulations, such as developing a process to deal with projects that cross administrative boundaries, changes to property ownership that affect program administration (i.e. federal or Indian lands), and the use of mitigation credits approved under both the state and federal regulatory programs.

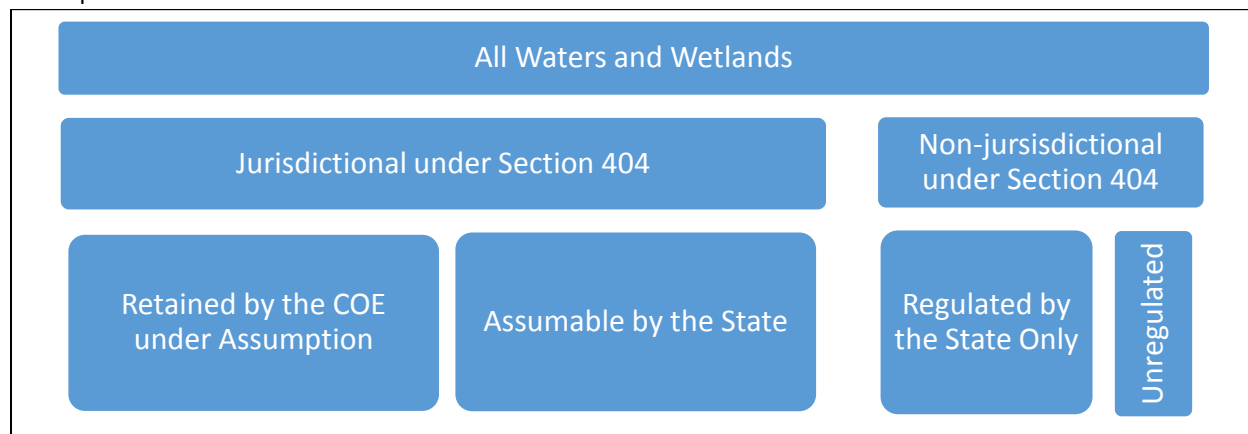
### 3.2.6. Implications for potential Section 404 assumption in Minnesota

The interpretation of which waters and wetlands are retained by the COE will affect both the extent of waters assumable by the state, and the ability to accurately identify them. Both of these factors in turn affect the potential benefits of assumption. Together, they are the most significant factors affecting the feasibility of Section 404 assumption in Minnesota.

The waters assumable by the state are those waters jurisdictional under Section 404 of the Clean Water Act minus those retained by the COE (see Figure 3.2.1). Those waters non-jurisdictional to Section 404 are essentially irrelevant to assumption (i.e. there is no Section 404 authority over those waters for the state to assume). The more similar the criteria used to determine COE-retained waters are to the criteria used to determine Section 404 jurisdiction, the fewer waters there are remaining for the state to

assume. The COE's interpretations of which waters are retained, and the extent to which adjacent wetlands are retained, will have significant effects on the extent of state-assumable waters.

Figure 3.2.1. General relationship between waters regulated by the COE and the state under Section 404 assumption.



In addition to the amount or extent of assumable waters, the timing and process used to identify them significantly affects the potential benefits accruing from Section 404 assumption. The process to determine Section 404 jurisdiction can be complicated and lengthy, particularly related to adjacent wetlands. Again, the more similar the criteria used to determine COE-retained waters are to the criteria used to determine Section 404 jurisdiction, the greater the potential difficulty in identifying which waters are regulated by whom (i.e. many waters would require a case-by-case determination to determine the proper regulatory authority at the time of application for a permit). The ability to identify COE-retained waters at the time of program assumption would be important for both state and federal program efficiency, as well as applicant certainty and timely permitting. It would be difficult to plan for and implement a program for which its applicability is uncertain.

It would also be more effective and efficient to establish an administrative boundary for assumable/non-assumable wetlands that is consistent with other state resource protection programs. Section 404 assumption does not change the overall level of resource protection, but rather who regulates it. The administrative boundary could be consistent with another existing regulatory boundary measured from the ordinary high water mark (i.e. building setback zones, shoreland program boundaries, etc.). Such consistency improves program efficiency and landowner awareness.

As discussed elsewhere in this chapter, there has been substantial uncertainty nationally over which waters are retained by the COE under Section 404 assumption. However, during the preparation of this report, the St. Paul District of the COE 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.

This position interprets COE-retained waters similarly to Section 404 jurisdictional waters, which has significant implications for state assumption. For example, in Minnesota, “adjacent” wetlands (as currently defined by the COE for Section 404 jurisdiction) can extend tens and even hundreds of miles from a water body. Under this interpretation, a significant portion of Minnesota waters and wetlands, particularly in the northern part of the state, would not be assumable and would remain under COE regulatory authority.

The COE, St. Paul District has informed the DNR and BWSR that they will provide a more formal statement of their current position on COE-retained waters. Once this statement is received, the state agencies will analyze and assess the implications for potential Section 404 assumption by the state of Minnesota. This analysis will include GIS-based maps of the approximate extent of COE-retained and state-assumable waters. When completed, this analysis will be incorporated into this report as an appendix.

The upcoming recommendations of the Assumable Waters Subcommittee may provide additional insight and options for the state and the COE, St. Paul District to consider in developing an MOA. However, federal guidance would provide the most clarity to the issue of assumable waters, and the extent to which program assumption is feasible in Minnesota. Other factors, such as court cases or changes in the COE position, could also affect the extent and identification of assumable waters. The planned analysis of COE-retained and state-assumable waters (preceding paragraph) would be updated to reflect any such changes, if they occur.

### 3.3. 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

To assume the Section 404 program, a state must regulate all waters that are jurisdictional under the CWA. A state may, for their own policy reasons, elect to regulate more waters than are covered under the CWA, but to assume Section 404, a state cannot omit from regulation waters that are jurisdictional under the CWA. (Note however, that the COE must retain permitting authority for certain waters if a state assumes Section 404 – see Section 3.2). The jurisdictional scope of the CWA and the applicable Minnesota state regulations are described and compared below, identifying implications for Section 404 assumption and potential solutions. For the waters regulated under Minnesota laws, this analysis focuses primarily on WCA and the PWPP as state permitting programs regulating physical impacts (dredge/fill/drain) to waters. They are the state programs analogous to the CWA Section 404 Program. Minnesota water quality regulations<sup>30</sup> apply to essentially all waters in the state, but they are not a stand-alone permitting program – they are typically applied to permits issued under other regulatory programs.

#### 3.3.1. Scope of Clean Water Act jurisdiction

Under Section 404 of the CWA, the COE and EPA have jurisdiction over “navigable waters.” This term is further defined in section 502(7) of the law as “waters of the United States, including the territorial seas.”<sup>31</sup> The CWA leaves it to EPA and the COE to define the term “waters of the United States.” The agencies’ definition has been litigated several times in the past 15 years which ultimately led to the rulemaking process that in 2015 produced a new definition of waters of the United States. Implementation of the new rule, however, has been stayed pending the resolution of several legal challenges. In the meantime the agencies continue to use the existing regulations (last codified in 1986) which defines “waters of the United States” as traditional navigable waters, interstate waters, all other waters that could affect interstate or foreign commerce, impoundments of waters of the United States, tributaries, the territorial seas, and adjacent wetlands.<sup>32</sup> The regulations also contain two specific exclusions from the definition of waters of the United States. Waste treatment systems designed to meet the requirements of the CWA and prior converted cropland are not “waters of the United States” under the agencies’ current regulations. Determining the CWA jurisdictional status of an area designated as prior converted cropland is solely up to the EPA, regardless of determinations made by any other Federal agency, such as USDA. The limit of CWA jurisdiction is the ordinary high water mark (as defined in the federal regulations) of a non-wetland water and, when adjacent wetlands are present, the limit of that wetland as determined in accordance with the Corps of Engineers Wetland Delineation Manual and applicable Regional Supplement.

Currently, the jurisdictional status of an aquatic resource under the CWA is a fact specific determination made by COE or EPA staff on a case by case basis. In contrast to the DNR’s PWPP, there is not a map or list that can be consulted to determine if a particular wetland or waterbody falls under CWA

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<sup>30</sup> M.S. 115.03 and M.R. Chapter 7050

<sup>31</sup> Codified in statute at 33 USC §1362(7)

<sup>32</sup> 33 CFR 328.3; 40 CFR 122.2

jurisdiction.<sup>33</sup> Further, unlike WCA where the scope of jurisdiction covers nearly all wetlands in the state, the U.S. Supreme Court has made it clear that there is a limit to federal jurisdiction, particularly for wetlands/waters that have only a speculative or insubstantial effect on downstream navigable waters. This lack of clarity on the scope of CWA jurisdiction is one of the major criticisms of the Section 404 program and one that causes delays in processing jurisdictional determinations and issuing permits.

### 3.3.2. Scope of Wetland Conservation Act jurisdiction

The jurisdictional scope of WCA is provided in M.R. Chapter 8420.0105. This chapter regulates “the draining or filling of wetlands, wholly or partially, and excavation in the permanently and semipermanently flooded areas of type 3, 4, and 5 wetlands, and in all wetland types if the excavation results in filling, draining, or conversion to nonwetland.”<sup>34</sup> This statement of scope covers both geographic jurisdiction (those resources on the landscape that are covered by WCA, i.e., wetlands) and activity jurisdiction (activities that are regulated, i.e, draining, filling, and in some cases, excavation). For comparative purposes, this section of the report will only address the geographic jurisdiction of WCA. The geographic scope of WCA is straightforward in that it generally covers all wetlands in the state with three exceptions: incidental wetlands, public waters wetlands, and wetlands affected by those peat mining operations that are subject to permit to mine and reclamation requirements of Minnesota Statutes sections 93.44 to 93.51.<sup>35</sup> Incidental wetlands are defined as “wetland areas that the landowner can demonstrate, to the satisfaction of the local government unit, were created in nonwetland areas solely by actions, the purpose of which was not to create the wetland.”<sup>36</sup> Examples of incidental wetlands include stormwater ponds and ditches constructed in upland areas. Relative to the amount of naturally occurring wetlands in Minnesota, the extent of incidental wetlands in the state is not significant. Public water wetlands are excluded from WCA jurisdiction because they are regulated under the DNR’s PWPP (Minnesota Statutes, Section 103G.005, subd. 15). Public water wetlands are discussed in more detail in section 3.3.3. Similarly, the state of Minnesota has also assigned responsibility for regulating wetlands associated with peat mining operations to the DNR under state’s permit to mine program. Peat mining projects over 40 acres are subject to mineland reclamation requirements while those less than 40 acres would generally be subject to WCA regulation or regulated under the PWPP if the area to be mined is a public water. The boundary of wetlands regulated under WCA jurisdiction is determined in accordance with the Corps of Engineers Wetland Delineation Manual

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<sup>33</sup> The exception to this is navigable waters designated under the Rivers and Harbors Act of 1899. The Corps maintains a list of those waters in Minnesota that have been designated as navigable waters. All navigable waters are also subject to the permitting requirements of the CWA.

<sup>34</sup> “Wetlands” are defined in state statute as follows:

M.S. 103G.005, Subd. 19. **Wetlands.** (a) “Wetlands” means lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this definition, wetlands must have the following three attributes:

- (1) have a predominance of hydric soils;
- (2) are inundated or saturated by surface or ground water at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
- (3) under normal circumstances support a prevalence of such vegetation.

(b) For the purposes of regulation under this chapter, the term wetlands does not include public waters wetlands as defined in subdivision 15a.

<sup>35</sup> See M.S. 103G.005, Subd. 19(b) and M.R. 8420.0105 Subp. 2.D. and G.

<sup>36</sup> M.R. 8420.0105, Subp. 2.D.



and applicable Regional Supplement. However, activities outside the boundary can be regulated if they result in draining or filling a wetland.

### 3.3.3. Scope of Public Waters Permitting Program jurisdiction

The statutory definition of public waters includes public waters and public waters wetlands. Public waters are all waterbasins and watercourses that meet the criteria set forth in Minnesota Statutes, Section 103G.005, subd. 15 that are identified on Public Water Inventory maps authorized by Minnesota Statutes, Section 103G.201. Public waters wetlands include all type 3, type 4, and type 5 wetlands (as defined in U.S. Fish and Wildlife Service Circular No. 39, 1971 edition) that are 10 acres or more in size in unincorporated areas or 2.5 acres or more in size in incorporated areas. The waters that are under the jurisdiction of the MNDNR are shown on maps commonly referred to as Public Waters Inventory (PWI) maps. The regulatory "boundary" of these waters and wetlands is the ordinary high water level (OHWL), as defined in state statute.

The waters covered by the PWPP are very specifically defined in statute and are readily identified as a result of the PWI mapping. Based on the criteria set forth in Minnesota Statutes, Section 103G.005, subd. 15 for non-wetland waters it is apparent that there is a class of such waters in the state that is not subject to PWPP jurisdiction; specifically watercourses having less than the two square mile drainage area threshold established in statute. Watercourses with less than this amount of contributing drainage area are not protected under state dredge/fill/drain permitting programs, regardless of their flow regime.<sup>37</sup> In addition to small drainage area streams, there are a few instances of other isolated stream segments that are not identified as regulated watercourses on PWI maps. There also appear to be some non-wetland, lake or pond-like basins that are not included on PWI maps and therefore would not be covered under any state dredge/fill/drain permitting program.<sup>38</sup> This would include some basins that do not meet the size criteria for public water designation, became deeper or larger after the PWI was completed, were simply missed during the inventory process, or were omitted from the PWI for other reasons. A more detailed survey would be needed to determine how many of these waters exist, but a brief review of the PWI map for Washington County identified several potential non-wetland waters that are not included on the PWI map for this county (Figure \_\_).

Public water wetlands are a narrowly defined subset of wetlands found in the state. Any wetlands that may have qualified as public waters wetlands but are not identified on the PWI would fall under WCA jurisdiction. Consequently, all wetlands in the state (except incidental wetlands – see above) are covered by state regulations.

### 3.3.4. Comparison of state and federal jurisdiction in Minnesota

A comparison of the jurisdictional scope of the CWA against the state regulatory programs must distinguish between wetlands and non-wetland aquatic resources because of the division of authority between the PWPP and WCA in Minnesota. Because of the case-specific determinations associated with

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<sup>37</sup> Certain trout stream headwaters having less than two-square mile drainage areas have been included on the PWI as a result of a lawsuit.

<sup>38</sup> These basins, as well as headwater streams are likely to be covered under state water quality standards, but the standards would not typically be applied in the absence of a permit issued under some other regulatory program.

CWA jurisdiction, the following comparisons should be viewed as general statements made at a programmatic level.

#### *3.3.4.1. Wetlands*

In general, the combined geographic scope of WCA, the PWPP, and the Permit to Mine Program have a broader geographic scope for wetland resources in Minnesota than the CWA. This is primarily attributable to the comprehensive nature of WCA. However, the difference in scope between the CWA and the combined state programs is not systematic and is not consistent across the state. For example, state program and CWA jurisdiction are likely to have nearly complete overlap in areas of the state having abundant wetlands that are contiguous to watercourses that have at least seasonal flow and high connectivity to downstream waters. Conversely, there is likely to be significantly less overlap where wetlands tend to be isolated and there is no apparent surface connection to downstream waters. However, the fact that state program jurisdiction is generally broader than CWA jurisdiction for wetlands does not pose problems for Section 404 assumption. It's likely that the current exclusion of incidental wetlands from WCA jurisdiction would need to be addressed under state assumption. While not all of the wetlands determined to be incidental would be jurisdictional under the CWA, it is reasonable to assume that at least some (e.g., road ditches) would be regulated.

#### *3.3.4.2. Non-wetland waters*

The most obvious and systematic difference in jurisdiction between the PWPP and the CWA is the extent to which streams with drainage areas of less than two square miles are regulated. The criteria in M.S. 103G.005 for defining public waters provide coverage for natural or altered watercourses where the total drainage area is greater than two square miles. The CWA does not impose a drainage area threshold but instead relies on the permanence of flow and/or a significant nexus to the downstream navigable water in order to assert jurisdiction over headwater streams that exhibit an ordinary high water mark. The COE routinely asserts jurisdiction over watercourses in areas upstream of the two square mile threshold, particularly if the watercourse exhibits perennial or seasonal flow.<sup>39</sup> Although it is difficult to quantify the difference in the scope of jurisdiction between the state and federal programs (measured in miles of watercourse) the number is expected to be fairly substantial given the large number of smaller drainage area and headwater streams and their cumulative length beyond the extent of PWPP jurisdiction.

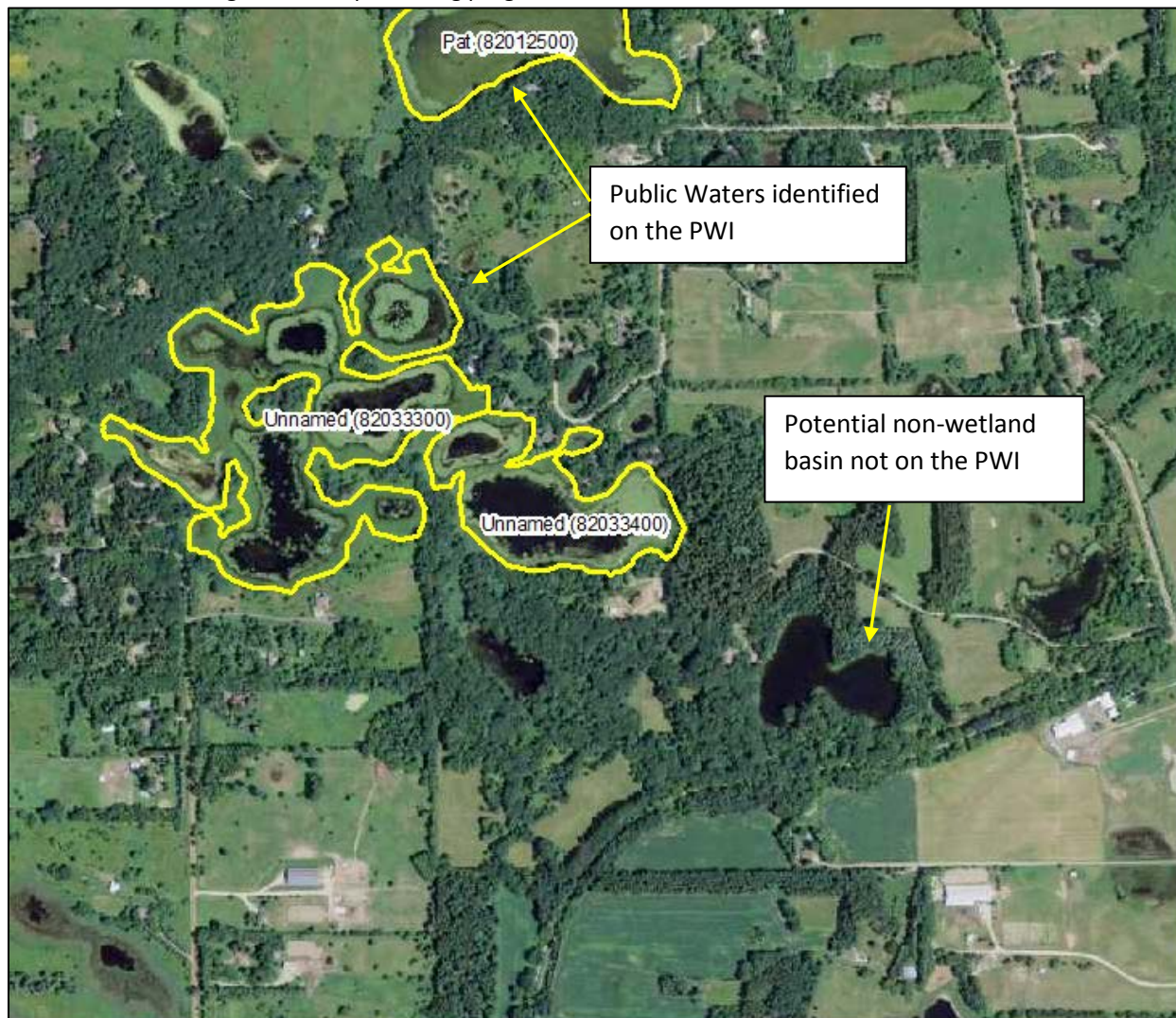
Regarding non-wetland water basins (lakes, ponds), the PWPP regulates a number of such basins that are likely non-jurisdictional under the CWA. Of greater relevance for potential Section 404 assumption is the fact that there are an unknown number of non-wetland basins that are not on the PWI and therefore not covered under any state dredge/fill/drain permitting program (Figure \_\_\_). Some of these are certain to be jurisdictional under the CWA, but cannot be identified without conducting a basin-specific jurisdictional analysis. In light of this, a concise statement regarding the overlap between the state and federal programs with respect to non-wetland water basins cannot be made without

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<sup>39</sup> Seasonal flow is defined in the Clean Water Act Jurisdictional Guidance after the Supreme Court decision in *Rapanos* as continuous flow for three months.

additional analysis. Nonetheless, for Minnesota to assume the Section 404 program, the state must regulate all basins that are jurisdictional under the CWA.

Figure 3.3.1. Example of potential non-wetland basins that are not on the PWI and therefore not regulated under Minnesota state dredge/fill/drain permitting programs.



### 3.3.5. Summary

The state of Minnesota would need to assert state dredge/fill/drain permitting program jurisdiction over some additional categories of waters to be able to certify that all of the CWA waters are regulated by the state. These additional categories include some types of incidental wetlands, some headwater streams with drainage areas less than two square miles and possibly other isolated stream reaches, and waterbasins not identified on the PWI that are generally greater than ten feet deep and thus not subject to WCA. Closing these jurisdictional gaps would also address the current uncertainty over defining waters of the U.S. under the CWA as it relates to Section 404 assumption. Regulating essentially all

waters in Minnesota under state dredge/fill/drain permitting programs would eliminate the need to separately determine CWA jurisdiction. Applicants who receive state permits/authorizations under state programs approved for Section 404 assumption would be covered under Section 404 whether the affected water is jurisdictional under the CWA or not.

### 3.4. 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

The federal regulations for state assumption of the Section 404 program contain the following provision:

40 CFR §233.1(d) Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act (*Clean Water Act*) and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.

The term “stringent” is not defined or described, but presumably refers to the overall effectiveness of the program procedures and requirements in achieving the goals of the CWA. The main focus of this section of the report is to compare Minnesota state regulatory programs with the provisions of the CWA Section 404 Program as they relate to protection of aquatic resources. Specifically, areas where Minnesota requirements and standards may be less stringent than Section 404 are identified in this section and further addressed in Section 3.5.

Some stakeholders expressed concern that state assumption of Section 404 may lead to weaker regulatory program enforcement and more wetland loss in Minnesota.<sup>40</sup> They recommended that this report identify additional measures to enhance overall resource protection under state regulatory programs. A full discussion of such measures is beyond the scope of this study, but would include increased funding and staffing for regulatory programs, improved staff training, and enhanced opportunities for public engagement in regulatory program decisions and enforcement. It is presumed for this study that if Minnesota applied for and received 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, other than potential improvements in permitting efficiency, depending on who administers the regulations (state vs. federal). It should also be noted that other stakeholders maintain that state assumption could lead to better resource protection, resulting from a comprehensive state program that also incorporates Section 404 requirements.

#### 3.4.1. Regulatory policy

The CWA establishes an overall goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters.<sup>41</sup> In addition, implementation of the Section 404 regulations reflects a national goal of achieving “no net loss” in wetland acreage and function. Minnesota asserts state control over public waters to, “conserve and use water resources of the state in the best interests of its people.”<sup>42</sup> Minnesota has several statutory policies specific to wetlands. The Minnesota Wetland Conservation Act declares that it is in the public interest to preserve the state’s wetlands for a variety of identified benefits.<sup>43</sup> WCA statutes also contain a specific goal to, “achieve no net loss in the quantity,

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<sup>40</sup> Many of these concerns are discussed in: Wood, L. D. 2009. The ECOS Proposal for Expanded State Assumption of the CWA §404 Program: Unnecessary, Unwise, and Unworkable. *Environmental Law Reporter* 39:10209 - 10217.

<sup>41</sup> 33 U.S.C §1251

<sup>42</sup> M.R. Chapter 6115.0150

<sup>43</sup> M.S. 103A.202

quality and biological diversity of Minnesota’s existing wetlands,”<sup>44</sup> which is explicitly referenced and manifested in the rules for implementing WCA.<sup>45</sup> The statutes also support an “increase the quantity, quality, and biological diversity of Minnesota’s wetlands by restoring or enhancing diminished or drained wetlands.” Minnesota state water quality rules establish that it’s state policy to protect wetlands and maintain wetland quality to support a number of specified beneficial uses.<sup>46</sup> While Minnesota’s regulatory policy language does not exactly mirror that of the CWA/Section 404, the expressed goals are largely consistent with, and in some respects broader than the federal program.

### 3.4.2. Scope of regulated activities and exemptions

Section 404 regulates the *discharge* of dredged or fill material into jurisdictional waters, while Minnesota state programs explicitly regulate most types of wetland alteration. WCA regulates *filling, draining and in some cases, excavation* of wetlands. The PWPP regulates *any alteration of the course, current or cross-section* of public waters, including public waters wetlands. State water quality standards apply to discharges (point and nonpoint) and any physical alteration of wetlands to protect the beneficial uses of state waters.

All of the programs, federal and state, contain exemptions for certain activities and certain categories of waters/wetlands. Section 404(f) of the CWA exempts the following activities from regulation, unless the activity results in a *new use* of the water/wetland and causes a *reduction in reach or impairment of flow or circulation* of the regulated water:

- Established (ongoing) farming, ranching, and silviculture activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices
- Maintenance (but not construction) of drainage ditches
- Construction and maintenance of irrigation ditches
- Construction and maintenance of farm or stock ponds
- Construction and maintenance of farm and forest roads, in accordance with best management practices
- Maintenance of structures such as dams, dikes, and levees

In practice, the aforementioned activities may not always qualify for exemption from regulation due to the recapture clause (above, in italics).

Similar to the Section 404(f) exemptions, normal farming practices are not regulated under WCA, provided they do not result in wetland drainage. Normal farming practices are defined in the WCA rules as, “ranching, silvicultural, grazing, and farming activities such as plowing, seeding, cultivating, and harvesting for the production of feed, food, and fiber products.” It should be noted that the wetland conservation compliance provisions (Swampbuster) of the federal farm program play a significant role in protecting wetlands on agricultural land. BWSR and the Minnesota NRCS have also developed, to the extent allowable under federal law, procedures to coordinate implementation of WCA and

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<sup>44</sup> M.S. 103A.201

<sup>45</sup> M.R. Chapter 8420

<sup>46</sup> M.R. 7050.0186

Swampbuster through the execution of two Interagency Memorandums of Understanding: “Wetland Conservation Act and Swampbuster Coordination” (2009) and “Administration and Use of the Minnesota Agricultural Wetland Bank” (2013).<sup>47</sup> These coordination efforts, particularly the establishment and implementation of the Minnesota Wetland Agricultural Wetland Bank, have been very successful and could continue under state assumption.

In addition to the aforementioned activities that are outside the scope of WCA regulation, WCA contains a number no-loss and exemption categories that, although still subject to regulation, do not require wetland replacement. No-loss categories, as the name implies, are activities that occur in wetlands, but do not result in the permanent loss of wetland area or function. Examples include removal of accumulated sediment or debris, wetland restoration, and maintenance/repair of existing utilities and public works structures involving no additional wetland impacts.<sup>48</sup> Section 404 contains no similarly-named provision, but such activities, if occurring in a jurisdictional wetland, are generally covered under general permit categories that generally do not require compensatory mitigation.

Unlike the no-loss categories, the WCA exemptions cover activities that can result in a loss of wetland area (or function and value), but for which the state has made a policy decision not to require wetland replacement. There are eight separate exemption categories, covering a range of specific activities associated with agriculture, repair and maintenance of drainage systems, utility work, forest road construction, and wildlife habitat improvement.<sup>49</sup> There is an exemption category for de minimis impacts, regardless of the project purpose, and a category that allows for drainage of wetlands previously restored under various conservation programs that allow wetland reversion after the term of the agreement expires. One of the exemption categories is aimed at regulatory program coordination and can exempt activities from wetland replacement requirements under WCA if a Section 404 permit is obtained. The amount of wetland that can be drained or filled under the WCA exemption categories ranges from very small amounts, such as the 20 square foot de minimis exemption for wetlands immediately adjacent to lakes, to unlimited amounts for forest road construction<sup>50</sup> and drainage of some wetlands that meet specific cropping history requirements. For the years 2010 through 2013 (most recent data available), the acres of wetland lost without replacement due to LGU-approved exemptions under WCA averaged 179 acres/year. Some of these losses may not be permanent, due to the type of exemption. On the other hand, this figure does not capture the total exempt losses because landowners exercising an exemption are not required to apply for approval or report their activities. Some WCA exempt impacts are subject to compensatory mitigation under a Section 404 permit or, particularly for farmed wetlands, the Swampbuster provisions of the federal farm program. Although the Section 404 program can and does authorize some minor impacts without requiring compensatory mitigation (typically under general permits), some of the WCA exemption categories and amounts may not be consistent with Section 404 requirements (See Section 3.5).

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<sup>47</sup> To view the memorandums, see the BWSR website at: <http://www.bwsr.state.mn.us/wetlands/index.html>

<sup>48</sup> See M.R. Ch. 8420.0415 for a complete list

<sup>49</sup> See M.R. Ch. 8420.0420

<sup>50</sup> The forest road exemption requires measures to limit overall wetland impact, but there is no set limit to the amount of wetland that can be filled.

Minnesota water quality standards, which are administered by the PCA, apply to all waters in the state (other than constructed basins used under permit for treatment or disposal systems) and to essentially any activity that may adversely affect the state's waters.<sup>51</sup> However application of the water quality standards generally relies upon permits or licenses issued under other regulatory programs, for example, by state certification of Section 404 permits. Minnesota assumption of the Section 404 program would not affect the scope of these standards, but the process for applying them could shift to state permits (WCA and PWPP) or the standards could be incorporated directly into the state permitting programs.

### 3.4.3. Permit application sequencing

The federal standards for deciding whether to issue or deny a Section 404 permit are primarily found in 40 CFR 230, which are known as the Section 404(b)(1) Guidelines.<sup>52</sup> The Guidelines are voluminous and detailed, but the general concept is that impacts to federally jurisdictional waters/wetlands must be avoided and minimized to the extent practicable and that unavoidable impacts generally require compensatory mitigation aimed at replacing the lost resources and their associated functions and values. These steps of “avoid – minimize – replace” are referred to as permit sequencing. The Guidelines reflect a strong preference for avoiding impacts to waters/wetlands:

40 CFR §230.1(c) Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.

The Guidelines also make a presumption that projects that are not water dependent (do not require access or proximity to or siting within an aquatic site to fulfill its basic purpose) have alternatives available that do not involve water/wetland impacts. To receive a Section 404 permit for non-water dependent projects, applicants must demonstrate that the presumed available alternatives are not practicable. In practice, very few Section 404 permit applications are denied, although for many projects, the amount of proposed impact is ultimately reduced through the permit review process.

WCA statutes and rules (M.R. Ch. 8420.0520), as well as Minnesota's water quality rules (M.R. Ch. 7050.0186) contain sequencing provisions very similar to the Section 404 Program. Some of the WCA rule language is taken almost verbatim from the federal regulations. However, WCA contains some exceptions that may not be clearly consistent with Section 404. Under WCA statutes, certain impacts to wetlands in cultivated fields are not subject to the avoidance and minimization requirements of sequencing – they can be authorized just by providing appropriate compensatory mitigation, which must be limited to restoration of previously drained or filled wetlands. Also, WCA rules contain a “sequencing flexibility” provision that can allow applicants to bypass the “avoid-minimize” steps under the following circumstances:

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<sup>51</sup> M.R. Ch. 7050.0186; 7050.0130, Subp. 2

<sup>52</sup> Section 404(b)(1) of the CWA directs the EPA to develop guidelines for identifying allowable sites for the discharge of dredged or fill material



- The wetland to be impacted is in such poor condition that a replacement wetland is certain to provide greater function and public value, as documented through an approved functional assessment.
- Avoiding impacts to the wetland would ultimately result in severely degrading the wetland due to changing surrounding land uses that are outside the scope of regulatory control. A typical example is a small, isolated wetland that, if retained, would be completely surrounded by a parking lot.
- The only feasible and prudent project alternative that would avoid wetland impacts will affect non-wetland resources that are determined to provide greater ecosystem function and public value than the wetland. Under this provision, impacts to the wetland must still be minimized and the non-wetland resource must be permanently protected from future impacts. A typical example would be a road that can either cross a low-quality wetland or a high quality upland woodland community of a type that is rare or declining in the project area (and not subject to any protective regulations).
- Human health and safety would be compromised by avoiding impacts to the wetland.

It should be noted that the Section 404 sequencing provisions could be appropriately applied to allow wetland impacts for all of the circumstances listed above. However, there is no explicit process in the Section 404 regulations for deviating from the sequencing steps comparable to the WCA sequencing flexibility provision.

The WCA rules on sequencing contain no explicit requirements similar to those found in the Section 404(b)(1) guidelines regarding the effect of permitted actions on water quality standard compliance, including potential violations of the standards of downstream states or tribes. Under Section 404 assumption, if a state-issued permit may adversely affect downstream state or tribal waters, the state must notify the downstream state or tribe, as well as the EPA. The EPA may require conditions or object to issuance of the state permit.

For the PWPP, there is a distinction in the sequencing provisions between public waters wetlands<sup>53</sup> and other public waters (lakes, streams, rivers). PWPP rules [M.R. Ch. 6115.0250 subp. 5B(1)] stipulate that impacts to public waters wetlands must follow the permit sequencing requirements found in the WCA rules. For all other public waters, the PWPP statutes and rules contain general requirements to avoid and minimize impacts, as well as more specific permitting requirements tailored to various categories of activities (fill, excavation, structures, etc.). One very important aspect of sequencing for public waters, including public waters wetlands is that filling public waters for the purpose of private-sector development is prohibited. Public waters may only be filled for public projects, which, in practice are most often transportation-related.

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<sup>53</sup> Public waters wetlands are a subset of the broader category of public waters regulated by the DNR. By definition, they comprise all Type 3, 4 or 5 wetlands (using the U.S. Fish and Wildlife Service Circular 39 classification system) that are 10 or more acres in size in unincorporated areas and 2.5 acres or more in incorporated areas.

### 3.4.4. Special considerations – T&E species, cultural resources, others

#### 3.4.4.1. Threatened and endangered species

Section 404 permit applications are currently reviewed for potential impacts on federally listed threatened and endangered (T&E) species under Section 7 of the Endangered Species Act (ESA). The COE consults with the USFWS in determining whether proposed activities will affect listed species. Under Section 7(a)(2) of the Endangered Species Act, the COE is required to ensure that any action it authorizes is not likely to jeopardize the continued existence of any federally listed species or result in the destruction or adverse modification of critical habitat. There is no specific requirement in the Section 404 regulations to consider impacts on *state* listed threatened or endangered species. However, under the Fish and Wildlife Coordination Act, the COE is obligated to seek and consider comments from state fish and wildlife agencies on Section 404 permit applications. In Minnesota, the DNR provides information and recommendations to the COE regarding potential impacts to state listed species.

WCA rules stipulate that a replacement plan application for activities that would involve taking a state listed endangered or threatened species cannot be approved unless the DNR issues a takings permit (under separate authority). The term “taking” includes pursuing, capturing, or killing for animals and picking, digging or destroying for plants. In practice, the focus on “taking” means that this WCA provision is seldom, if ever applied to projects where listed *animals* are present, since activities authorized by a WCA replacement plan seldom result in demonstrable killing of such animals. The fact that the WCA T&E provision does not specifically address impacts to *habitat* for listed species is a key distinction from Section 404 and ESA requirements. However, to be approved, WCA replacement plan applications must ensure the replacement of the public value of the impacted wetlands, which includes consideration of fish, wildlife and native plant habitats. Therefore, the presence of a T&E species would be a major consideration in a WCA decision, even in the absence of an actual “taking.”

The WCA rule provision regarding threatened and endangered species refers only to state listed species,<sup>54</sup> not federally listed species. However, all of the federally listed threatened and endangered species that occur in Minnesota<sup>55</sup> are also listed as state-threatened or endangered, except for the northern long-eared bat, Canada lynx, gray wolf, Topeka shiner and rufa red knot (Table 3.4.1). Under Section 404 assumption, EPA cannot waive their review of state permits that may affect federally listed species and designated critical habitat, and it’s EPA’s responsibility to coordinate with the USFWS and the COE. If Minnesota assumed the Section 404 program, it’s likely that the state would implement a procedure to screen permit applications for both state and federally listed species, and notify EPA accordingly (see Sections 3.6 and 3.8.3 for additional discussion).

Table 3.4.1. Species in Minnesota listed under the federal Endangered Species Act and their status under the Minnesota Endangered Species Act.

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<sup>54</sup> See M.R. Chapter 6134.0200 - 0400.

<sup>55</sup> See [https://www.fws.gov/midwest/endangered/lists/e\\_th\\_pr.html](https://www.fws.gov/midwest/endangered/lists/e_th_pr.html)

Species	Federal Status	Designated Critical Habitat	Minnesota Status <sup>a</sup>
<b>Mammals</b>			
Canada lynx ( <i>Lynx canadensis</i> )	T	X	SC
Gray wolf ( <i>Canis lupus</i> )	T	X	NL
Northern long-eared bat ( <i>Myotis septentrionalis</i> )	T		NL
<b>Birds</b>			
Piping plover ( <i>Charadrius melodus</i> ) – Great Lakes	E	X	E
Piping plover ( <i>Charadrius melodus</i> ) – N. Great Plains	T		E
Rufa red knot ( <i>Calidris canutus rufa</i> )	T		NL
<b>Fish</b>			
Topeka shiner ( <i>Notropis topeka</i> )	E	X	NL
<b>Insects</b>			
Dakota skipper ( <i>Hesperia dacotae</i> )	T	X	E
Karner blue butterfly ( <i>Lycaeides melissa samuelis</i> )	E		E
Poweshiek skipperling ( <i>Oarisma poweshiek</i> )	E	X	E
<b>Mussels</b>			
Higgins eye pearly mussel ( <i>Lampsilis higginsii</i> )	E		E
Sheepnose ( <i>Plethobasus cyphus</i> )	E		E
Snuffbox ( <i>Epioblasma triquetra</i> )	E		E
Spectaclecase ( <i>Cumberlandia monodonta</i> )	E		E
Winged mapleleaf ( <i>Quadrula fragosa</i> )	E		E
<b>Plants</b>			
Minnesota dwarf trout lily ( <i>Erythronium propullans</i> )	E		E
Leedy's roseroot ( <i>Rhodiola integrifolia ssp. leedyi</i> )	T		E
Prairie bush clover ( <i>Lespedeza leptostachya</i> )	T		T
Western prairie fringed orchid ( <i>Platanthera praeclara</i> )	T		E
<sup>a</sup> Status under the Minnesota Endangered Species Act (M.S. 84.0895) E – Endangered, T – Threatened, SC – Special Concern, NL – Not Listed			

PWPP rules state that DNR decisions on permit applications must be, “. . . consistent with the goals and objectives of applicable federal, state, and local environmental quality programs and policies, including . . . protected species management.”<sup>56</sup> Several specific types of activities in public waters are prohibited if the activity will take state listed threatened or endangered species unless a separate takings permit is obtained.<sup>57</sup> In addition, this aspect would be taken into account in the overall evaluation of environmental impact.

<sup>56</sup> M.R. Ch. 6115.0150

<sup>57</sup> M.R. Ch. 6115.0200, Subp. 3.D.; 6115.0210, Subp. 1.E.; 6115.0211, Subp. 6b.G; 6115.0215, Subp. 3.B.; 6115.0230, Subp. 3.E.;

#### 3.4.4.2. Cultural and historic resources

Section 404 permit decisions must follow the requirements of the federal Historical and Archeological Preservation Act and the National Historic Preservation Act. Permit applications may be reviewed by the state historic preservation office to identify potential impacts to sites of historic or cultural significance.

WCA regulations dictate that replacement plan applications must be denied if they would have a significant adverse impact on archaeological or historical values of sites on or eligible for listing on the National Register of Historic Places.

PWPP regulations do not specifically refer to historic or cultural resources.

#### 3.4.4.3. Other special considerations

WCA replacement plan decisions must take into account potential impacts on several additional “special considerations,” including rare natural communities, groundwater sensitivity, special fish and wildlife resources, sensitive surface waters (outstanding resource value waters and trout waters) and importance for education or research. In general, replacement plan applications for activities that would significantly adversely affect these resources cannot be approved. All of the aforementioned resources may also be considered in Section 404 permit evaluations, although they are not all specifically named in the regulations and the implications for permit decisions are not so clearly spelled out.

#### 3.4.5. Compensatory mitigation

Under Section 404 of the Clean Water Act and Minnesota state regulatory programs, unavoidable wetland impacts are potentially subject to compensatory mitigation (unless exempt – see Section 3.4.2). As the name implies, the goal of compensatory mitigation, or wetland replacement, is to compensate for or replace the functions and values that the impacted wetland provides:

Section 404 regulations (40 CFR §230.93): “The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA (*Department of the Army*) permits.”

WCA rules (M.R. Chapter 8420.0522, Subpart 1): “Wetland replacement must replace the public value of wetlands lost as a result of an impact.”

The Federal Mitigation Rule (40 CFR §230.93) outlines the basic requirements for compensatory mitigation, but the extensive details are contained in the *St. Paul District (COE) Policy for Wetland Compensatory Mitigation in Minnesota* (2009). The purpose of the St. Paul District policy is to serve as guidance for Project Managers in the COE Regulatory Branch. This is in contrast to the state’s WCA rules regarding compensatory wetland mitigation that must be implemented by local government units making WCA decisions and by the DNR on PWPP permits for impacts to public waters wetlands and permits to mine for wetlands impacted by mining activities. Minnesota state agencies and the COE have worked together for many years to achieve consistency between state and federal policy regarding

compensatory wetland mitigation, and the ability of the COE to adapt their more flexible policy to changes in WCA rules has contributed to this consistency. In most instances, wetland mitigation projects that meet state requirements will also meet federal requirements and vice versa. Minor differences are generally the result of inconsistencies between COE, St. Paul District policy and WCA rules, rather than conflicts between state statutes and the Federal Mitigation Rule.

Even though the Federal Mitigation Rule applies to all aquatic resources, neither the state nor the COE has developed specific compensatory mitigation requirements for aquatic resources other than wetlands. Although the PWPP requires compensatory mitigation for certain permitted activities affecting non-wetland aquatic resources, the requirements are general and vague in terms of their applicability and the quantity and quality of compensatory mitigation required for specific impact types and sizes. State water quality rules provide authority to require compensatory mitigation for impacts to all waters of the state, but the rules lack specific details other than to specify mitigation via restoration of a previously diminished wetland or creation of a wetland.<sup>58</sup>

Surrogates for wetland functions are used under state and federal programs to achieve compensatory wetland mitigation goals in Minnesota on a programmatic basis as opposed to a case-by-case measure of functional losses and gains. Such an approach recognizes the current lack of tools to effectively measure precise functional losses and gains, is more predictable for applicants and is more efficient to implement as compared to analyzing each impact and each replacement site in terms of functional losses and gains. An acreage-based surrogate is used for determining the amount (areal extent) of required wetland replacement in relation to the amount (areal extent) of wetland impacted. The ratio of required wetland replacement area to wetland impact area is referred to as the replacement or mitigation ratio. The minimum required replacement ratio varies from 1:1 to 2.5:1 depending on a number of different factors. Both state and federal programs allow for higher ratios if the standard minimum ratios are determined to be inadequate to achieve the objective of compensatory mitigation. In practice, most wetland impacts are required to provide replacement at the standard minimum ratios set in WCA rules and COE policy.

Per WCA replacement standards, the minimum replacement ratio varies in accordance with the following:

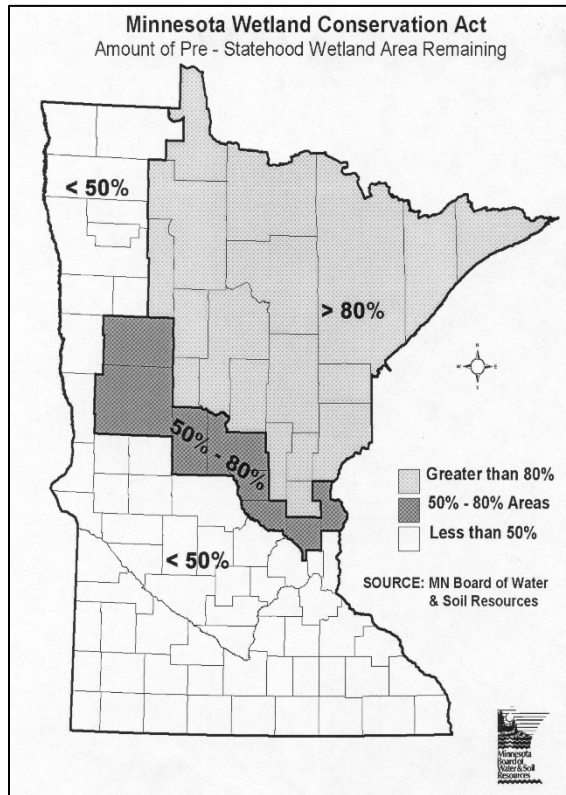
- Where the wetland impact occurs in the state related to the amount of wetlands remaining compared to pre-European settlement conditions (see Figure 3.4.1).
- Where the replacement wetland is located in relation to the wetland impact.
- The type of wetland impacted in relation to the type of replacement wetland (relating to plant communities, hydrology and landscape setting).
- The type of mitigation being used (pre-established credits from an existing wetland bank versus wetland replacement that corresponds to a specific impact, i.e. project specific or permittee responsible).

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<sup>58</sup> M.R. 7050.0185

- The proposed type of land use associated with the wetland impact (agricultural versus nonagricultural).

Figure 3.4.1. Administrative zones under WCA relating to historic wetland loss.



The specific factors related to determining the required minimum replacement ratio under WCA are complex, but in general, the minimum required wetland replacement increases when:

- Wetland impacts are located in an area of the state with higher historical wetland loss.
- Wetland impacts are located further from the proposed replacement wetland.
- Wetland impacts are to a different type of wetland than the replacement wetland.
- Wetland impacts are proposed to be replaced by a replacement project that has not been completed prior to the impact.
- The wetland impacts are on nonagricultural land, or are on agricultural land that is proposed for nonagricultural use.

State and federal regulatory programs have similar requirements and standards for generating compensatory wetland mitigation credits to offset wetland losses. Mitigation projects that are completed in advance of wetland impacts and that are not designated for a specifically identified impact deposit the resulting credits into a wetland mitigation bank account. Those credits can be sold to permittees requiring compensatory mitigation or used by the account holder for their own projects that

impact wetlands. The tracking of wetland credit deposits and withdrawals are consistent between state and federal programs and wetland bank service areas are the same for the state and federal programs. Additionally, state and federal wetland regulatory programs have developed similar performance standards and monitoring requirements for compensatory mitigation, some of which have been developed jointly. They all identify specific types of wetland restoration, creation and preservation actions<sup>59</sup> that can generate offsetting compensatory mitigation credits (credit actions). Although there are terminology differences, most credit actions identified in the WCA are roughly equivalent to those in the Federal Mitigation Rule. There are some minor differences in the interpretation and application of these credit actions between WCA rules and current COE, St. Paul District policy; only rarely does it result in differing credit amounts for the various credit actions. The process and procedures for approving compensatory mitigation projects and resulting credits is outlined in detail in the Federal Mitigation Rule, and the state has adapted their processes and procedures accordingly. WCA statute changes enacted in 2015 should allow the state to further match up approval processes and timelines with the Federal Mitigation Rule.

The Federal Mitigation Rule requires that there be mechanisms in place to ensure that a compensatory mitigation project will be successfully completed. A common mechanism is to require a financial assurance from the mitigation project sponsor. This is particularly applicable when wetland banks are allowed to generate compensatory mitigation credits upon plan approval but before project construction activities are initiated. For wetland banks in Minnesota, both the state and the COE withhold credits until initial project construction activities are completed, and then only release/approve credits as specific standards are achieved. This type of assurance mechanism obviates the need to collect and hold a financial assurance in most cases. For project-specific/permittee-responsible replacement that is not constructed in advance of associated impacts, WCA requires LGUs to obtain a financial assurance to ensure successful replacement.

A state conservation easement is the required long-term protection mechanism for all compensatory mitigation sites that function as wetland banks as well as certain types of project-specific/permittee responsible mitigation sites (for example, preservation sites). Currently, all other project-specific mitigation sites are protected by a declaration of restrictions and covenants in favor of the applicable local unit of government and the state. The long-term responsibility for maintaining the functions of compensatory mitigation sites is the responsibility of the landowner under the state's easement requirements and the responsibility of the project sponsor (for wetland banks) or permittee (for project specific or permittee responsible mitigation) under Federal Mitigation Rule requirements. In Minnesota, BWSR periodically inspects all wetland banks for compliance with easement conditions. The Federal Mitigation Rule requires compensatory mitigation sites to have a long-term management plan and an identified funding mechanism to meet long-term management needs, although this has not been fully implemented by the COE at this time. Although WCA does have a funding mechanism for monitoring and enforcement of easement conditions associated with compensatory wetland banks, this funding mechanism cannot be used for active management and repair of them.

As mentioned earlier, the specific replacement requirements described above for wetlands are not applicable to non-wetland aquatic resources (such as streams and lakes) under current state regulatory

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<sup>59</sup> Minnesota water quality standards at M.R. 7050.0186 do not identify preservation as an option for wetland compensatory mitigation

programs. PWPP rules require replacement when there is “a major change in the public water” (Chapter 6115.0240 Subpart 3C (5e)). PWPP replacement must be accomplished by “restoring degraded or impacted public waters having equal or greater public value or, if public waters restoration opportunities are not reasonably available, creating and protecting additional replacement water areas having greater public value.” Some non-wetland aquatic resources are not identified on PWI maps and are therefore not regulated under state dredge/fill/drain permitting programs, although state water quality standards may apply (see Section 3.3).

There are some inconsistencies between state statutes/rules and the Federal Mitigation Rule, which would possibly need to be rectified if Minnesota were to assume the Section 404 program. In practice, some of these differences are often of little consequence to applicants because the most restrictive requirement generally takes precedence. However, these differences occasionally make it difficult for some applicants to concurrently satisfy both state and federal mitigation requirements. In regard to compensatory mitigation, some aspects of the state regulatory programs that may be inconsistent with the Federal Mitigation Rule are as follows:

- State compensatory mitigation requirements for non-wetland aquatic resources regulated under the PWPP are general in nature and would likely require revision to be consistent with the detailed requirements in the Federal Mitigation Rule.
- WCA statutes and rules prohibit wetland impacts in one county from being replaced in a county with less historic wetland loss. WCA classifies counties by historical wetland loss into one of three categories: <50% of historical wetland area remaining, 50-80%, and >80% (Figure 3.4.1). Impacts in a “<50% county” cannot be replaced in a “50-80% county” or a “>80% county” regardless of watershed boundaries. A reasonable interpretation of the watershed approach as espoused in the Federal Mitigation Rule is that replacement in the same watershed is paramount to historical wetland loss considerations on a county basis. This discrepancy between WCA and the Federal Mitigation Rule is especially problematic in areas of the state where there are adjacent counties of different historical loss classifications and a single watershed extends into both counties. While this situation is not specifically addressed in the Federal Mitigation Rule, the use of county boundaries to in part determine replacement siting and ratios is likely inconsistent with the Federal Mitigation Rule, which emphasizes watershed boundaries (and a watershed-based approach) rather than political boundaries. Although the Federal Mitigation Rule allows a degree of flexibility to deviate from the watershed approach, it clearly implies that ecological/biological boundaries should be considered as opposed to political boundaries.<sup>60</sup>
- The Federal Mitigation Rule specifies that compensatory mitigation should be located within the same watershed as the impact site and in locations where it is most likely to successfully replace lost functions and services in the watershed, in accordance with a watershed approach. Although WCA rules emphasize similar watershed approach concepts as these, the current WCA replacement siting criteria includes prioritizing compensatory mitigation in the same County as

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<sup>60</sup> It should be noted that Minnesota has a statutory policy for managing surface water on a watershed approach (M.S. 103A.212), which is consistent with Section 404.



the impact site in addition to other watershed-based priorities. The incorporation of a County boundary-based component in the compensatory siting criteria is inconsistent with a strict watershed-based approach (see footnote 60).

- The Federal Mitigation Rule establishes a sequential preference for obtaining compensatory mitigation as follows: 1) mitigation bank credits; 2) in-lieu fee credits; 3) permittee-responsible mitigation under a watershed approach; 4) permittee-responsible mitigation through on-site and in-kind mitigation; 5) permittee-responsible mitigation through off-site and/or out-of-kind mitigation. Minnesota state regulatory programs do not contain a similar explicit order of preference, although WCA replacement ratios do provide an incentive for applicants to use wetland bank credits for replacement.
- The operation and use of wetland mitigation bank accounts is governed by state rules. In contrast, the Federal Mitigation Rule requires the execution of an individual mitigation banking instrument (MBI) for each specific wetland bank to govern its operation and use. In practice, the St. Paul District has standardized the operation and use of accounts by specifying the same or similar conditions for each account. Although the state's approach to governing the operation of use of wetland banks is not inconsistent with the Federal Mitigation Rule, the state does not have a requirement or mechanism to incorporate the MBI requirement of the Federal Mitigation Rule.
- The state does not require a long-term management plan and a funding source for long-term management or maintenance activities associated with compensatory mitigation projects once they are completed and all resulting credits are released. This is a requirement under the Federal Mitigation Rule. The state would need to establish a funding mechanism for long-term maintenance of mitigation sites.

#### 3.4.6. Enforcement and penalties

Section 404 enforcement and penalty provisions are provided in several locations in federal law, regulations and policy<sup>61</sup> and are summarized here. Both the COE and the EPA have enforcement and penalty authority for Section 404 violations, which may constitute unauthorized discharges or failure to comply with conditions of an issued permit, including permits issued by a state that has assumed the Section 404 Program. The COE and the EPA have established procedures to coordinate their enforcement efforts. The agencies may issue cease and desist orders to prevent ongoing activities and may also issue orders for corrective action. Except in certain specified circumstances, violators may apply to the COE for an after-the-fact permit. If the District Engineer determines that the activity does not comply with CWA standards for authorized discharges, the application may be denied and a restoration order issued. If legal action is warranted (generally for willful, repeated, flagrant or substantial impacts), cases are referred to the local U.S. Attorney for criminal or civil action, although the U.S. Attorney is not obligated to take action. Violations of the CWA are subject to criminal fines of

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<sup>61</sup> 33 USC 1344(s); 33 USC 1319(d),(g); 33 CFR 326; 1989 MOU Between The Department of the Army and The Environmental Protection Agency - Federal Enforcement for the Section 404 Program of the Clean Water Act

up to \$25,000 per day. The agencies may also issue administrative penalty orders of up to \$16,000 per violation, with a maximum cap of \$187,500 for any single enforcement action.<sup>62</sup>

Enforcement provisions for Minnesota state regulatory programs are primarily found in M.S. 103G.2372, M.R. 8420.0900 and M.R. 6115.0255. Under the PWPP and WCA, DNR conservation officers and licensed peace officers are authorized to issue cease and desist orders to halt on-going violations and to issue restoration and/or replacement orders. The DNR employs six Water Resource Enforcement Officers, dedicated to enforcing state water/wetland regulations and aquatic invasive species requirements. For WCA violations, the appropriate county soil and water conservation district conducts a site inspection and develops a restoration plan for inclusion in the restoration order. For PWPP violations, the DNR develops the restoration orders. Under WCA and the PWPP, parties responsible for a violation may apply for an after-the-fact replacement plan approval. For WCA violations, if the after-the-fact application is approved, the amount of required compensatory mitigation must be twice what would otherwise be required unless the local government unit and the enforcement authority agree that a lesser amount is acceptable. The enforcement authority may require a combination of restoration and replacement. Under the PWPP, conservation officers may issue a criminal citation immediately for violations, prosecuted as a misdemeanor with a maximum fine of \$700 and/or up to 90 days in jail. Under WCA, failure to comply with a restoration or replacement order is a misdemeanor, prosecuted at the discretion of the county attorney where the violation occurred. In addition, BWSR is authorized to issue administrative penalty orders for WCA and PWPP violations, up to \$10,000 per violation. Wetlands restored to satisfy a restoration order are subject to inspection by the soil and water conservation district, which is responsible for issuing a certificate of satisfactory restoration.

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. 113B) 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."

#### 3.4.7. Administrative Appeals

Section 404, WCA and the PWPP all have administrative appeal provisions for agency decisions on applications. Under Section 404 and the PWPP, appeals may only be made by the permit applicant. Under WCA, local government unit decisions on applications (approvals or denials) may also be appealed by parties other than the applicant, including by BWSR, DNR, SWCD and watershed district/watershed management organization representatives and by any person who has requested to receive notice of WCA applications and decisions. WCA decisions may also be appealed by petition of 100 or more residents of the county where a majority of the wetland that is the subject of the application is located. For PWPP and Section 404 appeals, the decision on the appeal is made by the responsible agency (DNR and COE). For WCA appeals, other than project-specific mitigation under a permit to mine issued by the DNR, the appeal decision is made by BWSR. For appeals of project-specific wetland mitigation under a permit to mine, the decision on appeal is made by the DNR. Under both

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<sup>62</sup> These amounts are adjusted every four years for inflation. See Federal Register, Nov. 6, 2013, 78(215):66643

state and federal regulatory programs, appellants have recourse to the respective state and federal courts of appeal upon conclusion of administrative appeal procedures.

#### 3.4.8. Wetland regulatory structure: overlapping regulations

There is a considerable body of published literature on environmental regulations in the U.S., including water/wetland regulations, focusing on the relationships between federal and state (and sometimes local) programs, or more specifically, on “federalism” as it relates to the regulations.<sup>63</sup> A full review of this aspect of wetland regulation is beyond the scope of this study, but the studies and analyses that were reviewed provide potentially useful findings and recommendations for states considering Section 404 assumption.

Given the U.S. federalist style of government, where national (federal), state and local governments have authority to establish regulations, there are legitimate and on-going questions about regulatory effectiveness and efficiency. For wetland/water regulation in particular, with Section 404 at the federal level and programs such as WCA and the PWPP at the state level, questions of redundancy and efficiency naturally arise. Several stakeholders from the advisory committee for this study mentioned permitting redundancy as a problem – why require two permits for the same impact? One school of federalism thought is that there is a single appropriate level of regulation (international, federal, state or local) for a given environmental issue. This “static” theory of federalism would be consistent with the desire to have a single permitting authority, which probably would be optimum purely in terms of efficiency. However, some analysts contend that having multiple levels of regulation (redundancy) enhances overall system stability, reliability and effectiveness in achieving program goals (clean water, clean air, etc.).<sup>64, 65</sup> Recognizing this view, others have proposed a “dynamic” or “negotiated” model of federalism, in which regulators at all levels work to develop regulatory approaches that are tailored to specific environmental problems and account for complex environmental and socio-political factors operating at multiple scales.<sup>66, 67</sup> An additional advantage is that these approaches are able to adapt to changing conditions.

One national-scale empirical study compared Section 404 permitting data in areas that had state wetland regulatory programs (i.e., redundant to Section 404) with areas where state programs were lacking. The study found that although there was no difference in the overall amount of permitted wetland fill between the two categories, there were 25% - 33% more Section 404 permits issued in areas having redundant state programs, suggesting that the presence of the state programs resulted in

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<sup>63</sup> For example, see Taylor, R.W., 2014. *Federalism of Wetlands*. Routledge, New York. 281 pp.; Robbins, K., ed. 2015. *The Law and Policy of Environmental Federalism*. Edward Elgar Publishing, Northampton, MA. 433 pp; and Thompson, D. B. 2009. Optimal federalism across institutions: theory and applications from environmental and health care policies. *Loyola University Chicago Law Journal* **40**:437-482.

<sup>64</sup> Landau, M. 1969. Redundancy, rationality, and the problem of duplication and overlap. *Public Administration Review* **29**(4):346-358.

<sup>65</sup> Landau, M. 1973. Federalism, redundancy and system reliability. *Publius* **3**(2):173-196.

<sup>66</sup> Adelman, D. and K. Engel. 2008. Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority. *Minn. Law Review* **92**:1796 – 1850.

<sup>67</sup> Ryan, R. 2011. Negotiating Federalism. *Boston College Law Review* **52**:1. Also available through William & Mary Law School Scholarship Repository, Faculty Publications. Paper 1129.

greater regulatory coverage of impacts by the Section 404 program and smaller impacts per issued permit.<sup>68</sup> While concluding that redundant state programs had a positive effect on Section 404 program effectiveness, the study did not examine the reverse -- how COE administration of Section 404 permits affected the state programs or overall permitting effectiveness, which would be of more interest in the context of evaluating state assumption of the Section 404 program.

Providing a somewhat contrasting view of regulatory overlap, the St. Louis County (Minnesota) Public Works Department in 2013 conducted a review of the wetland permitting process for five selected transportation projects in the county. They concluded that project delays associated with the Section 404 permitting process resulted in a cumulative increased cost of at least \$500,000, with no changes to the original project plans.<sup>69</sup> The County recommended several options for streamlining the regulatory process, including a federal - state programmatic agreement acknowledging the “sufficiency” of WCA, leading to a federal general permit that would eliminate the need for a separate Section 404 permit for projects under five acres of impact.

State assumption is one option along a continuum of regulatory models that seek to address dual federal/state authorities under the U.S. system of federalism. Section 3.11 describes other states’ experiences with assumption and Section 3.9 addresses alternatives to state assumption that may also address program efficiency and effectiveness.

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<sup>68</sup> Taylor, R.W., 2014. *Federalism of Wetlands*. Routledge, New York. 281 pp.

<sup>69</sup> Memo from James T. Foldesi, P.E., St. Louis County Public Works Director/Highway Engineer to Minnesota Congressional delegation, March 4, 2013. This analysis has not been independently verified.

### 3.5. 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

The aspects of Minnesota state regulatory programs discussed below were identified based on varying degrees of inconsistency with federal regulations as written, and in some cases, based on discussion with EPA and COE representatives. If Minnesota elected to pursue Section 404 assumption, it would be necessary to consult further with the EPA to clearly identify the specific changes to state programs that would be necessary to obtain approval. This consultation would be extensive and would require a dedicated state staff position as well as considerable time from other state regulatory program staff. The entire process, including the required statute and rule revisions would take at least two years (estimated cost = \$150K/year).

#### 3.5.1. Wetland Conservation Act implementation structure

State assumption of the Section 404 program is based on implementation of a state regulatory program (or programs) that is consistent with Section 404 requirements. In Minnesota, the PWPP and WCA comprise a comprehensive state water/wetland regulatory framework that would form the basis for state assumption. However, the federal requirements for state assumption are predicated on the state program(s) being implemented by state-level agencies.<sup>70</sup> Although WCA is a state regulatory program, with BWSR responsible for overall administration, it is largely implemented by local government units (LGU). Cities, counties, townships, watershed districts, watershed management organizations and soil and water conservation districts are largely responsible for accepting WCA applications, distributing notices and making decisions to approve or deny applications.<sup>71</sup> For this study, BWSR, DNR and PCA staff members consulted with EPA representatives from EPA Headquarters and EPA Region 5, which covers Minnesota, on certain aspects of the state's regulatory programs. The EPA representatives stated clearly that the current WCA structure relying on LGU implementation is not consistent with the Section 404 assumption regulations (Appendix F). Considering just regulatory structure, the PWPP would be approvable for assumption since it is implemented solely by a state agency (DNR).

Consequently, any successful Minnesota application for Section 404 assumption would require statutory and rule changes to ensure that the primary responsibility for processing and making decisions on all water/wetland applications resides with a state-level agency. A variety of options could be considered, from crafting an entirely new, comprehensive state regulatory program combining the PWPP and WCA, to modifying the existing regulatory structure in various ways. Given the current, well-established regulatory framework in Minnesota, the most feasible option would likely involve modifying WCA to re-assign primary permitting responsibility from local governments to BWSR. Although a significant change, this would entail the least amount of structural upheaval. Therefore, for the purposes of this feasibility study, it's assumed that any shift in permitting responsibility under Section 404 assumption

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<sup>70</sup> Under the federal regulations for state assumption, when a state assumes the Section 404 program, most regulatory responsibilities are assigned to the "State Director," which is defined as, "the chief administrative officer of any State or interstate agency operating an approved program, or the delegated representative of the Director." 40 CFR §233.2

<sup>71</sup> LGU decisions on applications can be appealed to BWSR, reflecting their state-level oversight. Also, for projects on state-owned land, the state agency responsible for administering the land is the "LGU" for implementing WCA.

would be to BWSR, but it's recognized that it could go to any state-level agency that has or obtains appropriate regulatory authority.

With the necessary shift in responsibility, two scenarios are considered: 1) full state implementation, where BWSR would manage the entire WCA permitting process (the DNR would continue to implement the PWPP and WCA duties related to enforcement and mining-related impacts); and 2) shared state-local implementation, where local governments would continue to have a role in WCA decisions through participation on WCA technical evaluation panels, and possibly by continuing to have 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.

Under either scenario, the current WCA statutes would be amended to clarify that BWSR, as a state agency, has primary responsibility for accepting WCA applications, for publishing/distributing public notices, and for making decisions to approve or deny applications. BWSR would require additional staff under this assumption requirement (see Section 3.6), as would any Minnesota state agency if assigned additional permitting responsibility. The shared state-local implementation would require LGUs to maintain some level of staffing devoted to water/wetland regulation. Additional aspects of the required changes in regulatory structure are addressed in Sections 3.6 and 3.7.

### 3.5.2. Public notice requirements and decision timelines

Under Section 404 assumption, state regulatory programs are required to distribute public notices of all permit applications (along with other actions such as issuance of general permits and public hearings) to a variety of specified parties (see Section 3.1). Both WCA and the PWPP currently include notice provisions, but neither program is fully consistent with the Section 404 assumption requirements – statute and/or rule changes pertaining to public notice requirements would be required. Specifically, WCA would need to be amended to include public notices to other agencies having jurisdiction over the project area and to adjoining property owners. The PWPP notice requirements would have to be revised to include notices to other agencies having jurisdiction over the project area (some, but not all of these are covered under current practice), to adjoining property owners, and to persons who request to receive notices. Both programs would likely need to institute some form of internet-based public notice that would be equivalent to the Section 404 assumption requirement to publish a notice in a local newspaper.

EPA review of state permit applications under state Section 404 assumption for certain categories of activities (see Section 3.8.3) creates some issues for state permitting timelines that could require statute and/or rule changes. M.S. 15.99, which currently applies to WCA authorizations, requires government agencies to approve or deny an application within 60 days of receipt. Failure of an agency to deny a request within 60 days (unless properly extended) results in approval of the request by operation of law. An agency may extend the review period an additional 60 days (120 total) with written notice. The M.S. 15.99 statute contains provisions that extend the time limit for certain processes to occur, as

required by state statute, federal law, or court order.<sup>72</sup> At this time, it's unclear if EPA's review of state permit applications under state Section 404 assumption would qualify under this provision. Based on the experience in Michigan, which has assumed the Section 404 program, the percentage of state permits subject to EPA review under Minnesota assumption is likely to be fairly low. Nonetheless, the application of M.S. 15.99 to state regulatory programs under Section 404 assumption would require further analysis by the state's attorney general's office, and potentially require statute and rule revisions.

### 3.5.3. Wetland Conservation Act exemptions

As described in Section 3.4.2, WCA contains a number of exemptions that allow wetland impacts without replacement (compensatory mitigation). Technically, these impacts are still regulated under WCA, but wetland replacement is not required and project sponsors are not required to submit any notification or application. Under the CWA, certain activities are not regulated at all<sup>73</sup> (see Section 3.4.2) and some activities (below certain size thresholds) are currently authorized under Section 404 general (nationwide and regional) permits that do not require notification to the COE or compensatory mitigation. Some of the WCA exemptions are similar to, or consistent with Section 404 non-regulated activities and/or certain general permit categories and would not need to be revised if Minnesota applied to assume the Section 404 program. However, the WCA exemptions identified below are, to varying degrees, inconsistent with the Section 404 program. Some would clearly need major revisions, possibly elimination if the state applies for Section 404 assumption. Others may be retained, but perhaps with limits on the amount of impact allowed, and/or with notice requirements.

An alternative procedural option to consider under state Section 404 assumption would be to: 1) eliminate all of the existing WCA exemptions and replace them with exemptions that exactly mirror the CWA non-regulated activities (see footnote 6), and 2) authorize other activities that the state wishes to allow without wetland replacement (per the existing WCA exemptions) via a state general permit that is consistent with current Section 404 general permits that do not require mitigation. The specific changes required to WCA exemptions would result from consultation with the EPA, based on an evaluation of Minnesota's regulatory programs' consistency with the CWA and how they satisfy the requirements of Section 404.

Agricultural activities (M.S. 103G.2241, Subd. 1; M.R. 8420.0420, Subp. 2) – This exemption has several parts, some of which are not consistent with the CWA and Section 404 regulations. The CWA exempts discharges associated with certain activities, including for normal farming practices. However, it does not refer to specific types of wetlands, as do some of the WCA agricultural exemptions, and conversion from wetland to non-wetland is not exempt under the CWA<sup>74</sup> The following two WCA agricultural exemptions are clearly inconsistent with Section 404 and would require revision:

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<sup>72</sup> From M.S. 15.99: "The time limit . . . is extended if a state statute, federal law, or court order requires a process to occur before the agency acts on the request, and the time periods prescribed in the state statute, federal law, or court order make it impossible to act on the request within 60 days." And "The time limit . . . is extended if: (1) a request submitted to a state agency requires prior approval of a federal agency."

<sup>73</sup> U.S.C. §1344(f) and 33 CFR §323.4 – Discharges not requiring permits

<sup>74</sup> U.S.C. §1344(f), 33 CFR §323.4 and 40 CFR §232.3 – Discharges not requiring permits

- Farmed wetlands – any amount of Type 1 or Type 2 wetlands<sup>75</sup> having a specified cropping history can be drained or filled without replacement, provided the land remains in agricultural use.
- Pastured wetlands – any amount of Type 1 wetland (except bottomland hardwoods) or up to two acres of Type 2 or Type 6 wetlands currently used for pasture can be drained or filled without replacement if the land remains in pasture.

The following parts of the WCA agricultural activities exemption are not inconsistent with Section 404 regulations, but would not work well under state Section 404 assumption because of the way they are applied.

- Aquaculture activities – no replacement is required under WCA for wetland impacts associated with aquaculture operations, including pond excavation, roads and dikes if they are authorized under a Section 404 permit.
- Wild rice production – no replacement is required under WCA for wetland impacts associated with wild rice production operations if they are authorized under a Section 404 permit.

Presently, to qualify for these exemptions under WCA, applicants must obtain a Section 404 permit. The purpose of state assumption is to reduce the need for separate Section 404 permits, except in areas of the state where the COE must retain regulatory jurisdiction (see Section 3.2). Furthermore, under state assumption, the state must regulate these activities to the extent that they are currently regulated under Section 404. Potential options for these exemptions would be to eliminate them, or possibly rewrite them to be consistent with any CWA exemptions that might apply (such as normal farming practices) or with any applicable Section 404 general permits that do not require notification or mitigation.

Drainage (M.S. 103G.2241, Subd. 2; M.R. 8420.0420, Subp. 3) – allows drainage of any amount of farmed wetland having a specified cropping history and any amount of type 1 and up to five acres of type 2 or 6 wetlands in an area assessed for drainage benefits, subject to certain other conditions. Under Section 404 this type of activity would require a permit if it involved a discharge of dredged or fill material into a wetland or waterbody that was determined to be jurisdictional under the CWA. It's highly likely that this exemption would require some level of revision under Section 404 assumption.

Restored wetlands (M.S. 103G.2241, Subd. 4; M.R. 8420.0420, Subp. 5) – allows landowners to drain or fill wetlands that were previously restored or created under conservation programs that allow reversion after the conservation contract or easement expires, or were solely funded by the current or previous landowners (no public or other private entity funding), provided the wetland has not been used for compensatory mitigation or deposited in the state wetland bank. There is no similar exemption in the Section 404 regulations. However, there are current and proposed Section 404 nationwide permits which would allow such reversions without compensatory mitigation under certain circumstances. This exemption may need to be revised to be consistent with such Section 404 requirements.

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<sup>75</sup> Classified according to: "Wetlands of the United States, USFWS Circular 39, 1956 and 1971 editions."



Utilities (M.S. 103G.2241, Subd. 6; M.R. 8420.0420, Subp. 6) – allows up to 0.5 acre of impact associated with the installation, maintenance or replacement of utilities such as pipelines and electrical transmission lines. This WCA exemption is somewhat consistent with current and proposed COE general permits. However, project proposers must provide notification to the COE in certain circumstances and mitigation may be required. This exemption would need revision under Section 404 assumption.

De minimis (M.S. 103G.2241, Subd. 9; M.R. 8420.0420, Subp. 8) – Allows various amounts of wetland impact (from 20 to 10,000 square feet) without replacement, regardless of the type or purpose of the activity. There is no similar blanket provision in the Section 404 regulations, although the COE St. Paul District had previously matched the 400 square foot de minimis threshold as an activity category in RGP-003-MN and adopted the WCA de minimis exemption scheme for mitigation thresholds as a standard condition in RGP-MN-003. Nonetheless, it's possible that some revisions in the de minimis exemption, such as noticing requirements, acreage reductions, or elimination of wetland type as a consideration would be necessary under state Section 404 assumption.

#### 3.5.4. State program wetland mitigation requirements

There are a few aspects of compensatory mitigation under Minnesota's state regulatory programs that are inconsistent with federal Section 404 requirements (see Section 3.4.5). Unless otherwise noted below, it's not certain that statute/rule changes would be required for these items, but they would certainly require further discussion with EPA if Minnesota elected to pursue state assumption.

WCA Administrative Zones -- Under WCA, Minnesota is divided into three distinct administrative zones relating to historic wetland loss (see Figure \_\_\_). These zones apply in determining the amount and location of compensatory mitigation required under both WCA and the PWPP (for impacts to public waters wetlands), as well as in establishing the amount of allowable impact under the WCA de minimis exemption. The zones are designated using county boundaries, partly for ease of administration, but mostly because the data on historic wetland loss was county-based.<sup>76</sup> Because of that, applying the administrative zones in determining WCA mitigation location and amounts sometimes conflicts with Section 404 requirements, which uses a watershed-based approach – i.e., the county-based pre-settlement boundaries divide bank service areas and watersheds. It would be necessary to adjust the boundaries to better conform to the watershed-based considerations required under Section 404 (which would also be consistent with Minnesota's watershed management policy under M.S. 103A.212) or perhaps to develop an entirely different approach to addressing the significant disparity in wetland loss/abundance across the state in mitigation policy.

WCA replacement siting criteria – Both WCA and Section 404 incorporate an incremental approach for locating compensatory mitigation projects, from as near as possible to the impact extending to distant watersheds, depending on practicability and other factors. Wetland bank service areas for use in wetland banking are consistent in Minnesota between WCA and Section 404. However, WCA includes a county-level step in its siting criteria, which is not fully consistent with the wholly watershed-based

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<sup>76</sup> Anderson, J. P., and W. J. Craig. 1984. Growing Energy Crops on Minnesota's Wetlands: The Land Use Perspective. CURA 84-3, University of Minnesota, Center for Urban and Regional Affairs, Minneapolis.

approach under Section 404 or Minnesota's watershed management policy under M.S. 103A.212 (see the discussion above regarding WCA Administrative Zones).

PWPP mitigation requirements – Compensatory mitigation is required for permitted impacts to public waters regulated under the PWPP.<sup>77</sup> For impacts to public waters wetlands, the mitigation requirements specified in WCA rules must be followed.<sup>78</sup> But for impacts to other public waters, generally lakes, streams and rivers, the PWPP rules contain no specific standards for mitigation. It's likely that mitigation considerations and specifications for lakes and waterways would need to be incorporated into Minnesota Rules Chapter 6115, including addressing the Section 404 preference that compensatory mitigation be "in-kind," i.e., impacts to streams be compensated by restoring or enhancing stream habitat and that mitigation for impacts to lakes be focused on lake habitat.<sup>79</sup>

Peat mining restoration/mitigation – Depending on the specific circumstances, peat mining may be regulated under either WCA, the PWPP, or a permit to mine issued by the DNR. Peat mining affecting public waters (including public waters wetlands) is subject to requirements for site restoration and/or compensatory mitigation that are largely consistent with Section 404 compensatory mitigation requirements, with the possible exception of accounting for temporal loss.<sup>80</sup> The restoration/mitigation requirements for peat mining affecting wetlands that are not public waters and are subject to a permit to mine are likely not sufficiently detailed to be consistent with Section 404 requirements and may need revision under Section 404 assumption.<sup>81</sup>

Water quality rule wetland mitigation options – Although they are generally only applied in the context of PCA's Section 401 certification of Section 404 permits, Minnesota's water quality rules for wetlands limit the options for compensatory mitigation to wetland restoration or creation.<sup>82</sup> The federal mitigation rule allows preservation of at-risk wetlands as a mitigation option (as do WCA rules). Although state programs may be more restrictive than federal requirements under Section 404 assumption, there may be a need to assess the wetland water quality mitigation standards in light of the Section 404 standards if Minnesota elects to pursue state assumption.

### 3.5.5. Public road project mitigation

Under WCA, a replacement plan is not required for individual public road projects that impact wetlands for the repair, rehabilitation, reconstruction, or replacement of currently serviceable existing roads to meet state or federal design or safety standards.<sup>83</sup> Instead, local road authorities report their impacts to BWSR, which is responsible for providing the wetland replacement (mitigation).<sup>84</sup> However, statute and rule exempt local road authorities from the wetland replacement requirements as long as they report

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<sup>77</sup> M.R. Chapter 6115.0250, Subp. 1a

<sup>78</sup> M.R. Chapter 6115.0250, Subp. 5.B.(1)

<sup>79</sup> 33 CFR §332.3(e)

<sup>80</sup> M.R. 6115.0280

<sup>81</sup> M.R. 6131.0120

<sup>82</sup> M.R. 7050.0186, Subp. 2.C.

<sup>83</sup> M.S. 103G.222, Subd. 1(m) and M.R. 8420.0544, para. D.

<sup>84</sup> State public road projects involving work on existing roads, typically constructed by MnDOT, are also exempted from the requirement to process a wetland replacement plan, but MnDOT is responsible for the mitigation.

their impacts, even if BWSR is unable to provide the replacement (due to insufficient funding, for example). While the general framework of the road impact replacement program is not inconsistent with Section 404, it would be necessary to amend WCA statutes and associated rules to eliminate the possibility for wetlands to be impacted without replacement in the event of insufficient program funding.

### 3.5.6. State regulatory program jurisdiction

Section 3.3 addresses differences between waters regulated under Minnesota state program jurisdiction and waters regulated under the Clean Water Act. To assume the Section 404 program, the state must regulate all waters/wetlands that are jurisdictional under the CWA.<sup>85</sup> Currently, there are some streams and stream reaches in Minnesota that are jurisdictional under the CWA but are not regulated under any state dredge/fill/drain permitting program – generally streams having a drainage area less than two square miles, which is the limit of jurisdiction under the PWPP. It would therefore be necessary to amend the state programs regulating discharge of dredged or fill material (WCA and/or the PWPP) to ensure comprehensive jurisdiction. It may be useful to consider the existing definition of “waters of the state” found in M.S. 115.01, recognizing that it covers some waters that are clearly outside the scope of Section 404 regulation:

Subd. 22. Waters of the state. "Waters of the state" means all streams, lakes, ponds, marshes, watercourses, waterways, wells, springs, reservoirs, aquifers, irrigation systems, drainage systems and all other bodies or accumulations of water, surface or underground, natural or artificial, public or private, which are contained within, flow through, or border upon the state or any portion thereof.

### 3.5.7. Water quality standards review/certification

Section 401 of the CWA requires that applicants for a Section 404 permit obtain certification (or a waiver) from the state that the project will comply with state water quality standards. If Minnesota assumes the Section 404 Program, the Section 401 certification process would not apply to activities for which a Section 404 permit is no longer required. However, the state may elect to develop a similar review/certification process for applying state water quality standards to state water/wetland permits (WCA and PWPP) under state assumption, at least for some categories and/or sizes of impact. Alternatively, state water quality standards could be incorporated into WCA and the PWPP to ensure the standards are being met.

### 3.5.8. Penalties for violations

The currently authorized penalties and fines for violations of the state regulatory programs are considerably less than what can be applied under the CWA. The federal regulations for state assumption indicate that a state program can be approved if it has a “demonstrably effective method of ensuring compliance which has both punitive and deterrence effects.” The extent to which current state programs meet this test would require additional discussion with the EPA, should Minnesota elect to pursue Section 404 assumption.

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<sup>85</sup> Clean Water Act jurisdiction is in the process of being revised, due to several Supreme Court decisions. For the purpose of this feasibility study, federal jurisdiction is being considered as it’s currently defined and practiced.

### 3.5.9. State regulatory program stability

Although state regulatory programs would require some revisions for Minnesota to successfully apply for Section 404 assumption, it should be recognized that once the state assumes Section 404, any subsequent statute or rule changes affecting the state regulatory programs would trigger EPA review to re-assess compliance with Section 404. The PWPP and state water quality regulations have undergone relatively few changes in the last twenty years and there is nothing to suggest that more frequent attempts at revision are forthcoming. On the other hand, WCA statutes have been amended thirteen times since original passage in 1991, and the WCA rules have been revised a comparable number of times. Continuing the past record of frequent WCA program changes would result in on-going administrative complications if Minnesota assumed the Section 404 program.

### 3.6. 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

Under Section 404 assumption, state regulatory programs are approved by the EPA to meet Section 404 requirements. Separate Section 404 permits issued by the COE are no longer required if an applicant obtains a state-issued permit or authorization, except in areas of the state where the COE must retain jurisdiction (see Section 3.2). This section of the report identifies new or revised state agency responsibilities that are likely to be necessary if Minnesota assumed the Section 404 program, many of which are related to the federal requirements for assumption discussed in Section 3.1 and the changes in state laws discussed in Section 3.5.

#### 3.6.1. Revised WCA responsibilities and workload

The most significant change required for Minnesota to assume the Section 404 program would be restructuring WCA, per EPA direction, to assign the primary permit processing and decision role to a state-level agency, as opposed to the current, local government-led process (see Section 3.5.1). The most practical scenario, based on current programmatic responsibilities, is to assign this role to BWSR, which is the assumption made for this feasibility study. Specifically, BWSR would be responsible for accepting WCA applications, issuing public notices and making permit decisions.<sup>86</sup> It may also be possible, via a state-issued general permit, for local governments to continue to handle some aspects of the permit process. But under any restructuring scenario, it's certain that BWSR would experience significant new workload. BWSR estimates that about 23 additional FTEs would be needed to handle the new permitting responsibilities.<sup>87</sup> This estimate is based on the scenario where BWSR would be responsible for permitting, but would establish a general permit under which LGUs could review and approve certain categories of permits.

The new BWSR positions would be focused on handling permitting duties for categories of permits for which BWSR must retain primary responsibility. These duties include advising applicants, accepting and reviewing applications, convening technical evaluation panels, making permit decisions, issuing notices, enforcement, coordinating application reviews with other local land-use requirements and programs, and other related responsibilities. The BWSR positions would be located throughout the state to optimize access for permit applicants and minimize travel time to project locations. Some positions may need to be located in areas where there are no current BWSR offices, which may incur additional costs (co-location with DNR or SWCD offices is a possibility, but would still incur costs). Developing and implementing an on-line application system that would also address noticing and reporting

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<sup>86</sup> The DNR would continue to implement WCA for mining-related impacts under DNR permits to mine

<sup>87</sup> The COE, St. Paul District currently employs a staff of about 50 to implement Section 404 and Section 10 permitting in Minnesota. The COE staff complement does not directly relate to state staffing needs under Section 404 assumption because Minnesota currently regulates more waters than the COE and under potential assumption will likely need to expand state jurisdiction even further.

requirements would greatly facilitate this scenario, but would also incur additional costs.<sup>88</sup> Additional information on the monetary consequences of these changes is in Section 3.7.

As discussed in Section 3.5.3, some of the current WCA exemptions may need to be revised for Minnesota to assume the Section 404 program. If any of the identified exemptions are eliminated or their acreage thresholds reduced, more wetland replacement plan applications would be submitted, causing increased workload, probably for BWSR staff (see above). Another possible revision to the WCA exemptions that may result from Section 404 assumption would be to institute a reporting requirement for landowners exercising an exemption to ensure compliance with other federal requirements (Endangered Species Act, National Historic Preservation Act) and for programmatic accounting. Reviewing and reporting on such notices would also increase workload over existing circumstances. Because landowners are not currently required to report their use of WCA exemptions, there is limited data on which to base associated projections of workload changes.

### 3.6.2. Endangered Species Act (ESA) coordination

Under state assumption of the Section 404 program, the EPA has responsibility for reviewing permit applications made under the state regulatory programs, although the EPA may waive their review for certain categories of applications. (In Michigan, where the state has assumed Section 404, the EPA reviews only about 2% of state permit applications.) However, EPA cannot waive their review of projects that may affect federally-designated threatened or endangered species, or their critical habitats. Minnesota is home to several federally-listed species, some of which also have designated critical habitats in the state (Table 3.1). Although most regulated projects are not likely to adversely affect these species, a few of the species are water-dependent or associated with wetland habitats. Technically, the federal regulations for Section 404 assumption require no additional action by states regarding federal ESA coordination. But to avoid the need for the EPA to review all state permits to screen for potential listed species impacts, it's more practical and efficient for such screening to be done as part of the state permitting process. Applications flagged as having potential impacts on listed species or critical habitat can then be forwarded to the USFWS and the EPA for further coordination. The Michigan Department of Environmental Quality and the New Jersey Department of Environmental Protection, through consultation with the EPA and the USFWS, have developed such a screening process as part of their state permit reviews under Section 404 assumption.

Both WCA and the PWPP have provisions for considering impacts to state-listed T&E species, which include most, but not all federally-listed species. However, neither program includes a *requirement* that permit applications be screened for potential impacts on listed species, state or federal. Under state assumption of Section 404, such screening would be necessary, at least for some categories of projects and in certain locations, and would likely become a state responsibility. There are several options for assigning this responsibility. The primary tool for screening applications is the Minnesota Natural

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<sup>88</sup> The DNR already operates an on-line permitting system (Minnesota Permitting and Reporting System -MPARS) for the PWPP, which potentially could be modified and expanded to also process WCA applications.

Heritage Information System (NHIS), a database maintained by the DNR containing known locations of listed species (federal and state). Consequently, the DNR would be a likely candidate for conducting the screening. However, the DNR can issue NHIS licenses to other agencies. Therefore, the screening responsibility for WCA applications could be assigned to BWSR, since they would likely be the point of application for WCA applications under state Section 404 assumption. Additional staffing would be required to conduct the screening, either at the DNR or split between DNR and BWSR -- up to 0.75 FTE depending on the number of applications designated as needing screening. Under the implementation scenario where local governments would continue to have some role in WCA permitting, the screening process could possibly be assigned to them, at least for the categories of permits they would be responsible for. The additional workload in that case would be highly distributed, making it difficult to estimate the need for additional staff. It may also be possible to accomplish some level of screening by linking a proposed on-line application system to the NHIS.

### 3.6.3. National Historic Preservation Act Coordination

Similar to the Endangered Species Act requirements, the EPA cannot waive their review of state permit applications involving activities within sites identified or proposed under the National Historic Preservation Act. If Minnesota assumed the Section 404 program, it's likely that the state permit programs (WCA and the PWPP) would be required to conduct some level of screening for potential impacts on historic/cultural sites, in coordination with the State Historic Preservation Office. The Michigan Department of Environmental Quality conducts such screening as part of their responsibilities under Section 404 assumption. If assigned to a state agency (DNR or BWSR), an estimated additional 0.25 FTE would likely be needed.

### 3.6.4. Water quality certification

Under Section 404 assumption, the number of Section 404 permits subject to Section 401 certification by the PCA would be reduced. However, the state could elect to develop a water quality certification process for state permits. In that case, the PCA's workload in reviewing and certifying permit applications for compliance with state water quality standards (see Section 3.8.3), would not necessarily change. The *process* could change, in that the PCA would work with BWSR and the DNR to provide water quality certification and permit conditions for WCA applications and PWPP permits, rather than to the COE (for projects for which the COE does not retain jurisdiction). While the PCA may elect to review categories of state permit applications that would be more or less than what they currently review via the Section 404 process,<sup>89</sup> such action would be at their discretion and not a direct result of Section 404 assumption.

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<sup>89</sup> On a project specific basis, PCA currently reviews only standard individual Section 404 permits; activities authorized under COE general permits (GP) are collectively certified by the PCA for water quality compliance by certifying the GP itself – individual projects that qualify for GP authorization are generally not reviewed by PCA.

### 3.6.5. Tribal Coordination

Under Section 404 assumption, if a state-issued permit may adversely affect downstream state or tribal waters, the state must notify the downstream state or tribe, as well as the EPA. If Minnesota assumes the Section 404 program, the state regulatory agencies would likely develop a coordination process with the tribes, in association with the EPA, for state permits issued on non-Indian lands that may affect downstream tribal waters.

### 3.6.6. Reporting requirements

A state that has assumed the Section 404 program is required to submit an annual report to the EPA as follows:

“The Director (*state agency*) shall submit to the Regional Administrator (*EPA*) within 90 days after completion of the annual period, a draft annual report evaluating the State’s administration of its program identifying problems the State has encountered in the administration of its program and recommendations for resolving these problems. Items that shall be addressed in the annual report include an assessment of the cumulative impacts of the State’s permit program on the integrity of the State regulated waters; identification of areas of particular concern and/or interest within the State; the number and nature of individual and general permits issued, modified, and denied; number of violations identified and number and nature of enforcement actions taken; number of suspected unauthorized activities reported and nature of action taken; an estimate of extent of activities regulated by general permits; and the number of permit applications received but not yet processed.” (40 CFR §233.52)

This responsibility would likely fall to BWSR and the DNR, with input from local governments under the shared implementation scenario. Tracking the state regulatory activities, preparing the annual report, along with other on-going coordination with EPA on assumption-related aspects of administering the state programs is estimated to require an additional 1.0 FTE between BWSR and the DNR. An operational on-line permit application system for WCA authorizations, as mentioned previously, would assist with the reporting requirements under state assumption and may reduce the staffing requirements.



### 3.7. The estimated costs and savings that would accrue to affected units of government

In this section, we estimate the state-level fiscal implications of Minnesota's assuming regulatory authority of the federal Clean Water Act Section 404 permitting program, taking account of additional staff, equipment, hearings, enforcement, and intergovernmental transfers. We estimate added direct costs only. We do not estimate associated changes in local property tax levies or local economic activity, if any.

We provide estimates for the state, for local governments in aggregate, and for local governments as permittees. A complete analysis of the fiscal effects for each and every county or for all (potential) permit applicants is beyond the scope of this study. A necessary holding for the fiscal analysis is that properly-implemented (as discussed in other sections of this report) Section 404 Assumption would lead to no significant difference in regulatory outcomes, other than potential improvements in permitting efficiency, and hence in no changes to the flow of ecosystem services from affected lands.

Under current Minnesota law, WCA provisions are administered by local government units (LGUs), such as counties, cities, certain townships, watershed districts, watershed management organizations, and soil and water conservation districts. BWSR provides oversight and technical support to the LGUs, and has overall responsibility for implementing WCA. For Minnesota to assume the Section 404 program, federal regulations require that the regulatory program(s) be administered by state agencies, not local governments. Therefore, for the purposes of this analysis, it's assumed that the primary responsibility for administering WCA would transfer from LGUs to a state agency, likely BWSR. The public waters permit program is already administered by a state agency (DNR) and would therefore not require a shift in responsibilities under state Section 404 assumption, and the DNR would continue to implement WCA for mining-related impacts.

#### 3.7.1. Methodology

We consider costs and savings under two scenarios: "full state implementation" and "shared state-local implementation." Under full state implementation, state agencies (likely DNR and BWSR) would manage the entire state wetland and waters permitting process. Under shared state-local implementation, 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). Under either scenario, state-level agencies must maintain ultimate responsibility and authority for program implementation, but the mechanism by which certain activities are permitted can vary. We estimate staffing implications of each of these scenarios for the state agencies with primary administrative responsibility—BWSR and DNR—and for local governments in aggregate. See Sections 3.1, 3.5 and 3.6 for a more thorough discussion of the shifts in WCA responsibility.

We assume that state assumption would not significantly alter the level of economic activity that currently requires water/wetland permitting. We also assume that the current ratio of permit issuance or denials would not be affected by the institutional arrangements that are associated with Section 404 assumption. In Section 3.7.3 we discuss the possibility that Section 404 assumption might alter the timing of permit processing and the potential fiscal implications.

Currently, BWSR field staff provide oversight and assistance to local governments, primarily through membership on Technical Evaluation Panels (TEPs). TEPs generally review a subset of all WCA applications to a given LGU. Data is not collected on the specific percentage of applications reviewed by TEPs, but BWSR staff experience indicates that it varies significantly across LGUs and over time, being affected by many factors. It is the responsibility of the LGU to coordinate TEP meetings and reviews, to assemble TEP findings, and to consider TEP recommendations in making decisions.

The current estimated value of state and local government staff dedicated to WCA implementation is summarized in Table 3.7.1. The total of 114,755 hours is equivalent to 65.2 FTE, using 1,760 hours/year as the amount of time a typical employee actually spends on primary duties, i.e., not counting training, administrative tasks, time off, etc. This is the principal staffing shift that will be accounted for in Section 3.7.2.

Staffing estimates were based on data reported to BWSR by LGUs for various types of projects or activities. The annual average estimated total hours allocated toward LGU implementation of each specified activity was used to determine the value to the state of those local services. The estimated time and value of current BWSR staff review/involvement was also determined for each activity in order to identify the overlap of current BWSR staff involvement compared to the two assumption scenarios.

Table 3.7.1. Current LGU/BWSR workload for certain WCA implementation activities used for calculating staffing shifts under Section 404 assumption.

	<b>LGU Administration of WCA</b>	<b>Other local government TEP participation</b>	<b>BWSR TEP participation</b>	<b>Total</b>
<b>Hours</b>	89,661	13,651	11,443	114,755
<b>FTEs</b>	50.9	7.8	6.5	65.2
<b>Value of activity (in millions)</b>	\$5.247	\$0.799	\$0.670	\$6,716

The value of annual WCA services in Table 3.7.1 was calculated using an annual rate of \$103,000, which is the average total cost (salary, benefits, and overhead) of a typical state agency regulatory position. Actual local government costs might be lower or higher; however, the purpose of this analysis is to estimate the value of those services to the state in 2016. It is important to note that Table 3.7.1 does not account for all local government workload associated with WCA implementation but, rather, the primary implementation activities for which the corresponding workload would shift to the state to varying degrees (see bullets in Section 3.7.2), depending on the scenario. This analysis also assumes that the numbers reported by LGUs do in fact account for all of their activities.

While the COE would realize savings in an amount equal to the value of work that would become the responsibility of the state, specific estimates of fiscal/staffing impacts to COE administration are beyond the scope of this study and, at any rate, have no bearing on the fiscal implications of Section 404 assumption to the state of Minnesota. However, we do consider the requirement that the state take

responsibility for some level of historic preservation and endangered species review requirements now administered by the COE.

### 3.7.2. Costs and savings of Section 404 assumption to affected units of government

Under Section 404 assumption, BWSR staff duties would increase considerably. BWSR staff would be responsible for duties that are currently handled by LGUs for most or all permit applications depending on the scenario. Responsibilities that would at least partially shift to BWSR staff include:

- Direct landowner contacts, pre-application coordination, and education.
- Initial review of application completeness.
- TEP coordination.
- Full, detailed review of applications (more in-depth than typical TEP review).
- Communication/coordination with applicants and other governments.
- Site inspections.
- Preparation of findings and decision documentation.
- Noticing and reporting (amount of workload would vary depending on permitting system).
- Coordination of permit reviews with other programs implemented by local governments (i.e., public drainage law, zoning, stormwater requirements, etc.)

Consequently, the principal staffing changes associated with Section 404 assumption would be an increase in state agency staff (presumed to be nearly all at BWSR) and, depending on the scenario, a reduction in local government staff or reallocation of at least some existing staff duties.

Under the full state implementation scenario, the new BWSR FTEs needed is simply determined by using the time necessary for LGU implementation (that would now shift to the state), subtracting the current BWSR staff time overlap and adding necessary management and support staff (Table 3.7.2). Under the shared state-local implementation scenario, the new BWSR workload is determined based on the estimated percentages of each activity for which decision-making responsibility would shift from LGUs to BWSR, again subtracting current BWSR staff time overlap and adding necessary management and support staff.

Table 3.7.2. Estimated increases in BWSR staff under Section 404 assumption (in FTE)

	<b>Shared State-Local Implementation</b>	<b>Full State Implementation</b>
Workload shift to BWSR:	22.6	50.9
Minus overlap:*	5.0	6.5
New field staff:	17.6	44.4
Plus other staff (management/clerical):	5.0	9.0
Total new BWSR FTE:	22.6	53.4

\* "Overlap" is the estimated time that BWSR staff currently spend on specific WCA activities through participation on TEPs.

We estimate that Section 404 assumption would require an additional 53.4 BWSR staff positions under the scenario of full state implementation and 22.6 new BWSR positions under shared state-local implementation (Table 3.7.2). In addition, it is expected that up to five additional state positions (BWSR and/or DNR; these are listed under DNR in the tables, for convenience) would be needed under either scenario to handle the expanded state jurisdiction required to assume Section 404 (see Sections 3.3 and 3.5.6). The expanded state jurisdiction would also require up to four additional DNR FTEs for water regulation enforcement (water resource enforcement officers) (see Section 3.4.6). One new FTE would likely be needed to conduct ESA and National Historic Preservation Act screening (see Sections 3.6.2 and 3.6.3). This position is listed under DNR in the tables, but does not necessarily have to be located in that agency. MnDOT currently pays for two staff positions at the COE to process permits. Under assumption, those positions might no longer be necessary, or the funding could shift to another state agency. These shifts are treated as “savings” in Tables 3.7.3 and 3.7.4; however, it should be considered potential savings, as MnDOT is not certain about the fate of these positions.

If Minnesota chooses to pursue Section 404 assumption, the state would require a one-time expenditure for administrative rule-making, logistical support, and legal counsel. This would also include the development of an on-line permit processing system that would provide considerable efficiencies in program administration and allow for accurate program tracking and reporting as required by EPA under Section 404 assumption. We estimate that the cost of the on-line permitting system would be \$3 million (based on DNR experience for a similar system), plus 1.5 FTE to support the new system. These FTE requirements are reflected in Tables 3.7.3 and 3.7.4, listed under DNR, but the one-time expenditure is not.

Some local government units with WCA implementation responsibilities currently receive state administrative funding as part of Natural Resources Block Grants (NRBG) disbursed by BWSR, either directly (in the case of counties) or indirectly as a revenue pass-through from the county. These funds are not necessarily proportional to the actual number of permits processed in a given year by an LGU and typically do not cover the full costs to administer WCA. In 2016, the WCA portion of the NRBG to LGUs was \$1.906 million, which requires a minimum 1:1 local match.

Under shared state-local implementation, it is assumed that the current flow of administrative funds (the WCA portion of the NRBG) to the LGUs would not be significantly affected since LGUs would continue to have a role in WCA implementation. However, because LGUs in aggregate spend far more than the NRBG and match to implement WCA, we assume that they would reduce current staffing, or shift the duties of those staff, by an amount roughly proportional to the shift in duties to BWSR under this scenario.

Under full state implementation, the requirement for LGUs to implement WCA and the associated WCA portion of the NRBG grant would be eliminated, creating potential “savings” (and workload reallocation) to the state. LGUs would presumably also lose whatever fee income they now obtain for the processing of wetland permits. The state would gain these revenues, assuming that the state charges similar permit fees. Complete data for such fee revenues is not available, so we do not include them in the tables. Based on BWSR staff experience, local government fees are extremely variable but, in aggregate, relatively small.

For the shared state-local implementation scenario, it’s assumed that there would be a reduction or reallocation in LGU staffing, but at a reduced level compared to the full state implementation, since

LGUs would continue to be involved in WCA permitting. Under both scenarios, the state would presumably also have to bear the cost of any associated public hearings and legal costs of notice, appeals, and enforcement now covered by LGUs.

Table 3.7.3. 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
<b>BWSR</b>	15.0	37.6	22.6	68.4	53.4
<b>DNR</b>	18.8	30.3	11.5	30.3	11.5
<b>MnDOT<sup>a</sup></b>	2.0	0	-2.0	0	-2.0
<b>MPCA</b>	3.5	3.5	0	3.5	0
<b>Total State Agency</b>	39.3	71.4	32.1	102.2	62.9
<b>Local Governments<sup>c</sup></b>	58.7	36.1	-22.6	0 <sup>d</sup>	-58.7
<b>Total State and Local</b>	98	107.5	9.5	102.2	4.2
<b>Change from Current</b>		9.5		4.2	

<sup>a</sup> 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.

<sup>b</sup> 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.

<sup>c</sup> 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.

<sup>d</sup> 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.

The costs and savings associated with Section 404 assumption, for both full and shared state-local implementation, are presented in Table 3.7.4. For the budget estimates, we assume that state staffing costs \$103,000 per FTE per year for salary, benefits, and overhead, based on average regulatory position costs for BWSR and the DNR. However, the annual cost for DNR enforcement FTEs is higher, at \$157,500 each. Potential savings to local government road authorities associated with avoided permit processing delays are discussed in Section 3.7.3.

Table 3.7.4. 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. (Any apparent discrepancies in the calculated values 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
<b>BWSR<sup>a</sup></b>	3.451	5.776	2.325	7.050	3.599
<b>DNR</b>	2.198	3.601	1.403	3.601	1.403
<b>MnDOT<sup>b</sup></b>	0.206	0	-0.206	0	-0.206
<b>MPCA<sup>c</sup></b>	0.361	0.361	0	0.361	0
<b>Total State Agency</b>	6.216	9.738	3.522	11.012	4.796
<b>Local Governments</b>	4.140	1.811	-2.329	0 <sup>d</sup>	-4.140
<b>Total State and Local</b>	10.356	11.548	1.193	11.006	0.656
<b>Change from Current</b>		1.192		0.651	

<sup>a</sup> 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.

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

<sup>c</sup> 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.

<sup>d</sup> 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.

The current costs in Table 3.7.4 are not actual costs, which fluctuate, but rather the estimated average cost of the number of FTEs dedicated to specific wetland program activities. Again, it is important to note that the estimates relating to local government workload contained in Tables 3 and 4 do not account for all local government workload associated with WCA implementation but, rather, the primary implementation activities for which the corresponding workload would shift to the state to varying degrees, depending on the scenario. The staffing projections included here are estimates based on the best available information. Should the state elect to pursue Section 404 assumption, staffing needs would become clearer as the required memorandum of agreement with EPA is developed outlining the specific framework and details of the state program. However, the estimates are generally in line with current actual staffing of related programs:

- The St. Paul District of the COE currently employs from 49 to 53 FTEs to implement Section 404 in Minnesota, depending on staffing levels. This number does not include public affairs,

office of council, or technical support staff (GIS and engineering department) that assist regulatory staff on a project/program basis.

- The Michigan Department of Environmental Quality employs approximately 60 FTEs for implementation of the state program under Section 404 assumption.

### 3.7.3. Savings to affected units of government associated with avoided permitting delays

In an economic environment in which delays in project startup can lead to increases in project costs (because of inflation, altered availability of equipment and/or labor, or whatever), unanticipated delays in permit processing can lead to project budgets being overrun. One of the arguments for state Section 404 assumption has been that the present system of dispersed decision authority among LGUs and the COE has led to such unanticipated delays. Assumption, the argument goes, would lead to administrative efficiencies that reduce processing time and so reduce project expenditures.

In Section 3.8.2, we examine processing times under the current system. We find that the bulk of Section 404 applications are acted upon within 60 days, but several have taken over 6 months and some more than a year. Permittees faced with an unanticipated delay in project start could find that bids come in higher than they would have a year before. (It could happen that bids come in lower than originally expected, because construction costs sometimes decrease from year to year. This was the case recently with the drops in fossil fuel and in steel prices.) Of course, not all of the “delay” is directly attributable to inefficiencies in administrative processing – see Section 3.8.2 for further discussion of the reasons for delay.

The authorizing law for this study requires an analysis of the estimated costs and savings to affected units of government that would occur under Section 404 assumption. Since state and local governments sponsor public transportation projects, savings that would accrue due to avoided permit delays can be considered a savings to affected units of government.

For this report, we investigated methods to predict savings for projects that might experience reductions in expenditures due to a decrease in permit processing time following Section 404 assumption. However, such analysis requires a number of assumptions and calculations that cannot be accurately and objectively made under the time and staffing constraints of this study:

- Quantifying actual cost savings would require accurate cost data for transportation projects subject to Section 404 permitting. With assistance from MnDOT, we attempted to calculate an average cost of such projects, but concluded that the data used was not representative enough to be used for this purpose (represented only a single year of data and did not include all transportation projects authorized by the COE).
- Estimating potential savings from reducing processing time would require a prediction of the inflation rate expected to be faced by project sponsors. Unfortunately, there is no commonly agreed-upon construction cost index that might be used to predict the inflation rate. The Federal Highway Administration reports an average annual cost increase of 0.54% for 2003-2016 (FHWA, 2016). The Minnesota DOT suggested a 2.0% rate for 2016, based upon the widely-cited Engineering News Record cost index (MNDOT, 2016). OMB Circular A94 recommends 2.97% for 2016 federal non-watershed projects (USDA NRCS, 2016). Figure 3.7.1 shows how widely these three calculated construction cost indexes, both over

time with respect to a single index and across indexes at any given point in time. The figure shows the annual price change compared to the previous year. One index (the FHWA index) has actually been negative (overall inflation-adjusted costs have declined) in some years.

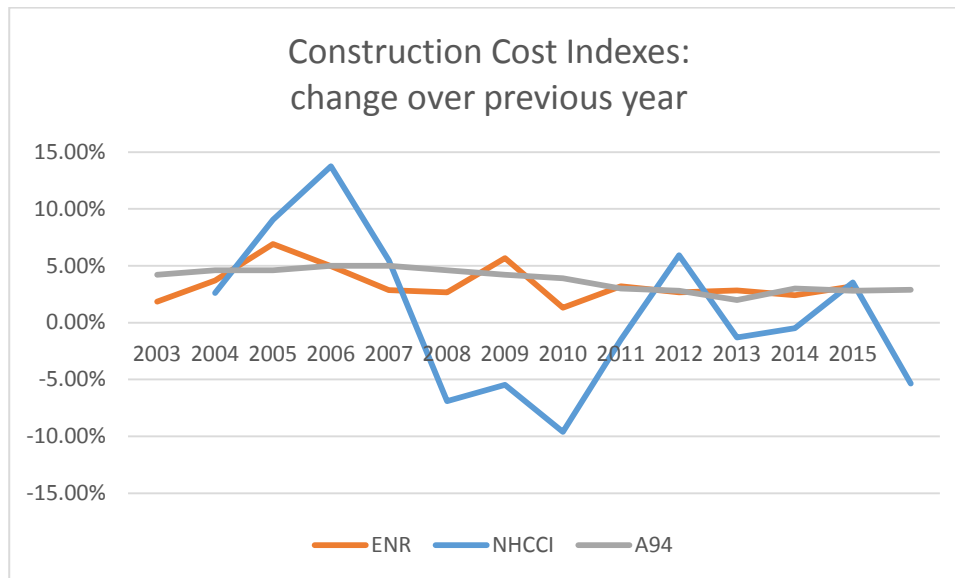


Figure 3.7.1. Three representative construction cost indexes. ENR – Engineering News Record; NHCCI – National Highway Construction Cost Index (Federal Highway Administration, Office of Highway Policy Information); A94 -Appendix C of Office of Management and Budget Circular No. A-94.

- Estimating savings due to avoided permitting delays using existing data requires an assumption that projects that did not receive permits within a certain timeframe (e.g. 120 days) were subject to construction delays extending into the following construction season. This assumption does not take into account timing of application -- applications are often submitted well in advance. Even if the permit takes longer to obtain than 120 days, or whatever threshold is selected, it's not known for certain that construction was delayed.
- Estimating savings due to avoided permitting delays requires an assumption that projects delayed due to Section 404 permitting would always be permitted faster by Minnesota state regulatory programs under Section 404 assumption. This assumption may in fact hold true for most transportation projects, given the current process for impact reporting and replacement by BWSR, but there is no way to predict with certainty -- state permits (WCA and PWPP) can and do sometimes take longer than the anticipated 60–120 day time frame. In addition, some of the reasons that Section 404 permits are delayed, such as endangered species/historic feature coordination, would still apply to some extent to state permitting under Section 404 assumption.

It is highly likely that some projects subject to Section 404 permitting timeframes might be authorized faster under Section 404 assumption, leading to cost savings for the project sponsors. However, the only accurate way to quantify such savings would be to individually analyze a wide sample of previous



projects to gather accurate cost information and identify the reason for the delays. As an example, the St. Louis County (Minnesota) Public Works Department in 2013 conducted a review of the wetland permitting process for five selected transportation projects in the county. They concluded that project delays associated with the Section 404 permitting process resulted in a cumulative increased cost of at least \$500,000, with no changes to the original project plans.<sup>90</sup> A more comprehensive, statewide analysis exceeds the time and staffing constraints of this study. We could find no peer-reviewed literature that directly addresses the cost of delay in wetland regulatory permitting.

Project sponsors would also 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 (see Section 3.2.).

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<sup>90</sup> Memo from James T. Foldesi, P.E., St. Louis County Public Works Director/Highway Engineer to Minnesota Congressional delegation, March 4, 2013. This analysis has not been independently verified.

### 3.8. Effect on application review and approval processes and time frames

The amount of time it takes to obtain permits, particularly under the Section 404 Program, was a major concern among project stakeholders representing the regulated community. These stakeholders commonly cited improved permitting time frames as an expectation if Minnesota were to assume the Section 404 Program. A related concern stated by these stakeholders is redundant permitting requirements, i.e., having to obtain for the same project both a federal and state permit, which typically have nearly identical requirements. This section of the Assumption Feasibility Report examines the current requirements regarding permit application processing, provides available data on actual permitting times for the various programs, and projects the potential effects of Section 404 assumption on permitting time frames.

#### 3.8.1. Current permit application processing requirements

Section 404 and 401 Program – The requirements for processing individual permits under the Section 404 Program are found in 33 CFR §325. Upon receiving a permit application, the COE has 15 days to either: 1) determine the application is complete and issue a public notice,<sup>91</sup> or 2) determine the application is incomplete and notify the applicant to submit the necessary information. An application is complete when all of the information required to issue a public notice is submitted -- it does not necessarily require all of the information needed to make a decision on an application. The public notice comment period must be between 15 and 30 days, but may be extended an additional 30 days based on level of controversy, the need for a field review, or other “pertinent factors.” According to the regulations, a decision on applications requiring an individual permit is to be made within 60 days of receiving a complete application unless:

- the decision is precluded as a matter of law or procedures required by law,
- the case must be referred to higher authority (see 33 CFR § 325.8),
- the comment period is extended,
- a timely submittal of information or comments is not received from the applicant,
- the processing is suspended at the request of the applicant, or
- information needed by the district engineer for a decision on the application cannot reasonably be obtained within the 60-day period.

The regulations also acknowledge that processes associated with complying with other laws, such as the Endangered Species Act, the National Environmental Policy Act, or the National Historic Preservation Act may extend the 60 day decision deadline. If the 60 day decision timeframe is suspended due to any of the aforementioned factors, the clock is supposed to resume once the issues are resolved. COE national performance measures for Section 404 permitting set an expectation that 50% of all standard individual

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<sup>91</sup> The COE is not required to issue a public notice for activities authorized under general permits, including nationwide permits, although applicants are required to submit a pre-construction notice to the COE for certain general permit categories.

permits be issued within 120 days, except those requiring formal Endangered Species Act coordination.<sup>92</sup>

State water quality certification of Section 404 permits under Section 401 of the CWA has the potential to introduce significant delays for certain projects, generally those requiring standard individual permits. The COE may not issue an individual permit without a state (and in some cases, tribal) Section 401 certification or waiver. Under the Section 401 regulations, states have up to one year to certify, deny or waive certification for Section 404 permit applications [33 USC §1341(a)]. The PCA, which is responsible for Section 401 certifications in Minnesota, attempts to complete their reviews within a 150-day timeframe established under state Executive Order 11-04 for issuing environmental permits. However, complex projects, such as mining operations, or controversial projects require extensive review and often exceed the 150-day timeframe. On the other hand, when it is clear that a project is non-controversial and is going to receive a waiver, the waiver is sometimes issued before the 30 day COE public notice period expires.

The time it takes the PCA to issue/deny Section 401 certification may be affected by the environmental review process under the Minnesota Environmental Protection Act and associated rules. For projects requiring state environmental review, state agencies may not make permit decisions until the environmental review process is complete (M.R. 7001.0140, Subp. 1). For projects requiring a state environmental impact statement (EIS), state agencies must wait 25 days after the EIS adequacy decision to make permit decisions (M.R. 7001.0140, Subp. 4). For complex projects, Section 401 certification action may be delayed for several months while the environmental review process is completed.

As an alternative to individual permits, the COE may authorize regulated activities using letters of permission (LOP) or general permits (GP), which allow abbreviated processing procedures. Activities authorized under LOPs require the COE to consult with state fish and wildlife agencies and the USFWS and require a public interest review, with a 15-day public notice posted on the COE website. GPs cover a range of activities determined by the COE to be substantially similar in nature and causing only minimal individual and cumulative environmental impacts.<sup>93</sup> Some GPs require project sponsors to contact the COE prior to conducting the regulated activity and wait for COE confirmation that the project qualifies for the GP. For other GPs, project sponsors may proceed without contacting the COE, based on their

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<sup>92</sup> Personal communication, St. Paul District COE staff

<sup>93</sup> The category of general permits includes nationwide permits (NWP) and regional permits. NWPs are developed by COE headquarters. Each COE district may adopt all or some of the NWPs, or may restrict their use by imposing regional conditions. The current NWPs expire in March 2017, but the COE has published new NWPs to replace them -- see Federal Register, 82(4), January 6, 2017, pp. 1860 – 2008. Regional (general) permits can be developed by COE districts following a public interest review process. States have the opportunity to certify regional general permit categories under Section 401 water quality certification. Once the GP categories are certified, individual projects authorized under the GP(s) do not require separate state water quality certification. The COE St. Paul District previously revoked the current NWPs in favor of a collection of regional general permits (RGP-MN-03), but have indicated that they intend to adopt, with regional conditions, most of the proposed new NWPs. The COE can also issue programmatic general permits, which confer Section 404 authorization based on project approval under a separate (usually state) regulatory program.

own determination that the activity qualifies for GP authorization and that they are in compliance with any applicable regional conditions. For nationwide permits (see footnote 3), Section 404 regulations stipulate that for activities requiring pre-construction notification to the COE, project sponsors may presume their project is authorized if they do not receive a response from the COE within 45 calendar days of the COE receiving the notification [33 CFR §330.1(e)]. There are no timeframes specified in the regulations for acting on applications eligible for authorization under LOPs and regional GPs, but the COE national performance measures for permitting set a goal of issuing 50% of all LOPs within 120 days and 80% of all GP authorizations within 60 days of receiving a complete application.

In sum, the Section 404 regulations set an expectation that the COE will make permit decisions for individual permits within 60 days of receiving a complete application, except for delays that are largely outside of COE control (Endangered Species Act/Historic Preservation Act coordination, Section 401 water quality certification, incomplete application submittals). Notably, there is no specified consequence under the regulations if a decision on an individual permit is not made within the expected time frame. LOPs and GPs allow for expedited processing. Many GPs do not require an application to the COE and therefore have no associated processing time. For NWP that require applicants to notify the COE, projects may proceed if the COE does not respond within 45 days. The COE national permitting performance measures establish a goal that 50% of all standard individual permits (except those requiring formal Endangered Species Act coordination) and letters of permission be issued within 120 days, and that 80% of all GP authorizations be issued within 60 days.

Wetland Conservation Act – The requirements for processing WCA applications are found in M.R. Chapter 8420.0255 and in M.S. 103G.2242. These WCA rule and statute provisions stipulate that certain WCA application time frames are subject to the time limits on agency actions established in M.S. 15.99. Upon receiving an application,<sup>94</sup> local government units (LGU) administering WCA have 15 business days to either inform the applicant of any missing information or distribute a notice of application<sup>95</sup> to those required to receive such notices. The notice of application must specify a comment period, which must be a minimum of 15 business days. Under M.S. 15.99, the LGU must generally make a decision to approve or deny an application within 60 calendar days of receiving a complete application, otherwise, the application is deemed approved. The 60-day limit may be extended if:

- processes associated with complying with other state or federal laws or court orders must be completed first (including state or federal environmental review processes),
- the application requires prior approval by a higher level of government,
- the LGU extends the deadline by providing written notice to the applicant, including the reasons for the extension, or
- the applicant requests an extension.

The LGU decision must be made within an additional 60 days from completion of other required processes, other required prior approvals or an extension made by the LGU, otherwise, the application is

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<sup>94</sup> Types of WCA applications include applications for wetland type/boundary, exemption, no-loss, sequencing, replacement plan and banking plans.

<sup>95</sup> LGUs are not required to distribute a notice of application for WCA exemption and no loss applications

deemed approved. However, for large or complicated projects, it's not unusual for LGUs and applicants to mutually agree to longer or multiple extensions.

Wetland impacts associated with certain types of public transportation projects are handled differently under WCA than typical, private-sector applications. Per WCA statute and rule, wetland impacts associated with the repair, rehabilitation, reconstruction, or replacement of existing roads do not require wetland replacement plan approval. For local roads, the applicable road authority reports the impacts to BWSR, which is responsible for providing wetland replacement using legislatively appropriated funds. As part of the reporting requirement, the road authority must document efforts to avoid and minimize wetland impacts. The WCA technical evaluation panel for the project area reviews the wetland delineation along with the project impacts and avoidance/minimization measures and may recommend on-site wetland replacement. The BWSR Wetland Banking Coordinator may also make decisions regarding a project's eligibility for replacement by BWSR. However, there are no application "approvals" as there are with other WCA replacement plans. Therefore, the permitting timeframes for these transportation projects are almost entirely dictated by the road authorities themselves in submitting sufficient project information, including the amount of wetland impact, to BWSR. MnDOT is responsible for implementing WCA for projects on state rights of way under its jurisdiction and is responsible for providing wetland replacement for its projects.

Public Waters Permit Program – The timing requirements for processing PWPP permit applications are primarily found in M.S. 84.027, Subd. 14a. Upon receiving a permit application (which is done electronically, through the on-line Minnesota DNR Permitting and Reporting System - MPARS), the DNR has 30 business days to notify the applicant that the application is complete or incomplete. Once a complete application is received, the statute establishes two categories of permits with assigned *goals* for time to permit decisions. The goal for Tier 1 permits is to make the permit decision within 90 days of receiving an application. For Tier 2 permits, the goal is to take action within 150 days of receiving the application.<sup>96</sup> It's up to the agencies to classify their various permit categories into the two tiers. The DNR has determined that general permits, which provide expedited authorizations for certain types of activities, qualify as Tier 1 permits and that individual permits are Tier 2 permits. There are no consequences for failing to meet the statutory permit timeframe goals. M.S. 15.99, under which permits are deemed approved if agencies fail to act on an application generally within 60 days, does not apply to PWPP permits. For projects subject to environmental review under M.S. 116D, permit decisions cannot be made until the environmental review process is complete.

Mining impacts -- Wetland impacts associated with metallic mineral mining are regulated under "permits to mine" issued by the DNR. In regulating such impacts, the DNR is required to apply WCA standards for impact sequencing and replacement, but the permitting *process* follows the permit to mine rules.<sup>97</sup> The procedures for new permits to mine or for substantial changes to existing permits to mine are governed by M.S. 93.44 - 93.51 and for ferrous mining by M.R. 6130 and for non-ferrous

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<sup>96</sup> This 150 day goal is also consistent with Minnesota State Executive Order 11-04, which applies to the DNR and the PCA. However, the Executive Order establishes a goal of issuing permits within 150 days of determining that an application is complete, rather than from the time of initial application.

<sup>97</sup> M.R. Chapter 6130.4800 for taconite or iron ore metallic mineral mining; M.R. 6132.4000 for non-ferrous metallic mineral mining.

mining by M.R. 6132. Most mining-related wetland impacts are regulated as non-substantial change amendments to existing permits to mine that do not trigger the public notice/hearing procedures in rule. For projects subject to environmental review under M.S. 116D, permit decisions cannot be made until the environmental review process is complete.

Peat mining projects over 40 acres are also regulated under DNR permits to mine, but they are subject to mineland reclamation requirements,<sup>98</sup> not WCA replacement standards. Peat mines less than 40 acres may be subject to WCA regulation, depending on how the work is accomplished, or regulated under the PWPP if the area to be mined is a public water.

### 3.8.2. Actual permitting timeframes

Section 404 Program – The St. Paul District COE provided data on COE permitting times for the period 2011 – 2015. The data cover Section 404 permits as well as combined Section 10/404 permits.<sup>99</sup> The data were categorized according to the various types of authorizations, as well as accounting for applications that were ultimately determined not to require a COE permit (Table 3.8.1 and Figure 3.8.1). The permitting timeframes shown are from the date of receiving a complete application (per 33 CFR 325.1), which in some cases is preceded by a considerable period of incremental project information submission by applicants.<sup>100</sup> The total number of permit actions for the reporting period, which includes applications that were withdrawn, was 8,730. Tables 3.8.2 and 3.8.3 provide additional information on the numbers and types of authorizations and permitting timeframes for various categories of regulated activities for the period 2013 - 2015.

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<sup>98</sup> M.S. 93.44 to 93.51 and M.R. Chapter 6131

<sup>99</sup> Section 10 of the Rivers and Harbors Act, authorizing work in navigable waters and often issued in conjunction with Section 404 permits.

<sup>100</sup> Some representatives of the regulated community state that COE project managers sometimes take a long time to notify applicants of incomplete applications, contributing to project delays. Objective data are not available on this aspect.

Table 3.8.1. Summary of COE Section 404 and Section 10/404 permit actions, 2011 – 2015. (Source: COE, St. Paul District)

Type of Action	Number	Days to issue	
		Average	Median
Authorizations under programmatic general permits	73	53	23
Authorizations under regional general permits	4926	64	36
Letters of permission issued	452	149	117
Permit modifications issued	163	71	18
Individual permits issued	108	312	221
Permits denied	39	76	43
No permit required	2096	50	10
Applications withdrawn	873	n/a	n/a
Total	8730		

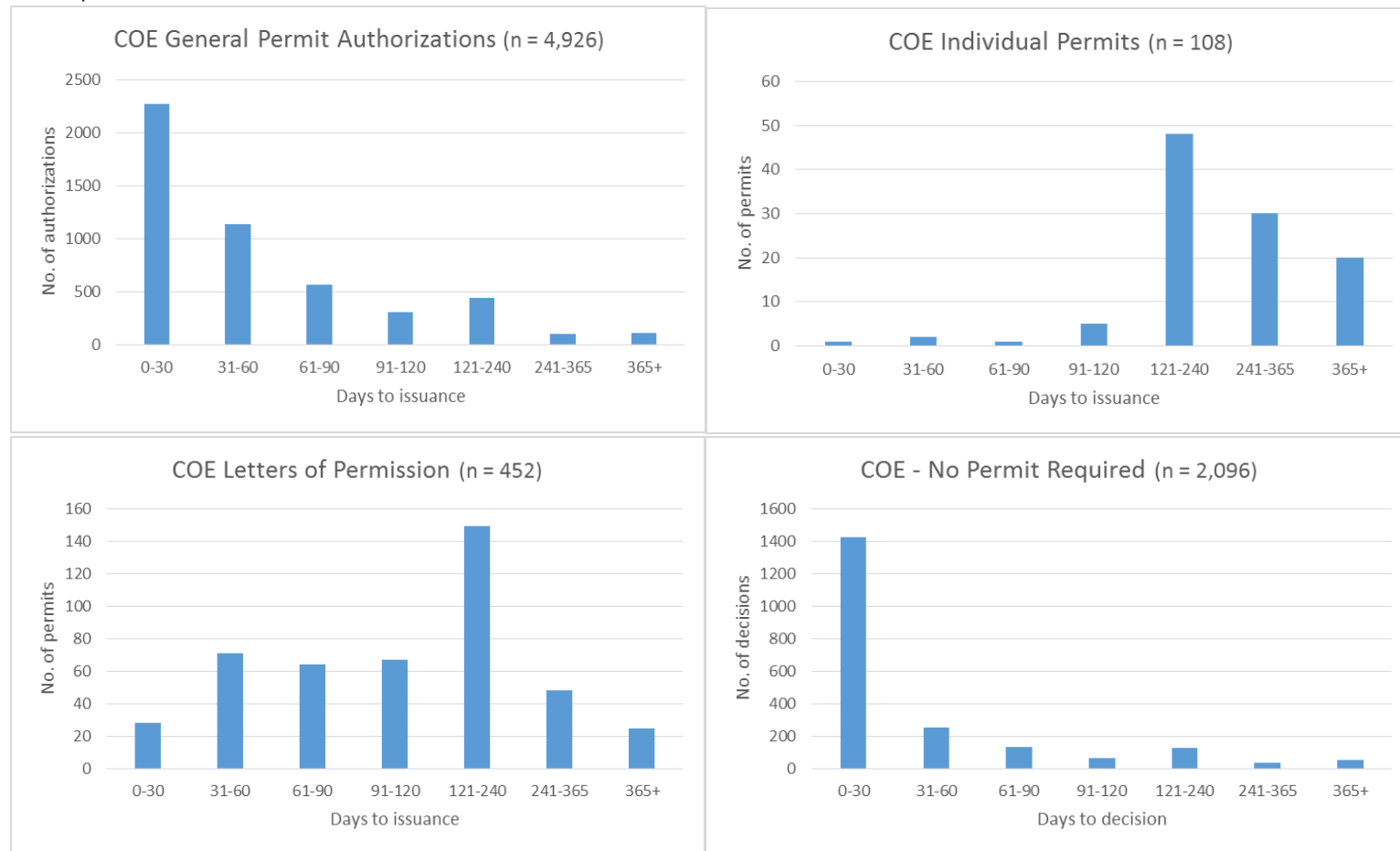
Table 3.8.2. Permitting data for COE **standard individual permits** issued in Minnesota for various types of projects, 2013 – 2015. (Source: COE, St. Paul District)

Type of Activity	No. of Permits	Days to Issue			
		Avg.	Median	Min.	Max.
Agriculture/aquaculture/drainage	6	210	184	1	500
General development	11	164	142	55	496
Flood damage reduction	3	178	175	163	197
Mining	3	368	353	88	663
Mitigation/restoration/bank stabilization	8	391	155	75	2060
Transportation	32	164	170	28	313
Utility	4	146	148	41	248
Other	5	658	447	66	1842

Table 3.8.3. Permitting data for COE **letters of permission** issued in Minnesota for various types of projects, 2013 – 2015. (Source: COE, St. Paul District)

Type of Activity	No. of LOPs	Days to Issue			
		Avg.	Median	Min.	Max.
Agriculture/aquaculture/drainage	19	182	128	33	692
General development	44	185	160	44	658
Flood damage reduction	6	158	143	37	449
Mining	6	186	161	42	438
Mitigation/restoration/bank stabilization	37	109	128	20	410
Transportation	137	143	124	2	500
Utility	14	109	88	41	268
Other	14	124	136	18	293

Figure 3.8.1. Distribution of COE permitting times for various categories of Section 404 and Section 10/404 authorizations, 2011 – 2015. (Source: COE, St. Paul District)





Expedited forms of Section 10/404 authorization (general permits and nationwide permits), which comprised a large majority of the authorizations issued, were generally issued fairly quickly, within about 60 days on average. On the other hand, most individual permits took considerably longer, an average of over 300 days and more than a year in several cases. The reason varies – according to COE staff, it frequently relates to required consultation under the Endangered Species Act and the National Historic Preservation Act, but may also involve negotiations with applicants over avoid-minimize sequencing and compensatory mitigation, as well as COE staff workload (Tables 3.8.4 and 3.8.5). The time it takes to receive state Section 401 water quality certification may also play a role (see next section).

A national-level study of COE permitting showed that the type of compensatory mitigation associated with permitted projects had an effect on permitting times, with banked or in-lieu-fee mitigation credits leading to faster permit issuance:

“For authorized activities that required compensatory mitigation, processing times for individual permit applications and general permit verifications were fastest when mitigation bank credits (120 days) or in-lieu fee program credits (136 days) were the approved source of compensatory mitigation. When permittee-responsible mitigation was required, authorizations where on-site compensatory mitigation was required were processed faster than authorizations where off-site compensatory mitigation was required (177 days versus 243 days, respectively) with both showing trends from 2010 to 2014 of increased processing times.”<sup>101</sup>

Table 3.8.4. Sub-actions added to all finalized **letter of permission permits**: 2013-2015. Sub-actions indicate that additional coordination was required. More than one sub-action may be added to a permit as appropriate. Total number of LOPs finalized FY 2013-2015 = 474. (Source: COE, St. Paul District)

Sub-action type	Number of sub-actions lasting >60 days	Percent of all LOPs (n = 474) for which sub-action lasted >60 days
401 Certification	5	1.1%
Awaiting required information from applicant	315	66.5%
Coordination within COE	3	0.6%
Coordination with external agency	6	1.3%
Endangered Species Act formal consultation	0	-
Endangered Species Act informal consultation	0	-
Historic property consultation	16	3.4%
Tribal consultation	16	3.4%

<sup>101</sup> The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources. 2015. Institute for Water Resources, Report 2015-R-03.

Table 3.8.5. Sub-actions added to all finalized **standard individual permits**: 2013-2015. Sub-actions indicate that additional coordination was required. More than one sub-action may be added to a permit as appropriate. Total number of SPs finalized FY 2013-2015 = 75. (Source: COE, St. Paul District)

Sub-action type	Total number of sub-actions lasting >60 days	Percent of all SIPs (n = 75) for which sub-action lasted >60 days
401 Certification	6	8.0%
Awaiting required information from applicant	10	13.3%
Coordination within COE	4	5.3%
Coordination with external agency	0	-
Endangered Species Act formal consultation	0	-
Endangered Species Act informal consultation	2	2.7%
Historic property consultation	10	13.3%
Tribal consultation	3	4.0%

The data presented here represent a five year period, but the COE representative who compiled the information indicates that the data show generally faster permitting timeframes within the past three years, partly due to more accurate data tracking, but also as a result of new review and interagency policies and procedures, and new permit vehicles. For example, RGP-004-MN has reduced the number of letters of permission and individual permits required for public road projects, leading to faster authorizations.

**Section 401 Water Quality Certification** – Currently, the PCA only reviews and issues Section 401 certifications for Section 404 individual permits. Certification is waived for activities authorized by Section 404 letters of permission. The PCA certifies general permits as they are proposed and renewed by the St. Paul District, but individual activities authorized under general permits are not reviewed or certified. Figures 3.8.2 through 3.8.5 below illustrate recent Section 401 certification data, and pertains to Section 404 individual permits only.

Figure 3.8.2. Number of Section 401 certifications, waivers and denials issued from 2011 to 2015.

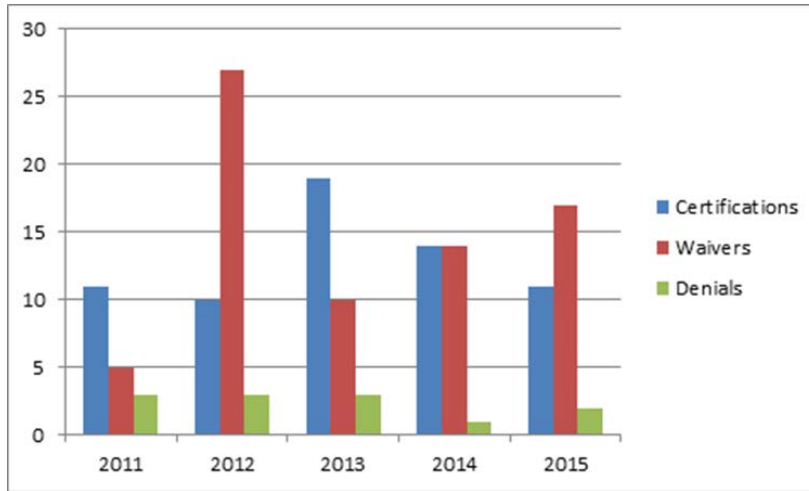


Figure 3.8.3. Average number of days to issue Section 401 certifications, waivers and denials, from 2011 to 2015.

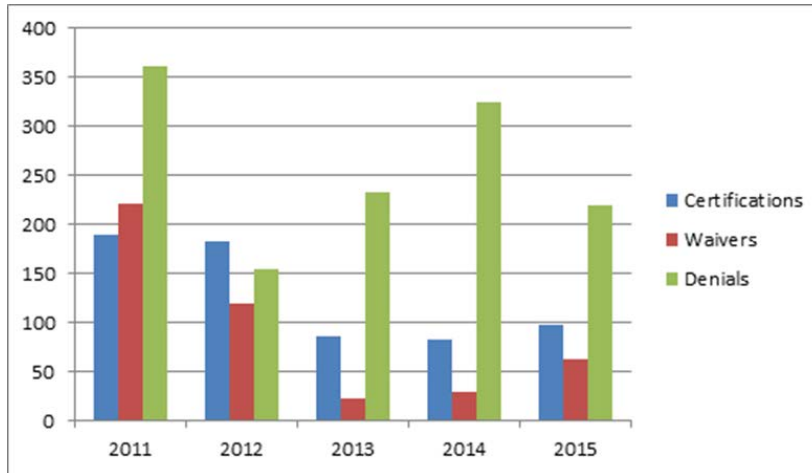


Figure 3.8.4. Average number of days for a certification decision (certification, waiver or denial).

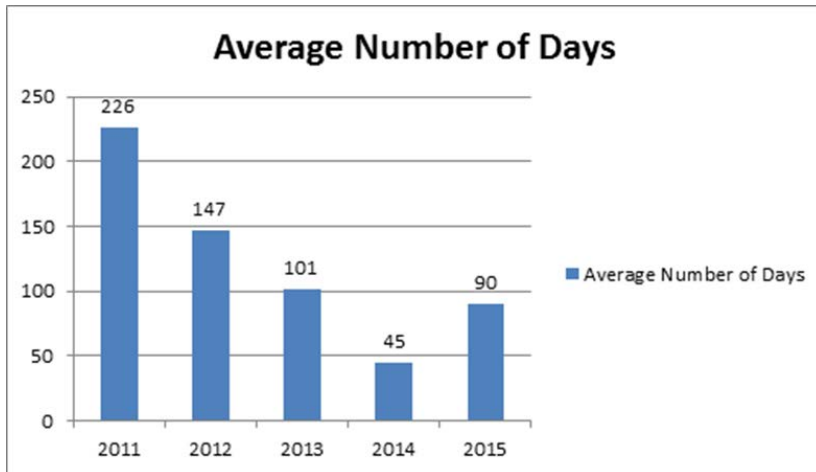
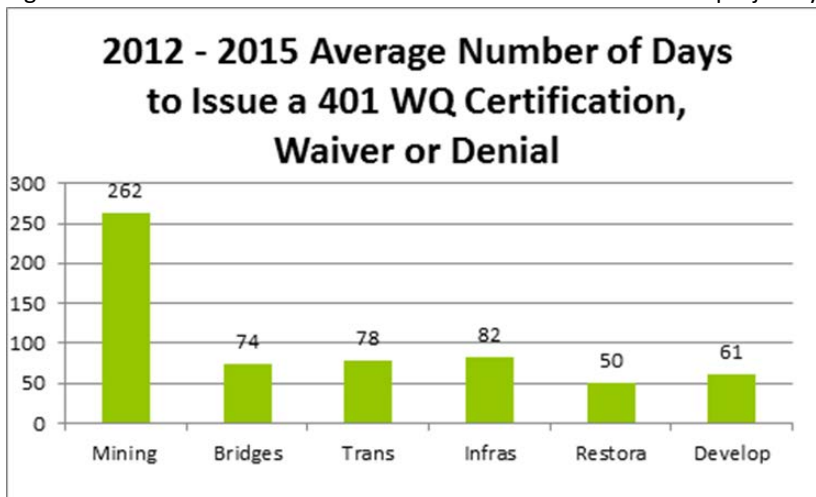


Figure 3.8.5. Timeframes for Section 401 certification for various project types.



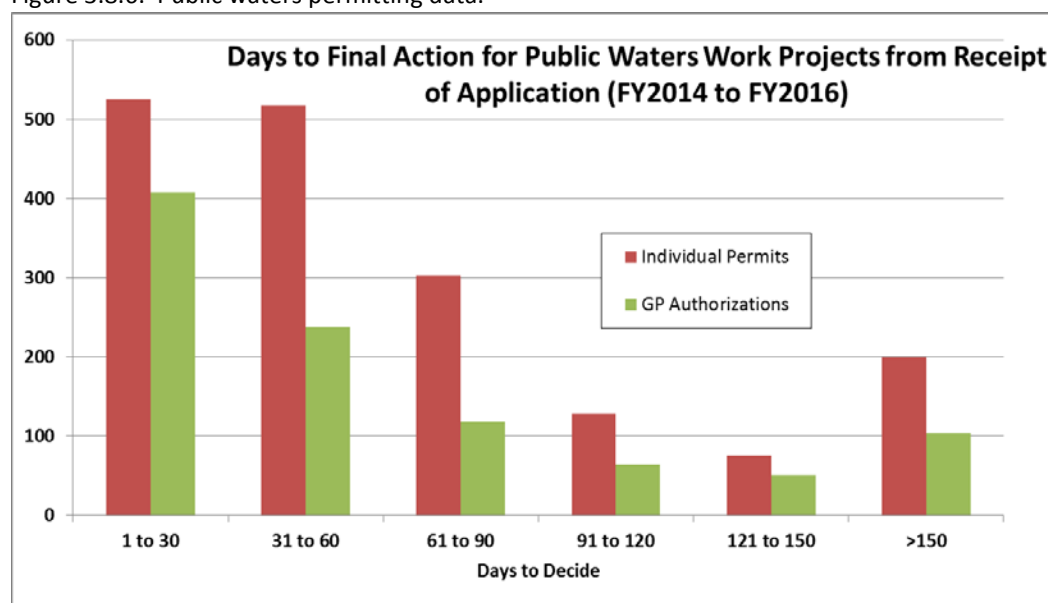
Wetland Conservation Act – BWSR collects data from local government units on the numbers of various types of WCA applications submitted and acted upon, including the corresponding acres of wetlands affected (Table 3.8.6). Data on WCA review times are not collected, so it's not possible to objectively assess how long it takes to obtain WCA approvals. However, based on their extensive working relationships with local governments, BWSR representatives report that most WCA decisions are made within the 60-day timeframe specified under M.S. 15.99. Default approvals under M.S. 15.99 are extremely rare. When encountering delays that threaten to extend beyond the initial 60-day statutory deadline, local government units may: 1) extend the deadline an additional 60 days, provided there are sufficient reasons to do so; 2) deny an application, if sufficient grounds for denial exist; or 3) suggest that the applicant grant a longer extension or withdraw the application. Therefore, it is possible for decisions to ultimately take longer than 120 days, and some do, but data are not available. Similarly, data are not available for permitting times for metallic mineral mining impacts regulated under DNR-issued permits to mine.

Table 3.8.6. Wetland Conservation Act permitting data.

Type of Application	2011	2012	2013	2014	2015
Boundary or Type Applications Approved	74	589	640	665	975
Boundary or Type Applications Denied	6	10	5	2	14
Boundary or Type Applications Withdrawn	10	6	9	10	9
No Loss Applications Approved	558	533	399	365	513
No Loss Applications Denied	8	8	10	13	5
No Loss Applications Withdrawn	3	3	4	8	4
Exemption Applications Approved	525	713	519	626	603
Exemption Applications Denied	33	76	45	10	29
Exemption Applications Withdrawn	8	15	8	10	11
Sequencing Applications Approved	51	85	12	57	23
Sequencing Applications Denied	2	14	1	6	6
Sequencing Applications Withdrawn	8	1	3	1	3
Replacement Plan Applications Approved	175	174	167	182	206
Replacement Plan Applications Denied	8	8	14	5	7
Replacement Plan Applications Withdrawn	8	7	9	5	7
<b>TOTAL APPLICATIONS APPROVED</b>	<b>1820</b>	<b>2094</b>	<b>1730</b>	<b>1891</b>	<b>2320</b>
<b>TOTAL APPLICATIONS DENIED</b>	<b>57</b>	<b>116</b>	<b>75</b>	<b>36</b>	<b>61</b>
<b>TOTAL APPLICATIONS WITHDRAWN</b>	<b>37</b>	<b>32</b>	<b>33</b>	<b>32</b>	<b>34</b>
<b>TOTAL Acres impacted via approved plan</b>	<b>176.5</b>	<b>233.6</b>	<b>215.9</b>	<b>151.9</b>	<b>153.5</b>

**Public Waters Permit Program** – Data on permitting times for PWPP permits was analyzed for a three year period, July 1, 2013 to June 30, 2016. This period corresponds to the length of time the DNR’s on-line permitting system (MPARS) has been fully implemented and provides the best available data. Permit times were analyzed for general permits and for individual permits (Figure 3.8.6). Of the 2,724 applications received, 77% received final action within 90 days and 89% within 150 days of receiving the initial application. For activities qualifying for general permit authorizations, 78% received authorization within the statutory goal of 90 days. For individual permits, 89% received final action within the statutory goal of 150 days. The individual permits requiring more than 150 days covered a variety of project types, but most were for shoreline/bank riprap, channel cleanouts and culvert replacement.

Figure 3.8.6. Public waters permitting data.



### 3.8.3. Projected effects of Section 404 assumption on permitting timeframes

If Minnesota assumed the Section 404 program, the need for separate Section 404 permits would be eliminated, except for activities affecting waters or lands for which the COE must retain jurisdiction (see Section 3.2). Assuming that state assumption would be based on implementation of WCA and the PWPP, then permit timeframes would generally follow the requirements of those respective programs (see above) and no additional authorizations would be required. However, there are a number of aspects of assumption that could affect the current state program permitting timelines:

- EPA permit review:** When states assume the Section 404 program, the EPA retains the right to review any or all state permit applications (see Section 3.1). The EPA can waive their review option for applications that meet certain conditions (e.g., size, activity, location), which is negotiated with the assuming state via a memorandum of agreement. In Michigan, which has assumed the Section 404 program, the EPA has waived their review for most impacts affecting less than an acre of wetland or less than 1,000 feet of stream channel, which comprise about 98% of all state permits issued. It may be reasonable to assume similar waiver thresholds

would eventually apply in Minnesota, if it assumed Section 404. However, the EPA has indicated that their project review waivers in Minnesota would be based on an independent review of the Minnesota regulatory programs at the time the state applies for assumption and would not necessarily be the same as in Michigan, which has a 30+ year history of operation under Section 404 assumption.

For the state permit applications that EPA reviews under Section 404 assumption procedures, they coordinate with the USFWS and the COE of Engineers (for Minnesota, the St. Paul District). The EPA has up to 90 days from receipt of the notice of application to respond to the state permitting authority. They may provide conditions to include on the permit, or they may object to permit issuance. If the EPA intends to comment on, provide recommendations or object to a permit application, they are to inform the state of their intent within 30 days of receiving the notice. If so notified, the state may not issue the permit until they have either received the EPA comments or the 90-day comment period has elapsed. If the EPA objects to an application or requires permit conditions, the state or any interested person has 90 days from receipt of the EPA comments to request the EPA to hold a public hearing. If the state requests a hearing, the EPA must hold one; otherwise, it's at EPA's discretion. There is no set timeframe by which the EPA must hold the hearing. Following a public hearing, the EPA has an unspecified period to respond to the state and reaffirm, modify or withdraw their objection or permit requirements. The state then has 30 days to either issue the permit (modified to address EPA's concerns, if necessary), or to notify EPA that the state intends to deny the application. If no public hearing is held, the state has 90 days from receipt of the EPA comments to either issue the permit (modified to address EPA's concerns, if necessary), or to notify EPA that the state intends to deny the application. If the state elects to issue the state permit over EPA's objections, then a separate Section 404 permit from the COE would be required for the activity.

WCA permit applications that trigger EPA review would likely take longer for a permit decision than the normal 60 day timeframe required under M.S. 15.99. The M.S. 15.99 time limit can be extended to 120 days, which may accommodate EPA review unless the EPA objects to the permit or requires permit conditions, which opens the door to a much longer process. The M.S. 15.99 statute contains provisions that extend the time limit for certain processes to occur, as required by state statute, federal law, or court order.<sup>102</sup> At this time, it's unclear if EPA's review of state permit applications under state Section 404 assumption would qualify under this provision or if delays associated with EPA review would result in default permit approvals under M.S. 15.99 (see Section 3.5.2). In the event of a default approval (or if the state issues a permit prior to completion of the EPA review for other reasons), a separate Section 404 permit issued by the COE would be needed for the activity, provided the affected water fell under CWA jurisdiction, which would be determined by the COE.

As far as the PWPP, the EPA 90-day review period does not conflict with the statutory goal of issuing permits within 150 days (for individual permits), but it is longer than the time it takes the DNR to actually issue most permits (see Figure 3.8.6).

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<sup>102</sup> M.S. 15.99, Subd. 3(d) and (e)

- Endangered Species Act (ESA) coordination: The EPA cannot waive their review for permit applications that have the potential to affect federally-listed threatened or endangered species or their critical habitat. Both WCA and the PWPP have provisions for considering impacts to *state*-listed T&E species, which include most, but not all federally-listed species. However neither WCA nor the PWPP include a requirement that permit applications be screened for listed species, state or federal. If Minnesota assumed the Section 404 program, it is possible that the EPA and the USFWS would require some level of screening of WCA and PWPP permit applications to assess the potential for effects on federal threatened or endangered species and their critical habitat in Minnesota, which could affect permit review timeframes. In Michigan, the Department of Environmental Quality conducts such screening as part of their Section 404 assumption responsibilities. The recent listing of the northern long-eared bat as a federally threatened species could have a significant effect on this coordination process since this species is found virtually statewide and some form of consultation is currently occurring for nearly every Section 404 regulated activity that involves tree clearing. See Section 3.6 for additional information.
- National Historic Preservation Act coordination: Similar to endangered species (above), the EPA cannot waive review of permits involving discharges within sites identified or proposed under the National Historic Preservation Act. If Minnesota assumed the Section 404 program, it is possible that the state permit programs would incorporate some level of screening for potential impacts on historic/cultural sites, likely in coordination with the State Historic Preservation Office (SHPO). Such screening would presumably focus on activities in or near known historic/cultural sites, or sites with characteristics suggesting a high probability of having historic/cultural significance. If the screening process identifies potential impacts, additional coordination with the EPA would be required. Coordination with applicable tribes would also likely occur for potential impacts on Indian cultural sites. (This would be for off-reservation projects, since the state cannot assume the Section 404 program on reservations.) The Michigan Department of Environmental Quality conducts such screening as part of their responsibilities under Section 404 assumption.
- Public notice/public hearing (33 CFR §233.33): States that assume the Section 404 program are required to provide public notice of all permit applications, possibly excepting authorizations granted under a state-issued general permit. WCA and the PWPP both have some level of noticing requirements, although revisions would be necessary to comply with Section 404 assumption requirements. However, of potentially more consequence to permitting timeframes is the fact that the public notice/review process must include a provision to allow anyone to request a public hearing on a permit application. It's up to the applicable state permitting authority to determine if a hearing is warranted, but in those cases where a hearing is held, the permitting timeframe could be extended.
- Water quality certification: Under Section 401 of the CWA, states have the opportunity to review Section 404 applications for compliance with state water quality standards. If Minnesota assumes the Section 404 Program, the Section 401 certification process would be eliminated for activities for which there is no longer a federal Section 404 permit. However, the



PCA, which conducts Section 401 reviews, may wish to work with the other state agencies to develop a similar review/certification process for applying state water quality standards to state water/wetland permits (WCA and PWPP), at least for some categories and/or sizes of impact. This process, if implemented, could affect current state permitting time frames. Alternatively, state water quality standards could be incorporated into WCA and the PWPP to ensure the standards are being met.

**Conclusion:** If Minnesota assumed the Section 404 program, the permitting timeframes associated with the applicable state permitting program (WCA and/or the PWPP) would become the sole controlling factor for most regulated activities (recognizing that the COE must retain jurisdiction over certain waters – see Section 3.2). However, for a certain, as yet undetermined subset of activities for which EPA review would be required, the 90 day EPA review period (or longer if the EPA has objections) has the potential to delay permit issuance beyond what would normally occur under the state programs. In addition, new or revised public notice requirements and additional coordination procedures that likely would have to be incorporated into the state permit processes to qualify for state assumption may also affect current WCA and PWPP permitting timelines, although it seems reasonable that these requirements could be accomplished within the current established timeframes. Based on data provided by the St. Paul District COE (Section 3.8.2), it seems clear that activities that currently require a standard individual Section 404 permit or, to some extent, a letter of permission (combined = 10% of the total authorizations issued from 2011 – 2015) would generally complete the permit process much faster under state Section 404 assumption. Many projects that qualify for Section 404 general permits, which comprise the majority of authorized activities and have small impacts, would likely experience minimal or no improvement in overall permitting times. Section 3.11 provides information on the experiences of other states that have assumed the Section 404 program related to permitting timeframes.

### 3.9. Alternatives to assumption that would also achieve the goals of regulatory simplification, efficiency, and reduced permitting times

#### 3.9.1. Current and previous coordination/streamlining efforts

There have been numerous efforts to streamline and coordinate the state and federal programs, especially following the passage of WCA in 1991. As the programs evolved and matured alongside each other it became obvious that there was an opportunity and, more recently, a need to coordinate decision-making on wetland delineations, reviews, permitting, and wetland bank applications. Previous efforts included a programmatic general permit<sup>103</sup> with the MNDNR (GP-001-MN<sup>104</sup>) that was in effect from 1984 through 2012, interagency personnel agreements between the COE and BWSR to fund staff to work on tasks and complete coordination beneficial to each agency, and multiple agency agreements (memorandums of understanding) coordinating agency procedures for wetland mitigation bank reviews, technical requirements for delineation reports, and other matters common to implementation of the respective programs where better coordination would benefit the public. At a more programmatic/policy level, both BWSR and COE have routinely participated on the Interagency Wetlands Group,<sup>105</sup> were both members of the MNDOT led streamlining effort for transportation permitting, and routinely hold coordination meetings at the staff and management levels. At the project level, COE participation on WCA Technical Evaluation Panel reviews has been useful in coordinating state – federal permitting requirements. Also, the PCA in 2012 streamlined its Section 401 water quality certification process to significantly reduce the time to certify Section 404 permits, although it's unclear how this has ultimately affected Section 404 permitting times.

Many of these coordination efforts were often reactive rather than proactive in nature and addressed specific issues brought to the attention of leadership. Because of this they rarely result in program-wide benefits but do have beneficial effects for the narrow areas of the program upon which they are focused. Comprehensive, forward looking planning for program coordination has been challenging because of ongoing commitments, budget constraints, and shifting program priorities at both the state and federal level.

#### 3.9.2. Alternatives to Section 404 assumption

State assumption of the Section 404 program in Minnesota is one way to address concerns over permitting efficiency, processing times, and regulatory duplication. However, there are other options available that could potentially address these concerns to varying degrees. These options range from developing a more efficient Federal permitting system in Minnesota to improved federal-state coordination and greater responsibility for permit application reviews by state and local agencies. An

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<sup>103</sup> A programmatic general permit issued by the COE allows expedited Section 404 authorization for activities based on approval under other specified (generally state) regulatory programs

<sup>104</sup> Provided automatic Section 404 authorization for certain projects that received PWPP permits from the DNR

<sup>105</sup> The Interagency Wetlands Group (IWG) is a forum for discussing issues associated with wetland regulation and policy in Minnesota. The IWG consists of the state and federal agencies involved in wetland regulation and management along with other state and local organizations that may be affected by changes in policy as well as other interested members of the public.

overview of each of these options is provided in the following sections. They are presented in an order that follows a continuum of increasing state and local involvement in the Section 404 permitting program, beginning with measures the COE could implement to improve their processing times up to programmatic permits. The extreme ends of the continuum (a completely independent Section 404 program on one end and state Section 404 assumption on the other) are not included in this section. Also, since the scope of this report is to assess the feasibility of Minnesota assumption of the Section 404 program, this chapter only addresses alternatives that involve both the Section 404 program and current state regulatory programs. Opportunities may exist to improve the efficiency and coordination of only the state programs, but that discussion is outside the scope of this study.

**Sector-specific COE Project Managers** (more efficient Federal regulatory program). One of the reasons given by the COE for the delays in permitting decisions in Minnesota is the workload demands imposed by certain sectors of the economy that have complex, controversial, and/or high volumes of permit applications. In Minnesota, the examples cited include mining, transportation, and flood damage reduction projects. Adequately reviewing and processing applications associated with these activities require more dedicated staff time, which reduces the number of staff available to process requests from the rest of the public. This is problematic because the COE has a finite pool of resources to draw from to maintain timely and efficient processing times.

The Water Resources Development Act of 2000 (WRDA 2000, Public Law No. 106-541), as amended, provided a potential solution to the backlog of permit reviews with the Section 404 program. Referred to as Section 214, the law provides that the Secretary of the Army, after public notice, may accept and expend funds contributed by a non-federal public entity, public utility company, or natural gas company to expedite the permit review process. The COE, acting on behalf of the Secretary, must ensure that the use of such funds will not impact impartial decision-making with respect to permits, either substantively or procedurally. Section 214 positions are used in many COE Districts across the country but were only established in Minnesota in 2014. The District currently has two Project Manager positions funded by the Minnesota Department of Transportation (MNDOT). These COE staff work exclusively on MNDOT or state aid funded projects and have their work prioritized by MNDOT staff. This arrangement results in greater predictability in the permitting of transportation projects and allows MNDOT to establish permitting priorities based on project construction schedules. However, these positions have not been in place long enough to fully assess their overall effectiveness. The COE has conducted outreach to other members of the regulated public where Section 214 agreements could be developed but little interest has been expressed in moving forward with funding a dedicated position at the COE.

**Potential Benefits:**

- Faster, more predictable Section 404 permitting timetables for projects covered under Section 214 positions;
- Potentially faster Section 404 permitting times for other projects due to more available COE staff time
- No state statute or rule changes required

Potential Drawbacks:

- Can only be implemented for public sector activities
- Cost for sponsoring entity
- Doesn't address regulatory duplication

**Expanded Use of Regional General Permits, including Nationwide Permits (more efficient Federal regulatory program).** General permits are COE authorizations that are issued on a nationwide or regional basis for a category of activities when:

- Those activities are substantially similar in nature and cause only minimal individual and cumulative environmental impacts; or
- The general permit would result in avoiding unnecessary duplication of the regulatory control exercised by another Federal, state, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal (programmatic general permit – discussed in a later section)

Nationwide permits (NWP) are a type of general permit issued by the COE and are designed to regulate with little (if any) delay or paperwork, certain activities in jurisdictional waters and wetlands that have no more than minimal adverse environmental impact. NWPs are issued by COE Headquarters and are supplemented by decision documents prepared by COE division offices. COE districts can modify NWPs on a regional basis through the addition of regional conditions, which restricts the use of the NWPs in those regions. Regional conditions are developed in cooperation with state and local agencies with input from the public prior to the issuance of the NWPs. In Minnesota, the COE has typically consulted with MPCA, BWSR, DNR, MNDOT, and others when making decisions on issuance of general permits, including the NWPs.<sup>106</sup>

There are currently 50 NWPs that provide a streamlined permitting mechanism for a wide range of activities.<sup>107</sup> In general, the nationwide permits authorize discharges of dredged or fill material into lakes, rivers, streams, and wetlands when those discharges do not result in greater than a 0.5 acre of loss for a single and complete project (mitigation is often required for these projects, especially those involving discharges into wetlands). Covered activities include such things as utility lines, linear transportation projects, maintenance of existing facilities, and residential developments. There are also several NWPs that specifically address activities in coastal areas and thus have no applicability in Minnesota (these NWPs would likely be revoked by the COE division office at the recommendation of the District). The COE – St. Paul District revoked all of the existing NWPs for Section 404 purposes in Minnesota in 2000 in favor of regional general permits, although the regional general permits borrowed heavily from the NWPs. Many of the categories in the District's current regional general permit RGP-003-MN are very similar, if not identical, to the descriptions for similar activities contained in the NWPs.

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<sup>106</sup> St. Paul COE District proposals to authorize categories of activities under a regional general permit or under Nationwide permits with regional conditions are subject to state water quality certification by MPCA under Section 401 of the CWA.

<sup>107</sup> See Federal Register, February 21, 2012 (77 FR 10184)

The current NWP's expire in March 2017 and on June 1, 2016 the COE published a notice in the Federal Register soliciting public comment for the reissuance of the existing NWP's and the issuance of two new NWP's and one new general condition.<sup>108</sup> The St. Paul District has announced their intention to adopt the new NWP's, with appropriate regional conditions. There are several potential benefits to Minnesota associated with a transition from the current St. Paul District permitting scheme focusing on regional general permits to the NWP's. First, there would be greater predictability with respect to the review process. Until recently, the COE has not included review timeframes in their general permits which makes their decision making process unpredictable and unreliable for the public.<sup>109</sup> The NWP's have a defined review process that requires the COE to make a completeness determination and notify the applicant within 30 days if their preconstruction notification is incomplete. Once a complete preconstruction notification has been provided, the COE must make a determination on the application within 45 days unless coordination with other agencies is required to comply with other federal laws. Second, the NWP's are a more straightforward permit than the current version of RGP-003-MN that the COE uses in Minnesota, which contains 24 categories of activities and 27 standard conditions that are often difficult for project sponsors to understand and determine if their project is eligible for authorization (see the discussion of regional general permits, below). The organization of the NWP's may be more understandable to the public and may represent a more streamlined permitting approach. Finally, a considerable amount of the development, coordination, and authorization process for the NWP's is completed by COE Headquarters. COE Districts are still responsible for preparing supporting documentation and issuing regional conditions but there are benefits to having the NWP's developed at a national level. For one, the national-level public review provides the COE significant feedback to evaluate and improve the NWP's to continually make them a better and more efficient permit tool. In addition, having the COE HQ lead the reissuance process reduces the staff resources the St. Paul District would otherwise invest relative to other options such as regional general permits, allowing more attention to be directed towards submitted permit applications.

Regional permits are another form of Section 404 general permits but differ from the NWP's in that they are issued by COE Districts or Divisions across the country for use within their respective geographic jurisdictions based on local, state, or regional factors. The Saint Paul District has used regional general permits (RGP) extensively since the NWP's were revoked in 1996. A RGP in one form or another has been the primary permitting mechanism in Minnesota for the categories of activities authorized by the NWP's for the past twenty years. The most recent iteration of this RGP is RGP-003-MN issued in 2012 and modified slightly in 2015. This RGP authorizes discharges of dredged or fill material for 25 different categories the District has determined are individually and cumulatively minimal in impact.<sup>110</sup> With some exceptions and minor modifications the categories of activities in RGP-003-MN are a representation of the most frequently encountered NWP activities in Minnesota. In general, RGP-003-

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<sup>108</sup> 81 FR 35186

<sup>109</sup> RGP-004-MN issued in 2015 contains a commitment from the Corps to make a completeness determination within 30 days of receipt of a preconstruction notification. RGP-002-MN issued in 2013 has a similar completeness review determination but also allows an applicant to go ahead with their project if they have not received written notification from the Corps within 45 days of submitting a complete preconstruction notification.

<sup>110</sup> Examples of categories of activities authorized include: maintenance activities, minor utility work, restoration/mitigation activities, minor transportation impacts and other minor discharges. See:

<http://www.mvp.usace.army.mil/Missions/Regulatory/Permitting-Process-Procedures/>

MN has been an effective permitting tool but the comprehensive nature of this permit and the numerous conditions and varied reporting requirements are, at times, confusing to the public. In the past several years the District has added additional RGPs for other categories of activities not covered by the multi-activity RGP-003-MN. These include a regional general permit for agricultural activities in 2013 (RGP-002-MN) and one for public transportation projects (RGP-004-MN) issued in 2015.

RGPs are a potentially attractive option for improving the efficiency of Section 404 decision making in Minnesota. The recently issued RGP-004-MN for public transportation projects has been well received and, if predictions from the COE are valid, will significantly reduce the number of these types of projects requiring more comprehensive and resource intensive reviews under an individual permit or letter of permission. Development of RGPs for other categories of activities, where appropriate, could further reduce the resources the COE must put towards comprehensive reviews. However, RGPs require a fair amount of up-front costs for staff to develop, coordinate, evaluate, and issue and must be reissued every five years per regulation. In light of this, the COE often looks at the potential benefits from a RGP versus the development costs when deciding whether a RGP for a particular activity or activities should be pursued.

Potential Benefits:

- Faster Section 404 authorization for covered projects
- Potentially faster Section 404 permitting times for other projects due to more available COE staff time
- No state statute or rule changes required

Potential Drawbacks:

- Can only cover projects having “minimal” impacts, although minimal is not precisely defined
- Requires considerable COE staff time to develop – process can be lengthy
- Development and implementation is at discretion of COE, St. Paul District
- Only partially addresses regulatory duplication

**Special Area Management Plans and Local Comprehensive Wetland Protection and Management**

**Plans (more efficient Federal regulatory program).** The 1980 amendments to the federal Coastal Zone Management Act define a Special Area Management Plan (SAMP) process as "a comprehensive plan providing for natural resource protection and reasonable coastal-dependent economic growth containing a detailed and comprehensive statement of policies, standards and criteria to guide public and private uses of lands and waters; and mechanisms for timely implementation in specific geographic areas within the coastal zone." The COE has expanded the scope of this process of collaborative interagency planning within a geographic area of special sensitivity to also include non-coastal areas for the Section 404 permitting program. The purpose of a SAMP is to develop and implement watershed-wide aquatic resource management plans and implementation programs, which include preservation, enhancement, and restoration of aquatic resources, while allowing reasonable and responsible economic development and activities within the watershed-wide study area. An effective SAMP reduces delays and inefficiencies associated with individual permit application reviews and adds predictability to the permit process. A Section 404 SAMP typically results in two products:

- Appropriate local/state approvals and a COE general permit or abbreviated processing procedure for activities in specifically defined situations; and
- A local/state restriction for undesirable activities.

The development of a SAMP is a labor intensive endeavor for the COE and the sponsoring local agency, typically involving extensive information gathering and analysis. Therefore, COE Districts are required to evaluate and determine that the following exist before committing to preparation of a SAMP:

- The area should be environmentally sensitive and under strong developmental pressure.
- There should be a sponsoring local agency to ensure that the plan fully reflects local needs and interests.
- There should be full public involvement in the planning and development process.
- All parties must express a willingness at the outset to conclude the SAMP process with a definitive regulatory product.

As the criteria suggest, a SAMP is a focused effort to address permitting issues in a discreet geographic area. SAMPs are not intended to be a tool for statewide implementation but do allow area or watershed specific issues to be addressed in a comprehensive manner that benefits the public within these areas and assists the regulatory agencies.

There is currently one active SAMP and associated general permit within the St. Paul District (none in Minnesota).<sup>111</sup> The City of Superior, Wisconsin completed a SAMP in 1996 in response to controversy, delays, and repeated questions about alternative upland sites for residential developments, commercial/industrial projects, and transportation improvements in areas of the city that contained a high concentration of wetlands. The original SAMP expired in 2007 and was renewed as a more comprehensive version referred to as SAMP II. The day-to-day operations of SAMP II are administered by the City of Superior and applications are forwarded to the COE and the Wisconsin Department of Natural Resources only after the appropriate environmental staff from the city have determined them complete. The longevity of the City of Superior SAMP is an indication of its benefits to the city and its utility to the permitting agencies in this wetland-rich, urban/industrial area.

WCA has a similar provision that could be combined with the federal SAMP process to streamline wetland impact permitting in a specified area. Under Minnesota Statutes, section 103G.2243 a LGU may develop a comprehensive wetland protection and management plan (CWMP) as an alternative to the rules adopted under 103G.2242. The goal of a CWMP is to maintain and improve the quality, quantity, and biological diversity of wetland resources within watersheds by prioritizing existing wetlands and strategically selecting wetland replacement sites. The purpose of developing a plan is to provide a watershed and ecosystem-based framework to make wetland impact and replacement decisions that meet state standards and locally identified goals, and to support the sustainability or improvement of wetland resources in watersheds while providing local flexibility. Since the goals of a SAMP and a CWMP are not mutually exclusive, there is an opportunity for a LGU to work with the COE and other stakeholders to develop a joint SAMP/CWMP that could be used to streamline permitting and replacement decisions in a defined geographic area. Although numerous CWMPs have been completed

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<sup>111</sup> The COE St. Paul District covers Minnesota and Wisconsin

by LGUs across the state, none of these have been officially recognized by the COE as having an acceptable basis from which to develop a general permit. The COE has officially acknowledged components of CWPMPs that are consistent with Section 404 requirements, but to date has not fully accepted a complete CWPMP. For example, in 2011 the COE issued a public notice advising interested parties that the COE will be utilizing the City of Sauk Rapids CWPMP in its Section 404 permit evaluations within the area addressed by the CWPMP. The COE identified the following components of the CWPMP as being consistent with Section 404 requirements:

- The wetland inventory and preliminary assessment of aquatic resources in the study area, to aid in watershed-based wetland management;
- The identification, at a landscape level, of a network of waterways, wetlands, and adjacent uplands for preservation, restoration, and/or establishment;
- Compensatory mitigation guidelines, based upon wetland impact type, location, and the degree of wetland resource degradation, that would be applicable to projects permitted within the study area;
- Wetland delineations completed in conformance with the U.S. Army Corps of Engineers Wetland Delineation Manual (January 1987) and applicable Supplements would be required as part of a permit application for any proposed wetland impact;

The COE public notice also clarified that additional information that would be required for individual development projects to further ensure consistency with the CWA. This information includes:

- Documentation of avoidance and minimization of wetland impacts to the maximum extent practicable including a demonstration that there are no less damaging alternative sites available to the applicant; and,
- Applicants must also consider off-site and on-site alternatives to their proposed action including potential alternatives outside of the CWPMP.

From a permitting perspective, the COE has agreed that this CWPMP provides useful information as an inventory and preliminary assessment tool, and can be used by COE staff when determining compensatory mitigation requirements for authorized impacts. The CWPMP does not, however, benefit applicants with sequencing and compliance with the Section 404(b)(1) Guidelines, one of the substantive requirements in the COE decision making process. Since 2011, the COE has offered to work more closely with LGUs who are interested in developing a CWPMP that is consistent with all aspects of the Section 404 program with a possible outcome being a SAMP-like product with a general permit for certain types of activities. Two LGUs have been working closely with the COE to achieve this type of product: the City of International Falls and the Rice Creek Watershed District. Both of these efforts have made significant progress towards an implementable product but as of August 2016 the COE has not issued a final decision for either.

SAMPs and CWPMPs are two options that could be used to streamline wetland impact permitting through a joint planning effort in a defined geographic area. There are also options for streamlining that focus on components or derivations of these more comprehensive efforts. These include advanced



identification of disposal areas (ADID),<sup>112</sup> watershed based mitigation plans, and local water/wetland management plans developed under a watershed approach. Each of these options has the potential to reduce uncertainties associated with certain facets of the permitting program. The potential benefit is that the up-front investment in staff time (COE, state, local) may be less than that associated with a SAMP or CWMP.

Potential Benefits:

- Greater predictability and potentially faster permitting within the plan areas.
- Potentially faster Section 404 permitting times for other projects due to more available COE staff time.
- Can be initiated by local sponsor.
- No state statute or rule changes required.

Potential Drawbacks:

- Considerable time, staff resources and expense to develop plans, particularly for the local sponsor.
- Benefits limited to the specified plan area, which is typically a fairly small geographic area.
- Only partially addresses regulatory duplication and does not provide statewide consistency.

**Wetland Conservation Act Federal Approvals Exemption (more efficient state and local regulatory program implementation).** WCA rules and related statutes include a provision allowing for the establishment of an exemption for wetland impacts that have gained federal approval under Section 404 of the Clean Water Act. The Federal Approvals exemption is intended to reduce dual state-federal regulation of projects impacting wetlands. To be valid, this exemption must be approved by the Board of Water and Soil Resources, along with the Pollution Control Agency and Departments of Agriculture and Natural Resources, noticed to local governments, and published in the State Register.

BWSR has recently approved one WCA Federal Approvals Exemption under this authority. The exemption addresses wetland impacts resulting from the construction, maintenance, or repair of utility lines, including pipelines, and associated facilities. If an applicant can demonstrate that their project complies with the conditions approved by BWSR, then they need only obtain a Section 404 permit and provide the required notifications to the LGU(s) with jurisdiction over the project to receive the WCA exemption. To streamline implementation of the exemption, BWSR, the DNR, and the COE drafted and executed a Memorandum of Understanding (MOU) that spells out the notification and review processes that will be followed for implementation of the exemption. The successful implementation of this exemption reduces the number of agencies involved in the review of a utility line project by deferring to the COE's process for these types of activities. There is no state or local regulation of the wetland impacts associated with these projects except for the opportunity to comment on the proposed project as part of the COE public comment process.

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<sup>112</sup> The ADID process is used to identify wetlands and other waters that are generally suitable or unsuitable for the discharge of dredged and fill material.

The WCA Federal Approvals Exemption could be expanded to cover more wetland impacts where those impacts are also regulated under Section 404. Any additional exemptions would need to be approved using the same process followed for the utility line exemption. The WCA Federal Approvals Exemption is a particularly attractive option for streamlining linear projects that cross LGU jurisdictional boundaries because it concentrates the review of wetland impacts with the COE and eliminates multiple LGU reviews of parts of a larger project.

Potential Benefits:

- Eliminates regulatory duplication for covered projects – projects only require a Section 404 permit
- Can be implemented solely by the state, although coordination with COE, St. Paul District is desirable
- No state statute or rule changes required

Potential Drawbacks:

- Does not address concerns over extended Section 404 permitting times
- Only applicable to wetlands under WCA jurisdiction – would not apply to PWPP waters/wetlands

**Programmatic General Permits** (higher level of coordination and responsibility for permit application reviews by state and local agencies). A Programmatic General Permit (PGP) is a type of general permit that confers Section 404 authorizations for regulated activities based on approvals issued under an existing state, local, or other Federal agency program. PGPs are specifically designed to avoid duplication with that program so long as it protects the aquatic environment in a manner equivalent to the Department of the Army regulatory program and the activities permitted are similar in nature and result in no more than minimal individual or cumulative adverse effects. PGPs can be tailored to a state, local, or other Federal agency program to match up with the geographic scope of their authority, the type of activities regulated, and the threshold for review. Projects authorized under PGPs have varied degrees of COE involvement ranging from no notification to the COE to project specific review by the COE to verify that no more than minimal adverse environmental impacts would occur.

PGPs are utilized throughout the nation to reduce duplication and improve the efficiency of the permitting process. Many COE Districts in the eastern and northeastern part of the country have developed PGPs in cooperation with their state partners to streamline permitting for specific activities (e.g., Virginia Regional Programmatic General Permit 12-SPGP-01) or as a replacement for certain categories of Nationwide permits (e.g., Pennsylvania State Programmatic General Permit-4). A common thread among all of these PGPs is a state program that has evaluation criteria nearly identical to that utilized by the COE: alternatives analysis, avoidance and minimization of impacts, and compensatory mitigation for unavoidable impacts. The sequencing requirements of WCA provide a parallel process in the state of Minnesota.

The primary benefit from PGPs is the reduction or elimination of duplicative regulatory oversight for a single action. Depending on the scope and coordination procedures, a PGP can completely eliminate COE involvement in an application review or significantly reduce the level of involvement (e.g. COE

involvement would be limited to determining compliance with other federal laws such as the Endangered Species Act or the National Historic Preservation Act). The other parts of the application review would be conducted by a local or state agency under their respective program, which the COE has reviewed and determined satisfies their program requirements. PGPs are an attractive permitting option for high volume activities involving minor impacts that are regulated at the state or local level. Typically, these activities can be more efficiently handled by local staff who are already regulating the work and are familiar with the potentially impacted resources and frequently used construction practices. The potential drawbacks from this type of permitting relationship with the COE are the reporting requirements for the state or local agency back to the COE (to track impacts, utilization and effectiveness) and a potential increase in documentation and coordination requirements to implement the PGP. A COE-approved state/local permitting/reporting mechanism would be necessary for implementation of a PGP in Minnesota.

Potential Benefits:

- Addresses regulatory duplication for covered project categories – projects only require a state permit (WCA or PWPP).
- Addresses concern over extended Section 404 permitting times.
- May not require state statute or rule changes.

Potential Drawbacks:

- Considerable time and staff resources (COE, state and local) needed to develop a PGP.
- Must be renewed every five years.
- State/local reporting requirements to COE.
- Can only cover projects having “minimal” impacts, although minimal is not precisely defined.
- Development and implementation is at discretion of COE, St. Paul District.

Unlike Section 404 assumption, all of the alternatives identified above could potentially be implemented without requiring statute or rule amendments to the Minnesota regulatory programs. On the other hand, they all have certain limitations as far as comprehensive, statewide permit streamlining. They also require a commitment from both the COE and the state agencies to work together, including devoting staff time to developing and implementing any of the identified options. Even though the staff time required for these options would be less than what would be required to assume Section 404, this factor may continue to be one of the obstacles to further streamlining. There are limited resources to devote to programmatic initiatives and each agency frequently has staff committed to other initiatives that may be equally as important to the respective agency. Although Minnesota state agencies and the COE have a long history of coordinating their regulatory programs, neither side can compel the other to engage in developing these options. One advantage of Section 404 assumption is that 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.

### 3.10. Options for financing any additional costs of implementation

As discussed in Section 3.7, there would be additional costs to the state for regulatory program implementation if Minnesota assumes the Section 404 program. It's possible that state and local governmental agencies that conduct projects requiring wetland/water permits (primarily transportation) may realize cost savings due to reduced permitting delays under Section 404 assumption. However, such savings cannot be accurately quantified and are unrelated to program implementation costs. Funding for implementation would be solely the state's responsibility. The federal government provides no implementation funding for states to assume the Section 404 program, although federal funds may be available through a competitive grant program for state program development, such as training or developing on-line permit application systems.<sup>113</sup> Options for funding the additional costs of implementation include the following:

#### 3.10.1. Legislative appropriation

Most of the additional cost for assuming the Section 404 program would likely be incurred by BWSR for additional staffing. Increased funding could be provided through the normal biennial agency funding process, most likely from the state's general fund, but also possibly from the Clean Water Fund.<sup>114</sup>

#### 3.10.2. Application fees

Local governments implementing WCA are currently authorized to collect application fees from applicants. Many local governments impose such fees – they are highly variable among the LGUs, ranging from \$20 for exemption determinations up to \$1,950 for wetland replacement plans or wetland bank plans. The DNR charges permit fees for PWPP permits, from \$150 to \$1,000. However, the fees under both WCA and the PWPP are generally not sufficient on their own to fund the current costs of implementation. DNR permit fees cover approximately 13% of the cost of administering the PWPP; data on LGU WCA administration could not be obtained within the time frame of this study.

Under state Section 404 assumption, BWSR would likely be responsible for accepting WCA applications, so it may be necessary to amend WCA statutes to authorize BWSR to assess application fees. In 2015, local governments implementing WCA reported that 2,415 applications of all types were submitted (see Table 3.8.x). Based on this number of annual applications, BWSR could cover their projected annual increased costs under Section 404 assumption (\$2.305m), by charging approximately \$950/application. However, of the total number of applications submitted, 91% were optional types of applications (wetland boundary, sequencing, no-loss and exemptions). It's likely that many applicants would not submit optional applications at a \$950 fee level, which means that BWSR would be unable to cover their costs on permit fees alone. It should also be noted that application fee revenue fluctuates from year to year, while staffing costs are relatively fixed. However, using a tiered fee schedule for various applications types, as some LGUs currently use, BWSR may be able to cover a portion of their additional costs.

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<sup>113</sup> Section 104(b)(3) of the Clean Water Act, 33 U.S.C. §1254(b)(3). These grant funds could also be used for work associated with preparing a state application for assuming Section 404.

<sup>114</sup> A component of the Clean Water, Land and Legacy Amendment to the Minnesota Constitution, Article XI, Section 15

### 3.10.3. Taxes/fees

Counties, cities and watershed districts have taxing authority and could levy a tax or raise existing levies to fund costs associated with wetland/water permitting. Some local governments also have authority to assess various types of fees or assessments, such as sewer/stormwater fees or fees associated with real estate transactions, building permits or similar activities. However, since the primary increased costs of implementation under Section 404 assumption would apply to BWSR, it's not clear how increases in revenue at the local level would contribute to funding those costs. It's possible that any increased local revenue could be used to reduce the amount they receive from BWSR through natural resource block grants (for WCA implementation), thus allowing BWSR to retain those funds for their increased costs. Nonetheless, given the likelihood of a continuing local role in water/wetland regulation under Section 404 assumption, taxes and/or fees at the local level could continue to contribute to shared state/local implementation.

### 3.10.4. Other revenue

The state could develop entirely new sources of revenue through such mechanisms as deposit fees for beverage containers (as an example), statewide drainage assessments, license fees or taxes on construction equipment, or taxes on potentially polluting items such as fertilizer or pesticides.

### 3.11. Other information as determined by the board and commissioner

#### 3.11.1. Information from other states on Section 404 assumption

Two states, Michigan and New Jersey, have assumed Section 404 to date. Many other states have engaged in varying levels of investigation and progress toward assumption. For this feasibility study, information was obtained from other states on their experiences through a variety of means.

- In late 2015, an intern for the PCA conducted an extensive review of reports and findings from other states that have either assumed Section 404 or have investigated assumption. She also interviewed state program staff from several states on their experiences. Her full report and a summary table are presented in Appendices F and G.
- Other documents and presentations on state assumption were obtained and reviewed, notably:
  - *“Clean Water Act Section 404 Program Assumption: A Handbook for States and Tribes,”* 2011, Association of State Wetland Managers, Inc. (ASWM) and Environmental Council of the States (ECOS) (see Appendix E)
  - *“Pursuing Clean Water Act Assumption: What States Say About the Benefits and Obstacles,”* presentation by Kathy Hurd and Jennifer Linn, USEPA, at the Association of Wetland Managers State/Federal Coordination Meeting, 2008. This presentation included the findings from interviews of regulatory program representatives from nine states selected based on a history of “serious inquiry” into Section 404 assumption.
  - *“The Trouble with Assumptions: An Analysis of the Ongoing Struggles with §404 Assumption,”* 2014, Aileen Carlos, M.S. Thesis, University of Oregon
- On July 11, 2016, state regulatory program representatives from New Jersey, Michigan and Oregon participated, via web conference, in a Core Feasibility Study Group/Stakeholder meeting for this study. Each of the states made presentations on their experiences with Section 404 assumption and answered questions from the Minnesota participants.
- Les Lemm, BWSR Wetlands Section Manager, represents Minnesota on a national EPA-led committee to address questions about what waters are assumable by states (see Section 3.2). Michigan, New Jersey and several states that have or are actively investigating Section 404 assumption are on the committee and have provided valuable insights through that forum.

As the only states to have assumed Section 404, the experiences of New Jersey and Michigan are instructive, particularly Michigan, as a Great Lakes state with abundant wetlands and located in EPA Region 5, as is Minnesota. Both states assumed Section 404 in the 1980’s, providing a long history with assumption. Representatives from both states were quite positive about their overall experience. They mentioned collaborative working relationships with EPA and cited the following benefits from having assumed section 404:

- Streamlined permitting, with a single (state) permit required for most projects. Michigan issues about 4,000 water/wetland permits each year. Under their MOU with EPA, only about 2% of the permits require EPA review. Most permits in Michigan are issued within their stated 45 day goal. New Jersey issues between 1,600 and 2,000 permits a year, with less than 10 per year requiring EPA review. Instances where the state issued a permit over EPA objections were very rare (one case in New Jersey, a “handful” in Michigan – mostly due to state permit decision

timing requirements). In those cases, the state issued their permit and the applicant had to apply for Section 404 authorization from the COE separately. Both states screen their applications for threatened and endangered species and cultural/historic sites and coordinate directly with the USFWS for Endangered Species Act compliance and with their State Historic Preservation Office for National Historic Preservation Act compliance.

- Improved resource protection by better allocating available state and COE staff.
- Greater ability to emphasize state resource protection goals by reliance on state (rather than federal) regulatory authorities.
- Greater incentive to maintain effective state regulatory protections because weakening the programs could jeopardize the states' assumption certification. In 2009, Michigan's then-governor proposed to discontinue the state's Section 404 assumption program and allow the COE to resume Section 404 permitting. A broad coalition of state stakeholders opposed this initiative because of the benefits that assumption provided. The state ultimately decided to continue with assumption, with some amendments to their state permit program. Those amendments, enacted in 2013, are currently under review by EPA for compatibility with the federal requirements for Section 404 assumption.

Despite a long history of pursuing state assumption, dating from the early 1980's to the present, Oregon has so far been unsuccessful in obtaining approval. Some attempts failed due to breakdowns in the legislative process to pass the necessary authorizations. The chief impediment recently has been failure to reach agreement with the USFWS and the NMFS regarding coordination on federally threatened/endangered salmon species. However, other challenges going forward included funding issues and the current uncertainty over assumable waters.

The ASWM/ECOS handbook on state assumption (see above) lists the need for broad public and political support as a challenge states face in assuming the Section 404 program (see Section 1.1) In this regard, stakeholders from Minnesota's conservation community have expressed concern over the potential loss of COE involvement in permitting should Minnesota pursue assumption. They cite analyses and studies indicating that redundant, though coordinated state-federal permitting can produce better resource outcomes (see Section 3.4.8). While recognizing that hearing only from state program employees from other states does not necessarily ensure a balanced picture, a thorough survey of stakeholders from other states is beyond the scope of this study. Of note however, is a 2012 report from the Michigan Wetlands Advisory Council, a government/stakeholder group with representation from all sectors charged with analyzing Michigan's regulatory program as it relates to Section 404 assumption. While including several recommendations for program improvement, the report states that, "The Council was unanimous in its belief that Michigan should retain its designation as an approved Section 404 Program, making the assumption that necessary legislative changes can be positively concluded."

According to a "*Status and Trends Report on State Wetland Programs in the United States*" prepared by the ASWM (2015)<sup>115</sup>, 24 states have at one time considered state assumption of Section 404. Although

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<sup>115</sup> Available at:

[http://www.aswm.org/pdf\\_lib/state\\_summaries/status\\_and\\_trends\\_report\\_on\\_state\\_wetland\\_programs\\_in\\_the\\_united\\_states\\_102015.pdf](http://www.aswm.org/pdf_lib/state_summaries/status_and_trends_report_on_state_wetland_programs_in_the_united_states_102015.pdf)

only two states have actually assumed Section 404, many states have implemented a variety of other coordinated federal-state permitting procedures. These include programmatic general permits (see Section 3.9), joint application forms, and joint public noticing.



Appendix A - Laws of Minnesota 2015 Special Session Chapter 4, Section  
137

**Laws of Minnesota 2015, 1<sup>st</sup> Special Session, Chapter 4, Article 4****Sec. 137. FEDERAL CLEAN WATER ACT SECTION 404 PERMIT PROGRAM FEASIBILITY STUDY.**

(a) The Board of Water and Soil Resources and the commissioner of natural resources shall study the feasibility of the state assuming administration of the section 404 permit program of the federal Clean Water Act. The United States Army Corps of Engineers, St. Paul District; and the United States Environmental Protection Agency shall be consulted with during the development of the study. The study shall identify:

- (1) the federal requirements for state assumption of the 404 program;
- (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;
- (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;
- (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;
- (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;
- (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;
- (7) the estimated costs and savings that would accrue to affected units of government;
- (8) the effect on application review and approval processes and time frames;
- (9) alternatives to assumption that would also achieve the goals of regulatory simplification, efficiency, and reduced permitting times;
- (10) options for financing any additional costs of implementation; and
- (11) other information as determined by the board and commissioner.

(b) The board and commissioner shall involve stakeholders in the development of the plan of study consistent with Minnesota Statutes, section 103B.101, subdivision 16 (*see Sec. 73, below*).

(c) By January 15, 2017, the board and commissioner must report the study to the legislative policy and finance committees and divisions with jurisdiction over environment and natural resources.

**Sec. 73.** Minnesota Statutes 2014, section 103B.101, is amended by adding a subdivision to read: Subd. 16. Wetland stakeholder coordination. The board shall work with wetland stakeholders to foster mutual understanding and provide recommendations for improvements to the management of wetlands and related land and water resources, including recommendations for updating the Wetland Conservation Act, developing an in-lieu fee program as defined in section 103G.005, subdivision 10g, and related provisions. The board may convene informal working groups or work teams to provide information and education and to develop recommendations.

Appendix B - Minnesota Section 404 Assumption Feasibility Study -  
Project Work Plan

## Clean Water Act Section 404 Assumption Feasibility Study for Minnesota Project Work Plan

*Minnesota Department of Natural Resources*

*Minnesota Board of Water and Soil Resources*

Rev. December 2015 - DRAFT

### **Purpose**

The purpose of this project is to comply with Minnesota Laws 2015 1st Special Session, Chapter 4, Article 4, Section 137, which requires the Board of Water and Soil Resources (BWSR) and the Department of Natural Resources (DNR) to study the feasibility of the state assuming the Clean Water Act Section 404 permitting program and report to the appropriate legislative committees and divisions by January 15, 2017 (Attachment A). In addition to the feasibility report, the agencies propose to provide recommendations based on the findings of the study.

### **Roles/Responsibilities/Process**

**Sponsoring Agencies** – The DNR and the BWSR have overall responsibility for conducting the feasibility study and submitting a report to the legislature. Because the Minnesota Pollution Control Agency (PCA) has a significant role in the Section 404 permitting process (certifying that permits meet state water quality standards under Section 401 of the Clean Water Act), that agency is included as a sponsoring agency. Upper level managers (assistant commissioners, assistant director) from each of the agencies are responsible for the overall project and final approval of the study and any associated recommendations.

**Project Management Team** – Responsible for general project oversight and coordination, including developing and implementing a work plan and timeline. Some project management team members may participate in researching Section 404 assumption requirements and collecting or developing information needed to address each of the specified report elements. The project management team will also propose action recommendations to be considered by the agency managers. The project management team consists of the following:

Doug Norris, Wetland Program Coordinator, DNR, Ecological and Water Resources Division  
(Project Lead –responsible for overall coordination and report writing)

Tom Hovey, Water Regulations Unit Supervisor, DNR, Ecological and Water Resources Division

Dave Weirens, Assistant Director, BWSR

Les Lemm, Wetland Conservation Act Coordinator, BWSR

Catherine Neuschler, Agency Rules Unit Supervisor, PCA

Additional state agency staff members and staff from local governments may be consulted or included in conducting the study as needed.

**Federal Agency Consultants** – Responsible for providing information on the federal requirements for Section 404 assumption and other implications of assumption related to federal programs, specifically as they relate to circumstances in Minnesota.

U.S. Environmental Protection Agency representative  
U.S. Army Corps of Engineers, St. Paul District representative  
U.S. Fish and Wildlife Service  
USDA – Natural Resources Conservation Service representative (as needed)

**Tribal Governments** – All tribal governments in Minnesota will be consulted throughout the study to identify and address potential tribal concerns. When a state assumes the Section 404 program, it does not include lands within the exterior boundaries of tribal reservations. However, state assumption would have implications within the various treaty areas outside of the reservations.

**Stakeholders** – By law, stakeholders are to be involved in developing the plan of study, which will include assisting with problem identification and providing information and perspectives related to regulatory efficiency and resource protection associated with Section 404 assumption and alternatives to assumption. The following organizations, by interest sector, have been identified as stakeholders for the study:

**Agriculture**

Minnesota Agricultural Water Resources Center  
Minnesota Farm Bureau Federation  
Minnesota Association of Wheat Growers  
Minnesota Corn Growers Association  
Minnesota Farmers Union  
Minnesota Soybean Growers Association

**Business and Industry**

Aggregate Ready-Mix Assoc. of Minnesota  
Builders Association of Minnesota  
Iron Mining Association of Minnesota  
Mining Minnesota  
Minnesota Association of Realtors  
Minnesota Chamber of Commerce  
Minnesota Timber Producers Association/Minnesota Forest Industries  
Association of General Contractors of Minnesota  
American Council of Engineering Companies of Minnesota

**Environment/Conservation**

Audubon Minnesota  
Fish and Wildlife Legislative Alliance  
Izaak Walton League - Minnesota Division  
Minnesota Environmental Partnership  
Minnesota Center for Environmental Advocacy  
Minnesota Chapter of The Wildlife Society  
Minnesota Conservation Federation  
Minnesota Ducks Unlimited

Minnesota Sierra Club - North Star Chapter  
Minnesota Waterfowl Association  
Pheasants Forever

Governmental

Association of Minnesota Counties  
Minnesota Inter-County Association  
Minnesota County Engineers Association  
League of Minnesota Cities  
Minnesota Association of Soil and Water Conservation Districts  
Minnesota Association of Townships  
Minnesota Association of Watershed Districts  
Minnesota Department of Agriculture  
Minnesota Department of Transportation  
Minnesota Rural Counties Caucus

Other

Minnesota Wetland Professionals Association

Any organization or individual can request to be added to the stakeholder list. All stakeholders will be provided with opportunities to review and provide input on the plan of study as well as drafts of the feasibility study report and will otherwise be consulted as necessary.

Core Study Planning Group -- A series of four to five stakeholder meetings will be held over an approximate 18 month period to develop the plan of study and provide input as the study progresses. To ensure productive, workable meetings, a smaller (12 – 15 member) core study planning group will be formed to actively participate in the meetings. Representatives for the core study planning group are being solicited as follows:

Agriculture

Minnesota Agricultural Water Resources Center (2-3 representatives from constituent organizations)

Business and Industry

Minnesota Chamber of Commerce (2-3 representatives from constituent organizations)

Environment/Conservation

Minnesota Environmental Partnership (2-3 representatives from constituent organizations)  
Unaffiliated Organizations – Fish and Wildlife Legislative Alliance, Minnesota Ducks Unlimited, Minnesota Waterfowl Association, Pheasants Forever, Minnesota Chapter of The Wildlife Society (1-2 representatives will be selected from among these groups, based on expressed interest)

Governmental (one representative each)

Association of Minnesota Counties

Minnesota County Engineers Association

Minnesota Inter-County Association

Minnesota Association of Soil and Water Conservation Districts

Minnesota Department of Transportation

Other

Minnesota Wetland Professionals Association (one representative)

All stakeholders will be invited to the stakeholder meetings and have some opportunity to provide input. However, primary participation will be through the core study planning group.

**Consultants/Contractors/Interns** – Potential roles:

- Assist with meeting logistics and facilitation.
- Gather information, perspectives and advice on Section 404 assumption from other states that have assumed the program (Michigan, New Jersey) or are actively investigating assumption.
- Evaluate economic implications of Section 404 assumption (costs and savings that would accrue to affected units of government and permit applicants).

**Timeline**

November 2015	Project work plan finalized; all participants and stakeholders identified and confirmed
January 2016	Stakeholder meeting to discuss plan of study and provide input on problem identification and on each of the required elements of the study report
March 2016	Plan of study finalized and approved; RFPs prepared for any consulting/contracting elements
June 2016	Contracts awarded and work begins
September 2016	Contractor reports completed
October 2016	Draft study report prepared and distributed to stakeholders for review
October 2016	Stakeholder meeting to discuss draft study report
November 2016	Final draft study report prepared and distributed to stakeholders for review
November 2016	Study report finalized and approved by DNR commissioner and BWSR executive director
December 2016	Final study report submitted to BWSR Board for approval
January 15, 2017	Final study report submitted to legislative committees

## Attachment A

**Laws of Minnesota 2015 Special Session Chapter 4****Sec. 137. FEDERAL CLEAN WATER ACT SECTION 404 PERMIT PROGRAM FEASIBILITY STUDY.**

(a) The Board of Water and Soil Resources and the commissioner of natural resources shall study the feasibility of the state assuming administration of the section 404 permit program of the federal Clean Water Act. The United States Army Corps of Engineers, St. Paul District; and the United States Environmental Protection Agency shall be consulted with during the development of the study. The study shall identify:

- (1) the federal requirements for state assumption of the 404 program;
- (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;
- (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;
- (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;
- (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;
- (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;
- (7) the estimated costs and savings that would accrue to affected units of government;
- (8) the effect on application review and approval processes and time frames;
- (9) alternatives to assumption that would also achieve the goals of regulatory simplification, efficiency, and reduced permitting times;
- (10) options for financing any additional costs of implementation; and
- (11) other information as determined by the board and commissioner.

(b) The board and commissioner shall involve stakeholders in the development of the plan of study consistent with Minnesota Statutes, section 103B.101, subdivision 16 (*see Sec. 73, below*).

(c) By January 15, 2017, the board and commissioner must report the study to the legislative policy and finance committees and divisions with jurisdiction over environment and natural resources.

**Appropriations:**

Article 3, Section 3, Subd. 3

To DNR, Ecological and Water Resources Division:

(7) compliance and monitoring.

\$10,000 the first year and \$64,000 the second year are to study, in cooperation with the Board of Water and Soil Resources, the feasibility of the state assuming administration of the section 404 permit program of the federal Clean Water Act as required in this act. This is a onetime appropriation.



Article 3, Section 4,

To BWSR

\$8,000 the first year and \$262,000 the second year are to study, in cooperation with the commissioner of natural resources, the feasibility of the state assuming administration of the section 404 permit program of the federal Clean Water Act as required in this act. This is a onetime appropriation.

Appendix C - 2012 Letter from BWSR Executive Director to Chairman of  
the House Subcommittee on Water Resources and Environment



September 27, 2012

Representative Bob Gibbs, Chairman  
 Transportation and Infrastructure Committee  
 Subcommittee on Water Resources & Environment  
 B-370A Rayburn HOB  
 Washington, DC 20515

Re: State Assumption of Clean Water Act 404

Dear Chairman Gibbs:

Thank you for holding the September 20, 2012 Subcommittee hearing on the potential for states to assume a lead role in wetland protection. This letter is written in support of your efforts to address this issue.

The State of Minnesota implements a comprehensive, stand-alone wetland protection program established in State law and rule entirely separate from Section 404 of the Federal Clean Water Act (404). The Minnesota Wetland Conservation Act (WCA), signed into law in 1991, operates similar to the 404 program in many respects, and because of that, and we have accomplished several coordination initiatives with the U.S. Army Corps of Engineers-St. Paul District. The WCA generally provides a greater level of protection and jurisdiction than 404 as it applies to all wetlands, including isolated wetlands and those affected solely by drainage.

The WCA relies on a network of trained State and local government staff to provide valuable expertise in program implementation, including site reviews and wetland impact authorizations or denials. The program includes a comprehensive wetland banking program that includes more restored wetlands than in any other state, including State funded wetland mitigation for public road projects. The State has also restored thousands of acres of wetlands through the Reinvest in Minnesota (RIM) program – mostly in the critical prairie pothole areas of western Minnesota.

In Minnesota, the WCA is implemented concurrent with the Federal 404 program. This can result in an extra layer of required regulatory approvals for landowners. For example, while the WCA includes specific time limits for decisions and administrative appeals, 404 decisions are often indeterminate. Minnesota is in a strong position to accomplish key 404 objectives through either a federally recognized state program or a coordinated approach that allows parts of the 404 program to be delegated to the State. With this in mind, we offer the following recommendations:

1. **Remove barriers to 404 assumption.** The assumption process should recognize overall protection and service delivery outcomes rather than being focused only on process, and thus be easier for states to accept implementation responsibility.
2. **Allow for formal recognition of state programs.** Provide a mechanism for federal recognition or delegation to state programs that achieve goals of the 404 program, without assuming all the federal processes.

<i>Bemidji</i>	<i>Brainerd</i>	<i>Duluth</i>	<i>Fergus Falls</i>	<i>Mankato</i>	<i>Marshall</i>	<i>New Ulm</i>	<i>Rochester</i>
403 Fourth Street NW Suite 200 Bemidji, MN 56601 (218) 755-2600	1601 Minnesota Drive Brainerd, MN 56401 (218) 828-2383	394 S. Lake Avenue Suite 403 Duluth, MN 55802 (218) 723-4752	1004 Frontier Drive Fergus Falls, MN 56537 (218) 736-5445	1160 Victory Drive South Suite 5 Mankato, MN 56601 (507) 389-6784	1400 East Lyon Street Marshall, MN 56258 (507) 337-6060	261 Highway 15 South New Ulm, MN 56073 (507) 359-6074	3555 9 <sup>th</sup> Street NW Suite 350 Rochester, MN 55901 (507) 206-2889

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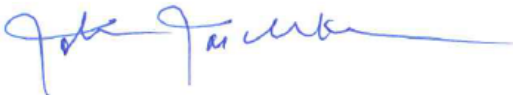
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Representative Bob Gibbs, Chairman  
September 27, 2012  
Page Two

3. **Allow for partial assumption.** Assumption or "certification" of certain elements of a state program should also be allowed. Minnesota's wetland banking program is one example.
4. **Provide federal funding for implementation.** A shared approach to funding wetland protection programs would be more efficient and cost-effective for both state and federal governments.

In summary, the State of Minnesota supports efforts for formal recognition of state wetland protection programs, like the WCA, that achieve the resource objectives of 404. We appreciate the Subcommittee's attention to this issue and the opportunity to provide comments.

Sincerely,



John Jaschke, Executive Director  
Minnesota Board of Water and Soil Resources (BWSR)

Cc: Les Lemm, BWSR WCA Program Coordinator  
Tamara Cameron, Regulatory Branch Chief, Corps of Engineers-St. Paul District  
BWSR Wetland Committee Members  
Minnesota Congressional Delegation

Appendix D - Notes from Minnesota – EPA Teleconference on Section  
404 Assumption Requirements

**Notes from Feb. 2, 2016 Teleconference – Minnesota Section 404 Assumption Feasibility Study**

Approved by all attendees

**Attending:**

Kerryann Weaver, Melanie Burdick, Reginald Pallesen – U.S. Environmental Protection Agency (EPA),  
Region 5

Kathy Hurlid – EPA HQ

Jill Bathke – U.S. Army Corps of Engineers, St. Paul District

Dave Weirens, Les Lemm – Mn. Board of Water and Soil Resources (BWSR)

Catherine Neuschler – Mn. Pollution Control Agency

Tom Hovey, Doug Norris – Mn. Department of Natural Resources

**Purpose:** Discuss Minnesota regulatory structure, particularly the MN Wetland Conservation Act (WCA), regarding suitability for Clean Water Act (CWA) Section 404 assumption. The attached document (Regulatory models in Minnesota) was circulated to attendees in advance of the teleconference.

**Notes:** Initial discussion focused on the current regulatory structure of the WCA. EPA representatives indicated that based on their understanding of the current WCA structure, it would not meet CWA requirements for state assumption. The main reason is that under 404 assumption, permitting authority must be with a state agency, or delegated to another state-level entity. CWA regulations (40 CFR Part 233.2) require that, under a state-assumed program, permit decisions be made by the state agency Director “or the delegated representative of the Director.” While this authority does allow for the delegation of decision-making authority to another state officer, it is EPA’s understanding that this authority does not allow delegation to a local government. This also includes responsibility for public noticing of permit applications and coordination with EPA on the applications. Even though BWSR has ultimate control over local government WCA decisions through the appeal process, the fact that the initial permitting decision is made by a local government is not, in EPA’s view, consistent with CWA requirements for assumption. EPA also had concerns over the practicality of EPA coordinating with and monitoring the regulatory activities of several hundred local governments, rather than a single (or a few) state agency and staff. EPA expressed the same legal and practical considerations regarding the 2<sup>nd</sup> alternative model described in the attached document. EPA supports local governments having input into the permit decisions, but CWA requirements are that a state agency must have responsibility for administering the application process in addition to making permit decisions and enforcement.

Regarding the 3<sup>rd</sup> regulatory alternative model, EPA representatives indicated that while General Permits can be issued by state agencies that have assumed the Section 404 program, such GPs must be approved by the EPA and the approval depends on the details. These GPs are renewed every 5 years.

Strictly in terms of state regulatory structure, EPA stated that the 4<sup>th</sup> alternative model would be similar to other states that have assumed the Section 404 program and would be approvable, provided the state program met all of the other CWA requirements.

**Additional discussion items:**

MN permit decision timelines (under MN Statutes 15.99) clearly conflict with CWA review periods under an assumption scenario. If Minnesota were to assume the Section 404 program, permit applications subject to EPA review would have to somehow be exempted from current state timeline requirements.

EPA staff capacity to coordinate with state agencies and review state permits under an assumed 404 program is not a factor in the EPA decision whether to approve a state's assumption application. If a state meets the CWA requirements for assumption, EPA must approve the application.

**Attachment:** Regulatory models in Minnesota.docx  
 Current water/wetland regulatory model in Minnesota:

	<b>Public Waters Permit Program (PWPP)</b>	<b>Wetland Conservation Act (WCA)</b>
<b>Administered by:</b>	Mn. Dept. Natural Resources, specifically area hydrologists in the Division of Ecological and Water Resources.	Local government units (LGU) with oversight by Board of Water and Soil Resources (BWSR).
<b>Applicable rules:</b>	Chapter 6115	Chapter 8420
<b>Jurisdiction over:</b>	Public waters identified on Public Waters Inventory (PWI) maps. Public waters includes public waterbasins (typically lakes), public watercourses and public waters wetlands. See Part IX, Additional Resources for information on availability of PWI maps.	All naturally occurring wetlands (as determined by the Corps of Engineers Wetland Delineation Manual) that are not Public Waters.
<b>Jurisdictional boundary determined by:</b>	Ordinary High Water Level.	Corps of Engineers Wetland Delineation Manual (1987 and Regional Supplements).
<b>Impact defined as:</b>	Alteration of course, current or cross-section.	Draining, filling, and in some cases excavation.
<b>Exemptions:</b>	Several - mostly activities that are regulated by other programs or de minimis-type activities .	Several (see 8420.0420).
<b>Noticing requirements:</b>	Applications and decisions sent to Soil & Water Conservation District, Watershed District (if one exists) and mayor of municipality (if applicable).	Applications and decisions sent to Soil & Water Conservation District, Watershed District or Watershed Mgmt. Organization (if one exists), BWSR, DNR, and members of public that request.
<b>Permit application review standards:</b>	Riparian rights, evaluation of alternatives, minimize environmental damage, appropriate mitigation. Filling public waters for private development is prohibited. See Part III regarding public waters wetlands.	Sequencing (avoid and minimize impacts, replace unavoidable impacts with wetlands of equal or greater public value, etc.).



<p><b>Appeal procedures:</b></p>	<p>Contested case hearings with administrative law judge.</p>	<p>Appeal to BWSR (BWSR makes final decision on LGU decisions that are appealed, and BWSR staff have standing to appeal LGU decisions).</p>
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The main issue for our discussion is administration and implementation roles. For the PWPP, this is probably not much of an issue as far as 404 assumption since the program is carried out completely by MnDNR staff (however, there may be other aspects of the PWPP that would have to be addressed in an assumption scenario). Of more interest is WCA, which relies heavily on local governments for implementation. However, here are a few factors to consider under the current regulatory set-up:

- BWSR staff has an opportunity to, and generally does, participate in all LGU decisions through the Technical Evaluation Panel (TEP) process, which is similar to the federal IRT except the TEP arguably has more authority (MN Rule 8420.0240).
- BWSR oversight also includes annual reporting requirements, spot-checks, and audits of LGU implementation, with the authority to withhold funding and/or declare a moratorium on all wetland activities within the jurisdiction of an LGU for inadequate implementation (MN Rule 8420.0200, Subd. 2 and 3).
- BWSR can appeal all LGU decisions and is also the agency that hears and acts on the appeal (MN Rule 8420.905, Subp. 3). Legally, a decision on an appeal is the final decision on an application. As such, all WCA decisions are ultimately subject to BWSR control under the current structure.
- Many of the LGUs that implement WCA are Soil and Water Conservation Districts, which are governmental subdivisions of the State established by BWSR and subject to BWSR oversight and funding (Minn. Stat. § 103C.201 and 103C.401).

Alternative models for implementing WCA, for discussion purposes:

- 1) The current structure, with some potential minor modifications.
- 2) LGUs continue to administer WCA (accepting permit applications, developing findings, etc.), but BWSR staff make decisions on approval/disapproval, with input from LGUs.
- 3) BWSR assumes full administration/implementation, but develops General Permits that allow LGUs to make permit decisions for certain categories and/or sizes of activities.
- 4) BWSR assumes full administration/implementation; LGUs can participate via the Technical Evaluation Panel process.

There may be additional models along this continuum.

Appendix E - Other state experiences with assumption – document  
review

**Information sources and notes from a review of other states' efforts on Section 404 assumption**

By Heidi Affi, MPCA Intern, Dec. 2015

**VIRGINIA**

- [http://www.deq.virginia.gov/Portals/0/DEQ/LawsAndRegulations/GeneralAssemblyReports/404\\_Feasibility\\_Study\\_2012.pdf](http://www.deq.virginia.gov/Portals/0/DEQ/LawsAndRegulations/GeneralAssemblyReports/404_Feasibility_Study_2012.pdf) : Study of the Costs and Benefits of State Assumption of Federal 404 Clean Water Act Permitting Program (Feasibility report)
  - benefits:
    - individual state control of water resources and a streamlined regulatory program
  - drawbacks:
    - increased costs and staffing & lack of funding for operation and administration
    - long application time
    - amendments to existing state law/programs
    - complexities in adhering to 404 assumption standards as state and federal authorities are different
    - lack of partial assumption
    - section 10 navigable waters are under Corps jurisdiction (rivers and harbors act)
    - goals could be met by an adequately funded state program
  - **DEQ assesses the current wetlands program including regulatory structure; jurisdictional scope; permit processing procedures; compliance mechanisms; existing staff; existing workloads; and cost analysis of permitting fees, salaries, and other expenditures. DEQ assessed the respective permit workloads for the VWP program and the corps' norfolk district for the period from calendar years 2010 through 2011, including permit types and processing timeframes. DEQ incorporated existing workload analysis data. DEQ analyzed operations reports for both programs to identify areas where effort is duplicated, where the Corps is performing duties that DEQ is not, and where the DEQ's jurisdiction exceeds the Corps', as with isolated wetlands and excavation in jurisdictional waters. (5-6)**
  - "in lieu of [assumption], or until a stable funding mechanism is identified, the commonwealth could explore working with the corps to renegotiate and expand the SPGP to provide resource protection as well as consistency, timeliness and certainty to a broader group of projects" (15).

**MONTANA**

- <http://leg.mt.gov/content/Committees/Interim/2013-2014/EQC/Meetings/September-2014/404-clean-water-act-issues.pdf> : Issues to consider for State Administration of Section 404 Clean Water Act permits
  - benefits of program:
    - increased efficiency combined with greater resource protection the the state
    - elimination of overlapping programs
    - more flexible regulations

- increased support for state review and local decision making
  - challenges:
    - demonstrating state jurisdiction is equal in scope to the federal law regarding waters of the US and proving state program is consistent with federal law
    - providing adequate funding for administration and operation
    - Section 10 Rivers and Harbors jurisdiction.
  - **Need to determine whether the state has adequate enforcement capability, enough public support, and the legal authority to meet federal requirements.**

## MINNESOTA

- [http://www.aswm.org/pdf\\_lib/404\\_assumption\\_feasibility\\_study\\_0509.pdf](http://www.aswm.org/pdf_lib/404_assumption_feasibility_study_0509.pdf) : State of Minnesota 404 Assumption Feasibility Study (1989)
  - **“The cost to the State without federal funding, the reportability by the State to the U.S. environmental protection agency and the program controversy with the public prevented the proposed legislation from being officially introduced during the session” (ii).**
  - includes requirements from the federal gov’t if MN would assume 404
  - desire to have a 401 similar program within the assuming agency
  - disadvantage noted from losing 401 requirements if the state assumes 404 (6)
  - topics explored:
    - types of activities and resources involved
    - federal conditions for state assumption
    - costs for state administration
    - alternative funding strategies
    - appropriate roles for state agencies and local units of government
    - necessary changes in current state law.
- <http://www.senate.leg.state.mn.us/departments/scr/report/bands/ENV.HTM> : American Indian Communities in Minnesota, Environmental Law on American Indian Reservations
  - “treatment as a state” (TAS) granted by EPA to an individual tribe through the rulemaking process
  - “Many tribes have been granted ‘treatment-as-a-state’ status with respect to funding components of various statutes, while a few have received ‘treatment-as-a-state’ status with respect to regulatory standards. No Minnesota tribe has yet implemented a regulatory program” (<http://www.senate.leg.state.mn.us/departments/scr/report/bands/ENV.HTM>)
  - **no tribes in MN have applied for Sec. 402 or Sec. 404 permitting authority under CWA**

## NEW JERSEY

- [http://www.aswm.org/pdf\\_lib/assumption\\_nj\\_style.pdf](http://www.aswm.org/pdf_lib/assumption_nj_style.pdf) : Assumption, New Jersey Style
  - preexisting state wetland program: Freshwater Wetland Protections Act. “The FWPA mirrors §404, incorporating the terms, definitions, review criteria, and conditions for permit approval

similar to those of the federal program. Furthermore, the law seeks to modify those parts of the CWA that were perceived to be responsible for continuing losses of wetlands in New Jersey” (6)

- assumption process: views of the regulated community, MOA’s overseen by EPA and by Corps, dealing with ESA
- opposition
  - state program less stringent than federal
  - no compliance with ESA, section 7
  - **complication with state exemptions and “projects that were grandfathered in under the state law, and the belief that additional enforcement staff would be necessary upon assumption” (7) \*\*\*\*\***
  - “Determine who will support and who will oppose assumption, and try to address reservations early in the process. Talk to all of the federal agencies directly. While EPA can be helpful, agreement with EPA is no substitute for direct experience with the other agencies” (7)

## MICHIGAN

- [http://www.oregon.gov/dsl/PERMITS/docs/404\\_michigan\\_program\\_eval\\_051308.pdf](http://www.oregon.gov/dsl/PERMITS/docs/404_michigan_program_eval_051308.pdf) : Results of the EPA Region 5 review of Michigan department of Environmental Quality’s Section 404 Program
  - Analysis of Legal authorities
    - Jurisdiction, permit exemptions, permitting authorities, compliance with 404(b)(1) guidelines, enforcement concerns, Indian lands, effect of newly-promulgated rules, notice of which legal provisions constitute Michigan’s program
  - Assessment of program administration
    - Assessment of 404 program implementation for compliance with the state program regulations: permit requirements, program operation, & federal oversight. wetland identification (very fleshed out) and enforcement and compliance review.
  - Responsiveness Summary of comments
    - Summary of comments from the public with responses by EPA, summary of comments from FWS and responses by EPA, and summary of comments from FSR and responses by EPA.
  - **Findings: pretty much summarizing the conclusions and recommending/giving corrective actions. see pages 98-107**
- [https://www.michigan.gov/documents/mdard/Commission\\_statement\\_in\\_support\\_of\\_continued\\_404\\_assumption\\_442696\\_7.pdf](https://www.michigan.gov/documents/mdard/Commission_statement_in_support_of_continued_404_assumption_442696_7.pdf) : Michigan’s clean water act section 404 program
  - Financial pressures and jurisdictional uncertainties make it difficult for the EPA to review 404 violations in Michigan.
  - Especially after the Rapanos case, there is much confusion about jurisdiction and jurisdictional language.
  - **Highlights lack of wetland enforcement** in section 5 (except for Michigan)

- [http://water.epa.gov/type/wetlands/upload/MI-2011-MOA\\_04.pdf](http://water.epa.gov/type/wetlands/upload/MI-2011-MOA_04.pdf) : Memorandum of Agreement between the Michigan Department of Environmental Quality and the United States Protection Agency, Region 5
  - establishes:
    - authorities
    - compliance monitoring and enforcement
    - federal permit of permit applications and waiver of review
    - coordination with other states and tribes
    - permit processing and federal comment
    - reporting, program review and oversight
    - Modifications.
  - Heavily focuses on the relationship between the EPA and MDEQ, allowing state to have most of the power until there are violations, comments, or jurisdictional barriers.

## FLORIDA

- [http://www.aswm.org/pdf\\_lib/consolidation\\_program.pdf](http://www.aswm.org/pdf_lib/consolidation_program.pdf) : Florida Consolidation of State and Federal Wetland Permitting Programs Implementation of House Bill 759
  - 759 mandates the DEP to report on the federal and state statutory changes that would be required to maximize consolidation of federal and state wetland permitting programs (2)
  - explores two options:
    - 404 assumption
    - expanded State programmatic general permits
  - has requirements for federal changes if the state is to assume 404, necessary changes in state statutes, and additional comments are made in recognition of funding and the ESA
  - Florida's wetland protection program is a dredging and filling permitting program in all wetland and surface waters, including waters no longer subject to federal jurisdiction under the SWANCC decision. "It also covers activities that impact the flow of water, such as storm water, across the surface of the land" (3)
  - **the plan as of now is to essentially review and expand the SPGP program while working with the Florida legislature to appropriate more funding to the DEP that would make full 404 assumption possible, including the assumption of federal wetlands (404(g)).**

## ALASKA

- [http://dec.alaska.gov/water/wetlands404/docs/SoA\\_Effort\\_to\\_become\\_primary\\_404\\_agency.pdf](http://dec.alaska.gov/water/wetlands404/docs/SoA_Effort_to_become_primary_404_agency.pdf) : The State of Alaska's Effort to Become the Primary Agency for Section 404 Permits
  - "On May 21, 2013, Governor Parnell signed SB 27 into law, giving DEC and DNR authority to evaluate the costs and benefits of state assumption of the section 404 Program, and to submit an application for assumption to EPA" (2)
  - Alaska currently operates a 401 program through 404.

- Pro-assumption argument:
  - “State assumption of the section 404 program gives Alaska, not the Corps or EPA, the leadership role in evaluating and issuing dredge and fill permits in “assumable waters” of the state. With a state- run section 404 program, two agencies – DEC and DNR – that have a long history of successful interaction – will run the program, rather than the four currently involved: The Corps, EPA, DEC, and DNR. Two vs. four simply means less bureaucracy” (6).
- **sees no NEPA review as a benefit to assumption**
- Downsides to assumption are what other states report on in addition to unclear jurisdiction between the state and the corps.
- recognizes SPGPs as an alternative
- [http://dec.alaska.gov/water/wetlands404/docs/404\\_Assumption\\_MOU.pdf](http://dec.alaska.gov/water/wetlands404/docs/404_Assumption_MOU.pdf) : Memorandum of Understanding between Corps, EPA, and the State of Alaska for 404 assumption study

## GENERAL

- <http://www.aswm.org/wetland-programs/regulation/s-404-assumption>
- [http://www.aswm.org/pdf/lib/CQ\\_swancc\\_6\\_26\\_06.pdf](http://www.aswm.org/pdf/lib/CQ_swancc_6_26_06.pdf)
- [http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa\\_guide/cwa\\_juris\\_2dec08.pdf](http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/cwa_juris_2dec08.pdf)
- <http://www2.epa.gov/sites/production/files/2015-06/documents/epa-hq-ow-2011-0880-20862.pdf>
- [http://online.nwf.org/site/DocServer/Wetlands\\_Report\\_July\\_2009.pdf?docID=10661](http://online.nwf.org/site/DocServer/Wetlands_Report_July_2009.pdf?docID=10661) : Protecting and restoring the Kidneys of the Great Lakes (2009)
  - key findings (taken directly from slide 3)
    - All four states have a very high percentage of applications approved.
    - While all states have developed wetland condition assessment programs, Ohio’s is likely one of the most sophisticated programs in the country.
    - Wetland inventories are still not complete in most of the states.
    - **Statutory and/or rulemaking restrictions and exemptions pose challenges to coverage of some isolated wetlands.**
    - **Statutory gaps in coverage of drainage activities remain in Ohio and Wisconsin.**
    - **Exemptions for agricultural, forestry, and some drainage activities remain problematic, and losses associated with these activities are generally not tracked.**
    - In spite of reasonable siting priority language in statutes or rules, mitigation sometimes occurs far removed from impact sites, and the quality of mitigation projects is not always regularly tracked.
    - Restoration efforts have been increasing, in recent years, and all states have some type of wetlands restoration or broader Great Lakes restoration strategy in place or development, and have made some efforts at identifying potentially restorable wetlands.

- Public notice and participation procedures vary, ranging from online notices and other announcements in Michigan and Ohio to more restricted announcements in Minnesota, to lack of pre-decision notices in Wisconsin.
  - suggestions for state programs focus on:
    - exemptions
    - ensure adequate funding (specific to 404 in Michigan but also generally for the possibility of 404 assumption)
    - increase protocol of isolated wetlands
    - fill statutory gaps related to drainage in wetlands
    - mitigation as part of permits
  - Particular specifics about state assumption of 404 are out of reach for this report but the general critique of state programs demonstrates that 404 cannot be assumed by a few states on basis other than funding. There are statutory gaps, lack of enforcement strength, and even lack of public comments.
- [http://www.aswm.org/state\\_meetings/2008/hurld.pdf](http://www.aswm.org/state_meetings/2008/hurld.pdf) : Pursuing Clean Water Act 404 Assumption: What states say about the benefits and obstacles
  - steps states have taken to assess 404 assumption:
    - consult stakeholders and developed initial resource estimates
    - examined regulatory consistency
    - proposed statutory, rule, or programmatic changes (or made them)
    - developed draft assumption requests
  - recommendations to EPA:
    - provide federal funding for implementation
    - expand EPA regional staff/resources to support assumed programs
    - provide detailed guidance on steps needed for assumption (particularly regarding endangered species act)
    - develop clearer/easier ways to step up to assumption
- <http://www.ncleg.net/documentsites/committees/BCCI-6626/2-27-14%20Committee%20Meeting/2-27-14%20Expanding%20State%27s%20Role%20with%20CWA.pdf> : Expanding the states' role in implementing 404 assumption
  - two main difficulties:
    - states are held to a higher standard when implementing 404 compared to other parts of the clean water act
    - no funding
    - "lack of political will, lack of funding, uncertainty on how to address other federal requirements, especially the Endangered Species Act (ESA), and jurisdictional issues, e.g. Section 10 waters, post-Rapanos uncertainty over isolated wetlands and headwater streams" (1)
  - some states may chose 401 or SPGPs or RGP (general permits)
  - summaries of state studies and state assumptions



- trouble with adjusting state law to comply with federal standards, avoid partial assumption, & endangered species protections
- **if a state has an established wetland program that directs it to 404 assumption, it has necessary funding for 404 assumption: “The state wetland program was already fully funded, so as long as the wetland program would be in place, New Jersey would have the necessary funding to support the 404 program” (7)** Despite this, New Jersey has had to hire some employees on EPA funding.
- Benefits:
  - improved resource protection
  - increased program efficiency
  - effective allocation of state and federal resources
  - improved integration with other state programs
  - use of state-specific resource policies and procedures
  - increased regulatory program stability
  - increased public support (9)
- barriers:
  - meeting program requirements
  - inability to assume administration of Section 10 waters of the Rivers and Harbors Act and wetlands adjacent to these waters
  - inability to assume 404 authority in only one geographic portion of the state
  - need for alternative coordination with other federal resource programs
  - lack of dedicated federal funding specifically for Section 404 Program administration
  - lack of detailed guidance from EPA on steps needed to assume 404 Program
  - uncertainty with inconsistent legal opinions at federal level in defining CWA waters
  - lack of political will within a state to deal with additional responsibilities of 404 assumption
- requirements:
  - jurisdiction
  - state laws must regulate at least the same activities as those regulated under federal law
  - ensured compliance with federal regulations (cannot be less stringent)
  - the state must have adequate enforcement authority.
- recommended changes to CWA 404 to support states:
  - funding
  - cooperation between corps and states for section 10 (rivers and harbors act) waters
  - Partial assumption in specific geographic areas only.

Appendix F - Assumption Study - State Summary Table

	Benefits of 404 Assumption	Barriers to 404 Assumption	Alternatives recognized	State changes necessary	Federal changes necessary	Methods of Study
Virginia (2012)	<ul style="list-style-type: none"> <li>- individual state control of water resources and a streamlined regulatory program</li> <li>- increased consistency in permit decisions</li> <li>- increased regulatory program stability and certainty</li> </ul>	<ul style="list-style-type: none"> <li>- high financial cost</li> <li>- lack of dedicated federal funding for 404 operation and administration</li> <li>- difficulty in meeting program requirements</li> <li>- lack of partial assumption option</li> <li>- section 10 navigable waters</li> <li>- loss of corps' knowledge base</li> </ul>	<ul style="list-style-type: none"> <li>- SPGP or 401, 401 is currently employed</li> </ul>	<ul style="list-style-type: none"> <li>- new funding for additional staff, training, and database improvements</li> <li>- amended laws and regulations to implement CWA and consistency, including changing or removing exemptions</li> </ul>	<ul style="list-style-type: none"> <li>- funding for implementation and operation of 404 assumption</li> </ul>	<ul style="list-style-type: none"> <li>- assess current wetland programs: jurisdiction, permitting process, existing staff and workloads, and other expenditures</li> <li>- cost analysis</li> <li>- permit workloads</li> </ul>
Montana	<ul style="list-style-type: none"> <li>- increased efficiency combined with greater resource protection the the state, elimination of overlapping programs, more flexible regulations, &amp; increased support for state review and local decision making</li> </ul>	<ul style="list-style-type: none"> <li>- demonstrating state jurisdiction is equal in scope to the federal law regarding waters of the US and proving state program is consistent with federal law, providing adequate funding for administration and operation, and section 10 jurisdiction.</li> </ul>	<ul style="list-style-type: none"> <li>- 401 is currently employed</li> </ul>	<ul style="list-style-type: none"> <li>- need to determine whether the state has adequate enforcement capability, enough public support, and the legal authority to meet federal requirements.</li> </ul>		<ul style="list-style-type: none"> <li>- identify overlapping regulations;</li> <li>- determine if Montana has the jurisdiction and authority to regulate activities covered by 404</li> <li>- solicit information from <b>*important parties*</b> to determine potential benefits, disadvantages, and obstacles</li> <li>- evaluate costs of applying, assuming, and ongoing costs of assumption and identify state laws that may need amendment to assume primacy</li> <li>-</li> </ul>

	<b>Benefits of 404 Assumption</b>	<b>Barriers to 404 Assumption</b>	<b>Alternatives recognized</b>	<b>State changes necessary</b>	<b>Federal changes necessary</b>	<b>Methods of Study</b>
Alaska	<ul style="list-style-type: none"> <li>- From their study: “State assumption of the section 404 program gives Alaska, not the Corps or EPA, the leadership role in evaluating and issuing dredge and fill permits in “assumable waters” of the state. With a state - run section 404 program, two agencies – DEC and DNR – that have a long history of successful interaction – will run the program, rather than the four currently involved: The Corps, EPA, DEC, and DNR. Two vs. four simply means less bureaucracy” (6).</li> <li>- no NEPA review is a benefit</li> </ul>	<ul style="list-style-type: none"> <li>- same as the other states, includes unclear jurisdictional between the states and the corps as a major deterrent. common threat with many coastal states.</li> </ul>	<ul style="list-style-type: none"> <li>- SPGPs and/or 401</li> <li>- 401 is currently in place</li> </ul>	<ul style="list-style-type: none"> <li>- Epa requirements to meet as a state: “has an equivalent scope of jurisdiction for those waters they may assume; regulates at least the same activities as the federal program; provides for public participation; is consistent with the CWA section 404(b)(1)Guidelines...; and has adequate enforcement authority”</li> </ul>	<ul style="list-style-type: none"> <li>- funding for implementation and operation</li> <li>- partial assumption as helpful</li> <li>- clear jurisdiction/definition of assumable waters</li> </ul>	<ul style="list-style-type: none"> <li>-Memorandum of Understanding in implementation of 404 assumption study, agreed upon with specific responsibilities by Corps, EPA, and the State</li> </ul>
Michigan	<ul style="list-style-type: none"> <li>-From the commission's statement in support of continued assumption: “elimination of a high percentage of duplication ... reduced costs for program applicants and often faster permit processes, more effective resource management at the watershed level, drawing on localized expertise and integration</li> </ul>	<ul style="list-style-type: none"> <li>- “lack of state program equivalency, lack of state implementation funds, and unwillingness to pay for something the feds are already doing”</li> </ul>	<ul style="list-style-type: none"> <li>- Currently employs 404 assumption</li> </ul>	<ul style="list-style-type: none"> <li>-current issues with 404: financial pressures and jurisdictional uncertainties make it difficult for the EPA to review 404 violations in Michigan.</li> <li>-changes due to court cases (Rapanos and now Clean Water Rule)</li> </ul>	<ul style="list-style-type: none"> <li>-EPA has no effective strategy or framework to evaluate 404 violations, the EPA does not have sufficient resources to make informed decisions about allocation for enforcement</li> <li>-jurisdictional issues in enforcement</li> </ul>	<ul style="list-style-type: none"> <li>-MOA between Michigan Department of Environmental Quality and USEPA Region 5</li> </ul>

	<b>Benefits of 404 Assumption</b>	<b>Barriers to 404 Assumption</b>	<b>Alternatives recognized</b>	<b>State changes necessary</b>	<b>Federal changes necessary</b>	<b>Methods of Study</b>
	<p>of wetland management with other state or tribal land use management and natural resource programs, incorporation of state goals into the overall permit process, and improved consistency and stability in the regulation of dredge and fill activities across multiple levels of state government.”</p>			<p>confuse jurisdiction/assumable waters</p>		
<p>New Jersey (1994)</p>	<ul style="list-style-type: none"> <li>- NJ passed a law in 1987 that mandated pursuing 404 assumption, seeking wetland protection</li> <li>- the building community was not enthused but preferred state programs as opposed to federal</li> </ul>	<ul style="list-style-type: none"> <li>- in NJ specifically, opposition to assumption came from FWS and national environmental groups. There was fear of not complying with section 7 of ESA. Environmental organizations feared that NJ was a bad example because of a lack of access to third party appeals for permit decisions, enforcement, and program funding.</li> </ul>	<ul style="list-style-type: none"> <li>- only other state that employs 404</li> </ul>	<ul style="list-style-type: none"> <li>- program to assume 404 should be closest in structure to federal 404 program</li> <li>- keep extensive records on program implementation</li> <li>- direct conversation with other agencies</li> <li>- coordination between EPA and FWS about ESA; consultation and MOAs to make all parties happy</li> </ul>	<ul style="list-style-type: none"> <li>- all federal agencies should adopt assumption as viable</li> <li>- “all involved federal agencies should suggest changes to the assumption regulations to address any additional concerns, such as satisfying the endangered species provisions.</li> <li>- more understanding standards of stringency</li> <li>- FUNDING</li> </ul>	<ul style="list-style-type: none"> <li>- Memorandums of Agreement and Understanding with other agencies</li> </ul>

	<b>Benefits of 404 Assumption</b>	<b>Barriers to 404 Assumption</b>	<b>Alternatives recognized</b>	<b>State changes necessary</b>	<b>Federal changes necessary</b>	<b>Methods of Study</b>
Oregon (2002)		<ul style="list-style-type: none"> <li>- (taken from 2002 document) : Oregon’s own Removal-Fill law contains a standard for evaluating alternative sites for proposed fills that 404 does not have in addition to public interest tests and alternative analyses</li> <li>- the state’s proposed standards for compensatory freshwater wetland mitigation are more stringent and far more specific than those contained in the federal MOA</li> <li>- in general, Oregon program enhances or exceeds the federal one by multiple standards</li> <li>- Oregon has an abundance of section 10 waters that are non-assumable</li> <li>- Oregon administers its endangered species program differently than the federal ESA</li> </ul>	<ul style="list-style-type: none"> <li>- its own wetland protection policies, SPGPs, 401 is currently employed</li> </ul>	<ul style="list-style-type: none"> <li>- changes in state endangered species conservation (salmon)</li> </ul>		<ul style="list-style-type: none"> <li>- side by side comparison of the federal CWA section 404 and the state’s removal fill program</li> <li>- close examination of existing state wetland protection programs</li> <li>- examination of jurisdiction</li> </ul>
Florida (2005)	<ul style="list-style-type: none"> <li>- mainly streamlining the process</li> </ul>	<ul style="list-style-type: none"> <li>- lack of full assumption, like waters under Rivers and Harbors Act and other non assumable waters</li> </ul>	<ul style="list-style-type: none"> <li>- SPGPs, 401 is currently employed</li> </ul>	<ul style="list-style-type: none"> <li>- adjust power of DEQ (wetland management)</li> <li>- amend state law to be consistent with CWA on a “recapture” provision in regards to agriculture</li> <li>- amend Florida state law to comply with</li> </ul>	<ul style="list-style-type: none"> <li>- want powers of full assumption of 404, including changes to Rivers and Harbors act so that states can assume section 10 navigable waters</li> <li>- remove the 5 year limitation on state issued 404 permits</li> <li>- delete “clean break” provision unless adequate funding and</li> </ul>	<ul style="list-style-type: none"> <li>- comparison of SPGPs to 404 assumption</li> </ul>

	Benefits of 404 Assumption	Barriers to 404 Assumption	Alternatives recognized	State changes necessary	Federal changes necessary	Methods of Study
				404(b)(1) - remove Florida’s default permit to applications not processed in 90 days - funding - amendments made under ESA section 7 as opposed to 10	resources are given to the state - require COE to continue monitoring, enforcing, and issuing modifications on permits previously issued by COE - allow the EPA administrator	
Minnesota (1989)	<ul style="list-style-type: none"> <li>- improve areas of overlap</li> <li>- increased state authority and enforcement</li> <li>- more regulation</li> <li>- public benefit</li> <li>- elimination of 401 program</li> </ul>	<ul style="list-style-type: none"> <li>- costs with no funding</li> <li>- EPA oversight and override</li> <li>- controversy/confusion over assumable waters</li> <li>- state changes necessary to comply</li> <li>- reports to EPA (costly) as well as difficulty in reporting and coordination in regards to 404 violations</li> </ul>	<ul style="list-style-type: none"> <li>- rgps 002,003,004</li> <li>- 401</li> <li>- wetland protection act</li> <li>- rewrite statutes to include state oversight of waters of the U.S. as defined by EPA</li> <li>- in lieu fee</li> </ul>	<a href="http://www.aswm.org/pdf/lib/404_assumption_feasibility_study_0509.pdf">http://www.aswm.org/pdf/lib/404_assumption_feasibility_study_0509.pdf</a> p.69	<a href="http://www.aswm.org/pdf/lib/404_assumption_feasibility_study_0509.pdf">http://www.aswm.org/pdf/lib/404_assumption_feasibility_study_0509.pdf</a> p.37	<ul style="list-style-type: none"> <li>- types of activities and resources involved</li> <li>- federal conditions for state assumption</li> <li>- costs for state administration, alternative funding strategies</li> <li>- appropriate roles for state agencies and local units of government</li> <li>- necessary changes in current state law</li> </ul>

## Appendix G - Code of Federal Regulations Chapter 40, Part 233 – 404, State Program Regulations

Available here: <https://www.epa.gov/cwa-404/40-cfr-part-233-404-state-program-regulations>



## Appendix H - ASWM/ECOS Handbook on State/Tribal Assumption

Available here: [http://www.aswm.org/pdf\\_lib/cwa\\_section\\_404\\_program\\_assumption.pdf](http://www.aswm.org/pdf_lib/cwa_section_404_program_assumption.pdf)