



LCC Subcommittee on Minnesota Water Policy

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Policy Issue: State Assumption of Federal Clean Water Act, Section 404 (Act)

BACKGROUND: This Federal Act regulates the discharge of dredged or fill material into waters of the United States. The Act is administered by the U.S. Army Corps of Engineers (COE) and the U.S. Environmental Protection Agency (EPA). The Act allows for state administration of these programs. This would eliminate separate federally-issued permits for most waters. The process, known as “assumption” would remove duplication and confusion in the permitting process, improve efficiencies, and reduce costs for permit applicants.

Minnesota has its own water and wetland regulatory programs that include the Wetland Conservation Act (WCA), the Public Waters Permit Program (PWPP), and state water-quality standards. These programs cover nearly all activities that affect Minnesota’s waters and wetlands, making Minnesota a good fit for assumption. Minnesota statutes contain authorization to pursue assumption, but some statute changes and funding would be needed. The state has investigated assumption primarily in response to concerns about costs and delays in obtaining federal permits. The results can be obtained on the BWSR website at: [404 assumption from BWSR](#)

BENEFITS OF ASSUMPTION: State and local agencies that manage programs (mostly transportation) would realize permit efficiencies and cost savings. Public and private permit applicants would not have to prepare separate permit applications, saving both time and money. The permitting process should be faster and federal jurisdictional issues would be eliminated. Permit management should be more efficient because of localized expertise, incorporation of state goals and policies into the permit process, and improved regulatory consistency across agencies.

ASSUMABLE WATERS: The COE had originally held that most of the waters of the state would remain under federal control (*Analysis of Retained and Assumable Waters in Minnesota, 2018*). However, that policy has changed, increasing the state’s benefits of assumption. This map shows, in red, the waters that are expected to remain under COE control, which are now limited to certain large lakes and river systems, and their immediately adjacent wetlands.



FEDERAL REQUIREMENTS FOR ASSUMPTION: States are required to have regulatory jurisdiction over waters covered by the CWA, and to apply at least an equivalent level of protection as the Act. Some permits would still be subject to review by the EPA.

APPLICATION PROCESS: The process is involved and lengthy. States need to show that programs are as protective as in Section 404 and that states have the legal authority and capacity to implement their laws. The process will require substantial negotiation with federal agencies. Substantial coordination among state agencies (DNR, BWSR, and PCA) also will be required. It is expected that the development of a complete application package would take two to three years and would include a substantial staff commitment.

CHANGES TO MINNESOTA'S PROGRAMS: Minnesota's regulatory programs are generally equivalent to the CWA relative to protecting aquatic resources. However, some aspects of the state's programs would require discussion with the EPA prior to assumption. These are as follows:

- State authority will likely need to be clarified or extended to ensure that certain water bodies are protected (small lakes and headwater streams not covered under the PWPP).
- Certain WCA exemptions have no apparent counterpart in the CWA and would need to be reviewed.
- Permit applications would need to be screened for potential impacts to threatened or endangered species, with federal notification when impacts are likely.
- State requirements for compensatory mitigation are largely consistent with federal law. Some specific mitigation polices would need to be reviewed for consistency, however. State mitigation impacts for lakes and streams are somewhat vague compared the 404 program.
- To some degree, certain WCA implementation responsibilities may need to be transferred from local agencies to the state.

STAFF REQUIREMENTS AND FUNDING:

Certain responsibilities for implementing federal requirements would become the obligation of the state under 404 assumption, requiring additional staff and associated resources. The 404 assumption feasibility study completed by the state in 2017 included staffing estimates for two different implementation scenarios. However, since that time there have been improvements to the process for determining which waters the State would assume, and EPA is currently amending the federal 404 assumption regulations with a goal of making assumption easier for states. Due to these factors, specific negotiations with EPA may now result in different state staffing estimates. Updated, accurate estimates will be developed by the agencies working with EPA and provided to the legislature by February 1, 2021.

In general, BWSR would likely require additional staff for implementing additional wetlands-related requirements and for state and federal program coordination. DNR would also likely require additional staffing to screen applications for potential impacts to threatened/endangered species and cultural/historic sites, and possibly for enforcement. PCA may not require additional staff as the changes to their water quality certification program would only be procedural.

The state will be required to submit an annual report to the EPA on implementation. This would be a new responsibility, likely shared among state agencies. Agencies would likely develop a coordination process with the Minnesota tribes for state permits issued on lands that might affect downstream tribal waters.

Although not directly required for assumption, developing and implementing an on-line permit application system for WCA would improve state compliance with the EPA reporting requirements, provide timelier permit decisions and issuance, and possibly enable the state to maintain a wetlands regulatory structure that utilizes local governments to a greater extent. Costs would include system development, operation, and maintenance for the state agency with primary implementation responsibility (likely BWSR).

OPTIONS FOR FINANCING ADDITIONAL COSTS OF IMPLEMENTATION: Options include legislative appropriations to state agencies, permit fees, local tax/levy authorities, a dedicated tax on specific transactions or other sources of revenue.

ASSUMPTION IN OTHER STATES: Two states are currently enrolled---Michigan and New Jersey. They report that the program is working well. Reported benefits include expedited permits, less permit redundancy, and good working relationships with EPA. Other states are currently interested in pursuing assumption, including Florida, Oregon, Wisconsin, Indiana, Arizona, Maryland, and Alaska.

WHAT IS NEEDED? The Environmental Quality Board (EQB) received \$200,000 during the 2019 session to continue planning for assumption. BWSR has also applied for a leveraged grant from the EPA to supplement that funding in order to develop a more complete application package. State costs and staffing implications are not fully understood at this time and are being developed. There are no legislative needs at this time. It is likely that there will be legislation needed to change statutes to accomplish the assumption process during the 2021 session.