



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 United States, including wetlands. Regulated activities include, but are not limited to, placement of fill for commercial and private development, water resource projects such as dams and levees, infrastructure development, and mining projects. The regulatory program:

- Requires avoidance and minimization of impacts, and compensation for unavoidable impacts.
- Establishes a permitting process for the authorization of impacts.
- Provides exemptions for certain farming and forestry activities.
- Is administered, implemented and enforced by the US. Army Corps of Engineers, with oversight and additional enforcement by the Environmental Protection Agency (EPA).

What is “404 Assumption?”

Under Section 404(g) of the CWA, a state may apply to the EPA to administer a state water and wetland regulatory program that meets Section 404 requirements, eliminating the need for separate, federally issued permits for projects affecting those waters covered by the state’s assumed program.

- States must implement water and wetland protection measures that are at least as protective as those of the federal Clean Water Act.
- The US Army Corps of Engineers (USACE) retains authority over certain navigable waters and a portion of their adjacent wetlands.

Two states, Michigan and New Jersey, are successfully implementing state-assumed programs.

Reasons for State Pursuit of 404 Assumption

Factors that may generate interest in 404 Assumption include:

- Improved permitting timelines as a result of decreased regulatory redundancy, streamlined processes, and administration by more responsive regulatory authorities (State\Local vs. Federal).
- Reduced costs for permit applicants resulting from more efficient and timely processes.
- Improved resource management and regulatory consistency through seamless integration with other state programs and availability of local expertise.

Role of the Federal Government

Under an assumed program, the primary role of the federal government is to provide oversight.

- EPA will review certain permit applications to ensure consistency with federal standards.
- The state must regularly report on program implementation to the EPA.

- Any substantive changes to state statutes and regulations must be reviewed by EPA for consistency with CWA Section 404 guidelines.
- The U.S. Army Corps of Engineers would no longer have authority over state-assumed waters.

Is 404 Assumption a Viable Option for Minnesota?

Minnesota is well equipped to implement federal 404 requirements through its existing, comprehensive, and mature state water/wetland regulatory programs, including the:

- Wetland Conservation Act (WCA), administered by the Board of Water and Soil Resources (BWSR) with implementation through local governments.
- Public Waters Permit Program (PWPP) and Permits to Mine administered by the Department of Natural Resources (DNR).
- State water quality standards administered by the Pollution Control Agency (PCA).

Some regulatory or procedural modifications may be required for an existing state regulatory program to meet the requirements for 404 Assumption. Areas of state law that may require review include possible gaps in regulatory authority, the extent of local government authority in Wetland Conservation Act (WCA) implementation, and procedural considerations.

Minnesota Progress Toward 404 Assumption

Progress to date toward potential 404 Assumption includes the following milestones:

- Completion of a comprehensive analysis of 404 assumption, published on January 17, 2017 as the “Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study,” an interagency report from BWSR, DNR, and the PCA.
- Completion of the “Analysis of Retained and Assumable Waters in Minnesota” on May 3, 2018.
- 2019 Legislative funding directing the state to pursue 404 Assumption.
- Receipt of a grant from EPA to fund development of the state’s application.
- Hired a program coordinator responsible for developing the state’s 404 Assumption application.
- Ongoing coordination with the EPA for development of the state’s 404 Assumption application.

What are the Components of a 404 Assumption Application?

Developing the 404 Assumption application package is a substantial undertaking that requires considerable coordination with the EPA and approximately two years or more to complete. The package must include:

- Complete description of the state’s regulatory program(s).
- A statement from the Attorney General that the laws and regulations of the state provide adequate authority to carry out the program.
- Memorandums of Agreement with the EPA Regional Administrator and Secretary of the Army.
- Copies of all applicable state statutes and regulations.
- Letter from the Governor requesting program approval.

A complete application will allow for an informed decision by agency leadership and elected officials on whether to move forward with 404 Assumption. More info at: <https://bwsr.state.mn.us/404-assumption>

Minnesota Federal Clean Water Act Section 404 Assumption - Report on Funding Estimates

Executive Summary

This report fulfills the requirement of Laws of Minnesota 2021, 1st Special Session, Chapter 6, Article 2, Section 108, Subd. 9 requiring the Minnesota Environmental Quality Board (EQB) to submit a report on the additional funding required to secure 404 assumption and to fully implement the state-assumed program.

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 (USACE) 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(s) to meet Section 404 requirements (“404 Program assumption”), thereby eliminating the need for separate, federally issued permits for projects affecting those waters over which the state assumes authority.

To receive approval from EPA to assume responsibility for implementation of Section 404, the state must demonstrate adequate:

- Jurisdiction
- Legal Authority
- Staffing Capacity
- Regulations
- Enforcement Authority
- Compliance with certain standards and procedural requirements

There are three primary state surface water regulatory laws in Minnesota: The Wetland Conservation Act (WCA) administered by the Minnesota Board of Water and Soil Resources (BWSR) and implemented by local governments and, for activities associated with a permit to mine, the Department of Natural Resources (DNR); the Public Waters Work Permit Program (PWWPP) administered by the DNR; and state water quality standards administered by the Minnesota Pollution Control Agency (MPCA). Each of these regulatory authorities would have a role in implementing 404 assumption in Minnesota.

Recent efforts to explore 404 assumption in Minnesota include completion of the Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study (2017) and the Analysis of Retained and Assumable Waters in Minnesota (2018). In addition, the 2017 federal Assumable Waters Subcommittee report and subsequent memo from the Department of the Army regarding the identification of USACE-retained and state-assumable waters are relevant to potential 404 assumption in Minnesota. These reports and other related information are available on the BWSR website at:

<https://bwsr.state.mn.us/404-assumption>.

More recently, the state has made substantial progress in determining what changes to state regulatory programs would be necessary to secure 404 assumption and how those changes affect estimates for additional funding. Such changes include, but are not limited to: establishment of a WCA permitting program that complies with federal 404 assumption requirements, whereby BWSR acts as the “permitting authority” while maintaining the important implementation role of local governments; establishment of procedures to ensure that state water quality standards are met; improvements to

ensure adequate jurisdiction, mitigation options, and program implementation on federal lands; compliance with federal procedural requirements; and improvements to the state’s permitting and data infrastructure. Broadly, additional funding would be required for development and submittal of the application, implementation of the program once approved, and to cover certain one-time costs that would occur at program start-up. Specifically, the funds required to 1) implement 404 assumption and to 2) complete assembly of the application materials are shown in the following two tables:

Additional annual funding (\$mil) required for 404 assumption implementation.

Agency	2022 Additional Funding Estimates ¹
BWSR	\$2.1 ²
DNR	\$2.7
MPCA	\$0.0
Total State Agency	\$4.8

1. In 2022 dollars.
2. The funding estimate for BWSR includes additional costs of implementation for WCA local government units, implementing expanded state jurisdiction, and ongoing maintenance costs for the online WCA permitting system.

Total additional funding required to implement the assumed 404 program is currently estimated at \$4.8 million. However, it is expected that these funding estimates would be refined further if additional progress is made in developing the specific implementation structure and procedures for the state programs as would be necessary for 404 assumption.

Additional funding (\$thousands) required to assemble 404 assumption materials.

Agency	Funding Required ¹
BWSR	\$580 ²
DNR	\$100
MPCA	\$60
Total State Agency	\$740

1. Required funding calculated using an average cost of \$150,000 per FTE based on total agency staffing costs (including salary, benefits, and overhead) in 2022.
2. BWSR funding includes costs for contractual work and certain tasks for all three agencies.

In addition to the funding in the above table, one-time costs that would be incurred at the time of program start-up include:

- \$1.5 million for development of a WCA online permitting system.
- \$800,000 to update DNR’s existing MPARS permitting system.
- A to-be-determined amount to execute programmatic changes and finalize the 404 assumption application, such as amending state statutes and rules, finalizing agreements with federal agencies, workload associated with the formal application process, and conducting training and outreach.

A legislative appropriation of \$740,000 would allow for continued analysis, program development work, and assembly of draft 404 assumption application materials. This work would result in a report to the Legislature that summarizes the necessary programmatic changes, required statute changes, and final cost estimates necessary to make an informed decision on whether to apply for 404 Assumption (such approval would consist of approval from the Governor and concurrence by the Legislature).