

Wetland Study Council

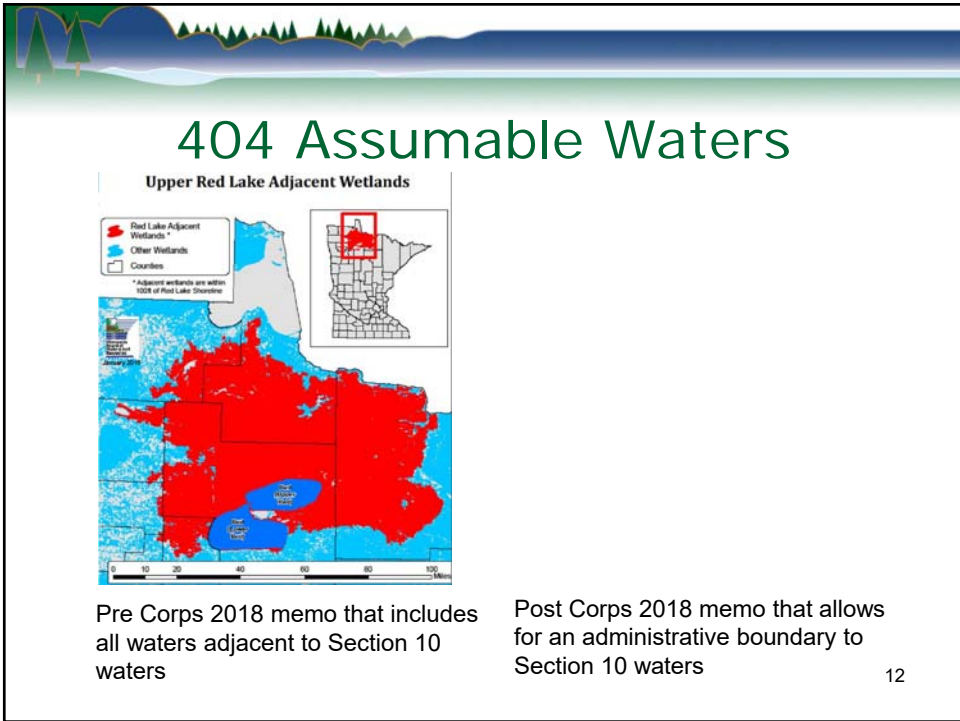
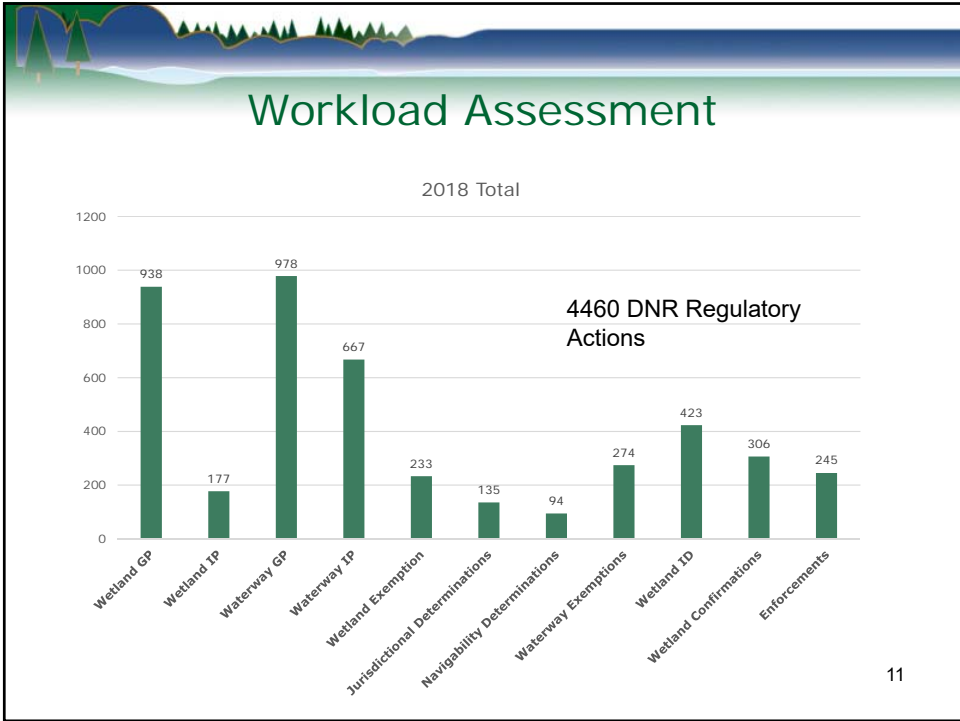
§404 Assumption Packet

June 21, 2019

Table of Content

- *Presentation*
- *Briefing Memo*
- *Background Reference Material*
- *Draft Feasibility Work Plan*
- *Draft Feasibility Report Outline*

*Prepared by Dan Helsel and Tom Pearce
Wisconsin Department of Natural Resources*





Alternatives to 404A

Permit Streamlining Alternatives

- Corps permitting options
 - Programmatic general permits
 - State programmatic general permits
 - Regional general permits
 - General authorization
- GP options (matching federal permits, etc.)
- Operating agreements
- IT and administrative streamlining

13



National Settings

- Two States have 404 Assumption
 - Michigan 1984 and New Jersey 1994
- Florida - draft laws and working on Endangered Species Act issues
- At least eight states have examined 404 Assumption in detail
- Previously, Wisconsin has “evaluated” 404 Assumption in 1993 and 2001

14

404A Application Materials

1. A letter from the Governor of the State
2. A complete regulatory program description
3. An Attorney General's statement
4. A Memorandum of Agreement with the EPA Regional Administrator
5. A Memorandum of Agreement with the Corps Secretary
6. Copies of all applicable State statutes and regulations



15

404 Assumption Advantages

- Elimination of some duplications of permitting process for assumable waters
- Generally shorter permitting timeframes than Corps
- Potential incorporation of State goals and policies into overall permit process
- Single point of contact leading to improved consistency and stability in regulation
- A single point of contact for compliance and enforcement



16

404 Assumption Limitations

- Not all waters are “assumable” and uncertainty associated with assumable waters
- Resources needed to align State laws with Federal regulations
- Lack of dedicated federal funding for 404 operation and administration
- Loss of some regulatory flexibility that currently exist in State wetland laws



17

404 Assumption Limitation Wisconsin Example

- Some regulatory flexibility may be reduced:

281.36(3n)(a)1. The department shall limit its review to those practicable alternatives ... at the site and adjacent to the site if the project:

- ❖ results in demonstrable economic public benefit
- ❖ necessary for expansion of industrial, commercial, agricultural or aquaculture facility
- ❖ Will occur in an existing industrial park

18

Feasibility Study

Next Steps

- Examine differences between State and Federal standards
- Compare permitting and guidance differences
- Estimate resources needed to assume the program
 - Enact new laws
 - Develop 404 application
 - Update IT components
 - Staff work load & training
- Explore alternatives for permit streamlining
- Map assumable waters



19

Wetland Study Council Discussion & Input



20

DATE: June 20, 2019
TO: Wetland Study Council
FROM: Dan Helsel, DNR Field Integration Leader
404 Assumption Project Manager
SUBJECT: Section 404 Wetland Program Assumption

The briefing memo relies on existing reports and materials produced by the WDNR, EPA, Association of State Wetland Managers, other states and independent authors. Many sections of this briefing are taken verbatim from these resource materials and referenced accordingly.

Table of Contents

The 404 Assumption Program.....2
National Setting of 404 Assumption4
Advantages and Challenges of §404 Assumption5
404 Assumption Application Process.....13
References14
Appendix 1 - Corps Assumable Waters Memo July 201815
Appendix 2 – Section 10 Waters of Wisconsin.....18

The 404 Assumption Program

The U.S. Congress has provided a mechanism for state/tribal and federal cooperation in the Clean Water Act (CWA) Section 404 program (§404) since 1977. In the process known as §404 Program Assumption, a state or tribe may request from the Environmental Protection Agency (EPA) to “administer its own individual and general permit program” in place of the federal dredge and fill permit program. Congress recognized that many states had already established parallel permitting programs 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 Army Corps of Engineers (COE) control over navigation in interstate waters (ASWM, 2011).

In order to qualify to “assume” the Federal §404 program, the state or tribal program must meet requirements that assure a level of resource protection that is equivalent to that provided by the federal agencies. Requirements for the assumption of the §404 program are detailed in the EPA’s §404 State Program Regulations at 40 CFR Part §2331.

CORRESPONDENCE/MEMORANDUM

An approved state or tribal program must have in place – in state/tribal laws and regulations – provisions that address a number of requirements, including:

- jurisdiction over all waters of the United States, including wetlands, other than waters where the COE retains jurisdiction;
- authority to regulate all activities that are regulated under federal law (a state/tribe cannot exempt activities that are not exempt under the CWA) and partial assumption is not allowed;
- permitting standards and procedures that will be at least as stringent as the federal permit program, and that will ensure consistency with the federal permitting criteria;
- compliance and enforcement authority including the ability to enforce permit conditions, and to address violations with penalty levels that are at least comparable to federal fines and penalties; and
- program funding and staffing sufficient to implement and enforce the program.

The state or tribe may impose more stringent requirements, but not less stringent requirements. The state or tribe may adopt Nationwide Permits or may develop its own General Permit categories for its program (ASWM, 2011).

The COE retains jurisdiction over waters which are, or could be, used as a means to transport interstate and foreign commerce, all 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). A recent July 2018 memo from Assist. Secretary of the Army, R.D. James (Appendix 1), and EPA initiation of rule making will both play a role in determining the extent of assumable waters in Wisconsin.

The EPA directly reviews permit applications defined in a Memorandum of Agreement (MOA) with the state and may object to issuance of a permit where federal guidelines are not met, or if the permit is subject to an interstate dispute. The EPA review also provides for coordination with other federal programs, including the COE, U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS). A state/tribe cannot issue a permit under §404 if EPA objects to issuance of the permit and the state has not taken steps required by the EPA Regional Administrator to eliminate the objection (ASWM, 2011).

The detailed process for EPA review of state/tribal §404 program permit applications is spelled out in federal law and regulations (Section 404(j); 40 CFR §233.50). Generally,

- The state or tribe is required to send EPA a copy of the public notice for any complete permit application received by the state except where EPA has waived review in the MOA. Public notices must be sent to the applicant, adjoining property owners, any agency with jurisdiction (including Tribes) and all persons who request a copy.
- The EPA in turn, provides these permit applications to the COE, the USFWS, and (in coastal waters) the NMFS for review. These agencies are given 50 days to provide comments to EPA.
- EPA must provide comments to the state/tribe within 90 days of its receipt of the permit application. These comments incorporate comments from the other federal agencies.
- In the event that EPA objects to the proposed project - typically by finding that some aspect of the project is not consistent with the §404(b)(1) Guidelines - then the state/tribe cannot issue a permit. This is similar to EPA's existing authority to raise concerns with, or veto COE permits. In most instances, federal concerns are resolved by: modification of the project by the applicant; provision of clarifying information by the applicant; or by agreement on conditions to be added to the permit.

CORRESPONDENCE/MEMORANDUM

- There is a time limit for resolution of federal issues. Once EPA has sent a letter of objection, all issues must be resolved within a 90-day period. After this, the EPA cannot withdraw the objection to the permit.
- If the state/tribe does not satisfy EPA's objections or requirement for a permit condition or does not deny the permit, then processing of the §404 permit reverts to the COE. The applicant may seek federal authority by filing a new application with the COE. Should the COE deny the permit, the applicant may appeal through the federal process. The state may, in some circumstances, issue a permit under state law in spite of an EPA objection – but in this instance the state permit would not provide any authority under §404 (ASWM, 2011).

In addition, the EPA reviews the state's annual program performance, and provides federal technical assistance. EPA also retains the right to take enforcement action on any §404 violation, although the primary responsibility for enforcement rests with the state/tribal §404 program.

National Setting of 404 Assumption

In spite of the promise and apparent advantages of §404 program assumption, only two states - Michigan and New Jersey - have requested and received approval for a state §404 program. Many states have examined the feasibility of §404 Assumption Programs (Minnesota, Maryland, Oregon, Virginia, Montana, Arizona, and Alaska) and their efforts have not resulted in actual assumption (NACEPT, 2017). The primary reasons for this are reported to be a strict requirement for consistency with federal law, setting a relatively high bar for permitting and enforcement, combined with a lack of dedicated federal funding to support state programs and uncertainties associated with jurisdictional/assumable waters and endangered species (ASWM, 2011).

Minnesota reported on the experience of other states that have either assumed the §404 program or have conducted significant investigations on assumption.

- The two states that have assumed §404, Michigan and New Jersey, report that the program works very well, including expedited permit times, less permit redundancy, and good working relationships with EPA.
- States that have investigated but not assumed §404 cite financial constraints, challenges with federal endangered species coordination, and lack of clarity on non-assumable waters (MNDNR, 2017).

Oregon has a long history with assumption and presents an interesting study of the issues a state comes across during the program development process. There are three major issues that have frustrated Oregon's attempts, in particular: Endangered Species Act (ESA), Tribal relations and concerns, and what are called "adjacent waters" to Section 10 non-assumable waters (Carlos, 2014).

The State of Florida is moving forward with the assumption process. During the 2018 State Legislative Session, comprehensive legislation, SB 1402 and HB 7043, was introduced and signed into law on March 23, 2018 by Governor Scott and "gives the Florida Department of Environmental Protection the authority to undertake rulemaking to explore whether the state should issue §404 permits as is the case in New Jersey and Michigan." (Scott, 2018). Florida plans to notice the draft §404 state wetland rules in October and continues to work with EPA and COE in development of the necessary memorandums of agreement and the definition of assumable waters (Rach, 2018).

Specifically, the legislation authorizes FDEP to:

- adopt by rule any federal requirements, criteria, or regulations necessary to obtain assumption of the program and provides that any such rules adopted may not become effective or otherwise enforceable until the U.S. Environmental Protection Agency has approved the state's assumption application;

CORRESPONDENCE/MEMORANDUM

- provides that state laws which conflict with the federal requirements necessary to obtain assumption of the §404 permitting program do not apply to state administered §404 permits;
- provides that a state administered §404 permit is not required for activities exempted from regulation in certain federal law and rule provisions and certain state statutory exemptions from permitting requirements do not apply to state administered §404 permits; and,
- provides that FDEP must grant or deny an application for a state administered §404 permit within the time allowed for permit review under federal rules (John J. Fumero, 2018)

Given that state/tribal regulations must be in accordance with federal requirements, and that EPA relies heavily on information gathered by the states, disagreements between state and federal reviewers are uncommon. In New Jersey, which assumed the program in 1994, there has been one permit that reverted to the COE for processing. In Michigan, where tens of thousands of permits have been issued since program assumption in 1984, there have only been 8 situations in which the state issued a permit over the objection of EPA – resulting in reversion of §404 processing to the COE (ASWM, 2011).

Advantages and Challenges of §404 Assumption

There are multiple incentives for a state/tribe to assume administration of the §404 program. Because of Wisconsin's well-developed State wetland permitting process, some advantages typically cited are already present and §404 Assumption would add little to the value of these program components. Virginia summarized the benefits of §404 Assumption as follows:

Regulatory streamlining and increased efficiency: State program §404 Assumption may reduce duplicative State and Federal permitting requirements, resulting in reduced time for review of regulated activities.

Increased consistency in permit decisions: A State run §404 program provides a single point of contact for the regulated community and can eliminate potentially conflicting permit decisions and conditions.

Increased regulatory program stability and certainty: During time of jurisdictional uncertainty at the federal level, such as in the wake of an individual federal legal decision, State governments are able to maintain a consistent and predictable definition of waters they regulate.

State-specific resource policies and procedures tailored to address conditions and needs of the State:

A State run §404 program can be designed in accordance with the individual State's unique water resources, geographic features and water protection goals. (VDEQ, 2012).

Potential Challenges and Barriers

While at least seven states have evaluated the feasibility of §404 Assumption, the fact that only two states (Michigan in 1984 and New Jersey in 1994) have assumed the §404 program since 1977 reflects the well-studied disadvantages and challenges associated with the 404 Assumption.

Virginia (VDEQ, 2012) summarized the disadvantages of §404 Assumption in 2012:

- High financial costs of creating state laws equivalent to §404, developing an application for §404 Assumption, and yearly implementation of the program.
- Lack of dedicated federal funding for §404 operation and administration while grant funds may help to evaluate and develop a §404 Assumption program, there is no implementation funding.
- Difficulty in meeting the program requirements of regulatory equivalent authority in all areas of the Federal §404 program.
- Section 10 Navigable Waters remain under COE jurisdiction and are not assumable waters by the State. In the coastal states, Great Lake States and states with large rivers, a greater geographical

CORRESPONDENCE/MEMORANDUM

extent of waters could be designed as non-assumable and therefore reduce the benefits of a state run §404 program.

- Loss of COE knowledge and technical resource base especially with respect to wetland delineations and enforcement investigations.
- Any subsequent changes to State regulatory programs may trigger a re-evaluation of the program by the EPA and any changes to federal regulations may require a State to revise state law.

The disadvantages are often presented in the terms of challenges or barriers and a state that is considering §404 program assumption will need to weigh the clear benefits with these obstacles and challenges. The ASWM, States and other authors have identified general barriers to §404 Assumption (discussed in greater detail below), including:

- the time and effort to modify or replace existing State wetland permitting program with a program equivalent to the §404 program;
- securing the necessary financial resources to the state for additional work tasks without available Federal funding;
- not all waters are exclusively regulated by the State and the COE still issues permits for non-assumable waters and the EPA retains its veto power;
- unclear or ambiguous mechanisms and requirements under the Endangered Species Act (ESA);
- Lack of an established framework for a §404 Assumption due to the differences between State wetlands and program goals (Carlos, 2014).
- developing the wide breath of broad public and political support for a State program that strictly implements Federal laws (ASWM, 2011);

Advantages for Wisconsin

Applicants work through permitting, compliance and enforcement with a single State point of contact improving consistency and shortening timelines. For most projects, DNR does process the permit faster and is more responsive compared to COE timelines.

Wisconsin can incorporate State goals and policies into the §404 Assumption program, within the limits of standards that remain as, or more stringent than Federal standards.

Advantages Already Existing in Wisconsin

Permit duplication is already minimized in Wisconsin. DNR and COE share all application materials under a formal MOU. DNR forwards all permit materials directly to the COE

A watershed and broad-based resource review of permits already occur in Wisconsin. Permitting reviews utilize and integrate with local DNR resource experts at a watershed levels.

Compensatory mitigation is already streamlined with the adoption of a joint set of guidelines for compensatory wetland mitigation by both the DNR and COE.

A comprehensive wetland & waterway regulatory program already exists in Wisconsin and includes some isolated wetlands and navigable waters.

A Number of State Laws Need to be Modified

The federal regulations for state assumption of the §404 program contain the following provision:

40 CFR §233.1(d) Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act (Clean Water Act) and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.

Minnesota identified state regulatory programs with varying degrees of inconsistency with federal regulations and found it would be necessary to consult further with the EPA to clearly identify the specific changes to state laws that would be necessary to obtain approval. This consultation would be extensive and would require a dedicated state staff position as well as considerable time from other state regulatory program staff (MNDNR, 2017).

Both COE and Wisconsin follow comparable standards for permits decisions under the general concept that impacts to jurisdictional waters/wetlands must be avoided and minimized to the greatest extent practicable and that unavoidable impacts generally require compensatory mitigation aimed at replacing the lost resources and their associated functions and values. Some aspects of Wisconsin's state regulatory programs are equivalent, though not necessarily identical to the CWA in terms of protecting aquatic resources. However, certain parts of the state regulatory programs (including, but not necessarily limited to the items below) would require more detailed review with EPA if Wisconsin elects to pursue §404 assumption:

- Some of the Wisconsin wetland permitting exemptions that allow wetland impacts with no replacement or reporting have no counterpart in the CWA.
- The state has no established mitigation requirements for impacts to lakes and streams compared to certain aspects of the §404 program.
- Wisconsin's legal framework may not be equivalent to the CWA provisions allowing citizens to commence civil suits in federal district court for alleged violations of the CWA (modified from (MNDNR, 2017)).

For Wisconsin, the requirement to put in place a regulatory equivalency program for §404 Assumption would require recent wetland permitting flexibilities put in place by the legislature to be removed for §404 assumable waters. This would include:

- The narrowing of the practicable alternative analysis for "contiguous projects" or projects that show a "demonstrable economic benefit" passed in 2012;
- Eliminate the consideration of "net environmental positive impact;"
- The narrowing of practicable alternatives and mitigation standards for ferrous mining, passed in 2013;
- The narrowing of practicable alternatives for residential, agriculture and small business projects, passed in 2016;
- The exemption for artificial wetlands passed in 2018;

Some of the State wetland fill general permits are not available under §404 assumption.

Another consideration of establishing an equivalent program to assume the §404 program, is that a state must regulate all waters that are jurisdictional under the CWA. A state may, for their own policy reasons, elect to regulate more waters than are covered under the CWA, but to assume §404, a state cannot omit from regulation waters that are jurisdictional under the CWA discussed further under assumable waters.

Additional Staff and Budget is Required

The financial cost of implementing a new program can be substantial, and is often difficult, if not impossible, for states to manage without Federal assistance. The Federal government provides grants for the development of a wetland program, but these grants do not continue once a program is implemented.

Virginia, Oregon, and Minnesota, for example, have all pointed to lack of Federal funding in the implementation phase as one of the major roadblocks to dredge-and-fill assumption (Carlos, 2014). Kentucky compared program costs among states with and without §404 Assumption and published the information shown in Table 1.

Table 1. State wetland program costs (ASWM, 2011)

State	Annual cost	FTEs	
New Jersey	\$3 million	42	(State Assumed §404)
Michigan	\$7 million	86	(State Assumed §404)
Wisconsin	\$3.5 million	27	(State program/RGP)
Tennessee	\$1 million	16	(State program)
Maryland	\$2.4 million	40	(SPGP)
est. to assume 404	+ \$2 million	+ 23 FTEs	

The state absorbs responsibility for a number of new tasks immediately upon assumption and must maintain the level of staff necessary to handle the increase at a cost to the state. For Wisconsin, increased work load for the Department would be expected as a result of increased responsibilities for the tasks in Table 2. At the current time, the estimated additional staff and budgetary support needed to implement §404 Assumption in Wisconsin is unknown given recent agency alignment and staffing changes, the unknown number of assumable waters and uncertainties related to program implementation (e.g. Endangered Species Act). Historical estimates related to implementation of §404 program have focused on Waterway and Wetland program and ranged upwards for needing 10 -15 additional staff and associated office/travel funding. The estimates have not included additional work to other programs across the Department (Law Enforcement, Legal Services, Natural Heritage, Internal Services, etc.).

Table 2. Work Tasks Likely to Increase with §404 Assumption

Additional Work Tasks Under 404 Assumption
Assuming jurisdictional determinations for Waters of the US for non-assumable waters
Processing permits for activities under Federal law that are currently exempt or eligible for general permits under State law
Potential increased effort in response to oversight and involvement on specific permits from the EPA and other agencies
Assuming sole responsibility for enforcement
Additional EPA reporting requirements and oversight for the 404 assumption program
Additional work to coordinate Endangered Species Act reviews
Training staff and updating forms and public information

When Virginia examined assuming §404, its research found that the program would cost the state an additional \$4 million per year beyond the cost of its existing wetlands program to increase its staff and administrative resources. It would have had to more than double the size of its existing program, without including indirect costs like rent.

CORRESPONDENCE/MEMORANDUM

Because both local and state government handle wetland permitting in Minnesota, the fiscal impact estimates included an increased cost for State government (between \$3.5m and \$4.7m) due to the required shift in permitting authority from local governments to a state agency. And local governments would save program costs between \$2.3m and \$4.1m. Overall §404 Assumption costs in MN would increase \$0.6m to \$1.1m and 4.2 to 9.5 FTEs primarily due to the requirement to extend state regulatory program jurisdiction to additional waters (MNDNR, 2017).

More recently, Florida DEP has concluded that no additional resources are required for the implementation of §404 Assumption because of the robust State wetland permitting program. However, there was not a specific work load analysis developed and the conclusion was based upon the input of veteran staff suggesting there is a 80% to 85% overlap with COE work (Megan Seward, Chief Advisor Regulatory Programs, pers. comm.).

A state that has assumed the §404 Program must also submit an annual report to the EPA Regional Administrator evaluating the state's administration of its regulatory program(s), including identifying problems and providing recommendations for solutions. New Jersey's 2016 annual report to the EPA consisted of approximately 16 pages of reporting text and 130 pages of spreadsheet data summarizing different components of the program. The report must address the following (40 CFR §233.52):

- an assessment of the cumulative impacts of the state's permit program(s) on the integrity of state-regulated waters;
- identification of areas of particular concern and/or interest;
- the number and nature of individual and general permits issued, modified, and denied;
- number of violations identified, and number and nature of enforcement actions taken;
- number of suspected unauthorized activities reported, and nature of action taken;
- an estimate of extent of activities regulated by general permits;
- the number of permit applications received but not yet processed (MNDNR, 2017).

Assumable Waters Update – Fall 2018

On July 30, 2018, the state received a copy of a memo signed by R.D. James, Assistant Secretary of the Army, addressing the extent of assumable waters by the states (Appendix 1). The memo suggests, as a starting point, the Corps would maintain authority over wetlands adjacent to Section 10 waters landward to an administrative boundary. This is consistent with the recommendations of NACEPT subcommittee issued in May 2017 which also suggested a default administrative boundary of 300 feet. This recent memo, as well as EPA plans to proceed with rulemaking to address the assumable waters issue will likely affect the extent of assumable water jurisdiction in Wisconsin.

The COE will retain jurisdiction and permitting authority over an unknown number of waters. Possibly the major roadblock to assumption is the unclear jurisdiction over the “adjacent waters” to navigable waters. There is a line between which waters are covered by Federal acts, and thus cannot be delegated, and which waters could be under state jurisdiction. Section 10 of the Rivers and Harbors Act grants the COE full and unassumable authority over the “navigable capacity of any water of the United States.” Section 10 Navigable Waters of Wisconsin are included in Appendix 2. The Clean Water Act also reserves certain waters to the exclusive jurisdiction of the Federal Government, including any water that has been, could be, or used to be used for navigation or interstate commerce, waters subject to the ebb and flow of the tide, and all waters and wetlands “adjacent to” any of the jurisdictional waters.

CORRESPONDENCE/MEMORANDUM

While some bodies of water are easily defined as navigable, or adjacent to navigable waters, there are many waters that are not easily discernible. States cannot look to the existing state §404 programs because both Michigan and New Jersey determined the scope of the assumable waters before the Rapanos and SWANCC decisions changed the definition of navigable waters, and both states were able to assume permitting before the regulatory environment became so convoluted. In addition to certain waters and wetlands discussed above, the state may not assume permitting authority for projects on lands for which it does not have jurisdiction, such as Indian lands.

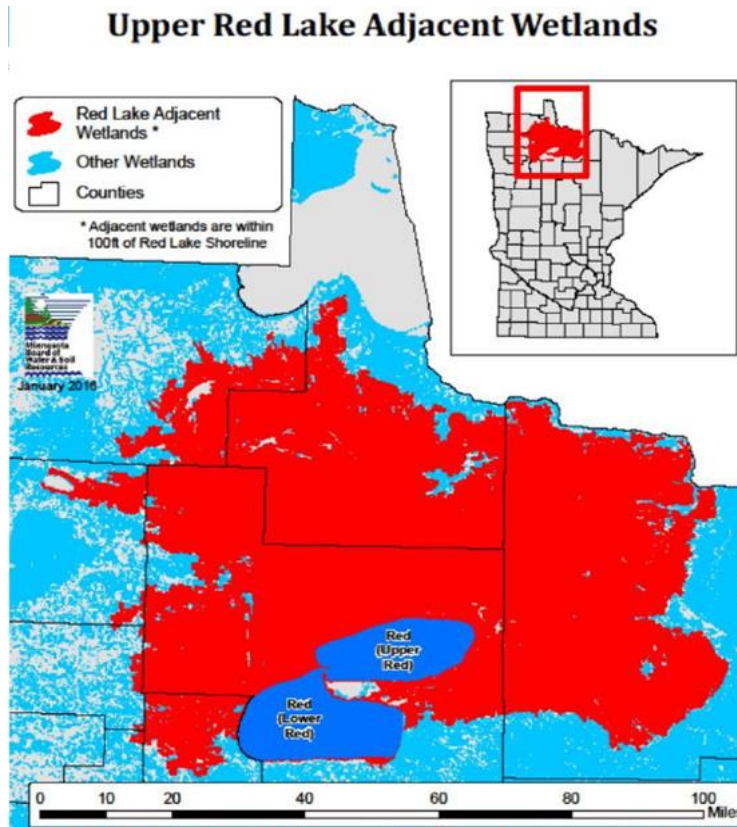


Figure 1. MN example of estimated extent of non-assumable waters. Estimated area of Corps continued jurisdiction for wetlands “adjacent” to Upper and Lower Red lakes. Pre James 2018 memo.

Minnesota found that some interpretations of the federal statute would result in a limited number of the state’s waters being assumable, creating little incentive for the state to pursue §404 assumption (MNDNR, 2017). There is no hard-and-fast definition of the boundaries in either guidance documents or in regulations, so states and the COE must create a method by which they divvy up the contested waters (Carlos, 2014).

Minnesota reported that understanding of congressional intent is limited, as is the history of application, since only two states have assumed the Section 404 program and others that investigated §404 assumption have had differing experiences. As such, it remains unclear as to which wetlands (and to what extent) should be retained by the COE. Assuming a known set of retained navigable waters can be identified, it could be extremely difficult to determine the specific extent to which wetlands are retained by the COE (vs. those assumable by the state) without consistent and implementable guidance (MNDNR, 2017).

determine how joint jurisdiction will work for issuing permits. However, this coordination does not always create a solution that is palatable to the regulated audience. In fact, this jurisdictional difficulty was another reason why Oregon halted its assumption process (Carlos, 2014).

To work with the Section 10 water inconsistencies and overlaps, states can assume joint control of some waters along with the COE – which means that the parties must

Minnesota further explored the extent of assumable waters directly with COE Headquarters (MNDNR, 2017) and was informed that the current position of COE headquarters, which the District is obligated to apply, is that the waters which would be retained by the COE include:

- navigable waters under Section 10 of the Rivers and Harbors Act,
- “traditionally navigable waters,” and
- all wetlands adjacent to those waters using the current COE regulatory definition for determining jurisdiction.

CORRESPONDENCE/MEMORANDUM

Minnesota found this interpretation has significant implications for state assumption. For example, in Minnesota, “adjacent” wetlands (as currently defined by the COE for §404 jurisdiction) can extend tens and even hundreds of miles from a water body (Figure 1). Under this interpretation, a significant portion of Minnesota waters and wetlands, particularly in the northern part of the state, would not be assumable and would remain under COE regulatory authority (MNDNR, 2017).

Jurisdictional changes to “waters of the United States” at the EPA level, whether caused by modifications to §404 code, executive order or judicial decision, may result in states having to change their assumable water approach. For example, following the Carabell/Rapanos decision (2006), the state of Michigan has asserted state jurisdiction in areas adjacent to the Great Lakes, where the COE cannot. In New Jersey the state law provided protection of isolated wetlands when CWA does not (Christie, 2010).

In 2015, partly in response to uncertainties mentioned above, 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 U.S. Environmental Protection Agency can best clarify for which waters the state/tribe has CWA §404 permit responsibilities, and for which waters the COE retains CWA §404 permit responsibility. NACEPT completed their work in May 2017 (NACEPT, 2017) and with a majority, recommended:

- the EPA develop guidance or regulations to clarify that when a state or tribe assumes the §404 program, the COE must retain authority over waters included on lists of waters regulated under Section 10 of the Rivers and Harbors Act;
- the EPA adopt and implement a policy under which the COE would retain administrative authority over all wetlands adjacent to retained navigable waters (Section 10 Waters) landward to an administrative boundary agreed upon by the state or tribe and the COE (NACEPT, 2017).

Florida DEP has suggested the COE utilize the recommendation of NACEPT as part of their recent work toward §404 Assumption, recognizing the COE was the minority dissenting party to NACEPT 2017 findings. As part of developing a COE MOA with the COE, the initial list of Section 10 Navigable Water included more than 522 rivers and more than 110 lakes to which the COE has suggested adding 2,000 more rivers and 1,200 more lakes (FDEP, 2018).

Substantial Uncertainties Existing Around the Endangered Species Act Implementation

The Endangered Species Act (ESA) is commonly perceived as the strongest environmental protection statute in the Federal government and imposes strict requirements on any discretionary agency action undertaken. However, this duty to consult only applies to Federal actions, and does not carry over to states, even under the §404 Assumption program. While ESA consultation does not apply to either the states or to the transfer of authority from EPA, states are still required to provide some protections for endangered species and EPA still has the responsibility to review permits for discharges with reasonable potential for affecting endangered or threatened species as determined by USFWS. When a state is creating its equivalent endangered species program, States need to figure out how to comply with §7 under §404 Assumption compared to §10 which is commonly implemented by state programs (Carlos, 2014).

State permitting programs do not explicitly require consideration of impacts to federally listed threatened or endangered species, although some federally listed species are also listed under the Wisconsin Endangered Species Act, which is a consideration under state permitting programs. Under §404 assumption, EPA cannot waive their review of state permits that may affect federally listed species and designated critical habitat and must coordinate with the USFWS and the COE. If Wisconsin assumed the §404 program, it’s likely that the state would need to implement a procedure to screen permit applications for both state and federally listed species and notify EPA accordingly. The Michigan Department of Environmental Quality and the New Jersey Department of

CORRESPONDENCE/MEMORANDUM

Environmental Protection, through consultation with the EPA and the USFWS, have developed such a screening process as part of their state permit reviews under §404 assumption (MNDNR, 2017).

No Recent State §404 Assumptions Approvals to Use as a Template

If the states had an application template and process to follow, it would diminish some of the burdens on the state – namely, the time and money it takes to research §404 application procedures. Additionally, a state must still have the flexibility to create a program that is tailored to its unique wetlands and political environment. There is no single approach that has or has not worked, when it comes to the states that have pursued assumption; and each state has different motivations, different wetlands, and different programs in place, so there is no one approach that works. Additionally, as is the case in Wisconsin, many states have developed a wetland program over time without the explicit intent of meeting the requirements of federal assumption, and therefore, must significantly retrofit their existing programs or create a new program from scratch (Carlos, 2014).

Public and Political Opinions Vary

Section 404 Assumption is really a political process done at the request of the Governor with a legal evaluation by the Attorney General office and approval by the EPA. Assumption must have enough political popularity to spur the Governor’s request, and then maintain enough political momentum to pass the needed regulatory law changes and allocate the financial resources through the legislature and the public. Since it is a political decision, ultimately, the states need to get broad support and address the separate stakeholder groups’ interests and concerns. Developers would like to keep the comfort of the status quo unless they see clear permitting streamlining benefits and need reassurance that the difficulty of getting a permit will not increase. Environmental advocates are concerned about the loss of Federal protection, and the comfort of the strong Federal environmental statutes. Environmental advocates fear that even if the state has a program that is “equivalent to” the Federal program on paper, the process will not be “equivalent to” in application (Carlos, 2014).

Currently, the State is able to implement some of the regulatory flexibilities that have been passed by the legislature since the early 2000s and most recently in 2018. For assumable waters, the State will not have the same level of regulatory flexibilities. If the State is applying two different set of standards for wetland approvals, this may cause some confusions with applicants – even though those same standards are currently in place but implemented by the COE.

Challenges for Wisconsin
COE will keep jurisdiction for all Section 10 Waters (~40 in Wisconsin) and an unknown number of connected and adjacent wetlands to those Section 10 Waters – James’ 2018 memo and EPA rulemaking may help to clarify.
Increased inefficiencies related to determining Federal vs State jurisdiction
Some level of changes in State Statute and Code required
Significant staff and resources needed to change the new laws prior to §404 Assumption application
Potential Federal lawsuits with attorney fees if the State assumes the Federal program
Uncertainty of available resources across the Department to replace the COE roles in mitigation, enforcement, and reporting, etc.
Endangered species act implementation ambiguity

CORRESPONDENCE/MEMORANDUM***404 Assumption Application Process***

Congress included a provision in 40 CFR §233.10-14 of the Clean Water Act that allows states to “assume” control of dredge-and-fill permits from the Federal government that avoided this duplicative scheme. This provision, §404(g), allows states to assume control as the primary permitting authority for the “assumable waters” within the state, rather than the COE, and thus remove the need for permittees to apply for both a state and a Federal permit for dredge-and-fill activities. Section 404 provides a checklist by which states can prove to the COE and to the EPA that it has a permit program that is equivalent to the Federal program. This checklist is deceptively simple and provides that the Governor of any state may submit an application for assumption to the EPA (Carlos, 2014).

Under 40 CFR §233.10, the check list includes:

- (a) A letter from the Governor of the State requesting program approval.
- (b) A complete program description, as set forth in section 40 CFR §233.11.
- (c) An Attorney General's statement that applicable state laws and regulations provide adequate authority to implement a qualifying program(s), as set forth in section 40 CFR §233.12.
- (d) A Memorandum of Agreement with the EPA Regional Administrator specifying certain implementation details, including general state and federal responsibilities, classes of permit applications that are waived from EPA review, state reporting on program implementation, and compliance monitoring and enforcement responsibilities, as set forth in section 40 CFR §233.13.
- (e) A Memorandum of Agreement with the COE Secretary that identifies which waters the COE would retain jurisdiction over, describes procedures for transferring pending §404 permit applications to the state, and provides a plan for state implementation of any general permits currently issued by the COE, as set forth in section 40 CFR §233.14. While the regulations lay out the general content of the MOA, they do not prescribe a process or timeline to create it. The requirement to address these issues through an MOA clearly implies that there would be state and federal collaboration during its development, but the authority to identify retained waters ultimately falls to the COE. The regulations also do not identify procedures for resolving disputes between a state or tribe and a COE District, should they arise (MNDNR, 2017).
- (f) Copies of all applicable State statutes and regulations, including those governing applicable State administrative procedures.

Upon receipt of a complete application, the EPA undertakes a review process involving other federal agencies (COE, USFWS, NMFS) and the public. The EPA must make a decision to approve or disapprove within 120 days of receiving a complete application, unless extended by mutual agreement with the state. The EPA has determined that a decision on a state application for Section 404 assumption does not constitute a major federal action affecting the environment that would require preparing an Environmental Impact Statement under the National Environmental Policy Act (MNDNR, 2017).

Fiscal Resources to Develop a 404 Assumption Application

Wisconsin has estimated 1,200 hours of staff time to develop a §404 Assumption application.

The most recent §404 Assumption application was submitted by New Jersey (circa 1994) and consisted of at least 7 different documents including:

- Attorney General Statement (9 pgs.)
- Assumable Waters Definition (9 pgs.)
- Description of State Laws (15 pgs.)
- Estimated Program Resources (38 pgs.)

CORRESPONDENCE/MEMORANDUM

- EPA MOA (11 pgs.)
- COE MOA (6 pgs.)
- ESA MOA (10 pgs.)

Minnesota found application process for §404 assumption is extensive and would require extensive coordination with the EPA and the COE. A dedicated FTE at a state agency would be required for two years or more to identify specific statute/rule changes, develop the required agreements with the EPA and COE, and prepare the assumption application package (MNDNR, 2017) at an estimated cost of \$150,000.

In Florida, a task force team of about 14 FDEP staff have been working on the §404 Assumption application for little more than a year since the agency decided it would pursue assumption. Florida has been working closely with EPA and COE and stakeholders for that same time periods and has developed draft MOAs and a cross walk comparison of State law and §404 laws. FDEP has shared their draft EPA MOA (9 pgs) and COE MOA (27 pgs) and regulatory rule crosswalk (33 pgs). FDEP goal is to have the State laws modified between now and early fall and then submit an application to the EPA in September (Megan Seward, Chief Advisor of Regulatory Programs, pers. comm.).

References

- ASWM. (2011). *Section 404 program assumption, a handbook for States and Tribes*. Windham, ME: Association of State Wetland Managers and the Environmental Council of the States.
- Carlos, A. (2014). *The trouble with assumption: An analysis of the ongoing struggles with 404 assumption*. Eugene, Oregon: Master's Thesis, Conflict and Dispute Resolution Program, University of Oregon.
- Christie, L. S. (2010). *Expanding the State's role in implementing CWA §404 assumption*. Eugene, ME: Association of State Wetland Managers.
- FDEP. (2018). *Draft MOA between FDEP and COE for §404 Assumption*. Tallahassee, FL: Florida Department of Environmental Protection .
- John J. Fumero, E. (2018, January 29). *Linkedin.com*. Retrieved from State of Florida seeks takeover of federal wetland program.: <https://www.linkedin.com/pulse/state-florida-seeks-takeover-federal-wetland-program-john-j-fumero>
- MNDNR. (2017). *Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study - Report to the Legislature*. St. Paul, Minnesota: Minnesota Department of Natural Resources and Minnesota Board of Water and Soil Resources. Retrieved from http://www.bwsr.state.mn.us/wetlands/cwa_404/Minn_Section_404_Assumption_Feasibility_Study_Report_Final.pdf
- NACEPT. (2017). *Final Report of the Assumable Waters Subcommittee*. National Advisory Council for Environmental Policy and Technology (NACEPT).
- Rach, T. (2018). Personal communication, October 2018.
https://www.flrules.org/Gateway/View_notice.asp?id=20402318.
- Scott, G. (2018). *Letter to Secretary of State*. Tallahassee, FL: Office of the Governor, State of Florida.
- VDEQ. (2012). *Study and the costs of benefits of state assumption of the Federal §404 clean water act permitting program*. Richmond, VA: Virginia Department of Environmental Quality.

Appendix 1 - Corps Assumable Waters Memo July 2018

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY
CIVIL WORKS
108 ARMY PENTAGON
WASHINGTON DC 20310-0108
30 JULY 2018

MEMORANDUM FOR COMMANDING GENERAL, U.S. ARMY CORPS OF ENGINEERS**SUBJECT: Clean Water Act Section 404(g) - Non-Assumable Waters**

1. Congress enacted Section 404(g) of the Clean Water Act (CWA) to allow states and tribes to take an active role in the permitting of dredge and fill operations within their jurisdiction of governance, with one exception: the Corps must retain exclusive permitting authority over certain waters. The waters over which the Corps must retain permitting authority, referred to as non-assumable or "retained" waters, are "... 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 ..." 33 U.S.C. § 1344(g).

The Corps provides to states and tribes that are seeking to administer a dredge and fill program under CWA Section 404 an identification of these waters over which the Corps would retain authority.

2. In 2015, the Environmental Protection Agency (EPA) established the Assumable Waters Subcommittee within the National Advisory Council for Environmental Policy and Technology (NACEPT) to provide advice and develop recommendations regarding the meaning of Section 404(g) and thus the scope of waters and adjacent wetlands that may be assumed by a state or tribe. The NACEPT Subcommittee issued a Final Report in May 2017.¹ Though many states have shown interest in assuming the Section 404 program, only two states have done so. The Subcommittee report cited a number of possible reasons why so few states have assumed the Section 404 program, one of which may be the difficulty in ascertaining those waters that are retained waters. The Subcommittee noted that this area of uncertainty has stifled the interests of several states in particular in recent years. Further, I have personally heard from state officials who – but for this uncertainty – would pursue Section 404(g) assumption on behalf of their state. While EPA intends to address the Subcommittee report and clarify the waters for which a state or tribe could assume responsibility as well as the procedures related to state assumption under Section 404(g) in a rulemaking process, assumption of the Section 404

¹ The Army has not previously taken any formal position on the recommendations contained in this report.

program by states and tribes is not dependent upon and need not await the completion of any such rulemaking.

3. The Subcommittee's majority-formed of all 21 members aside from a Corps technical representative- recommended a policy under which, when a state or tribe program is approved by EPA under Section 404(g), the waters retained within the Corps' permitting authority would be limited to waters regulated under Section 10 of the Rivers and Harbors Act of 1899 (RHA), less those waters that are jurisdictional under the RHA due solely to historical navigability and with the addition of wetlands adjacent to other retained waters.² For ease of implementation, the Subcommittee's majority recommended using existing RHA Section 10 lists of waters as a starting point, which could be amended by the Corps as appropriate following consideration of the RHA case law and relevant factors set forth in the RHA Section 10 regulations. The majority also recommended that the agencies clarify that the Corps would retain administrative authority over all wetlands adjacent to retained navigable waters landward to an administrative boundary agreed upon by the state or tribe and the Corps. The majority's discussion provides considerations that may be useful to the state or tribe and the Corps as they evaluate the appropriate administrative boundary suited to the particular circumstances of the state or tribe, including state or tribal regulatory authority, topography, and hydrology.

4. I have reviewed the Subcommittee's findings and recommendations and believe that the majority's recommendations reflect an appropriate apportionment of responsibility between the states and tribes and the Federal government for the regulation of waters under a program administered by a state or tribe pursuant to Section 404(g). In my view, implementing Section 404(g) in this manner adheres to the language of the statute and the intent of Congress when enacting this provision.

5. Therefore, subject to further proceedings by EPA and the Corps, it is appropriate for the Corps to retain the following categories of waters for permitting under Section 404(g) of the Clean Water Act:

a. waters that are jurisdictional under Section 10 of the Rivers and Harbors Act of 1899, provided that -

² The Assumable Waters Subcommittee report noted that the scope of retained waters defined by the parenthetical of Section 404(g)(1) is similar to the scope of Section 10 waters under the RHA, except for the deletion of historical-use-only waters and the addition of adjacent wetlands.

- retained waters include tidal waters shoreward to their mean high water mark, or mean higher high water mark on the west coast, and
 - retained waters do not include those waters that qualify as "navigable" solely because they were "used in the past" to transport interstate or foreign commerce; and
- b. wetlands adjacent to waters retained under a. above, landward to an administrative boundary agreed upon by the state or tribe and the Corps.

For ease of implementation and to provide transparency to states, tribes and the public, the Corps will use existing RHA Section 10 lists of waters as a starting point, which could be amended by the Corps as appropriate consistent with applicable regulations and case law.

6. Nothing in this memorandum affects the scope of "waters of the United States" under the CWA, as this memorandum addresses only the division of responsibility between the Corps and a state or tribe that assumes the Section 404(g) program. Further, this memorandum is not intended to address future decisions to be made by EPA under Sections 404(g) or 404(h). Any final decisions pertaining to a specific application for state or tribe assumption under 404(g) will be made at a later time and may be made case-by-case to take into account context-specific information. No rights are created and no obligations are imposed through this guidance memorandum.



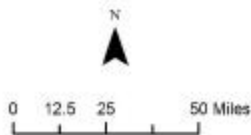
R. D. James

Assist Secretary of the Army
(Civil Works)

Appendix 2 – Section 10 Waters of Wisconsin



Federally Designated Section 10 Waters



Also included but not shown on map:

Root River	Kinnickinnic River	Fond du Lac River
Manitowoc River	West Twin River	Nemadji River
Pensaukee River	Duck Creek	Little Saumico River
Kewaunee River	Ahnapee River	Menomonee River
East River	White River	Menominee River
Lake Poygan	West Twin River	Lake Winneconne
	Lake Butte des Morts	

Map prepared by Tom Pearce, Wisconsin DNR, June 2019

LISTING OF
 NAVIGABLE WATERS
 OF THE UNITED STATES WITHIN
 THE STATE OF WISCONSIN
 (Section 10 Waters)

<u>NAME OF WATERWAY</u>	<u>HEAD OF NAVIGABILITY</u>
Ahnapee River (Algoma Harbor)	2 miles above 4 th Street bridge at Algoma, between secs. 15 and 16, T. 25 N., R. 25 E., Kewaunee County
Bad River	Approximately 23 miles above mouth at the gauging station in sec. 2, T. 46 N., R. 3 W., Ashland County
Black River	Navigable throughout Bois
Brule River	Navigable throughout Chippewa
River	Navigable throughout
Duck Creek	2.7 miles above mouth to the Chicago and Northwestern railroad tracks in sec. 10, T. 24 N., R. 20 E., Brown County
East River	Fixed highway bridge at Baird Street 1.35 miles above mouth in T. 24, N., R. 21 E., Brown County
East Twin River	Approximately 3 miles above mouth between secs. 23 and 26, T. 20 N., R. 24 E., Manitowoc County
Fox River (includes Little Lake Butte des Morts)	To its juncture with the Wolf River in Winnebago County
Green Bay	Navigable throughout
Kenosha Harbor	Navigable throughout
Kewaunee River	Kewaunee Harbor to 6.5 miles above mouth between secs. 14 and 23, T. 23 N., R. 24 E., Kewaunee County
Kinnickinnic River (Milwaukee Harbor)	Fixed bridge at Lincoln Avenue 2.12 miles above mouth, between secs. 5 and 8, T. 6 N., R. 22 E., Milwaukee County

NAME OF WATERWAY

HEAD OF NAVIGABILITY

Lake Butte des Morts	Navigable throughout
Lake Michigan	Navigable throughout
Lake Poygan	Navigable throughout
Lake Superior	Navigable throughout
Lake Winnebago (includes Fond du Lac, Brothertown, and Calumet Harbors)	Navigable throughout (Fond du Lac River to Scott Street bridge, U.S. 41 and 45) Stockbridge,
Lake Winneconne	Navigable throughout
Little Suamico River	Point 2,500 feet above mouth in the NE 1/4 NE 1/4 sec. 30, T. 26 N., R. 21 E., Oconto County
Manitowoc River (Manitowoc Harbor)	Fixed railroad bridge above 21 st street, 2.37 above mouth, in sec. 19, T. 19 N., R. 24 E., Manitowoc County
Menominee River	Lower dam, 2.5 miles above mouth, in sec. 6, T. 30 N., R. 24 E., Marinette County, Wisconsin – Menominee County, Michigan
Menomonee River (Milwaukee Harbor)	Fixed railroad bridge at Canal Street, 2.9 miles above mouth, T. 7 N., R. 22 E., Milwaukee County (South Menominee and Burnham Canals are navigable throughout)
Milwaukee River Harbor)	Fixed bridge at North Humboldt Blvd., (Milwaukee approximately 2.9 miles above mouth, sec. 21, T. 7 N., R. 22 E., Milwaukee County
Mississippi River	Navigable throughout in Wisconsin (to Prescott)
Namekagon River	Navigable throughout

NAME OF WATERWAY

HEAD OF NAVIGABILITY

Nemadji River	14 miles above mouth in the SE ¼ SE ¼ sec. 22, T. 48 N., R. 14 W., Douglas County
Oconto River	Oconto Harbor, 1 mile above mouth, upper city wharf, sec. 20, T. 28 N., R. 22 E., Oconto County
Pecatonica River	Main stem to mile 154.2 to mouth of Mineral Point Branch (County Highway O), in sec. 1, T. 3 N., R. 2 E., LaFayette County; and East Branch to State Highway 81 in Argyle, in sec. 26, T. 3 N., R. 5 E., LaFayette County
Pensaukee River	Fish wharves, 3/4 mile above mouth (Pensaukee Harbor) in sec. 11, T. 27 N., R. 21 E., Oconto County
Peshtigo River	Fish wharf, 1/4 mile above mouth in Secs. 13 and 14, T. 29 N., R. 23 E., Marinette County
Port Washington	Navigable throughout
Rock River	Mile 290 at Horicon in sec. 6, T. 11 N., R. 16 E., Dodge County
Root River (Racine Harbor)	Former bridge at Leudtke Court, approximately 2.38 miles above mouth, in sec. 8, T. 3 N., R. 23 E., Racine County
Sheboygan River Avenue, (Sheboygan Harbor)	Railroad bridge below New Jersey approximately 2.38 miles above mouth, in sec. 22, T. 15 N., R. 23 E., Sheboygan County
St. Croix River mouth of the	Navigable to approximately mile 133, to Namekagon River
St. Louis River Includes St Louis Bay, Spirit Lake, Mud Lake	Navigable in Wisconsin,
Sturgeon Bay and Lake Michigan Ship Canal	Navigable throughout

Suamico River (Big
23, Suamico River)

Carp pond, 2 miles above mouth in sec.
T. 25 N., R. 20 E., Brown County

NAME OF WATERWAY

HEAD OF NAVIGABILITY

Thornapple River

Navigable throughout

West Twin River
(Two Rivers Harbor)

7 miles above mouth between secs. 19 and
30, T. 20 N., R. 24 E., Manitowoc County

White River

Navigable throughout

Wisconsin River

330 miles above mouth at Tomahawk,

WI

Wolf River

Leeman bridge (County Highway F)

near

Leeman, 96.2 miles above Main Street
bridge at Oshkosh between secs. 4 and 9, T.
24 N.,
R. 16 E., Outagamie County

§404 Assumption Reference Materials

June 20, 2019

BACKGROUND

[Part 233: 404 State Program Regulations from the EPA](#)

[Association of State Wetland Managers \(ASWM\) 404 Assumption Handbook](#)

[Letter from EPA to ASWM Regarding ESA Consultation for State 404 Programs](#)

[Final Report of the Assumable Waters Subcommittee \(recs for determining assumable waters\)](#)

MINNESOTA

Minnesota Board of Soil and Water Resource (BWSR) 404 Assumption Page

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

- 2017 Feasibility Study
- Analysis of Retained and Assumable Waters

Minnesota Feasibility Study Process - Slides from 2015

<http://www.nclucb.org/wp-content/uploads/2018/10/404-Assumption-Briefing.pdf>

FLORIDA

Florida Assumption White Paper

<https://www.conservancy.org/file/policy/wetlands-protection/State-Assumption-of-Dredge-and-Fill-Permitting.pdf>

Draft Florida and EPA MOA for State 404 Program

<https://www.florida-stormwater.org/assets/MemberServices/Advocacy/Draft%20-%20FL%20EPA%20MOA%20May%202018.pdf>

Draft Florida and Corps MOA for State 404 Program

<https://www.florida-stormwater.org/assets/MemberServices/Advocacy/Regulatory/DEP%20USACE%20Combined%20MOA%20%283%29.pdf>

OREGON

Summary of Oregon 404 Assumption Studies and Efforts

<https://www.oregon.gov/dsl/WW/Documents/404Assumption.pdf>

EPA Report on Difficulties of ESA consultation in Oregon 404 assumption

https://www.epa.gov/sites/production/files/2015-11/documents/or404_assumption_final_esa_report_march_12_2014.pdf

VIRGINIA

2012 Feasibility Study

https://www.deq.virginia.gov/Portals/0/DEQ/LawsAndRegulations/GeneralAssemblyReports/404_Feasibility_Study_2012.pdf

NEW JERSEY (assumption approved in 1994)

New Jersey and FWS MOA for State 404 Program ESA Review

<https://www.fws.gov/northeast/njfieldoffice/pdf/MOAUSFWS.pdf>

New Jersey and EPA MOA for State 404 Program

<https://www.epa.gov/sites/production/files/2013-09/documents/nj-moa-mpdes.pdf>

New Jersey and USACE MOA for State 404 Program

<http://www2.law.mercer.edu/elaw/wetlands/new%20jersey%20corps%20assumption%20moa.pdf>

MICHIGAN (assumption approved in 1984)

Michigan and EPA MOA for State 404 Program

https://www.michigan.gov/documents/deq/wrd-jpa-404-moa_483185_7.pdf

Michigan and USACE MOA for State 404 Program

<http://www2.law.mercer.edu/elaw/wetlands/michigan%20corps%20assumption%20moa.pdf>

Wetland Program Development Grant §404 Assumption Draft Detailed Scope of Work

Summary

This scope of work details the tasks, key staff and schedule to accomplish the work funded by a portion of the 2018 EPA Wetland Program Development Grant (WPDG) awarded to the Wisconsin Department of Natural Resources to evaluate assumption of the §404 program. Helsel and Minks will co-lead the project and oversee and coordinate the work prescribed below. The project team will have monthly meetings to review ongoing work and deliverables with the planned completion of this work by November 2019. The team will brief program leadership on the project status and will be prepared to work with the Wetland Study Council as directed by program leadership.

Task 1. Comparison of Federal and State Wetland Standards

	Dan Helsel	Co-lead
	Amanda Minks	Co-lead
	Mike Kowalkowski	Legal analysis and review

Task 2. Evaluation of Staffing and Resources

	Dan Helsel	Co-lead
	Amanda Minks	Co-lead
	Jim Amberson	Financial/resource analysis
	Calvin Lawrence	GIS analysis
	Tom Pearce**	Evaluation

Task 3. Analysis of Alternatives to §404 Assumption

	Dan Helsel	Co-lead
	Amanda Minks	Co-lead
	Mike Kowalkowski	Legal analysis and review
	Tom Pearce**	Analysis

**** Funded by WPDG**

Task 1 - Comparison of Federal and State Wetland Legal Standards

The federal regulations for state assumption of the §404 program contain the following provision:

40 CFR §233.1(d) Any approved State Program shall, at all times, be conducted in accordance with the requirements of the Act (Clean Water Act) and of this part. While States may impose more stringent requirements, they may not impose any less stringent requirements for any purpose.

Under Task 1, the federal requirements (i.e. legal standards) will be compared to the legal standards prescribed in Wisconsin state statutes and administrative codes. The comparison will be comprehensive and include the legal standards for permitting,

application processes and timeframes, public notification and enforcement. The Florida Department of Environmental Protection (FDEP) developed a regulatory checklist/crosswalk to analyze their state program standards compared to the Federal §404 program. This 134-page document will be used as a template to compare Wisconsin's wetland program to the Federal program. The comparison crosswalk will make an initial determination whether state law is as stringent as federal law. However, within the scope of this work, recommended changes to the state law to meet federal standards will not be developed and could be included in future efforts with or without WPDG funding.

Table 1 – Detailed Task Descriptions for Task 1	
<i>Detailed Description</i>	<i>Assigned</i>
<i>1.1 Review and update the federal definitions and legal requirements in the Florida DEP regulatory checklist/crosswalk</i>	<i>Helsel</i>
<i>1.2 Insert state definition and legal requirements into WI regulatory checklist/crosswalk</i>	<i>Helsel</i>
<i>1.3 Review WI regulatory checklist/crosswalk</i>	<i>Kowalkowski</i>
<i>1.4 Coordinate EPA review of WI regulatory checklist/crosswalk</i>	<i>Helsel</i> <i>Minks</i>
<i>1.5 Finalize WI regulatory checklist/crosswalk</i>	<i>Helsel</i> <i>Kowalkowski</i>

Task 2 - Staffing and Resources Evaluation

Wisconsin has a well-developed state wetland regulatory program with many of the administrative processes and legal standards either based upon, or comparable with the federal §404 program. This means that many of the wetland permitting activities for assumable waters will not change for the state. However, there are certain program development and implementation activities that will potentially require additional resources under §404 assumption.

Resource estimates will include staff time, salary costs, and travel and supply funds if applicable. Task 2 will be completed using information from existing permitting trends in Wisconsin, other state feasibility studies and the nearly completed §404 assumption program in Florida. The estimated resources for Task 2 will be based upon the state assuming the §404 program for all waters beyond a 300-foot administrative buffer on Section 10 waters or other likely assumable water boundaries.

Table 2 – Detailed Task Descriptions for Task 2	
<i>Detailed Description</i>	<i>Assigned</i>
<i>2.1 Estimate the resources required to develop statute/code regulatory standards at least as stringent as federal code</i>	<i>Minks</i> <i>Pearce</i>
<i>2.2 Estimate the number of wetland permits/activities within assumable and non-assumable zones within the state (used for tasks 2.3 – 2.4)</i>	<i>Pearce</i> <i>Lawrence</i>

2.3	<i>Estimate the resources required to determine regulatory jurisdiction for assumable and non-assumable waters</i>	<i>Minks Pearce</i>
2.4	<i>Estimate the resources required to process §404 permits that would no longer be exempt or covered by a general permit under state regulations (e.g. artificial wetlands).</i>	<i>Minks Pearce</i>
2.5	<i>Estimate the resources efficiencies to process §404 exemptions and general permits that currently require a state general individual permit</i>	<i>Minks Pearce</i>
2.6	<i>Estimate the resources required for endangered species act implementation for assumable waters</i>	<i>Minks Pearce</i>
2.7	<i>Estimate the resources required to undertake sole enforcement actions, with EPA oversight, for assumable waters</i>	<i>Minks Pearce</i>
2.8	<i>Estimate the resources required to train state staff to implement the §404 program including jurisdiction determinations, exemptions, general and individual permits, coordination with and reporting to EPA, and enforcement steps.</i>	<i>Minks Pearce</i>
2.9	<i>Estimate the resources required to change administrative components of the state program for §404 assumption (e.g. forms, educational and informational materials, etc.)</i>	<i>Minks Pearce</i>
2.10	<i>Estimate the resources required for NR 207 implementation</i>	<i>Minks Pearce</i>

Task 3 - Alternatives to §404 Assumption

Some of the benefits assigned to §404 assumption include more efficient and faster permitting for the regulated community. There may be other alternatives to §404 assumption that could result in realized permitting efficiencies and faster turn-around times. Some of these alternatives include increasing the use or streamlining the following:

- Programmatic General Permit
- State Programmatic General Permit
- Regional General Permit
- General Authorization
- Expanding Non-reporting permits
- Jurisdictional determination
- Mitigation requirements

This task will capitalize on the experiences of other states and information from the Association of Wetland Managers to compile and evaluate the benefits and limitations of program changes that would increase permitting efficiencies and reduce turn-around times for the applicants.

Table 3 – Detailed Task Descriptions for Task 3	
<i>Detailed Description</i>	<i>Assigned</i>
<i>3.1 Compile a list of wetland permitting programmatic alternatives that will increase permitting efficiencies and reduce turn-around times</i>	<i>Pearce Minks</i>
<i>3.2 Evaluate the benefits and limitations of the alternatives</i>	<i>Pearce Minks</i>
<i>3.3 Develop a preliminary implementation strategy for the alternatives that show the greatest promise for Wisconsin</i>	<i>Pearce Minks</i>

Draft Outline of 2019-2020 Wisconsin Assumption Study

Executive Summary

Acronyms

Chapter 1. Introduction

Problem Statement. Description of DNR Vision for W/W Program.
Brief Overview of Assumption
Assumption Study Timeline, Scope, and Methods

Chapter 2. Background and Current Issues

Waterway and Wetland Regulations in Wisconsin
Previous WI assumption studies
Stakeholder Interests and Expectations

Chapter 3. Assumable Waters

Retained waters
Other states (MI and NJ)
Assumable waters subcommittee
Other non-assumable waters
Process for determining extent of assumption
Implications for assumption

Chapter 4. Federal and Wisconsin Jurisdictional and Legal Differences

Waters of the U.S. regulations compared to WI waters regulations
Scope of CWA jurisdiction
Scope of WI state waters statutes
Scope of WI public waters regulatory program
State and federal jurisdiction comparison
Summary
Measures to ensure protection of aquatic resources consistent with the CWA and WI law
Regulatory policy
Scope of regulated activities and exemptions
Permit application sequencing
Listed species, cultural resources
Compensatory mitigation
Enforcement and appeals
Administrative appeals
Wetland regulatory structure, overlapping regulations

Chapter 5. Feasibility for Wisconsin to Assume the 404 Program

Changes to state law needed for assumption
State statute
Public notice process
Exemptions

- Mitigation
- Transportation project mitigation
- Jurisdiction
- Water quality cert
- Penalties for violations
- State program stability
- New responsibility for the state (resources and staff)*
 - Revised wetland program responsibilities and workload
 - ESA coordination
 - NHPA coordination
 - Water quality certification
 - Tribal coordination
 - Reporting requirements
- Estimated workload and costs for WDNR*
- Effect on application review and approval process and time frames*
 - Current permit application processing timelines
 - Actual timelines
 - Projected effects of 404 assumption on timelines

Chapter 6. Alternatives to assumption

- Previous WI efforts
- Develop Programmatic General Permits
- Increase number of sector-specific Corps project managers (MN)
- Expand regional GPs including NWP (MN)
- More SAMP and Comprehensive wetland protection plans (MN)
- Expand federal approvals exemption (MN)
- Options for financing*
 - Legislative funding
 - Application fees
 - Taxes
 - Other

Feasibility Items to Study in 2019-20:

1. Extent of assumable waters in Wisconsin
 - While the NACEPT report from 2017 recommends using a set administrative boundary, each state and Corps District must negotiate the extent of wetlands included in retained and assumable waters. Minnesota has been working with the Corps for several years on this issue.
2. Legal changes necessary to assume 404
 - DNR legal staff has begun a comparison of state and federal statutes to determine which laws must be amended to meet the stringency requirements for a program application. The analysis of this comparison will explain the scope of law changes needed, a reasonable time frame for achieving such changes, and any implications for nonfederal aquatic resource regulations in Wisconsin.

3. Consultation with Fish and Wildlife Service for ESA listed species review
 - The New Jersey State 404 Program has an MOA with FWS that allows the state to conduct federal listed species review on its own. A process is established for when permits are sent to FWS for further review. ESA consultation therefore still exists according to the process outlined in that MOA.
 - Oregon would like to assume 404, however the extent of habitat for listed salmon species has been a major roadblock to predicted gains in efficiency, as ESA consultation has not been worked out to a degree that saves the state or FWS or EPA any time or resources.
4. Mitigation
 - Under a Wisconsin state 404 program, many mitigation requirements would no longer be Corps issued. Therefore, the Corps may prefer a state-only mitigation system to operate separate from the Corps mitigation system that is currently under Interagency Review Team oversight. These details would have to be planned and agreed to in a MOA between Wisconsin and the Corps. Also, the St. Paul District and WDNR currently have different mitigation requirements attached to some of their general permits. These would have to be rectified also.
5. Additional workload for the DNR wetland program
 - The St. Paul District Corps has agreed to send DNR permit data for the last two years organized by impact type, permit type, timelines and mitigation requirements. This data will allow some analysis into how much extra work DNR would have to do for a new load of permits covering 404 impacts to assumable waters.
 - With this information, DNR will estimate the amount of additional funding necessary to successfully implement the 404 program
6. Additional funding requirements
 - Other state assumption feasibility studies show that a significant financial investment is necessary to make program changes in order to receive EPA approval for an assumption application. This funding is needed over the first 2-5 years to add staff, train new and existing staff, and develop new processes that meet assumption requirements. Thereafter, additional staff will need to be retained and so a larger annual cost to the Wisconsin wetland regulatory program will be needed indefinitely. Additional funding must come from permit fees and/or legislative appropriations.
7. Anticipated effects on permit timelines
 - After careful review of assumable waters, additional federal coordination required, and changes in workload, the study may be able to provide an estimate of potential changes in permit review times given a full staffed Wisconsin 404 state program.