

## Memo

**Date:** October 19, 2020

**To:** Minnesota “Clean Water Act Section 404 Assumption” Stakeholders

**From:** Les Lemm, BWSR Wetlands Section Manager

### **RE: Clean Water Act Section 404 Assumption Status Update**

The purpose of this memo is to provide an update to stakeholders concerning the State’s work on potential State assumption of Section 404 of the Federal Clean Water Act, including efforts stemming from 2019 legislation and stakeholder participation opportunities.

#### **Background**

Section 404 of the federal Clean Water Act (CWA) regulates the discharge of dredged or fill material into waters of the U.S. (33 USC §1344). The 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 to apply to the EPA to administer a state water and wetland regulatory program that meets Section 404 requirements (aka “404 assumption”), eliminating the need for separate, federally issued permits for projects affecting those waters covered by state assumption. Minnesota is well equipped to implement federal 404 requirements through its existing, comprehensive, and mature state water and wetland regulatory programs, including the Wetland Conservation Act administered by the Board of Water and Soil Resources (BWSR) with local governments, the Public Waters Work Permitting Program administered by the Department of Natural Resources (DNR), and state water quality standards administered by the Pollution Control Agency (PCA).

Minnesota initially explored 404 assumption in 1989, with the most comprehensive analysis of 404 assumption being the January 17, 2017 “Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study,” an interagency report from BWSR, DNR, and the PCA. The agencies completed a follow-up “Analysis of Retained and Assumable Waters in Minnesota” on May 3, 2018. Both of these reports, and more, can be viewed on the 404 Assumption page of the BWSR website at: <https://bwsr.state.mn.us/404-assumption>

A lack of clarity in the identification of waters and wetlands a state can assume permitting authority over (aka “assumable waters”) presented a significant barrier to Section 404 assumption, as outlined in the 2018 Analysis of Retained and Assumable Waters in Minnesota report. In June 2018 the EPA announced that they would begin rulemaking to address the assumable waters issue consistent with the recommendations of the Assumable Waters Subcommittee of the National Advisory Council for Environmental Policy and Technology. Previously, in May 2017, the Assumable Waters Subcommittee had provided recommendations to EPA concerning how to best clarify assumable waters. Those recommendations provide greater clarity and result in a broader scope of assumable waters compared to the outcome of Minnesota’s May 2018 analysis. In August 2018 the United States Department of the Army released a memo adopting the Subcommittee’s recommendations, effectively removing the assumable waters barrier to 404 assumption in Minnesota.

## 2019 Legislation

Laws of Minnesota 2019, 1st Special Session, Chapter 4, Article 1, Section 2, Subd. 9(a) (2019 legislation) directed the Environmental Quality Board (EQB) to begin to assemble the materials required for a State 404 assumption application. This legislation was signed into law by Governor Walz on May 24, 2019. The full text of the 2019 legislation is as follows:

*\$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, 2021, 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.*

While BWSR, DNR, and PCA are the three state agencies responsible for administering Minnesota's primary water and wetland protection programs, the 2019 legislation directed funding to EQB and granted them the authority to execute contracts or interagency agreements to facilitate the work. On September 11, 2019, EQB and BWSR executed an agreement for implementation of the 2019 legislation. Under the agreement, BWSR is responsible for overall project coordination, providing staff to complete project tasks, coordination with DNR and PCA (including any additional interagency agreements), and other miscellaneous responsibilities.

## Environmental Protection Agency Grant

Developing an accurate estimate of the additional funding needed to fully implement a state-assumed program will require a full understanding of necessary changes in state program jurisdiction; statute and rule changes; program implementation structure, including the role of local governments; review and coordination procedures for threatened and endangered species; and other factors. To identify and address these needs, the state must work with EPA through the 404 assumption application development and negotiation process. The process is a significant and complex undertaking, and the funding associated with the 2019 legislation was insufficient to complete it.

In an effort to secure additional funding BWSR applied for and was awarded an EPA Wetland Program Development Grant (Grant). The Grant provides up to \$300,000 for the development of a more complete Minnesota 404 assumption application. Combined with the 2019 legislative appropriation, the Grant will allow for greater BWSR, DNR, and PCA staff participation and the hiring of a full-time project coordinator to focus solely on the 404 assumption program and application development process.

## Current Status

In December of 2019, BWSR hired Lewis Brockett as the agency's Wetlands Policy Coordinator. This position will focus solely on 404 assumption, perform work for all three state agencies (BWSR, DNR, and PCA), and will have primary responsibility for the development of the State's 404 assumption application materials and associated legislative reports. Lewis comes to BWSR from the USDA Natural Resource Conservation Service (NRCS) in Minnesota where he served as the Assistant State Conservationist for Compliance and served on two official details as the National Wetland Compliance Specialist. His experience also includes working as the State Wetland Compliance Specialist and as an Area Biologist for NRCS, a Regulatory Project Manager for the US Army

Corps of Engineers (Mobile District), and as a natural resource consultant in multiple states. Lewis has substantial experience in federal policy and program development and administration, which will be helpful in the development of the state's 404 assumption application.

Since Lewis' hiring, the agencies have developed a work-plan, researched the specific federal requirements for 404 assumption, begun work on a comprehensive comparison of applicable state and federal regulations, and initiated regular discussions with EPA staff. The requirements for 404 assumption are primarily contained in federal regulations (40 CFR § 233). To summarize, there are seven overarching tasks and multiple subtasks that are necessary to develop a complete 404 assumption application for the state of Minnesota. The following provides a generally chronological list of these primary tasks. However, multiple tasks must be completed concurrently.

- 1. Identification of Necessary State Statute and Rule Changes (*Ongoing*).**
  - a) Comparison of state statutes and rules to federal regulations to ensure that the state program provides at least an equivalent scope of jurisdiction and level of protection.
  - b) Based on these findings, development of draft proposed revisions to State statutes and rules.
- 2. Program Implementation Structure (*Pending Completion of Task 1*).**
  - a) Development of permitting structure and associated procedures.
  - b) Substantially dictated by the outcome of Task 1.
- 3. Determine Staffing and Funding Requirements (*Pending Completion of Task 2*).**
  - a) Identification of number and type of additional staff required for program implementation.
  - b) Determination of the amount of additional state funding necessary to complete development of the 404 assumption application, and the amount necessary to implement an assumed program.

\*This task will serve as the basis for the funding information to be provided to the State Legislature.
- 4. Complete Regulatory Program Description (*Ongoing – Subject to Completion of Tasks 1 through 3*).**
  - a) Drawing from the results of Tasks 1 through 3, development of a comprehensive description of the state's proposed program for submittal to EPA during transmittal of the application.
- 5. Memorandum of Agreement with the Secretary of the Army (*Independent of Other Tasks*).**
  - a) Identification and mapping of waters to be retained by the U.S. Army Corps of Engineers under the state assumed program.
  - b) Development of procedures for projects with state/federal overlap and addressing other coordination issues.
  - c) Incorporation of items a and b into a MOA between the USACE District Engineer and the state natural resource agencies.
- 6. Memorandum of Agreement with EPA Regional Administrator (*Pending Completion of Tasks 1 through 5*).**
  - a) Development of an MOA between the state natural resource agencies and the EPA Regional Administrator outlining state and federal responsibilities and other considerations under the proposed state-assumed program.
- 7. Draft Application for 404 Assumption (*Pending Completion of All Other Tasks*).**
  - a) Assembly of products developed through all previous tasks for consideration by state agency leadership, the state legislature, and the Governor's office for potential submittal to EPA.

Given the depth and complexity of all associated tasks, we anticipate that no fewer than two additional years will be required to complete the state's full 404 assumption application package. It is also important to note

that the development of a complete 404 assumption application does not necessarily mean that Minnesota will assume 404; rather, it will enable agency leadership staff and elected officials to make an informed decision as to whether to assume Section 404.

As with the 2017 Feasibility Study, there will be a significant effort to inform and involve stakeholders throughout this process. Stakeholder coordination will use the same process as the 2017 Feasibility Study, including a broad general stakeholder contact list and utilization of a smaller core advisory committee for regular, active meeting participation. We are currently in the process of updating those contact lists and will be scheduling upcoming stakeholder meetings. Additional information will be provided in the coming weeks.

If you have any questions, feel free to contact me at [les.lemm@state.mn.us](mailto:les.lemm@state.mn.us) or 651-296-6057, or Lewis Brockette at [lewis.brockette@state.mn.us](mailto:lewis.brockette@state.mn.us) or 651-205-4664.