

Briefing Paper on Clean Water Act Section 404 Assumption in Minnesota

Prepared by Minnesota Department of Natural Resources and the Board of Water and Soil Resources
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Background

The following background information is taken from *Clean Water Act Section 404 Program Assumption: A Handbook for States and Tribes*.¹

“State/tribal assumption. In 1977, the U.S. Congress formally recognized the potential for and desirability of a major state/tribal role in management of dredge and fill activities, including administration of the §404 program. Congress recognized that many states had already established parallel permitting programs (resulting in duplicative state and federal permit requirements), and that the traditional role of the states/tribes in land use management provides states/tribes with a particularly effective basis for wetland management. However, Congress also emphasized the need to retain Corps control over navigation in interstate waters.

The resulting provisions of §404 allow a state or tribe to administer its own regulatory program in lieu of the Corps permit program for most waters, if approved by the EPA, and with oversight by the EPA. Congress prohibited assumption of the program in certain waters as defined in §404(g)(1) of the CWA—including waters which are or could be used to transport interstate and foreign commerce, 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). The Corps retains §404 jurisdiction over these waters.

In the simplest terms, the assumption process authorizes states or tribes to assume greater responsibility for dredge and fill activities in waters of the United States. In practice, a state/tribal §404 program is a close partnership between state or tribal and federal agencies.”

Previous Actions Related to §404 Assumption in Minnesota

In 1989, the Minnesota Department of Natural Resources (DNR) conducted a feasibility study for state assumption of the §404 Program². 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, which greatly expanded state regulation of wetlands. In addition, federal requirements and expectations have increased since that time. There have been no recent attempts to estimate the incremental cost of incorporating §404 Program administration into current state and local government costs for wetland protection.

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 has since been amended, but remains in statute:

¹ Association of State Wetland Managers and Environmental Council of the States. 2011. *Clean Water Act Section 404 Program Assumption: A Handbook for States and Tribes*.

² 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.

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 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
- (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 the Minnesota Board of Water and Soil Resources (BWSR) and the DNR to produce a report to the Legislature on improving wetland regulatory programs. The final report³ contains the following under the heading of "Ideas for Future Short Term Action:"

³ Wetland Regulations Legislative Report, January 12, 2001

“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, the legislature enacted another provision authorizing adoption of rules to assume the §404 program, but with BWSR having the lead rather than DNR (Minn. Statutes 103G.2375).

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.

Also in 2012, 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. 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.

Current Considerations for Assumption of the §404 Program in Minnesota

Much has changed in Minnesota’s wetland regulatory landscape since the original §404 assumption analysis in 1989, but the main potential benefit remains--i.e., to reduce regulatory duplication while maintaining wetlands protections, thereby shortening permitting times and reducing costs for applicants. The passage and implementation of the WCA may have made state assumption of §404 more feasible. In combination, WCA and DNR's Public Waters Permit Program bring most activities that impact wetlands in the state under state/local regulation. However, a number of important considerations for §404 assumption in Minnesota remain:

- There is no federal funding for states that assume §404. Of states with wetlands regulatory programs, two (MI and NJ) have elected to assume §404, and both of them did this some time ago.
- The provisions for state assumption of §404 are generally based on state agency implementation of the state regulations. It’s unknown whether the USEPA would approve assumption in Minnesota based on WCA regulation, which has state-level oversight by BWSR but is implemented by several hundred local governments. In previous discussions of the

potential for state assumption in Minnesota, officials from USEPA headquarters and USEPA Region 5 (which covers Minnesota) have indicated that assumption would not be approved without some changes to the WCA framework. However, the only way to know for certain is to apply.

- Assumption of §404 does not remove federal participation from the permitting process for waters that are under federal jurisdiction. For states that assume §404, the U.S. Environmental Protection Agency (USEPA) reviews state permit applications (review of some categories of permits can be waived) and can object to permit issuance.
- With state assumption of §404, the USEPA undertakes responsibility for coordination with the U.S. Fish and Wildlife Service for federal endangered species review and with the State Historic Preservation Office for review of sites identified or proposed under the National Historic Preservation Act. The time frames established in federal regulations for these coordination procedures exceed state permit issuance requirements and policies, although the federal coordination review periods can be shortened upon mutual agreement by the affected agencies.
- Assumption of §404 does not eliminate the need for a federal permit for activities in all waters in Minnesota. The federal government retains authority for, and must issue permits for Clean Water Act regulated activities in Minnesota affecting major rivers, Lake Superior, and wetlands adjacent to these waters. However, it may be possible to develop a programmatic general permit for these waters based on state-level regulation.
- To assume the §404 program, the applicable state regulations must be at least as restrictive as federal regulations for waters that are under federal jurisdiction. In some respects, WCA and the Public Waters Permit Program are more restrictive than §404 (e.g., they regulate drainage in addition to filling), but WCA contains several exemptions that would have to be modified or eliminated for impacts associated with placement of fill material. There is no provision for states to assume §404 authority for only the activities/waters they currently regulate – it’s an all or none proposition.
- A state that assumes the §404 program must have authority to assess or recover civil penalties for violations in an amount of at least \$5,000 per day and to seek fines for criminally negligent violations in an amount of at least \$10,000 per day. Minnesota Statutes 103B.101, Subd. 12 and 103G.141 address these requirements to some extent, but additional revisions may be needed to comply with §404 requirements.
- Additional coordination procedures may need to be put in place for WCA and Public Waters Permit Program permit applications to accommodate review of water quality standard compliance by the Minnesota Pollution Control Agency (MPCA). The MPCA currently reviews §404 permit applications received by the Corps of Engineers under the §401 water quality certification provisions.
- The application requirements and process for assuming §404 are extensive and lengthy. It would likely require additional state personnel or reassignment of one or more existing positions for some period of time to manage the assumption process. Following assumption, the State would be responsible for ensuring staff and other capacity exists to run the program. If the state assumes the program, there is a requirement for the state to submit an annual report on program administration to USEPA, which will also require state staff time.