



## State “Assumption” of Section 404 of Federal Clean Water Act

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[www.bwsr.state.mn.us](http://www.bwsr.state.mn.us)

### Primary Federal/State Water Regulatory Authorities in MN

- 1) Federal Clean Water Act Section 404
  - U.S. Army Corps of Engineers
- 2) State Wetland Conservation Act
  - BWSR & Local Governments
- 3) State Public Waters Permit Program
  - DNR
- 4) State Water Quality Standards
  - PCA

## What is “404 Assumption?”

Section 404 of the Federal Clean Water Act:

- Regulates activities in lakes, streams, and wetlands.
- Implemented by U.S. Army Corps of Engineers.
- Allows state implementation of equivalent program, eliminating the need for separate permits.

33 U.S.C. § 1251(b): “It is the policy of Congress that the States... implement the permit programs under sections 1342 and 1344 of this title.” (1977)

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## What are the benefits of 404 Assumption?

Groups interested in assumption have cited the following:

- ✓ Improved permitting timelines/faster processing
- ✓ Reduced regulatory duplication and redundancy
- ✓ Reduced costs for permit applicants
- ✓ More responsive regulatory authorities (state/local vs. federal)

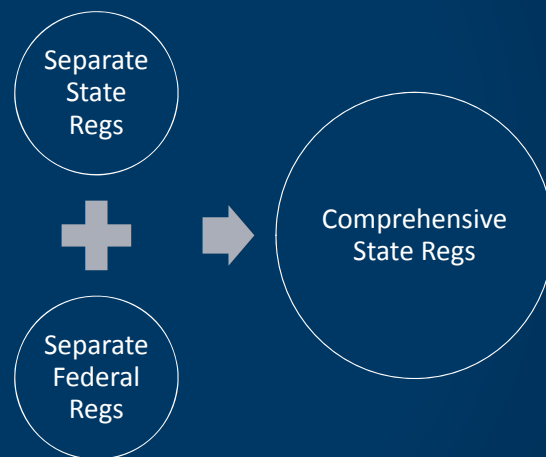
## What are the benefits of 404 Assumption?

“Section 404 Program Assumption: A Handbook for States and Tribes” (ASWM/ECOS, 2011), also cites the following benefits:

- ✓ More effective resource management drawing on localized expertise.
- ✓ Integration of wetland management with other state programs.
- ✓ Incorporation of state goals and policies into the permit process.
- ✓ Improved regulatory consistency and stability across multiple levels of government.

## How does 404 assumption affect the protection of our waters and wetlands?

- Federal law requires states implement water and wetland protection measures that are at least as protective as those of Section 404.
- 404 assumption =
  1. comprehensive set of state regulations
  2. equivalent or greater level of protection



## What is the role of the federal government?

- EPA must approve state 404 assumption application
- EPA oversees state implementation:
  - Annual reporting requirements
  - Permit reviews
  - Review of all potential state statute and rule changes for consistency with 404
- Corps permitting authority eliminated for most waters

## What has MN done regarding 404 assumption?

- 1989-1993: Two DNR reports addressing 404 assumption.
- 1991/2012: Minn. Stat. §§ 103G.127 and 103G.2375 provide authority to DNR and BWSR to assume 404.
- 2015-present: State agency input to EPA regarding 404 assumption.
- 2017: “Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study.”
- 2018: “Analysis of Retained and Assumable Waters in Minnesota.”

## Key Findings: Feasibility Study

- ✓ Faster permit decisions, improved efficiency
- ✓ Cost savings to applicants and local governments
- ✓ Must be administered by a state agency/agencies
- ✓ Some statute and rule changes necessary: expanded jurisdiction, exemptions, noticing
- ✓ State and overall non-federal costs would increase

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

Report to the Legislature  
January 17, 2017



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DEPARTMENT OF  
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## What are “assumable waters?”

When a state assumes 404, the assumption authority does not apply to all waters; the Corps retains permitting authority over certain waters.

- CWA Section 404(g)(1): “...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...”


## Previous Findings: Assumable Waters Analysis

Type of Water	% COE-Retained	% State-Assumable
Wetlands (acres)	91.5%	8.5%
Lakes/Basins (acres)	98.7%	1.3%
Streams (miles)	12.0%	88.0%

- 1) Very few waters and wetlands to assume (except for headwater streams and ditches).
- 2) The process to identify them would be impracticable.

**Analysis of Retained and Assumable Waters in Minnesota**

A Supplement to the January 17, 2017 Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study Report to the Legislature  
May 3, 2018



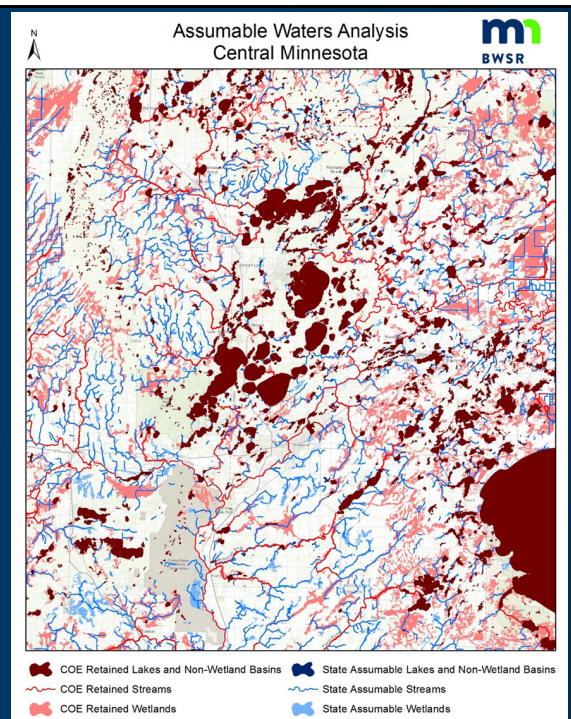
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## Previous Findings: Assumable Waters Analysis

Central Minnesota Example

**Shades of Red** = Corps-retained

**Shades of Blue** = State-assumable

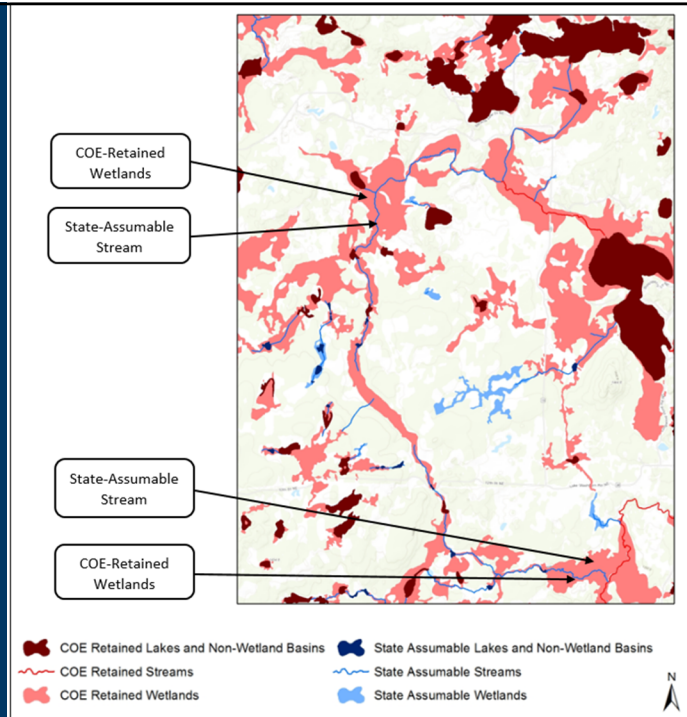


## Previous Findings: Assumable Waters

Example of implementation complications.

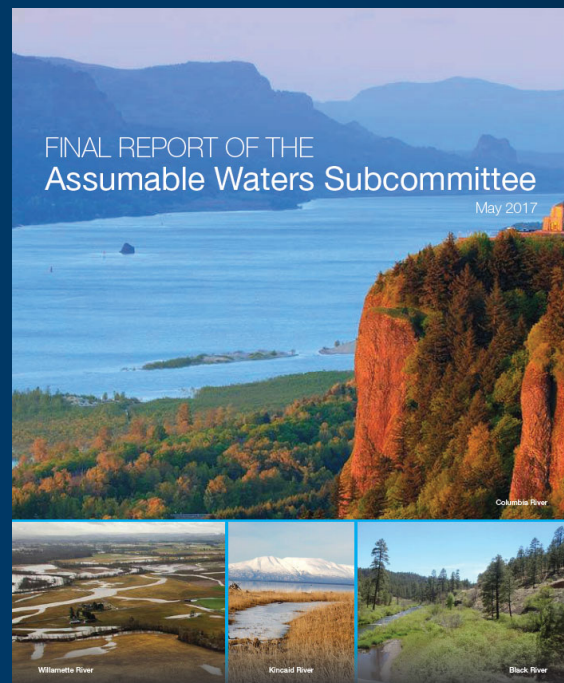
Shades of Red = Corps-retained

Shades of Blue = State-assumable



## What's changed?

- 1) Assumable Waters Subcommittee recommendations to EPA
  - a) A reasonable amount of waters to assume
  - b) A known status of waters, identified and mapped programmatically
- 2) 2018 Corps memo adopting subcommittee recommendations
- 3) EPA 404 assumption rulemaking



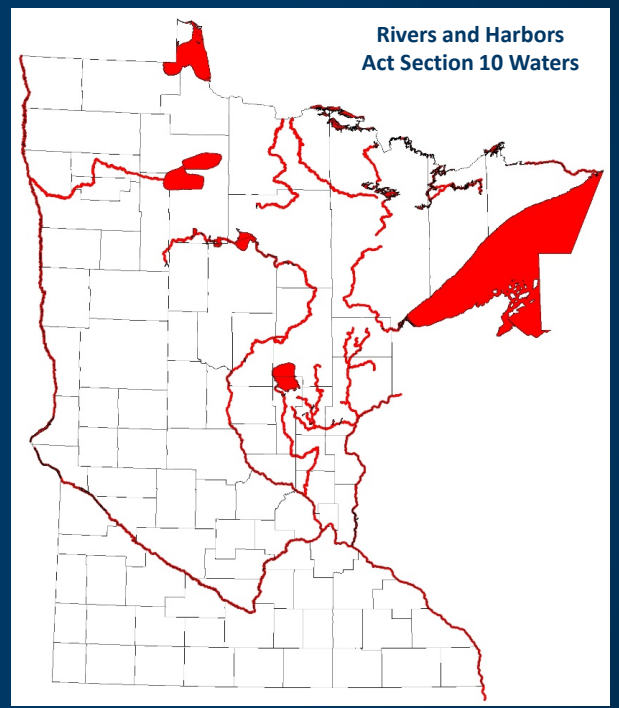
## Significant Changes to Assumable Waters

Corps-retained waters =

- 1) "Section 10" waters\*
- 2) adjacent wetlands to administrative boundary (e.g. 300 feet)

\*Except those listed for historic use only

- ❖ **The state can assume 404 authority over all other waters and wetlands.**



## What do the changes mean for Minnesota?

- Removes the most significant barrier to 404 assumption (assumable waters).
- Additional changes to federal rules are expected to make 404 assumption more feasible.
- Substantial interest in 404 assumption amongst Minnesota stakeholders.
- Greater clarity allows for more informed decision-making.



## 404 assumption requirements and process.

Basic requirement: State program(s) must be at least as protective as Section 404, and the state must have the legal authority and staffing capacity to implement it.

Application contents:

- Complete description of the state's regulatory program(s).
  - Copies of state statutes and regulations.
  - MOAs with EPA and the Corps.
  - Attorney General's statement of authority.
- ❖ If a final decision is made by the state to assume, the application is submitted to EPA along with a letter from Governor requesting program approval.

## Next Steps in Process

- ✓ Interagency coordination (BWSR, DNR, PCA)
- ✓ Negotiations with EPA
- ✓ Stakeholder outreach and coordination
- ✓ Specific, targeted statute and rule changes
- ✓ Funding for application development and program implementation

# Thank You!

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