

Minnesota Federal Clean Water Act Section 404 Assumption

Report on Funding Estimates

January 11, 2022 *DRAFT*



m MINNESOTA

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Chapter 1. Introduction

This report fulfills the reporting requirement of Laws of Minnesota 2021, 1st Special Session, Chapter 6, Article 2, Section 108, Subd. 9(a). This law required the Minnesota Environmental Quality Board (EQB) to begin to develop and assemble the material required to assume the section 404 permitting program of the Federal Clean Water Act (404 assumption), and to submit a report on the additional funding required to apply for and secure 404 assumption and to fully implement the state-assumed program. The full text of the legislation is shown below.

\$200,000 the first year is from the environmental fund to begin to develop and assemble the material required under Code of Federal Regulations, title 40, section 233.10, to have the state of Minnesota assume the section 404 permitting program of the Federal Clean Water Act. The Board may execute contracts or interagency agreements to facilitate developing the required agreements and materials. By February 1, 2022, the board must submit a report on the additional funding necessary to secure section 404 assumption and the additional funding needed to fully implement the state-assumed program to the chairs and ranking minority members of the legislative committees and divisions with jurisdiction over the environment and natural resources. This is a onetime appropriation and is available until June 30, 2022.

To fulfill the requirements of the legislation, EQB entered into an agreement with the Minnesota Board of Water and Soil Resources (BWSR), who in turn developed agreements with the Minnesota Department of Natural Resources (DNR) and the Minnesota Pollution Control Agency (MPCA) to participate in this work.

The purpose of this report is to provide the funding estimates required by law, including a summary of progress made on the program development needs that directly affect these funding estimates. This report does not address all issues or information related to 404 assumption, discuss advantages or disadvantages, or provide recommendations related to state assumption of the Section 404 permitting program.

The processes and funding estimates contained in this report are based on the best available information at this time. Areas of uncertainty regarding assumption, such as technical complexities, public engagement needs, tribal interest considerations, and federal coordination, have limited the ability to provide greater accuracy for some of the funding estimates. Prior to making any recommendations on whether or not to pursue 404 assumption, state agencies would need to collect this additional information to provide increased certainty for program development needs and funding estimates. Consequently, projections contained in this report would need to be refined if additional program development or implementation is directed.

Chapter 2. Background

2.1. State Assumption of Section 404 of the federal Clean Water Act

Section 404 of the federal Clean Water Act (CWA) is the primary federal program regulating placement of fill material into waters of the U.S. (33 USC §1344), such as rivers, streams, lakes, and wetlands, for the purpose of avoiding adverse impacts to those waters and waters downstream. In Minnesota and

other states that have not assumed the program, the Section 404 Program 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 to meet Section 404 requirements, thereby eliminating the need for separate, federally issued permits. This process is known as Section 404 Program assumption. To clarify, 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.

2.2. Current state surface water regulatory authorities in Minnesota

There are three primary state surface water regulatory laws in Minnesota: the Wetland Conservation Act (WCA) administered by BWSR and implemented by local governments and, for activities associated with a permit to mine, the DNR; the Public Waters Work Permit Program (PWPP) administered by the DNR; and state water quality standards administered by the MPCA. Each of these regulatory authorities would have a role in implementing 404 assumption in Minnesota and are described in further detail below.

2.2.1. State Wetland Conservation Act (WCA)

Overview: WCA was enacted in 1991 to contribute to the achievement of no net loss to, an increase in, and avoidance of direct or indirect impacts to the quantity, quality, and biological diversity of Minnesota's existing wetlands, while replacing wetland values where avoidance of activity is not feasible and prudent. The Minnesota Board of Water and Soil Resources (BWSR) is responsible for promulgating and administering the WCA rule (MN Rule Chapter 8420). Local Government Units (LGUs) are primarily responsible for implementing WCA, including issuing decisions as to whether proposed activities can be authorized under the WCA rule. A Technical Evaluation Panel (TEP), consisting of technical staff from BWSR, the LGU, the Soil and Water Conservation District, and the DNR (when public waters are present), reviews proposed activities and makes findings and recommendations to the LGU.

Jurisdiction and Regulated Activities: WCA prohibits the draining or filling of wetlands, excavation in certain wetland types, and excavation in all wetland types if the excavation results in filling, draining, or conversion to non-wetland, unless exempt or replaced under an approved replacement plan.

Enforcement: DNR enforcement officers and other licensed peace officers.

Legal Authorities: Primarily Minn. Stat. §103G. and other related sections; Minnesota Rules Chapter 8420.

2.2.2. DNR Permit to Mine

Overview: 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 wetland impacts, but the permitting process follows the permit to mine rules (e.g. MN Rules Chapters 6130 and 6132). Currently, peat mining operations that exceed 40 acres under MN Rules Chapter 6131 are not subject to WCA (in most cases) because reclamation requires wetland areas to be returned to wetland areas. The typical 404 permit issued by the St. Paul District of the USACE can require mitigation

for temporal loss of the wetlands. Under assumption, this aspect would also be added to the DNR's authority.

Jurisdiction and Regulated Activities: While the permit to mine program covers a broader set of mining-related activities, the regulatory authority applies to wetlands affected by activities authorized under the permit to mine.

Enforcement: DNR

Legal Authorities: Minn. Stat. § 93.44 - 93.51; Minn. Stat. § 103G.222, Subdivision 1; Minnesota Rules Chapters 6130, 6131, 6132, and 8420.

2.2.3. State Public Waters Work Permit Program (PWWPP)

Overview: The Minnesota DNR Ecological and Water Resources Division oversees the administration of the Public Waters Work Permit Program. This program, begun in 1937, regulates water development activities below the ordinary high-water level (OHWL) in public waters and public waters wetlands. Public waters were inventoried by DNR and mapped for each county under a process completed in the early 1980's. Field staff serve as the primary contacts for this program, and most activities can be authorized at either DNR Ecological and Water Resources area or regional offices.

Jurisdiction and Regulated Activities: The PWWPP regulates activities below the OHWL in public waters (lakes), public waters wetlands, and public water streams/rivers. The PWWPP requires a permit for work affecting the course, current, or cross-section of such waters. Such work may include fill, excavation, shore protection, bridges and culverts, structures, marinas, water level controls, dredging, and dams.

Enforcement: DNR

Legal Authorities: Minn. Stat. § 103G and Minnesota Rules Chapter 6115.

2.2.4. State Water Quality Standards (WQS)

Overview: The CWA requires states to designate beneficial uses for all waters and develop water quality standards to protect each use. The MPCA is the agency responsible for developing and maintaining water quality standards in Minnesota. Water permits issued by the MPCA must ensure compliance with water quality standards (WQS). Section 401 of the CWA requires that any person applying for a federal permit or license, for which the activity may result in a discharge of pollutants into waters of the United States, must obtain a state water quality certification that the activity complies with all applicable state WQS, limitations, and restrictions. In Minnesota, the application of WQS associated with federal permits or licenses is administered by the MPCA's "401 Certification Program." The program applies state WQS to federally authorized projects by requiring a certification or waiver for federal permits or licenses that cause a potential discharge to Waters of the U.S. from a "point source." Certifications with conditions become an enforceable part of a federally issued permit. If the state denies certification, a federal permit cannot be issued. The most common requirement for certification is a Clean Water Act Section 404 Permit application to the USACE.

Jurisdiction and Regulated Activities: WQS identify the designated beneficial uses for each water body and describe the criteria to protect each beneficial use. These standards can be applied through permitting programs to ensure protection of waters. The 401 Certification Program regulates water

quality impacts from federally permitted/licensed projects discharging pollutants into waters of the United States.

Enforcement: The MPCA has broad enforcement authority to enforce WQS. Specific to the 401 Certification Program, the MPCA may enforce WQS associated with a 401-certified project, however, enforcement of 401 conditions falls to the federal permitting/licensing agency (typically the USACE).

Legal Authorities: Federal: CWA Section 401 and Title 40 of the Code of Federal Regulations (CFR), Part 121 Section 303 and 40 CFR Part 131. State: Minn. Stat. § 115.03 assigns establishment and protection of water quality standards to the MPCA; Minnesota Rules Chapters 7050 and 7052 codify the state water quality standards; and Minnesota Rules Chapter 7001 addresses the procedural requirements for the 401 Program.

2.3. Basic requirements for Section 404 assumption

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

- jurisdiction over all waters of the United States, including wetlands, excluding those waters to be retained by the USACE (the USACE retains permitting responsibility over certain navigable waters relating to their authority under Section 10 of the Rivers and Harbors Act of 1899);
- regulation of at least the scope of activities required by applicable federal statute and rule;
- adequate legal authority and staffing capacity to implement the program(s);
- adequate enforcement authority; and
- compliance with certain permitting standards, and procedural, noticing, and reporting requirements.

A state's application for 404 Assumption must include:

- a complete description of the state's regulatory program(s);
- copies of state statutes and regulations;
- a Memorandum of Agreement with the USACE describing USACE-retained and state-assumable waters;
- a Memorandum of Agreement with the EPA setting forth state and federal responsibilities for administration and enforcement; and
- an Attorney General's statement of authority.

After the additional assessment identified in Chapter 1, a final decision can be made by the state to decide whether to apply for 404 assumption. The application would then be submitted to EPA, which would have to be accompanied by a letter from the Governor requesting program approval.

2.4. History of 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 is relevant to potential 404 assumption in Minnesota.

2.4.1. 2017 Feasibility Study

The study was conducted with substantial stakeholder involvement and culminated in the January 2017 *Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study*. The study provided significant findings for the legislatively required study elements, which included:

- the federal requirements for state assumption of the (Section) 404 program;
- 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;
- 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;
- 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;
- 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;
- 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;
- the estimated costs and savings that would accrue to affected units of government;
- the effect on application review and approval processes and time frames; and
- options for financing any additional costs of implementation.

During the study, stakeholders were asked to identify their desired outcomes relating to the potential assumption of Section 404 implementation by the state. Generally, the desired outcomes are 1) efficient and timely permitting that is well coordinated between state and federal programs (less redundancy), and 2) effective protection of water/wetland resources.

With regard to the stakeholder's desired outcomes, the results of the study found that: 1) state assumption of Section 404 would streamline permitting for applicants, since projects would no longer require both a state and a federal permit on state-assumed waters; 2) applicants would likely receive permit decisions more quickly and at a lower cost; and 3) effective protection of water resources would be ensured by increasing regulatory compliance through the reduction of regulatory redundancy, complexity, and delays associated with current multi-agency (state and federal) permitting processes. The 2017 report is available on the BWSR website at: <https://bwsr.state.mn.us/404-assumption>

2.4.2. Assumable Waters

On May 3rd, 2018, BWSR, DNR, and MPCA provided the "Analysis of Retained and Assumable Waters in Minnesota" report to the state legislature as a supplement to the 2017 Feasibility Study report. The report included estimates of the amounts of waters that were likely to be retained by the USACE, and

those assumable by the state under 404 assumption. The underlying analysis found that, under the USACE interpretation at that time, there would be relatively few waters and wetlands for the state to assume and that the process to identify them would be impracticable. Specifically, although being able to assume approximately 88% of streams, other state assumable waters would consist of only 8.5% of the state's wetlands and 1.3% of lakes and other basins. The 2018 report is available on the BWSR website at: <https://bwsr.state.mn.us/404-assumption>

In June of 2015, the 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 [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 an approved state/tribal program.”

The Subcommittee's final report was completed in May of 2017 and submitted to the EPA Administrator on June 2, 2017. In general, acceptance of the report's majority recommendations would result in a significant majority of waters being assumable in Minnesota, utilizing a process that both provides certainty and is implementable on the ground. These recommendations would significantly improve the feasibility of 404 assumption in Minnesota. The Assumable Waters Subcommittee's Final Report is available on the EPA website at: <https://www.epa.gov/cwa-404/submission-assumable-waters-subcommittees-final-report>

On August 7, 2018, the U.S. Army released a memorandum from the Assistant Secretary of the Army for Civil Works (dated July 30, 2018) that clarifies the waters that would be retained by the USACE under state assumption. The memo is consistent with the Assumable Waters Subcommittee's majority recommendations regarding the scope of retained waters.

Adoption of the Assumable Waters Subcommittee majority recommendations changed the outcome of the State's 2018 Assumable Waters Analysis significantly, removing a practical barrier to 404 assumption. Although a more precise number would not be available until after a Memorandum of Agreement is developed with the USACE, an initial estimation completed by BWSR indicates that the proportion of state-assumable wetlands increases from approximately 8.5% to approximately 98.5% as a result of this action.

Chapter 3. Program Development Progress.

As development of the material required under Code of Federal Regulations, title 40, section 233.10 and corresponding funding estimates began, several state program development and underlying policy considerations had to be addressed. In some instances, multiple options existed to address a particular issue. The following principles were used to aid in the decision-making process as staff assessed options to implement 404 assumption requirements:

- Maintain (or streamline) existing state permitting processes and approaches to the greatest extent possible while meeting 404 assumption requirements.
- Generally, the option that represents the least amount of change to the current structure of state programs is preferred (the least amount of change will typically also correlate to the least amount of additional cost).

- The state agencies should not use 404 assumption to expand jurisdiction or increase current state regulatory requirements beyond what is necessary for the state to assume.

3.1. Equivalent Jurisdiction

Under 404 assumption, a state must ensure regulatory jurisdiction over all waters of the United States, except those retained by the USACE. In Minnesota, the current gaps between state and federal jurisdiction that would need to be addressed include:

- 1) Stream reaches with watersheds that are under two square miles and/or are not mapped on PWWPP maps.
- 2) Water basins that are too deep to be entirely wetland but are not public waters according to Minn. Stat. 103G.005, Subd. 15, due to a lack of adequate size or other criteria.

The above waterbodies are not regulated by the PWWPP and those waterbodies, or portions of waterbodies, that do not meet the criteria to be classified as wetland are not regulated by WCA. These gaps can be addressed through revisions to the jurisdiction of existing state regulatory programs. The regulatory option that minimizes the amount of change to current state programs, processes, and costs is to add these waterbodies to the regulatory scope of WCA, as most of these resources partly consist of wetlands or are otherwise associated with wetlands, already involving them in WCA implementation to some extent.

Expansion of WCA jurisdiction over non-public waters stream reaches and the resulting review of stream impacts and mitigation (both associated and unassociated with wetlands) would result in an increase in workload for BWSR, DNR, and, to a lesser extent, LGUs.

With regard to non-wetland, non-PWWPP water basins, since the vast majority, if not all, of the non-public water basins have some extent of a wetland fringe that is currently regulated by WCA, expanding WCA jurisdiction to cover the remainder of the waterbody is not expected to cause any discernable increase in the cost of implementation for BWSR or LGUs.

Impacts to incidental wetlands are exempt from WCA and typically have not required mitigation under CWA Section 404 due to regulatory allowances or lack of jurisdiction. If the state assumed 404, it is expected that a similar regulatory approach and outcome could apply. However, subsequent changes at the federal level could require modification to the state's regulations for incidental wetlands.

If the state were to apply for and assume the Section 404 program and subsequent federal rulemaking or court actions altered the extent of waters of the United States, the state would need to assess whether those changes would require corresponding changes to the state's programs. Any such changes to state programs could in-turn necessitate additional staff training and public outreach.

3.2. Permitting Authority and Implementation Structure

DNR is the permitting authority for the PWWPP and for Permits to Mine, but BWSR is currently not a permitting authority for WCA as local governments make decisions on WCA applications. Only state agencies can be permitting authorities for an assumed 404 program. Therefore, BWSR would need to become a permitting authority for WCA under an assumed program. In addition, as MPCA has authority over state water quality standards and is authorized to review federally issued permits for compliance

with these standards, a process would need to be established for the MPCA review of state issued permits to ensure state water quality standards, including antidegradation, are met.

3.2.1. Board of Water and Soil Resources

Transferring the primary responsibility for WCA implementation from local governments to a state agency (BWSR) was identified in the 2017 Feasibility Study as one of the likely changes that would be necessary to allow for assumption of the 404 program. The need for this change is based on the Section 404 assumption requirement that, under an approved state program, permit decisions must be made by a state agency or agencies, identified as the “permitting authority.” Both a state-only and a shared state-local implementation model were evaluated in the 2017 Feasibility Study, and the estimated costs to implement the two options are shown in Table 1. However, many of the details of how these models would work in practice were unknown at the time, as were other options that could comply with the 404 assumption permitting authority requirement. Since that time, further coordination with the EPA has resulted in the development of a more cost-effective implementation approach (which is reflected in the cost estimates contained in Table 2) that largely maintains the existing local government role in WCA implementation while ensuring that BWSR meets the federal requirement that a state agency act as the permitting authority.

The newly developed WCA implementation approach would utilize a series of general permits (GPs) issued by BWSR to authorize categories of similar activities, and that would encompass all WCA decisions (exemption, no-loss, replacement plan, etc.) and standards within a certain limit or limits of wetland fill acreage. These GPs would include permit conditions related to the discharge of dredged/fill material (i.e. wetland fill) and other potential impacts, that are required for 404 assumption, but would be structured to allow for the continuation of existing WCA LGU application and processing procedures.

The federally required permit conditions include the avoidance of impacts to federally threatened and endangered species and historic properties. BWSR would be responsible for coordinating the review of GPs, at the time of their development, as it pertains to federal requirements for assumption above and beyond current WCA standards and procedural requirements. The GPs would encompass all WCA decisions and standards within a certain limit or limits of fill within those waters regulated by the program. All projects involving fill would be authorized under a GP provided the limit for fill specified in the GP is not exceeded and the federally required permit conditions related to the fill are met.

Projects that cannot be authorized under a GP would be reviewed and processed by BWSR as an Individual Permit (IP). Aside from additional public notice and coordination requirements, BWSR would follow the same basic procedures for processing WCA applications that local governments currently use. This includes providing notice of complete applications, seeking a recommendation from the Technical Evaluation Panel, determining the consistency of the proposal with appropriate rules and statutes, and final decision making.

The additional public notice and coordination requirements referenced above would include coordination with MPCA on water quality standards (Section 2.1.3), posting of notices on a publicly accessible webpage, and coordination with adjoining states or tribes, the EPA, the U.S. Fish and Wildlife Service, and the State Historic Preservation Office as applicable.

While the above-described implementation structure should result in little change for LGUs processing WCA applications, the workload for BWSR will increase due to the following:

- Screening WCA applications for meeting general permit requirements related to assumption (i.e. threatened and endangered species and historic property impacts);
- Creation of, justification for, and issuance of general permits every 5 years, including responding to public comments and coordination with relevant state and federal agencies;
- Implementation of WCA on federal lands;
- Processing and review of individual permits, including noticing, ensuring compliance with federal requirements related to federally threatened and endangered species, historic properties, state WQS, and coordination with federal agencies and tribes;
- Preparation of decision documents for individual permits in compliance with 404(b)(1) guidelines;
- Preparation of annual report to EPA on assumption activities;
- Coordination with USACE on projects that impact both USACE-retained and state-assumed waters per a memorandum of agreement ; and
- Coordination with EPA whenever changes are made to state statutes or rules affecting the state regulatory programs.

3.2.2. Department of Natural Resources

The DNR's PWWPP program could be carried out substantially as it currently exists, although there are some consequential changes that would need to be adopted and federally compliant GPs would likely need to be developed to expedite the authorization of most activities. The DNR's Permit to Mine program could require substantial changes and the utilization of GPs may not be the most suitable approach for Permit to Mine projects. For example, the 404 program requires mitigation for excavation associated with a discharge of dredged or fill material in a wetland, including mining projects. The existing and proposed mitigation requirements for mining projects are substantial and are reflected in the cost estimates for DNR provided in Table 2. Like WCA, these programs regulate many more activities and impacts than required by Section 404 of the CWA. These programs could develop federally compliant GPs for activities that involve the discharge of dredged/fill material into an aquatic resource. For projects that involve fill but are not covered by a GP, the DNR would have to process those as individual permits utilizing the same noticing, coordination, and documentation requirements described above for BWSR under assumption. DNR is already a permitting agency with staff in place to issue permits, however, assumption would result in a significant increase in workload for DNR, to meet these additional federal requirements under assumption.

Similar to the GPs BWSR would need to develop, DNR's GPs would include several permit conditions related to the discharge of dredged/fill material (i.e. wetland fill) that are required for 404 assumption, but would be structured to allow for the continuation of existing Public Waters permit application and processing procedures. The federally required permit conditions include the avoidance of impacts to federally threatened and endangered species and historic properties. DNR would be responsible for coordinating the review of GPs, at the time of their development, as it pertains to federal requirements for assumption above and beyond current Public Water permitting standards and procedural requirements. The GPs would encompass all public waters decisions and standards within a certain limit

or limits of fill within those waters regulated by the program. All projects involving fill would be authorized under a GP provided the limit for fill specified in the GP is not exceeded and the federally required permit conditions related to the fill are met (DNR would have the authority to process any application as an individual permit if the GP conditions are not met).

Projects that cannot be authorized under a GP would be reviewed and processed by DNR as an Individual Permit (IP). Aside from additional public notice and coordination requirements, DNR would follow the same basic procedures for public water permitting as in the past. This includes collection of permit fees, seeking comment from local units of government, determining the consistency of the proposal with appropriate rules and statutes, and final decision making.

The additional public notice and coordination requirements referenced above would include coordination with MPCA on water quality standards (Section 2.1.3), posting of notices on a publicly accessible webpage, and coordination with adjoining states or tribes, the EPA, the U.S. Fish and Wildlife Service, and the State Historic Preservation Office (SHPO) as applicable. SHPO is required to coordinate with the Tribal Historic Preservation Office. Additional and ongoing tribal consultation will be important to several aspects of continued efforts regarding 404 assumption.

The above-described implementation structure would result in some change for DNR staff processing PWWPP applications and the workload for DNR staff would increase due to the following:

- Screening permit applications for meeting general permit requirements related to assumption (i.e. threatened and endangered species and historic property impacts);
- Creation of, justification for, and issuance of general permits every 5 years;
- Processing and review of individual permits, including assuring compliance with federal requirements related to federally threatened and endangered species, historic properties, state WQS, and coordination with federal agencies and tribes;
- Preparation of decision documents for individual permits in compliance with 404(b)(1) guidelines;
- Ongoing training of DNR staff and public outreach;
- Preparation of annual report to EPA on assumption activities;
- Coordination with USACE on projects that impact both USACE-retained and state-assumed waters per a memorandum of agreement; and
- Informing EPA of proposed or actual changes to the state's regulatory authority or any significant modifications to the administration of the program.

3.2.3. Pollution Control Agency

Included in the requirements of 404 assumption is compliance with 40 Code of Federal Regulations (C.F.R.) Part 230 Section 404(b)(1), *Guidelines for Specification of Disposal Sites for Dredged or Fill Material*. The 404(b)(1) guidelines prohibit the issuance of a permit for the discharge of dredged/fill material if it will violate state water quality standards (WQS). Currently, the USACE satisfies this requirement when they issue 404 permits by following the requirements and procedures of Section 401 of the CWA, which stipulates that a federal agency may not issue a permit or license to conduct any activity that may result in any discharge into waters of the United States unless a Section 401 water quality certification is issued, or certification is waived. States and authorized tribes where the discharge

would originate are generally responsible for issuing water quality certifications. The MPCA has adopted water quality standards for protection of waters of the state (Minnesota Rules, chapter 7050), including procedures for Section 401 certifications of federal individual permits (Minnesota Rules, part 7050.0285) and general permits (Minnesota Rules, part 7050.0305).

Under 404 assumption, the state (BWSR and DNR) would issue permits for discharges of dredged/fill material in regulated waters. The Section 401 requirements, procedures, and legal authorities administered by MPCA do not apply to state-issued permits because they are specifically tied to the issuance of a federal permit. However, state-issued permits must comply with 404(b)(1) guidelines, which includes a provision that prohibits the issuance of a permit that violates WQS. Therefore, the state would have to develop a process to review proposed permits that involve the discharge of dredged/fill material into assumed waters for compliance with WQS. This process would require some additional time for BWSR and DNR staff coordination with MPCA when an individual permit is reviewed for water quality certification.

For those waters not assumed by the state (i.e. retained by the USACE), the MPCA will continue to use the Section 401 process to issue, waive, or deny certification for compliance with WQS for 404 permits issued by the USACE for discharges of dredged/fill material into those waters. The mechanism and process developed for ensuring compliance with WQS for state-issued permits in assumed waters is similar to the Section 401 process and will provide consistency for permittees and MPCA staff. However, the mechanism and process for state-issued permits under 404 assumption will operate independent of, and separate from, the Section 401 process and requirements for federally issued 404 permits.

The 2017 Feasibility Study estimated no additional implementation costs for MPCA under 404 assumption. That estimate remains valid assuming the current average number of individual permits requiring evaluation for water quality standard compliance certification does not increase under 404 assumption. Since the goal of the state agencies is to utilize general permits to the extent possible, the number of individual permits issued by the state under 404 assumption is not expected to increase based on current projections. However, as the potential permitting structures of WCA, the PWWPP, and the Permit to Mine program are further developed, additional information could warrant a revision to MPCA cost estimates.

3.3. Development and Modification of Online Permitting Systems

To implement an assumed 404 Program, the development and use of an online WCA permitting system by BWSR would be necessary to:

- i. facilitate EPA's oversight responsibilities;
- ii. enable efficient coordination among affected agencies and LGUs for purposes of review of jurisdiction, coordination for permit development and issuance, and oversight;
- iii. provide an efficient method for applications to be prepared and submitted;
- iv. facilitate the efficient screening of projects for potential affects to federal threatened and endangered species;
- v. ensure transparency; and
- vi. conduct reporting both within the state and to meet the reporting requirements to EPA under the federal regulations for state-assumed 404 Programs.

During completion of the 2017 Feasibility Study, the cost for development of the online WCA permitting system was estimated to be approximately \$3.4 million¹, with approximately \$225 thousand² required annually to support the new system. These estimates were based primarily on the cost of developing the Minnesota DNR Permitting and Reporting System (MPARS). However, technology has improved since that time, staff have further investigated other similar systems, and a new wetland banking database has been developed (which would become a component of the larger permitting system). These factors allow for a substantial downward revision to the estimates included in the 2017 Feasibility Study. In consultation with MNIT staff, we currently estimate a one-time development cost of approximately \$1.5 million, with ongoing annual maintenance costs of approximately \$90 thousand.

The DNR's Water Permitting and Reporting System (MPARS) would also require modifications to implement an assumed 404 Program. The programming might not be as extensive as what would be necessary to develop the entirely new WCA online permitting system but, nonetheless, substantive changes to the existing system would be needed to address additional requirements. The changes would include tracking general permit authorizations, facilitating the efficient screening of projects for potential affects to federal threatened and endangered species, required noticing when an individual permit is needed, conducting annual reporting to EPA, and other miscellaneous changes. One-time funding in the amount of approximately \$800,000 would be required to develop the necessary changes.

The above systems do not include permitting for DNR's Permit to Mine program. Either the new WCA permitting system or MPARS could potentially be designed to allow for inclusion of permits to mine if the DNR so chooses.

3.4. Mitigation

Some aspects of the state's current approach to the mitigation of impacts to streams and wetlands would need to be addressed as summarized below.

3.4.1. Public Waters Work Permit Program

Compensatory mitigation is required for permitted impacts to public waters regulated under the PWWPP. However, for impacts to public waters, generally being lakes and streams, the PWWPP rules contain no specific standards for the required mitigation. Mitigation specifications for lakes and waterways would need to be developed and implemented, including addressing the Section 404 preference and current state WQS requirement that compensatory mitigation be "in-kind" to the extent possible (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).

Currently, the process of arriving at mitigation requirements for impacts to public waters is flexible, determined on a case-by-case basis, and protective. Any mitigation specifications developed for assumption of the 404 program would ideally include 404 preferences and allow the flexibility and protection of existing public water rules and statutes regarding mitigation.

¹ The 2017 estimate was adjusted for inflation using Consumer Price Index data from 2017 through 2021.

² The 2017 estimate was adjusted to account for 2022 staffing costs.

3.4.2. Wetland Conservation Act

The WCA rules contain specific standards for wetland mitigation (replacement) that are substantially equivalent with the requirements of Section 404. However, if WCA jurisdiction is expanded to cover non-PWWPP stream segments as discussed in section 3.1, standards would need to be developed for instances when mitigation would be required for impacts to those resources. It is expected that the state agencies would continue to coordinate consistent standards for stream mitigation between the PWWPP and WCA. Such standards could be established in the WCA rules, the PWWPP rules, or both. Additional information on how those mitigation standards could be implemented is contained in section 3.4.3 below.

3.4.3. Minnesota Stream Quantification Tool and Debit Calculator

Unlike wetlands, there have been no consistent and quantifiable methods for assessing impacts to streams and determining the resulting compensatory mitigation requirements in place in Minnesota. For 404 assumption, the state must implement function-based policies and assessment methods when evaluating permit applications for the discharge of dredged/fill material into streams in accordance with the Federal Mitigation Rule (40 CFR Part 230).

In response to a need for a specific mechanism to assess and inform permitting and compensatory mitigation decisions related to streams, staff from BWSR, the MPCA, and the DNR collaborated with federal agencies and an expert stream consultant hired by EPA to develop the Minnesota Stream Quantification Tool and associated Debit Calculator (MNSQT). The MNSQT is a spreadsheet-based tool that includes a user manual, spreadsheets, and workbooks to produce quantitative measures of stream functions. It uses function-based parameters and metrics to assess stream functions. Through function-based measures and observations, the MNSQT can be used to calculate the change in condition before and after an impact to a stream has occurred or stream restoration activities are implemented. The MNSQT includes 24 metrics within 12 parameters that can be evaluated at a project site. A basic set of metrics within five parameters is required at all project sites evaluated. The user manual provides data collection methods related to each metric. For some metrics, methods include both rapid and more detailed forms of data collection, allowing the tool to be used for rapid or more comprehensive site assessments.

This tool is a key component for which the state can develop policies, rules, and procedures to address the issuance of permits for projects that impact streams under both the PWWPP and WCA. It provides the basis for assessing stream impacts, determining compensatory mitigation requirements for streams, and generating stream credits that can be banked and sold for compensatory mitigation purposes. Similar SQTs have been developed and are being used in other states. The state could learn from these other states and develop more refined policies and procedures to be implemented under assumption.

3.4.4. The State Wetland Bank

In addition to specifying the mitigation requirements for lakes and streams, a mechanism would need to be established to allow for the effective development and use of the prescribed mitigation. The most efficient option for establishing such a mechanism, and the option that represents the least amount of change from current state program structure, would be to add additional categories of waters to the

State Wetland Bank established pursuant to Minn. Stat. 103G.2242 Subdivision 1. While the bank is already established for wetlands and specific procedures for its use are in place, additional coordination would be required amongst the state agencies for the approval and use of banked mitigation across programs.

3.5. External Coordination

Under an assumed 404 program, EPA is responsible for coordinating with the federal agencies when potential impacts to threatened or endangered species may occur. The state would seek to implement measures to facilitate EPA's coordination to ensure an efficient and effective process for the agencies and applicants. During permit development, the state would also need to screen for potential impacts to sites listed or eligible for listing on the National Register of Historic places and notify EPA if impacts to those sites may occur. Under 404 assumption, the state must also regulate dredge and fill activities occurring in waters located on federal lands, with such activities consisting primarily of projects completed by federal agencies.

3.5.1. 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). Under an Assumed 404 program, EPA cannot waive their review of state permits that may affect federally listed threatened or endangered species and their designated critical habitat. Further, under the program, EPA is responsible for coordinating with the federal agencies when potential impacts to threatened or endangered species may occur. However, existing state permitting programs do not explicitly require determination of whether such species are present or consideration of impacts to these species, although some federally listed species are also listed under the Minnesota Endangered Species Act and are considered under state permitting programs.

If Minnesota assumed the Section 404 program, the state would need to implement a procedure to screen permit applications for both state and federally listed species and notify EPA accordingly. Further, the state would implement measures to facilitate EPA's coordination with the federal agencies, ensuring an efficient and effective process for permit applicants.

3.5.2. Historic Places

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, the state permit programs (WCA and the PWPP) must ensure that adequate screening for potential impacts on historic/cultural sites occurs, in coordination with the State Historic Preservation Office. Specifically, during permit development, the state would review projects for potential impacts to sites listed or eligible for listing on the National Register of Historic places and notify and coordinate with EPA if impacts to those sites may occur.

3.5.3. Federal Lands

To date, the state has generally not asserted WCA jurisdiction for activities occurring on federal lands. However, under assumption, such activities must fall under the purview of a state-assumed program.

While relatively few projects that impact wetlands occur on federal lands, the distribution of federal lands in the state would disproportionately affect certain counties. Consequently, the most likely option for permitting WCA wetland impacts on federal lands would be for BWSR, rather than the LGU, to coordinate with the federal agencies and to verify eligibility for a given general permit, in addition to issuing individual permits for projects on federal lands. Given the relatively low occurrence of projects impacting wetlands on federal lands, the workload associated with such permit applications under 404 assumption is expected to be low.

The DNR currently has the authority to regulate and manage the public waters and public waters wetlands located inside areas under federal jurisdiction (e.g., national forests). It is DNR's position that the federal government must obtain PWWPP permits for work in public waters and public waters wetlands just as other private landowners must. Consequently, the State's cost of reviewing permit applications for projects on federal lands would not be expected to change under 404 assumption. Regarding the Permit to Mine program (which applies WCA standards through its mining permits), the number and size of metal mining projects on federal lands is currently unknown.

3.5.4. State Program Administration

Implementation of an assumed 404 program would require the state agencies to undertake coordination and consultation with entities such as the EPA, USACE, Tribal Governments, and other states. Direct government to government consultation with tribal governments would be a necessary component of subsequent program development and implementation in MN. The state has increased and improved tribal coordination in recent years and is committed to continue doing so on this topic as well.

Coordination is multifaceted and would be necessary to carry out the daily routine functions of the program as well as to ensure the successful overall administration of the program, including:

- Conducting routine coordination with the EPA for the processing and review of individual permits and issuance or reissuance of general permits, issuance of public notices, responses to comments received during formal comment periods, and so on.
- Coordinating with the Tribes and/or other states when a proposed discharge may affect the biological, chemical, or physical integrity of the waters on Tribal lands or of another state.
- Monitoring and providing oversight for revisions to the state program, memorandums of agreement, or potential changes to the status of assumed or retained waters, coordinating with the office of the EPA Regional Administrator and/or the USACE District Engineer, when applicable.
- Carrying out other facets of coordination with EPA, including oversight of the state's response to EPA objections to permit issuance or requirements for permit conditions, and to represent the state at public hearings held by the EPA Regional Administrator.
- Ensuring that the state fulfills its requirement to provide to the EPA a draft annual report including tabular data, evaluating the State's administration of its program, identifying problems the State has encountered in the administration of its program, and making recommendations for resolving these problems.
- Consulting with the USACE for projects that will impact both state-assumed and USACE-retained waters.

Chapter 4. Funding Estimates

According to the 2019 legislation: “By February 1, 2022, the board must submit a report on the additional funding necessary to secure section 404 assumption and the additional funding needed to fully implement the state-assumed program to the chairs and ranking minority members of the legislative committees and divisions with jurisdiction over the environment and natural resources.”

4.1. Methods

The 2017 Feasibility Study contained estimates of the cost to implement a State-assumed program. However, in developing these estimates the state agencies and stakeholders were unable to anticipate revisions to the framework of the prospective state-assumed program that have since been developed. The most significant of these improvements are discussed in Chapter 3. These recent improvements will provide the basis for developing more accurate cost estimates.

To develop the funding estimates for this report, the 2017 cost estimates were adjusted to account for current (2022) staffing costs. The estimates were then further refined to develop the new 2022 estimates where progress in developing the state assumed program framework is expected to change the amount of staffing needed and/or other costs. The adjusted 2017 cost estimates are summarized in Table 1 and the new 2022 estimates are addressed in section 4.2.

Table 1. Adjusted 2017 Feasibility Study estimates of annual funding (\$mil) required for 404 assumption.

Agency	2017 Additional Funding Estimates ¹	
	Full State Scenario (\$M)	State\Local Scenario (\$M)
BWSR	\$6.1	\$3.4
DNR ²	\$1.9	\$1.9
MPCA	\$0.0	\$0.0
Total State Agency	\$8.0	\$5.3

1. The 2017 cost estimates were adjusted to account for 2022 staffing costs.
 2. Funding for expanded jurisdiction and the operation and maintenance of the WCA online permitting system were listed under the DNR in the 2017 cost estimates.

Since the extent to which the WCA implementation structure (utilizing local governments) would need to change to comply with 404 assumption requirements was not yet known, the 2017 Feasibility Study included funding estimates for two potential scenarios (see Chapter 3.2.1). The full state WCA implementation scenario assumed elimination of WCA LGU authority and a cost increase of \$6.10 million annually for BWSR to fully implement the program. Under the shared state-local implementation scenario, the study estimated that there would be an increased cost to the State of \$3.4 million annually.

Cost estimates for DNR were not affected by the WCA implementation scenarios as local governments do not have permitting authority for DNR programs. The cost for MPCA implementation of State WQS

was not expected to increase, as it was anticipated that a state process similar to the existing 401 certification process would be developed. The 2017 Feasibility Study also estimated that annual funding in the amount of \$225,000 would be required to implement and maintain the online WCA permitting system described in Chapter 3.3.

The 2017 Feasibility Study did not address the cost to develop the structure of a State-assumed program and assemble the 404 assumption application materials.

4.2. Additional funding needed to fully implement the state-assumed program

For purposes of this section, “additional funding” refers to the annual funding needed to implement the requirements of 404 assumption. As stated above, because of the remaining unknowns, these costs are estimates, subject to change. The estimated additional funding needed by BWSR to implement a state-assumed program is approximately \$2.1 million. This funding estimate corresponds to recent progress made in developing the WCA implementation structure under 404 assumption; specifically, the development and use of WCA general permits based on existing state regulations, the continued involvement of local governments under this structure, and the estimated cost of developing an online WCA permitting and reporting system.

Existing funding for DNR permitting programs is already inadequate to handle existing workload. In addition, the 2017 report estimates did not include any additional funding for implementation of the Permit to Mine program. The funding needed by DNR to implement a state-assumed program is currently estimated at approximately \$2.7 million dollars annually, which includes additional permitting positions for the PWWPP and Permit to Mine programs. This funding is necessary to administer new requirements related to the permitting process, including federal coordination, recurring training of staff, periodic legal review, ongoing maintenance of MPARS, and screening for threatened and endangered species and historic places.

As discussed in Chapter 3.2.3, the MPCA’s costs to administer the state water quality standards under 404 assumption are not expected to increase based on our current expectations for the structure of state programs. However, revisions to the MPCA cost estimates could be warranted as the details of the permitting structure of WCA and the PWWPP are refined and finalized.

Table 2. 2022 additional funding (\$mil) required for 404 assumption implementation.

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

The above cost estimates are arranged by agency. However, the benefits of certain costs incurred by a given agency may be shared between agencies to meet 404 assumption requirements more effectively. Opportunities may also exist for the state to use some identified funding to contract for services where such services would more efficiently meet program requirements. For example, BWSR and/or DNR could contract with the State Historic Preservation Office to ensure that permits do not adversely affect historic properties/sites as the need arises. The most effective way to utilize funding to meet 404 assumption requirements would become clearer as implementation procedures and processes are further refined and reviewed by EPA as part of the process to develop a full 404 assumption application package.

In summary, 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.

4.3. Additional funding necessary to secure section 404 assumption

The additional funding that would be necessary to determine whether to apply for and secure section 404 assumption includes costs associated with completing program development activities, including development of the additional information outlined in Chapter 1 which would need to be completed prior to making a decision on whether to pursue an application. If a decision were made to proceed, there would also be one-time costs for executing programmatic changes, developing and enhancing online permitting systems, and completing the 404 assumption application process. The additional state funding necessary to develop additional analysis, make a recommendation on whether or not to pursue 404 assumption and then, if necessary, the assembling the 404 assumption application materials is projected at approximately \$740 thousand (Table 3).

4.3.1. Assembly of the 404 assumption application materials

Substantial progress has been made in developing the state program structure and processes necessary for 404 assumption. To continue that progress, additional funding would be required beyond June 30, 2022 if the decision is made to complete the assembly of the required assumption application materials. Upon completion of the application materials and review by EPA, the required cost to assume can be further refined to allow for fully informed decision making by the legislative and executive branches of state government. The additional funding would be used for the following tasks:

- A. Continued development of the program structure, including tasks such as further refinement of WCA draft general permits, drafting of general permits for PWWPP, refinement of mitigation requirements for WCA and PWWPP, refinement of enforcement procedures, and so on.
- B. Finalization of ongoing research of, and draft changes to, applicable state statutes and rules necessary to receive authorization for 404 assumption. If this requires changes to reclamation rules (Chapters 6130, 6131 or 6132), the effort could be a substantial workload, particularly for the metallic mining rules which have not been revised since promulgation and tend to garner public interest.

- C. Continue to develop and complete all materials to satisfy the administrative requirements for 404 assumption. Examples include draft agreements with the USACE and the EPA, a detailed state-federal regulatory comparison, and development of application forms and procedures to be used in the administration of the program.
- D. Continuation of ongoing coordination with the EPA and other federal agencies for all aspects of program development and prospective application.
- E. Coordination and consultation with Tribes, affected state agencies, local governments, and interested stakeholders on multiple aspects of program development.

The additional state funding necessary to finish assembling the 404 assumption application materials is projected at approximately \$740 thousand (Table 3).

Table 3. Additional funding (\$thousands) required to assemble 404 assumption materials.

Agency	Funding Required ¹
BWSR	\$580
DNR	\$100
MPCA	\$60
Total State Agency	\$740
<small>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 work for all three agencies.</small>	

4.3.2 Additional one-time costs

If, after review and consideration of the fully assembled materials, the state makes a decision to formally submit a 404 assumption application to EPA, certain one-time costs would be incurred in addition to those provided above. These costs will result primarily from the following activities:

- 1) Development of an online WCA permitting system as described in Section 3.3. One-time funding in the amount of approximately \$1.5 million would be required to develop and execute the online system. The annual cost of maintaining and administering the permitting system, once established, is included in Section 4.3.
- 2) Updates to the DNR’s existing MPARS online application system will be required to account for changes to existing permit requirements and processes. One-time funding in the amount of approximately \$800,000 would be required to develop the necessary changes. Ongoing costs of system maintenance and administration are not expected to change.
- 3) Execution of programmatic changes and the 404 assumption application, including:
 - adoption of amendments to state statutes,

- revisions to administrative rules,
- finalization of agreements with federal agencies,
- workload associated with the formal application process, and
- staff training and stakeholder outreach for implementation of the assumed program.

The cost of executing the programmatic changes identified in paragraph 3 above will depend on the final structure of permitting systems and authorities, the method of change (statute vs. rulemaking vs. permit condition, etc.), and the extent of any potential uncertainties relating to the proposed programmatic structure. Estimates for these additional costs would be provided as part of the process to reach a decision on whether to proceed with a state application for 404 assumption.

Chapter 5. Next Steps

Laws of Minnesota 2021, 1st Special Session, Chapter 6, Article 2, Section 108, Subd. 9(a) provided \$200,000 for the state agencies to “begin to develop and assemble the material required... to have the state of Minnesota assume the section 404 permitting program of the Federal Clean Water Act.” As stated in the introduction, there remain some aspects that would need to be assessed further before deciding whether the state should apply for 404 assumption. The funding described in Table 3 would provide the necessary resources for state agency staff to finish developing and assembling the application materials. The following is a summary of the next steps for the state to continue moving forward with a potential 404 assumption application:

- 1) Legislative appropriation of funds identified in Table 3.
- 2) Prepare additional analysis needed to make the decision on whether to pursue assumption.
- 3) If decision is yes, agency staff continue assembly the draft 404 application materials, including the preparation of drafts of the program description, interagency agreements, Memorandums of Agreement with federal agencies, necessary policy changes, and other required materials.
- 4) A summary of the necessary programmatic changes, required statute changes, and final cost estimates provided to the legislature.
- 5) Decision on whether to apply for 404 assumption, consisting of approval from the Governor and concurrence by the Legislature as legislative action would be needed to accomplish the necessary statute changes and appropriation of funding identified in Table 2.
- 6) Completion of agency rulemaking as necessary for 404 assumption and execution of interagency agreements.
- 7) Assemble and submit formal application package to the EPA, including the required Attorney General’s statement and letter from the Governor requesting EPA approval of the state’s application.
- 8) EPA review and decision to approve or deny the state’s 404 assumption application.
- 9) State acceptance and implementation of the assumed program.