

Executive Summary

Section 404 of the federal Clean Water Act (CWA) is administered by the U.S. Army Corps of Engineers (COE) with oversight by the U.S. Environmental Protection Agency (EPA). Section 404(g) of the CWA allows for state “assumption” of the Section 404 permitting program. However, that assumption authority does not apply to all waters; the COE retains permitting authority over certain waters. Those Section 404-jurisdictional waters that are not retained by the COE are “assumable” by the state. Under current EPA regulations, the COE has the sole authority to identify which waters they will retain.

In 2015, the Minnesota legislature directed the State’s Board of Water and Soil Resources (BWSR) and Department of Natural Resources (DNR) to study the feasibility of state assumption. In January 2017, BWSR and the DNR, in collaboration with the Minnesota Pollution Control Agency (PCA), submitted the final assumption feasibility study report to the legislature. The report noted that the extent of assumable waters is one of the most significant factors affecting the feasibility of state Section 404 assumption and the agencies committed to conducting an assumable waters assessment, in cooperation with the COE.

In a letter dated January 25, 2017, the COE St. Paul District described the waters which the COE would retain (Appendix B). BWSR and Minnesota IT Services staff then worked with the COE to develop specific criteria to map the approximate extent of COE-retained waters described in the letter using Geographic Information Systems (GIS). The mapping results were reviewed and there was general agreement that, although there are limitations in using GIS data layers to map on-the-ground resources, it appeared to provide a reasonable way to estimate the proportions of retained and assumable waters. Specifically, the COE indicated that, given the substantive GIS limitations, it *“is reasonable to illustrate an estimate of the relative proportion of waters and wetland that would be assumable under 40 CFR 233.”*

Consequently, BWSR and MNIT moved forward with assembling the resulting data, including an analysis of Section 404 permit locations in an attempt to assess the extent to which permit activity occurred in retained versus assumed waters and wetlands. The mapping analysis showed that the vast majority of Section 404-jurisdictional wetlands, lakes, and non-wetland basins in Minnesota would be retained by the COE under Section 404 Assumption. In contrast, a significant majority (in terms of linear miles) of streams would be assumable by the State primarily because the State would assume all first and second order (headwater) streams, which comprise the majority of statewide total stream length. Due to limitations in the data, the analysis of Section 404 permitting was largely inconclusive with respect to the extent to which permits were issued in waters that would be retained or assumed.

Relative statewide proportions of COE-retained and State-assumable waters in Minnesota:

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

The COE had initially indicated concerns with the mapping results and draft report. However, on February 16, 2018, after further review of a modified version of the draft report, the COE commented that, “Given the limitations acknowledged in the report, the most recent draft appears to be as representative an estimate as can reasonably be obtained using landscape scale GIS data.”

Particularly given the goals of State assumption to improve efficiency and certainty for the regulated public, and to reduce regulatory redundancy by assuming the majority of waters and permitting authority, the outcome of the State's current attempt to estimate and map assumable waters is not favorable for Section 404 assumption in Minnesota for the following reasons:

- 1) The results of the current analysis indicate that, with the exception of first and second order streams, relatively few waters in Minnesota would be assumable by the State.
- 2) While the COE has indicated that this analysis may be a reasonable, representative estimate of COE-retained and State-assumable waters, they also have emphasized that there are limitations to mapping the waters described in their January 25, 2017 letter. Therefore, while this analysis may be useful for planning purposes, some uncertainties remain about the extent to which Minnesota could assume Section 404 responsibilities.
- 3) Regardless of the potential extent of assumption, the COE has indicated that they would rely, to some degree, on case-by-case determinations to specifically identify COE-retained waters (particularly wetlands) thereby diminishing the potential gains in permitting efficiency from State assumption.

In light of concerns expressed by the COE during completion of the report, the State agencies were concerned that the outcome of the current analysis may not result in a sufficiently accurate representation of COE-retained and State-assumable waters to reasonably assess the feasibility of state assumption. On February 2, 2018, in order to obtain the information on COE-retained waters necessary to inform further decision-making, BWSR, DNR, and PCA sent a joint letter to the COE to begin the process of preparing a Memorandum of Agreement that satisfies the requirement for an assumption application package to the EPA (Appendix G). As the first step in this process, the agencies requested that the St. Paul District, in accordance with 40 CFR § 233.14(b)(1), specifically identify the waters that would be retained by the COE under Section 404 assumption in Minnesota. The agencies are hopeful that the outcome of this request may provide additional information and certainty related to the feasibility of Section 404 assumption in Minnesota.

Difficulties in identifying retained and assumable waters in a way that is both implementable and results in sufficiently extensive assumable waters to make state assumption feasible are not unique to Minnesota. In 2015, partly in response to a request by three state associations, EPA established the Assumable Waters Subcommittee of the National Advisory Council for Environmental Policy and Technology to provide advice and develop recommendations on how to best clarify for which waters a state or tribe may assume CWA section 404 responsibilities. The Subcommittee's final report was completed in May, 2017 and submitted to EPA Administrator Scott Pruitt on June 1, 2017. Implementation of the Subcommittee's majority recommendations would result in a reasonable amount of waters for Minnesota to assume, while utilizing a process that both provides certainty and is implementable on the ground. These recommendations, if adopted, would significantly improve the feasibility of Section 404 Assumption in Minnesota. The federal government, however, would need to take action to implement the Subcommittee's majority recommendations in order to address impediments to Section 404 assumption related to assumable waters. The Subcommittee's majority recommendations should be supported.