Program Description for Minnesota State Draft Application for 404 Assumption

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1 OVERVIEW

1.1 PURPOSE

The following program description contributes to the state's fulfillment of the requirements of a 2019 grant awarded by the EPA to the State of Minnesota (State) for the purpose of "…[providing] support to [the] Minnesota Board of Water and Soil Resources to undertake the efforts associated with preparing a package for assuming the Clean Water Act Section 404 program." More specifically, the grant agreement workplan requires the state to develop and submit to EPA a substantially complete, non-binding draft application for 404 Assumption, of which this Program Description is one component. A legislative directive to develop a final application and apply for 404 Assumption has not been issued to the State. Accordingly, there are certain programmatic, statutory, and regulatory developments that are not in place but that must occur if the state were to proceed with 404 Assumption. **To ensure that there is a clear distinction between the current state program and those developments the state may implement if 404 Assumption were formally pursued, each applicable section of this program description provides a summary of the current state program, followed by a list or summary of those statutory, regulatory, and programmatic developments that may be necessary to implement in the event that the state applies for 404 Assumption.**

This program description documents the structure, organization, and procedures that the State would follow if administering a state permitting program meeting the requirements of Section 404 of the Clean Water Act (CWA), pursuant to 33 USC §1344(g). The content of the program description is organized into sections whose content is consistent with the subparagraphs of 40 C.F.R. Part 233.11, with one additional section titled "Additional Information." Where detailed descriptions of the permitting program standards and procedures are required, reference is made to the memorandum of agreement (MOA), Memorandum of Understanding (MOU), other document, or State 404 Program regulation that describes those standards and procedures. The standards and procedures are not repeated in detail within this document.

1.2 BACKGROUND

In fulfillment of Laws of Minnesota 2015, Special Session Chapter 4, Section 137, the Board of Water and Soil Resources (BWSR), the Department of Natural Resources (DNR), and the Pollution Control Agency (PCA) completed a comprehensive analysis of 404 Assumption entitled the "Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study," (Feasibility Study), issued on January 17, 2017. The agencies completed a subsequent "Analysis of Retained and Assumable Waters in Minnesota" on May 3, 2018, upon the results of which Minnesota determined that 404 Assumption was not feasible.

In June of 2015, EPA established the Assumable Waters Subcommittee of the National Advisory Council for Environmental Policy and Technology (NACEPT) to "provide advice and develop recommendations on how the [EPA] can best clarify for which waters the state/tribe has CWA section 404 permit responsibilities, and for which waters the USACE retains CWA section 404 permit responsibility, under an approved state/tribal program." The Subcommittee's final report was completed in May 2017 and submitted to the EPA Administrator on June 2, 2017. Implementation of the Subcommittee's majority recommendations would significantly improve the feasibility of 404 assumption in Minnesota. On August 7, 2018, the U.S. Army released a memorandum (dated 7-30-18) that clarifies the waters that would be retained by the COE under state assumption consistent with the Assumable Waters Subcommittee's majority recommendations. This memo significantly changed the conclusions of the May 2018 Minnesota Assumable Waters Analysis, making 404 Assumption more feasible.

In addition, BWSR and DNR have similar, existing statutory authority to pursue 404 Assumption. Both Minnesota Statutes (MS) §§ 103G.2375 and 103G.127 provide the agencies with the authority, through rulemaking, to regulate "the discharge of dredged and fill material into the waters of the state as necessary to obtain approval from the United States Environmental Protection Agency" to administer the section 404 the permit program.

On April 1, 2019, Minnesota Governor Tim Walz signed Executive Order 19-17, "Continuing Wetland Protection, Enhancement, and Restoration." Among other things, the order requires all responsible departments and agencies to "pursue opportunities to improve the effectiveness of the State's wetland and related water resource protections," and to "…collaborate with federal agencies, local governments, and private sector organizations to:

- Coordinate implementation of wetland and related water resource regulatory and restoration programs.
- Pursue simplification and cost-effectiveness measures to benefit landowners, permit applicants, local governments, and agency operations."

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

The EQB subsequently entered into an agreement with the Minnesota Board of Water and Soil Resources (BWSR), who in turn developed agreements with the Minnesota Department of Natural Resources (DNR) and the Minnesota Pollution Control Agency (MPCA) to collectively complete this work.

The 2021 legislation directing the EQB as described above lapsed in 2023. Since then, no further legislative directive has been issued or funding authorized to continue to develop the application, or to apply for, 404 Assumption.

1.3 Legislative Authority

The state legislative authority to apply for and implement a state program meeting the requirements of Section 404 of the Clean Water Act will be included in the formal application if/when such legislation is enacted, and application made.

2 PROGRAM SCOPE AND STRUCTURE

This section meets the requirement of 40 C.F.R. § 233.11(a) to provide "*a description of the scope and structure of the State's program". The description must include the "extent of State's jurisdiction, scope of activities regulated, anticipated coordination, scope of permit exemptions if any, and permit review criteria*."

2.1 GENERAL STRUCTURE

The State administers three independent permitting programs for the protection and conservation of aquatic resources. These programs include:

A. The Wetland Conservation Act (WCA) regulatory program, implemented by the Minnesota Board of Water Resources (BWSR).
B. The Public Waters Work Permitting Program (PWWPP), administered by the Department of Natural Resources (DNR).
C. The Permit to Mine (PTM) program, administered by the DNR's Land and Minerals (LAM) Division.

These programs collectively authorize non-exempt impacts to state waters through the issuance of general and individual permits. The Minnesota Pollution Control Agency (MPCA) will review and certify state-issued permits for compliance with the water quality and antidegradation standards in Minnesota Rules (MR), chapter 7050 (https://www.revisor.mn.gov/rules/7050/).

2.2 EXTENT OF STATE JURISDICTION AND SCOPE OF ACTIVITIES REGULATED

2.2.1 Current Jurisdiction.

Upon approval, state jurisdiction over surface waters will encompass and exceed all potentially assumable Waters of the United States as defined under 33 CFR Part 328, except for those retained by the U.S. Army Corps of Engineers (USACE) under the Memorandum of Agreement for Retained Waters Under 404 Assumption in The State of Minnesota (Retained Waters MOA). The USACE will retain administration of the federal Section 404 permit program within retained waters, as identified in the Retained Waters MOA. Further, the state regulates activities encompassing and exceeding those regulated under Section 404 of the Clean Water Act on assumed waters. As provided at 40 CFR Part 233.1(c), "Where an approved State program has a greater scope than required by Federal law, the additional coverage is not part of the Federally approved program and is not subject to Federal oversight or enforcement."

The three state regulatory programs provide comprehensive jurisdiction over all state waters (streams, deepwater habitats, wetlands). Additionally, other "waters of the state" are subject to regulatory requirements associated with maintaining the state's water quality and anti-

degradation standards when there is a proposed discharge of dredged/fill material into an associated aquatic resource.

2.2.1.1 WCA Jurisdiction

The jurisdictional scope of WCA is provided in Minnesota Rules (MR) § 8420.0105. This chapter regulates "the draining or filling of wetlands, wholly or partially, and excavation in the permanently and semi-permanently flooded areas of type 3, 4, and 5 wetlands, and in all wetland types if the excavation results in filling, draining, or conversion to nonwetland." The jurisdictional scope of WCA is straightforward in that it generally covers all wetlands in the state with three exceptions: incidental wetlands, public waters wetlands, and wetlands affected by those peat mining operations that are subject to permit to mine and reclamation requirements of MS § 93.44 to 93.51.35. Incidental wetlands are defined as "wetland areas that the landowner can demonstrate, to the satisfaction of the local government unit, were created in nonwetland areas solely by actions, the purpose of which was not to create the wetland."

"Public water wetlands" are excluded from WCA jurisdiction because they are regulated under the DNR's PWWPP (MS § 103G.005, subd. 15). Similarly, the state of Minnesota has also assigned responsibility for regulating wetlands associated with peat mining operations to the DNR under state's permit to mine program. Peat mining projects over 40 acres are subject to mine land reclamation requirements while those less than 40 acres would generally be subject to WCA regulation or regulated under the PWWPP if the area to be mined is a public water. The boundary of wetlands regulated under WCA jurisdiction is determined in accordance with the Corps of Engineers Wetland Delineation Manual and applicable Regional Supplement.

2.2.1.2 PWWPP Jurisdiction

The statutory definition of public waters includes public waters and public waters wetlands. Public waters are all water basins and watercourses that meet the criteria set forth in MS § 103G.005, subd. 15 that are identified on Public Water Inventory maps authorized by MS § 103G.201. Public waters wetlands include all type 3, type 4, and type 5 wetlands (as defined in U.S. Fish and Wildlife Service Circular No. 39, 1971 edition) that are 10 acres or more in size in unincorporated areas or 2.5 acres or more in size in incorporated areas. The waters that are under the jurisdiction of the MNDNR are shown on maps commonly referred to as Public Waters Inventory (PWI) maps. The regulatory "boundary" of these waters and wetlands is the ordinary high water level (OHWL), as defined in state statute.

The waters covered by the PWWPP are very specifically defined in statute and are readily identified as a result of the PWI mapping. Based on the criteria set forth in MS § 103G.005, subd. 15 for non-wetland waters it is apparent that there is a class of such waters in the state that is not subject to PWPP jurisdiction; specifically, watercourses having less than the two square mile drainage area threshold established in statute. Watercourses with less than this amount of contributing drainage area are not protected under state dredge/fill/drain permitting programs, regardless of their flow regime. In addition to small drainage area

streams, there are a few instances of other isolated stream segments that are not identified as regulated watercourses on PWI maps. There also appear to be some non-wetland, lake or pond-like basins that are not included on PWI maps and therefore would not be covered under any state dredge/fill/drain permitting program. This would include some basins that do not meet the size criteria for public water designation, became deeper or larger after the PWI was completed, were simply missed during the inventory process, or were omitted from the PWI for other reasons.

Public water wetlands are a narrowly defined subset of wetlands found in the state. Any wetlands that may have qualified as public waters wetlands but are not identified on the PWI would fall under WCA jurisdiction. Consequently, all wetlands in the state are covered by state regulations.

2.2.2 Expansion of State Jurisdiction under 404 Assumption

To ensure that the state possesses jurisdiction over Waters of the United States as defined under 33 CFR Part 328, except for those waters retained by the USACE under the Retained Waters MOA, legislation will be enacted to expand state jurisdiction to encompass the following:

1. Some “Incidental Wetlands”, the extent of which is to be determined in further consultation with the USACE and EPA;
2. Streams and stream reaches that have a drainage area of less than two square miles that are not on the Public Water Inventory (PWI), and that are otherwise subject to federal jurisdiction under 33 CFR Part 328, Revised Definition of ‘‘Waters of the United States’’; and
3. Water-basins that are not on the PWI and have a normal surface water depth that exceeds the depth included in the state and federal definition of a wetland, and that are otherwise subject to federal jurisdiction under 33 CFR Part 328, Revised Definition of ‘‘Waters of the United States’’.

2.3 COORDINATION (NON-FEDERAL)

In addition to the coordination with federal agencies prescribed under 40 CFR Part 233 and detailed in section of IV of this document, state agencies and local government units (LGUs) will coordinate under each regulatory program as follows:

2.3.1 WCA Coordination

The WCA is administered at the local level, meaning that applicants proposing activities that impact aquatic resources under WCA jurisdiction most often apply to a designated LGU (MR § 8420.0200) to evaluate and ensure WCA compliance. LGUs generally consist of cities, counties, townships, watershed districts, watershed management organizations. For impacts associated with a Permit to Mine, DNR’s Division of Lands and Minerals assumes the duties of an LGU. For

impacts on state land, the LGU is the state agency, or the agency's designee, with administrative responsibility for that land.

LGUs coordinate application processing and decisions with the local Soil and Water Conservation District (SWCD), BWSR, DNR, and the applicable watershed district. This is primarily accomplished through notices (notice of application, notice of decision, determination notice) and technical findings and recommendations of a Technical Evaluation Panel, or TEP (MR § 8420.0240).

Under 404 Assumption, BWSR will issue General Permits (GPs) that authorize a range of activities and impact types within a predetermined impact threshold. Assisted by the TEP, LGUs will make WCA compliance decisions for GPs ("verifications") through existing processes set forth in MR § 8420. Through its membership on the TEP, BWSR will monitor and ensure that WCA compliance decisions are consistent with the provisions of the GPs. When reviewing and/or authorizing an activity under an Individual Permit (IP), BWSR will follow WCA noticing and processing procedures as well as federal coordination requirements under 40 CFR Part 233. The BWSR will coordinate with MPCA to ensure that water quality and anti-degradation standards are met through a state water quality certification process that is similar to the federal 401 certification process.

Additional coordination between the PWWPP and WCA is required when projects impact waters regulated by WCA and those under the jurisdiction of the PWWPP. Coordination procedures and requirements are specified in MR § 8420.0105 Subp. 2E and associated guidance document at https://bwsr.state.mn.us/sites/default/files/2019-01/Wetland_WCA_WCA-DNR_Prot_Waters_Permit_Prog_Coord_Guidance.pdf

2.3.2 PWWPP Coordination

The PWWPP is administered by the DNR through the issuance of general and individual permits. Under 404 assumption, the DNR will issue GPs that cover a range of activities for the discharge of dredged/fill material up to specified, area-based thresholds for fill activities. DNR coordinates with LGUs and other state agencies through noticing procedures established in state rules (MR § 6115.0250). DNR will coordinate with MPCA for GP development and approval and IP review and approval to ensure that water quality and anti-degradation standards are met through a state water quality certification process that is similar to the federal 401 certification process. That process is described in detail in the proposed procedures included in the "Procedures for State Water Quality Certification of Permits Issued under an Approved State (404) Program" document located in Appendix D.

2.3.3 Historic Properties Coordination

Evaluation of and avoidance of impacts to areas specified under 40 CFR Part 230.54 and 40 CFR Part 233, which includes but is not limited to historic properties, will at times require expertise beyond that which is possessed by field level staff implementing the assumed 404 program. Frequent coordination will occur between BWSR, DNR and the State Historic Preservation

Office (SHPO) in according with the screening process set forth in the proposed MOA between the State Agencies and SHPO, located in Appendix C, to ensure that the requirements of Parts 230 and 233 are met. If the screening process identifies potential impacts, additional coordination with the EPA would be required. Coordination with applicable tribes would also likely occur for potential impacts on Indian cultural sites.

2.3.4 Threatened and Endangered Species Coordination

The EPA cannot waive their review for permit applications that have the potential to affect federally listed threatened or endangered species or their critical habitat. Under the State Program, some coordination with EPA and the USFWS would be required during screening of WCA and PWWPP permit applications, to assess the potential for effects on federal threatened or endangered species and their critical habitat in Minnesota.

2.3.5 State/Federal Program Manager

Agencies within the state will routinely coordinate with the BWSR State Program Manager for to ensure that the state program is implemented in accordance with all federal requirements, respond to inquiries from federal agencies and the public related to the administrative aspects of 404 Assumption, respond to comments from federal agencies resulting from public notice of permit applications, and to ensure timely and accurate production of data required to meet annual reporting responsibilities.

2.4 Scope of Permit Exemptions

2.4.1 Wetland Conservation Act

WCA rules define specific activities that qualify as a “no-loss” of wetlands (MR § 8420.0415) as well as certain activities and impacts that are exempt from wetland replacement requirements (MR § 8420.0420). Many no-loss and exempt activities/impacts do not involve the discharge of dredged/fill material and are not part of the EPA-approved State Program. Impacts resulting from fill activities that are exempt under WCA, but that are subject to regulation under the EPA-approved State Program upon enactment of the necessary statutory or regulatory revisions, will be incorporated into non-reporting GPs with area-based thresholds. Thus, though exempt under WCA, the activity/impact is not exempt under the State Program.

2.4.2 Public Waters Work Permit Program

PWWPP rules (MR § 6115) specify permit standards for activities in public waters including filling (MR § 6115.0190), excavation (MR § 6115.0200), structures (MR § 6115.0210), restoration (MR § 6115.0215), water level controls (MR § 6115.0220), bridges/culverts/intakes/outfalls (MR § 6115.0230), and drainage (MR § 6115.0270). Specific “no permit required” criteria are identified for each activity. Under the State Program, those “no permit required” criteria that may result in placement of fill into waters regulated under the State Program will be incorporated as non-reporting components of GPs with area-based fill limits.

2.4.3 Best Management Practices for Exemptions

40 CFR § 233.11(i) requires the State to provide "A description of the specific best management practices proposed to be used to satisfy the exemption provisions of section 404(f)(1)(E) of the Act for construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment."

2.4.3.1 WCA

MR § 8420.0410 - 8420.0420 apply best management practices as conditions across all exemption types. These conditions include the specific requirement to implement erosion control measures and avoid of impact to fish activity, and further, require the implementation of all applicable BMPs described in the following publications:

- Minnesota Construction Site Erosion and Sediment Control Planning Handbook
- Agriculture and Water Quality: Best Management Practices for Minnesota
- Storm-Water and Wetlands: Planning and Evaluation Guidelines for Addressing Potential Impacts of Urban Storm-Water and Snow-Melt Runoff on Wetlands

2.4.3.2 PWWPP

The PWWPP does not provide exemptions for construction or maintenance of farm, forest, or temporary mining roads.

3 PERMIT REVIEW CRITERIA AND STATE PERMITTING PROCEDURES

This section meets the requirements of 40 C.F.R. § 233.11(a) to describe the State Program's permit review criteria, and of 40 C.F.R. § 233.11(b) to provide "*a description of the State's permitting, administrative, judicial review, and other applicable procedures;*". Though prescribed separately in the 40 C.F.R. § 233, these components have been combined in this section for clarity, to enable a more efficient, intuitive approach in the review of the State Program. The following presents a general summary of permit review criteria and permitting procedures, with more specific and complete details being available in the attached regulatory "crosswalk" documents located in the two regulatory "crosswalks" found in Appendices F and G, and in the copies of relevant statutes and regulations found in Appendix J.

In its current form, the State Program is neither entirely "consistent with" nor "no less stringent" than the Clean Water Act and EPA's regulations. However, the statutory, regulatory, and programmatic revisions that may be required to achieve such equivalency have been identified and summarized in the applicable subsections, below, with a full, specific list of revisions being included in the regulatory "crosswalks" found in Appendices F and G, and in the "Proposed State Program Revisions" document located in Appendix H. These potential revisions are derived from a line-by-line comparison of state and federal provisions, not upon a comparison of the intent and effect of such provisions, **and thus represent the maximum extent of revisions that may be required** if the state were to proceed to apply for 404 Assumption. **It is anticipated that the number of proposed revisions may substantially decrease following further joint evaluation of the State Program by EPA and the State Agencies**, in further consideration of relevant federal provisions. In either case, the description of current permit review criteria and the permit review criteria described under "Statutory, Regulatory and Programmatic Revisions" collectively constitute the permit review criteria that would exist under the State Program and should be reviewed accordingly.

Additionally, as the provisions of Part 233 apply to any state that has received approval to implement a state 404 program, **it is the state agencies' understanding that it is not necessary for the state to provide equivalent provisions for much of the text of Part 233**. For instance, the prohibitions on permit issuance in Part 233.20 apply to the state under an approved program regardless of whether state statute/regulation also contains such provisions.

3.1 AGENCY ROLES IN THE PERMITTING PROCESS

The discharge of dredged/fill material into state waters is regulated by the Minnesota Wetland Conservation Act through MR § 8420, and the Public Waters Work Permit Program through MR § 6115. BWSR is the permitting authority for WCA, with DNR being the permitting authority for the PWWPP and for impacts associated with metallic mining and peat mining (generally for projects greater than 40 acres). BWSR authorizes impacts to state waters under WCA through

the issuance of “replacement plans” (permits), with DNR issuing General and Individual Permits under the PWWPP. Minnesota water quality standards, which are administered by the MPCA, apply to all waters in the state (other than constructed basins used under permit for treatment or disposal systems) and to most activities that may adversely affect the state’s waters. However, application of the water quality standards generally relies upon permits or licenses issued under other regulatory programs; for example, by state certification of Section 404 permits.

3.2 WETLAND CONSERVATION ACT (WCA)

3.2.1 Permit Review Criteria

As described in preceding sections, full permit review criteria are listed in the regulatory crosswalk documents in Appendices F and G, and in copies of relevant statutes and regulations provided in Appendix J. MR § 8420 specifies procedures and criteria for avoiding and minimizing impacts and ensuring adequate replacement of lost public value from unavoidable impacts, to regulated aquatic resources (wetlands, non-public waters deepwater habitats, and non-public waters stream reaches). This includes a requirement that applicants meet sequencing provisions (avoid, minimize, rectify, replace impacts) of MR § 8420.0520, including consideration of alternatives. This requirement is no less stringent than the alternative analysis requirements prescribed in the 404(b)(1) Guidelines.

“Public value” is defined as the importance and benefit to the public derived from the wetland functions listed in MR § 8420.0522, subpart 1. Those functions include water quality; flood and storm water retention; public recreation and education; commercial uses, including wild rice and cranberry growing and harvesting; fish, wildlife and native plant habitat; low-flow augmentation; and other functions and public uses as identified in wetland evaluation methods demonstrated to reasonably identify appropriate candidates for wetland replacement. The board maintains a list of the methods that are approved for wetland evaluation under the WCA.

3.2.1.1 Mitigation

Projects meeting sequencing requirements must then fulfill the requirements for mitigating wetland impacts under MR § 8420.0522 through MR § 8420.0820. These requirements include function and value considerations, in-kind replacement, replacement ratios, buffer requirements, ecological suitability/sustainability, replacement timing, replacement siting, financial assurances, various actions that are eligible for generating replacement credit, replacement construction standards, and the use and establishment of wetland banks. These requirements incentivize the use of wetland banks over project specific replacement, encourage a watershed approach to mitigation, and largely follow the compensatory mitigation requirements in the federal mitigation rule.

The minimum required replacement ratio varies from 1:1 to 2.5:1, and is dependent on the following factors:

- Where the wetland impact occurs in the state related to the amount of wetlands remaining compared to pre-European settlement conditions (see Figure 3.4.1).
- Where the replacement wetland is located in relation to the wetland impact.
- The type of wetland impacted in relation to the type of replacement wetland (relating to plant communities, hydrology and landscape setting).
- The type of mitigation being used (pre-established credits from an existing wetland bank versus wetland replacement that corresponds to a specific impact, i.e. project specific or permittee responsible).
- The proposed type of land use associated with the wetland impact (agricultural versus nonagricultural).

A state conservation easement is the required long-term protection mechanism for all compensatory mitigation sites that function as wetland banks as well as certain types of project-specific/permittee responsible mitigation sites (for example, preservation sites). Currently, all other project-specific mitigation sites are protected by a declaration of restrictions and covenants in favor of the applicable local unit of government and the state. The long-term responsibility for maintaining the functions of compensatory mitigation sites is the responsibility of the landowner under the state's easement requirements and the responsibility of the project sponsor (for wetland banks) or permittee (for project specific or permittee responsible mitigation) under Federal Mitigation Rule requirements. WCA has a funding mechanism for maintenance, repair, and monitoring and enforcement of easement conditions associated with compensatory wetland banks.

3.2.1.2 Threatened and Endangered Species:

MR § 8420.0515 stipulates that a replacement plan application for activities that would involve taking a **state** listed endangered or threatened species cannot be approved unless the DNR issues a "takings" permit under separate authority. The term "taking" includes pursuing, capturing, or killing for animals and picking, digging, or destroying for plants. The WCA provision does not specifically address impacts to habitat for listed species; however, to be approved a WCA replacement plan application must ensure the replacement of the "public value" of the impacted wetlands, which includes consideration of fish, wildlife, and native plant habitats. Therefore, the presence of a T&E species is a consideration in a WCA decision, even in the absence of an actual "taking."

3.2.1.3 Historic Properties

WCA regulations dictate that replacement plan applications must be denied if a significant adverse impact would occur to the archaeological or historical values of sites on or eligible for listing on the National Register of Historic Places.

3.2.2 Permitting Procedures

The requirements for processing WCA applications are found in MR § 8420.0255 and in MS § 103G.2242. Applicants proposing impacts to waters regulated under WCA, where those impacts

are associated with mining activities, must apply for a permit to mine (MR § 6130 and MR § 6132) from the DNR's Division of Lands and Minerals. WCA rule and statute provisions stipulate that certain WCA application time frames are subject to the time limits on agency actions established in MS § 15.99. Upon receiving an application, local government units (LGU) administering WCA have 15 business days to either inform the applicant of any missing information or distribute a notice of application to those required to receive such notices. Notices of application must be provided to members of the technical evaluation panel; the watershed district or water management organization if there is one; the commissioner; and individual members of the public who request a copy. The notice of application must specify a comment period, which must be a minimum of 15 business days. Under MS § 15.99, the LGU must generally decide to approve or deny an application within 60 calendar days of receiving a complete application, otherwise, the application is deemed approved. The 60-day limit may be extended if:

- processes associated with complying with other state or federal laws or court orders must be completed first (including state or federal environmental review processes);
- the application requires prior approval by a higher level of government;
- the LGU extends the deadline by providing written notice to the applicant, including the reasons for the extension, or
- the applicant requests an extension.

The LGU decision must be made within an additional 60 days from completion of other required processes, other required prior approvals or an extension made by the LGU, otherwise, the application is deemed approved. However, for large or complicated projects, it is not unusual for LGUs and applicants to mutually agree to longer or multiple extensions.

Wetland impacts associated with certain types of public transportation projects are handled differently under WCA than other applications. Per WCA statute and rule, wetland impacts associated with the repair, rehabilitation, reconstruction, or replacement of existing roads do not require wetland replacement plan approval. For local roads, the applicable road authority reports the impacts to BWSR, which is responsible for providing wetland replacement using legislatively appropriated funds. As part of the reporting requirement, the road authority must document efforts to avoid and minimize wetland impacts. The WCA technical evaluation panel for the project area reviews the wetland delineation along with the project impacts and avoidance/minimization measures and may recommend on-site wetland replacement. The BWSR Wetland Mitigation Supervisor may also make decisions regarding a project's eligibility for replacement by BWSR. However, there are no application "approvals" as there are with other WCA replacement plans. Therefore, the permitting timeframes for these transportation projects are almost entirely dictated by the road authorities themselves in submitting sufficient project information, including the amount of wetland impact, to BWSR. The Minnesota Department of Transportation is responsible for implementing WCA for projects on state rights

of way under its jurisdiction and is responsible for providing wetland replacement for its projects.

Statutory, Regulatory and Programmatic Revisions:

As described in earlier in this document, in its current form the State Program is neither entirely "consistent with" nor "no less stringent" than the Clean Water Act and EPA's regulations. The following statutory, regulatory, and programmatic revisions **may** be required to achieve such equivalency, and will be enacted, as applicable, when the state makes formal application for 404 Assumption. This is a partial list of potential revisions, with a full, specific list of potential revisions being included in the regulatory "crosswalks" found in Appendices F and G, and in the "Proposed State Program Revisions" document located in Appendix H. Again, **it is anticipated that the number of proposed revisions will substantially decrease following further joint evaluation of the State Program by EPA and the State Agencies**

3.2.2.1 General

3.2.2.1.1 Legislative Revisions:

- Currently, LGUs serve as permitting authorities under WCA. Amendments should be enacted to ensure that BWSR is the sole permitting authority for permits issued under WCA for the State 404 Program.
- Amend WCA to require local road authorities to submit applications and seek approval to impacts associated with their projects. Also, local road authorities should be required to provide permittee-responsible mitigation if the Board of Water and Soil Resources does not have suitable credits available.

3.2.2.1.2 Regulatory and Programmatic Revisions:

- Amend the WCA rules to allow BWSR to issue general permits for categories of activities that individually and cumulatively result in minimal impacts to the aquatic environment. The framework for approving general permits under WCA must be consistent with the conditions of 40 CFR Part § 230.7.
- Amend MR § 8420.0500, subpart 2 to state that no discharge of dredged or fill material will be permitted which will cause or contribute to significant degradation of assumed waters.
- Amend WCA rule to include missing prohibitions on discharges prescribed in the 404(b)(1) Guidelines in 40 CFR Part § 230.10. While some of the restrictions on discharge not currently covered under WCA may be addressed by requiring WQS certification of state permits, there remains multiple gaps.
- Amend WCA rule to require factual determinations that incorporate the elements prescribed in 40 CFR Part § 230.11. Although WCA requires a finding of fact as a basis for a permit decision it does not require the same type of information required under 40 CFR Part §. Specifically, the permitting authority must **A)** determine in writing, the **B)** potential short or long term effects on the **C)** physical chemical and biological

components of the aquatic environment, **D)** on the basis of potential impacts described in subparts C through F, **E)** and ensure that the written determination specifically includes those items in 40 CFR Part § 230.11(a-h).

  - Further, per EPA, while many of the potential impacts in subparts C through F would seem to be addressed by the application of state WQS and anti-degradation standards to state permits, these evaluations are still to be made on a case-by-case basis for each IP and GP (initial issuance). It cannot be asserted that consideration of these potential impacts has been made simply through adoption of applicable WQSs and anti-degradation standards.

- Revise MR § 8420.0255, subpart 3 to require that notices contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. The distribution of public notices must be expanded to include all state and federal agencies with jurisdiction over the site, adjacent landowners, and the public.
- Amend MR § 8420.0520, subpart 3 to include that, for projects that are not wetland dependent, alternatives are presumed to exist that have less impact unless demonstrated otherwise.
- Revise MR § 8420.0520, subpart 7a(A)(1) and (2) to prohibit mitigation from being considered when determining compliance with the "restrictions on discharge", and to align sequencing flexibility with the limitations in the 404(b)(1) Guidelines.
- MR § 8420.0255 subpart 4 will be amended to require that all BWSR individual and general permits and LGU general permit verifications for wetland impacts involving a discharge of dredged or fill material into assumed waters include a compliance determination consistent with the content and format requirements on 40 CFR Part § 230.12, or equivalent format prescribed by the Board.
- A process must be established for the approval and review of general permits.
- A process must be established under which local government units evaluate replacement plan applications for compliance with the terms and conditions of general permits.
- The Memorandum of Agreement Between the Minnesota Board of Water and Soil Resources, the Minnesota Department of Natural Resources, and the Minnesota Department of Administration State Historic Preservation for Meeting Historic Property Review Requirements Under the State (404) Program, located in Appendix C, should be enacted and implemented.
- The State Program (404) Proposed Threatened and Endangered Species Review Procedures, located in Appendix E, should be adopted.
- MR § 8420.0544 subpart D will be amended to require submission of an application for all public road projects that impact wetlands for the repair, rehabilitation, reconstruction, or replacement of a currently serviceable public road. Also, subpart I of

that section must be revised to require local road authorities to provide mitigation in the event BWSR does not have wetland credits available.

3.2.2.2 Mitigation

While there are some instances where state statute and regulation does not contain mitigation provisions that are directly equivalent to some of those prescribed in the 404(b)(1) Guidelines, the state believes that the mitigation program under WCA is demonstrably effective and is, in its effect, no less stringent than the federal requirements for mitigation under 404 Assumption. Thus, **the state considers this portion of the existing State Program to be approvable without substantial revision**. Regardless, to ensure transparency and to form the basis for future evaluation/justification, a line-by-line comparison of state and federal provisions was conducted, as was done for all other program areas, with partial results being provided below and comprehensive results being included in the attached appendices. At such time that the state receives a legislative directive to develop a final application for 404 Assumption, the state will demonstrate that its mitigation program under WCA is no less stringent than the federal program and will develop a more concise list of necessary revisions.

3.2.2.2.1 Legislative Revisions:

- Provide BWSR with approval authority for compensatory mitigation sites to replace functions and values lost through approved impacts. Mitigation sites include project-specific, in-lieu fee, and banks. Also, establish that there must be a signed agreement between the bank sponsor and the state (an instrument) for the bank to provide mitigation for authorized impacts.
- Provide BWSR with the authority to collect, manage, and expend funds for the purpose of long-term management of wetland compensatory mitigation sites consistent with the requirements in 40 CFR Part § 230.
- Expand the composition of the Technical Evaluation Panel for wetland bank applications to include the U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, and other state, local, federal agencies, or tribal governments where such agencies have authorities and/or mandates directly affecting, or affected by, the establishment, operation, or use of the mitigation bank or in-lieu fee program.
- Provide BWSR with the authority to collect, manage, and expend funds associated with financial assurances consistent with the requirements in 40 CFR §230.

3.2.2.2.2 Regulatory and Programmatic Revisions:

- Revise MR § 8420.0522 to establish a sequential preference for obtaining compensatory mitigation consistent with 40 CFR Part § 230.93(b) that consists of: 1) mitigation bank credits; 2) in-lieu fee credits; 3) permittee-responsible mitigation under a watershed approach; 4) permittee-responsible mitigation through on-site and in-kind mitigation; 5) permittee-responsible mitigation through off-site and/or out-of-kind mitigation.

- Revise MR § 8420.0522 Subp. 9 to establish: (1) BWSR as the decision maker for financial assurance requirements associated with replacement sites; (2) a process for determining the amount of financial assurances for all sources of wetland mitigation; and, (3) procedures for enforcement, phasing out, termination, and directing payments consistent with 40 CFR Part § 230.
- Amend MR § 8420.0330, subpart 3, item B to include objectives, maintenance plan, performance standards, long-term management plan, adaptive management plan, and financial assurance.
- Amend MR § 8420.0330, subpart 4, item B so that the land protection mechanism for project-specific mitigation is equivalent to 40 CFR Part § 230.97.
- Amend MR § 8420.0705, subpart 3 to include more explanation and description for providing ecologically based performance standards and credit releases schedules. Also, this requirement should extend to all forms of replacement and not just wetland banking. This rule change may also necessitate changes to MR § 8420.0330.
- Amend MR § 8420.0705 subpart 5 to require a 60-day advance notification before any action is taken to void or modify the protective instrument.
- Amend MR § 8420.0705 to require a signed legal agreement between the bank sponsor and BWSR containing the information at 40 CFR Part § 230.98(d)(6)(ii).
- Amend MR § 8420.0705 subpart 3 to establish a three-step process for the review and approval of wetland bank applications that has the same effect of the federal review process in 40 CFR Part § 230.98. The steps of the process will include concept plan, draft bank plan, and final bank plan. The amended rule will contain timeframes for the first two steps which are not decision-making points in the review process. The timeframes in the final step will be subject to MS §, section 15.99. This section will also be amended to establish BWSR as a co-chair under the Federal review process along with procedures for coordination bank reviews with the Corps.
- Amend MR § 8420.0705 to include a provision for bank sponsors to request modifications of approved bank plans and establish for the review and approval of such requests.

3.2.2.3 Online Permitting System

In addition to the potential revisions described above, implementation of the State Program would require the development and use of an online permitting system by BWSR to:

- facilitate EPA's oversight responsibilities;
- enable efficient coordination among affected agencies and LGUs for purposes of review of jurisdiction, coordination for permit development and issuance, and oversight;
- provide an efficient method for applications to be prepared and submitted;
- facilitate the efficient screening of projects for potential affects to federal threatened and endangered species;
- ensure transparency; and

- conduct reporting both within the state and to meet the reporting requirements to EPA under the federal regulations for state-assumed 404 Programs.

3.3 PUBLIC WATERS WORK PERMIT PROGRAM (PWWPP)

3.3.1 Permit Review Criteria

As described in a preceding section, full permit review criteria are listed in the attached crosswalk documents in Appendices F and G. PWWPP rules located at MR § 6115 specify standards and criteria for activities that change the course, current, or cross section of public waters. These standards and criteria are specific to various actions including those that may involve the discharge of dredged/fill material into public waters. Each action has specific prohibitions, criteria for determining whether a permit is required, and specific standards for permit issuance. Actions include filling in public waters (MR § 6115.0190), structures in public waters (MR § 6115.0210), restoration of public waters (MR § 6115.0215), bridges/culverts/intakes/outfalls in public waters (MR § 6115.0230), and alterations to public waters for mining (MR § 6115.0280). Filling public waters for the purpose of private-sector development is prohibited. When projects effect wetlands/waters under both WCA and PWWPP programs and permitting of impacts are waived by DNR to WCA under the provisions of MR § 6115.0250 Subparts 5 thru 7, WCA replacement requirements apply.

Additional criteria for all permit applications are listed in MR § 6115.0240 Subp. 3B and, for impacts to public waters wetlands, include compliance with the same sequencing provisions as WCA (avoid, minimize, rectify, replace impacts).

3.3.1.1 Mitigation

Projects meeting all permit criteria and resulting in adverse impacts to public waters are subject to the general mitigation requirements in MR § 6115.250 Subp. 1a, which include restoring public waters and creating or restoring additional replacement water areas. The specific replacement requirements for wetlands, described above, are not applicable to non-wetland aquatic resources (such as streams and lakes) under current state regulatory program. PWPP rules require replacement when there is “a major change in the public water” MR § 6115. 0240 Subpart 3(C)(5)(e). PWWPP replacement must be accomplished by “restoring degraded or impacted public waters having equal or greater public value or, if public waters restoration opportunities are not reasonably available, creating and protecting additional replacement water areas having greater public value.” Some non-wetland aquatic resources are not identified on PWI maps and are therefore not regulated under state dredge/fill/drain permitting programs, although state water quality standards may apply.

3.3.1.2 Threatened and Endangered Species

The PWWPP requires that DNR decisions on permit applications must be, “. . . consistent with the goals and objectives of applicable federal, state, and local environmental quality programs and policies, including . . . protected species management.” Several specific types of activities in

public waters are prohibited if the activity will take state listed threatened or endangered species unless a separate takings permit is obtained. In addition, this aspect would be considered in the overall evaluation of environmental impact.

3.3.1.3 Historic Properties

Though MS § 103G.101(1) and MR § 6115.0150 broadly addresses historic properties, there are no provisions specifically imposing a requirement for review and avoidance of impacts to historic properties under the PWWPP.

3.3.2 Permitting Procedures

Procedures for processing PWWPP permit applications are primarily found in MS § 84.027, Subd. 14a. Upon receiving a permit application, which is done electronically through the on-line Minnesota DNR Permitting and Reporting System - MPARS, the DNR has 30 business days to notify the applicant that the application is complete or incomplete. Once a complete application is received, the statute establishes two categories of permits with assigned goals for time to permit decisions. The goal for Tier 1 permits is to make the permit decision within 90 days of receiving an application. For Tier 2 permits, the goal is to act within 150 days of receiving the application. General permits, which provide expedited authorizations for certain types of activities, qualify as Tier 1 permits, with individual permits being Tier 2 permits. There are no consequences for failing to meet the statutory permit timeframe goals. MS § 15.99, under which permits are deemed approved if agencies fail to act on an application generally within 60 days, does not apply to PWWPP permits. For projects subject to state environmental review under the Minnesota Environmental Policy Act of 1973 (MEPA) (MS § 116D), permit decisions cannot be made until the environmental review process is complete.

Impacts associated with metallic mineral mining are regulated under a Permit to Mine(PTM) issued by the DNR. The DNR is required to apply WCA standards for impact sequencing and replacement, but the permitting process follows the “PTM rules at MR § 6130 for ferrous mining, MR § 6132 for non-ferrous mining, and MR § 6131 for peat mines greater than 40 acres. The procedures for projects requiring a PTM are governed by MS § 93.44 - 93.51. For projects subject to environmental review under MS § 116D, permit decisions cannot be made until the environmental review process is complete.

Peat mining projects over 40 acres are regulated under DNR permits to mine, and they are subject to mine land reclamation requirements, not WCA replacement standards. Peat mines less than 40 acres may be subject to WCA regulation, depending on how the work is accomplished, how it is regulated by the LGU, or how it is regulated under the PWPP if the area to be mined is a public water.

3.3.3 Statutory, Regulatory and Programmatic Revisions:

As described in earlier in this document, in its current form the State Program is neither entirely “consistent with” nor “no less stringent” than the Clean Water Act and EPA's regulations. The following statutory, regulatory, and programmatic revisions **may** be required to achieve such

equivalency, and will be enacted, as applicable, when the state makes formal application for 404 Assumption. This is a partial list of potential revisions, with a full, specific list of potential revisions being included in the regulatory "crosswalks" found in Appendices F and G, and in the "Proposed State Program Revisions" document located in Appendix H. Again, **it is anticipated that the number of proposed revisions will substantially decrease following further joint evaluation of the State Program by EPA and the State Agencies**

3.3.3.1 General

3.3.3.1.1 Regulatory and Programmatic Revisions:

- Amend MR § 6115.0250 to state that no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of assumed waters.
- Amend MR 6115 to include missing prohibitions on discharges prescribed in the 404(b)(1) Guidelines in 40 CFR Part § 230.10. While some of the restrictions on discharge not covered under the PWWPP may be addressed by requiring WQS certification of state permits, there remains numerous gaps.
- Amend MR 6115 to require factual determinations that incorporate the elements prescribed in 230.11. Although the PWWPP requires a finding of fact as a basis for a permit decision it does not require the same type of information required under 230.11. Specifically, the permitting authority must **A)** determine in writing, the **B)** potential short or long term effects on the **C)** physical chemical and biological components of the aquatic environment, **D)** on the basis of potential impacts described in subparts C through F, **E)** and ensure that the written determination specifically includes those items in paragraphs 230.11 (a-h).
    - Further, per EPA, while many of the potential impacts in subparts C through F would seem to be addressed by the application state WQS and anti-degradation standards to state permits, these evaluations are still to be made on a case-by-case basis for each IP and GP (initial issuance). It cannot be asserted that consideration of these potential impacts has been made simply through adoption of applicable WQSs and anti-degradation standards.
- DNR is authorized in state rule to issue general permits (MR § 6115.0250 Subp. 4). However, there are no specific standards or processes for the establishment of general permits under the PWWPP. Provision must be included to ensure that, when GPs are issued for discharges into assumed waters, they include the conditions and meet the requirements of 40 CFR Part § § 230.7.
- MR § 6115.0250 will be amended to require that all PWWPP permits and general permit verifications for activities authorized by MR § 6115.0190, subpart 5; MR § 6115.0210, subpart 5; MR § 6115.0215, subpart 5; MR § 6115.0220, subpart 5; MR § 6115.0230, subpart 5; MR § 6115.0270, subpart 4; or MR § 6115.0280, subpart 4 involving a discharge of dredged or fill material into assumed waters must include a

compliance determination consistent with the content and format requirements in 40 CFR § 230.12 or equivalent format.

- MR § 6115.0410 will be amended to require that dam permits involving a discharge of dredged or fill material into assumed waters must include a compliance determination consistent with the content and format requirements in 230.12 or equivalent format.
- The following sections of MR § 6115 will be amended to recognize specific actions in 40 CFR § 230.70 through 230.77 that may be utilized to minimize potential adverse impacts on the aquatic environment: 6115.0191, 6115.0211, 6115.216, 6115.0221, 6115.0231, 6115.0271, 6115.0280, and 6115.0410.
- PWWPP notice requirements will be revised to include notices to other agencies having jurisdiction over the project area, to adjoining property owners, and to persons who request to receive notices.
- The Memorandum of Agreement Between the Minnesota Board of Water and Soil Resources, The Minnesota Department of Natural Resources and The Minnesota Department Of Administration State Historic Preservation For Meeting Historic Property Review Requirements Under The State (404) Program, located in Appendix C, should be enacted and implemented.
- The State Program (404) Proposed Threatened and Endangered Species Review Procedures, located in Appendix E, should be adopted.

3.3.3.2 Mitigation

The State of Minnesota does not currently have a program to facilitate and oversee compensatory mitigation for non-wetland aquatic resources (streams, rivers, and lakes). To address this, the DNR will establish a regulatory framework for the review, approval, oversight, and compliance/enforcement of a banking program. The specific legislative and regulatory developments necessary to establish this framework are described in the two regulatory "crosswalks" found in Appendices F and G, and in the "Proposed State Program Revisions" document located in Appendix H. The DNR program should utilize the same three step review process and TEP coordination procedures established under WCA. Through rulemaking the DNR will clarify the technical requirements for these banks, including eligibility, crediting, performance standards, release schedules, monitoring, maintenance responsibilities, construction certification, financial assurances, and long-term maintenance. The administrative requirements for establishing and operating the program (review process, accounting, credit transactions, reporting) should replicate the BWSR wetland banking program. To avoid redundancies, certain aspects of the DNR mitigation bank program, such as processing credit transactions, maintaining ledgers of approved banks, managing bank easements, may be managed by BWSR.

3.3.3.3 Online Permitting System

The DNR's Water Permitting and Reporting System (MPARS) would require modifications to implement the State Program. Substantive changes to the existing system would be required to enable tracking general permit authorizations, facilitate the efficient screening of projects for potential affects to federal threatened and endangered species, transmit required noticing when an individual permit is needed, conduct annual reporting to EPA, and other miscellaneous changes.

3.4 WATER QUALITY STANDARDS

Minnesota's water quality standards are provided in MR § 7050 (Waters of the State), and MR § 7052 (Lake Superior Basin Water Standards). Details of how water quality standards are currently implemented in point-source discharge permitting are contained in MR § 7053 (State Waters Discharge Restrictions), and parts of MR § 7052. State WQS are administered by the PCA, apply to all waters in the state (other than constructed basins used under permit for treatment or disposal systems), and apply to essentially any activity that may adversely affect the state's waters. However, application of the water quality standards generally relies upon permits or licenses issued under other regulatory programs, for example, by state certification of Section 404 permits. Minnesota assumption of the Section 404 program would not affect the scope of these standards but would nullify the current process through which WQS are applied and enforced in the state.

To ensure the application of state WQS to permits issued under the State Program, PCA will conduct WQS review and certification for all General and Individual Permits issued by BWSR and DNR for their respective programs. The process will emulate the procedures for Section 401 certifications of individual federal licenses and permits as prescribed at MR § 7050.0285. The WQS review and certification process that would be implemented under the State Program is described in Appendix D, Procedures for State Water Quality Standard Certification of Permits Issued Under The Minnesota State (404) Program.

3.5 ADMINISTRATIVE AND JUDICIAL REVIEW PROCEDURES

3.5.1 Wetland Conservation Act

The rules and procedures governing the WCA appeals process or located at MR § 8420.905. For appeals made under the WCA program, other than project-specific mitigation under a permit to mine issued by the DNR, the appeal decision is made by BWSR. This includes appeals of enforcement orders. The State Attorney General's Office provides legal representation to BWSR for all appeals. BWSR charges an appeal fee of $500. Appeals by TEP members are exempted from the fee.

Local government unit decisions on applications (approvals or denials) may be appealed by the applicant and by parties other than the applicant, including BWSR, DNR, SWCD, watershed

district/watershed management organization representatives and any person who has requested to receive notice of WCA applications and decisions. Further, WCA decisions may also be appealed by petition of 100 or more residents of the county where a majority of the wetland that is the subject of the application is located. In addition to possessing the authority to appeal any LGU decision, BWSR makes the decision on whether to accept an appeal and BWSR makes the decision on an appeal, even when BWSR is the appellant (MR § 8420.905, Subp. 3). An LGU decision is not final until a decision has been made on an appeal or the appeal window is closed. Thus, through BWSR's authority to both appeal and make decisions upon its appeal of LGU decisions, BWSR may, in effect, reverse any LGU decision prior to it becoming final. Appeals of the board decision may then be taken to the state court of appeals and is considered an appeal from a contested case decision for purposes of judicial review under MS § 14.63 through 14.69.

3.5.2 Public Waters Work Permit Program and Permit to Mine:

If a permit applicant or recipient of a DNR Commissioner's Order is aggrieved by a decision made by the DNR, the applicant or local unit of government (Soil and Water Conservation District, Watershed District, or mayor of a city) may demand a public hearing. The demand for hearing must be submitted in writing to the commissioner, accompanied by a $500.00 bond (cashier's check or bond surety) made payable to the Department of Natural Resources within 30 days' receipt of the Commissioner's Order (local units of government are exempt from the bond requirement). If the $500.00 bond is not included with the demand, the DNR hearings coordinator will write or phone the hearing demander to inform him or her of this requirement. Under MS § 103G.311 Subdivision 7, the hearing demander must pay hearing costs up to $750 if the DNR Commissioner's Order is affirmed without material modification.

Public hearings are held before an "independent" Administrative Law Judge (ALJ) assigned to cases by the Minnesota Office of Administrative Hearings. The hearings are generally held at a public facility in the county where the dispute exists. The DNR is represented by the Minnesota Attorney General's Office and the hearing demander is generally represented by an attorney although one is not required. The ALJ hears testimony from the hearing demander, DNR personnel, witnesses, and the general public. After collecting all testimony from the hearing, the ALJ writes a final report on the matter. The DNR and Attorney General's Office then conducts an "independent" review of the ALJ's report and hearing record. The DNR may or may not arrive at the same findings and conclusions as the ALJ. The DNR then issues the hearing demander a final Commissioner's Order either affirming what the demander originally wanted to do or ordering them to do what the order specifies. If the hearing demander is aggrieved by the Commissioner's Order, they may ask the State Court of Appeals to review the DNR's decision. Several cases have even progressed to the state and federal Supreme Court levels to resolve the issue(s) raised in the original hearing demand.

3.5.3 Legislative, Regulatory, and Programmatic Revisions:

The appeal processes in place for existing State regulatory programs substantially meets the requirements for 404 Assumption. Proposed legislative, regulatory, and programmatic revisions are relatively minor in scope and significance, and are described in detail in the regulatory "crosswalks" found in Appendices F and G, and in the "Proposed State Program Revisions" document located in Appendix H.

4 STATE COMPLIANCE EVALUATION AND ENFORCEMENT

This section meets the requirement of 40 CFR § 233.11(g) to provide "*A description of the State's compliance evaluation and enforcement programs, including a description of how the State will coordinate its enforcement strategy with that of the Corps and EPA*".

4.1 PERMIT COMPLIANCE EVALUATION

The purpose of compliance evaluation is to ensure that authorized activities comply with the specified terms and conditions of permits. The PWWPP and WCA each have the statutory authority to monitor and inspect authorized impacts to assess compliance, but neither has developed procedures to implement this authority in a manner consistent with the requirements of 40 CFR § 233.

The WCA program is primarily focused on pre-impact evaluation and requirement for replacement of the public value of wetlands impacted under its broad geographic jurisdiction. While the program does contain a contractor notification provision (MR § 8420.0335) that prohibits a contractor from draining, excavating, or filling wetlands unless the contractor has obtained a signed statement from the landowner or their agent stating that a replacement plan has been obtained or is not required and the contractor has sent a copy of the signed statement to the local government unit, the WCA rules do not contain a specific requirement for BWSR or local government units to inspect impact sites associated with approved replacement plans, nor does it establish a process for resolving non-compliance outside of addressing them as an unauthorized activity subject to the enforcement procedures in MR § 8420.0900.

Similarly, the PWWPP rules do not establish a program or process for evaluating compliance with issued permits, nor is there a framework for resolving permit non-compliance. MS § 103G.251 gives the DNR statutory authority to monitor and investigate activities occurring with a permit that may affect waters of the State, but the agency has not developed specific procedures for implementing this authority. The PWWPP has a contractor notification requirement (MS § 103G.241) that is identical to the requirement in WCA and uses the same form, but the focus is on raising awareness of the need for permits, rather than monitoring and ensuring compliance with the terms and conditions of issued permits. Although the PWWPP does not have a defined compliance program, the commissioner of the DNR possesses the statutory authority (MS § 103G.127) to adopt rules to establish a permit program that meets the requirements for an assumed program as determined by the EPA, as well as the statutory authority to resolve permit violations under an assumed program (MS § 103G.141). These authorities combined with the agency's electronic permitting system (MnDNR Permitting and Reporting System) give the DNR the authority and data management infrastructure from which an acceptable compliance program may be established through an agency rulemaking process.

4.1.1 Legislative, Regulatory and Programmatic Revisions:

As described in earlier in this document, in its current form the State Program is neither entirely "consistent with" nor "no less stringent" than the Clean Water Act and EPA's regulations. The following statutory, regulatory, and programmatic revisions may be required to achieve such equivalency, and will be enacted, as applicable, when the state makes formal application for 404 Assumption. As described above, this is a partial list of necessary revisions, with a full, specific list of revisions being included in the regulatory "crosswalks" found in Appendices F and G, and in the "Proposed State Program Revisions" document located in Appendix H. Summary revisions include:

Establish in both BWSR and DNR's state program regulations a "program" to systematically identify persons who failed to obtain a permit or violated an existing permit, not simply a mechanism to address compliance once coincidentally identified. For instance, to identify violation of existing authorizations, conduct random spot checks of a specific percentage of authorized activities from prior years.

Establish in BWSR State Program Regulations a requirement and process for receiving and ensuring proper consideration of whistleblower complaints submitted by the public.

4.2 ENFORCEMENT

Enforcement provisions for Minnesota state regulatory programs are primarily found in MS § 103G.2372, MR § 8420.0900 and MR § 6115.0255. Under both the PWWPP and WCA, DNR conservation officers and licensed peace officers are authorized to issue cease and desist orders to halt on-going violations and to issue restoration and/or replacement orders. The DNR employs six Water Resource Enforcement Officers, dedicated to enforcing state water/wetland regulations and aquatic invasive species requirements. The DNR Commissioner, as head of the enforcing agency, can sue in District Court to, by injunction, force compliance with, or restrain the violation of an order (MS § 103G.135).

4.2.1 PWWPP Enforcement

PWWPP rules related to the discharge of dredged/fill material into assumed waters are enforced through criminal proceedings established in MS § 103G.141, subdivision 1, and DNR Commissioner orders authorized under MS § 103G.251, which include Cease and Desist (MR § 6115.0255 Subp. 2) and/or Restoration and Replacement (MR § 6115.0255 Subp. 4) orders.

DNR's enforcement Division has the full powers of peace officers in the State of Minnesota. The jurisdiction of Conservation Officers is statewide and on boundary waters, with authorities that are concurrent with various units of government. Their primary responsibility is to provide resource protection and public safety by gaining voluntary compliance through education and law enforcement. They enforce DNR rules and regulations and general criminal laws on lands administered by the DNR, including state parks, trails, forests, waysides, scientific and natural areas, state trails, and archeological and burial sites. They also enforce regulations related to

invasive species, wetland protection, water appropriation, water quality, solid waste, timber theft, and air quality. Under the PWPP, conservation officers may issue a criminal citation immediately for violations, prosecuted as a misdemeanor with a maximum fine of $700 and/or up to 90 days in jail. Further, when the commissioner finds that a person is in violation of a condition or limitation set forth in a permit issued under the State Program, the Commissioner must:

a) Issue an order requiring the person to comply with the condition or limitation, or,
b) Commence a civil action for appropriate relief in district court, including a permanent or temporary injunction. The court may restrain the violation and require compliance.

When a person violates a condition or limitation of a permit or violates an order issued by the commissioner under the State Program, they are subject to a civil penalty not to exceed $25,000 per day for each violation.

4.2.2 WCA Enforcement

There are several WCA enforcement mechanisms in Minnesota, with the primary authority to initiate enforcement actions and ultimately bring about compliance resting with the state:

4.2.2.1 Minnesota Department of Natural Resources

The DNR has assigned regional water resource enforcement officers in addition to regular conservation officers (all are licensed peace officers) that have the responsibility and authority to enforce both WCA and the Public Waters Permit Program. Enforcement orders are issued under the authority of the DNR Commissioner. DNR's WCA enforcement authorities include:

- Cease and Desist Orders. These orders are issued to immediately stop an unauthorized activity or to prevent an action from starting or re-commencing. It is common for the enforcement officer to coordinate with the local government and/or BWSR prior to issuing them. A violation of a Cease and Desist Order is a criminal offense.
- Restoration and Replacement Orders. A restoration order is issued to the landowner or responsible party to compel restoration of a wetland impacted by an unauthorized activity (or for impacts beyond what was authorized) within a specified timeframe and in accordance with a restoration plan developed by Soil and Water Conservation District technical staff and/or members of the TEP. A replacement order is issued to require mitigation when restoration of the wetland is unlikely to be successful. After-the-fact replacement (mitigation) is usually required at twice the normal ratio. Violations of these orders must be prosecuted by the County Attorney (civil or criminal), or the DNR may initiate a civil suit to compel compliance.
- Deed Restrictions. WCA violations may also be recorded on the deed of the affected property. A deed restriction is associated with a restoration or replacement order and remains in place until the wetland is restored.

4.2.2.2 Minnesota Board of Water and Soil Resources

In addition to the LGU's and DNR's enforcement authorities, BWSR possesses administrative penalty order (APO) authority. BWSR has independent authority to identify violations and issue APOs to compel restoration of the wetland and impose monetary penalties of up to $10,000 per violation. For non-compliance with an APO, the state's attorney general's office may proceed to enforce penalties that are due and compel compliance through a final judgment of the district court.

4.2.2.3 Local Government Units.

While the most common enforcement mechanism is a DNR-issued order, LGUs can adopt more stringent regulations and enforce them through local controls. It is rare, but LGUs also have the option of developing a restoration or replacement order and having it served by the local Sherriff (any licensed peace officer has the authority to serve such an order). It is important to note that these local enforcement options are in addition to the state's authority and do not replace or supersede it.

4.2.3 Legislative, Regulatory and Programmatic Revisions:

As described, in its current form the State Program is neither entirely "consistent with" nor "no less stringent" than the Clean Water Act and EPA's regulations. ***However, with regard to compliance and enforcement, EPA may approve a state program where there is a lack of authority to impose the required penalties provided the enforcement program is demonstrably effective. The State believes that the WCA, PWWPP and PTM enforcement programs ARE demonstrably effective, and that these portions of the State Program are approvable without substantive revision.***

If the EPA does not concur with his finding, then the following statutory, regulatory, and programmatic revisions may be required to achieve such equivalency, and will be enacted, as applicable, when the state makes formal application for 404 Assumption. As described above, the following is a partial list of necessary revisions, with a full, specific list of revisions being included in the regulatory "crosswalks" found in Appendices F and G, and in the "Proposed State Program Revisions" document located in Appendix H. Summary revisions include:

4.2.3.1 Legislative:

- Revise relevant statute/rule to provide for public participation in the state enforcement process by allowing intervention of right in any civil or administrative action by any citizen having an interest, or by assuring written responses to all citizen complaints, not opposing lawful intervention by citizens, and by publishing notice and allowing comments on proposed settlements.
- Establish statutory authority for DNR to seek criminal fines in the amounts specified in 40 CFR Part § 233.41(a)(3)(ii)
- Amend MS § 103G.141 Subd. 2 to include violations where no permit was previously issued, and to seek penalties in the required amounts.

- Revise MS § 103B.101 Subd. 12 to authorize BWSR to levy civil penalties of at least $5,000 per DAY. Currently, the penalty is $10,000 per violation, not per violation per day. Alternatively, the "Alternate Revision" described below would authorize fines of up to $25,000 per violation per day, though additional revision would be required to establish a minimum of $5,000 per violation per day.

4.2.3.2 Regulatory and Programmatic:

- Revise MR § 8420.0900 to provide a framework for receiving, evaluating, and investigating whistleblower complaints submitted by the public.
- Revise MR § 6115.0255 to provide a framework and process for evaluating and assessing criminal fines.

4.2.3.3 Alternate Revision, to MS §103G.141:

a) Revise to include violations where no permit was previously issued. Current text applies this section only to "…violation of a condition or limitation set forth in a permit issued…" Federal text clearly states application to "…without a required permit…"
b) Then, revise to apply also to "…rules adopted by the Director", to prescribe the provisions of this part to WCA administration.
c) Revise penalty amount to be applied per violation per day and establish a minimum of $5,000.
d) Establish criminal fines under this section for willful or criminally negligent discharges. If instead addressed under other sections, then also establish authority for BWSR, and to expand authority to apply required dollar amount for DNR.
e) Revise to seek criminal fines for criminal mischief described in 40 CFR § 233.41(a)(3)(iiii).

5 STATE AGENCY ORGANIZATION AND STRUCTURE

This section meets the requirement of 40 CFR § 233.11(c) to provide "*[a] description of the basic organization and structure of the State agency (agencies) which will have responsibility for administering the program. If more than one State agency is responsible for the administration of the program, the description shall address the responsibilities of each agency and how the agencies intend to coordinate administration and evaluation of the program*."

5.1 OVERALL STRUCTURE

The state program is administered by the Minnesota Board of Water and Soil Resources (BWSR) and the Minnesota Department of Natural Resources (DNR), with water quality certification for permits issued by the two administering agencies being conducted by the Minnesota Pollution Control Agency (MPCA). Within the DNR, the Ecological and Water Resources and Lands and Minerals Divisions administer the Public Waters Work Permit Program (PWWPP) and the Permit to Mine Program (PTM), respectively. Local Government Units provide limited administrative

and technical services related to the implementation of the WCA, but do not act as permitting authorities under the State Program.

5.2 Agency Structure and Responsibilities

5.2.1 Minnesota Board of Water and Soil Resources

The Minnesota Board of Water and Soil Resources (BWSR) consists of 20 members. The board is the state's administrative agency for 88 soil and water conservation districts, 46 watershed districts, 23 metropolitan watershed management organizations, and 80 county water managers. Members can be citizens, state agency staff, or local government representatives that deliver BWSR programs. Approximately 140 agency staff implement the Board's policy agenda.

The agency is led by the Executive Director, who reports to the Board while also possessing separate, independent statutory authority and responsibilities. The agency is divided into three divisions, with each division containing multiple "Sections". Located within the Programs and Policy Development Division, the Wetland Section is primarily responsible for WCA administration, and thus, BWSR's responsibilities under 404 Assumption. Additionally, the Engineering, Resource Conservation, and Conservation Easement Sections assist in the administration of the agency's Wetland Banking program, with staff from the Resource Conservation Section also providing assistance for appeals. BWSR Wetland Section staff members are located in nine field offices throughout the state.

5.2.2 Minnesota Department of Natural Resources

The Minnesota Department of Natural Resources is charged with conserving and managing the state's natural resources. The DNR regulates state waters under the PWWPP and PTM programs, as well as maintains public areas such as state parks, state forests, recreational trails, and recreation areas. Further, the DNR manages minerals, wildlife, and forestry throughout the state.

The DNR is led by the DNR Commissioner, who reports to the Governor, and contains seven distinct divisions. Each division is managed by an Assistant Commissioner. The Division of Ecological and Water Resources is responsible for administration of the PWWPP program, the Lands and Minerals Division administers the Permit to Mine Program, and the Enforcement Division and its Conservation Officers provide enforcement services for implementation of all state water resource regulatory programs.

5.2.3 Minnesota Pollution Control Agency

Through the authority of state and federal statutes and guidelines, the Minnesota Pollution Control Agency (MPCA) focuses on preventing and reducing the pollution of air, land, and water, and leads Minnesota's efforts to protect against the effects of climate change. The MPCA works with regulated parties, businesses, governments, organizations, and Minnesota's

11 tribal nations to protect natural resources, improve human heath, and foster strong economic growth through the administration and implementation of multiple programs, including the development of State Water Quality Standards and the 401 Water Quality Certification Program for federal permits issued under Section 404 of the Clean Water Act.

With approximately 850 employees, the agency divides its work into seven divisions. The Resource Management and Assistance Division will be responsible for conducting the review of applications submitted under the PWWPP and WCA to ensure that proposed activities do not violate State WQS. MPCA makes the decision to waive review, or upon review, to certify the permit or deny water quality certification.

5.3 Administration and Evaluation

The administration and implementation of each program is the responsibility of that program's administering agency. However, BWSR will provide general oversight for those parts of all state programs which are used to meet the requirements for 404 Assumption. More specifically, BWSR will:

a) Coordinate between the state and federal agencies, serving as the primary point of contact for federal agencies concerning those aspects of state programs used to satisfy the requirements of Section 404 of the CWA.
b) Compile data from all state agencies and subsequently develop and ensure timely submittal of annual program reports to the EPA Regional Administrator.
c) Ensure that each agency's quality review processes meet applicable federal requirements.
d) Manage Memorandums of Agreement between each applicable State Agency and the EPA Regional Administrator and Secretary of the Army.
e) Coordinate with the EPA for proposed revisions to General Permits, revisions to any state agency's program, review of and objection to the issuance of state permits, and other similar administrative matters.

6 STAFFING AND FUNDING

This section meets the requirement of 40 CFR § 233.11(d) to provide "*A description of the funding and manpower which will be available for program administration*;"

Because the State Agencies currently administer a comprehensive water resource regulatory program that largely meets the requirements for 404 Assumption, the State intends to administer the State Program using primarily existing staff and fiscal resources. The permit review and approval processes required to meet the requirements of 40 CFR § 230 and 233 overlap substantially with existing state processes, minimizing the need for additional staffing and funding.

The current state regulatory programs are implemented by 22 BWSR staff, 270 LGU staff, 32 DNR staff, and 4 MPCA staff. It is estimated that up to 30 additional FTEs would be required, and would be provided, to fulfill additional responsibilities associated with administering a program meeting the requirements of 40 CFR Parts 230 and 233.

As displayed in Table 1, $4.8 million in additional funding per fiscal year would be required and allocated to meet these staffing needs, for implementation of those portions of the state regulatory programs specifically related to satisfying the requirements for 404 Assumption. Multiple funding sources are typically used for program implementation including State legislative appropriations, various fees, interagency agreements, and grants. More specific details describing funding and the additional tasks that would be performed by staff at the state agencies under the State Program can be viewed in the attached Appendix I, Minnesota Federal Clean Water Act Section 404 Assumption, Report on Funding Estimates.

Table 1. Additional annual funding ($mil) required for 404 assumption implementation.

Agency	2022 Additional Funding Estimates[1]
BWSR	$2.1[2]
DNR	$2.7
MPCA	$0.0
Total State Agency	$4.8

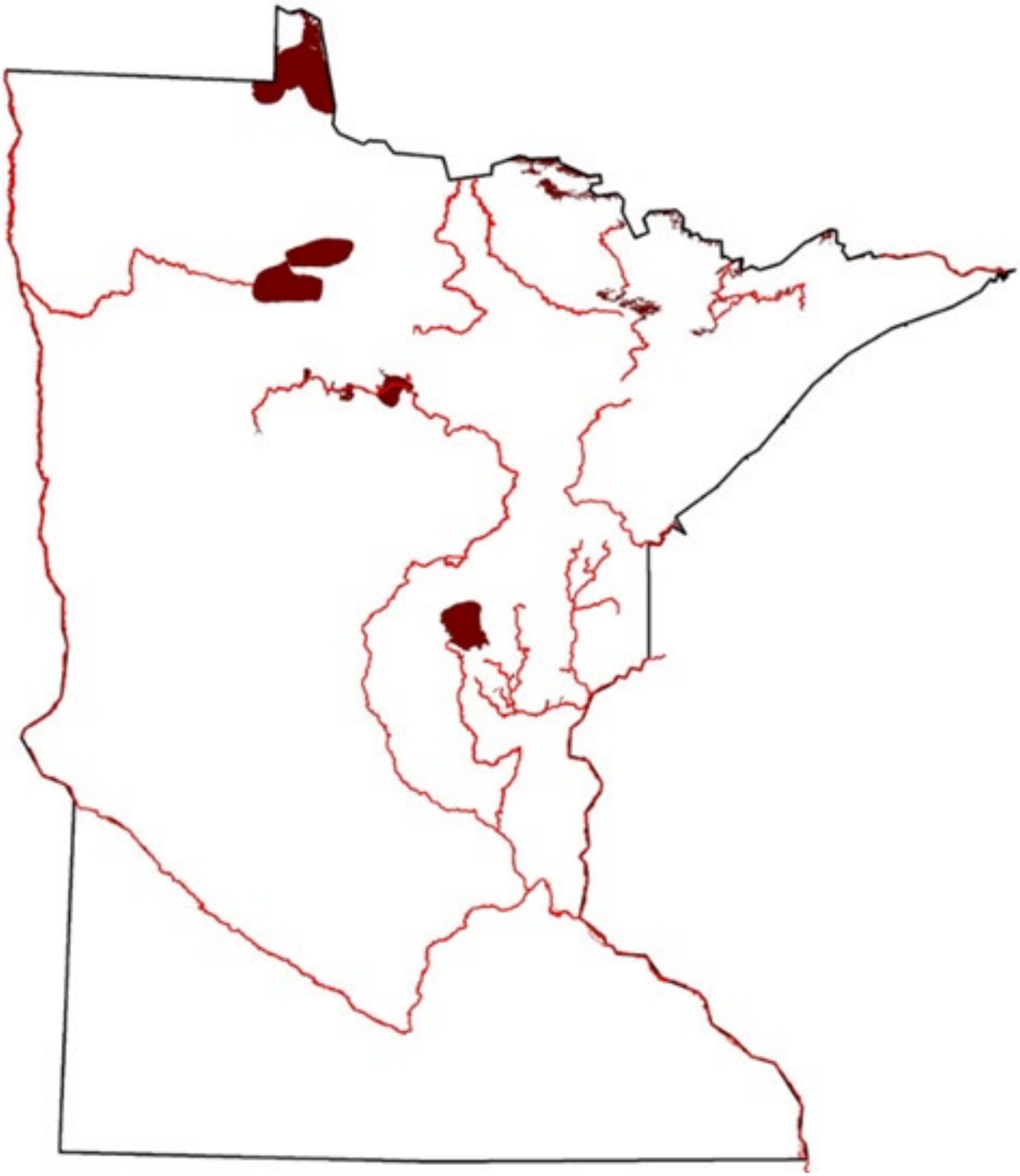
1. In 2022 dollars.
2. The funding estimate for BWSR includes additional costs of implementation for WCA local government units, implementing expanded state jurisdiction, and ongoing maintenance costs for the online WCA permitting system.

7 DESCRIPTION OF STATE-ASSUMED WATERS

This section meets the requirement of 40 CFR § 233.11(h) to provide "A description of the waters of the United States within a State over which the State assumes jurisdiction under the approved program; a description of the waters of the United States within a State over which the Secretary retains jurisdiction subsequent to program approval; and a comparison of the State and Federal definitions of wetlands."

The CWA includes provisions that allow a state to assume administration of a 404 program in certain waters (state-assumed waters). Rather than defining which waters a state can assume regulatory authority over, the CWA describes waters that a state cannot assume regulatory authority over and for which jurisdiction remains with the USACE. Such waters are "retained waters". State-assumed waters consist, then, of all waters of the United States that are not retained waters.

Under Minnesota's state program, the USACE will retain responsibility for permitting for the discharge of dredged or fill material in those waters meeting the definition of Navigable Waters of the United States (33 CFR § 329), and wetlands encompassed by an administrative boundary extending landward from such waters, as described in the attached Appendix B, Memorandum of Agreement for Retained Waters Under 404 Assumption In The State Of Minnesota. The administrative boundary applied to adjacent wetlands over which jurisdiction is retained by the USACE is located 300 feet from the ordinary high-water mark (OHWM) of the retained water. In the case of a project that involves discharges of dredged or fill material both waterward and landward of the 300-foot administrative boundary, the USACE will retain jurisdiction to the landward boundary of the project for the purposes of that project only. Retained waters will be identified in the Retained Waters List, with a broad approximation of such waters displayed in the image below.



8 APPENDICES

Appendix A: Memorandum of Agreement Between the Minnesota Board of Water and Soil Resources and Minnesota Department of Natural Resources, And the United States Environmental Protection Agency for Administration of The State (404) Program

Appendix B: Memorandum of Agreement for Retained Waters Under 404 Assumption in The State of Minnesota

Appendix C: Memorandum of Agreement Between the Minnesota Board of Water and Soil Resources, The Minnesota Department of Natural Resources and The Minnesota Department of Administration State Historic Preservation for Meeting Historic Property Review Requirements Under the State (404) Program

Appendix D: Procedures for State Water Quality Standard Certification of Permits Issued Under the Minnesota State (404) Program

Appendix E: State Program (404) Proposed Threatened and Endangered Species Review Procedures

Appendix F: 40 CFR Part § 233 – State Assumption Regulations “Crosswalk”

Appendix G: 40 CFR Part § 230 – 404(B)(1) Guidelines Regulatory “Crosswalk”

Appendix H: Proposed State Program Revisions

Appendix I: Report on Funding Estimates

Appendix A

MEMORANDUM OF AGREEMENT BETWEEN THE MINNESOTA BOARD OF WATER AND SOIL RESOURCES AND MINNESOTA DEPARTMENT OF NATURAL RESOURCES, AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY FOR ADMINISTRATION OF THE STATE (404) PROGRAM

XXXX X, 202X

I. GENERAL

A. Purpose

This Memorandum of Agreement (MOA or Agreement) is entered into by and between the Minnesota Board of Water and Soil Resources (BWSR) and Minnesota Department of Natural Resources (DNR), hereafter referred to as "State Agencies", and Region V of the United States Environmental Protection Agency (EPA). This agreement sets forth the roles and responsibilities of the State Agencies and the EPA in the State's administration of a state regulatory program (State Program) meeting the requirements of Section 404 of the Clean Water Act (CWA), Title 33 of the United States Code (U.S.C.), § 1251 et seq., and establishes certain provisions as required by 40 CFR § 233.13. This Agreement does not impose any legal obligations on the public.

B. Authorities

1. The statutory authority for the State of Minnesota's (State) assumption of permitting responsibility under Section 404 of the CWA is established in Section 404(g)(1) of the Act. The regulations governing both application for and administration of the State Program are found at 40 C.F.R. § 230, 231, 232 and 233.

2. The state statutory authority for the State of Minnesota's (State) assumption of permitting responsibility under Section 404 of the CWA is established in Minnesota Statute (MS) § <WCA - to be determined> and MS § <PWWPP - to be determined>.

C. Effective Date and Revisions

1. This Agreement must be executed by the State Agencies and the USACE and will take effect within 30 days after publication of the notice of EPA's program approval in the Federal Register.

2. No provision set forth in this Agreement will be construed to restrict EPA's authority to fulfill its oversight and enforcement responsibilities under the CWA, nor will it be construed to restrict the State Agencies' enforcement responsibilities under Minnesota law.

3. This Agreement will be reviewed annually by BWSR, on behalf of the state agencies, and EPA. Either party may request in writing an amendment or modification to the Agreement. Such requests must be in writing and will be effective upon completion of the process outlined in 40 C.F.R. § 233.16, and upon signature of all parties. If the State Program authorization is amended in a manner that would affect this Agreement, this Agreement must be amended as appropriate.

4. This Agreement will remain in effect until it is amended, modified, or replaced; EPA withdraws authorization pursuant to 40 C.F.R. § 233.53(b); or the State voluntarily transfers program responsibilities to the USACE in the manner prescribed in 40 C.F.R. § 233.53(a).

D. Computation of Time Periods

The computation of any period of time prescribed by this Agreement will begin on the day immediately following the date on which the time period begins. Saturdays, Sundays, and state and federal holidays will be included. When the period of time expires on a Saturday, Sunday, or legal holiday, the stated period of time must be extended to include the next business day.

II. STATE PROGRAM ADMINISTRATION

A. Overall Administration

1. The BWSR will be the lead state agency for administration of the State Program, serving as the primary contact for EPA and providing for general oversight of State Program. More specifically, BWSR will:

a) Coordinate between the state and federal agencies, serving as the primary point of contact for federal agencies concerning those aspects of state programs used to satisfy the requirements of Section 404 of the CWA.

b) Compile data from all state agencies to develop and ensure timely submittal of annual program and other reports to the EPA Regional Administrator.

c) Ensure that each agency's quality review processes meet applicable federal requirements.

d) Manage Memorandums of Agreement between each applicable State Agency and the EPA Regional Administrator and Secretary of the Army.

e) Coordinate with the EPA for proposed revisions to General Permits, revisions to any state agency's program, review of and objection to the issuance of state permits, and other administrative matters.

2. The State Agencies administer multiple water resource regulatory programs that may cover similar or the same projects as those permitted under the State 404 Program. If a State Agency does not resolve an objection or requirement for a Section 404 permit condition made under 40 C.F.R. § 233.51 and issues a permit solely to satisfy State regulatory program requirements, the State permit does not constitute a permit under Section 404 of the CWA and the applicant must be notified of this fact in writing. Conversely, failure of a state agency to resolve an objection or requirement for a Section 404 permit condition does not invalidate authorization for the same project under the applicable state program.

B. Coordination with Other States and Tribes

1. When waters within "Indian Country", as that term is defined at 18 U.S.C. § 1151, may be affected by a proposed discharge, all requirements for coordination and public notice otherwise applied to a state under 40 C.F.R. § 233.31 and 40 C.F.R. § 233.32.2(c)(1)(v) must be applied to the potentially affected tribe.

2. If a State Agency receives an application for a permit that has a reasonable potential to impact the waters of an adjacent state or waters within "Indian country," the relevant State Agency must ensure that the potentially impacted state or federally recognized tribe are included as recipients of the public notice.

a) When requested by a potentially affected state or tribe, the relevant State Agency will consult with the state or tribe during its initial review of an application prior to providing public notice.

C. Program Modifications

1. The State Agencies must timely notify EPA of any proposed or actual change to the State's statutory or regulatory authority or any other modifications which are significant to administration of the State Program, including, but not limited to:

a) An action by the State Legislature to strike down or limit State authorities, or that contemplates cessation of the administration of the State Program by the State of Minnesota.

b) An action by a State court striking down or limiting State authorities.

c) Revision of the State's legal authorities needed to maintain consistency with changes to applicable federal regulations.

d) Proposed transfer of the program in whole or in part to another State agency.

2. In response to notification of a change in the State Program in accordance with paragraph (1), EPA must inform the State in writing of any specific concerns regarding State authority and must provide the State an opportunity to make any necessary program revisions in accordance with 40 C.F.R. 233.16(d).

a) If the proposed revisions are not substantial, notice of approval may be given by letter to the Governor or designee, per 40 C.F.R. 233.16(d)(2).

b) If EPA determines that the proposed revisions are substantial, EPA will publish notice of the proposed revisions, provide opportunity for a public hearing, consult with the Corps, USFWS, and NMFS, and review the proposed modification in accordance with 40 C.F.R. 233.16(d)(3). Such changes will not be effective until review and approval by EPA and publication of notice in the Federal Register.

3. When EPA has reason to believe that circumstances have changed with respect to the State Program, EPA may request, and the State will provide, a supplemental Attorney General's statement, program description, or other documents or information necessary to evaluate the State 404 Permit Program's compliance with the requirements of the CWA and regulations at 40 C.F.R. § 233.

4. If the State determines that it will no longer administer the State Program, it must provide notice to EPA and the Corps not less than 180 days prior to cessationof program operation, and must arrange for transfer of all program materials to the Corps.

5. Pursuant to 40 C.F.R. § 233.16(b), the State must revise the State Program as necessitated by any revision to 40 C.F.R. § 233 or any other applicable Federal statute or regulation. The program must be revised within one year of the date of promulgation of such regulation, except where the State must amend or enact a statute in order to makethe required revision, in which case the revision must take place within two years.

6. Any program modifications that necessitate modifications to this Agreement will not be effective until the modified agreement is signed by the State Agencies and EPA, and EPA gives notice of approval of program modifications.

III. EPA WAIVER OF REVIEW

A. Except as otherwise provided in this paragraph, EPA waives federal review of MN State Program permit applications for all but those categories of discharge for which, under 40 CFR § 233.51, review may not be waived. EPA retains the authority to review MN State Program permit application for:

1. Discharges impacting compensatory mitigation sites, including mitigation banks, in lieu fee program sites, and permittee responsible mitigation sites; and

2. Discharges impacting sites that are owned or managed by federal entities, and activities by an applicant that is a federal entity.

B. EPA may terminate waiver of the review of categories of permit applications outlined in this Agreement pursuant to 40 C.F.R. § 233.51(a).

C. When requested by EPA, the relevant State Agency must supply the EPA Regional Administrator with copies of public notices for permit applications for which permit review has been waived, in accordance with 40 C.F.R. § 233.50(a)(1).

D. The State Agencies or the applicant may request EPA review of specific projects that would otherwise not require EPA review.

IV. COMPLIANCE MONITORING AND ENFORCEMENT

A. EPA will continue to directly implement its authority for the 404 Permit Program in “Indian country,” as that term is defined at 18 U.S.C. § 1151, including conducting necessary compliance monitoring and enforcement actions for activities and sites located on Indian country.

B. EPA will retain responsibility for any pending enforcement actions undertaken by EPA prior to the date of EPA's approval of the State 404 Permit Program. The State Agencies will have primary responsibility for compliance monitoring and enforcement of the State Program. The State Agencies will take timely and appropriate enforcement action against persons in violation of permit conditions of permits issued pursuant to the State Program and against persons conducting unauthorized discharges of dredged or fill material into waters of the United States over which the State has assumed jurisdiction under the State Program.

C. The State Agencies will coordinate with EPA when a violation is identified that is within the discharge categories in Section III of this Agreement. The relevant State Agency must provide a summary ofthe unauthorized activity and inform EPA of the status of the file as enforcement actions are taken,including any decision to accept an after-the-fact permit application.

D. The State may refer information regarding possible or alleged violations to EPA and may request that EPA consider initiating independent and/or parallel enforcement action. Such circumstances include, but are not limited to:

1. Violations that have or have a reasonable potential to have direct impacts on waters of a tribe or another state.

2. Major or repeat offenses.

3. Violations that have, or will potentially have, major adverse resource impacts or impacts on special federal resources, such as federally listed threatened or endangered species.

E. EPA may initiate independent and/or parallel enforcement actions in accordance with Sections 309 and 404(n) of the CWA.

F. If the State proposes to resolve a compliance or enforcement issue through an administrative or judicial consent agreement for a violation where federal review would not be waived as described in Section III of this Agreement, the State must provide EPA 30 days to review and comment on the draft consent agreement prior to signature. If EPA objects to a provision of the draft consent agreement, the executed consent agreement implementing that provision will not constitute authorization under Section 404 of the CWA. The State must provide a copy of the executed consent agreement and any after-the-fact State 404 permits to EPA.

G. EPA must notify the Director of BWSR prior to initiating federal enforcement action for an unauthorized discharge that is regulated under the State Program. When practicable, preliminary staff discussions will take place between EPA and State Program representatives before initiation of such action.

H. When a violation is identified that may affect the waters of tribes and/or other states, the relevant State Agency must provide a summary of the violation and inform the tribes and/or other states of the status of the file as enforcement actions are taken, including any decision to accept an after-the- fact permit application.

V. FREQUENCY AND CONTENT OF REPORTS

A. Program Review and Oversight

EPA may conduct periodic evaluations of the State 404 Permit Program in accordance with Section 404(i) of the CWA.

B. Reporting

1. For the first five state fiscal years following the approval of Minnesota's State Program, BWSR must submit to EPA and make available for public inspection an annual report evaluating Minnesota's administration of the program, providing a summary of any significant changes in program operations or procedures, and identifying any problems experienced the in administration of the program. The report must include proposals for resolving such problems. The report must include the elements required by 40 C.F.R. § 233.52(b).

2. Within 60 days of receipt of the draft annual report, EPA will review the report and transmit comments, questions, or requests for additional evaluation and/or information to BWSR.

3. Within 30 days of receipt of EPA's comments, BWSR will finalize the annual report, incorporating and/or responding to EPA's comments, and will transmit the final report to EPA. EPA will publish notice of availability of the final annual report upon acceptance.

4. The period for the annual report will be the State fiscal year ending June 30th, and the report must be submitted to EPA by September 30th of each year.

VI. GENERAL PROVISIONS

A. The Parties are entering into this Agreement based solely on the representations and warranties herein and not based on any promises, representations, and/or warranties not foundherein.

B. This MOA does not create any right or benefit, substantive or procedural, enforceable by law or equity, by any persons, their officers or employees, or any other person. This MOA does not apply to any person outside of the State Agencies and EPA.

C. The signatory agencies do not waive any administrative claims, positions, or interpretations they may have with respect to the applicability or enforceability of the CWA, the ESA, the NHPA, Minnesota laws, or implementing regulations.

D. Nothing in this MOA will be interpreted as obligating the signatory agencies for the expenditure of funds in excess of appropriations authorized by law, or otherwise commit the signatory agencies to actions for which they lack statutory authority.

E. The headings in this Agreement are for convenience of reference only and will not limit or otherwise affect the meaning hereof.

F. If any provision of this Agreement is held to be illegal or invalid by a court of competent jurisdiction, such provision will be deemed to be severed and deleted, and neither suchprovision, nor its severance and deletion, will affect the validity of the remaining provisions.

VII. SIGNATURES

APPENDIX B

MEMORANDUM OF AGREEMENT FOR RETAINED WATERS UNDER 404 ASSUMPTION IN THE STATE OF MINNESOTA

I. GENERAL

A. Purpose and Authority

1. Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344, authorizes the Secretary of the Army, acting through the Chief of Engineers, to regulate the discharge of dredged or fill material into waters of the United States. The U.S. Army Corps of Engineers, Saint Paul District (USACE), currently administers the Section 404 program in the State of Minnesota.

2. Section 404(g) of the CWA, 33 U.S.C. § 1344(g), authorizes a state, with approval from the United States Environmental Protection Agency (EPA), to administer its own permit program for the discharge of dredged or fill material into certain waters of the United States (State Program) in lieu of the permitting program implemented by the USACE. The EPA has promulgated regulations at 40 C.F.R. § 233 outlining, among other things, its requirements for approving a state program. Among these, Part 233.14 requires that the Secretary of the Army and the state agencies administering the State 404 Program enter into an agreement that includes:

a) "A description of waters of the United States within the State over which the Secretary retains jurisdiction, as identified by the Secretary." (40 C.F.R. § 233.14(b)(1))

b) "Procedures whereby the Secretary will, upon program approval, transfer to the State pending 404 permit applications for discharges in State regulated waters and other relevant information not already in the possession of the Director." (40 C.F.R. § 233.14(b)(2))

c) "An identification of all general permits issued by the Secretary the terms and conditions of which the State intends to administer and enforce upon receiving approval of its program, and a plan for transferring responsibility for these general permits to the State, including procedures for the prompt transmission from the Secretary to the Director of relevant information not already in the possession of the Director, including support files for permit issuance, compliance reports and records of enforcement actions." (40 C.F.R. § 233.14(b)(3))

3. The State of Minnesota is making application to administer its own State Program in compliance with the above-cited authorities. This Memorandum of Agreement (Agreement) between the USACE, and Minnesota Board of Water and Soil Resources (BWSR) and Minnesota Department of Natural Resources (DNR), fulfills the requirements of 40 C.F.R. § 233.14.

4. BWSR and DNR (State Agencies) are authorized to issue permits for regulated activities, including the discharge of dredged and fill material, into state waters.

B. Effective Date and Revisions

1. This Agreement must be executed by the State Agencies and the USACE and will take effect within 30 days after publication of the notice of EPA's program approval in the Federal Register.

2. Either party may request, in writing, an amendment or modification to the Agreement. Amendments and modifications will be effective upon the signature of both parties and approval by EPA.

3. This Agreement will remain in effect until such time that the State Program authorization is modified by EPA in a manner that would affect this Agreement; until EPA's approval is withdrawn pursuant to 40 C.F.R. § 233.53(b); or, until the State voluntarily transfers program responsibilities to the USACE according to the criteria and procedures established in 40 C.F.R. § 233.53(a).

4. If the responsibilities of the State Agencies described in this agreement are reassigned between the State Agencies or are assigned to an agency of the state that is not a signatory to this agreement, this Agreement will be modified or a new Agreement will be entered into to reflect such assignment.

5. At the request of the State Agencies and/or the USACE, the EPA must moderate any dispute concerning the implementation of this agreement, including disputes resulting from proposed and/or required revisions to this agreement.

II. WATERS TO BE RETAINED

A. The USACE will retain permitting authority for the discharge of dredged or fill material under Section 404 of the CWA for 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, as identified in the Retained Waters List (Attachment A). Further, the USACE will retain permitting authority for wetlands adjacent thereto, landward to the administrative boundary. The administrative boundary is defined as a line established a distance of 300 feet landward from the ordinary high-water mark of the retained water.

B. The USACE will retain permitting authority on all 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, but that are not specifically listed in the Retained Waters List, including wetlands adjacent thereto, landward to the administrative boundary. The administrative boundary is defined as a line established a distance of 300 feet landward from the ordinary high-water mark of the retained water.

C. When a project involves discharges of dredged or fill material both waterward and landward of the 300-foot guideline, the USACE will retain jurisdiction to the landward boundary of the project for the purposes of that project only.

D. The USACE will retain responsibility for permitting the discharge of dredged and fill material in waters of the United States within "Indian country," as that term is defined at 18 U.S.C. § 1151.

E. The USACE does not retain responsibility for permitting the discharge of dredged or fill material within waters deemed navigable solely on the basis of historic use. Therefore, discharges of dredged or fill material in such waters may require a Section 10 permit from the USACE and a State permit from the relevant State Agency.

F. All waters of the United States not retained by the USACE will be regulated by the State Agencies under the State Program.

G. The USACE will provide Retained Waters GIS layers to the State Agencies, and will update the GIS layers as necessary, in accordance with II(H). and III(B), below.

H. Any modifications to the Retained Waters List which affect the area of jurisdiction are subject to EPA approval pursuant to 40 C.F.R. § 233.16(d). Waters, including identification of the head of navigation, will be added or removed from the Retained Waters List and Retained Waters List GIS layers when a water is determined to meet or no longer meet, respectively, the criteria provided in paragraph II(A-E) of this agreement.

III. JOINT COORDINATION PROCEDURES

A. Determination of Jurisdiction

1. When an application or verification request is received by either party, the application will be screened using the Retained Waters List and GIS layers to determine if the proposed activity will occur within USACE retained waters, as identified in Section II, above. When a proposed activity falls within retained waters, the State Agency in receipt of the application or verification request must, within five calendar days of receipt, advise the applicant to contact the USACE to determine whether a federal permit is also required. When a proposed activity falls within State assumed waters, the USACE must, within five calendar days of receipt, refer the applicant to the relevant State Agency.

2. If a State Agency has reason to believe a proposed activity is within the USACE's jurisdiction as defined in Section II(A-F), above, but is not within the Retained Waters List or depicted in the retained waters GIS layers, the State Agency will request the USACE determine whether the project falls within retained waters. The USACE must provide its determination within seven calendar days of receipt of the State Agency's request. In the event the USACE determines the proposed activity falls within its jurisdiction, the State Agency must refer the applicant to the USACE. Within 30 calendar days, the USACE must update its GIS layer and Retained Waters List accordingly.

B. Anchorage and Navigation

1. A State Agency must not issue a permit if notified that the USACE has determined, in accordance with 40 C.F.R. § 233.20(d), that anchorage and navigation of any navigable waters would besubstantially impaired.

C. USACE Civil Works Projects

1 . Section 14 of the RHA (33 U.S.C. § 408) (Section 408) mandates that any use or alteration of a USACE Civil Works project by another party is subject to the approval of the USACE. Within five calendar days of receipt of a permit application or verification request, the State Agencies will inform the USACE of and instruct the applicant to contact the appropriate USACE Section 408 contact person for any activities that may use or alter an existing USACE Civil Works project. Within 14 calendar days of receipt of the notification from a State Agency, the USACE will notify the State Agency if the USACE's approval is required pursuant to Section 408, in which case the State Agency must delay any final State actions until Section 408 review is complete, or, include a special condition in the permit requiring Section 408 approval prior to construction.

2. USACE Civil Works projects involving the discharge of dredged or fill material into waters of the United States must be developed in accordance with the guidelines promulgated under Section 404(b)(1) of the CWA, as amended, unless exempted by Section 404(f) of the CWA. For USACE Civil Works projects in State assumed waters, other than projects specifically authorized by Congress for which the USACE has applied or will apply Section 404(r) of the CWA, the USACE and the State Agencies will develop and follow, as practicable, mutually agreed upon procedures for submission of information necessary for the State Agencies to process an application for a permit under the State Program.

D. State 404 Permits

1. As per 40 C.F.R. § 233.50(j), if a State Agency has received an EPA objection or requirement for a permit condition to a permit application or draft general permit in State assumed waters and the State Agency neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the USACE must process the permit application. The State Agency must provide a

copy of the administrative record to the USACE using an agreed upon method.

IV. EXISTING PERMITS AND PENDING PERMIT APPLICATIONS

A. Individual Permits

1. The time limit for completing work authorized under a Department of the Army (DA) individual permit issued prior to the effective date of assumption for the discharge of dredged or fill material in State-assumed waters will remain the expiration date stated in the permit. If a permittee wishes to complete work that has not been completed upon expiration of the permit, the applicant must apply for a new permit from the relevant State Agency. The USACE will not review requests for time extensions of permits and will refer the applicant to the State Agency to apply for a new permit under the State Program. A State Agency may administratively continue an expiring USACE permit until the effective date of a new permit (40 C.F.R. § 233.38), if any, or a decision is made not to issue a new permit.

2. The USACE retains authority to make minor modifications to DA permits in State assumed waters. Minor modifications must be administrative in nature and will be limited to the following: a) correction of errors or typographical mistakes; b) incorporation of changes requested by the USACE; c) revision of due dates for reporting or performance deadlines; d) transference of a permit upon a change in ownership or control; and e) to make minor technical changes. Other minor modifications may be conducted upon concurrence from the relevant State Agency; however, in no case will a minor modification expand the volume or amount, enlarge the footprint, change the location, or extend the duration of the authorized discharge. The USACE must refer modifications that it determines, in its sole discretion, to fall outside the scope of a minor modification to the relevant State Agency for determination of whether a permit is required under the State Program.

B. General Permits

1. The State will not administer or enforce general permits previously issued by the Secretary.

2. The time limit for completing the work under a DA general permit verified prior to the effective date of assumption for the discharge of dredged or fill material in State assumed waters will remain the expiration date stated in the verification letter, to include 12 months after expiration if work has commenced or is under contract to commence. After the effective date of assumption, any work that remains incomplete by the expiration date must receive a new permit from the applicable State Agency under the State Program. Requests for modifications of verifications under a DA general permit within State assumed waters must be made to applicable State Agency. After the effective date of

assumption, no new verifications under general permits will be issued by the USACE within State assumed waters.

C. Records Transfer

1. Upon notification of program approval from EPA, the USACE will transfer to the relevant State Agency any pending Section 404 program permit application files within State assumed waters. Upon request by a State Agency, the USACE will provide copies of specific permits for purposes of the State Agency issuing a new permit. Transfer methods must be mutually agreed upon by the USACE and the State Agency, but all transfers must be completed within 15 days from the date that the USACE receives a State Agency's request for transfer.

V. ENFORCEMENT

A. After the effective date of State assumption, the USACE will continue to monitor compliance and enforce the terms and conditions of all DA individual and general permits issued or verified in State assumed waters prior to the effective date of assumption.

B. The State will enforce against unauthorized discharges of dredged or fill material in violation of the approved State Program which occur in State assumed waters after the effective date of assumption. Unauthorized discharges include discharges that exceed the volume or amount of discharge authorized under a permit, that occur outside of the areas authorized for discharge under a permit, or that occur outside the period specified in a permit.

C. Except as provided in Section V(D), the State Agencies will enforce against unauthorized discharges of dredged or fill material in violation of the CWA which occurred in State assumed waters prior to the effective date of State assumption.

D. The USACE will remain the lead agency for ongoing enforcement actions against unauthorized discharges of dredged or fill material in violation of the CWA or against noncompliance with the terms and conditions of a DA permit in State assumed waters that have not been resolved prior to the effective date of State assumption, hereafter referred to as Ongoing Enforcement Action. If there is an unusual circumstance concerning an Ongoing Enforcement Action, the state may assume enforcement responsibility for the ongoing enforcement action, subject to approval by the USACE and the applicable State Agency. For those instances where the USACE, on its own or in coordination with EPA or the United States Department of Justice, resolves an Ongoing Enforcement Action, the USACE will consult with the relevant State Agency and will provide the State Agency a copy of any consent decree or settlement agreement. The State Agency will issue any necessary after-the-fact permit for the discharge of dredged or fill material associated with the consent decree or settlement agreement.

VI. COMMUNICATION BETWEEN PARTIES

A. Communication and record sharing between the parties of this Agreement may be accomplished through electronic means.

B. Following the effective date of State assumption, the USACE and the State Agencies will meet once per month during the first six months of State assumption to ensure effective coordination in the implementation of this Agreement.

VII. GENERAL PROVISIONS

A. The Parties are entering into this Agreement based solely on the representations and warranties herein and not based on any promises, representations, and/or warranties not found herein.

B. This Agreement does not create any right or benefit, substantive or procedural, enforceable by law or equity, by any persons, their officers or employees, or any other person. This Agreement does not apply to any person outside of the USACE or the State Agencies.

C. The signatory agencies do not waive any administrative claims, positions, or interpretations they may have with respect to the applicability or enforceability of the CWA, the ESA, the National Historic Preservation Act, or any other applicable federal or State laws or regulations.

D. Nothing in this Agreement will be interpreted as obligating the signatory agencies for the expenditure of funds in excess of appropriations authorized by law, or otherwise commit the signatory agencies to actions for which they lack statutory authority.

E. Nothing in this Agreement will affect any of the USACE' tribal trust responsibilities.

F. The headings in this Agreement are for convenience of reference only and will not limit or otherwise affect the meaning hereof.

G. If any provision of this Agreement is held to be illegal or invalid by a court of competent jurisdiction, such provision must be deemed to be severed and deleted; and neither such provision, nor its severance and deletion, will affect the validity of the remaining provisions.

VIII. SIGNATURES

APPENDIX C

MEMORANDUM OF AGREEMENT BETWEEN THE MINNESOTA BOARD OF WATER AND SOIL RESOURCES, THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES AND THE MINNESOTA DEPARTMENT OF ADMINISTRATION STATE HISTORIC PRESERVATION FOR MEETING HISTORIC PROPERTY REVIEW REQUIREMENTS UNDER THE STATE (404) PROGRAM

I. INTRODUCTION

The Minnesota Board of Water and Soil Resources (BWSR) and the Minnesota Department of Natural Resources (DNR), hereafter collectively referred to as "State Agencies", have been approved by EPA to implement a state program meeting the requirements of Section 404 of the Clean Water Act, to regulate the discharge of dredge and fill material into Waters of the United States (WOTUS). In its administration of this program (State Program), the State must consider and avoid the effects, if any, that a State Program permit may have on areas designated under Federal and State laws or local ordinances to be managed for their historical value, and sites identified or proposed under the National Historic Preservation Act, both collectively hereafter referred to as "historic properties". The State Agencies have entered into this Memorandum of Agreement (MOA) with the Minnesota State Historic Preservation Office (SHPO) to establish the review process to be used to ensure that permits issued under the State Program meet this requirement. The processes described in this MOA adhere to the established timeframes for the processing of Wetland Conservation Act Replacement Plan and Public Waters Work Permit Applications.

II. PARTIES

The following parties may have an interest or consultative role in the historic properties or tribal resources review associated with the discharge of dredged or fill material into an assumed water.

A. Minnesota Board of Water and Soil Resources. The BWSR is the administrator of the State Program and is also the agency responsible for implementation of the Wetland Conservation Act (WCA).
B. Minnesota Department of Natural Resources. The DNR is responsible for implementation of the Public Waters Work Permit Program (PWWPP) and the Permit to Mine (PTM) Program.
C. State Historic Preservation Office. The SHPO, a division of the Department of Administration, leads the state's historic preservation efforts by "articulating a statewide preservation vision and supporting Minnesotans who execute that vision". SHPO staff review state and federal projects for their potential to affect historic resources; provide technical assistance to local, state, and federal agencies; and ensure the state's historic resources are considered as part of project planning and development.
D. Indian tribes. Indian tribes include any Indian Tribe, band, group, or community which are recognized as eligible for special programs and services provided by the United States to Indians. Indian tribes frequently have an interest in State undertakings which may affect cultural resources or historic properties of religious and cultural significance on ancestral, aboriginal, or ceded lands.
E. Local Government. A representative of a local government with jurisdiction over the area in which the effects of an application may occur may participate as a consulting party.

III. DUTIES AND RESPONSIBILITIES

A. State Agencies. The State Agencies are responsible for completing historic properties or tribal resources review for activities involving a discharge of dredged or fill material into an assumed water. The State Agencies will perform the following duties:
   a. Assist Local Government Units (LGUs) with the review of requests for verification that impacts are authorized under a general permit to determine whether coordination with the SHPO must occur.
   b. Notify SHPO of an application for an Individual Permit or request for verification under a General Permit in accordance with the procedures provided in Section IV.
   c. Provide the SHPO sufficient information to assess the potential effects the proposed activity may have on historic properties or tribal resources.
   d. Request from the applicant any additional information required to support the findings, recommendations, or determinations of the SHPO.

B. SHPO. The SHPO will perform the following duties:
   a. Review general permit public notices and provide feedback to the State Agencies regarding the need for coordination for the identified categories of activities.
   b. Notify the State Agencies of additional information required from the applicant to complete the historic properties or tribal resources review.
   c. Determine whether historic properties or tribal resources may exist in a project area and whether the authorization of impacts under a General or Individual permit would adversely affect such properties.
   d. Provide recommendations for alternatives or modifications to the application that could avoid, minimize, or mitigate adverse effects on historic properties or tribal resources.
   e. Inform the applicant if the SHPO determines that the project area includes a historic property listed or eligible for listing on the National Register.
   f. Determine whether a given historic property may be eligible for listing on the National Register.
   g. Develop and provide criteria for the LGU and State Agencies to use in determining whether an application should be forwarded to the SHPO for review. Criteria will include those necessary to complete preliminary screening for potential affects to properties of historic, religious, and cultural significance to Indian Tribes.

IV. PROCEDURES

A. Individual Permit Applications and Requests for Verification under a General Permit

a. Within five days of receipt of an application under this paragraph, the relevant State Agency will conduct an initial review of the application using criteria provided by the SHPO to determine if the project must be forwarded to the SHPO for further review. If the State Agency determines that SHPO review is required, it will provide notification to the SHPO. The notification will include the following information:

i. Application number;
ii. Applicant name;
iii. City and County where project is located;
iv. Location (GPS coordinates, TRS, street address, or parcel ID);
v. Description of the activity and the aquatic resources that would be impacted including design and grading plans;
vi. A site map showing the project boundaries;

b. The SHPO will review the application for potential effects to historic properties or tribal resources. The SHPO will also review the application for potential affects to properties of historic, religious, and cultural significance to Indian Tribes, hereafter referred to as "tribal resources."

i. If the application provides sufficient information required to make an effects determination, the SHPO will provide an effects determination in accordance with Section V and provide initial recommendations for resolution of any adverse effects.

1. When the SHPO determines that adverse impacts to tribal resources may occur, the SHPO will coordinate directly with the Tribal Historic Preservation Office (THPO), or other individual or office designated by the relevant tribe, on behalf of the State Agency.

ii. If the application does not provide sufficient information required to make an effects determination, the SHPO will notify the State Agency that additional information is required from the applicant. The request will clearly identify the information needed to make an effects determination.

iii. Upon receipt of the requested information from the Applicant, the State Agency will provide the requested information to the SHPO and will provide notification of the deadline for the State Agency to make a decision on the application.

c. The SHPO will review the new information, consulting with applicable Indian Tribes as necessary, and, within the timeframe provided in the State Agency's notification, provide an effects determination in accordance with Section V. The determination will include recommendations for resolution of any adverse effects, including those to tribal resources.

d. If an effects determination is not provided within the specified timeframe, a determination of "No Effect" will be considered to have been made.
e. Consultation with the SHPO is not required for projects that do not meet the criteria for consultation.

B. State Agency Decisions
   a. In making the decision on an individual or general permit application, the State Agency will consider all criteria set forth in their respective rules including the effects of the permitted activity on historic properties or tribal resources, any comments of the consulting parties, and any views of other interested parties.
   b. The State Agency will deny authorization for an application that has an unresolved adverse effect on historic properties or tribal resources.

C. Development and Approval of General Permits
   a. Upon request from a State Agency, the SHPO must review and make an effects determination for proposed General Permits.
   b. When the SHPO makes an effects determination of "Conditional" or "Adverse", the SHPO will make recommendations for revising the impacts proposed under the General Permit, or for developing conditions to include in the General Permit, to ensure that adverse effects do not occur.
   c. The SHPO will determine whether coordination with the Indian Tribes should occur. If such coordination is necessary, the SHPO will coordinate directly with the appropriate tribal representative and incorporate the SHPO's findings into its effects determination and any resulting recommendations to the relevant State Agency.

V. EFFECTS DETERMINATIONS AND RESOLUTION OF ADVERSE EFFECTS

A. Effects Determination
   a. **"No Effect"** to historic properties or tribal resources. If the SHPO finds that either there are no historic properties or tribal resources present, or there are historic properties or tribal resources present but the proposed activity will have no effect upon them, the SHPO will make a determination of "No Effect".
   b. **"Effect Not Adverse"** to historic properties or tribal resources. If the SHPO finds that the proposed activity is likely to affect a historic property or tribal resource, but that the effect is not adverse, the SHPO will make a determination of "No Adverse Effect".
   c. **"Conditional No Adverse Effect"** If the SHPO determines that the activity, as proposed, will have an adverse effect to a historic property or tribal resource, but that the effect can be avoided, minimized, or mitigated through specific measures, the SHPO will make a determination of "Conditional No Adverse Effect" and will provide the LGU or State Agency with the conditions that must be met to maintain such determination.
      i. As applicable, the LGU or State Agency, the permittee, and the SHPO may collaborate to develop and evaluate alternatives or modifications to

the application that would avoid, minimize, or mitigate adverse effects on historic properties or tribal resources.

ii. When the SHPO makes a determination of "Conditional No Adverse Effect", the State Agency will require that the specific condition(s) provided by the SHPO be met for the authorization to remain valid. For individual permits, these conditions will be included in the "Conditions" section of the permit. For verifications under General Permits, these conditions will be clearly stated in the LGU or State Agency's response to the applicant's request for verification.

d. **"Adverse Effect"** to historic properties or tribal resources

i. An adverse effect is found when an application may alter, directly or indirectly, and in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association, any of the following:

1. Areas designated under Federal and State laws or local ordinances to be managed for their historical value.
2. Any sites identified or proposed under the National Historic Preservation Act.
3. Properties of historic, religious, and cultural significance to Indian Tribes (Tribal Resources).

ii. Consideration will be given to all qualifying characteristics of a subject property, including those that may have been identified subsequent to the original evaluation of a property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the application that may occur later in time, be farther removed in distance, or be cumulative.

iii. If the SHPO cannot recommend, or cannot agree on, alternatives or modifications to the application or permit conditions that could avoid, minimize, or mitigate adverse effects on historic properties or tribal resources, the consulting party(s) will notify the State Agency the application has an adverse effect on historic properties or tribal resources. The State Agency will deny the permit.

B. Federal Review/Mediation of Disputes

a. The State Agency will request EPA consultation for an application where the consulting parties cannot agree on the effect determination of a proposed activity or where the State Agency does not accept the recommendations of one of the consulting parties for the resolution of adverse effects; and,

b. A State Agency will notify the EPA if it does not accept the effect determination of a proposed activity or recommendations for the resolution of adverse effects to Tribal Resources. The State Agency will provide EPA its reason(s) for disputing the effects determination, and request that the EPA comment upon, object to, or make recommendations concerning the effects determination.

VIII. SIGNATURES

APPENDIX D

PROCEDURES FOR STATE WATER QUALITY STANDARD CERTIFICATION OF PERMITS ISSUED UNDER THE MINNESOTA STATE (404) PROGRAM

To ensure the application of state Water Quality Standards (WQS) to permits issued under the State Program, the Minnesota Pollution Control Agency (MPCA) will conduct WQS review and certification for all General and Individual Permits issued by the Minnesota Board of Water and Soil Resources (BWSR) and the Minnesota Department of Natural Resources (DNR), hereafter referred to as State Agencies, for their respective programs. The process will emulate the procedures for Section 401 certifications of individual federal licenses and permits as prescribed at Minnesota Rules (MR) § 7050.0285.

Review Process for Individual Permits

The following process integrates the public notice requirements for state permitting authorities under assumption (40 C.F.R. Part 233.32) and the state's antidegradation procedures (MR § 7050.0285). Under the approved State Program, MPCA will review and certify state-issued permits involving the discharge of dredged/fill material for compliance with the water quality and antidegradation standards in MR § 7050.

1. State permitting authorities will incorporate the information required from the applicant for an antidegradation assessment into their application forms and guidance. State permitting authorities must inform applicants of the need to provide this information if they do not qualify for a general permit that has been certified by MPCA.

2. The State Agency must, within 15 days of receipt of a complete individual permit application, provide notice, with a copy of the application, to MPCA and any others required to receive notice per CFR 40 Part 233.32. The State Agency will provide a minimum 30-day comment period.

3. The MPCA must conduct a preliminary review of the submitted antidegradation assessment and notify the applicant and the permitting authority, within the 30-day comment period, if they require more information and/or if they intend to waive their authority to certify the permit.

4. If the MPCA does not intend to waive their authority to certify the permit and the applicant has provided the necessary information for the antidegradation review, MPCA will notify the permitting authority of their intent to review the application for certification within the 30-day notice period. The permitting authority shall notify the applicant of the intended permit review schedule within 15 days of the notice expiration date.

5. The MPCA must make a preliminary antidegradation determination to issue or deny certification and distribute a public notice of the preliminary antidegradation determination with a comment period of no less than 10 days.

6. The permitting authority must coordinate with MPCA and make any adjustments to the permit review schedule that are warranted based on comments received, complexity of issues, coordination requirements and any consultation requested

with tribes and other states. The permitting authority must inform the applicant of adjustments to the permit review schedule in a timely manner.

7. The MPCA must make a final antidegradation determination and certification decision within one year of receipt of a complete application unless otherwise extended as mutually agreed to by the applicant. The final antidegradation determination and certification decision will be provided to the permitting authority for final action on the permit. The permitting authority must incorporate any WQS certification conditions as permit conditions if it grants the permit.
8. The permitting authority shall coordinate with the MPCA on the enforcement of any permit conditions associated with WQS certification.

Review Process for General Permits

The following process integrates the public notice requirements for state permitting authorities under assumption (40 C.F.R. §233.32) and the state's antidegradation procedures (MR § 7050.0305).

1. Following the preparation of a draft general permit or permits, the state permitting authority (BWSR and DNR) shall send a public notice to MPCA (and others required to receive notice per 40 C.F.R. § 233.32) with a minimum 30-day comment period.
2. The MPCA shall, within the 30-day comment period, notify the permitting authority if they require more information to complete their review of the draft general permits or if they intend to waive their authority to certify the permit or certain activities within the permit.
3. If the MPCA does not intend to waive their authority to certify the permit(s) and the permitting authority has provided the necessary information for their review, they will notify the permitting authority of their intent to review the application for certification within the 30-day notice period. The MPCA and permitting authority shall establish a coordinated process and schedule for reviewing the application which incorporates preliminary antidegradation determination (and draft certification) public notice requirements and established coordination procedures with tribes and other states as applicable. The permitting authority must also consider any comments provided by the EPA, Corps, FWS, tribes, and NMFS and any requests for a public hearing/meeting in determining a schedule for permit review.
4. During the established permit review schedule, the MPCA and permitting authority shall coordinate their respective reviews including joint meetings with the applicant and field reviews as warranted. The MPCA must make a preliminary antidegradation determination and distribute a public notice of the preliminary antidegradation determination to issue or deny certification with a comment period of no less than 10 days.

5. The permitting authority must coordinate with MPCA and make any adjustments to the permit review schedule that are warranted based on comments received, complexity of issues, and coordination with tribes and other states.
6. The MPCA must make a final antidegradation within one year of receipt of the draft general permit(s). The final determination will be provided to the permitting authority for final action on the general permit(s). The permitting authority must incorporate any WQS certification conditions as permit conditions if it issues the permit(s).

APPENDIX E

STATE PROGRAM (404) PROPOSED THREATENED AND ENDANGERED SPECIES REVIEW PROCEDURES

<u>Background</u>:

Under a state-assumed 404 program, no permit may be issued that does not comply with the 404(b)(1) guidelines.

40 CFR § 233.20(a): "*No permit shall be issued by the Director in the following circumstances:*

(a) When permit does not comply with the requirements of the Act or regulations thereunder,

including the section 404(b)(1) Guidelines (part 230 of this chapter)."

The 404(b)(1) guidelines prohibit authorization of the discharge of fill when the activity is likely to impact federally listed threated or endangered species:

> 40 CFR § 230.10(b)(3): "*No discharge of dredged or fill material shall be permitted if it: Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended.*"

As set forth in the State Program Regulations at 40 CFR § 233, and among other requirements for review, federal (EPA) review of state permit applications must occur when there is a *"…reasonable potential for affecting endangered or threatened species* ***as determined by FWS***. [emphasis added]" From this and its preceding text, it should be emphasized that:

1. The EPA may waive review of Individual Permits except under the circumstances specified in § 233.51(b).
2. EPA review for impacts to T&E Species is required only when there is "… a reasonable potential for affecting [such species]".
3. It is the responsibility of the U.S. Fish and Wildlife service to determine whether such impacts to T&E Species may occur.

Further, **it is the responsibility of the Environmental Protection Agency to coordinate with relevant federal agencies to conduct such reviews, and to provide recommendations to eliminate any objections to permit issuance, when applicable.** Specifically, except for categories of permit applications for which EPA has waived review, upon receiving a copy of the state's public notice and a copy of the complete permit application:

A. The Regional Administrator (EPA) must provide a copy of "…information needed for review of the application to the Corps, FWS, and NMFS, within **10 days of receipt**." (40 CFR § 233.50(b))
B. The listed agencies must notify the Regional Director **within 15 days** if they intend to provide comment. (40 CFR § 233.50(b))

C. The Regional Administrator (EPA) **must notify the state within 30 days** if he intends to "…comment upon, object to, or make recommendations with respect to a permit application." (40 CFR § 233.50(d))
    a. If so notified, the state shall not issue the permit until "… after the receipt of such comments or 90 days of the Regional Administrator's receipt of the public notice…"
D. Such [federal] agencies must provide such comment to the Regional Administrator **within 50** days of their receipt of the public notice and complete permit applications. (40 CFR 233.50(d))
E. **Within 90 days of the receipt of the public notice\complete permit application** The Regional Administrator must provide the Director (state) a written statement of his comments, objections, or recommendations; the reasons for the comments, objections, recommendations; and the actions that must be taken by the Director in order to eliminate any objections. (40 CFR § 233.50(e))
F. If the Director receives an objection or requirement for a permit condition from the Regional Administrator, he or any interested person may request a public hearing **within 90 days of receipt** of such objection or permit condition.
    a. The Regional Administrator *shall* conduct the hearing at the Director's request and *may* conduct the hearing in response to significant public interest. (40 CFR 233.50(g))
    b. The Director (state) has 90 days from receipt of the objection or requirement for a permit condition to issue the permit revised to satisfy EPA's objections or notify EPA of its intent to deny the permit. (40 CFR § 233.50(i))
    c. If the Director (state) neither satisfies the objection or permit condition requirement, nor denies the permit, the Corps will process the permit application. (40 CFR § 233.50(j))

Screening Procedures:

The state seeks to meet federal requirements for avoidance of impacts to T&E Species while concurrently implementing a process that ensures that coordination and reviews are conducted efficiently. The following process will ensure such efficiency during the review and approval or denial of General and Individual Permits.

A. Online Screening Tool. The processes below refer to an online screening tool. For non-Permit to Mine (PTM) Wetland Conservation Act (WCA) permits and Public Waters Work Permit Program (PWWPP) permits the agencies will integrate a simple screening tool into existing and prospective online permitting systems. The permitting system and screening tool will:
    i. Have the ability to plot project locations on a GIS layer containing the potential range of each federally listed T&E Species.
    ii. Generate a checklist of screening questions specific to the species whose range encompasses the project area.

i. The checklist items may be tiered such that the selection of certain responses to preliminary questions determines that certain species cannot occur in the project area, with the selection of subsequent checklist items being narrowed accordingly.

iii. To the greatest extent, the screening tool will use existing resources, including those external to the state's online permitting system(s), such as the U.S. Fish and Wildlife online tool for determining T&E Species range.

B. Screening Procedures

General Permit Verifications:

Activities that are likely to adversely affect federally listed Threatened or Endangered Species cannot be authorized by a General Permit.

1. Applicant completes screening tool during online submittal of application for verification of authorization under a General Permit.
2. The agency completes a brief review for accuracy of screening information provided by the applicant.
    a. If the information is accurate and the project is not likely to adversely affect a listed species, no further review for impacts to T&E species will occur.
    b. If the information appears to be inaccurate and/or the project may adversely affect a listed species, the application is referred to the T&E Specialist (Specialist) for review.
3. If referred to the Specialist for review, and the Specialist determines that the activity is likely to adversely affect T&E Species, the activity cannot be authorized under a General Permit. The applicant must apply for an Individual Permit.

General and Individual Permit Issuance:

1. Applicants complete screening tool during online submittal of application for an Individual Permit. PTM applicants provide sufficient information to conduct screening through the DNR PTM application process in place at the time that the application is made.
2. After ensuring that the application is complete, the application will be forwarded to the Specialist for screening prior to the application/public notice being forwarded to EPA.
    a. If the Specialist determines that T&E Species are not likely to be adversely affected, the Specialist will document such findings in the agency record. Such findings will be provided to EPA when the public notice/complete application is forwarded to them.
    b. If the Specialist determines that T&E Species are likely to be adversely affected, the Specialist will forward the application to the U.S. Fish and

Wildlife Service (USFWS), copying EPA. *This is not required under the 404 Assumption regulations but will expedite and facilitate coordination between EPA and USFWS and reduce wait times for applicants.*

3. If the application is forwarded under 2(b), above, the Specialist will coordinate directly with the EPA, and if applicable, USFWS, to address the potential impacts to T&E Species, ensuring that the state adheres to the processes and timelines in 40 CFR § 233.50.

APPENDIX F

40 CFR PART 233 – STATE ASSUMPTION REGULATIONS "CROSSWALK"

40 CFR Part 233 – State Assumption Regulations "Crosswalk"

The summaries provided below do not represent the full scope of content contained in the text they summarize and are intended only to facilitate expedited identification and review of specific topics in the federal text for the purpose of determining equivalency. The original text, and not the summaries, must be the basis upon which the evaluation of equivalency is ultimately conducted. Some sections were not summarized because they were either too pervasively general and vague, or conversely, because their specificity prevented the exclusion of any of the original text. When summary conclusions can be made as to whether a state provision is more or less stringent than the corresponding federal provision, such is indicated as "more stringent", "equally stringent", or "less stringent" in the "Assessment of Equivalency" column.

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
	Subpart C Permit Requirements					
	233.20 Prohibitions					
	233.20(a)	No permit shall be issued by the Director in the following circumstances: (a) When permit does not comply with the requirements of the Act or regulations thereunder, including the section 404(b)(1) Guidelines (part 230 of this chapter).	Restrictions against permit issuance.	WCA: No provision exists. PWWPP: No provision exists.	WCA: No provision exists. PWWPP: No provision exists.	WCA and PWWPP: 404-assumption specific prohibitions imposed directly on state which has received EPA approval to implement a State 404 Program. Consult with EPA to determine whether it necessary, then for the state to explicitly impose the prohibitions of 230.20 upon itself. If it is necessary to incorporate equivalent text into state provisions, simply amend state statute or regulation to provide that "No permit will be issued under the State Program that does not comply with the prohibitions of 40 CFR § 233.20".
	233.20(b)	(b) When the Regional Administrator has objected to issuance of the permit under § 233.50 and the objection has not been resolved.		WCA: No provision exists. PWWPP: No provision exists.	WCA: No provision exists. PWWPP: No provision exists.	See response to 233.20(a)
	233.20(c)	(c) When the proposed discharges would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the Administrator under section 404(c) of the Act, or when the discharge would fail to comply with a restriction imposed thereunder.		WCA: No provision exists. PWWPP: No provision exists.	WCA: No provision exists. PWWPP: No provision exists.	See response to 233.20(a)
	233.20(d)	(d) If the Secretary determines, after consultation with the Secretary of the Department in which the Coast Guard is operating, that anchorage and navigation		WCA: No provision exists. PWWPP: No provision exists.	WCA: No provision exists. PWWPP: No provision exists.	See response to 233.20(a)

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		of any of the navigable waters would be substantially impaired.				
	233.21 General Permits					
	233.21(a)	(a) Under section 404(h)(5) of the Act, States may, after program approval, administer and enforce general permits previously issued by the Secretary in State regulated waters. Note: If States intend to assume existing general permits, they must be able to ensure compliance with existing permit conditions and any reporting monitoring, or prenotification requirements.	The state may issue GPs and administer GPs previously issued by USACE. Director can require IP for activity otherwise covered by GP. Permits must contain: - Conditions in 233.23 - Specific description of activity and limitations - Geographic description - Reporting requirements	WCA: No provision exists. PWWPP: MN Rule 6115.0250	WCA: No provision exists. PWWPP: Authorizes the commissioner to issue general permits for classes of activities having minimal impact on public waters under which more than one activity may be conducted with a single permit.	WCA: Less stringent. Provisions must be included in the rule authorizing the issuance of GPs. The stipulations in 233.21(a-b, d, e) must be included, and the GP content prescribed in 233.21(c) must be included, incorporated by reference, or included in an SOP. PWWPP: Less stringent. DNR is authorized in state rule to issue general permits (6115.0250 Subp. 4). However, the stipulations in 233.21(a-b, d, e) must be included, and the GP content prescribed in 233.21(c) must be included, incorporated by reference, or included in an SOP.
	233.21(b)	(b) The Director may issue a general permit for categories of similar activities if he determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. Any general permit issued shall be in compliance with the section 404(b)(1) Guidelines.		See response to 233.21(a)	See response to 233.21(a)	WCA: See response to 233.21(a) PWWPP: See response to 233.21(a)
	233.21(c)	(c) In addition to the conditions specified in § 233.23, each general permit shall contain: (1) A specific description of the type(s) of activities which are authorized, including limitations for any single operation. The description shall be detailed enough to ensure that the requirements of paragraph (b) of this section are met. (This paragraph supercedes § 233.23(c)(1) for general permits.)		See response to 233.21(a)	See response to 233.21(a)	WCA: See response to 233.21(a) PWWPP: See response to 233.21(a)

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		(2) A precise description of the geographic area to which the general permit applies, including limitations on the type(s) of water where operations may be conducted sufficient to ensure that the requirements of paragraph (b) of this section are met.				
	233.21(d)	(d) Predischarge notification or other reporting requirements may be required by the Director on a permit-by-permit basis as appropriate to ensure that the general permit will comply with the requirement (section 404(e) of the Act) that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.		See response to 233.21(a)	See response to 233.21(a)	WCA: See response to 233.21(a) PWWPP: See response to 233.21(a)
	233.21(e)	(e) The Director may, without revoking the general permit, require any person authorized under a general permit to apply for an individual permit. This discretionary authority will be based on concerns for the aquatic environment including compliance with paragraph (b) of this section and the 404(b)(1) Guidelines (40 CFR part 230.) (1) This provision in no way affects the legality of activities undertaken pursuant to the general permit prior to notification by the Director of such requirement. (2) Once the Director notifies the discharger of his decision to exercise discretionary authority to require an individual permit, the discharger's activity is no longer authorized by the general permit.		See response to 233.21(a)	See response to 233.21(a)	WCA: See response to 233.21(a) PWWPP: See response to 233.21(a)
	233.22 Emergency Permits					
	233.22(a)	Notwithstanding any other provision of this part, the Director may issue a temporary emergency permit for a discharge of dredged or fill material if unacceptable harm to life or severe loss of physical property is likely to occur before a permit could be issued or modified under procedures normally required.	Director may issue emergency permits in accordance with (1-2).	WCA: No provision exists. PWWPP: MN Rule 6115.0350	WCA: No provision exists. PWWPP: Provision pertains only to emergency dam alteration, repair or removal.	WCA: Emergency permit issuance is discretionary, not compelled, under State Program. If the state does wish to issue such permits, state rule must include provisions ensuring consistency with this section of federal text.

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						PWWPP: Currently possesses the authority to issue Emergency Permits for dam, reservoir, control structure, or waterway obstruction alteration, repair, or removal; however, state provisions are not equivalent to or consistent with federal provision. For these specific activities, must revise MN Statute 103G.245 Subd. 11 and/or MR § 6115.0350 to include requirements in § 233.22(b-f) or incorporate by reference.
	233.22(b)	(b) Emergency permits shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of § 233.23.		See response to 233.22(a)	See response to 233.22(a)	WCA: See response to 233.22(a) PWWPP: See response to 233.22(a)
	233.22(b)(1)	(1) Any emergency permit shall be limited to the duration of time (typically no more than 90 days) required to complete the authorized emergency action.		See response to 233.22(a)	See response to 233.22(a)	WCA: See response to 233.22(a) PWWPP: See response to 233.22(a)
	233.22(b)(2)	(2) The emergency permit shall have a condition requiring appropriate restoration of the site.		See response to 233.22(a)	See response to 233.22(a)	WCA: See response to 233.22(a) PWWPP: See response to 233.22(a)
	233.22(c)	(c) The emergency permit may be terminated at any time without process (§ 233.36) if the Director determines that termination is necessary to protect human health or the environment.		See response to 233.22(a)	See response to 233.22(a)	WCA: See response to 233.22(a) PWWPP: See response to 233.22(a)
	233.22(d)	(d) The Director shall consult in an expeditious manner, such as by telephone, with the Regional Administrator, the Corps, FWS, and NMFS about issuance of an emergency permit.		See response to 233.22(a)	See response to 233.22(a)	WCA: See response to 233.22(a) PWWPP: See response to 233.22(a)
	233.22(e)	(e) The emergency permit may be oral or written. If oral, it must be followed within 5 days by a written emergency permit. A copy of the written permit shall be sent to the Regional Administrator.		See response to 233.22(a)	See response to 233.22(a)	WCA: See response to 233.22(a) PWWPP: See response to 233.22(a)

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	233.22(f)	(f) Notice of the emergency permit shall be published and public comments solicited in accordance with § 233.32 as soon as possible but no later than 10 days after the issuance date.		See response to 233.22(a)	See response to 233.22(a)	WCA: See response to 233.22(a) PWWPP: See response to 233.22(a)
	233.23 Permit Conditions					
	233.23(a)	For each permit the Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines, applicable section 303 water quality standards, and applicable section 307 effluent standards and prohibitions.	Conditions required for all permits.	WCA: No provision exists. PWWPP: MN rule 6115.	WCA: No provision exists. PWWPP: In granting a permit, the commissioner may include specific conditions; however, no specific conditions are prescribed in rule for inclusion.	WCA: No provision exists which establishes permit conditions requiring compliance with the Guidelines (or equivalent provisions), or Sections 303 and 307. Amend applicable regulation or incorporate by reference. PWWPP: While MN rule 6115 does authorize the issuance of GPs, no provision exists which establishes permit conditions requiring compliance with the Guidelines, 303, or 307. Amend MR § 6115 to apply requirements in § 233.23.
	233.23(b)	Section 404 permits shall be effective for a fixed term not to exceed 5 years.		WCA: MN Rule 8420.0255 Subp.. 4; MN Statute 103G.2242 Subd. 2a. PWWPP: Minn. Stat. 103G.315, Subd. 13	WCA: Rule provides a period of validity for decisions of 3 years or as otherwise specified based on advice from TEP, with statute providing a limit of 5 years for wetland boundary and type, which can be shortened upon TEP advice but not lengthened. The latter will be incorporated into rule at a future date PWWPP: The time period to complete an authorized activity is limited to a period of 5 years following issuance of the permit.	WCA: Equally stringent. While the validity period of permit decisions may be extended, the cumulative time limit may not exceed 5 years. PWWPP: Equally stringent. Although 103G.315 does not specifically frame in terms of a permit being effective for a term not to exceed 5 years, it requires that the authorized activity be completed within five years of permit issuance, having the same effect.
	233.23(c)(1)	Each 404 permit shall include conditions meeting or implementing the following requirements:		WCA: 8420.0255 Subp. 5, 8420.0330 Subp. 3 (Replacement Plan Application	WCA: WCA rule provides considerable flexibility with what is included in the Notice of Decision: “A summary of the local government unit’s decision must be sent in a form prescribed by the Board.”	WCA: Less stringent. WCA rule does not require inclusion of address, description of authorized activity, location and purpose of discharge, or type

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		A specific identification and complete description of the authorized activity including name and address of permittee, location and purpose of discharge, type and quantity of material to be discharged. (This subsection is not applicable to general permits).		Contents) and Subp. 4 (Approval Conditions). PWWPP: MN Statute 103G.315 Subd. 6.	However, there are few required elements and none that are consistent with this requirement. PWWPP: In granting a permit, the commissioner may include specific conditions; however, no specific conditions are prescribed in rule for inclusion.	and quantity of material in Notice of Decision (AKA – "Permit"). Further, while WCA considers the application to be part of the permit, as referenced by NOD, the application is often modified through the review process, so even if these details were initially included in application, they may not remain accurate. Revise rule to require these details in Notices of Decision. PWWPP: Less stringent. The commissioner has the authority to condition a public water permit but there is not a list of standard requirements that must be included with each permit. Incorporate permit condition requirements into state regulation by reference.
	233.23(c)(2)	Only the activities specifically described in the permit are authorized.		WCA: No provision exists. PWWPP: MN rule 6115 Subd. 6.	WCA: No provision exists. PWWPP: In granting a permit, the commissioner may include specific conditions; however, no specific conditions are prescribed in rule for inclusion.	WCA: Less stringent. Incorporate permit condition requirements into state regulation or permit template. PWWPP: Less stringent. Incorporate permit condition requirements into state regulation or permit template.
	233.23(c)(3)	The permittee shall comply with all conditions of the permit even if that requires halting or reducing the permitted activity to maintain compliance. Any permit violation constitutes a violation of the Act as well as of State statute and/or regulation.		See response to 233.23(c)(2)	See response to 233.23(c)(2)	WCA: Less stringent. Incorporate permit condition requirements into state regulation or permit template. PWWPP: Less stringent. Incorporate permit condition requirements into state regulation or permit template.

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	233.23(c)(4)	The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit.		See response to 233.23(c)(2)	See response to 233.23(c)(2)	WCA: Less stringent. Incorporate permit condition requirements into state regulation or permit template. PWWPP: Less stringent. Incorporate permit condition requirements into state regulation by reference.
	233.23(c)(5)	The permittee shall inform the Director of any expected or known actual noncompliance.		See response to 233.23(c)(2)	See response to 233.23(c)(2)	WCA: Less stringent. Incorporate permit condition requirements into state regulation or permit template. PWWPP: Less stringent. Incorporate permit condition requirements into state regulation or permit template.
	233.23(c)(6)	The permittee shall provide such information to the Director, as the Director requests, to determine compliance status, or whether cause exists for permit modification, revocation or termination.		See response to 233.23(c)(2)	See response to 233.23(c)(2)	WCA: Less stringent. Incorporate permit condition requirements into state regulation or permit template. PWWPP: Less stringent. Incorporate permit condition requirements into state regulation or permit template.
	233.23(c)(7)	Monitoring, reporting and recordkeeping requirements as needed to safeguard the aquatic environment. (Such requirements will be determined on a case-by-case basis, but at a minimum shall include monitoring and reporting of any expected leachates, reporting of noncompliance, planned changes or transfer of the permit.)		See response to 233.23(c)(2)	See response to 233.23(c)(2)	WCA: Less stringent. Incorporate permit condition requirements into state regulation or permit template. PWWPP: Less stringent. Incorporate permit condition requirements into state regulation or permit template.
	233.23(c)(8)	Inspection and entry. The permittee shall allow the Director, or his authorized representative, upon presentation of proper identification, at reasonable times to: (i) Enter upon the permittee's premises where a regulated activity is located or		WCA: PWWPP: MN Statute 103G.251 Subd. 1 (Investigating Activities Affecting Waters of the State)	WCA: No provision exists. PWWPP: See response to 233.23(c)(2). DNR may investigate and monitor activities being conducted with or without a permit that may affect waters of the state. However, this is not required to be stated as a condition in permits.	WCA: Less stringent. Incorporate permit condition requirements into state regulation or permit template. PWWPP: Less stringent. Incorporate permit condition requirements into state regulation or permit template.

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		where records must be kept under the conditions of the permit, (ii) Have access to and copy any records that must be kept under the conditions of the permit, (iii) Inspect operations regulated or required under the permit, and (iv) Sample or monitor, for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.				
	233.23(c)(9)	Conditions assuring that the discharge will be conducted in a manner which minimizes adverse impacts upon the physical, chemical and biological integrity of the waters of the United States, such as requirements for restoration or mitigation.		See response to 233.23(c)(2)	See response to 233.23(c)(2)	WCA: Less stringent. Incorporate permit condition requirements into state regulation or permit template. PWWPP: Less stringent. Incorporate permit condition requirements into state regulation or permit template.
	Subpart D Program Operation					
	233.30 Application for a permit					
	233.30(a)	Except when an activity is authorized by a general permit issued pursuant to § 233.21 or is exempt from the requirements to obtain a permit under § 232.3, any person who proposes to discharge dredged or fill material into State regulated waters shall complete, sign and submit a permit application to the Director. Persons proposing to discharge dredged or fill material under the authorization of a general permit must comply with any reporting requirements of the general permit.	Unless exempt or covered by GP, person proposing discharge must apply to Director for permit. To be complete, application must include ((b)(1-5)) and any additional information requested by Director, with level of detail being commensurate with impact.	WCA: 8420.0330 Subp. 3(B)(11) PWWPP: MN Statute 103G.301 (General Permit; Application Procedures); MN Rule 6115.0240 Subp. 2 (Who May Apply). MN Rules 6115.0150 through 6115.0280 provide additional requirements and	WCA: Within the application for a replacement plan, the applicant is required to sign statements confirming certain requirements related to replacement (mitigation) timing and history and future use of replacement area. PWWPP: 103G.301 outlines permit application and fee requirements; 6115.0240 Subp. 2 describes who may apply	WCA: Equally stringent. PWWPP: Equally stringent. Statute and rules promulgated for the PWWPP specify information required for a complete application. The commissioner also has the authority to develop an application form that specifies other information that must be provided.

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				standards for review for each type of activity authorized under the PWWPP.		
	233.30(b)	A complete application shall include: (1) Name, address, telephone number of the applicant and name(s) and address(es) of adjoining property owners. (2) A complete description of the proposed activity including necessary drawings, sketches or plans sufficient for public notice (the applicant is not generally expected to submit detailed engineering plans and specifications); the location, purpose and intended use of the proposed activity; scheduling of the activity; the location and dimensions of adjacent structures; and a list of authorizations required by other Federal, interstate, State or local agencies for the work, including all approvals received or denials already made. (3) The application must include a description of the type, composition, source and quantity of the material to be discharged, the method of discharge, and the site and plans for disposal of the dredged or fill material. (4) A certification that all information contained in the application is true and accurate and acknowledging awareness of penalties for submitting false information. (5) All activities which the applicant plans to undertake which are reasonably related to the same project should be included in the same permit application.		WCA: 8420.0305; 8420.0330 PWWPP: MN Statute 103G.301; MN Rule 6115.0240 Subp. 3	WCA: Application forms are approved by the board. Applications are divided into 5 types in the WCA rule, with an additional section specifying general application content requirements. The general content requirements (8420.0305) and replacement plan requirements (8420.0330), collectively, provide the content requirements for a permit application under an assumed program. In addition to general information concerning the proposed activity, the rule requires extensive additional information and demonstration that PWWPP: Both statute and rule describe what is required to be included in a permit application. Items 1 and 5 are not specifically required in statute or rule and may not be required through the MNDR permitting and reporting system (MPARS) but the commissioner has the authority to require additional as needed to conduct the review of the project.	WCA: Less stringent. Revise application form. Applicants are not required to provide the address of adjacent property owners, specific information about the material that would be discharged, and a description of all of the activities to be undertaken that are reasonably related to the proposed discharge. PWWPP: Less stringent. Revise MPARS application form. At DNR has the authority to require all prescribed elements but does not require items 1-5 of this (federal) paragraph.
	233.30(c)	In addition to the information indicated in § 233.30(b), the applicant will be required to furnish such additional information as the Director deems appropriate to assist in the evaluation of the application. Such		WCA: MN Rule 8420.0305 B(9)	WCA: WCA rule includes an open-ended item under the General Application Requirements section that gives the LGU the opportunity to request additional	WCA: Equally stringent. The LGU may request other information they consider to be necessary for evaluation of the application.

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		additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.		PWWPP: MN Statute 103G.301 Subd. 1 (b); MN Rule 6115.0240 Subp. 3 (C)(5)	information from an applicant if it is considered necessary for the review. PWWPP: Commissioner may require a statement of the effect the actions proposed in the permit application will have on the environment.	PWWPP: Equally stringent.
	233.30(d)	The level of detail shall be reasonably commensurate with the type and size of discharge, proximity to critical areas, likelihood of long-lived toxic chemical substances, and potential level of environmental degradation. Note: EPA encourages States to provide permit applicants guidance regarding the level of detail of information and documentation required under this subsection. This guidance can be provided either through the application form or on an individual basis. EPA also encourages the State to maintain a program to inform potential applicants for permits of the requirements of the State program and of the steps required to obtain permits for activities in State regulated waters.		WCA: No provision exists. PWWPP: No provision exists.	WCA: No provision exists. PWWPP: No provision exists.	WCA: Equally stringent. PWWPP: Equally stringent.
	233.31 Coordination Requirements					
	233.31(a)	If a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any State(s) other than the State in which the discharge occurs, the Director shall provide an opportunity for such State(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted by the Director, he shall notify the affected State and the Regional Administrator prior to permit issuance in writing of his failure to accept these recommendations, together with his reasons for so doing. The Regional	Coordination will occur for interstate impacts and Federal-State planning and review processes.	WCA: No provision exists. PWWPP: No provision exists.	WCA: No provision exists. PWWPP: No provision exists.	WCA and PWWPP: Less stringent. Statute or rule must be revised to explicitly require or incorporate by reference the requirement for the State to provide an opportunity for comment to other state's whose waters may be affected by a proposed discharge, and to adhere to the additional coordination requirements of this paragraph.

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		Administrator shall then have the time provided for in § 233.50(d) to comment upon, object to, or make recommendations.				Inquire with EPA; may be inherently satisfied through the public notice and comment process, if/when brought into alignment with federal requirements.
	233.31(b)	State section 404 permits shall be coordinated with Federal and Federal-State water related planning and review processes.		WCA: No provision exists. PWWPP: No provision exists.	WCA: No provision exists. PWWPP: No provision exists.	WCA and PWWPP: Less stringent. Also, Statute/rule must be revised to require that permits be coordinated with Federal and Federal-State water related planning and review processes. Verify with EPA; may be inherently satisfied through the public notice and comment process, if/when brought into alignment with federal requirements.
	233.32 Public Notice					
	233.32(a)	(a) Applicability. (1) The Director shall give public notice of the following actions: (i) Receipt of a permit application. (ii) Preparation of a draft general permit. (iii) Consideration of a major modification to an issued permit. (iv) Scheduling of a public hearing. (v) Issuance of an emergency permit. (2) Public notices may describe more than one permit or action.	Public notice will be provided through mail and one additional delivery method when (i-v) occur, will provide a reasonable amount of time for comment, and will contain ((d)(1-7)), with notices of public hearing also containing ((e)(1-3)).	WCA: MN Rules 8420.0255 MN Statutes 103G.2242 PWWPP: MN Rules 6115.0250 Subp. 2. MN Statute 103G.301 Subd. 6 (Filing Application)	WCA: WCA rules require a notice of application be sent by the LGU within 15 business days of a receipt of a complete application. The notice is required to be sent to the TEP, applicant, and any members of the public who request to receive notices (plus BWSR wetland bank coordinator for all wetland bank plans). Replacement plan modifications are required to be re-noticed if changes in replacement plan exceed thresholds specified in 8420.0255 Subp. 3A. All WCA decisions by LGUs must noticed to the same entities as the notice of application within 10 days of the decision. All decisions require noticing, emergency or otherwise. No notice of application required for receipt of application unless the application is deemed complete. Public hearings on WCA decisions are at the discretion of the LGU and follow local	WCA: Less stringent. The process in WCA rule does not have the same level of accessibility to the public. PWWPP: Less stringent. The DNR is required to coordinate their review with other units of government having jurisdiction in such matters, but this falls short of the public notice process described under 233.32(a).

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					notice requirements for hearing/meeting. PWWPP: No direct public notice process; There is a request for agency comments (e.g. watersheds, conservation districts, municipalities) process during permit review and permit decision.	
	233.32(b)	(b) Timing. (1) The public notice shall provide a reasonable period of time, normally at least 30 days, within which interested parties may express their views concerning the permit application. (2) Public notice of a public hearing shall be given at least 30 days before the hearing. (3) The Regional Administrator may approve a program with shorter public notice timing if the Regional Administrator determines that sufficient public notice is provided for.		WCA: MN Rules 8420.0255 MN Statutes 103G.2242 PWWPP: MN Statute 103G.301 Subd. 7 (Recommendation of Local Units of Government); 103G.311 (Permit Hearing); Chapter 14 (Administrative Procedures for Hearings)	WCA: WCA rules specify a minimum comment period of 15 business days from date notice is sent. Public hearings on WCA decisions are at the discretion of the LGU and follow local notice requirements for hearing/meeting. PWWPP: Statutes are not a permit fit, but there are public notice and hearing time periods given	WCA: Less stringent. The process in WCA rule allows for shorter review and comment periods. PWWPP: Less stringent. The DNR notice is a notification to other units of government and does not have broad public distribution. The DNR process does afford opportunities for a hearing, but the hearing notice is required for two weeks prior to the hearing which is short of the 30-day requirement in 233.32(b).
	233.32(c)	(c) The Director shall give public notice by each of the following methods: (1) By mailing a copy of the notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his rights to receive notice for any classes or categories of permits): (i) The applicant. (ii) Any agency with jurisdiction over the activity or the disposal site, whether or not the agency issues a permit. (iii) Owners of property adjoining the property where the regulated activity will occur.		WCA: MN Rules 8420.0255 MN Statutes 103G.2242 PWWPP: MN Statute 103G.311 (Permit Hearing)	WCA: WCA rules require a notice of application be sent by the LGU within 15 business days of a receipt of a complete application. The notice is required to be sent to the TEP, applicant, and any members of the public who request to receive notices (plus BWSR wetland bank coordinator for all wetland bank plans). All WCA decisions by LGUs must noticed to the same entities as the notice of application within 10 days of the decision. All decisions require noticing, emergency or otherwise. No notice of application required for receipt of application unless the application is deemed complete. No provision for notice to adjoining property owners, other states, or other agencies with jurisdiction over the	WCA: Less stringent. The distribution list in WCA is less than what is required. PWWPP: Less stringent. The noticing procedures under the PWWPP are focused on coordination after decisions are made on applications. In these situations, the notification typically does include items 233.32(c)(1)(iii) and (v) or distribution as required by233.32(c)(2).

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		(iv) All persons who have specifically requested copies of public notices. (The Director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Director may delete from the list the name of any person who fails to respond to such a request.) (v) Any State whose waters may be affected by the proposed discharge. (2) In addition, by providing notice in at least one other way (such as advertisement in a newspaper of sufficient circulation) reasonably calculated to cover the area affected by the activity.			activity except for DNR who receives all notices as a member of the TEP. Notices can be sent electronically (email) instead of or in addition to mailing. No provision for another form of notice (newspaper, etc.). PWWPP: There is a section for permit hearing, but the hearing is typically waived	
	233.32(d)	(d) All public notices shall contain at least the following information: (1) The name and address of the applicant and, if different, the address or location of the activity(ies) regulated by the permit. (2) The name, address, and telephone number of a person to contact for further information. (3) A brief description of the comment procedures and procedures to request a public hearing, including deadlines. (4) A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills, and a description of the type, composition and quantity of materials to be discharged. (5) A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the		WCA: MN Rules 8420.0255 MN Statutes 103G.2242 PWWPP: No provision exists	WCA: WCA notice of application content requirements are as follows: The notice must identify the type of application, the date the comment period ends, and where to submit comments. Individual members of the public who request a copy must be sent a summary of the application that includes information to identify the applicant and the location and scope of the project. Notice of Decision content is as follows: A summary of the local government unit's decision, in a format prescribed by the board. The notice of decision must include information on the process and time period to appeal the decision of the local government unit. For replacement plans involving use of bank credits the LGU must notify BWSR's bank coordinator and include the bank account, the user of credits, and the amount of credit approved for withdrawal. PWWPP: No provision exists.	WCA: Less stringent. Members of the public are provided only a summary of the application and the contact information of the applicant. PWWPP: Less stringent.

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		proposed structures to the size of the impacted waterway and depth of water in the area. (6) A paragraph describing the various evaluation factors, including the 404(b)(1) Guidelines or State-equivalent criteria, on which decisions are based. (7) Any other information which would significantly assist interested parties in evaluating the likely impact of the proposed activity.				
	233.32(e)	(e) Notice of public hearing shall also contain the following information: (1) Time, date, and place of hearing. (2) Reference to the date of any previous public notices relating to the permit. (3) Brief description of the nature and purpose of the hearing.		WCA: No provision exists. PWWPP: MN Statute 103G.311 (Permit Hearing)	WCA: No provision exists. PWWPP: Statute outlines hearing process	WCA: Less stringent. Agency requirement to hold public hearings in accordance with this paragraph must be established in statute/rule. PWWPP: Less stringent. The PWWPP does not have an equivalent public notice requirement, so item (2) is not applicable.
	233.33 Public Hearing					
	233.33(a)	Any interested person may request a public hearing during the public comment period as specified in § 233.32. Requests shall be in writing and shall state the nature of the issues proposed to be raised at the hearing.		WCA: No provision exists PWWPP: No provision exists.	WCA: No provision exists PWWPP: No provision exists	WCA and PWWPP: Less stringent. Agency requirement to hold public hearings in accordance with this paragraph must be established in statute/rule.
	233.33(b)	The Director shall hold a public hearing whenever he determines there is a significant degree of public interest in a permit application or a draft general permit. He may also hold a hearing, at his discretion, whenever he determines a hearing may be useful to a decision on the permit application.		WCA: No provision exists PWWPP: MN Statute 103G.311 (Permit Hearing)	WCA: No provision exists PWWPP: Statute outlines hearing process	WCA: Agency requirement to hold public hearings in accordance with this paragraph must be established in statute/rule. PWWPP: Less stringent. Hearings under the PWWPP are described as contested case hearings and are held after a permit decision is made.
	233.33(c)	At a hearing, any person may submit oral or written statements or data concerning the permit application or draft general permit.		WCA: No provision exists	WCA: No provision exists	WCA: Less stringent. Agency requirement to hold public hearings in accordance with this

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		The public comment period shall automatically be extended to the close of any public hearing under this section. The presiding officer may also extend the comment period at the hearing.		PWWPP: MN Statute 103G.311 (Permit Hearing); Chapter 14 (Administrative Procedures for Hearings)	PWWPP: Statute outlines hearing process	paragraph must be established in statute/rule. PWWPP: Less stringent. See response to 233.3(b).
	233.33(d)	All public hearings shall be reported verbatim. Copies of the record of proceedings may be purchased by any person from the Director or the reporter of such hearing. A copy of the transcript (or if none is prepared, a tape of the proceedings) shall be made available for public inspection at an appropriate State office.		WCA: No provision exists PWWPP: MN Statute 103G.311 (Permit Hearing); Chapter 14 (maybe)	WCA: No provision exists PWWPP: Statute outlines the hearing process	WCA: Less stringent. Agency requirement to hold public hearings in accordance with this paragraph must be established in statute/rule. PWWPP: Equally stringent.
	233.34 Making a decision on a permit application					
	233.34(a)	The Director will review all applications for compliance with the 404(b)(1) Guidelines and/or equivalent State environmental criteria as well as any other applicable State laws or regulations.	Applications must be reviewed for compliance with 404(b)(1) guidelines and applicable state law. All comments must be considered. Decision must be in writing and include rationale, and record must be open to the public.	WCA: No provision exists PWWPP: No provision exists	WCA: No provision exists PWWPP: No provision exists	WCA and PWWPP: Less stringent. Revise statute/rule to require that applications be reviewed for compliance with 404(b)(1) guidelines and applicable state law.
	233.34(b)	The Director shall consider all comments received in response to the public notice, and public hearing if a hearing is held. All comments, as well as the record of any public hearing, shall be made part of the official record on the application.		WCA: MN Rules 8420.0255 MN Statutes 103G.2242 PWWPP: MN Statute 103G.311 (Permit Hearing);	WCA: WCA rules require that the local government unit's decision must be based on the standards and procedures required by this chapter and on the technical evaluation panel's findings and recommendation, when provided. The local government unit must consider and include in its record of decision the technical evaluation panel's recommendation, when provided, to approve, modify, or deny the application. The local government unit must also consider any comments received from those required to receive notice. PWWPP: Statute outline hearing process	WCA: Equally stringent. PWWPP: Less stringent. See the responses for 233.32(a) and 233.33(a).
	233.34(c)	After the Director has completed his review of the application and consideration of comments, the Director will determine, in accordance with the record and all		WCA: MN Rules 8420.0255 MN Statutes 103G.2242	WCA: WCA rules require the LGU to have a written record of decision. Content of that record is not specified.	WCA: Less stringent. The decision-making process is roughly equivalent but there is

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		applicable regulations, whether or not the permit should be issued. No permit shall be issued by the Director under the circumstances described in § 233.20. The Director shall prepare a written determination on each application outlining his decision and rationale for his decision. The determination shall be dated, signed and included in the official record prior to final action on the application. The official record shall be open to the public.		PWWPP: MN Statute 103G.315 Subd. 2 (Denying and Issuing Permits); MN Rule 6115.0250 (Permit Review)	PWWPP: Statute describes the findings of fact and under what circumstances a permit is granted (plans of the applicant are reasonable, practical, and will adequately protect public safety and promote public welfare); Rule describes permit review and decision-making process.	no provision equivalent to the restrictions in 230.20. PWWPP: Less stringent. The decision-making process is roughly equivalent but there is no provision equivalent to the restrictions in 230.20.
	233.35 Issuance and effective date of permit					
	233.35(a)	If the Regional Administrator comments on a permit application or draft general permit under § 233.50, the Director shall follow the procedures specified in that section in issuing the permit.	Permit not effective until signed by Director AND applicant.	WCA: No provision exists PWWPP: No provision exists.	WCA: No provision exists. PWWPP: No provision exists.	WCA and PWWPP Less stringent. Revise state statute/rule to make permits effective upon being signed by Director AND applicant.
	233.35(b)	If the Regional Administrator does not comment on a permit application or draft general permit, the Director shall make a final permit decision after the close of the public comment period and shall notify the applicant. (1) If the decision is to issue a permit, the permit becomes effective when it is signed by the Director and the applicant. (2) If the decision is to deny the permit, the Director will notify the applicant in writing of the reason(s) for denial.		WCA: No provision exists PWWPP: No provision exists.	WCA: No provision exists PWWPP: No provision exists.	
	233.36 Modification, suspension or revocation of permits					
	233.36(a)	General. The Director may reevaluate the circumstances and conditions of a permit either on his own motion or at the request of the permittee or of a third party and initiate action to modify, suspend, or revoke a permit if he determines that sufficient cause exists. Among the factors to be considered are: (1) Permittee's noncompliance with any of the terms or conditions of the permit;	Director may modify, suspend or revoke permits on the basis of 1-6, provided is in compliance with 233.20. Director must develop procedures for such.	WCA: No provision exists PWWPP: MN Statute 103G.315 (Denying and Issuing Permits); MN Rule 6115.0250 (Permit Review)	WCA: No provision exists PWWPP: Under 103G.315, limitations can be placed on a permit and modifications of project design can be required to protect the public interest. Restoring the effects of unlawful activities is described.	WCA: Less stringent. PWWPP: Less stringent. The commissioner has authority to pursue unauthorized activities, but this is not the same as having the authority to pursue compliance with terms and conditions of permits. **233.36 ALL subparagraphs**: Amend state regulations to

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		(2) Permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at the time; (3) Information that activities authorized by a general permit are having more than minimal individual or cumulative adverse effect on the environment, or that the permitted activities are more appropriately regulated by individual permits; (4) Circumstances relating to the authorized activity have changed since the permit was issued and justify changed permit conditions or temporary or permanent cessation of any discharge controlled by the permit; (5) Any significant information relating to the activity authorized by the permit if such information was not available at the time the permit was issued and would have justified the imposition of different permit conditions or denial at the time of issuance; (6) Revisions to applicable statutory or regulatory authority, including toxic effluent standards or prohibitions or water quality standards.				establish a procedure for modification, suspension or revocation of permits consistent with § 233.36.
	233.36(b)	Limitations. Permit modifications shall be in compliance with § 233.20.		WCA: No provision exists PWWPP: No provision exists.	WCA: No provision exists PWWPP: No provision exists.	WCA: Less stringent. PWWPP: Less stringent
	233.36(c)	Procedures. (1) The Director shall develop procedures to modify, suspend or revoke permits if he determines cause exists for such action (§ 233.36(a)). Such procedures shall provide opportunity for public comment (§ 233.32), coordination with the Federal review agencies (§ 233.50), and opportunity for		WCA: MN Rules 8420.0255 MN Statutes 103G.2242 PWWPP: MN Statute 103G.311 (Permit Hearing); 103G.315 (Denying and Issuing	WCA: WCA replacement plan modifications are required to be re-noticed (Notice of Application with comment period) if changes in replacement plan exceed thresholds specified in 8420.0255 Subp. 3A. Otherwise, modifications of decisions can be handled administratively through issuance of revised notices of decision by	WCA: Less stringent. While there is a process for modifying approved replacement plans, it falls short of the requirements referenced in 233.36(c). PWWPP: Less stringent. There is little information in statute or rule regarding compliance and

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		public hearing (§ 233.33) following notification of the permittee. When permit modification is proposed, only the conditions subject to modification need be reopened. (2) Minor modification of permits. The Director may, upon the consent of the permittee, use abbreviated procedures to modify a permit to make the following corrections or allowance for changes in the permitted activity: (i) Correct typographical errors; (ii) Require more frequent monitoring or reporting by permittee; (iii) Allow for a change in ownership or operational control of a project or activity where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director; (iv) Provide for minor modification of project plans that do not significantly change the character, scope, and/or purpose of the project or result in significant change in environmental impact; (v) Extend the term of a permit, so long as the modification does not extend the term of the permit beyond 5 years from its original effective date and does not result in any increase in the amount of dredged or fill material allowed to be discharged.		Permits); 103G.301 Subd. 2 (General Permit Application Procedures – Permit Application and Notification Fees; MN Rule 6115.0060 (Permit Fees Applications) and 6115.0065	LGU. No rule/statutory limit on permit extensions. PWWPP: 103G.311 outlines hearing process; 103G.315 outlines modification, denial, and granting of permits, restoring effects of unlawful activities, and limitations on permits; 103G.301 Subd. 2 outlines permit application fees for each request for a new permit application and for each request to amend or transfer an existing permit; 6115.0060 and 6115.0065 outline fees for new applications, amendments, and transfers.	modification procedures outside of a formal hearing.
	233.37	**Signatures on permit applications and reports**. The application and any required reports must be signed by the person who desires to undertake the proposed activity or by	No summary	WCA: MN Rules 8420.0330 MN Statutes 103G.2242	WCA: WCA rules require signed statements from the applicant for all replacement plans. In addition, the board is given authority to develop and require the use of a specific application	WCA: Equally stringent. PWWPP: Equally stringent.

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		that person's duly authorized agent if accompanied by a statement by that person designating the agent. In either case, the signature of the applicant or the agent will be understood to be an affirmation that he possesses or represents the person who possesses the requisite property interest to undertake the activity proposed in the application.		PWWPP: MN Statute 103G.245 Subd. 3 (Work in Public Waters – Permit Application); MN Rule 6115.0240 (Application for Public Waters Work Permits)	form, which currently requires a signature. PWWPP: 103G.245 – Application must be on prescribed forms; 6115.0240 – Applications shall be made on forms prepared by DNR	
	233.38	**Continuation of expiring permits.** A Corps 404 permit does not continue in force beyond its expiration date under Federal law if, at that time, a State is the permitting authority. States authorized to administer the 404 Program may continue Corps or State-issued permits until the effective date of the new permits, if State law allows. Otherwise, the discharge is being conducted without a permit from the time of expiration of the old permit to the effective date of a new State-issued permit, if any.	No summary	WCA: No provision exists PWWP: No provision exists.	WCA: No provision exists PWWPP: No provision exists.	N/A
	233.39	**Electronic Reporting** States that choose to receive electronic documents must satisfy the requirements of 40 CFR Part 3 - (Electronic reporting) in their state program.	No summary	WCA: No provision exists PWWPP: No provision exists.	WCA: No provision exists PWWPP: No provision exists.	WCA and PWWPP: Less stringent. Incorporate by reference the requirements of 40 CFR Part 3 and consult with MNIT to ensure necessary IT infrastructure and software is in place.
	Subpart E Compliance Evaluation and Enforcement					
	233.40 Requirements for compliance evaluation programs					
	233.40(a)	In order to abate violations of the permit program, the State shall maintain a program designed to identify persons subject to regulation who have failed to obtain a permit or to comply with permit conditions.	No summary. I included (b) under the Authorization and\or Conditions section of the recent draft GP.	MN Rules 8420.0900 MN Statutes 103G.2372 PWWPP: MN Statute 103G.251 (Investigation of Activities Without Permit)	WCA rules establish an enforcement mechanism for compliance. Conservation officers as well as other peace officers are empowered to enforce WCA provisions and have the authority enter premises for investigative purposes via standard policing powers including search warrants. PWWPP: Statute outlines investigation of activities being conducted without a	WCA: Less stringent. WCA has a process for identifying and resolving activities conducted without the required approval. However, WCA does not have a mechanism for addressing non-compliance unless it involves a wetland impact that required prior approval. PWWPP: Less stringent. The PWWPP has equivalent

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					permit that may affect waters of the state	authorities for unauthorized activities. However, the PWWPP does not have equivalent procedures for permit non-compliance. Both: Include in state regulation a "program" to systematically identify persons (not simply a mechanism to address compliance once coincidentally identified) who failed to obtain a permit or violated an existing permit. For instance, for violation of existing authorizations, random spot checks of a predetermined percentage of authorized activities from prior years.
	233.40(b)	The Director and State officers engaged in compliance evaluation, upon presentation of proper identification, shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program.		WCA: PWWPP: MN Statute 103G.251 (Investigation of Activities Without Permit)	WCA: PWWPP: Statute outlines investigation of activities being conducted without a permit that may affect waters of the state	WCA: Equally stringent. PWWPP: Equally stringent.
	233.40(c)	The State program shall provide for inspections to be conducted, samples to be taken and other information to be gathered in a manner that will produce evidence admissible in an enforcement proceeding.		WCA: MN Rules 8420.0900 PWWPP: MN Statute 103G.251 (Investigation of Activities Without Permit)	WCA: The enforcement authority for wetland impacts without prior approval is the DNR, conservation officers, and other peace officers. Through their law enforcement authorities, they are permitted to inspect alleged WCA violations and collect information. This generally equivalent to the authorities the DNR has under the PWWPP. PWWPP: Statute outlines investigation of activities being conducted without a permit that may affect waters of the state.	WCA: Equally stringent. PWWPP: Equally stringent.
	233.40(d)	The State shall maintain a program for receiving and ensuring proper		WCA:	WCA: No provision exists. PWWPP:	WCA: Less stringent. Establish in state regulation a program for receiving and ensuring proper

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		consideration of information submitted by the public about violations.		PWWPP: No provision exists.		consideration of whistleblower complaints submitted by the public. PWWPP: Equally stringent. The DNR has hotlines and regional contacts for the public to provide notification of alleged violations.
	233.41 Requirements for enforcement authority					
	233.41(a)(1) and (2)	(a) Any State agency administering a program shall have authority: (1) To restrain immediately and effectively any person from engaging in any unauthorized activity; (2) To sue to enjoin any threatened or continuing violation of any program requirement;	State agency must have authority to restrain, sue to enjoin, and assess or sue to recover civil penalties and seek criminal remedies, including fines. EPA may approve a state program where there is a lack of authority to impose such penalties provided the enforcement program is demonstrably effective.	WCA: MN Rules 8420.0900 Subparts 1, 2 and 7, MN Statutes 103G.2372; 103G.135; PWWPP: MN Rule 6115.0255 Public Waters Enforcement Procedures, 103G.141 Subd. 2(c); 103G.135	WCA: Enforcement is generally carried out by DNR "conservation officers". WCA rules provide for a "cease and desist" order to be issued if enforcement authority has probable cause that violation has or is occurring (Subp. 2). Violation of enforcement orders are a misdemeanor that require prosecution by the County attorney (Subp. 7). The DNR commissioner, as head of the enforcing agency, can sue in District Court to, by injunction, force compliance with, or restrain the violation of the order (103G.135). PWWPP: 6115.0255 outlines enforcement options, including criminal proceedings, orders of the Commissioner, cease and desist orders, restoration orders, and replacement orders. Further, in addition to the authority to sue under 103G.135, separate authority applies to a state-assumed 404 program, under which the Commissioner may specifically sue in District Court for temporary or permanent injunction. The court may restrain the violation and require compliance.	WCA: Equally stringent. BWSR technically does not possess direct authority to restrain or to sue; however, DNR enforcing on BWSR behalf may be considered sufficient. PWWPP: Equally stringent.
	233.41(a)(3)(i)	(3) To assess or sue to recover civil penalties and to seek criminal remedies, as follows: (i) The agency shall have the authority to assess or recover civil penalties for discharges of dredged or fill material		WCA: MN Statutes 103B.101 Subd. 12, MN Statute 116.072 Subd. 9;	WCA: The BWSR has the authority to issue administrative penalty orders of up to $10,000 **per violation**.	WCA: Less stringent. Although the amount exceeds the $5,000 requirement, it is levied per violation, not per violation per **day**. Consider statutory revisions to apply 103.141, specific to a

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		without a required permit or in violation of any section 404 permit condition in an amount of at least $5,000 per day of such violation.		PWWPP: MN Statute 103G.141 Subd. 2(c)	PWWPP: Specific to permits issued by the state and an assumed 404 program, the DNR commissioner may levy civil penalty of up to $25,000 per day for each violation.	state-assumed program, to apply to permits issued under rules adopted by the Director, as opposed to just the Commissioner (current). Further, revise 103G.141 to include violations where no permit was previously issued. Current text applies this section only to "…violation of a condition or limitation set forth in a permit issued…" Federal text specifies application to "without a required permit". PWWPP: Less stringent. DNR commissioner may fine up to $25,000 per violation per day for permits issued under a state-assumed program and may sue to force or restrain. Revise 103G.141 to establish a minimum of $5,000 per violation per day. May need to further revise 103G.141 to include violations where no permit was previously issued, as federal text specifies "without a required permit". Current text applies this section only to "…violation of a condition or limitation set forth in a permit issued…"
	233.41(a)(3)(ii)	(ii) The agency shall have the authority to seek criminal fines against any person who willfully or with criminal negligence discharges dredged or fill material without a required permit or violates any permit condition issued under section 404 in the amount of at least $10,000 per day of such violation.		WCA: No provision exists	WCA: Although prosecution is required when a person violates an enforcement order, neither statute nor rule specifically authorize assessment or recovery of ***criminal*** *fines* in a specified dollar amount. However, criminal misdemeanor prosecution of violations of orders is compelled.	WCA: Less stringent on the technicality that the fines that may be levied under 103B.101 Subd. 12 are administrative, not criminal, and because the fines are imposed per violation, not per violation per day. To address the latter, consider statutory

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				PWWPP: No provision exists.	PWWPP: No provision exists.	revisions to apply 103.141, specific to a state-assumed program, imposing an administrative fine of up to $10,000 per violation per day. Propose that such a capacity to fine, coupled with compulsory prosecution of enforcement orders, exceeds federal requirements. PWWPP: Under the PWWPP there is no authority for criminal fines.
	233.41(a)(3)(iii)	(iii) The agency shall have the authority to seek criminal fines against any person who knowingly makes false statements, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act, these regulations or the approved State program, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under the permit, in an amount of at least $5,000 for each instance of violation.		WCA: MN Rules 8420.0900 MN Statutes 103G.2372 PWWPP: No provision exists.	Violation of enforcement orders are a misdemeanor that must be prosecuted by the County attorney. DNR can also sue to enforce an order. PWWPP: No provision exists.	WCA: Less stringent PWWPP: Less stringent.
	233.41(b)(1)	(b)(1) The approved maximum civil penalty or criminal fine shall be assessable for each violation and, if the violation is continuous, shall be assessable in that maximum amount for each day of violation.		WCA MN Statutes 103B.101 PWWPP: MN Statutes 103G.141	WCA: BWSR has the authority to issue administrative penalty orders of up to $10,000 per violation. PWWPP: A person who violates a condition or limitation in a permit issued by the commissioner under section 103G.127, and a person who violates an order issued by the commissioner under paragraph (a), is subject to a civil penalty not to exceed $25,000 per day for each violation	WCA: Less stringent. The penalty is civil only, and is levied per violation, not per day. PWWPP: Equally stringent.
	233.41(b)(2)	(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no		MN Statutes 103B.101	WCA: PWWPP: The commissioner may investigate and monitor activities being	WCA: Equally stringent. PWWPP: Equally stringent.

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		greater than the burden of proof or degree of knowledge or intent EPA must bear when it brings an action under the Act.		PWWPP: MN Statute 103G.251	conducted with or without a permit that may affect waters of the state and may make findings and issue orders related to activities being conducted without a permit that affect waters of the state.	
	233.41(c)	(c) The civil penalty assessed, sought, or agreed upon by the Director under paragraph (a)(3) of this section shall be appropriate to the violation. Note: To the extent that State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA may, when authorized by section 309 of the Act, commence separate action for penalties.		WCA: MN Statutes 103B.101 Subd, 12 PWWPP: 103G.141 Subd. 2(C)	WCA: BWSR has the authority to issue administrative penalty orders of **up to** $10,000 per violation. PWWPP: In determining the amount of civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit, if any, resulting from the violation, any history of violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and other matters justice may require.	WCA: Equally stringent. Subject to the need to address daily, as opposed to per-violation, penalties, the phrase "up to" infers board discretion in the amount of civil penalty to be imposed. PWWPP: Equally stringent.
	233.41(d)	(d)(1) The Regional Administrator may approve a State program where the State lacks authority to recover penalties of the levels required under paragraphs (a)(3)(i)-(iii) of this section only if the Regional Administrator determines, after evaluating a record of at least one year for an alternative enforcement program, that the State has an alternate, demonstrably effective method of ensuring compliance which has both punitive and deterrence effects. (2) States whose programs were approved via waiver of monetary penalties shall keep the Regional Administrator informed of all enforcement actions taken under any alternative method approved pursuant to paragraph (d)(1) of this section. The manner of reporting will be established in the Memorandum of Agreement with the Regional Administrator (§233.13).		N/A	N/A	N/A

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
	233.41(e)	(e) Any State administering a program shall provide for public participation in the State enforcement process by providing either: (1) Authority which allows intervention of right in any civil or administrative action to obtain remedies specified in paragraph (a)(3) of this section by any citizen having an interest which is or may be adversely affected, or (2) Assurance that the State agency or enforcement authority will: (i) Investigate and provide written responses to all citizen complaints submitted pursuant to State procedures; (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.	No summary	WCA: No provision exists PWWPP: No provision exists	WCA: No provision exists PWWPP: No provision exists.	WCA: Less stringent. PWWPP: Less stringent.
	233.41(f)	(f) *Provision for Tribal criminal enforcement authority.* To the extent that an Indian Tribe does not assert or is precluded from asserting criminal enforcement authority (§233.41(a)(3) (ii) and (iii)), the Federal government will continue to exercise primary criminal enforcement responsibility. The Tribe, with the EPA Region and Corps District(s) with jurisdiction, shall develop a system where the Tribal agency will refer such a violation to the Regional Administrator or the District Engineer(s), as agreed to by the parties, in an appropriate and timely manner. This agreement shall be incorporated into joint or separate Memorandum of Agreement with the EPA Region and the Corps District(s), as appropriate.	N/A	Not applicable	Not applicable	WCA: Not Applicable PWWPP: Not applicable.

APPENDIX G

40 CFR PART 230 – 404(B)(1) GUIDELINES REGULATORY "CROSSWALK"

40 CFR Part 230 – 404(b)(1) Guidelines

The summaries provided below do not represent the full scope of content contained in the text they summarize and are intended only to facilitate expedited identification and review of specific topics in the federal text for the purpose of determining equivalency. The original text, and not the summaries, must be the basis upon which the evaluation of equivalency is ultimately conducted. Some sections were not summarized because they were either too pervasively general and vague, or conversely, because their specificity prevented the exclusion of any of the original text. When summary conclusions can be made as to whether a state provision is more or less stringent than the corresponding federal provision, such is indicated as “more stringent”, “equally stringent”, or “less stringent” in the “Assessment of Equivalency” column.

Responsible Agency	**Provision Citation (40 CFR §…)**	**Provision Text**	**Summary of Provision**	**Related State Law Citation**	**Summary\Explanation of Applicable State Law Text**	**Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)**
	Subpart A	**General**				
	230.1	Purpose and Policy	Not Applicable			
N/A	230.2 *Applicability*	(a) These Guidelines have been developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army acting through the Chief of Engineers under section 404(b)(1) of the Clean Water Act (33 U.S.C. 1344). The Guidelines are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States. Sites may be specified through: (1) The regulatory program of the U.S. Army Corps of Engineers under sections 404(a) and (e) of the Act (see 33 CFR Parts 320, 323 and 325); (2) The civil works program of the U.S. Army Corps of Engineers (see 33 CFR 209.145 and section 150 of Pub. L. 94-587, Water Resources Development Act of 1976); (3) Permit programs of States approved by the Administrator of the Environmental Protection Agency in accordance with section 404(g) and (h) of the Act (see 40 CFR parts 122, 123 and 124); (4) Statewide dredged or fill material regulatory programs with best management practices approved under section 208(b)(4)(B) and (C) of the Act (see 40 CFR 35.1560); (5) Federal construction projects which meet criteria specified in section 404(r) of the Act.	Guidelines apply to permit programs of states approved under 404(g-h).	N/A	N/A	

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		(b) These Guidelines will be applied in the review of proposed discharges of dredged or fill material into navigable waters which lie inside the baseline from which the territorial sea is measured, and the discharge of fill material into the territorial sea, pursuant to the procedures referred to in paragraphs (a)(1) and (2) of this section. The discharge of dredged material into the territorial sea is governed by the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. 92-532, and regulations and criteria issued pursuant thereto (40 CFR parts 220 through 228). (c) Guidance on interpreting and implementing these Guidelines may be prepared jointly by EPA and the Corps at the national or regional level from time to time. No modifications to the basic application, meaning, or intent of these Guidelines will be made without rulemaking by the Administrator under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*).				
Do not address	230.3 *Definitions*	For purposes of this part, the following terms shall have the meanings indicated: (a) The term *Act* means the Clean Water Act (also known as the Federal Water Pollution Control Act or FWPCA) Pub. L. 92-500, as amended by Pub. L. 95-217, 33 U.S.C. 1251, *et seq.* (b) The term *adjacent* means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands." (c) The terms *aquatic environment* and *aquatic ecosystem* mean waters of the United States, including wetlands, that serve as habitat for interrelated and interacting	No comment		DNR: We may want to define "protected waters" from 6115.0030 and "Public waters" in 103G.005 as they guide why and how we divide regulation and may help with understanding of the remainder of the crosswalk.	

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		communities and populations of plants and animals. (d) The term *carrier of contaminant* means dredged or fill material that contains contaminants. (e) The term *contaminant* means a chemical or biological substance in a form that can be incorporated into, onto or be ingested by and that harms aquatic organisms, consumers of aquatic organisms, or users of the aquatic environment, and includes but is not limited to the substances on the 307(a)(1) list of toxic pollutants promulgated on January 31, 1978 (43 FR 4109). (f)-(g) [Reserved] (h) The term *discharge point* means the point within the disposal site at which the dredged or fill material is released. (i) The term *disposal site* means that portion of the "waters of the United States" where specific disposal activities are permitted and consist of a bottom surface area and any overlying volume of water. In the case of wetlands on which surface water is not present, the disposal site consists of the wetland surface area. (j) [Reserved] (k) The term *extraction site* means the place from which the dredged or fill material proposed for discharge is to be removed. (l) [Reserved] (m) The term *mixing zone* means a limited volume of water serving as a zone of initial dilution in the immediate vicinity of a discharge point where receiving water quality may not meet quality standards or other				

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		requirements otherwise applicable to the receiving water. The mixing zone should be considered as a place where wastes and water mix and not as a place where effluents are treated. (n) The term *permitting authority* means the District Engineer of the U.S. Army Corps of Engineers or such other individual as may be designated by the Secretary of the Army to issue or deny permits under section 404 of the Act; or the State Director of a permit program approved by EPA under section 404(g) and section 404(h) or his delegated representative. (o) The term *pollutant* means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials not covered by the Atomic Energy Act, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. The legislative history of the Act reflects that "radioactive materials" as included within the definition of "pollutant" in section 502 of the Act means only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated under the Atomic Energy Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant", are radium and accelerator produced isotopes. See *Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1 (1976). (p) The term *pollution* means the man-made or man-induced alteration of the chemical, physical, biological or radiological integrity of an aquatic ecosystem.				

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		(q) The term *practicable* means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. (q-1) *Special aquatic sites* means those sites identified in subpart E. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region. (See §230.10(a)(3)) (r) The term *territorial sea* means the belt of the sea measured from the baseline as determined in accordance with the Convention on the Territorial Sea and the Contiguous Zone and extending seaward a distance of three miles. (s) The term *waters of the United States* means: (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (2) All interstate waters including interstate wetlands; (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:			

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or (iii) Which are used or could be used for industrial purposes by industries in interstate commerce; (4) All impoundments of waters otherwise defined as waters of the United States under this definition; (5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section; (6) The territorial sea; (7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA. (t) The term *wetlands* means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of				

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.				
	230.4	Organization	Not Applicable			
BWSR, DNR (While some content of section address functions carried out by PCA, those functions as they relate to this section underly the broader permitting process ("General procedures…"). Thus, it would be the role of the permitting authority (agency issuing permit) to address equivalency in this section.	230.5 *General Procedures to be followed*	*General procedure to be followed.* In evaluating whether a particular discharge site may be specified, the permitting authority should use these Guidelines in the following sequence: (a) In order to obtain an overview of the principal regulatory provisions of the Guidelines, review the restrictions on discharge in §230.10(a) through (d), the measures to minimize adverse impact of subpart H, and the required factual determinations of §230.11. (b) Determine if a General permit (§230.7) is applicable; if so, the applicant needs merely to comply with its terms, and no further action by the permitting authority is necessary. Special conditions for evaluation of proposed General permits are contained in §230.7. If the discharge is not covered by a General permit: (c) Examine practicable alternatives to the proposed discharge, that is, not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences (§230.10(a)). (d) Delineate the candidate disposal site consistent with the criteria and evaluations of §230.11(f). (e) Evaluate the various physical and chemical components which characterize the non-living environment of the candidate site, the	Sequence of review. Prescribes general guidelines to be used in sequence: • Obtain overview by reviewing guidelines • Determine whether General Permit is applicable. If not: • Consider alternatives • Delineate site • Evaluate nonliving site characteristics • Evaluate special and critical characteristics w\regard to living communities and human use • Review factual determinations (230.11) to determine whether information will ensure adequate documentation and evaluation • Evaluate discharge material w\regard to contamination\incompatibility ○ If probability of, then conduct tests • Identify changes to project to minimize impact • Make and document Factual Determinations (FD) (230.11 • Make and document Findings of Compliance by comparing FD to Restrictions on Discharge (RD)	BWSR: MN Rule 8420.0255 (General Application Procedures) MN Rule 8420.0305, 0310, 0315, 0320, 0325, 0330 (Application Requirements). MN Statutes 103G.2242 DNR: MN Statutes 103G.245 and MN Rule 6115.0190; 6115.0420 Subp. 3 apply to designated public waters.	BWSR: WCA rules prescribe specific procedures and requirements for Local Government Units (LGUs) to accept, review, notice and make decisions on projects that impact wetlands. Those procedures include consideration of alternatives and delineation of wetlands. Decisions on impacts to wetlands must be based on specified standards for different application types (replacement plan, exemption, wetland boundary/type, banking plan, no-loss) and application procedures. Procedural requirements include consideration of public and agency comments. WCA rules require Local Government Units to maintain a record of their decision and to specifically consider and address their decisions in relation to any recommendation from the Technical Evaluation Panel. DNR: MN Rule prohibits placement of fill material in public waters, for multiple specified purposes. When fill is not prohibited, the project is evaluated through the public waters work permit application. Rules specify that a permit may be issued only if the project will involve a minimum encroachment, change, or damage to the environment, particularly the ecology of the waterway. Further, the DNR must consider whether or not there is a feasible and practical alternative to the project that would have less environmental impact; and the public need for the project rules out the no-build alternative. Public-waters-work permits must include provisions to compensate for the detrimental aspects of the change.	This section prescribes order that "these" guidelines "should" be used in. We do not use these guidelines. Also, "should" does not indicate requirement. WCA and PWWPP: Sequencing provisions ensure execution of a general procedure for evaluating whether a discharge can be authorized. The process is not inconsistent with 230.5 and ensures an equivalent procedural outcome. With regard to WCA, the state currently does not make permit decisions. To ensure equivalency, provisions must be added to require that the state follow the same WCA standards and processes when BWSR staff, as opposed to LGUs, make a decision. PCA: Not relevant. Overarching process occurs under WCA and PWWPP.

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		substrate and the water including its dynamic characteristics (subpart C). (f) Identify and evaluate any special or critical characteristics of the candidate disposal site, and surrounding areas which might be affected by use of such site, related to their living communities or human uses (subparts D, E, and F). (g) Review Factual Determinations in §230.11 to determine whether the information in the project file is sufficient to provide the documentation required by §230.11 or to perform the pre-testing evaluation described in §230.60, or other information is necessary. (h) Evaluate the material to be discharged to determine the possibility of chemical contamination or physical incompatibility of the material to be discharged (§230.60). (i) If there is a reasonable probability of chemical contamination, conduct the appropriate tests according to the section on Evaluation and Testing (§230.61). (j) Identify appropriate and practicable changes to the project plan to minimize the environmental impact of the discharge, based upon the specialized methods of minimization of impacts in subpart H. (k) Make and document Factual Determinations in §230.11. (l) Make and document Findings of Compliance (§230.12) by comparing Factual Determinations with the requirements for discharge of §230.10. This outline of the steps to follow in using the Guidelines is simplified for purposes of illustration. The actual process followed may be iterative, with the results of one step			Decisions are documented with a findings of fact and permits are issued through the DNR's MPARS online permit system.	

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		leading to a reexamination of previous steps. The permitting authority must address all of the relevant provisions of the Guidelines in reaching a Finding of Compliance in an individual case.				
BWSR, DNR See comment re: PCA in preceding section.	230.6 *Adaptability*	*Adaptability* (a) The manner in which these Guidelines are used depends on the physical, biological, and chemical nature of the proposed extraction site, the material to be discharged, and the candidate disposal site, including any other important components of the ecosystem being evaluated. Documentation to demonstrate knowledge about the extraction site, materials to be extracted, and the candidate disposal site is an essential component of guideline application. These Guidelines allow evaluation and documentation for a variety of activities, ranging from those with large, complex impacts on the aquatic environment to those for which the impact is likely to be innocuous. It is unlikely that the Guidelines will apply in their entirety to any one activity, no matter how complex. It is anticipated that substantial numbers of permit applications will be for minor, routine activities that have little, if any, potential for significant degradation of the aquatic environment. It generally is not intended or expected that extensive testing, evaluation or analysis will be needed to make findings of compliance in such routine cases. Where the conditions for General permits are met, and where numerous applications for similar activities are likely, the use of General permits will eliminate repetitive evaluation and documentation for individual discharges. (b) The Guidelines user, including the agency or agencies responsible for implementing the Guidelines, must recognize the different levels of effort that should be associated with varying degrees of impact and require or prepare commensurate documentation. The	• Provides that the full scope of guidelines not intended to apply to every scenario. Adapt as needed. Level of documentation should reflect significance of impact. "Presumption against discharge" applies to all depths of evaluation and decision making. • Use GPs to greatest extent possible. For GPs, analysis and decision making occur at time of issuance.			N/A

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		level of documentation should reflect the significance and complexity of the discharge activity. (c) An essential part of the evaluation process involves making determinations as to the relevance of any portion(s) of the Guidelines and conducting further evaluation only as needed. However, where portions of the Guidelines review procedure are "short form" evaluations, there still must be sufficient information (including consideration of both individual and cumulative impacts) to support the decision of whether to specify the site for disposal of dredged or fill material and to support the decision to curtail or abbreviate the evaluation process. The presumption against the discharge in §230.1 applies to this decision-making. (d) In the case of activities covered by General permits or section 208(b)(4)(B) and (C) Best Management Practices, the analysis and documentation required by the Guidelines will be performed at the time of General permit issuance or section 208(b)(4)(B) and (C) Best Management Practices promulgation and will not be repeated when activities are conducted under a General permit or section 208(b)(4)(B) and (C) Best Management Practices control. These Guidelines do not require reporting or formal written communication at the time individual activities are initiated under a General permit or section 208(b)(4)(B) and (C) Best Management Practices. However, a particular General permit may require appropriate reporting.				
BWSR	230.7 *General Permits*	(a) *Conditions for the issuance of General permits.* A General permit for a category of activities involving the discharge of dredged or fill material complies with the Guidelines if it meets the applicable restrictions on the	Provides conditions and requirements for issuance of GPs: • Meets RD (230.10)	BWSR: None DNR: MN Rule 6115.0250 Subp. 4	BWSR: General permits do not exist. DNR: DNR does not have general permits for discharge or fill. We do have a no-permit required category for sand blankets and for rip	WCA: Less stringent. Provisions must be included in the rule authorizing the issuance of GPs. The

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		discharge in §230.10 and if the permitting authority determines that: (1) The activities in such category are similar in nature and similar in their impact upon water quality and the aquatic environment; (2) The activities in such category will have only minimal adverse effects when performed separately; and (3) The activities in such category will have only minimal cumulative adverse effects on water quality and the aquatic environment. (b) *Evaluation process.* To reach the determinations required in paragraph (a) of this section, the permitting authority shall set forth in writing an evaluation of the potential individual and cumulative impacts of the category of activities to be regulated under the General permit. While some of the information necessary for this evaluation can be obtained from potential permittees and others through the proposal of General permits for public review, the evaluation must be completed before any General permit is issued, and the results must be published with the final permit. (1) This evaluation shall be based upon consideration of the prohibitions listed in §230.10(b) and the factors listed in §230.10(c), and shall include documented information supporting each factual determination in §230.11 of the Guidelines (consideration of alternatives in §230.10(a) are not directly applicable to General permits); (2) The evaluation shall include a precise description of the activities to be permitted under the General permit, explaining why they are sufficiently similar in nature and in environmental impact to warrant regulation	• Activities are similar in nature and impact, minimal impact separately and cumulatively. • Must be supported by written evaluation based on consideration of RD, precise description of discharge, and include no. of anticipated discharges, etc. Perhaps address through rule revisions stating GPs will be developed in accordance with 230.7, or just ensure requirements are met during permit development w\explanation of how being included in Program Description.		rap along shorelines (that may meet wetland criteria) that may be relevant here.	requirement to meet the conditions of 230.7 should be included in the authorizing text through incorporation by reference. PWWPP: DNR is authorized in state rule to issue general permits (6115.0250 Subp. 4). Provision must be included to state that, when GPs are issued, they will meet the conditions and requirements of Part 230. PCA: Not relevant. Permits issued by BWSR and DNR.

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		under a single General permit based on subparts C through F of the Guidelines. Allowable differences between activities which will be regulated under the same General permit shall be specified. Activities otherwise similar in nature may differ in environmental impact due to their location in or near ecologically sensitive areas, areas with unique chemical or physical characteristics, areas containing concentrations of toxic substances, or areas regulated for specific human uses or by specific land or water management plans (e.g., areas regulated under an approved Coastal Zone Management Plan). If there are specific geographic areas within the purview of a proposed General permit (called a draft General permit under a State 404 program), which are more appropriately regulated by individual permit due to the considerations cited in this paragraph, they shall be clearly delineated in the evaluation and excluded from the permit. In addition, the permitting authority may require an individual permit for any proposed activity under a General permit where the nature or location of the activity makes an individual permit more appropriate. (3) To predict cumulative effects, the evaluation shall include the number of individual discharge activities likely to be regulated under a General permit until its expiration, including repetitions of individual discharge activities at a single location.				
	Subpart B	**Compliance with the guidelines**				
	230.10	**Restrictions on Discharge**				
Entirety of (a). BWSR, DNR Concerning WQS and PCA: The permitting agencies address overarching	230.10(a)	(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences.	No discharge where practicable alternative with less adverse impact and no other significant adverse impact exists. Defines practicable. Unless nature of activity necessitates location in or near “special aquatic site”, alternatives are presumed to exist and have less impact unless demonstrated otherwise.	BWSR: Rule 8420.0520 Statute 103G.222 DNR: MN Statutes 103G.245 and MN Rule 6115.0190 and 6115.0250	BWSR: Minnesota rules require applicants to first avoid and minimize impacts to wetlands before replacement (compensatory mitigation) can be considered. These “sequencing” provisions of the rule require applicants to describe at least two alternatives that avoid wetland impacts or for projects that repair or rehabilitate existing infrastructure, only one	WCA: Equally stringent. Plan must not be approved unless it is demonstrated that alternatives that avoid and\or minimize impacts have been considered and, if

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
considerations such as 230.10(a), with responsibility on them to ensure no issuance if practicable alternative exists. Those authorities work with PCA in background, through whatever process is established, to ensure satisfaction of WQS component. PCA will address equivalency specific to WQS in later sections of this document.				apply to designated public waters. +6115.0240 Sub. 3(C) +0191? Look at part on filling (0190 w/more specific in 1091), then structures (0210), then more on structures (0211).	alternative is required. The alternatives may include consideration of alternate sites or alternative project configurations on the proposed site. The alternatives must be "good faith efforts". Instead of "practicable", WCA rules evaluate alternatives as being feasible and prudent or not feasible and prudent. The feasible and prudent standard is defined as: capable of being done from an engineering point of view, is in accordance with accepted engineering standards and practices; is consistent with reasonable requirements of the public health, safety, and welfare; is an environmentally preferable alternative based on a review of social, economic, and environmental impacts; and it would create no truly unusual problems. WCA rules include more specific considerations of alternatives such as site suitability for the project purpose, reasonable modifications of scope/size/configuration, physical as well as economic and demographic requirements for the project, and the public value of affected wetlands. WCA rules specifically address the issue of wetland dependency. A project is wetland dependent if wetland features or functions are essential to fulfill the basic purpose of the project. A wetland present at the site of a proposed project does not make that project wetland dependent. Wetland dependent projects are exempt from the alternatives analysis. DNR: No discharge unless "there is no other feasible and practical alternative to the project that would have less environmental impact; and the public need for the project rules out the no-build alternative;". For an application to be considered complete, the applicant must further demonstrate that the activity "…avoids direct or indirect impacts to public waters…"	"reasonable and prudent", adopted. WCA: Rule assigns the above to LGU. Must be revised to indicate permitting authority. PWWPP: Less stringent. Permit cannot be issued if there exists a "feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare." However, neither "feasible and prudent" nor "reasonable requirements" are defined.
	230.10(a)(1)(i) and (ii)	(1) For the purpose of this requirement, practicable alternatives include, but are not limited to: (i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters; (ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters;				WCA: More stringent. (wetlands only). Requires two alternatives that AVOID impacts, whereas (i) and (ii) requires alternatives that do not involve discharge or discharges in other location in WOTUS. PWWPP: Less stringent. No requirement for consideration of specific alternatives (IE – 230.10(a)(1)(i-ii).
	230.10(a)(2)	(2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and				WCA: More stringent. "Feasible and prudent" exceeds requirement of

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		logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered.			and "…minimizes the impact to public water…" (Subp. 3 (C)(5)(a-b). Practical alternative not defined – nothing related to cost in our rules Not sure. What is "special aquatic site?"	"practicable", which is defined simply as: (q) The term practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. PWWPP: Less stringent. "Feasible and prudent" not defined.
	230.10(a)(3)	(3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (*i.e.*, is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise.				WCA: Equally stringent. WCA assumed the availability of and requires consideration of two avoidance alternatives for projects that are not water dependent. WCA: Discuss w\EPA WCA Rule exception to alternatives analysis (avoidance) for wetland dependent projects. Part 230 provides no such exception. PWWPP: No provision exists which address water dependency.
	230.10(a)(4)	Actions subject to NEPA	Not Applicable			
	230.10(a)(5)	(5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the	**To the extent that** alternatives are identified under a CZM, Section 208, or other planning processes, they must be considered during alternatives analysis and, if insufficient, supplemented as needed.	BWSR: Rule 8420.0830, 8420.0515 Subp.10 Statute 103G.2243	BWSR: WCA rules require consideration of the extent to which proposed activities affecting wetlands at both the impact and replacement site are consistent with other plans, such as local water management plans, watershed management plans, land use plans, zoning, and	WCA: Equally stringent. WCA requires consideration of consistency with other plans, but not specific consideration of

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		consideration of alternatives under the Guidelines. Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly.		DNR: No Provision Exists	comprehensive plans. WCA sequencing provisions regarding alternatives analysis do not specifically address the consideration of alternatives developed under other planning processes except for provisions related to the development of Comprehensive Wetland Protection and Management Plans (CWPMPs). However, such alternatives identified in other planning processes can be considered and are often cited and considered when evaluating replacement plan applications. CWPMP rule provisions state that the plan should be developed as part of, or in coordination with, other relevant local or regional plans and requirements.	alternatives identified under such plans as part of the permitting authority's alternatives analysis. Alternatives are inherently considered as a result of WCA's broader requirement for consideration of consistency of plans (entirety), not just one component (ie-alternatives identified in plans). PWWPP: Less stringent. Does not require consideration of other plans.
	230.10(b)	(b) No discharge of dredged or fill material shall be permitted if it:	No discharge if: • Violation of WQS • Violates toxic effluent standard or prohibition (CWA 307) • Jeopardizes T&E or critical habitat, unless exempted • Marine sanctuary			
BWSR (via PCA)	230.10(b)(1)	(1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard;		WCA: No provision exists. PWWPP: No Provision Exists	WCA: No Provision Exists PWWPP: No Provision Exists	WCA and PWWPP: Less stringent. Regulatory revision required (WCA Rule + PW Rule) to impose condition on permit issuance ensuring compliance with WQS through establishment of process for WQS certification of state permits. Specifically, need to trigger 7053.0205 Subp. 5(A), which prohibits violation of WQS after consideration of dilution.

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BWSR (via PCA?)	230.10(b)(2)	(2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act;		No Provision Exists	N/A	WCA and PWWPP: Less stringent. Regulatory revision required (WCA Rule + PW Rule) to impose condition on permit issuance ensuring compliance.
BWSR, DNR	230.10(b)(3)	(3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply in lieu of this subparagraph;		No Provision Exists	N/A	WCA and PWWPP: Less stringent. State rules only apply to state-listed species. Rule revision recommended to state that replacement plan\permit cannot be approved if it results in impact to **federally** listed species.
N/A?	230.10(b)(4)	(4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under title III of the Marine Protection, Research, and Sanctuaries Act of 1972.		N/A	N/A	N/A
BWSR, DNR, PCA – See and address through Subparts B through G.	230.10(c)	(c) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests required by subparts B and G, after consideration of subparts C through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects contributing to significant degradation considered individually or collectively, include:	No discharge permitted which results in **significant degradation (SD)** of WOTUS. SD based on FDs, evaluations and tests in Subpart B and G, w\consideration of C through F, with emphasis on persistence. Must consider, individually and collectively, effects of discharge of pollutants on: • Human health and welfare, including public water supply, wildlife, shellfish, plankton, etc. • Life stages of aquatic life and wildlife dependent on aquatic systems • Aquatic ecosystem diversity, productivity and stability. • Recreational, aesthetic and economic values.	BWSR: No Provision Exists DNR: No Provision Exists MPCA: MN Rule 7050.0285	MPCA: Minn. R. 7050.0250-0335 is Minnesota's antidegradation regulations which are premised upon 1 – protection of existing and designated beneficial use for all waters 2- further minimization of degradation in high quality waters and only to the extent that it supports important economic/social change in area of impact 3- no degradation of outstanding resource value waters (2 tiers – "restricted" ORVWs where degradation limited to that which protects outstanding characteristics of the waters for which they were designated, and "prohibited" ORVW where no degradation allowed)	WCA: Less stringent. Amend MR § 6115.0250 to state that no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of a wetland or downstream receiving water and that associated determinations be based on factual determinations, tests and evaluations no less stringent than those in Subparts B and G.

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						PWWPP: Less stringent. Amend MR § 6115.0250 to state that no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of assumed waters and that associated determinations be based on factual determinations, tests and evaluations no less stringent than those in Subparts B and G. Subject state permits to compliance with anti-degradation and state water quality standards and address remaining gaps through amendment to appropriate regulations.
BWSR\DNR (via PCA)	230.10(c)(1)	(1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites.		See response to 230.10(c)	See response to 230.10(c)	See response to 230.10(c)
BWSR\DNR (via PCA)	230.10(c)(2)	(2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes;		See response to 230.10(c)	See response to 230.10(c)	See response to 230.10(c)
BWSR\DNR (via PCA)	230.10(c)(3)	(3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such		See response to 230.10(c)	See response to 230.10(c)	See response to 230.10(c)

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		effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or				
BWSR\DNR (via PCA)	230.10(c)(4)	(4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values.		See response to 230.10(c)	See response to 230.10(c)	See response to 230.10(c)
BWSR, DNR	230.10(d)	Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.	No permit w\out steps for minimization.	BWSR: MN Rule: 8420.0100 Subp. 1, 8420.0500 Subp. 2, 8420.0520 Subp. 1 – 8. Statute: 103G.222 Subd. 1, 103A.201 Subd. 2b. DNR: MN Rule 6115.0240 Subp. 3; MN Statute 103G.305	BWSR: Avoidance and minimization of wetland impacts is a fundamental principle in the WCA replacement plan application process. The process of first avoiding and then minimizing impacts to wetlands is referred to in WCA as "Sequencing". Sequencing provisions require replacement plan applicants to demonstrate that they have taken steps to avoid and minimize impacts. There is an exception to this requirement for wetlands in cultivated fields. 8420.0520 Subp. 8 waives the priority sequencing order (avoid, minimize, replace) for wetlands located in a cultivated field when they are replaced via restoration. DNR: Applications for PW permits must include information about alternatives and must comply with avoidance\minimization\rectification\reduction or elimination over time\replacement principles, in descending order. For an application to be considered complete, the applicant must demonstrate that the activity "…avoids direct or indirect impacts to public waters…" and "…minimizes the impact to public water…" (Subp. 3 (C)(5)(a-b). When project impacts PWW and WCA wetland, and LGU waives to DNR, DNR is required to follow WCA replacement standards, including sequencing. MN Rule prohibits placement of fill material in public waters, for multiple specified purposes. When fill is not prohibited, the project is evaluated through the public waters work permit application. Rules specify that a permit	WCA: Less stringent. WCA rule provides, in multiple sections, an equivalent basic requirement for minimization of impacts prior to approval of a replacement plan. Equivalency of specific steps will be addressed alongside 230 Subpart H. Although equivalent in its basic requirement, the WCA rule is less than stringent in that it provides an exception to sequencing for wetlands in cultivated fields when they are replaced via restoration. A consideration to undertake in addressing this apparent gap is that there is a federal exemption for land determined to be Prior Converted under the WC Provisions, and that has not been abandoned (under the 404 definition; there is no such thing as

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					may be issued only if the project will involve a minimum encroachment, change, or damage to the environment, particularly the ecology of the waterway. Further, the DNR must consider whether or not there is a feasible and practical alternative to the project that would have less environmental impact; and the public need for the project rules out the no-build alternative. Public-waters-work permits must include provisions to compensate for the detrimental aspects of the change. Decisions are documented with a findings of fact and permits are issued through the DNR's MPARS online permit system.	abandonment of PC under Farm Program definition). The vast majority of non-pothole wetlands that were manipulated prior to 12/23/85, used to produce an agricultural commodity prior to that date, and did not support woody vegetation as of that date, should be correctly determined PC (again, 404 definition may result in "abandonment" for federal program in some instances). Remaining areas (IE – potholes) to which this exemption to sequencing would apply would generally not be subject to the jurisdiction of the federal program due to being isolated wetlands. Thus, with regard to the 404 program the waiver to sequencing would only be an issue on the rarely occurring non-pothole wetland within a cultivated field that does not meet the definition of Prior Converted Cropland. PWWPP: Less stringent. The PWWPP rule prescribes basic requirements for minimization of

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						impacts; however, they are overly broad and are included under "Information Required" of an applicant. Equivalency of specific steps will be addressed alongside 230 Subpart H. Under an assumed program the LGU technically cannot waive to DNR because the LGU cannot retain permitting authority for such waters under an assumed program. In either case, the same gap described under the BWSR equivalency, above, technically exists under the PWWPP program as DNR must follow WCA sequencing provisions for waived PWWs. This will be addressed, by default, when the gap described under the WCA equivalency portion of this text is addressed.
	230.11	**<u>Factual Determinations</u>**				
BWSR, DNR ("permitting authority shall…")	230.11	The permitting authority shall determine in writing the potential short term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic environment in light of subparts C through F. Such factual determinations shall be used in §230.12 in making findings of compliance or noncompliance with the restrictions on discharge in §230.10. The evaluation and	FDs are based on consideration of "Potential Impact" Subparts (C though F) will be made by permitting authority and will used in determining compliance\noncompliance with the RDs. Evaluation and Testing procedures in 230.60 and 230.61 ***shall*** be used *as necessary*. **<u>FDs shall include</u>**, with each stating the "nature and degree of effect that the proposed discharge will have individually and cumulatively":	BWSR: No Provision Exists DNR: MN Statute 103G.315 Subd. 2	BWSR: N/A DNR: Per statute: "Denying and Issuing Permits - The commissioner shall make findings of fact on issues necessary for determination of the applications considered. Orders made by the commissioner must be based upon findings of fact made on substantial evidence. The	WCA and PWWPP: Less Stringent. Revise rule to require factual determinations that incorporate the elements prescribed in 230.11. Although both WCA and the PWWPP require a finding of fact as a basis for a permit

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		testing procedures described in §230.60 and §230.61 of subpart G shall be used as necessary to make, and shall be described in, such determination. The determinations of effects of each proposed discharge shall include the following:	• *Physical substrate determinations* (230.11(a)) – characteristics of substrate. • *Water circulation, fluctuation and salinity determinations* (230.11(b)) water, current patterns, circulation including downstream flows, and normal water circulation. • *Suspended particulate/turbidity determinations (*230.11l) changes on kind and concentration. • *Contaminant determinations* (230.110(d)) – introduce, relocate or increase contaminants. • *Aquatic ecosystem and organism determinations* (230.11l) – structure and function. • *Proposed disposal site determination* (230.11(f)) – Each disposal site shall be specified by the PA through use of guidelines and shall be based on ten factors ((230.11(f)(i-x)). • Cumulative and secondary effects on the aquatic ecosystem.		commissioner may have investigations made. The facts disclosed by investigation must be put in evidence at the hearing"	decision they do not require the same type of information required under 230.11. Specifically, the permitting authority must **A)** determine in writing, the **B)** potential short or long term effects on the **C)** physical chemical and biological components of the aquatic environment, **D)** on the basis of potential impacts described in subparts C through F, **E)** and ensure that the written determination specifically includes those items in paragraphs a-h. Additionally, though there may be substantial overlap between the potential impacts that must be considered under the existing state regulatory programs and those potential impacts that must be considered under Subparts C through F, state regulations may need to be amended to address remaining gaps. Also, per EPA, while many of the potential impacts in these subparts C through F would seem to be

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						covered by state WQS, these evaluations are still to be made on a case-by-case basis for each IP and GP (initial issuance). **It cannot be asserted that consideration of these potential impacts has been made simply through adoption of applicable WQSs.**
BWSR, DNR	230.11(a)	(a) *Physical substrate determinations.* Determine the nature and degree of effect that the proposed discharge will have, individually and cumulatively, on the characteristics of the substrate at the proposed disposal site. Consideration shall be given to the similarity in particle size, shape, and degree of compaction of the material proposed for discharge and the material constituting the substrate at the disposal site, and any potential changes in substrate elevation and bottom contours, including changes outside of the disposal site which may occur as a result of erosion, slumpage, or other movement of the discharged material. The duration and physical extent of substrate changes shall also be considered. The possible loss of environmental values (§230.20) and actions to minimize impact (subpart H) shall also be considered in making these determinations. Potential changes in substrate elevation and bottom contours shall be predicted on the basis of the proposed method, volume, location, and rate of discharge, as well as on the individual and combined effects of current patterns, water circulation, wind and wave action, and other physical factors that may affect the movement of the discharged material.		BWSR: No Provision Exists DNR: MN Rule 6115.0190 Filling into Public Waters Subp. 5	BWSR: N/A DNR: Standards in place related to **physical substrate determinations** that apply to all filling in public waters: A. The project does not exceed more than a minimum encroachment, change, or damage to the environment, particularly the ecology of the water. B. The fill consists of clean inorganic material free of pollutants and nutrients. C. The existence of a stable, supporting foundation is established by appropriate means, including soil boring data. E. The proposed project represents the minimal impact solution to a specific need with respect to all other reasonable alternatives. F. The size, shape, depths, shoreline, and bottom character and topography, and susceptibility of the beds to actions of wind, waves, and currents are such that the fill will be stable. Lists the requirements that the disposal of excavated materials are subject to.	See response to 230.11

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				and 5B		
BWSR, DNR	230.11(b)	(b) *Water circulation, fluctuation, and salinity determinations.* Determine the nature and degree of effect that the proposed discharge will have individually and cumulatively on water, current patterns, circulation including downstream flows, and normal water fluctuation. Consideration shall be given to water chemistry, salinity, clarity, color, odor, taste, dissolved gas levels, temperature, nutrients, and eutrophication plus other appropriate characteristics. Consideration shall also be given to the potential diversion or obstruction of flow, alterations of bottom contours, or other significant changes in the hydrologic regime. Additional consideration of the possible loss of environmental values (§§230.23 through 230.25) and actions to minimize impacts (subpart H), shall be used in making these determinations. Potential significant effects on the current patterns, water circulation, normal water fluctuation and salinity shall be evaluated on the basis of the proposed method, volume, location, and rate of discharge.		MPCA: Minn. R. 7050.0210	MPCA: General Standards – describe mixing zones, minimum stream flows Water Quality Standards by Designated Use include standards for chloride, salinity, sodium, total dissolved salts, temperature, eutrophication, etc.	See response to 230.11
PCA	230.11(c)	(c) Suspended particulate/turbidity determinations. Determine the nature and degree of effect that the proposed discharge will have, individually and cumulatively, in terms of potential changes in the kinds and concentrations of suspended particulate/turbidity in the vicinity of the disposal site. Consideration shall be given to the grain size of the material proposed for discharge, the shape and size of the plume of suspended particulates, the duration of the discharge and resulting plume and whether or not the potential changes will cause violations of applicable water quality standards. Consideration should also be given to the possible loss of environmental values (§230.21) and to actions for minimizing		No provision exists	MPCA: Water quality standard is TSS, not turbidity; however, all WQS apply to all Waters of the State, and MPCA has general authority to enforce Waters of the State is defined in Minn. Stat. 115.01, Subp. 22; Also see: Minn. R. 7050.0150 Determination of Water Quality, Biological and Physical Conditions, and Compliance with Standards Also, Minn. R. 7050.0210 has a general standard for excessive suspended solids	See response to 230.11

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		impacts (subpart H). Consideration shall include the proposed method, volume, location, and rate of discharge, as well as the individual and combined effects of current patterns, water circulation and fluctuations, wind and wave action, and other physical factors on the movement of suspended particulates.				
PCA	230.11(d)	(d) Contaminant determinations. Determine the degree to which the material proposed for discharge will introduce, relocate, or increase contaminants. This determination shall consider the material to be discharged, the aquatic environment at the proposed disposal site, and the availability of contaminants.		No provision exists	PCA: Depending on contamination found, disposal may be required as solid or hazardous waste; and Minn. R. 7050.0210 addresses "contaminants" in mixing zones	See response to 230.11
BWSR, DNR	230.11(e)	(e) Aquatic ecosystem and organism determinations. Determine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms. Consideration shall be given to the effect at the proposed disposal site of potential changes in substrate characteristics and elevation, water or substrate chemistry, nutrients, currents, circulation, fluctuation, and salinity, on the recolonization and existence of indigenous aquatic organisms or communities. Possible loss of environmental values (§230.31), and actions to minimize impacts (subpart H) shall be examined. Tests as described in §230.61 (Evaluation and Testing), may be required to provide information on the effect of the discharge material on communities or populations of organisms expected to be exposed to it.		BWSR: No provision exists DNR: MN Rule 6115.0190 Filling into Public Waters Subp. 3 PCA: Minn. R. 7050.0222	BWSR: N/A DNR: Fill placement is prohibited to achieve vegetation control, create upland areas, stabilize beds of public waters which cannot support fill, stabilize/impound active springs, dispose of material resulting from activities above the OHWL, construct roadway/pathway/improve land access to islands (with some exceptions for government agency projects), or fill in posted fish spawning areas. PCA: Water Quality Standards - includes biocriterion (adopted in 2017) for aquatic life and habitats.	See response to 230.11
BWSR, DNR	230.11(f)	(f) Proposed disposal site determinations. (1) Each disposal site shall be specified through the application of these Guidelines. The mixing zone shall be confined to the smallest practicable zone within each specified disposal site that is consistent with the type of dispersion determined to be appropriate by the application of these		BWSR: No provision exists DNR: MN Rule 6115.0190 Filling into Public Waters Subp. 3	BWSR: N/A DNR: Fill placement is prohibited to achieve vegetation control, create upland areas, stabilize beds of public waters which cannot support fill, stabilize/impound active springs, dispose of material resulting from activities	See response to 230.11

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		Guidelines. In a few special cases under unique environmental conditions, where there is adequate justification to show that widespread dispersion by natural means will result in no significantly adverse environmental effects, the discharged material may be intended to be spread naturally in a very thin layer over a large area of the substrate rather than be contained within the disposal site. (2) The permitting authority and the Regional Administrator shall consider the following factors in determining the acceptability of a proposed mixing zone: (i) Depth of water at the disposal site; (ii) Current velocity, direction, and variability at the disposal site; (iii) Degree of turbulence; (iv) Stratification attributable to causes such as obstructions, salinity or density profiles at the disposal site; (v) Discharge vessel speed and direction, if appropriate; (vi) Rate of discharge; (vii) Ambient concentration of constituents of interest; (viii) Dredged material characteristics, particularly concentrations of constituents, amount of material, type of material (sand, silt, clay, etc.) and settling velocities; (ix) Number of discharge actions per unit of time; (x) Other factors of the disposal site that affect the rates and patterns of mixing.		MN Rule 6115.0190 Filling into Public Waters Subp. 5	above the OHWL, construct roadway/pathway/improve land access to islands (with some exceptions for government agency projects), or fill in posted fish spawning areas. Public waters permits are required for the placement of fill in public waters (except when fill is prohibited (Subp. 3) or no permit is required (Subp. 4)) and a project must meet all requirements listed, including: E. The size, shape, depths, shoreline, and bottom character and topography, and susceptibility of the beds to actions of wind, waves, and currents are such that the fill will be stable.	
BWSR, DNR	230.11(g)(1) and (2)	(g) Determination of cumulative effects on the aquatic ecosystem. (1) Cumulative impacts are the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material. Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and		BWSR: No provision exists DNR: MN Rule 6115.0190 Filling into Public Waters Subp. 3	BWSR: N/A DNR: Fill placement is prohibited to achieve vegetation control, create upland areas, stabilize beds of public waters which cannot support fill, stabilize/impound active springs, dispose of material resulting from activities above the OHWL, construct roadway/pathway/improve land access to islands (with some exceptions for government	See response to 230.11

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		interfere with the productivity and water quality of existing aquatic ecosystems. (2) Cumulative effects attributable to the discharge of dredged or fill material in waters of the United States should be predicted to the extent reasonable and practical. The permitting authority shall collect information and solicit information from other sources about the cumulative impacts on the aquatic ecosystem. This information shall be documented and considered during the decisionmaking process concerning the evaluation of individual permit applications, the issuance of a General permit, and monitoring and enforcement of existing permits.		DNR: MN Rule 6115.0190 Filling into Public Waters Subp. 5	agency projects), or fill in posted fish spawning areas. DNR: Standards in place that examine and limit the scope of work: A. The project does not exceed more than a minimum encroachment, change, or damage to the environment, particularly the ecology of the waters. E. The proposed project represents the minimal impact solution to a specific need with respect to all other reasonable alternatives.	
BWSR, DNR	230.11(h)(1) and (2)	(h) Determination of secondary effects on the aquatic ecosystem. (1) Secondary effects are effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material. Information about secondary effects on aquatic ecosystems shall be considered prior to the time final section 404 action is taken by permitting authorities. (2) Some examples of secondary effects on an aquatic ecosystem are fluctuating water levels in an impoundment and downstream associated with the operation of a dam, septic tank leaching and surface runoff from residential or commercial developments on fill, and leachate and runoff from a sanitary landfill located in waters of the U.S. Activities to be conducted on fast land created by the discharge of dredged or fill material in waters of the United States may have secondary impacts within those waters which should be considered in evaluating the impact of creating those fast lands.		BWSR: No provision exists DNR: MN Rule 6115.0190 Filling into Public Waters Subp. 5	BWSR: N/A DNR: Consideration of secondary effects is included as part of the review of the scope of the proposed work. Standards in place that examine and limit the scope of work: B. The project does not exceed more than a minimum encroachment, change, or damage to the environment, particularly the ecology of the waters. F. The proposed project represents the minimal impact solution to a specific need with respect to all other reasonable alternatives.	See response to 230.11
	230.12	**Findings on the compliance…**				
BWSR, DNR (although PCA must provide	230.12	Findings on the compliance or noncompliance with the restrictions on discharge.	Based on potential impacts (Sub C-F) and evaluation and testing (Sub G), disposal sites for discharge must be specified as:	BWSR: No provision exists	BWSR: N/A	WCA and PWWPP: Less stringent. Amend rule to specify that findings

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
for some restrictions on discharge and related factual determinations, as a procedural necessity permitting authority must ultimately make the "Findings on Compliance".)		(a) On the basis of these Guidelines (subparts C through G) the proposed disposal sites for the discharge of dredged or fill material must be: (1) Specified as complying with the requirements of these Guidelines; or (2) Specified as complying with the requirements of these Guidelines with the inclusion of appropriate and practicable discharge conditions (see subparts H and J) to minimize pollution or adverse effects to the affected aquatic ecosystems; or (3) Specified as failing to comply with the requirements of these Guidelines where: (i) There is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, so long as such alternative does not have other significant adverse environmental consequences; or (ii) The proposed discharge will result in significant degradation of the aquatic ecosystem under §230.10(b) or (c); or (iii) The proposed discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem; or (iv) There does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with these Guidelines. (b) Findings under this section shall be set forth in writing by the permitting authority for each proposed discharge and made available to the permit applicant. These findings shall include the factual determinations required by §230.11, and a brief explanation of any adaptation of these Guidelines to the activity under consideration. In the case of a General permit, such findings shall be prepared at the time of issuance of that permit rather than for each subsequent discharge under the authority of that permit.	A. Complying with guidelines; or B. Complying when conditions are added; or C. Failing to comply due to: a. Existence of practicable alternative; or b. Significant Degradation; or c. Failure to minimize impact; or d. Insufficient information to determine compliance. Findings will be provided in writing by PA and will include basis (FDs).	DNR: No provision exists.	DNR: N/A	of compliance must be made in writing and must include factual determinations equivalent to those required by §230.11.

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
	Subpart C	**Potential impacts on physical and chemical characteristics of the aquatic ecosystem**	The following Subparts, C through F contain the "Potential Impacts" mentioned in multiple paragraphs above, and that must be considered when making Factual Determinations. Each first subparagraph (a) identifies and defines the use\value, with the second (b) describing the potential loss of characteristics and values that must be considered. The necessary detail of the paragraphs does not permit summarization, so summaries are therefore not provided. Although not necessarily in the same order, these subparts encompass the "Potential impact" categories and subcategories described in my summary for 230.11, above.	MN Rules 8420.0100 Subp. 1 & 2, 8420.0515, and 8420.0522 Subp. 1. MN Statutes 103G.2242, 103G.222, and 103A.201	WCA rules require evaluations of wetland impacts to include consideration of the public value of wetlands based on their functions. Functions listed in rule include: 1) water quality, including filtering pollutants to surface water and groundwater, using nutrients that would otherwise pollute public waters, trapping sediments, protecting shoreline and recharging groundwater; 2) flood water and storm water retention, including the potential for flooding in the watershed, the value of property subject to flooding, and the reduction in potential flooding by the wetland; 3) public recreation and education, including hunting and fishing areas, wildlife viewing areas, and nature areas; 4) commercial uses, including wild rice and cranberry growing and harvesting and aquaculture; 5) fish, wildlife, and native plant habitats; 6) low-flow augmentation; and 7) other functions and public uses as identified in wetland evaluation methods demonstrated to reasonably identify appropriate candidates for wetland replacement. The assessment of these functions involves physical, chemical and biological characteristics that affect wetland functions. Applicable characteristics for each function must be considered when making determinations of wetland impacts and necessary replacement/mitigation. WCA rules also require the consideration of certain "special considerations" including state threatened and endangered species, groundwater sensitive areas, and various other features. Ultimately, the assessment of wetland functions and special considerations is directly tied to the overall purpose of WCA - achieve no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands.	See response to 230.11
BWSR, DNR	230.20(a) and (b)	(a) The substrate of the aquatic ecosystem underlies open waters of the United States and constitutes the surface of wetlands. It consists of organic and inorganic solid materials and includes water and other liquids	**Substrate of aquatic ecosystems.**	Refer to Subpart C response	Refer to Subpart C response	See response to 230.11

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		or gases that fill the spaces between solid particles. (b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can result in varying degrees of change in the complex physical, chemical, and biological characteristics of the substrate. Discharges which alter substrate elevation or contours can result in changes in water circulation, depth, current pattern, water fluctuation and water temperature. Discharges may adversely affect bottom dwelling organisms at the site by smothering immobile forms or forcing mobile forms to migrate. Benthic forms present prior to a discharge are unlikely to recolonize on the discharged material if it is very dissimilar from that of the discharge site. Erosion, slumping, or lateral displacement of surrounding bottom of such deposits can adversely affect areas of the substrate outside the perimeters of the disposal site by changing or destroying habitat. The bulk and composition of the discharged material and the location, method, and timing of discharges may all influence the degree of impact on the substrate.				
PCA	230.21(a) and (b)	(a) Suspended particulates in the aquatic ecosystem consist of finegrained mineral particles, usually smaller than silt, and organic particles. Suspended particulates may enter water bodies as a result of land runoff, flooding, vegetative and planktonic breakdown, resuspension of bottom sediments, and man's activities including dredging and filling. Particulates may remain suspended in the water column for variable periods of time as a result of such factors as agitation of the water mass, particulate specific gravity, particle shape, and physical and chemical properties of particle surfaces. (b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can result in greatly	**Suspended particulates in the aquatic ecosystem.**	Refer to Subpart C response	Refer to Subpart C response	See response to 230.11

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		elevated levels of suspended particulates in the water column for varying lengths of time. These new levels may reduce light penetration and lower the rate of photosynthesis and the primary productivity of an aquatic area if they last long enough. Sightdependent species may suffer reduced feeding ability leading to limited growth and lowered resistance to disease if high levels of suspended particulates persist. The biological and the chemical content of the suspended material may react with the dissolved oxygen in the water, which can result in oxygen depletion. Toxic metals and organics, pathogens, and viruses absorbed or adsorbed to finegrained particulates in the material may become biologically available to organisms either in the water column or on the substrate. Significant increases in suspended particulate levels create turbid plumes which are highly visible and aesthetically displeasing. The extent and persistence of these adverse impacts caused by discharges depend upon the relative increase in suspended particulates above the amount occurring naturally, the duration of the higher levels, the current patterns, water level, and fluctuations present when such discharges occur, the volume, rate, and duration of the discharge, particulate deposition, and the seasonal timing of the discharge.				
PCA	230.22(a) and (b)	(a) Water is the part of the aquatic ecosystem in which organic and inorganic constituents are dissolved and suspended. It constitutes part of the liquid phase and is contained by the substrate. Water forms part of a dynamic aquatic lifesupporting system. Water clarity, nutrients and chemical content, physical and biological content, dissolved gas levels, pH, and temperature contribute to its lifesustaining capabilities. (b) Possible loss of environmental characteristics and values: The discharge of	**Characteristics of water in the aquatic ecosystem**	Refer to Subpart C response	Refer to Subpart C response	See response to 230.11

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		dredged or fill material can change the chemistry and the physical characteristics of the receiving water at a disposal site through the introduction of chemical constituents in suspended or dissolved form. Changes in the clarity, color, odor, and taste of water and the addition of contaminants can reduce or eliminate the suitability of water bodies for populations of aquatic organisms, and for human consumption, recreation, and aesthetics. The introduction of nutrients or organic material to the water column as a result of the discharge can lead to a high biochemical oxygen demand (BOD), which in turn can lead to reduced dissolved oxygen, thereby potentially affecting the survival of many aquatic organisms. Increases in nutrients can favor one group of organisms such as algae to the detriment of other more desirable types such as submerged aquatic vegetation, potentially causing adverse health effects, objectionable tastes and odors, and other problems.				
BWSR, DNR	230.23(a) and (b)	(a) Current patterns and water circulation are the physical movements of water in the aquatic ecosystem. Currents and circulation respond to natural forces as modified by basin shape and cover, physical and chemical characteristics of water strata and masses, and energy dissipating factors. (b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can modify current patterns and water circulation by obstructing flow, changing the direction or velocity of water flow, changing the direction or velocity of water flow and circulation, or otherwise changing the dimensions of a water body. As a result, adverse changes can occur in: Location, structure, and dynamics of aquatic communities; shoreline and substrate erosion and deposition rates; the deposition of suspended particulates; the rate and extent of mixing of dissolved and suspended	**Currents and water circulation**	Refer to Subpart C response	Refer to Subpart C response	See response to 230.11

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		components of the water body; and water stratification.				
DNR, BWSR	230.24(a) and (b)	(a) Normal water fluctuations in a natural aquatic system consist of daily, seasonal, and annual tidal and flood fluctuations in water level. Biological and physical components of such a system are either attuned to or characterized by these periodic water fluctuations. (b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can alter the normal waterlevel fluctuation pattern of an area, resulting in prolonged periods of inundation, exaggerated extremes of high and low water, or a static, nonfluctuating water level. Such water level modifications may change salinity patterns, alter erosion or sedimentation rates, aggravate water temperature extremes, and upset the nutrient and dissolved oxygen balance of the aquatic ecosystem. In addition, these modifications can alter or destroy communities and populations of aquatic animals and vegetation, induce populations of nuisance organisms, modify habitat, reduce food supplies, restrict movement of aquatic fauna, destroy spawning areas, and change adjacent, upstream, and downstream areas.	**Daily, seasonal and annual water level fluctuations**	Refer to Subpart C response	Refer to Subpart C response	See response to 230.11
N/A	230.25(a) and (b)	(a) Salinity gradients form where salt water from the ocean meets and mixes with fresh water from land. (b) Possible loss of environmental characteristics and values: Obstructions which divert or restrict flow of either fresh or salt water may change existing salinity gradients. For example, partial blocking of the entrance to an estuary or river mouth that significantly restricts the movement of the salt water into and out of that area can effectively lower the volume of salt water available for mixing within that estuary. The downstream migration of the salinity gradient can occur,	**Salinity**	N/A	N/A	See response to 230.11

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		displacing the maximum sedimentation zone and requiring salinitydependent aquatic biota to adjust to the new conditions, move to new locations if possible, or perish. In the freshwater zone, discharge operations in the upstream regions can have equally adverse impacts. A significant reduction in the volume of fresh water moving into an estuary below that which is considered normal can affect the location and type of mixing thereby changing the characteristic salinity patterns. The resulting changed circulation pattern can cause the upstream migration of the salinity gradient displacing the maximum sedimentation zone. This migration may affect those organisms that are adapted to freshwater environments. It may also affect municipal water supplies.				
	Subpart D	**Potential impacts on biological characteristics of the aquatic ecosystem**				
BWSR, DNR	230.30(a), (b), and (c)	(a) An endangered species is a plant or animal in danger of extinction throughout all or a significant portion of its range. A threatened species is one in danger of becoming an endangered species in the foreseeable future throughout all or a significant portion of its range. Listings of threatened and endangered species as well as critical habitats are maintained by some individual States and by the U.S. Fish and Wildlife Service of the Department of the Interior (codified annually at 50 CFR § 17.11). The Department of Commerce has authority over some threatened and endangered marine mammals, fish and reptiles. (b) Possible loss of values: The major potential impacts on threatened or endangered species from the discharge of dredged or fill material include: (1) Covering or otherwise directly killing species;	**T&E Species**	None	N/A	See response to 230.11 Mostly overlapping state/federal species, with minimal additional federal species. Develop and adopt online assessment/screening process.

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		(2) The impairment or destruction of habitat to which these species are limited. Elements of the aquatic habitat which are particularly crucial to the continued survival of some threatened or endangered species include adequate good quality water, spawning and maturation areas, nesting areas, protective cover, adequate and reliable food supply, and resting areas for migratory species. Each of these elements can be adversely affected by changes in either the normal water conditions for clarity, chemical content, nutrient balance, dissolved oxygen, pH, temperature, salinity, current patterns, circulation and fluctuation, or the physical removal of habitat; and (3) Facilitating incompatible activities. (c) Where consultation with the Secretary of the Interior occurs under section 7 of the Endangered Species Act, the conclusions of the Secretary concerning the impact(s) of the discharge on threatened and endangered species and their habitat shall be considered final.				
BWSR, DNR	230.31(a) and (b)	(a) Aquatic organisms in the food web include, but are not limited to, finfish, crustaceans, mollusks, insects, annelids, planktonic organisms, and the plants and animals on which they feed and depend upon for their needs. All forms and life stages of an organism, throughout its geographic range, are included in this category. (b) Possible loss of values: The discharge of dredged or fill material can variously affect populations of fish, crustaceans, mollusks and other food web organisms through the release of contaminants which adversely affect adults, juveniles, larvae, or eggs, or result in the establishment or proliferation of an undesirable competitive species of plant or animal at the expense of the desired resident species. Suspended particulates settling on attached or buried eggs can smother the eggs	**Aquatic organisms in "food web"**	BWSR: Refer to Subpart C response DNR: MN Rules 6115.0170, Subp. 9a.	Refer to Subpart C response DNR: Describes "Ecology of the waters" as including organisms, physical characteristics, and interactions between and among the organisms and their surroundings.	See response to 230.11

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		by limiting or sealing off their exposure to oxygenated water. Discharge of dredged and fill material may result in the debilitation or death of sedentary organisms by smothering, exposure to chemical contaminants in dissolved or suspended form, exposure to high levels of suspended particulates, reduction in food supply, or alteration of the substrate upon which they are dependent. Mollusks are particularly sensitive to the discharge of material during periods of reproduction and growth and development due primarily to their limited mobility. They can be rendered unfit for human consumption by tainting, by production and accumulation of toxins, or by ingestion and retention of pathogenic organisms, viruses, heavy metals or persistent synthetic organic chemicals. The discharge of dredged or fill material can redirect, delay, or stop the reproductive and feeding movements of some species of fish and crustacea, thus preventing their aggregation in accustomed places such as spawning or nursery grounds and potentially leading to reduced populations. Reduction of detrital feeding species or other representatives of lower trophic levels can impair the flow of energy from primary consumers to higher trophic levels. The reduction or potential elimination of food chain organism populations decreases the overall productivity and nutrient export capability of the ecosystem.				
BWSR, DNR	230.32(a) and (b)	(a) Wildlife associated with aquatic ecosystems are resident and transient mammals, birds, reptiles, and amphibians. (b) Possible loss of values: The discharge of dredged or fill material can result in the loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem. These adverse impacts upon wildlife habitat may result from changes in	**Wildlife associated w\aquatic ecosystem**	Refer to Subpart C response	Refer to Subpart C response	See response to 230.11

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		water levels, water flow and circulation, salinity, chemical content, and substrate characteristics and elevation. Increased water turbidity can adversely affect wildlife species which rely upon sight to feed, and disrupt the respiration and feeding of certain aquatic wildlife and food chain organisms. The availability of contaminants from the discharge of dredged or fill material may lead to the bioaccumulation of such contaminants in wildlife. Changes in such physical and chemical factors of the environment may favor the introduction of undesirable plant and animal species at the expense of resident species and communities. In some aquatic environments lowering plant and animal species diversity may disrupt the normal functions of the ecosystem and lead to reductions in overall biological productivity.				
	Subpart E	**Potential impacts in special aquatic sites**	• Sanctuaries and refuges • Wetlands • Mud flats • Vegetated shallows • Coral reefs • Riffle and pool complexes	MN Rules 8420.0100 Subp. 1 & 2, 8420.0515, and 8420.0522 Subp. 1. MN Statutes 103G.2242, 103G.222, and 103A.201	WCA rules require evaluations of wetland impacts to include consideration of the public value of wetlands based on their functions. Functions listed in rule include: 1) water quality, including filtering pollutants to surface water and groundwater, using nutrients that would otherwise pollute public waters, trapping sediments, protecting shoreline and recharging groundwater; 2) flood water and storm water retention, including the potential for flooding in the watershed, the value of property subject to flooding, and the reduction in potential flooding by the wetland; 3) public recreation and education, including hunting and fishing areas, wildlife viewing areas, and nature areas; 4) commercial uses, including wild rice and cranberry growing and harvesting and aquaculture; 5) fish, wildlife, and native plant habitats; 6) low-flow augmentation; and 7) other functions and public uses as identified in wetland evaluation methods demonstrated to reasonably identify appropriate candidates for wetland replacement. The assessment of these functions involves consideration of any of the listed special aquatic sites (except coral reefs which are not applicable to MN) when	See response to 230.11

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					they are associated with wetlands. WCA rules also require the consideration of certain "special considerations" including state threatened and endangered species, rare natural communities, groundwater sensitive areas, and various other features. Ultimately, the assessment of wetland functions and special considerations is directly tied to the overall purpose of WCA - achieve no net loss in the quantity, quality, and biological diversity of Minnesota's existing wetlands.	
BWSR, DNR (or N/A)	230.40	(a) Sanctuaries and refuges consist of areas designated under State and Federal laws or local ordinances to be managed principally for the preservation and use of fish and wildlife resources. (b) Possible loss of values: Sanctuaries and refuges may be affected by discharges of dredged or fill material which will: (1) Disrupt the breeding, spawning, migratory movements or other critical life requirements of resident or transient fish and wildlife resources; (2) Create unplanned, easy and incompatible human access to remote aquatic areas; (3) Create the need for frequent maintenance activity; (4) Result in the establishment of undesirable competitive species of plants and animals; (5) Change the balance of water and land areas needed to provide cover, food, and other fish and wildlife habitat requirements in a way that modifies sanctuary or refuge management practices; (6) Result in any of the other adverse impacts discussed in subparts C and D as they relate to a particular sanctuary or refuge.	**Sanctuaries and refuges**	See Subpart E response	See Subpart E response	See response to 230.11
BWSR, DNR (PWW)	230.41	(a)(1) Wetlands consist of areas that are inundated or saturated by surface or ground water at a frequency and duration enough to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil	**Wetlands**	BWSR: See Subpart E response	See Subpart E response DNR: These subdivisions are definitions for Public waters, Public water wetlands, and Wetlands, respectively.	See response to 230.11

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		conditions. (2) Where wetlands are adjacent to open water, they generally constitute the transition to upland. The margin between wetland and open water can best be established by specialists familiar with the local environment, particularly where emergent vegetation merges with submerged vegetation over a broad area in such places as the lateral margins of open water, headwaters, rainwater catch basins, and groundwater seeps. The landward margin of wetlands also can best be identified by specialists familiar with the local environment when vegetation from the two regions merges over a broad area. (3) Wetland vegetation consists of plants that require saturated soils to survive (obligate wetland plants) as well as plants, including certain trees, that gain a competitive advantage over others because they can tolerate prolonged wet soil conditions and their competitors cannot. In addition to plant populations and communities, wetlands are delimited by hydrological and physical characteristics of the environment. These characteristics should be considered when information about them is needed to supplement information available about vegetation, or where wetland vegetation has been removed or is dormant. (b) Possible loss of values: The discharge of dredged or fill material in wetlands is likely to damage or destroy habitat and adversely affect the biological productivity of wetlands ecosystems by smothering, by dewatering, by permanently flooding, or by altering substrate elevation or periodicity of water movement. The addition of dredged or fill material may destroy wetland vegetation or result in adnoncement of succession to dry land species. It may reduce or eliminate nutrident exchange by a reduction of the system's productivity, or by altering current patterns and velocities. Disruption or elimination of the		DNR: Minn. Stat. 103G.005. subd. 15, 15a., and 19. Minn. Rules 6115.0170, Subp. 31 thru 31b. Minn. Rules 6115.0190, Subp. 1 Minn. Rules 6115.0190, Subp. 3 Minn. Rules 6115.0190, Subp. 5	Defines Public Waters, Public waters wetlands, and Public water basins, all which may consist of wetlands as described in 230.41. It is the goal of the DNR to limit the placement of any fill into public waters in order to minimize change or damage to the environment. It is prohibited to fill in posted fish spawning areas. Permits are required for the placement of fill in public waters, and projects must be the minimum impact solution to the specific problem, adverse impacts to the physical or biological character of the waters must be mitigated These are the specific standards for issuing permits to fill in public waters.	

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		wetland systeam can degrade water quality by obstructing circulation patterns that flush large expanses of wetland systeems, by interfering with the filtration function of wetlands, or by changing the aquifer recharge capability of a wetland. Discharges can also change the wetland habitat value for fish and wildlife as discussed in subpart D. When disruptions in flow and circulation patterns occur, apparently minor loss of wetland acreage may result in major losses through secondary I'mpacts. Discharging fill material in wetlands as part of municipal, industrial or recreational development may modify the capacity of wetlands to retain and store floodwaters and to serve as a buffer zone shielding upland areas from wave actions, storm damage and erosion.				
DNR/BWSR	230.42	(a) Mud flats are broad flat areas along the seacoast and in coastal rivers to the head of tidal influence and in inland lakes, ponds, and riverine systems. When mud flats are inundated, wind and wave action may resuspend bottom sediments. Coastal mud flats are exposed at extremely low tides and inundated at high tides with the water table at or near the surface of the substrate. The substrate of mud flats contains organic material and particles smaller in size than sand. They are either unvegetated or vegetated only by algal mats. (b) Possible loss of values: The discharge of dredged or fill material can cause changes in water circulation patterns which may permanently flood or dewater the mud flat or disrupt periodic inundation, resulting in an increase in the rate of erosion or accretion. Such changes can deplete or eliminate mud flat biota, foraging areas, and nursery areas. Changes in inundation patterns can affect the chemical and biological exchange and decomposition process occurring on the mud flat and change the deposition of suspended material affecting the productivity of the area.	**Mud Flats**	BWSR: See Subpart E response DNR: NA	See Subpart E response	See response to 230.11

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		Changes may reduce the mud flat's capacity to dissipate storm surge runoff.				
BWSR, DNR	230.43	(a) Vegetated shallows are permanently inundated areas that under normal circumstances support communities of rooted aquatic vegetation, such as turtle grass and eelgrass in estuarine or marine systems as well as a number of freshwater species in rivers and lakes. (b) Possible loss of values: The discharge of dredged or fill material can smother vegetation and benthic organisms. It may also create unsuitable conditions for their continued vigor by: (1) Changing water circulation patterns; (2) releasing nutrients that increase undesirable algal populations; (3) releasing chemicals that adversely affect plants and animals; (4) increasing turbidity levels, thereby reducing light penetration and hence photosynthesis; and (5) changing the capacity of a vegetated shallow to stabilize bottom materials and decrease channel shoaling. The discharge of dredged or fill material may reduce the value of vegetated shallows as nesting, spawning, nursery, cover, and forage areas, as well as their value in protecting shorelines from erosion and wave actions. It may also encourage the growth of nuisance vegetation.	**Vegetated Shallows**	BWSR: See Subpart E response DNR: N/A	See Subpart E response	See response to 230.11
N/A	230.44	(a) Coral reefs consist of the skeletal deposit, usually of calcareous or silicaceous materials, produced by the vital activities of anthozoan polyps or other invertebrate organisms present in growing portions of the reef. (b) Possible loss of values: The discharge of dredged or fill material can adversely affect colonies of reef building organisms by burying them, by releasing contaminants such as hydrocarbons into the water column, by reducing light penetration through the water, and by increasing the level of suspended	**Coral Reefs**	BWSR: N/A DNR: N/A	N/A	WCA and PWWPP: N/A

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		particulates. Coral organisms are extremely sensitive to even slight reductions in light penetration or increases in suspended particulates. These adverse effects will cause a loss of productive colonies which in turn provide habitat for many species of highly specialized aquatic organisms.				
DNR	230.45	(a) Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are characterized by a slower stream velocity, a steaming flow, a smooth surface, and a finer substrate. Riffle and pool complexes are particularly valuable habitat for fish and wildlife. (b) Possible loss of values: Discharge of dredged or fill material can eliminate riffle and pool areas by displacement, hydrologic modification, or sedimentation. Activities which affect riffle and pool areas and especially riffle/ pool ratios, may reduce the aeration and filtration capabilities at the discharge site and downstream, may reduce stream habitat diversity, and may retard repopulation of the disposal site and downstream waters through sedimentation and the creation of unsuitable habitat. The discharge of dredged or fill material which alters stream hydrology may cause scouring or sedimentation of riffles and pools. Sedimentation induced through hydrological modification or as a direct result of the deposition of unconsolidated dredged or fill material may clog riffle and pool areas, destroy habitats, and create anaerobic conditions. Eliminating pools and meanders by the discharge of dredged or fill material can reduce water holding capacity of streams and cause rapid runoff from a watershed. Rapid	**Riffle and pool complexes**	DNR: Minn. Stat. 103G.005. Subp. 15, 15a., and 19. Minn. Rules 6115.0170, Subp. 31 thru 31b. Minn. Rules 6115.0190, Subp. 1 Minn. Rules 6115.0190, Subp. 3 Minn. Rules 6115.0190, Subp. 5. Minn. Rules 6115.0191, Subp. 1	DNR: These subdivisions are definitions for Public waters, Public water wetlands, and Wetlands, respectively. Defines Public Waters, Public waters wetlands, and Public waterbasins, all which may consist of wetlands as described in 230.41. It is the goal of the DNR to limit the placement of any fill into public waters in order to minimize change or damage to the environment. It is prohibited to fill in posted fish spawning areas. Permits are required for the placement of fill in public waters, and projects must be the minimum impact solution to the specific problem, adverse impacts to the physical or biological character of the waters must be mitigated These are the specific standards for issuing permits to fill in public waters. They include sections on fish and wildlife habitat and trout streams.	See response to 230.11.

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		runoff can deliver large quantities of flood water in a short time to downstream areas resulting in the destruction of natural habitat, high property loss, and the need for further hydraulic modification.				
	Subpart F	**Potential effects on human use characteristics**		See Subpart E response	See Subpart E response	
PCA	230.50(a) and (b)	(a) Municipal and private water supplies consist of surface water or ground water which is directed to the intake of a municipal or private water supply system. (b) Possible loss of values: Discharges can affect the quality of water supplies with respect to color, taste, odor, chemical content and suspended particulate concentration, in such a way as to reduce the fitness of the water for consumption. Water can be rendered unpalatable or unhealthy by the addition of suspended particulates, viruses and pathogenic organisms, and dissolved materials. The expense of removing such substances before the water is delivered for consumption can be high. Discharges may also affect the quantity of water available for municipal and private water supplies. In addition, certain commonly used water treatment chemicals have the potential for combining with some suspended or dissolved substances from dredged or fill material to form other products that can have a toxic effect on consumers.		DNR: Minn. Stat. 103G.101 Minn. Rule 6115.0150.	DNR: Requires development of program that includes conservation, allocation, and development of waters of the state for the best interests of the people. Describes purpose of 6115 rules and statutory authority. Purpose includes consistent review of permit applications in order to conserve and utilize the water resources of the state in the best interest of its people. It must consider environmental quality, shoreland management, floodplain management, water quality management, recreational or wilderness management, critical areas management, scientific and natural areas management, and protected species management.	See response to 230.11
N/A (Any waters in which this would apply would likely be retained by USACE)	230.51(a) and (b)	(a) Recreational and commercial fisheries consist of harvestable fish, crustaceans, shellfish, and other aquatic organisms used by man. (b) Possible loss of values: The discharge of dredged or fill materials can affect the suitability of recreational and commercial fishing grounds as habitat for populations of consumable aquatic organisms. Discharges can result in the chemical contamination of recreational or commercial fisheries. They		BWSR: N/A DNR: N/A	BWSR: N/A DNR: N/A	See response to 230.11

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		may also interfere with the reproductive success of recreational and commercially important aquatic species through disruption of migration and spawning areas. The introduction of pollutants at critical times in their life cycle may directly reduce populations of commercially important aquatic organisms or indirectly reduce them by reducing organisms upon which they depend for food. Any of these impacts can be of short duration or prolonged, depending upon the physical and chemical impacts of the discharge and the biological availability of contaminants to aquatic organisms.				
BWSR, DNR	230.52(a) and (b)	(a) Water-related recreation encompasses activities undertaken for amusement and relaxation. Activities encompass two broad categories of use: consumptive, e.g., harvesting resources by hunting and fishing; and nonconsumptive, e.g. canoeing and sightseeing. (b) Possible loss of values: One of the more important direct impacts of dredged or fill disposal is to impair or destroy the resources which support recreation activities. The disposal of dredged or fill material may adversely modify or destroy water use for recreation by changing turbidity, suspended particulates, temperature, dissolved oxygen, dissolved materials, toxic materials, pathogenic organisms, quality of habitat, and the aesthetic qualities of sight, taste, odor, and color.		BWSR: See Subpart E response DNR: Minn. Stat. 103G.101 Minn. Rule 6115.0150	BWSR: See Subpart E response DNR: Requires development of program that includes conservation, allocation, and development of waters of the state for the best interests of the people. Describes purpose of 6115 rules and statutory authority. Purpose includes consistent review of permit applications in order to conserve and utilize the water resources of the state in the best interest of its people. It must consider environmental quality, shoreland management, floodplain management, water quality management, recreational or wilderness management, critical areas management, scientific and natural areas management, and protected species management	See response to 230.11
BWSR, DNR	230.53(a) and (b)	(a) Aesthetics associated with the aquatic ecosystem consist of the perception of beauty by one or a combination of the senses of sight, hearing, touch, and smell. Aesthetics of aquatic ecosystems apply to the quality of life enjoyed by the general public and property owners. (b) Possible loss of values: The discharge of dredged or fill material can mar the beauty of		BWSR: See Subpart E response DNR: Minn. Stat. 103G.101	BWSR: See Subpart E response DNR: Requires development of program that includes conservation, allocation, and development of waters of the state for the best interests of the people. Describes purpose of 6115 rules and statutory authority. Purpose includes consistent review	See response to 230.11

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		natural aquatic ecosystems by degrading water quality, creating distracting disposal sites, inducing inappropriate development, encouraging unplanned and incompatible human access, and by destroying vital elements that contribute to the compositional harmony or unity, visual distinctiveness, or diversity of an area. The discharge of dredged or fill material can adversely affect the particular features, traits, or characteristics of an aquatic area which make it valuable to property owners. Activities which degrade water quality, disrupt natural substrate and vegetational characteristics, deny access to or visibility of the resource, or result in changes in odor, air quality, or noise levels may reduce the value of an aquatic area to private property owners.		Minn. Rule 6115.0150	of permit applications in order to conserve and utilize the water resources of the state in the best interest of its people. It must consider environmental quality, shoreland management, floodplain management, water quality management, recreational or wilderness management, critical areas management, scientific and natural areas management, and protected species management	
BWSR, DNR	230.54(a) and (b)	Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar preserves (a) These preserves consist of areas designated under Federal and State laws or local ordinances to be managed for their aesthetic, educational, historical, recreational, or scientific value. (b) Possible loss of values: The discharge of dredged or fill material into such areas may modify the aesthetic, educational, historical, recreational and/or scientific qualities thereby reducing or eliminating the uses for which such sites are set aside and managed.		BWSR: See Subpart E response DNR: Minn. Stat. 103G.101 Minn. Rule 6115.0150	BWSR: See Subpart E response DNR: Requires development of program that includes conservation, allocation, and development of waters of the state for the best interests of the people. Describes purpose of 6115 rules and statutory authority. Purpose includes consistent review of permit applications in order to conserve and utilize the water resources of the state in the best interest of its people. It must consider environmental quality, shoreland management, floodplain management, water quality management, recreational or wilderness management, critical areas management, scientific and natural areas management, and protected species management	See response to 230.11
	Subpart G	**Evaluation and testing**				
PCA (Or, circumvent by including blanket requirement that fill be clean	230.60	**General Evaluation of dredged or fill material**. The purpose of these evaluation procedures and the chemical and biological testing sequence outlined in § 230.61 is to provide information to reach the determinations required by § 230.11.	Evaluation procedures to determine if discharge is carrier of contaminants (FD under 230.11). Section used in conjunction with Subparts C-F to make FD. May or may not require testing under 230.61. Requires consideration of:	BWSR: N/A DNR: N/A		WCA and PWWPP: Less stringent. Incorporate by reference or include blanket requirement that fill must be clean,

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from onsite, or clean from commercial source)		Where the results of prior evaluations, chemical and biological tests, scientific research, and experience can provide information helpful in deciding, these should be used. Such prior results may make new testing unnecessary. The information used shall be documented. Where the same information applies to more than one determination, it may be documented once and referenced in later determinations. (a) If the evaluation under paragraph (b) indicates the dredged or fill material is not a carrier of contaminants, then the required determinations pertaining to the presence and effects of contaminants can be made without testing. Dredged or fill material is most likely to be free from chemical, biological, or other pollutants where it is composed primarily of sand, gravel, or other naturally occurring inert material. Dredged material so composed is generally found in areas of high current or wave energy such as streams with large bed loads or coastal areas with shifting bars and channels. However, when such material is discolored or contains other indications that contaminants may be present, further inquiry should be made. (b) The extraction site shall be examined in order to assess whether it is sufficiently removed from sources of pollution to provide reasonable assurance that the proposed discharge material is not a carrier of contaminants. Factors to be considered include but are not limited to: (1) Potential routes of contaminants or contaminated sediments to the extraction site, based on hydrographic or other maps, aerial photography, or other materials that show watercourses, surface relief, proximity to tidal movement, private and public roads, location of buildings, municipal and industrial areas, and agricultural or forest lands.	• Potential contaminant routes identified through remote resources. • Results of previous test. • Potential for pesticide introduction via runoff or percolation. • Spill\disposal records • Government records indicating significant pollutant production • Potential for release from substantial natural mineral deposits. Testing (under 230.61) not required if: • This evaluation indicates discharge not a carrier of contaminants. • If extraction and discharge sites are adjacent and substantially similar, and transfer from extraction site into less polluted area is contained. Decision not to test must be explained. The testing section (230.61) speaks very generally, providing ***guidance*** in determining which test and\or evaluation procedures to apply if results of evaluation (230.60) require testing. Requires that permitting authority provide guidance to applicants concerning applicability of various methods. Recommends general testing approaches for: • Chemical-biological interactive effect testing, including water column effects and effects on benthos. • Use of comparison sites • Physical tests, including for water circulation, salinity, etc.			on-site fill, or that it be clean fill from a commercial source. This would circumvent the need\requirement for testing, and would in fact pose a stricter requirement than Part 230. If equivalency with the actual text is sought, consider that basic requirement for evaluation to determine if discharge is carrier is contained in (b), with testing waived in (a) if (b) determines discharge is not carrier. If potential carrier, testing must be carried out per 230.61. Consider structuring as I have presented here, as opposed to how presented in federal text.

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		(2) Pertinent results from tests previously carried out on the material at the extraction site, or carried out on similar material for other permitted projects in the vicinity. Materials shall be considered similar if the sources of contamination, the physical configuration of the sites and the sediment composition of the materials are comparable, in light of water circulation and stratification, sediment accumulation and general sediment characteristics. Tests from other sites may be relied on only if no changes have occurred at the extraction sites to render the results irrelevant. (3) Any potential for significant introduction of persistent pesticides from land runoff or percolation; (4) Any records of spills or disposal of petroleum products or substances designated as hazardous under section 311 of the Clean Water Act (See 40 CFR part 116); (5) Information in Federal, State and local records indicating significant in production of pollutants from industries, municipalities, or other sources, including types and amounts of waste materials discharged along the potential routes of contaminants to the extraction site; and (6) Any possibility of the presence of substantial natural deposits of minerals or other substances which could be released to the aquatic environment in harmful quantities by man-induced discharge activities. (c) To reach the determinations in § 230.11 involving potential effects of the discharge on the characteristics of the disposal site, the narrative guidance in subparts C through F shall be used along with the general evaluation procedure in § 230.60 and, if necessary, the chemical and biological testing sequence in § 230.61. Where the discharge site is adjacent to the extraction site and subject to the same sources of contaminants, and materials at the				

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		two sites are substantially similar, the fact that the material to be discharged may be a carrier of contaminants is not likely to result in degradation of the disposal site. In such circumstances, when dissolved material and suspended particulates can be controlled to prevent carrying pollutants to less contaminated areas, testing will not be required. (d) Even if the § 230.60(b) evaluation (previous tests, the presence of polluting industries and information about their discharge or runoff into waters of the U.S., bio inventories, etc.) leads to the conclusion that there is a high probability that the material proposed for discharge is a carrier of contaminants, testing may not be necessary if constraints are available to reduce contamination to acceptable levels within the disposal site and to prevent contaminants from being transported beyond the boundaries of the disposal site, if such constraints are acceptable to the permitting authority and the Regional Administrator, and if the potential discharger is willing and able to implement such constraints. However, even if tests are not performed, the permitting authority must still determine the probable impact of the operation on the receiving aquatic ecosystem. Any decision not to test must be explained in the determinations made under § 230.11.				
PCA	230.61	**Chemical, biological and physical evaluation and testing.** NOTE: The Agency is today proposing revised testing guidelines. The evaluation and testing procedures in this section are based on the 1975 section 404(b)(1) interim final Guidelines and shall remain in effect until the revised testing guidelines are published as final regulations. (a) No single test or approach can be applied in all cases to evaluate the effects of proposed				WCA and PWWPP: Less stringent. See 230.60 response.

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		discharges of dredged or fill materials. This section provides some guidance in determining which test and/or evaluation procedures are appropriate in a given case. Interim guidance to applicants concerning the applicability of specific approaches or procedures will be furnished by the permitting authority. (b) Chemical-biological interactive effects. The principal concerns of discharge of dredged or fill material that contain contaminants are the potential effects on the water column and on communities of aquatic organisms. (1) Evaluation of chemical-biological interactive effects. Dredged or fill material may be excluded from the evaluation procedures specified in paragraphs (b) (2) and (3) of this section if it is determined, on the basis of the evaluation in § 230.60, that the likelihood of contamination by contaminants is acceptably low, unless the permitting authority, after evaluating and considering any comments received from the Regional Administrator, determines that these procedures are necessary. The Regional Administrator may require, on a case-by-case basis, testing approaches and procedures by stating what additional information is needed through further analyses and how the results of the analyses will be of value in evaluating potential environmental effects. If the General Evaluation indicates the presence of a sufficiently large number of chemicals to render impractical the identification of all contaminants by chemical testing, information may be obtained from bioassays in lieu of chemical tests. (2) Water column effects. (i) Sediments normally contain constituents that exist in various chemical forms and in various concentrations in several locations within the sediment. An elutriate test may be used to predict the effect on water quality due to				

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		release of contaminants from the sediment to the water column. However, in the case of fill material originating on land which may be a carrier of contaminants, a water leachate test is appropriate. (ii) Major constituents to be analyzed in the elutriate are those deemed critical by the permitting authority, after evaluating and considering any comments received from the Regional Administrator, and considering results of the evaluation in § 230.60. Elutriate concentrations should be compared to concentrations of the same constituents in water from the disposal site. Results should be evaluated in light of the volume and rate of the intended discharge, the type of discharge, the hydrodynamic regime at the disposal site, and other information relevant to the impact on water quality. The permitting authority should consider the mixing zone in evaluating water column effects. The permitting authority may specify bioassays when such procedures will be of value. (3) Effects on benthos. The permitting authority may use an appropriate benthic bioassay (including bioaccumulation tests) when such procedures will be of value in assessing ecological effects and in establishing discharge conditions. (c) Procedure for comparison of sites. (1) When an inventory of the total concentration of contaminants would be of value in comparing sediment at the dredging site with sediment at the disposal site, the permitting authority may require a sediment chemical analysis. Markedly different concentrations of contaminants between the excavation and disposal sites may aid in making an environmental assessment of the proposed disposal operation. Such differences should be interpreted in terms of the potential for harm as supported by any pertinent scientific literature.				

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		(2) When an analysis of biological community structure will be of value to assess the potential for adverse environmental impact at the proposed disposal site, a comparison of the biological characteristics between the excavation and disposal sites may be required by the permitting authority. Biological indicator species may be useful in evaluating the existing degree of stress at both sites. Sensitive species representing community components colonizing various substrate types within the sites should be identified as possible bioassay organisms if tests for toxicity are required. Community structure studies should be performed only when they will be of value in determining discharge conditions. This is particularly applicable to large quantities of dredged material known to contain adverse quantities of toxic materials. Community studies should include benthic organisms such as microbiota and harvestable shellfish and finfish. Abundance, diversity, and distribution should be documented and correlated with substrate type and other appropriate physical and chemical environmental characteristics. (d) Physical tests and evaluation. The effect of a discharge of dredged or fill material on physical substrate characteristics at the disposal site, as well as on the water circulation, fluctuation, salinity, and suspended particulates content there, is important in making factual determinations in § 230.11. Where information on such effects is not otherwise available to make these factual determinations, the permitting authority shall require appropriate physical tests and evaluations as are justified and deemed necessary. Such tests may include sieve tests, settleability tests, compaction tests, mixing zone and suspended particulate plume determinations, and site assessments of water flow, circulation, and salinity characteristics.				

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	Subpart H	**Actions to Minimize Adverse Effects**		8420.0520 Subparts 4, 6. MN Statutes 103G.222 Subp. 1	BWSR: WCA rules require applicants to minimize impacts to wetland for their project, with permit approval being contingent upon this being demonstrated to PA's (currently LGU) satisfaction.	WCA: Basic requirement for minimization is addressed under 230.10; however, as with other requirements, responsibility must be reassigned to the state.
BWSR, DNR	230.70	NOTE: There are many actions which can be undertaken in response to § 203.10(d) to minimize the adverse effects of discharges of dredged or fill material. Some of these, grouped by type of activity, are listed in this subpart. Additional criteria for compensation measures are provided in subpart J of this part. **§ 230.70 Actions concerning the location of the discharge.** The effects of the discharge can be minimized by the choice of the disposal site. Some of the ways to accomplish this are by: (a) Locating and confining the discharge to minimize smothering of organisms; (b) Designing the discharge to avoid a disruption of periodic water inundation patterns; (c) Selecting a disposal site that has been used previously for dredged material discharge; (d) Selecting a disposal site at which the substrate is composed of material similar to that being discharged, such as discharging sand on sand or mud on mud; (e) Selecting the disposal site, the discharge point, and the method of discharge to minimize the extent of any plume; (f) Designing the discharge of dredged or fill material to minimize or prevent the creation of standing bodies of water in areas of normally fluctuating water levels, and minimize or prevent the drainage of areas subject to such fluctuations. **§ 230.71 Actions concerning the material to be discharged.** The effects of a discharge can be minimized by treatment of, or limitations on the material itself, such as: (a) Disposal of	These sections recommend specific measures to minimize the adverse effects of a project. The requirement itself is in 230.10. The "compensation measures" referenced in the note and contained in Subpart J are for compensatory mitigation. - Location - Material to be discharged - Post-discharge control - Actions affecting method of dispersion - Technology - Actions affecting plant and animal populations - Action affecting human use	8420.0520 Subp. 4 and 6 8420.0522 Subp. 1	BWSR: 8420.0520 Subp. 4 and Subp. 6 require consideration of minimization across multiple parameters. Included in these parameters is minimization of impacts to wetland functions, which are further described in Subp. 1 (A-G). DNR: No provision exists.	WCA: Consistent with federal requirements. WCA rule addresses location (Subp. 4 (A, B, C, D, E), post-discharge control (Subp. 6), actions affecting method of dispersion (Subp. 4 (D, G)), Technology (Subp. 4 (G)), plant and animal populations (Subp. 4 D, E, F, G; 8420.0522 Subp. 1 (E)), and human use (Subp. 4 (E, G); 8420.0522 Subp. 1 (C, D, G)). PWWPP: Less stringent. Broad requirement for minimization exists, but no specific actions are recommended or prescribed. While implementation of the specific measures for minimization are not mandated (IE – alternative effective measures not described in this part could be implemented), their consideration is. Revise state regulation to

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		dredged material in such a manner that physiochemical conditions are maintained, and the potency and availability of pollutants are reduced. (b) Limiting the solid, liquid, and gaseous components of material to be discharged at a particular site; (c) Adding treatment substances to the discharge material; (d) Utilizing chemical flocculants to enhance the deposition of suspended particulates in diked disposal areas. **§ 230.72 Actions controlling the material after discharge.** The effects of the dredged or fill material after discharge may be controlled by: (a) Selecting discharge methods and disposal sites where the potential for erosion, slumping or leaching of materials into the surrounding aquatic ecosystem will be reduced. These sites or methods include, but are not limited to: (1) Using containment levees, sediment basins, and cover crops to reduce erosion; (2) Using lined containment areas to reduce leaching where leaching of chemical constituents from the discharged material is expected to be a problem; (b) Capping inplace contaminated material with clean material or selectively discharging the most contaminated material first to be capped with the remaining material; (c) Maintaining and containing discharged material properly to prevent point and nonpoint sources of pollution; (d) Timing the discharge to minimize impact, for instance during periods of unusual high water flows, wind, wave, and tidal actions. **§ 230.73 Actions affecting the method of dispersion.** The effects of a discharge can be minimized by the manner in which it is dispersed, such as: (a) Where environmentally desirable, distributing the dredged material widely in a thin layer at the disposal site to maintain natural substrate contours and elevation; (b) Orienting a dredged or fill material mound to minimize undesirable				include consideration of equivalent considerations.

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		obstruction to the water current or circulation pattern, and utilizing natural bottom contours to minimize the size of the mound; (c) Using silt screens or other appropriate methods to confine suspended particulate/turbidity to a small area where settling or removal can occur; (d) Making use of currents and circulation patterns to mix, disperse and dilute the discharge; (e) Minimizing water column turbidity by using a submerged diffuser system. A similar effect can be accomplished by submerging pipeline discharges or otherwise releasing materials near the bottom; (f) Selecting sites or managing discharges to confine and minimize the release of suspended particulates to give decreased turbidity levels and to maintain light penetration for organisms; (g) Setting limitations on the amount of material to be discharged per unit of time or volume of receiving water. **§ 230.74 Actions related to technology.** Discharge technology should be adapted to the needs of each site. In determining whether the discharge operation sufficiently minimizes adverse environmental impacts, the applicant should consider: (a) Using appropriate equipment or machinery, including protective devices, and the use of such equipment or machinery in activities related to the discharge of dredged or fill material; (b) Employing appropriate maintenance and operation on equipment or machinery, including adequate training, staffing, and working procedures; (c) Using machinery and techniques that are especially designed to reduce damage to wetlands. This may include machines equipped with devices that scatter rather than mound excavated materials, machines with specially designed wheels or tracks, and the use of mats under heavy machines to reduce wetland surface compaction and rutting; (d) Designing access roads and channel spanning structures using				

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		culverts, open channels, and diversions that will pass both low and high water flows, accommodate fluctuating water levels, and maintain circulation and faunal movement; (e) Employing appropriate machinery and methods of transport of the material for discharge. **§ 230.75 Actions affecting plant and animal populations.** Minimization of adverse effects on populations of plants and animals can be achieved by: (a) Avoiding changes in water current and circulation patterns which would interfere with the movement of animals; (b) Selecting sites or managing discharges to prevent or avoid creating habitat conducive to the development of undesirable predators or species which have a competitive edge ecologically over indigenous plants or animals; (c) Avoiding sites having unique habitat or other value, including habitat of threatened or endangered species; (d) Using planning and construction practices to institute habitat development and restoration to produce a new or modified environmental state of higher ecological value by displacement of some or all of the existing environmental characteristics. Habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat. Additional criteria for compensation measures are provided in subpart J of this part. Use techniques that have been demonstrated to be effective in circumstances similar to those under consideration wherever possible. Where proposed development and restoration techniques have not yet advanced to the pilot demonstration stage, initiate their use on a small scale to allow corrective action if unanticipated adverse impacts occur; (e) Timing discharge to avoid spawning or migration seasons and other biologically critical time periods; (f) Avoiding the destruction of remnant natural sites within				

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		areas already affected by development. [45 FR 85344, Dec. 24, 1980, as amended at 73 FR 19687, Apr. 10, 2008] **§ 230.76 Actions affecting human use.** Minimization of adverse effects on human use potential may be achieved by: (a) Selecting discharge sites and following discharge procedures to prevent or minimize any potential damage to the aesthetically pleasing features of the aquatic site (e.g. viewscapes), particularly with respect to water quality; (b) Selecting disposal sites which are not valuable as natural aquatic areas; (c) Timing the discharge to avoid the seasons or periods when human recreational activity associated with the aquatic site is most important; (d) Following discharge procedures which avoid or minimize the disturbance of aesthetic features of an aquatic site or ecosystem; (e) Selecting sites that will not be detrimental or increase incompatible human activity, or require the need for frequent dredge or fill maintenance activity in remote fish and wildlife areas; (f) Locating the disposal site outside of the vicinity of a public water supply intake. **§ 230.77 Other actions**. (a) In the case of fills, controlling runoff and other discharges from activities to be conducted on the fill; (b) In the case of dams, designing water releases to accommodate the needs of fish and wildlife; (c) In dredging projects funded by Federal agencies other than the Corps of Engineers, maintain desired water quality of the return discharge through agreement with the Federal funding authority on scientifically defensible pollutant concentration levels in addition to any applicable water quality standards; (d) When a significant ecological change in the aquatic environment is proposed by the discharge of dredged or fill material, the permitting authority should consider the				

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		ecosystem that will be lost as well as the environmental benefits of the new system.				
	Subpart I	**Planning to shorten permit processing time**				
DNR, BWSR (Optional only if we intend to pursue?)	230.80	Advanced identification of disposal areas (a) Consistent with these Guidelines, EPA and the permitting authority, on their own initiative or at the request of any other party and after consultation with any affected State that is not the permitting authority, may identify sites which will be considered as: (1) Possible future disposal sites, including existing disposal sites and nonsensitive areas; or (2) Areas generally unsuitable for disposal site specification; (b) The identification of any area as a possible future disposal site should not be deemed to constitute a permit for the discharge of dredged or fill material within such area or a specification of a disposal site. The identification of areas that generally will not be available for disposal site specification should not be deemed as prohibiting applications for permits to discharge dredged or fill material in such areas. Either type of identification constitutes information to facilitate individual or General permit application and processing. (c) An appropriate public notice of the proposed identification of such areas shall be issued; (d) To provide the basis for advanced identification of disposal areas, and areas unsuitable for disposal, EPA and the permitting authority shall consider the likelihood that use of the area in question for dredged or fill material disposal will comply with these Guidelines. To facilitate this	Advanced identification of suitable and unsuitable disposal sites to expedite permitting. Subject to public notice. Advanced is not required, but if used, but meet these requirements.	MN Rules 8420.0830. MN Statutes 103G.2243	WCA rules allow local government units to develop and implement Local Comprehensive Wetland Protection and Management Plans which are used to maintain and improve the quality, quantity, and biological diversity of wetland resources within watersheds through the prioritization of existing wetlands and the strategic selection of replacement sites. The purpose of developing a plan is to provide a watershed and ecosystem-based framework to make wetland impact and replacement decisions that meet state standards and locally identified goals and support the sustainability or improvement of wetland resources in watersheds while providing local flexibility as allowed.	Note “may…” in federal text. WCA: Equally stringent PWWPP: N/A No provisions exist; none needed.

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		analysis, EPA and the permitting authority should review available water resources management data including data available from the public, other Federal and State agencies, and information from approved Coastal Zone Management programs and River Basin Plans; (e) The permitting authority should maintain a public record of the identified areas and a written statement of the basis for identification.				
	Subpart J	**Compensatory mitigation for losses of aquatic resources**				
BWSR, DNR	230.91(a-b)	Purpose and general considerations (a) *Purpose*. (1) The purpose of this subpart is to establish standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the United States authorized through the issuance of permits by the U.S. Army Corps of Engineers (Corps) pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344). This subpart implements section 314(b) of the 2004 National Defense Authorization Act (Pub. L. 108–136), which directs that the standards and criteria shall, to the maximum extent practicable, maximize available credits and opportunities for mitigation, provide for regional variations in wetland conditions, functions, and values, and apply equivalent standards and criteria to each type of compensatory mitigation. This subpart is intended to further clarify mitigation requirements established under the Corps and EPA regulations at 33 CFR part 320 and this part, respectively. (2) This subpart has been jointly developed by the Secretary of the Army, acting through the	Note: Inquire w\EPA regarding that this Subpart repeatedly addresses the District Engineer specifically, as opposed to "permitting authority". 230.91 provides general overarching information concerning mitigation, and reiterates that mitigation may be required to ensure that a permit complies with the Guidelines. Requires consideration of regional variations in wetland conditions, functions, and values. Requires the application of equivalent standards and criteria to all types of compensatory mitigation (project-specific, banking, ILF). Substitutes this part for previously issued guidance re: mitigation (see actual text for list).	Rule 8420.0522, 8420.0528, 8420.0830 Statutes 103G.2242, 103G.222, 103A.201, 103G.2243	WCA rules include specific standards and criteria for wetland replacement. These standards provide for consideration of regional variations in wetland conditions and functions and values. Broadly, the location of replacement is governed by bank service areas (BSAs), major/minor watersheds, pre-settlement wetland areas, and land use (agricultural vs nonagricultural lands). More specifically, WCA rules allow consideration of existing ecological conditions of regional areas. This includes identification of degraded and high-quality wetlands, watershed-scale resource needs, functions and values, etc. For example, 8420.0522 Subp. 4 C. specifying replacement ratios references 8420.0830 Subp. 5 which includes various ecologically-based characteristics that are considered on a regional, watershed-scale basis. 8420.0522 Subp. 5 specifies various ecological suitability and sustainability replacement requirements that involve consideration of regional conditions. Replacement standards in WCA rules apply to all forms of replacement, although there are variations in standard replacement ratios for project-specific versus banking replacement.	WCA: Equally stringent. WCA rules recognize all of the mentioned forms of mitigation (replacement) and utilize equivalent standards for each type. PWWPP: Less stringent. The PWWPP rules for impacts to lakes, rivers, and streams are limited with respect to mitigation. If the commissioner determines that a major change in public waters is justified and can be authorized the permit must include provisions to compensate for the detrimental aspects of the change. The compensatory mitigation options

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		Chief of Engineers, and the Administrator of the Environmental Protection Agency. From time to time guidance on interpreting and implementing this subpart may be prepared jointly by EPA and the Corps at the national or regional level. No modifications to the basic application, meaning, or intent of this subpart will be made without further joint rulemaking by the Secretary of the Army, acting through the Chief of Engineers and the Administrator of the Environmental Protection Agency, pursuant to 40 CFR Ch. I (7–1–11 Edition) the Administrative Procedure Act (5 U.S.C. 551 et seq.). (b) Applicability. This subpart does not alter the circumstances under which compensatory mitigation is required or the definition of ‘‘waters of the United States,’’ which is provided at § 230.3(s). Use of resources as compensatory mitigation that are not otherwise subject to regulation under section 404 of the Clean Water Act does not in and of itself make them subject to such regulation.				available in such cases include: A. restoring degraded or impacted public waters having equal or greater public value; B. creating or restoring additional replacement water areas having equal or greater public value; or C. any other measures approved by the commissioner that compensates for the detrimental aspects of the change. There is no additional information addressing mitigation in rule or statute.
BWSR, DNR	230.91(c)(1)	(1) Nothing in this section affects the requirement that all DA permits subject to section 404 of the Clean Water Act comply with applicable provisions of this part.		N/A	NA	NA
BWSR, DNR	230.91(c)(2)	(2) Pursuant to these requirements, the district engineer will issue an individual section 404 permit only upon a determination that the proposed discharge complies with applicable provisions of 40 CFR part 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States. Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. Compensatory mitigation for unavoidable		BWSR: Rule 8420.0520 Statute 103G.222	BWSR: Minnesota rules require applicants to first avoid and minimize impacts to wetlands before replacement (compensatory mitigation) can be considered. These “sequencing” provisions of the rule require applicants to describe at least two alternatives that avoid wetland impacts or for projects that repair or rehabilitate existing infrastructure, only one alternative is required. The alternatives may include consideration of alternate sites or alternative project configurations on the proposed site. The alternatives must be “good faith efforts”. Instead of “practicable”, WCA rules evaluate alternatives as being feasible	WCA: Equally stringent. See response provided for 40 CFR 230.10(a). PWWPP: Less stringent. See response provided for 40 CFR 230.10(a).

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		impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines.			and prudent or not feasible and prudent. The feasible and prudent standard is defined as: capable of being done from an engineering point of view, is in accordance with accepted engineering standards and practices; is consistent with reasonable requirements of the public health, safety, and welfare; is an environmentally preferable alternative based on a review of social, economic, and environmental impacts; and it would create no truly unusual problems. WCA rules include more specific considerations of alternatives such as site suitability for the project purpose, reasonable modifications of scope/size/configuration, physical as well as economic and demographic requirements for the project, and the public value of affected wetlands. WCA rules specifically address the issue of wetland dependency. A project is wetland dependent if wetland features or functions are essential to fulfill the basic purpose of the project. A wetland present at the site of a proposed project does not make that project wetland dependent. Wetland dependent projects are exempt from the alternatives analysis.	
BWSR, DNR	230.91(c)(3)	(3) Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines. During the 404(b)(1) Guidelines compliance analysis, the district engineer may determine that a DA permit for the proposed activity cannot be issued because of the lack of appropriate and practicable compensatory mitigation options.		BWSR: MN Rule 8420.0500 Subp. 1 & 2, 8420.0520 Subp. 1 MN Statutes 103G.222	BWSR: WCA rules specifically require the replacement of lost public value from unavoidable impacts to wetlands. Applications with inadequate replacement of lost function and value must be denied.	WCA: Equally stringent PWWPP: Equally stringent. If the commissioner determines that a major change in public waters is justified and can be authorized, the permit must include provisions to compensate for the detrimental aspects of the change

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BWSR, DNR	230.91(d)	(d)Accounting for regional variations. Where appropriate, district engineers shall account for regional characteristics of aquatic resource types, functions and services when determining performance standards and monitoring requirements for compensatory mitigation projects.		BWSR: No specific provision	WCA: The overall WCA implementation structure of having individual Local Government Units (LGUs) and Technical Evaluation Panels (TEPs) determine performance standards and monitoring requirements for replacement projects facilitates the consideration of regional variations. These individual, local evaluations take into consideration resource types and functions and services at a local/regional level. Further, the geographic scope of the Section 404 permitting program is significantly greater than just the State of Minnesota, so this provision is recognizing the differences in aquatic resources across the entire and not just across Minnesota. Regardless, WCA recognizes and allows for regional variations in aquatic resource types.	WCA: Equally stringent PWWPP: Less stringent. The PWWPP has no standards in statute or rule regarding mitigation projects.
BWSR, DNR	230.91(e)	(e)Relationship to other guidance documents. (1) This subpart applies instead of the ''Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks,'' which was issued on November 28, 1995, the ''Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act,'' which was issued on November 7, 2000, and Regulatory Guidance Letter 02–02, ''Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899'' which was issued on December 24, 2002. These guidance documents are no longer to be used as compensatory mitigation policy in the Corps Regulatory Program. (2) In addition, this subpart also ap-plies instead of the provisions relating to the amount, type, and location of compensatory mitigation projects, including the use of preservation, in the February 6, 1990, Memorandum of Agreement (MOA) between the		N/A	N/A	

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		Department of the Army and the Environmental Protection Agency on the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines. All other provisions of this MOA remain in effect.				
BWSR, DNR	230.92 Definitions	Definitions For the purposes of this subpart, the following terms are defined: *Adaptive management* means the development of a management strategy that anticipates likely challenges associated with compensatory mitigation projects and provides for the implementation of actions to address those challenges, as well as unforeseen changes to those projects. It requires consideration of the risk, uncertainty, and dynamic nature of compensatory mitigation projects and guides modification of those projects to optimize performance. It includes the selection of appropriate measures that will ensure that the aquatic resource functions are provided and involves analysis of monitoring results to identify potential problems of a compensatory mitigation project and the identification and implementation of measures to rectify those problems. *Advance credits* means any credits of an approved inlieu fee program that are available for sale prior to being fulfilled in accordance with an approved mitigation project plan. Advance credit sales require an approved in-lieu fee program instrument that meets all applicable requirements including a specific allocation of advance credits, by service area where applicable. The instrument must also contain a schedule for fulfillment of advance credit sales. *Buffer* means an upland, wetland, and/or riparian area that protects and/ or enhances aquatic resource functions associated with wetlands, rivers, streams, lakes, marine, and estuarine systems from disturbances associated	Definitions	N/A	N/A	

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		with adjacent land uses. *Compensatory mitigation* means the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved. *Compensatory mitigation project* means compensatory mitigation implemented by the permittee as a requirement of a DA permit (i.e., permittee-responsible mitigation), or by a mitigation bank or an in-lieu fee program. *Condition* means the relative ability of an aquatic resource to support and maintain a community of organisms having a species composition, diversity, and functional organization comparable to reference aquatic resources in the region. *Credit* means a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the accrual or attainment of aquatic functions at a compensatory mitigation site. The measure of aquatic functions is based on the resources restored, established, enhanced, or preserved. *DA* means Department of the Army. *Days* means calendar days. *Debit* means a unit of measure (e.g., a functional or areal measure or other suitable metric) representing the loss of aquatic functions at an impact or project site. The measure of aquatic functions is based on the resources impacted by the authorized activity. *Enhancement* means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic				

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		resource function(s). Enhancement does not result in a gain in aquatic resource area. *Establishment* (creation) means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area and functions. *Fulfillment of advance credit sales of an in-lieu fee program* means application of credits released in accordance with a credit release schedule in an approved mitigation project plan to satisfy the mitigation requirements represented by the advance credits. Only after any advance credit sales within a service area have been fulfilled through the application of released credits from an in-lieu fee project (in accordance with the credit release schedule for an approved mitigation project plan), may additional released credits from that project be sold or transferred to permittees. When advance credits are fulfilled, an equal number of new advance credits is restored to the program sponsor for sale or transfer to permit applicants. *Functional capacity* means the degree to which an area of aquatic resource performs a specific function. *Functions* means the physical, chemical, and biological processes that occur in ecosystems. *Impact* means adverse effect. *In-kind* means a resource of a similar structural and functional type to the impacted resource. *In-lieu fee program* means a program involving the restoration, establishment, enhancement, and/or preservation of aquatic resources through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for DA permits. Similar to a mitigation bank, an in-lieu fee program sells compensatory mitigation credits				

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		to permittees whose obligation to provide compensatory mitigation is then transferred to the in-lieu program sponsor. However, the rules governing the operation and use of in-lieu fee pro grams are somewhat different from the rules governing operation and use of mitigation banks. The operation and use of an in-lieu fee program are governed by an in-lieu fee program instrument. *In-lieu fee program instrument* means the legal document for the establishment, operation, and use of an in-lieu fee program. *Instrument* means mitigation banking instrument or in-lieu fee program instrument. *Interagency Review Team* (IRT) means an interagency group of federal, tribal, state, and/or local regulatory and resource agency representatives that re views documentation for, and advises the district engineer on, the establishment and management of a mitigation bank or an in-lieu fee program. *Mitigation bank* means a site, or suite of sites, where resources (e.g., wet lands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by DA permits. In general, a mitigation bank sells compensatory mitigation credits to permittees whose obligation to provide compensatory mitigation is then transferred to the mitigation bank sponsor. The operation and use of a mitigation bank are governed by a mitigation banking instrument. *Mitigation banking instrument* means the legal document for the establishment, operation, and use of a mitigation bank. *Off-site* means an area that is neither located on the same parcel of land as the impact site, nor on a parcel of land contiguous to the parcel containing the impact site. *On-site* means an area located on the same parcel of land as the impact site, or on a parcel of land contiguous to the impact site.				

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		Out-of-kind means a resource of a different structural and functional type from the impacted resource. *Performance standards* are observable or measurable physical (including hydrological), chemical and/or biological attributes that are used to determine if a compensatory mitigation project meets its objectives. *Permittee-responsible mitigation* means an aquatic resource restoration, establishment, enhancement, and/or preservation activity undertaken by the permittee (or an authorized agent or contractor) to provide compensatory mitigation for which the permittee retains full responsibility. *Preservation* means the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions. *Re-establishment* means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions. *Reference aquatic resources* are a set of aquatic resources that represent the full range of variability exhibited by a regional class of aquatic resources as a result of natural processes and anthropogenic disturbances. *Rehabilitation* means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a				

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		gain in aquatic resource function, but does not result in a gain in aquatic resource area. *Release of credits* means a determination by the district engineer, in consultation with the IRT, that credits associated with an approved mitigation plan are available for sale or transfer, or in the case of an in-lieu fee program, for fulfillment of advance credit sales. A proportion of projected credits for a specific mitigation bank or in-lieu fee project may be released upon approval of the mitigation plan, with additional credits released as milestones specified in the credit release schedule are achieved. *Restoration* means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: reestablishment and rehabilitation. *Riparian areas* are lands adjacent to streams, rivers, lakes, and estuarine-marine shorelines. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. *Service area* means the geographic area within which impacts can be mitigated at a specific mitigation bank or an in-lieu fee program, as designated in its instrument. *Services* mean the benefits that human populations receive from functions that occur in ecosystems. *Sponsor* means any public or private entity responsible for establishing, and in most circumstances, operating a mitigation bank or in-lieu fee program. *Standard permit* means a standard, individual permit issued under the authority of section 404 of the Clean Water Act. *Temporal loss* is the time lag between the loss of aquatic resource functions caused by the permitted impacts and the replacement of				

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		aquatic resource functions at the compensatory mitigation site. Higher compensation ratios may be required to compensate for temporal loss. When the compensatory mitigation project is initiated prior to, or concurrent with, the permitted impacts, the district engineer may determine that compensation for temporal loss is not necessary, unless the resource has a long development time. *Watershed* means a land area that drains to a common waterway, such as a stream, lake, estuary, wetland, or ultimately the ocean. *Watershed approach* means an analytical process for making compensatory mitigation decisions that support the sustainability or improvement of aquatic resources in a watershed. It involves consideration of watershed needs, and how locations and types of compensatory mitigation projects address those needs. A landscape perspective is used to identify the types and locations of compensatory mitigation projects that will benefit the watershed and offset losses of aquatic resource functions and services caused by activities authorized by DA permits. The watershed approach may involve consideration of landscape scale, historic and potential aquatic resource conditions, past and projected aquatic resource impacts in the watershed, and terrestrial connections between aquatic resources when determining compensatory mitigation requirements for DA permits. *Watershed plan* means a plan developed by federal, tribal, state, and/or local government agencies or appropriate non-governmental organizations, in consultation with relevant stakeholders, for the specific goal of aquatic resource restoration, establishment, enhancement, and preservation. A watershed plan addresses aquatic resource conditions in the watershed, multiple stakeholder interests, and land uses. Watershed plans may also identify priority sites for aquatic resource				

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		restoration and protection. Examples of watershed plans include special area management plans, advance identification programs, and wetland management plans.				
	230.93	**General compensatory mitigation requirements**				
BWSR, DNR	230.93(a)(1)	(a)*General considerations.* (1) The fundamental objective of compensatory mitigation is to offset environmental losses resulting from unavoidable impacts to waters of the United States authorized by DA permits. The district engineer must determine the compensatory mitigation to be required in a DA permit, based on what is practicable and capable of compensating for the aquatic resource functions that will be lost as a result of the permitted activity. When evaluating compensatory mitigation options, the district engineer will consider what would be environmentally preferable. In making this determination, the district engineer must assess the likelihood for ecological success and sustainability, the location of the compensation site relative to the impact site and their significance within the watershed, and the costs of the compensatory mitigation project. In many cases, the environmentally preferable compensatory mitigation may be provided through mitigation banks or in-lieu fee programs because they usually involve consolidating compensatory mitigation projects where ecologically appropriate, consolidating resources, providing financial planning and scientific expertise (which often is not practical for permittee-responsible compensatory mitigation projects), reducing temporal losses of functions, and reducing uncertainty over project success. Compensatory mitigation requirements must	Mitigation requirements will be based on what is practicable and capable of compensation, while being environmentally preferable. Requirements must be commensurate with amount and type of impact. Acceptable methods are restoration, enhancement and establishment, with preservation being acceptable only in limited circumstances. Projects may be sited on private or public (with condition) lands.	BWSR: MN Rule 8420.0330 Subp. 3B (11) (d), 8420.0500, 8420.0522, 8420.0526 MN Statutes 103G.2242, 103G.222, 103A.201	BWSR: WCA rules regarding wetland replacement establish the requirement than an applicant must replace lost public value based on wetland functions for unavoidable wetland impacts. WCA rules include specific provisions on determining replacement requirements based on the kind of replacement (bank vs project-specific), location of replacement relative to impacts, degree of impact (partial drainage vs complete drainage), and type of replacement relative to type of impact (plant community or HGM class). WCA rules specify preference of restoration over creation for replacement and require that all replacement meet specific ecological suitability and sustainability standards as well as design standards and other considerations. Replacement ratios incentivize the use of wetland bank credits or “in-advance” replacement over project-specific (i.e. permittee-responsible) replacement. Although the terminology differs, WCA rules specifically identify acceptable wetland replacement options that include restoration, enhancement, establishment, and preservation. Replacement involving preservation requires the concurrence of the technical evaluation panel based on their analysis and consideration of specific eligibility criteria. WCA rules account for differing gains in wetland function by establishing wetland credit percentages based on the type of replacement	WCA: Equally stringent. The objective of replacement under WCA is identical to that identified under the Guidelines, to offset unavoidable losses of wetland functions and values from authorized impacts. Although there may be some minor differences in terminology and approach, overall the Guidelines and WCA are nearly identical in their governing principles and factors that need to be considered to maximize the benefits of mitigation projects. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		be commensurate with the amount and type of impact that is associated with a particular DA permit. Permit applicants are responsible for proposing an appropriate compensatory mitigation option to offset unavoidable impacts. (2) Compensatory mitigation may be performed using the methods of restoration, enhancement, establishment, and in certain circumstances preservation. Restoration should generally be the first option considered because the likelihood of success is greater and the impacts to potentially ecologically important uplands are reduced compared to establishment, and the potential gains in terms of aquatic resource functions are greater, compared to enhancement and preservation. (3) Compensatory mitigation projects may be sited on public or private lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. All compensatory mitigation projects must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.			action. For example, restoration of a completely drained/filled wetland is eligible for up to 100% credit for the area restored, whereas preservation of an existing high quality wetland under threat is eligible for up to 12.5% credit for the area preserved. WCA rules allow for siting of replacement on both public and private lands. WCA rules prohibit replacement from being restored or created with financial assistance from public conservation programs or restored or created for other unrelated regulatory purposes.	
BWSR, DNR	230.93(b)	*(b) Type and location of compensatory mitigation.* (1) When considering options for successfully providing the required compensatory mitigation, the district engineer shall consider the type and location options in the order presented in paragraphs (b)(2) through (b)(6)	DE (PA?) shall consider mitigation type and location options in the following order (see text for additional requirements\restrictions for each): 1. Mitigation Bank Credits for impacts w\in service area 2. In-Lieu Fee for impacts w\in service area	MN Rule 8420.0522 Subp. 4 MN Statute 103G.222 Subd. 3	WCA rules incentivize in-watershed replacement, the use of in-advance replacement (bank credits and in-advance project-specific replacement), and in-kind replacement through minimum replacement ratio requirements. Additionally, WCA rules require the following priority order for siting wetland replacement:	WCA: Less stringent. WCA does not have a firm hierarchy for the type of mitigation (bank credits, in-lieu fee credits, or permittee-responsible) although the factors to

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		of this section. In general, the required compensatory mitigation should be located within the same watershed as the impact site, and should be located where it is most likely to successfully replace lost functions and services, taking into account such watershed scale features as aquatic habitat diversity, habitat connectivity, relationships to hydrologic sources (including the availability of water rights), trends in land use, ecological benefits, and compatibility with adjacent land uses. When compensating for impacts to marine resources, the location of the compensatory mitigation site should be chosen to replace lost functions and services within the same marine ecological system (e.g., reef complex, littoral drift cell). Compensation for impacts to aquatic resources in coastal watersheds (watersheds that include a tidal water body) should also be located in a coastal watershed where practicable. Compensatory mitigation projects should not be located where they will increase risks to aviation by attracting wildlife to areas where aircraft-wildlife strikes may occur (e.g., near airports). *(2) Mitigation bank credits.* When permitted impacts are located within the service area of an approved mitigation bank, and the bank has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Since an approved instrument (including an approved mitigation plan and appropriate real estate and financial assurances) for a mitigation bank is required to be in place before its credits can begin to be used to compensate for authorized impacts, use of a mitigation bank can help reduce risk and uncertainty, as well as temporal loss of resource functions and services. Mitigation bank credits are not released for debiting until specific milestones associated with the mitigation bank site's	3. Permittee-Responsible under watershed approach 4. Permittee-responsible mitigation through on-site and in-kind mitigation 5. Permittee-responsible mitigation through off-site and/or out-of-kind mitigation "In general," should be located in same watershed.		(1) on site or in the same minor watershed as the impacted wetland; (2) in the same watershed as the impacted wetland; (3) in the same county or wetland bank service area as the impacted wetland; and (4) in another wetland bank service area;	be considered when selecting the required mitigation are nearly identical. Also, WCA does not specifically mention in-lieu fee program credits when discussing replacement ratios or siting of mitigation. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		protection and development are achieved, thus use of mitigation bank credits can also help reduce risk that mitigation will not be fully successful. Mitigation banks typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible mitigation. Also, development of a mitigation bank requires site identification in advance, project-specific planning, and significant investment of financial resources that is often not practicable for many in-lieu fee programs. For these reasons, the district engineer should give preference to the use of mitigation bank credits when these considerations are applicable. However, these same considerations may also be used to override this preference, where appropriate, as, for example, where an in-lieu fee program has released credits available from a specific approved in-lieu fee project, or a permittee-responsible project will restore an outstanding resource based on rigorous scientific and technical analysis. *(3) In-lieu fee program credits.* Where permitted impacts are located within the service area of an approved in-lieu fee program, and the sponsor has the appropriate number and resource type of credits available, the permittee's compensatory mitigation requirements may be met by securing those credits from the sponsor. Where permitted impacts are not located in the service area of an approved mitigation bank, or the approved mitigation bank does not have the appropriate number and resource type of credits available to offset those impacts, in-lieu fee mitigation, if available, is generally preferable to permittee-responsible mitigation. In-lieu fee projects typically involve larger, more ecologically valuable parcels, and more rigorous scientific and technical analysis, planning and implementation than permittee-responsible				

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		mitigation. They also devote significant resources to identifying and addressing high-priority resource needs on a watershed scale, as reflected in their compensation planning framework. For these reasons, the district engineer should give preference to in-lieu fee program credits over permittee-responsible mitigation, where these considerations are applicable. However, as with the preference for mitigation bank credits, these same considerations may be used to override this preference where appropriate. Additionally, in cases where permittee-responsible mitigation is likely to successfully meet performance standards before advance credits secured from an in-lieu fee program are fulfilled, the district engineer should also give consideration to this factor in deciding between in-lieu fee mitigation and permittee-responsible mitigation. (4) *Permittee-responsible mitigation under a watershed approach.* Where permitted impacts are not in the service area of an approved mitigation bank or in-lieu fee program that has the appropriate number and resource type of credits available, permittee-responsible mitigation is the only option. Where practicable and likely to be successful and sustainable, the resource type and location for the required permittee-responsible compensatory mitigation should be determined using the principles of a watershed approach as outlined in paragraph (c) of this section. *(5) Permittee-responsible mitigation through on-site and in-kind mitigation.* In cases where a watershed approach is not practicable, the district engineer should consider opportunities to offset anticipated aquatic resource impacts by requiring on-site and in-kind compensatory mitigation. The district engineer must also consider the practicability of on-site compensatory mitigation and its compatibility with the proposed project.				

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		(6) *Permittee-responsible mitigation through off-site and/or out-of-kind mitigation.* If, after considering opportunities for on-site, in-kind compensatory mitigation as provided in paragraph (b)(5) of this section, the district engineer determines that these compensatory mitigation opportunities are not practicable, are unlikely to compensate for the permitted impacts, or will be incompatible with the proposed project, and an alternative, practicable off-site and/or out-of-kind mitigation opportunity is identified that has a greater likelihood of offsetting the permitted impacts or is environmentally preferable to on-site or in-kind mitigation, the district engineer should require that this alternative compensatory mitigation be provided.				
BWSR, DNR	230.93(c)(1) – (4)	(c) *Watershed approach to compensatory mitigation.* (1) The district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practicable. Where a watershed plan is available, the district engineer will determine whether the plan is appropriate for use in the watershed approach for compensatory mitigation. In cases where the district engineer determines that an appropriate watershed plan is available, the watershed approach should be based on that plan. Where no such plan is available, the watershed approach should be based on information provided by the project sponsor or available from other sources. The ultimate goal of a watershed approach is to maintain and improve the quality and quantity of aquatic resources within watersheds through strategic selection of compensatory mitigation sites. (2) *Considerations.* (i) A watershed approach to compensatory mitigation considers the importance of	DE (PA?) must implement watershed approach in establishing mitigation requirements for permits "to the extent appropriate and practicable". The section continues by providing a number of considerations and informational needs.	BWSR: MN Rules 8420.0522, 0528, 0830 MN Statutes 103G.2243	BWSR: WCA rules include design standards and ecological consistency and long-term sustainability considerations for all wetland replacement. Watershed approach concepts are incorporated into these design standards and considerations. WCA rules allow for the creation of local Comprehensive Wetland Protection and Management Plans (CWPMPs). The goal of a CWPMP is to maintain and improve the quality, quantity, and biological diversity of wetland resources within watersheds through the prioritization of existing wetlands and the strategic selection of replacement sites. The purpose of developing a plan is to provide a watershed and ecosystem-based framework to make wetland impact and replacement decisions that meet state standards and locally identified goals and support the sustainability or improvement of wetland resources in watersheds while providing local flexibility. CWPMPs must include the establishment of watershed goals based on an analysis of the existing ecological conditions of the plan area and the development of corresponding goals	WCA: Equally stringent. WCA has a codified replacement siting approach that is based on watersheds and emphasizes replacing lost functions and values in the watershed where the impact occurs. Other parts of WCA rule emphasize the importance of the watershed approach and recognize the value of watershed plans when identifying locations for replacement and maximizing functional gains. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or

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		landscape position and resource type of compensatory mitigation projects for the sustainability of aquatic resource functions within the watershed. Such an approach considers how the types and locations of compensatory mitigation projects will provide the desired aquatic resource functions, and will continue to function over time in a changing landscape. It also considers the habitat requirements of important species, habitat loss or conversion trends, sources of watershed impairment, and current development trends, as well as the requirements of other regulatory and non-regulatory programs that affect the watershed, such as storm water management or habitat conservation programs. It includes the protection and maintenance of terrestrial resources, such as non-wetland riparian areas and uplands, when those resources contribute to or improve the overall ecological functioning of aquatic resources in the watershed. Compensatory mitigation requirements determined through the watershed approach should not focus exclusively on specific functions (e.g., water quality or habitat for certain species), but should provide, where practicable, the suite of functions typically provided by the affected aquatic resource. (ii) Locational factors (e.g., hydrology, surrounding land use) are important to the success of compensatory mitigation for impacted habitat functions and may lead to siting of such mitigation away from the project area. However, consideration should also be given to functions and services (e.g., water quality, flood control, shoreline protection) that will likely need to be addressed at or near the areas impacted by the permitted impacts. (iii) A watershed approach may include on-site compensatory mitigation, off-site compensatory mitigation (including mitigation banks or in-lieu fee programs), or a			for maintaining and improving those conditions. The ecological condition of the plan area should be based on inventories of historic and existing wetland resources, including identification of degraded wetlands, existing high-quality wetlands, and immediate and long-term resource needs within the plan area.	rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		combination of on-site and off-site compensatory mitigation. (iv) A watershed approach to compensatory mitigation should include, to the extent practicable, inventories of historic and existing aquatic resources, including identification of degraded aquatic resources, and identification of immediate and long-term aquatic resource needs within watersheds that can be met through permittee-responsible mitigation projects, mitigation banks, or in-lieu fee programs. Planning efforts should identify and prioritize aquatic resource restoration, establishment, and enhancement activities, and preservation of existing aquatic resources that are important for maintaining or improving ecological functions of the watershed. The identification and prioritization of resource needs should be as specific as possible, to enhance the usefulness of the approach in determining compensatory mitigation requirements. (v) A watershed approach is not appropriate in areas where watershed boundaries do not exist, such as marine areas. In such cases, an appropriate spatial scale should be used to replace lost functions and services within the same ecological system (e.g., reef complex, littoral drift cell). (3) *Information Needs.* (i) In the absence of a watershed plan determined by the district engineer under paragraph (c)(1) of this section to be appropriate for use in the watershed approach, the district engineer will use a watershed approach based on analysis of information regarding watershed conditions and needs, including potential sites for aquatic resource restoration activities and priorities for aquatic resource restoration and preservation. Such information includes: Current trends in habitat loss or conversion; cumulative impacts of past development activities, current development trends, the presence and needs of sensitive species; site				

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		conditions that favor or hinder the success of compensatory mitigation projects; and chronic environmental problems such as flooding or poor water quality. (ii) This information may be available from sources such as wetland maps; soil surveys; U.S. Geological Survey topographic and hydrologic maps; aerial photographs; information on rare, endangered and threatened species and critical habitat; local ecological reports or studies; and other information sources that could be used to identify locations for suitable compensatory mitigation projects in the watershed. (iii)The level of information and analysis needed to support a watershed approach must be commensurate with the scope and scale of the proposed impacts requiring a DA permit, as well as the functions lost as a result of those impacts. (4) *Watershed Scale.* The size of watershed addressed using a watershed approach should not be larger than is appropriate to ensure that the aquatic resources provided through compensation activities will effectively compensate for adverse environmental impacts resulting from activities authorized by DA permits. The district engineer should consider relevant environmental factors and appropriate locally developed standards and criteria when determining the appropriate watershed scale in guiding compensation activities.				
BWSR, DNR	230.93(d)(1) – (3)	*Site selection.* (1) The compensatory mitigation project site must be ecologically suitable for providing the desired aquatic resource functions. In determining the ecological suitability of the compensatory mitigation project site, the district engineer must consider, to the extent practicable, the following factors:	Mitigation must occur on ecologically suitable site. Suitability must be determined through practicable consideration of items i-vi. DE (PA?) may require on-site, off-site, or combination of both. In-kind mitigation is preferred unless DE determines out-of-kind will better serve needs of watershed. Basis must be documented. In-kind	BWSR: MN Rules 8420.0522, 0528 MN Statutes 103G.2242, 103G.222	BWSR: WCA rules incentivize in-watershed replacement, the use of in-advance replacement (bank credits and in-advance project-specific replacement), and in-kind replacement through minimum replacement ratio requirements. Additionally, WCA rules require the following priority order for siting wetland replacement:	WCA: Equally stringent. WCA rules recognize the public value of wetlands (based on the functions of wetlands including water quality, flood water and storm attenuation, public recreation and education, commercial

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		(i) Hydrological conditions, soil characteristics, and other physical and chemical characteristics; (ii)Watershed-scale features, such as aquatic habitat diversity, habitat connectivity, and other landscape scale functions; (iii) The size and location of the compensatory mitigation site relative to hydrologic sources (including the availability of water rights) and other ecological features; (iv) Compatibility with adjacent land uses and watershed management plans; (v) Reasonably foreseeable effects the compensatory mitigation project will have on ecologically important aquatic or terrestrial resources (e.g., shallow sub-tidal habitat, mature forests), cultural sites, or habitat for federally- or state-listed threatened and endangered species; and (vi) Other relevant factors including, but not limited to, development trends, anticipated land use changes, habitat status and trends, the relative locations of the impact and mitigation sites in the stream network, local or regional goals for the restoration or protection of particular habitat types or functions (e.g., re-establishment of habitat corridors or habitat for species of concern), water quality goals, flood- plain management goals, and the rel- ative potential for chemical contami- nation of the aquatic resources. (2) District engineers may require on- site, off-site, or a combination of on- site and off-site compensatory mitigation to replace permitted losses of aquatic resource functions and serv-ices. (3) Applicants should propose compensation sites adjacent to existing aquatic resources or where aquatic re- sources previously existed.	restoration or preservation is should be used for difficult-to-replace wetland types.		(1) on site or in the same minor watershed as the impacted wetland; (2) in the same watershed as the impacted wetland; (3) in the same county or wetland bank service area as the impacted wetland; and (4) in another wetland bank service area. WCA rules include design standards and ecological consistency and long-term sustainability considerations for all wetland replacement. All WCA replacement must have a goal of replacing public values. The public value of wetlands is based upon the functions of wetlands, including: A. water quality, including filtering pollutants to surface water and groundwater, using nutrients that would otherwise pollute public waters, trapping sediments, protecting shoreline, and recharging groundwater; B. flood water and storm water retention, including the potential for flooding in the watershed, the value of property subject to flooding, and the reduction in potential flooding by the wetland; C. public recreation and education, including hunting and fishing areas, wildlife viewing areas, and nature areas; D. commercial uses, including wild rice and cranberry growing and harvesting and aquaculture; E. fish, wildlife, and native plant habitats; F. low-flow augmentation; and G. other functions and public uses as identified in wetland evaluation methods	uses, habitat, low-flow augmentation, and others) and ecological suitability and sustainability in the site selection process. These considerations are in addition to the emphasis on replacement embedded in statute and rule with respect to replacement siting. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(e)	*Mitigation type* (1) In general, in-kind mitigation is preferable to out-of- kind mitigation because it is most		BWSR: MN Rules 8420.0522 Subd. 3	BWSR: WCA rules are specific to wetlands and only allow for wetland to wetland replacement. MN Statute 103G.2242 Subd. 12 grants BWSR	WCA: Equally stringent. WCA rule has a definition of in-kind

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		likely to compensate for the functions and services lost at the impact site. For example, tidal wetland compensatory mitigation projects are most likely to compensate for unavoidable impacts to tidal wetlands, while perennial stream compensatory mitigation projects are most likely to compensate for unavoidable impacts to perennial streams. Thus, except as provided in paragraph (e)(2) of this section, the re- quired compensatory mitigation shall be of a similar type to the affected aquatic resource. (2) If the district engineer determines, using the watershed approach in accordance with paragraph (c) of this section that out-of-kind compensatory mitigation will serve the aquatic re- source needs of the watershed, the district engineer may authorize the use of such out-of-kind compensatory mitigation. The basis for authorization of out-of-kind compensatory mitigation must be documented in the administrative record for the permit action. (3) For difficult-to-replace resources (e.g., bogs, fens, springs, streams, Atlantic white cedar swamps) if further avoidance and minimization is not practicable, the required compensation should be provided, if practicable, through in-kind rehabilitation, enhancement, or preservation since there is greater certainty that these methods of compensation will successfully off-set permitted impacts.		MN Statute 103G.2242, 103G.222	authority to adopt rules allowing the restoration and protection of streams to replace for wetland impacts in the >80% areas of the state (Northeast MN). Otherwise, in-kind mitigation is considered specific to wetland plant community type or hydrogeomorphic class. WCA rules provide incentives for in-kind replacement via reduction in replacement ratios.	very similar to the one in the 230.92. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(f)	*Amount of compensatory mitigation.* (1) If the district engineer determines that compensatory mitigation is necessary to offset unavoidable impacts to aquatic resources, the amount of required compensatory mitigation must be, to the extent practicable, sufficient to replace lost aquatic resource functions. In cases where appropriate functional or condition	- Determination of amount of mitigation should use functional assessment. If an assessment is not used, minimum compensation will be 1:1 for acreage and\or linear foot. - Greater than 1:1 will be required when appropriate to account for other a number of factors (method, temporal loss,	BWSR: MN Rules 8420.0522 Subp. 4D MN Statutes 103G.222	BWSR: WCA rules specify that wetland replacement must be of a size sufficient to ensure that it provides equal or greater public value than the impacted wetland it will replace. The actual replacement ratio required may be more than the minimum ratio otherwise required if the local government unit determines that a higher ratio is necessary to replace the public value of the wetland lost. In	WCA: Equally stringent. Replacement amounts are ratio based in WCA and are set in statute. Since there are no approved ILF programs in Minnesota as of 2023 alternative replacement ratios

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		assessment methods or other suitable metrics are available, these methods should be used where practicable to determine how much compensatory mitigation is required. If a functional or condition assessment or other suitable metric is not used, a minimum one-to-one acreage or linear foot compensation ratio must be used. (2) The district engineer must require a mitigation ratio greater than one-to-one where necessary to account for the method of compensatory mitigation (e.g., preservation), the likelihood of success, differences between the functions lost at the impact site and the functions expected to be produced by the compensatory mitigation project, temporal losses of aquatic resource functions, the difficulty of restoring or establishing the desired aquatic resource type and functions, and/or the distance between the affected aquatic resource and the compensation site. The rationale for the required replacement ratio must be documented in the administrative record for the permit action. (3) If an in-lieu fee program will be used to provide the required compensatory mitigation, and the appropriate number and resource type of released credits are not available, the district engineer must require sufficient compensation to account for the risk and uncertainty associated with in-lieu fee projects that have not been implemented before the permitted impacts have occurred.	etc., etc.) that would otherwise result in 1:1 providing for inadequate replacement of function. - If ILF is used and credits are not available, additional compensation must be provided to account for uncertainty. - Authorizes use of banks and ILF subject to order of (b) of this section.		no case shall the replacement ratio be less than 1:1 in greater than 80 percent areas or agricultural land, and 2:1 in all other areas.	have not been established but current ratios for use of bank credits may already address risk and uncertainty with ILF projects. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(g)	*Use of mitigation banks and in lieu fee programs.* Mitigation banks and in-lieu fee programs may be used to compensate for impacts to aquatic resources authorized by general permits and individual permits, including after-the- fact permits, in accordance with the preference hierarchy in paragraph (b) of this		MN Rule 8420.0522 Subp. 4, 0528, 0700, 0705, 0725, 0735, 0745, 0755 MN Statute 103G.222 Subd. 3, 103G.2243,	MN Statute 103G.2242 Subd. 1 and 103G.005 Subd. 10g define *in-lieu fee* (ILF) and give BWSR the authority to develop rules on the creation and use of an ILF and associated ILF credits. Statute requires that rules conform with requirements in the Federal compensatory mitigation rule. Rules have not been developed to address this statutory provision.	WCA: Stringency N/A. ILF program is not required. If established, clearly the state's ILF provisions must comport with the requirements of Part 230. The statutory authority for in lieu fee

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		section. Mitigation banks and in-lieu fee programs may also be used to satisfy requirements arising out of an enforcement action, such as supplemental environmental projects.		103G.2242 Subd. 1, 103G.005 Subd. 10g	WCA rules establish a wetland banking system administered by BWSR that includes specific provisions for bank establishment, performance standards, monitoring, credit releases, and use of credits for replacement. There are no restrictions on the use of bank credits based on the action necessitating replacement such as enforcement and after-the-fact approvals.	programs currently exists but rules have not been promulgated to allow for ILF program establishment. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(h)	*Preservation* (1) Preservation may be used to provide compensatory mitigation for activities authorized by DA permits when all the following criteria are met: (i) The resources to be preserved provide important physical, chemical, or biological functions for the watershed; (ii) The resources to be preserved contribute significantly to the ecological sustainability of the watershed. In determining the contribution of those resources to the ecological sustainability of the watershed, the district engineer must use appropriate quantitative assessment tools, where available; (iii) Preservation is determined by the district engineer to be appropriate and practicable; (iv) The resources are under threat of destruction or adverse modifications; and (v) The preserved site will be permanently protected through an appropriate real estate or other legal instrument (e.g., easement, title transfer to state resource agency or land trust). (2) Where preservation is used to provide compensatory mitigation, to the extent appropriate and practicable the preservation	Authorizes preservation to satisfy mitigation requirements, subject to certain criteria (i-v).	BWSR: MN Rules 8420.0526 Subp. 8 & 9 MN Statutes 103G.2242 Subd. 12	BWSR: In greater than 80 percent areas, replacement credit for wetland preservation may only be granted after considering replacement by other means (restoration, creation, etc.). To be eligible for credit the technical evaluation panel must determine that there is a high probability the wetland will be degraded or impacted and the wetland: A. contains or benefits an exceptional resource per Subpart 8 (see below); B. is of a type or function that is rare, difficult to replace, or of high value to the watershed; C. contains a rare or declining plant community; or D. is of a type that is not likely to regenerate, such as northern white cedar. Subpart 8 of 8420.0562 allows replacement credit for the restoration and protection of calcareous fens, white cedar swamps, floodplain or riparian wetlands and upland buffers, habitat corridors with other important resources, wetlands adjacent to designated trout waters or other actions that restore and protect wetlands and adjacent areas when the action improves or directly contributes to the function and sustainability of an exceptional natural resource. For purposes of this subpart, exceptional natural resources are:	WCA: More stringent. WCA rule has more prescriptive requirements for approval of mitigation sites involving preservation and ENRV credit actions (exceptional natural resource value are unique and/or high quality sites where some restoration and/or enhancement is required along with a preservation component) PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		shall be done in conjunction with aquatic resource restoration, establishment, and/or enhancement activities. This requirement may be waived by the district engineer where preservation has been identified as a high priority using a watershed approach described in paragraph (c) of this section, but compensation ratios shall be higher.			(1) habitat for state-listed endangered or threatened species; (2) rare native plant communities; (3) special fish and wildlife resources, such as fish passage and spawning areas, colonial water bird nesting colonies, migratory waterfowl concentration areas, deer wintering areas, and wildlife travel corridors; (4) sensitive surface waters; or (5) other resources determined to be exceptional by the technical evaluation panel based on the value relative to other resources in the watershed or a board-approved plan. Project eligibility and the allocation of credit under this subpart is determined by the local government unit with concurrence of the technical evaluation panel based on the qualification of the resource as exceptional, the actions proposed, and the resulting contribution to the value and sustainability of the exceptional resource. Areas receiving credit must be protected by a permanent conservation easement, in a format prescribed by the board, that is granted to and accepted by the state.	
BWSR, DNR	230.93(i)	(i*) Buffers.* District engineers may require the restoration, establishment, enhancement, and preservation, as well as the maintenance, of riparian areas and/or buffers around aquatic resources where necessary to ensure the long-term viability of those resources. Buffers may also provide habitat or corridors necessary for the ecological functioning of aquatic resources. If buffers are required by the district engineer as part of the compensatory mitigation project, compensatory mitigation credit will be provided for those buffers.	Authorizes DE (PA) requirement of buffers and requires that credit be provided for their use.	MN Rules 8420.0522 MN Statutes 103G.2242 Subd. 12	WCA rules have a buffer requirement for all wetland replacement. Replacement credit is specified for all required buffers.	WCA: More stringent. Upland buffers are required around all wetland replacement sites. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(j)	*Relationship to other federal, tribal, state, and local programs* (1) Compensatory mitigation projects for DA permits may also be used to satisfy the		MN Rules 8420.0745, 8420.0330 Subp. 3 B (11) (b),	WCA rules state that credits from the state wetland bank may be used to replace wetland impacts authorized by local government units under this chapter or by other local, state, and	WCA: More stringent. WCA rule allows for credits to be used for other regulatory

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		environmental requirements of other programs, such as tribal, state, or local wetlands regulatory programs, other federal programs such as the Surface Mining Control and Reclamation Act, Corps civil works projects, and Department of Defense military construction projects, consistent with the terms and requirements of these programs and subject to the following considerations: (i) The compensatory mitigation project must include appropriate compensation required by the DA permit for unavoidable impacts to aquatic resources authorized by that permit. (ii) Under no circumstances may the same credits be used to provide mitigation for more than one permitted activity. However, where appropriate, compensatory mitigation projects, including mitigation banks and in-lieu fee projects, may be designed to holistically address requirements under multiple programs and authorities for the same activity. (2) Except for projects undertaken by federal agencies, or where federal funding is specifically authorized to provide compensatory mitigation, federally funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by DA permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefits of the restoration or conservation project. 3) Compensatory mitigation projects may also be used to provide compensatory mitigation under the Endangered Species Act or for		8420.0330 Subp. 3B (11) (d) MN Statutes 103G.2242 Subp. 12, 103G.2251	federal regulatory authorities, provided the impacted wetland is within the state of Minnesota and the credit withdrawal procedures of this chapter are followed. No sale, withdrawal, transfer, or use of banking credits for replacement is valid until the board debits the applicable bank account. Bank credits may be used only once to replace wetland impacts. Bank accounts must maintain a positive balance. When all credits have been withdrawn or transferred, the account is closed. WCA rules state that the replacement area cannot be previously restored or created under a prior approved replacement plan. WCA rules and associated statutes prohibit replacement areas from being restored or created with financial assistance from public conservation programs or restored or created for other unrelated regulatory purposes.	programs, but the approach is focused on wetland impacts. This would limit opportunities for conservation banking currently allowed under 230.93(j). Otherwise WCA is consistent with this provision. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		Habitat Conservation Plans, as long as they comply with the requirements of paragraph (j)(1) of this section.				
	230.93(k)	**Permit conditions**				
BWSR, DNR	230.93(k)(1)	(1) The compensatory mitigation requirements for a DA permit, including the amount and type of compensatory mitigation, must be clearly stated in the special conditions of the individual permit or general permit verification (see 33 CFR 325.4 and 330.6(a)). The special conditions must be enforceable.	Mitigation requirements must be stated in permit "Special Conditions" or verification letter. Must state number and type of credits. Further: - IP: Must identify responsible party, reference mitigation plan, state objectives\standards\monitoring requirements, describe financial assurances (unless in final mitigation plan). - GP: special conditions must describe proposal and restrict commencement of work until final plan approval (can be waived by DE(PA?)). Should also address the items listed under IP, above.	MN Rules 8420.0330, 8420.0255 Subp.4, 5, & 6 MN Statutes 103G.2242	WCA rules specify application requirements that include specific information on wetland replacement including type of replacement, location, number of credits, bank account number, etc. This is the basis for the LGU approval of the replacement plan. WCA rules require the LGU to base its decision on the standards of the rule, keep a record of their decision, consider the TEP's recommendation, provide a summary of their decision in a notice, verify the availability of bank credits proposed to be used, obtain a copy of credit purchase agreement or withdrawal form, and notify the board of its decision and the resulting credits authorized for withdrawal.	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(k)(2)	(2) For an individual permit that requires permittee-responsible mitigation, the special conditions must: (i) Identify the party responsible for providing the compensatory mitigation; (ii) Incorporate, by reference, the final mitigation plan approved by the district engineer; (iii) State the objectives, performance standards, and monitoring required for the compensatory mitigation project, unless they are provided in the approved final mitigation plan; and (iv) Describe any required financial assurances or long-term management provisions for the compensatory mitigation project, unless they are specified in the approved final mitigation plan.		8420.0810 Subp. 3	WCA rules 8420.0810 Subp. 3 require that replacement success be evaluated against approved goals in the replacement plan. They give the LGU authority to extend monitoring, order corrective actions, or pursue enforcement if replacement is not successful. Also, WCA rules 8420.0330 Subp. 3 identifies the information that must be submitted with a replacement plan. The list contains sixteen items including all of those identified in 230.93(k)(2). The LGU approval of the replacement plan gives them the ability to ensure compliance with the replacement plan.	WCA: Equally stringent. The replacement plan submitted by an applicant that includes project-specific (permittee-responsible) mitigation includes the elements required under 230.93(k)(2). The project-specific replacement approved by an LGU is required as part of the approval of the application and is enforceable. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory

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						mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(k)(3)	(3) For a general permit activity that requires permittee-responsible compensatory mitigation, the special conditions must describe the compensatory mitigation proposal, which may be either conceptual or detailed. The general permit verification must also include a special condition that states that the permittee cannot commence work in waters of the United States until the district engineer approves the final mitigation plan, unless the district engineer determines that such a special condition is not practicable and not necessary to ensure timely completion of the required compensatory mitigation. To the extent appropriate and practicable, special conditions of the general permit verification should also address the requirements of paragraph (k)(2) of this section.		MN Rules 8420.0330 Subp.1 & 4 MN Statutes 103G.2242	WCA rules require an applicant to receive approval of a replacement plan prior to impacting a wetland.	WCA: More stringent. WCA requires the applicant to obtain more than approval of a replacement (mitigation) plan before moving forward with a wetland impact. For project-specific replacement the applicant may be required to provide a financial assurance or provide notice of a deed restriction being placed on the land where the replacement will occur. For approvals utilizing wetland bank credits the applicant must receive confirmation that the BWSR Board has withdrawn the credits from the state wetland bank. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(k)(4)	(4) If a mitigation bank or in-lieu fee program is used to provide the required compensatory mitigation, the special conditions must indicate whether a mitigation bank or in-lieu		MN Rules 8420.0330 MN Statutes 103G.2242	WCA rules specify application requirements that include specific information on wetland replacement including type of replacement,	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no

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		fee program will be used, and specify the number and resource type of credits the permittee is required to secure. In the case of an individual permit, the special condition must also identify the specific mitigation bank or in-lieu fee program that will be used. For general permit verifications, the special conditions may either identify the specific mitigation bank or in-lieu fee program, or state that the specific mitigation bank or in-lieu fee program used to provide the required compensatory mitigation must be approved by the district engineer before the credits are secured.			location, number of credits, bank account number, etc.	standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.93(l)	**Party responsible for compensatory mitigation**				
BWSR, DNR	230.93(l)(1)	(1) For permittee-responsible mitigation, the special conditions of the DA permit must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project.			WCA rules by default place the responsibility for project-specific replacement on the applicant.	WCA: Equally stringent PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(l)(2)	(2) For mitigation banks and in-lieu fee programs, the instrument must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project(s). The instrument must also contain a provision expressing the sponsor's agreement to assume responsibility for a permittee's compensatory mitigation requirements, once that permittee has secured the appropriate number and resource type of credits from the sponsor and the district engineer has received the documentation described in paragraph (l)(3) of this section.		Mn Rules 8420.0700, 0705, 0725, 0735, 0745, 0755 MN Statutes 103G.2242	WCA rules designate the wetland bank applicant/sponsor as responsible for implementing the approved wetland bank plan. The landowner where the bank is located must allow for the recording of a state conservation easement. The conservation easement places the long-term responsibility of the bank with the landowner. An applicant using credits from a wetland bank is released of responsibility for those credits once they are withdrawn by BWSR in accordance with an approved wetland replacement plan. Credits in a wetland bank are allowed to be transferred to other entities, but the long-term responsibility for the wetland bank lies with the landowner. There are no	WCA: Less stringent. Wetland banks approved under WCA do not utilize an instrument but instead have a Bank Plan and a conservation easement. The easement identifies the landowner as the party responsible for long-term management of the site but funding for maintenance is generally not provided. The State of MN has

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					rules for in-lieu fee program at this time, but statutory authority to establish them.	established an account that funds long-term compliance activities at wetland banks but this does not include maintenance activities. Also, under WCA wetland bank plans do not have a provision expressing the sponsor's agreement to assume responsibility for a permittee's compensatory mitigation requirements, once that permittee has secured the appropriate number and resource type of credits from the sponsor. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(l)(3)	(3) If use of a mitigation bank or in-lieu fee program is approved by the district engineer to provide part or all of the required compensatory mitigation for a DA permit, the permittee retains responsibility for providing the compensatory mitigation until the appropriate number and resource type of credits have been secured from a sponsor and the district engineer has received documentation that confirms that the sponsor has accepted the responsibility for providing the required compensatory mitigation. This		MN Rules 8420.0330 Subp. 4 MN Statutes 103G.2242	For replacement consisting of wetland bank credits, confirmation that the board has withdrawn the credits from the state wetland bank as specified in the approved replacement plan is required per WCA rules.	WCA: Equally stringent. Applicants cannot proceed with a wetland impact until they have received notice that the credits have been withdrawn from the state wetland bank. The LGU and BWSR have authority to pursue measures against the sponsor if

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		documentation may consist of a letter or form signed by the sponsor, with the permit number and a statement indicating the number and resource type of credits that have been secured from the sponsor. Copies of this documentation will be retained in the administrative records for both the permit and the instrument. If the sponsor fails to provide the required compensatory mitigation, the district engineer may pursue measures against the sponsor to ensure compliance.				they fail to provide the replacement at the replacement site. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(m)	(m) *Timing.* Implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts. The district engineer shall require, to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity.	Mitigation to occur in advance or concurrent with impact.	MN Rules 8420.0522 Subp. 8 MN Statutes 103G.2242	WCA rules state that replacement of wetland function and value must be completed in advance of or concurrent with the actual wetland impact. For replacement that is not in advance, a financial assurance is required.	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.93(n)	**Financial assurances**				
BWSR, DNR	230.93(n)(1)	(1) The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority) the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project.	Financial assurances required and will be determined by DE(PA?) in consultation with project sponsor, and will be based on factors provided in (2). - Must be included as special condition - Shall be phased out once project is determined to be successful. - Must be in form that ensures 120 days notice is received by DE(PA?) prior to termination\revocation. - Shall be payable at direction of DE (PA?).	MN Rules 8420.0522 Subp. 9 MN Statutes 103G.2242	WCA rules require a financial assurance for wetland replacement that is not in advance to ensure successful replacement. The local government unit may waive this requirement if it determines the financial assurance is not necessary to ensure successful replacement. The financial assurance may be used to cover costs of actions necessary to bring the project into compliance with the approved replacement plan specifications and monitoring requirements. The financial assurance does not serve as an in-lieu fee and is not a substitute for enforcement, but may be used for repair, construction, vegetation establishment and management, maintenance, monitoring, or other actions the local government unit determines necessary to ensure adequate	WCA: Less stringent. A financial assurance can only be required when the replacement is in advance and the authority to require a financial assurance is with the LGU and not the state. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory

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					replacement. Before drawing on the financial assurance, the local government unit must provide the landowner written notice stating the actions necessary to bring the replacement project into compliance and that the landowner has 30 days to complete the actions, after which the local government unit will use the financial assurance to gain compliance.	mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(n)(2)	(2) The amount of the required financial assurances must be determined by the district engineer, in consultation with the project sponsor, and must be based on the size and complexity of the compensatory mitigation project, the degree of completion of the project at the time of project approval, the likelihood of success, the past performance of the project sponsor, and any other factors the district engineer deems appropriate. Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments, subject to the approval of the district engineer. The rationale for determining the amount of the required financial assurances must be documented in the administrative record for either the DA permit or the instrument. In determining the assurance amount, the district engineer shall consider the cost of providing replacement mitigation, including costs for land acquisition, planning and engineering, legal fees, mobilization, construction, and monitoring.		MN Rules 8420.0522 Subp. 9 MN Statutes 103G.2242	WCA rules require a financial assurance for wetland replacement that is not in advance to ensure successful replacement. The local government unit may waive this requirement if it determines the financial assurance is not necessary to ensure successful replacement. The financial assurance may be used to cover costs of actions necessary to bring the project into compliance with the approved replacement plan specifications and monitoring requirements. The financial assurance does not serve as an in-lieu fee and is not a substitute for enforcement, but may be used for repair, construction, vegetation establishment and management, maintenance, monitoring, or other actions the local government unit determines necessary to ensure adequate replacement. Before drawing on the financial assurance, the local government unit must provide notify the landowner in writing written notice to the landowner stating the actions necessary to bring the replacement project into compliance and that the landowner has 30 days to complete the actions, after which the local government unit will use the financial assurance to gain compliance.	WCA: Less stringent. WCA rule specifically states that the financial assurance may be used to cover the costs of bringing the replacement project into compliance and is not to serve as in-lieu fee payment. The federal program allows the district engineer to consider the cost of providing mitigation at an alternate site when determining the amount of the financial assurance. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(n)(3)	(3) If financial assurances are required, the DA permit must include a special condition requiring the financial assurances to be in place prior to commencing the permitted activity.		MN Rules 8420.0522 Subp. 9 MN Statutes 103G.2242	WCA rules require a financial assurance for wetland replacement that is not in advance to ensure successful replacement. The local government unit may waive this requirement if it determines the financial assurance is not necessary to ensure successful replacement.	WCA: Less stringent. WCA rule is not specific as to how the requirement for a financial assurance is established and

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					The financial assurance may be used to cover costs of actions necessary to bring the project into compliance with the approved replacement plan specifications and monitoring requirements. The financial assurance does not serve as an in-lieu fee and is not a substitute for enforcement, but may be used for repair, construction, vegetation establishment and management, maintenance, monitoring, or other actions the local government unit determines necessary to ensure adequate replacement. Before drawing on the financial assurance, the local government unit must provide notify the landowner in writing written notice to the landowner stating the actions necessary to bring the replacement project into compliance and that the landowner has 30 days to complete the actions, after which the local government unit will use the financial assurance to gain compliance.	enforced. The timing for establishing the financial assurance also is not specifically established in rule. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(n)(4)	(4) Financial assurances shall be phased out once the compensatory mitigation project has been determined by the district engineer to be successful in accordance with its performance standards. The DA permit or instrument must clearly specify the conditions under which the financial assurances are to be released to the permittee, sponsor, and/or other financial assurance provider, including, as appropriate, linkage to achievement of performance standards, adaptive management, or compliance with special conditions.		MN Rules 8420.0522 Subp. 9 MN Statutes 103G.2242	WCA rules require a financial assurance for wetland replacement that is not in advance to ensure successful replacement. The local government unit may waive this requirement if it determines the financial assurance is not necessary to ensure successful replacement. The financial assurance may be used to cover costs of actions necessary to bring the project into compliance with the approved replacement plan specifications and monitoring requirements. The financial assurance does not serve as an in-lieu fee and is not a substitute for enforcement, but may be used for repair, construction, vegetation establishment and management, maintenance, monitoring, or other actions the local government unit determines necessary to ensure adequate replacement. Before drawing on the financial assurance, the local government unit must provide notify the landowner in writing written notice to the landowner stating the actions necessary to bring the replacement project into compliance and that the landowner has 30 days to complete the actions, after which the	WCA: Equally stringent. Although there are differences between WCA and 230.93(n) regarding when financial assurances are required and the amount of the financial assurance when they are required under WCA the rule allows for phasing out the assurance based on a successful demonstration of performance. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see

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					local government unit will use the financial assurance to gain compliance.	the response for 230.91(a-b).
BWSR, DNR	230.93(n)(5)	(5) A financial assurance must be in a form that ensures that the district engineer will receive notification at least 120 days in advance of any termination or revocation. For third party assurance providers, this may take the form of a contractual requirement for the assurance provider to notify the district engineer at least 120 days before the assurance is revoked or terminated.		MN Rules 8420.0522 Subp. 9 MN Statutes 103G.2242	WCA rules require a financial assurance for wetland replacement that is not in advance to ensure successful replacement. The local government unit may waive this requirement if it determines the financial assurance is not necessary to ensure successful replacement. The financial assurance may be used to cover costs of actions necessary to bring the project into compliance with the approved replacement plan specifications and monitoring requirements. The financial assurance does not serve as an in-lieu fee and is not a substitute for enforcement, but may be used for repair, construction, vegetation establishment and management, maintenance, monitoring, or other actions the local government unit determines necessary to ensure adequate replacement. Before drawing on the financial assurance, the local government unit must provide notify the landowner in writing written notice to the landowner stating the actions necessary to bring the replacement project into compliance and that the landowner has 30 days to complete the actions, after which the local government unit will use the financial assurance to gain compliance.	WCA: Less stringent. WCA rule does not contain any requirement for notification of termination or revocation of the financial assurance. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(n)(6)	(6) Financial assurances shall be payable at the direction of the district engineer to his designee or to a standby trust agreement. When a standby trust is used (e.g., with performance bonds or letters of credit) all amounts paid by the financial assurance provider shall be deposited directly into the standby trust fund for distribution by the trustee in accordance with the district engineer's instructions.		MN Rules 8420.0522 Subp. 9 MN Statutes 103G.2242	WCA rules require a financial assurance for wetland replacement that is not in advance to ensure successful replacement. The local government unit may waive this requirement if it determines the financial assurance is not necessary to ensure successful replacement. The financial assurance may be used to cover costs of actions necessary to bring the project into compliance with the approved replacement plan specifications and monitoring requirements. The financial assurance does not serve as an in-lieu fee and is not a substitute for enforcement, but may be used for repair, construction, vegetation establishment and management, maintenance, monitoring, or other actions the local government unit	WCA: Less stringent. Under WCA the LGU has the responsibility to review and approve the financial assurance and is also the party that decides when to draw on the funds to conduct the actions necessary to bring the site into compliance. Although not clearly stated in rule, the LGU could use the funds to conduct the work themselves or

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					determines necessary to ensure adequate replacement. Before drawing on the financial assurance, the local government unit must provide notify the landowner in writing written notice to the landowner stating the actions necessary to bring the replacement project into compliance and that the landowner has 30 days to complete the actions, after which the local government unit will use the financial assurance to gain compliance.	could hire a third party to complete the work. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.93(o)	The compensatory mitigation project must comply with all applicable federal, state, and local laws. The DA permit, mitigation banking instrument, or in-lieu fee program instrument must not require participation by the Corps or any other federal agency in project management, including receipt or management of financial assurances or long-term financing mechanisms, except as determined by the Corps or other agency to be consistent with its statutory authority, mission, and priorities.	Mitigation project must comply with all applicable laws. I do not believe remainder of paragraph, concerning limitations on involvement, would be applicable to state under assumption.	MN Rules 8420.0105 Subp. 2 F		WCA: Less stringent. Paragraph F of 8420.0105 Subp. 2 generally references other federal, state, and local regulations that WCA is in addition to but does not specifically require compliance with these regulations. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.94	**Planning and documentation**				
BWSR, DNR	230.94(a)	(a) *Preapplication consultations.* Potential applicants for standard permits are encouraged to participate in preapplication meetings with the Corps and appropriate agencies to discuss potential mitigation requirements and information needs.	Self explanatory	MN Rules 8420.0305 C. 103G.2242	WCA rules state that a landowner may seek advice from the local government unit regarding the applicability of a no-loss or exemption, the adequacy of sequencing arguments and alternatives, or other interpretation of this chapter without submitting an application.	WCA: Equally stringent. PWWPP: Equally stringent
	230.94(b)	**Public review and comment**				

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BWSR, DNR	230.94(b)(1)	(b) *Public review and comment.* (1) For an activity that requires a standard DA permit pursuant to section 404 of the Clean Water Act, the public notice for the proposed activity must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. This explanation shall address, to the extent that such information is provided in the mitigation statement required by 33 CFR 325.1(d)(7), the proposed avoidance and minimization and the amount, type, and location of any proposed compensatory mitigation, including any out-of-kind compensation, or indicate an intention to use an approved mitigation bank or in-lieu fee program. The level of detail provided in the public notice must be commensurate with the scope and scale of the impacts. The notice shall not include information that the district engineer and the permittee believe should be kept confidential for business purposes, such as the exact location of a proposed mitigation site that has not yet been secured. The permittee must clearly identify any information being claimed as confidential in the mitigation statement when submitted. In such cases, the notice must still provide enough information to enable the public to provide meaningful comment on the proposed mitigation.	Public notices shall contain a statement explaining avoidance, minimization and compensation (mitigation) associated with permit. Must include sufficient detail for public to meaningfully comment on proposed mitigation.	MN Rules 8420.0255 MN Statutes 103G.2242	WCA rules include very specific public noticing procedures at the application submission stage and after a decision is made. A copy of the full application or the ability to access the complete application is a required part of the notice. A complete application involving replacement would include all of the compensatory mitigation details as listed in this federal provision because they are required as part of a complete application, and said application is available for public review and comment via the notice of application procedures. Members of the public have to request to receive notices from the LGU on applications. If requested, those members of the public receiving the notice can then view the application and make comments that the LGU must consider in its decision.	WCA: Less stringent. Under WCA there is no distinction between permit types such that all replacement plan applications are available for public review and the public is provided an opportunity to comment on the application. However, in order to receive notification from an LGU that an application has been received and is being considered, a member of the public must have previously requested to receive notices. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.94(b)(2)	(2) For individual permits, district engineers must consider any timely comments and recommendations from other federal agencies; tribal, state, or local governments; and the public.		MN Rules 8420.0200 Subp. 2E, 8420.0240 C & D, 8420.0255 Subp. 4 MN Statute 103G.2242	WCA rules require the LGU to consider recommendations of the TEP which consists of representatives from state agencies and local governments and the public (those who requested to receive notices). Members of the public have to request to receive notices from the LGU on applications. If requested, those members of the public receiving the notice can then view the application and make comments that the LGU must consider in its decision.	WCA: Equally stringent. The LGU is required to consider comments provided by those required to receive notice of the application which includes other federal, state, and local agencies as well as members of the public.

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						PWWPP: Equally stringent.
BWSR, DNR	230.94(b)(3)	(3) For activities authorized by letters of permission or general permits, the review and approval process for compensatory mitigation proposals and plans must be conducted in accordance with the terms and conditions of those permits and applicable regulations including the applicable provisions of this part.		N/A	N/A	WCA: Equally stringent. There is no distinction between standard permits and general permits under WCA so the review and approval process for compensatory mitigation projects is the same for all replacement plan applications. PWWPP: Equally stringent.
	230.94(c)	**Mitigation plan**				
	230.94(c)(1)	**Preparation and approval**				
BWSR, DNR	230.94(c)(1)(i)	(i) For individual permits, the permittee must prepare a draft mitigation plan and submit it to the district engineer for review. After addressing any comments provided by the district engineer, the permittee must prepare a final mitigation plan, which must be approved by the district engineer prior to issuing the individual permit. The approved final mitigation plan must be incorporated into the individual permit by reference. The final mitigation plan must include the items described in paragraphs (c)(2) through (c)(14) of this section, but the level of detail of the mitigation plan should be commensurate with the scale and scope of the impacts. As an alternative, the district engineer may determine that it would be more appropriate to address any of the items described in paragraphs (c)(2) through (c)(14) of this section as permit conditions, instead of components of a compensatory mitigation plan. For permittees who intend to fulfill their compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu fee programs, their mitigation	Mitigation plans for IPs, GPs, banks and ILF must all include descriptions of: 1. Objectives 2. Site Selection 3. Site protection instrument 4. Baseline information 5. Determination of credits 6. Mitigation work plan 7. Maintenance plan 8. Performance standards 9. Monitoring requirements 10. Long-term management plan 11. Adaptive management plan 12. Financial assurances 13. Other information (determined by DE(PA?) Plans must be approved prior to permit issuance. For mitigation using banks or ILF, plans only need contain Baseline information and Determination of Credits.	MN Rules 8420.0330 Subp. 3 and MN Statutes 103G.2242		WCA: Less stringent. The mitigation plan Equally stringent under WCA is the replacement plan. The required elements of a complete replacement plan are provided in WCA rule at 8420.0330 subpart 3. The replacement plan elements include many of the same items required in a Mitigation Plan but does not include the following: maintenance plan, performance standards, long-term management plan, adaptive management plan, and financial assurance.

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		plans need include only the items described in paragraphs (c)(5) and (c)(6) of this section, and the name of the specific mitigation bank or in-lieu fee program to be used.	DE (PA?) may address mitigation through permit conditions instead of requiring separate mitigation plan.			The requirements for applicants who intend to use mitigation bank or in-lieu fee credits is the same under WCA. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.94(c)(1)(ii)	(ii) For general permits, if compensatory mitigation is required, the district engineer may approve a conceptual or detailed compensatory mitigation plan to meet required time frames for general permit verifications, but a final mitigation plan incorporating the elements in paragraphs (c)(2) through (c)(14) of this section, at a level of detail commensurate with the scale and scope of the impacts, must be approved by the district engineer before the permittee commences work in waters of the United States. As an alternative, the district engineer may determine that it would be more appropriate to address any of the items described in paragraphs (c)(2) through (c)(14) of this section as permit conditions, instead of components of a compensatory mitigation plan. For permittees who intend to fulfill their compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu fee programs, their mitigation plans need include only the items described in paragraphs (c)(5) and (c)(6) of this section, and either the name of the specific mitigation bank or in-lieu fee program to be used or a statement indicating that a mitigation bank or in-lieu fee program will be used (contingent upon approval by the district engineer).		MN Rules 8420.0330 Subp. 1 MN Statutes 103G.2242	WCA rules state that a landowner proposing a wetland impact that requires replacement must apply to the local government unit and receive approval of a replacement plan before impacting the wetland.	WCA: More stringent. There is no distinction between standard permits and general permits under WCA so the requirement for the submittal of a replacement plan containing the required elements applies to all applications. The requirements for applicants who intend to use mitigation bank or in-lieu fee credits is the same under WCA. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
BWSR, DNR	230.94(c)(1)(iii)	(iii) Mitigation banks and in-lieu fee programs must prepare a mitigation plan including the items in paragraphs (c)(2) through (c)(14) of this section for each separate compensatory mitigation project site. For mitigation banks and in-lieu fee programs, the preparation and approval process for mitigation plans is described in §230.98.				WCA: Less stringent. The mitigation plan equivalent under WCA is the replacement plan. The required elements of a complete replacement plan are provided in WCA rule at 8420.0330 subpart 3. The replacement plan elements include many of the same items required in a Mitigation Plan but does not include the following: maintenance plan, long-term management plan, adaptive management plan, and financial assurance. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.94(c)(2)	(2) *Objectives.* A description of the resource type(s) and amount(s) that will be provided, the method of compensation (*i.e.*, restoration, establishment, enhancement, and/or preservation), and the manner in which the resource functions of the compensatory mitigation project will address the needs of the watershed, ecoregion, physiographic province, or other geographic area of interest.		MN Rules 8420.0522 Subp. 5, 8420.0705 Subp. 3, 8420.0725 D, 8420.0810 Subp. 4 MN Statutes 103G.2242, 103G.222	WCA rules require identification of plan objectives and performance standards. Restoration and replacement of wetlands must be accomplished according to the ecology of the landscape area. The replacement site must be ecologically suitable for providing the desired functions and compatible with adjacent land uses. A replacement or banking plan that would result in wetland types or characteristics that do not naturally occur in the landscape area in which the replacement will occur must be denied. Replacement must not adversely affect other habitat types or ecological communities that are important in maintaining	WCA: Less stringent. While some of the information described in 230.94(c)(2) would be provided in other parts of the replacement plan there is not a clear and concise requirement in rule for providing objectives. PWWPP: Less stringent. The PWWPP has no

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
					the overall biological diversity of the area. Replacement projects must be located and designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. "Self-sustaining" refers to the ability of a wetland to provide the desired functions over time in a changing landscape without human intervention. When determining the location, type, function, and design of replacement, applicants and local government units must consider landscape position, habitat requirements, development and habitat loss trends, sources of watershed impairment, protection and maintenance of upland resources and riparian areas, and providing a suite of functions.	standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.94(c)(3)	(3) *Site selection.* A description of the factors considered during the site selection process. This should include consideration of watershed needs, onsite alternatives where applicable, and the practicability of accomplishing ecologically self-sustaining aquatic resource restoration, establishment, enhancement, and/or preservation at the compensatory mitigation project site. (See §230.93(d).)		MN Rules 8420.0522 Subp. 5, 8420.0705 Subp. 3, 8420.0725 D, 8420.0810 Subp. 4 MN Statutes 103G.2242, 103G.222	WCA rules require identification of plan objectives and performance standards. Restoration and replacement of wetlands must be accomplished according to the ecology of the landscape area. The replacement site must be ecologically suitable for providing the desired functions and compatible with adjacent land uses. A replacement or banking plan that would result in wetland types or characteristics that do not naturally occur in the landscape area in which the replacement will occur must be denied. Replacement must not adversely affect other habitat types or ecological communities that are important in maintaining the overall biological diversity of the area. Replacement projects must be located and designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. "Self-sustaining" refers to the ability of a wetland to provide the desired functions over time in a changing landscape without human intervention. When determining the location, type, function, and design of replacement, applicants and local government units must consider: landscape position, habitat requirements, development and habitat loss trends, sources of watershed impairment,	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
					protection and maintenance of upland resources and riparian areas, and providing a suite of functions.	
BWSR, DNR	230.94(c)(4)	(4) *Site protection instrument.* A description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site (see §230.97(a)).		MN Rules 8420.0705 Subp. 5 MN Statutes 103G.2242 Subd. 3(b)	WCA rules require BWSR to hold a conservation easement for all banks as a site protection mechanism except for those on state land.	WCA: Less stringent. A conservation easement in favor of the State is required for all wetland banks. For project-specific replacement applicants must record a notice with the deed for lands containing a replacement wetland. The deed notice is not as restrictive as a conservation easement and may be less enforceable. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.94(c)(5)	(5) *Baseline information.* A description of the ecological characteristics of the proposed compensatory mitigation project site and, in the case of an application for a DA permit, the impact site. This may include descriptions of historic and existing plant communities, historic and existing hydrology, soil conditions, a map showing the locations of the impact and mitigation site(s) or the geographic coordinates for those site(s), and other site characteristics appropriate to the type of resource proposed as compensation. The baseline information should also include a delineation of waters of the United States on		MN Rules 8420.0330, 8420.0705 Subp. 3 MN Statutes 103G.2242	WCA rules require replacement applicants to provide baseline information on the replacement and mitigation site. Rules also give BWSR the authority to establish additional application requirements.	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		the proposed compensatory mitigation project site. A prospective permittee planning to secure credits from an approved mitigation bank or in-lieu fee program only needs to provide baseline information about the impact site, not the mitigation bank or in-lieu fee project site.				
BWSR, DNR	230.94(c)(6)(i) and (ii)	(6) *Determination of credits.* A description of the number of credits to be provided, including a brief explanation of the rationale for this determination. (See §230.93(f).) (i) For permittee responsible mitigation, this should include an explanation of how the compensatory mitigation project will provide the required compensation for unavoidable impacts to aquatic resources resulting from the permitted activity. (ii) For permittees intending to secure credits from an approved mitigation bank or in-lieu fee program, it should include the number and resource type of credits to be secured and how these were determined.		MN Rules 8420.0330, 8420.0705 Subp. 3 MN Statutes 103G.2242	WCA rules require replacement applicants to provide baseline information on the replacement and mitigation site. Rules also give BWSR the authority to establish additional application requirements.	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.94(c)(7)	(7) *Mitigation work plan.* Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures. For stream compensatory mitigation projects, the mitigation work plan may also include other relevant information, such as planform geometry, channel form (e.g., typical channel cross sections), watershed size, design discharge, and riparian area plantings.		MN Rules 8420.0330, 8420.0705 Subp. 3 MN Statutes 103G.2242	WCA rules require replacement plan applicants to provide baseline information on the replacement and mitigation site. Rules also give BWSR the authority to establish additional application requirements.	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.94(c)(8)	(8) *Maintenance plan.* A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed.		MN Rules 8420.0330, 8420.0810	WCA rules require monitoring of replacement sites to include maintenance construction activities completed and planned. Application requirements for replacement require	WCA: Less stringent. Although a vegetation establishment and management plan is

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
				MN Statutes 103G.2242	descriptions of construction, timetable, vegetation management plan, etc.	required under WCA this is only a part of what is required in the maintenance plan for a compensation site. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.94(c)(9)	(9) *Performance standards.* Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives. (See §230.95.)		MN Rules 8420.0522 Subp. 5, 8420.0705 Subp. 3, 8420.0725 D, 8420.0810 Subp. 4 MN Statutes 103G.2242, 103G.222	WCA rules require identification of plan objectives and performance standards. Restoration and replacement of wetlands must be accomplished according to the ecology of the landscape area. The replacement site must be ecologically suitable for providing the desired functions and compatible with adjacent land uses. A replacement or banking plan that would result in wetland types or characteristics that do not naturally occur in the landscape area in which the replacement will occur must be denied. Replacement must not adversely affect other habitat types or ecological communities that are important in maintaining the overall biological diversity of the area. Replacement projects must be located and designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. "Self-sustaining" refers to the ability of a wetland to provide the desired functions over time in a changing landscape without human intervention. When determining the location, type, function, and design of replacement, applicants and local government units must consider landscape position, habitat requirements, development and habitat loss trends, sources of watershed impairment, protection and maintenance of upland	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
					resources and riparian areas, and providing a suite of functions.	
BWSR, DNR	230.94(c)(10)	(10) *Monitoring requirements.* A description of parameters to be monitored in order to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results to the district engineer must be included. (See §230.96.)		MN Rules 8420.0800, 8420.0810 MN Statutes 103G.2242	WCA rules require monitoring of all wetland replacement areas to assess progress and attainment of objectives and performance standards.	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.94(c)(11)	(11) *Long-term management plan.* A description of how the compensatory mitigation project will be managed after performance standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for long-term management. (See §230.97(d).)		MN Rules 8420.0330, 8420.0810, 8420.0820 MN Statutes 103G.2242	WCA rules require monitoring of replacement sites to include maintenance construction activities completed and planned. Application requirements for replacement require descriptions of construction, timetable, vegetation management plan, etc.	WCA: Less stringent. A long-term management plan is not required for replacement sites. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.94(c)(12)	(12) *Adaptive management plan.* A management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures. The adaptive management plan will guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success. (See §230.97(c).)		MN Rules 8420.0820 MN Statutes 103G.2242	WCA rules place responsibility for long-term management with the landowner of the replacement area via the conservation easement or declaration of restrictions and covenants. The LGU can order corrective actions for replacement areas.	WCA: Less stringent. An adaptive management plan is not required for replacement sites. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see

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						the response for 230.91(a-b).
BWSR, DNR	230.94(c)(13)	(13) *Financial assurances.* A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards (see §230.93(n)).		MN Rules 8420.0522 Subp. 9 MN Statutes 103G.2242	WCA rules require a financial assurance for wetland replacement that is not in advance to ensure successful replacement. The local government unit may waive this requirement if it determines the financial assurance is not necessary to ensure successful replacement. The financial assurance may be used to cover costs of actions necessary to bring the project into compliance with the approved replacement plan specifications and monitoring requirements. The financial assurance does not serve as an in-lieu fee and is not a substitute for enforcement, but may be used for repair, construction, vegetation establishment and management, maintenance, monitoring, or other actions the local government unit determines necessary to ensure adequate replacement. Before drawing on the financial assurance, the local government unit must provide notify the landowner in writing written notice to the landowner stating the actions necessary to bring the replacement project into compliance and that the landowner has 30 days to complete the actions, after which the local government unit will use the financial assurance to gain compliance.	WCA: Less stringent. The LGU may require a financial assurance for replacement that is not done in advance. Financial assurances are not required for other types of replacement, including wetland banks. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.94(c)(14)	(14) *Other information.* The district engineer may require additional information as necessary to determine the appropriateness, feasibility, and practicability of the compensatory mitigation project.		MN Rules 8420.0330, 8420.0705 Subp. 3 MN Statutes 103G.2242	WCA rules require replacement plan applicants to provide baseline information on the replacement and mitigation site. Rules also give BWSR the authority to establish additional application requirements.	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.95	**Ecological Performance Standards**				

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
BWSR, DNR	230.95(a-b)	(a) The approved mitigation plan must contain performance standards that will be used to assess whether the project is achieving its objectives. Performance standards should relate to the objectives of the compensatory mitigation project, so that the project can be objectively evaluated to determine if it is developing into the desired resource type, providing the expected functions, and attaining any other applicable metrics (e.g., acres). (b) Performance standards must be based on attributes that are objective and verifiable. Ecological performance standards must be based on the best available science that can be measured or assessed in a practicable manner. Performance standards may be based on variables or measures of functional capacity described in functional assessment methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position. The use of reference aquatic resources to establish performance standards will help ensure that those performance standards are reasonably achievable, by reflecting the range of variability exhibited by the regional class of aquatic resources as a result of natural processes and anthropogenic disturbances. Performance standards based on measurements of hydrology should take into consideration the hydrologic variability exhibited by reference aquatic resources, especially wetlands. Where practicable, performance standards should take into account the expected stages of the aquatic resource development process, in order to allow early identification of potential problems and appropriate adaptive management.	An approved mitigation plan must contain standards. Standards must be based on attributes that are objective and verifiable.	MN Rules 8420.0522 Subp. 5, 8420.0705 Subp. 3, 8420.0725 D, 8420.0810 Subp. 4 MN Statutes 103G.2242, 103G.222	WCA rules require identification of plan objectives and performance standards. Restoration and replacement of wetlands must be accomplished according to the ecology of the landscape area. The replacement site must be ecologically suitable for providing the desired functions and compatible with adjacent land uses. A replacement or banking plan that would result in wetland types or characteristics that do not naturally occur in the landscape area in which the replacement will occur must be denied. Replacement must not adversely affect other habitat types or ecological communities that are important in maintaining the overall biological diversity of the area. Replacement projects must be located and designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. "Self-sustaining" refers to the ability of a wetland to provide the desired functions over time in a changing landscape without human intervention. When determining the location, type, function, and design of replacement, applicants and local government units must consider landscape position, habitat requirements, development and habitat loss trends, sources of watershed impairment, protection and maintenance of upland resources and riparian areas, and providing a suite of functions.	WCA: Less stringent. Performance standards are required as part of the bank plan under WCA. However, the rule does not contain specific requirements that the standards be ecologically oriented and based on best available science that can be measured in a practicable manner. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.96	**Monitoring**				

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
BWSR, DNR	230.96(a)	(a)*General* (1) Monitoring the compensatory mitigation project site is necessary to determine if the project is meeting its performance standards, and to determine if measures are necessary to ensure that the compensatory mitigation project is accomplishing its objectives. The submission of monitoring reports to assess the development and condition of the compensatory mitigation project is required, but the content and level of detail for those monitoring reports must be commensurate with the scale and scope of the compensatory mitigation project, as well as the compensatory mitigation project type. The mitigation plan must address the monitoring requirements for the compensatory mitigation project, including the parameters to be monitored, the length of the monitoring period, the party responsible for conducting the monitoring, the frequency for submitting monitoring reports to the district engineer, and the party responsible for submitting those monitoring reports to the district engineer. (2) The district engineer may conduct site inspections on a regular basis (e.g., annually) during the monitoring period to evaluate mitigation site performance.	Monitoring for a period of not less than 5 years, with submittal of monitoring reports, is required. - Level of detail commensurate with scale and scope of project. - Monitoring requirements must be addressed in mitigation plan. - Monitoring requirements may be waived when DE (PA?) determines project has achieved performance standards. - Monitoring report requirements should be described in special conditions. - Reports are to be made available to interested parties upon request.	MN Rules 8420.0800, 8420.0810 MN Statutes 103G.2242	WCA rules require monitoring of all wetland replacement areas to assess progress and attainment of objectives and performance standards. Minimum monitoring report requirements are identified in rule, and annual or biannual monitoring reports are required. Provisions are identified for waiving or extending the monitoring period.	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.96(b)	(b) *Monitoring period.* The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs). Following project implementation, the district engineer may reduce or waive the remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. Conversely the district engineer may extend the original monitoring period upon a determination that		MN Rules 8420.0800, 8420.0810 MN Statutes 103G.2242	WCA rules require monitoring of all wetland replacement areas to assess progress and attainment of objectives and performance standards. Minimum monitoring report requirements are identified in rule, and annual or biannual monitoring reports are required. Provisions are identified for waiving or extending the monitoring period. Default monitoring period is 5 years unless otherwise shortened or lengthened by the LGU.	WCA: Equally stringent, PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		performance standards have not been met or the compensatory mitigation project is not on track to meet them. The district engineer may also revise monitoring requirements when remediation and/or adaptive management is required.				
BWSR, DNR	230.96(c)	(c) *Monitoring reports.* (1) The district engineer must determine the information to be included in monitoring reports. This information must be sufficient for the district engineer to determine how the compensatory mitigation project is progressing towards meeting its performance standards, and may include plans (such as as-built plans), maps, and photographs to illustrate site conditions. Monitoring reports may also include the results of functional, condition, or other assessments used to provide quantitative or qualitative measures of the functions provided by the compensatory mitigation project site. (2) The permittee or sponsor is responsible for submitting monitoring reports in accordance with the special conditions of the DA permit or the terms of the instrument. Failure to submit monitoring reports in a timely manner may result in compliance action by the district engineer. (3) Monitoring reports must be provided by the district engineer to interested federal, tribal, state, and local resource agencies, and the public, upon request.		MN Rules 8420.0800, 8420.0810 MN Statutes 103G.2242	WCA rules require monitoring of all wetland replacement areas to assess progress and attainment of objectives and performance standards. Minimum monitoring report requirements are identified in rule, and annual or biannual monitoring reports are required. Provisions are identified for waiving or extending the monitoring period. Monitoring reports are distributed by the LGU to members of the TEP.	WCA: Equally stringent in content but decision-making authority on compliance with bank plan is the LGU. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.97	**Management**				
BWSR, DNR	230.97(a)(1)	(a) *Site protection.* (1) The aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project must be provided long-term protection through real estate instruments or other available mechanisms, as appropriate. Long-term protection may be provided through real estate instruments such as conservation easements held by entities such as federal, tribal, state, or local resource agencies, nonprofit conservation	Site protection through real estate instruments is required for mitigation project areas. • The PA is not required to be the holder of the instrument. • Instrument must prohibit incompatible uses. • Instruments must contain 60-day notice provision concerning transfer, voidance or modification. • If mitigation occurs on private lands and future changes to	MN Rules 8420.0705 Subp. 5, and 8420.0330 Subp. 4B MN Statutes 103G.2242 Subd. 3(b)	WCA rules require BWSR to hold a conservation easement for all banks as a site protection mechanism except for those on state land. BWSR's conservation easement prohibits incompatible uses.	WCA: Less stringent. A conservation easement in favor of the State is required for all wetland banks. For project-specific replacement applicants must record a notice with the deed for lands containing a replacement wetland.

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		organizations, or private land managers; the transfer of title to such entities; or by restrictive covenants. For government property, long-term protection may be provided through federal facility management plans or integrated natural resources management plans. When approving a method for long-term protection of nongovernment property other than transfer of title, the district engineer shall consider relevant legal constraints on the use of conservation easements and/or restrictive covenants in determining whether such mechanisms provide sufficient site protection. To provide sufficient site protection, a conservation easement or restrictive covenant should, where practicable, establish in an appropriate third party (e.g., governmental or nonprofit resource management agency) the right to enforce site protections and provide the third party the resources necessary to monitor and enforce these site protections.	statute\reg\management directives result in incompatible use, agency must provide alternative mitigation.			The deed notice is not as restrictive as a conservation easement and may be less enforceable. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.97(a)(2)	(2) The real estate instrument, management plan, or other mechanism providing long-term protection of the compensatory mitigation site must, to the extent appropriate and practicable, prohibit incompatible uses (e.g., clear cutting or mineral extraction) that might otherwise jeopardize the objectives of the compensatory mitigation project. Where appropriate, multiple instruments recognizing compatible uses (e.g., fishing or grazing rights) may be used.		MN Rules 8420.0705 Subp. 5 MN Statutes 103G.2242 Subd. 3(b)	WCA rules require BWSR to hold a conservation easement for all banks as a site protection mechanism except for those on state land. BWSR's conservation easement prohibits incompatible uses.	WCA: Equally stringent for wetland banks and less stringent for project-specific replacement. The deed restrictions required in WCA may not specifically state the prohibitions on incompatible uses. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
BWSR, DNR	230.97(a)(3)	(3) The real estate instrument, management plan, or other long-term protection mechanism must contain a provision requiring 60-day advance notification to the district engineer before any action is taken to void or modify the instrument, management plan, or long-term protection mechanism, including transfer of title to, or establishment of any other legal claims over, the compensatory mitigation site.		MN Rules 8420.0705 Subp. 5 MN Statutes 103G.2242 Subd. 3(b)	N/A – BWSR holds the easement and is the only entity that can void or modify it.	WCA: Less stringent. The standard conservation easement used for wetland banks does not contain a notification requirement. The deed restrictions required in WCA also do not contain a notification requirement. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.97(a)(4)	(4) For compensatory mitigation projects on public lands, where Federal facility management plans or integrated natural resources management plans are used to provide long-term protection, and changes in statute, regulation, or agency needs or mission results in an incompatible use on public lands originally set aside for compensatory mitigation, the public agency authorizing the incompatible use is responsible for providing alternative compensatory mitigation that is acceptable to the district engineer for any loss in functions resulting from the incompatible use.		No provision		WCA: Less stringent. WCA has no provision for addressing replacement on federal lands. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.97(a)(5)	(5) A real estate instrument, management plan, or other long-term protection mechanism used for site protection of permittee responsible mitigation must be approved by the district engineer in advance		MN Rules 8420.0705 Subp. 5 MN Statutes 103G.2242 Subd. 3(b)	WCA rules require BWSR to hold a conservation easement for all banks as a site protection mechanism except for those on state land. BWSR's conservation easement prohibits incompatible uses.	WCA: Equally stringent. Conservation easements for wetland banks must be approved and recorded before credits are

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		of, or concurrent with, the activity causing the authorized impacts.				deposited into the bank account. Similarly, the deed restrictions required for project-specific replacement must be approved by the LGU and recorded before the wetland is impacted. PWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.97(b)	(b) *Sustainability.* Compensatory mitigation projects shall be designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. This includes minimization of active engineering features (e.g., pumps) and appropriate siting to ensure that natural hydrology and landscape context will support long-term sustainability. Where active long-term management and maintenance are necessary to ensure long-term sustainability (e.g., prescribed burning, invasive species control, maintenance of water control structures, easement enforcement), the responsible party must provide for such management and maintenance. This includes the provision of long-term financing mechanisms where necessary. Where needed, the acquisition and protection of water rights must be secured and documented in the permit conditions or instrument.	Mitigation projects shall be sustainable. Management is the responsibility of responsible party. Responsible party will notify DE if: • Project cannot be constructed in accordance with plan. • Monitoring suggests performance standards will not be met. Performance standards may be revised to address deficiencies or changes in management strategies and objectives.	MN Rules 8420.0522 Subp. 5, 8420. 0735 MN Statutes 103B.103, 103G.2242 MN Rules 8420.0735	State statute establishes an easement stewardship account whereby revenue from payments of wetland bank owners is distributed annually to BWSR to use for easement stewardship. WCA rules empower the LGU and BWSR to order corrective actions, freeze credits, and undertake reconstruction work if there are deficiencies in the replacement site.	WCA: Equally stringent. WCA rule emphasizes the ecological suitability of replacement sites and also has provisions for requiring corrective actions if a bank site does not meet performance standards. However, there is not a provision requiring long-term financing for maintenance. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see

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						the response for 230.91(a-b).
BWSR, DNR	230.97(c)(1)	(c) *Adaptive management.* (1) If the compensatory mitigation project cannot be constructed in accordance with the approved mitigation plans, the permittee or sponsor must notify the district engineer. A significant modification of the compensatory mitigation project requires approval from the district engineer.		MN Statutes 103B.103, 103G.2242 MN Rules 8420.0735	WCA rules empower the LGU and BWSR to order corrective actions, freeze credits, and undertake reconstruction work if there are deficiencies in the replacement site.	WCA: Equally stringent. WCA does not use the term adaptive management but the underlying purpose behind its use in the 404(b)(1) Guidelines is inherent in statute and rule. LGU and BWSR staff have several options to identify and site deficiencies (monitoring, easement inspections, etc.) and work cooperatively with replacement site owners/sponsors to rectify performance related issues. The LGU has the ability to pursue more formal actions if landowners are uncooperative. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.97(c)(2)	(2) If monitoring or other information indicates that the compensatory mitigation project is not progressing towards meeting its performance standards as anticipated, the responsible party must notify the district engineer as soon as possible. The district engineer will evaluate and pursue measures to address deficiencies in the compensatory		MN Statutes 103B.103, 103G.2242 MN Rules 8420.0735	WCA rules empower the LGU and BWSR to order corrective actions, freeze credits, and undertake reconstruction work if there are deficiencies in the replacement site.	WCA: Equally stringent. LGU and BWSR staff have several options to identify and site deficiencies (monitoring, easement inspections, etc.) and work cooperatively

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		mitigation project. The district engineer will consider whether the compensatory mitigation project is providing ecological benefits comparable to the original objectives of the compensatory mitigation project.				with replacement site owners/sponsors to rectify performance related issues. The LGU has the ability to pursue more formal actions if landowners are uncooperative. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.97(c)(3)	(3) The district engineer, in consultation with the responsible party (and other federal, tribal, state, and local agencies, as appropriate), will determine the appropriate measures. The measures may include site modifications, design changes, revisions to maintenance requirements, and revised monitoring requirements. The measures must be designed to ensure that the modified compensatory mitigation project provides aquatic resource functions comparable to those described in the mitigation plan objectives.		MN Statutes 103B.103, 103G.2242 MN Rules 8420.0735	WCA rules empower the LGU and BWSR to order corrective actions, freeze credits, and undertake reconstruction work if there are deficiencies in the replacement site.	WCA: LGU and BWSR staff have several options to identify and site deficiencies (monitoring, easement inspections, etc.) and work cooperatively with replacement site owners/sponsors to rectify performance related issues. The LGU has the ability to pursue more formal actions if landowners are uncooperative. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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BWSR, DNR	230.97(c)(4)	(4) Performance standards may be revised in accordance with adaptive management to account for measures taken to address deficiencies in the compensatory mitigation project. Performance standards may also be revised to reflect changes in management strategies and objectives if the new standards provide for ecological benefits that are comparable or superior to the approved compensatory mitigation project. No other revisions to performance standards will be allowed except in the case of natural disasters.		MN Statutes 103B.103, 103G.2242 MN Rules 8420.0735	WCA rules empower the LGU and BWSR to order corrective actions, freeze credits, and undertake reconstruction work if there are deficiencies in the replacement site.	WCA: Equally stringent. LGU and BWSR staff have several options to identify and site deficiencies (monitoring, easement inspections, etc.) and work cooperatively with replacement site owners/sponsors to rectify performance related issues including the modification of bank and replacement plans. The LGU also has the ability to pursue more formal actions if landowners are uncooperative. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.97(d)(1)	(d) *Long-term management.* (1) The permit conditions or instrument must identify the party responsible for ownership and all long-term management of the compensatory mitigation project. The permit conditions or instrument may contain provisions allowing the permittee or sponsor to transfer the long-term management responsibilities of the compensatory mitigation project site to a land stewardship entity, such as a public agency, nongovernmental organization, or private land manager, after review and approval by the district engineer. The land stewardship entity need not be identified in the original permit or instrument, as long as the future	Permit conditions or instrument must identify party responsible for long-term management and may contain provisions allowing transfer or responsibility to land stewardship entity. Provisions for long-term financing must be addressed in original permit or instrument.	WCA: MN Rules 8420.0735 MN Statutes 103B.103, 103G.2242	WCA: WCA rules state that the fee owner and the banking applicant, if different from the fee owner, are jointly and severally responsible for the success of the banking project according to the approved banking plan and for maintaining the banking project according to the conditions of the conservation easement. The banking plan applicant, if different from the fee owner, is not responsible for maintenance after the monitoring requirements have been completed if the banking plan applicant no longer owns an easement interest in the real estate or credits associated with the banked wetland.	WCA: Less stringent. An easement stewardship account has been established by the state and fees are currently collected for this purpose and deposited into the account. The fees are used by BWSR to conduct assess compliance with easements for wetland banks that are outside of the required

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		transfer of long-term management responsibility is approved by the district engineer.			State statute establishes an easement stewardship account whereby revenue from payments of wetland bank owners is distributed annually to BWSR to use for easement stewardship. WCA rules empower the LGU and BWSR to order corrective actions, freeze credits, and undertake reconstruction work if there are deficiencies in the replacement site.	monitoring period. However, the funds cannot be used to repair any deficiencies identified through the inspection process. Long-term management funding is currently not required under WCA so any required activities are the responsible of the landowner. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.97(d)(2)	(2) A long-term management plan should include a description of long-term management needs, annual cost estimates for these needs, and identify the funding mechanism that will be used to meet those needs.		WCA: MN Statutes 103B.103, 103G.2242 MN Rules 8420.0735	WCA: State statute establishes an easement stewardship account whereby revenue from payments of wetland bank owners is distributed annually to BWSR to use for easement stewardship. WCA rules empower the LGU and BWSR to order corrective actions, freeze credits, and undertake reconstruction work if there are deficiencies in the replacement site.	WCA: Less stringent. Long-term management plans and long-term management funding are currently not required under WCA. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.97(d)(3)	(3) Any provisions necessary for long-term financing must be addressed in the original				WCA: Less stringent. Long-term

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		permit or instrument. The district engineer may require provisions to address inflationary adjustments and other contingencies, as appropriate. Appropriate long-term financing mechanisms include nonwasting endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments. In cases where the long-term management entity is a public authority or government agency, that entity must provide a plan for the long-term financing of the site.		WCA: MN Statutes 103B.103, 103G.2242 MN Rules 8420.0735	WCA: State statute establishes an easement stewardship account whereby revenue from payments of wetland bank owners is distributed annually to BWSR to use for easement stewardship. WCA rules empower the LGU and BWSR to order corrective actions, freeze credits, and undertake reconstruction work if there are deficiencies in the replacement site.	management plans and long-term management funding are currently not required under WCA. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
BWSR, DNR	230.97(d)(4)	(4) For permittee responsible mitigation, any long-term financing mechanisms must be approved in advance of the activity causing the authorized impacts.				WCA: Less stringent. Long-term management plans and long-term management funding are currently not required for project-specific replacement under WCA. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.98	**Mitigation banks and in-lieu fee programs**	**Not applicable**			
BWSR (Remainder of Document)	230.98(a) *General Considerations*	(a) *General considerations.* (1) All mitigation banks and in-lieu fee programs must have an approved instrument signed by the sponsor and the district engineer prior to being used to provide compensatory mitigation for DA permits.	Banks and ILF must have an approved instrument signed by DE (Director/Commissioner) and sponsor prior to use, must be designed to be self-sustaining, and must comply with standards of this part irrespective of siting or sponsorship.	MN Rules 8420.0705 MN Statutes 103G.2242	Wetland bank plans are approved by the LGU with input from the Technical Evaluation Panel. The required elements of a bank plan and the process for establishing a wetland bank are outlined in rule. ILF programs are required to comply with the requirements of the Federal	WCA: Less stringent. A signed instrument is not required for mitigation banks. ILF programs must satisfy the requirements in the Federal Mitigation

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		(2) To the maximum extent practicable, mitigation banks and in-lieu fee project sites must be planned and designed to be self-sustaining over time, but some active management and maintenance may be required to ensure their long-term viability and sustainability. Examples of acceptable management activities include maintaining fire dependent habitat communities in the absence of natural fire and controlling invasive exotic plant species. (3) All mitigation banks and in-lieu fee programs must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.			Mitigation Rule in order to be approved under WCA.	Rule, including having a signed instrument. Banks and ILF programs will also need to comply with all of the requirements in the Federal Mitigation Rule, including the items covered previously that are incorporated into this part. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.98(b) *Interagency Review Team.*	(b) *Interagency Review Team.* (1) The district engineer will establish an Interagency Review Team (IRT) to review documentation for the establishment and management of mitigation banks and in-lieu fee programs. The district engineer or his designated representative serves as Chair of the IRT. In cases where a mitigation bank or in-lieu fee program is proposed to satisfy the requirements of another federal, tribal, state, or local program, in addition to compensatory mitigation requirements of DA permits, it may be appropriate for the administering agency to serve as co-Chair of the IRT. (2) In addition to the Corps, representatives from the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, NOAA Fisheries, the Natural Resources Conservation Service, and other federal agencies, as appropriate, may participate in the IRT. The IRT may also include representatives from tribal, state, and local regulatory and resource	IRT will be established to review documentation for establishment and management of banks and ILF. Provides requirements for inclusion of other parties in IRT and described responsibilities of IRT. Requires DE (PA?) to give timely consideration to comments\advice of IRT. DE(PA) may enter into MOA with other agency (including state and local) to perform some or all functions of IRT. - Must include provisions for federal oversight	WCA: MN Rule 8420.0240 MN Statutes 103G.2242 Subd. 2	WCA: WCA establishes a technical evaluation panel (TEP) that reviews, makes recommendations, and has appeal rights for all WCA decisions, including wetland banking. Rules allow the TEP to seek advice and assistance from others with additional expertise to help the panel in its work. When a technical evaluation panel assembles findings or makes a recommendation, the local government unit must consider the findings or recommendation of the panel in its approval or denial of an application. If the local government unit does not agree with the panel's findings and recommendation, the detailed reasons for the disagreement must be part of the local government unit's record of decision.	WCA: Less stringent. The TEP functions much like the IRT but WCA rule establishes the members of the TEP and does not allow for representation from federal agencies, tribes, or other agency staff on a case-by-case basis. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		agencies, where such agencies have authorities and/or mandates directly affecting, or affected by, the establishment, operation, or use of the mitigation bank or in-lieu fee program. The district engineer will seek to include all public agencies with a substantive interest in the establishment of the mitigation bank or in-lieu fee program on the IRT, but retains final authority over its composition. (3) The primary role of the IRT is to facilitate the establishment of mitigation banks or in-lieu fee programs through the development of mitigation banking or in-lieu fee program instruments. The IRT will review the prospectus, instrument, and other appropriate documents and provide comments to the district engineer. The district engineer and the IRT should use a watershed approach to the extent practicable in reviewing proposed mitigation banks and in-lieu fee programs. Members of the IRT may also sign the instrument, if they so choose. By signing the instrument, the IRT members indicate their agreement with the terms of the instrument. As an alternative, a member of the IRT may submit a letter expressing concurrence with the instrument. The IRT will also advise the district engineer in assessing monitoring reports, recommending remedial or adaptive management measures, approving credit releases, and approving modifications to an instrument. In order to ensure timely processing of instruments and other documentation, comments from IRT members must be received by the district engineer within the time limits specified in this section. Comments received after these deadlines will only be considered at the discretion of the district engineer to the extent that doing so does not jeopardize the deadlines for district engineer action. (4) The district engineer will give full consideration to any timely comments and advice of the IRT. The district engineer alone				

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		retains final authority for approval of the instrument in cases where the mitigation bank or in-lieu fee program is used to satisfy compensatory mitigation requirements of DA permits. (5) *MOAs with other agencies.* The district engineer and members of the IRT may enter into a memorandum of agreement (MOA) with any other federal, state or local government agency to perform all or some of the IRT review functions described in this section. Such MOAs must include provisions for appropriate federal oversight of the review process. The district engineer retains sole authority for final approval of instruments and other documentation required under this section.				
	230.98(c) *Compensation planning framework for in-lieu fee programs*	(c) *Compensation planning framework for in-lieu fee programs.* (1) The approved instrument for an in-lieu fee program must include a compensation planning framework that will be used to select, secure, and implement aquatic resource restoration, establishment, enhancement, and/or preservation activities. The compensation planning framework must support a watershed approach to compensatory mitigation. All specific projects used to provide compensation for DA permits must be consistent with the approved compensation planning framework. Modifications to the framework must be approved as a significant modification to the instrument by the district engineer, after consultation with the IRT. (2) The compensation planning framework must contain the following elements: (i) The geographic service area(s), including a watershed-based rationale for the delineation of each service area; (ii) A description of the threats to aquatic resources in the service area(s), including how the in-lieu fee program will help offset impacts resulting from those threats;	ILF instruments must include a watershed-based compensation planning framework to select, secure and implement required activities, and must include the elements in i-xi.	WCA: MN Statutes 103G.2242, Subd. 1	WCA: Statute directs BWSR to adopt rules governing the approval of wetland value replacement plans under this section and public waters work permits affecting public waters wetlands under section 103G.245. Any in-lieu fee program established by the board must conform with Code of Federal Regulations, title 33, section 332.8, as amended.	WCA: Equally stringent. MN Statute requires that any IFL program established by BWSR must conform to 33 CFR 332.8 (identical to this section of the 404(b)(1) Guidelines). PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		(iii) An analysis of historic aquatic resource loss in the service area(s); (iv) An analysis of current aquatic resource conditions in the service area(s), supported by an appropriate level of field documentation; (v) A statement of aquatic resource goals and objectives for each service area, including a description of the general amounts, types and locations of aquatic resources the program will seek to provide; (vi) A prioritization strategy for selecting and implementing compensatory mitigation activities; (vii) An explanation of how any preservation objectives identified in paragraph (c)(2)(v) of this section and addressed in the prioritization strategy in paragraph (c)(2)(vi) satisfy the criteria for use of preservation in §230.93(h); (viii) A description of any public and private stakeholder involvement in plan development and implementation, including, where appropriate, coordination with federal, state, tribal and local aquatic resource management and regulatory authorities; (ix) A description of the long-term protection and management strategies for activities conducted by the in-lieu fee program sponsor; (x) A strategy for periodic evaluation and reporting on the progress of the program in achieving the goals and objectives in paragraph (c)(2)(v) of this section, including a process for revising the planning framework as necessary; and (xi) Any other information deemed necessary for effective compensation planning by the district engineer. (3) The level of detail necessary for the compensation planning framework is at the discretion of the district engineer, and will take into account the characteristics of the service area(s) and the scope of the program. As part of the in-lieu fee program instrument, the compensation planning framework will be reviewed by the IRT, and will be a major				

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		factor in the district engineer's decision on whether to approve the instrument.				
	230.98(d) *Review process*	(d) *Review process.* (1) The sponsor is responsible for preparing all documentation associated with establishment of the mitigation bank or in-lieu fee program, including the prospectus, instrument, and other appropriate documents, such as mitigation plans for a mitigation bank. The prospectus provides an overview of the proposed mitigation bank or in-lieu fee program and serves as the basis for public and initial IRT comment. For a mitigation bank, the mitigation plan, as described in §230.94(c), provides detailed plans and specifications for the mitigation bank site. For in-lieu fee programs, mitigation plans will be prepared as in-lieu fee project sites are identified after the instrument has been approved and the in-lieu fee program becomes operational. The instrument provides the authorization for the mitigation bank or in-lieu fee program to provide credits to be used as compensatory mitigation for DA permits. (2) *Prospectus.* The prospectus must provide a summary of the information regarding the proposed mitigation bank or in-lieu fee program, at a sufficient level of detail to support informed public and IRT comment. The review process begins when the sponsor submits a complete prospectus to the district engineer. For modifications of approved instruments, submittal of a new prospectus is not required; instead, the sponsor must submit a written request for an instrument modification accompanied by appropriate documentation. The district engineer must notify the sponsor within 30 days whether or not a submitted prospectus is complete. A complete prospectus includes the following information: (i) The objectives of the proposed mitigation bank or in-lieu fee program.	Paragraph (d) does not lend itself to summation. In short, it provides the requirements for content and process for review of mitigation bank and ILF prospectus, and draft and final instruments. (e) Process for responding to objection to the approval of instrument by EPA, USFWS or NMFS. - DE (PA?) has 30 days to respond - 15 days for RA or RD to elevate if they are not satisfied with response. - If issue was not forwarded, DE (PA?) may proceed. Additional steps apply to DofA NHQ. (f) Deadlines for processes above may be extended under listed circumstances.	WCA: MN Rules 8420.0255, 8420.0705, 8420.0725 MN Statutes 103G.2242, 103G.222	WCA: WCA rules have a set process for all decisions including wetland banks. The process includes notices (application and decision) and TEP review and recommendations. Additional steps are required for wetland banks related to easement acquisition, wetland bank account establishment and credit deposits.	WCA: Less stringent. The only step required by statute and rule for wetland bank establishment in Minnesota is the banking plan application (MN Rules 8420.0705 subp. 3). The bank plan under WCA is roughly equivalent to the mitigation plan described at 230.94(c). There are no required steps similar to the prospectus phase of the federal review process. Further, since a banking instrument is also not required, there are no steps associated with the submittal and review of this document. Also, the federal review process contains several review periods and timeframes for agency responses. The only timeframe in the WCA review process is the section 15.99 MN requirement that requires a written response within 60 days of receipt. The public has an opportunity to comment on the proposed bank vis the noticing requirement in WCA.

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		(ii) How the mitigation bank or in-lieu fee program will be established and operated. (iii) The proposed service area. (iv) The general need for and technical feasibility of the proposed mitigation bank or in-lieu fee program. (v) The proposed ownership arrangements and long-term management strategy for the mitigation bank or in-lieu fee project sites. (vi) The qualifications of the sponsor to successfully complete the type(s) of mitigation project(s) proposed, including information describing any past such activities by the sponsor. (vii) For a proposed mitigation bank, the prospectus must also address: (A) The ecological suitability of the site to achieve the objectives of the proposed mitigation bank, including the physical, chemical, and biological characteristics of the bank site and how that site will support the planned types of aquatic resources and functions; and (B) Assurance of sufficient water rights to support the long-term sustainability of the mitigation bank. (viii) For a proposed in-lieu fee program, the prospectus must also include: (A) The compensation planning framework (see paragraph (c) of this section); and (B) A description of the in-lieu fee program account required by paragraph (i) of this section. (3) *Preliminary review of prospectus.* Prior to submitting a prospectus, the sponsor may elect to submit a draft prospectus to the district engineer for comment and consultation. The district engineer will provide copies of the draft prospectus to the IRT and will provide comments back to the sponsor within 30 days. Any comments from IRT members will also be forwarded to the sponsor. This preliminary review is optional but is strongly recommended. It is intended to				PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		identify potential issues early so that the sponsor may attempt to address those issues prior to the start of the formal review process. (4) *Public review and comment.* Within 30 days of receipt of a complete prospectus or an instrument modification request that will be processed in accordance with paragraph (g)(1) of this section, the district engineer will provide public notice of the proposed mitigation bank or in-lieu fee program, in accordance with the public notice procedures at 33 CFR 325.3. The public notice must, at a minimum, include a summary of the prospectus and indicate that the full prospectus is available to the public for review upon request. For modifications of approved instruments, the public notice must instead summarize, and make available to the public upon request, whatever documentation is appropriate for the modification (e.g., a new or revised mitigation plan). The comment period for public notice will be 30 days, unless the district engineer determines that a longer comment period is appropriate. The district engineer will notify the sponsor if the comment period is extended beyond 30 days, including an explanation of why the longer comment period is necessary. Copies of all comments received in response to the public notice must be distributed to the other IRT members and to the sponsor within 15 days of the close of the public comment period. The district engineer and IRT members may also provide comments to the sponsor at this time, and copies of any such comments will also be distributed to all IRT members. If the construction of a mitigation bank or an in-lieu fee program project requires a DA permit, the public notice requirement may be satisfied through the public notice provisions of the permit processing procedures, provided all of the relevant information is provided.				

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		(5) *Initial evaluation.* (i) After the end of the comment period, the district engineer will review the comments received in response to the public notice, and make a written initial evaluation as to the potential of the proposed mitigation bank or in-lieu fee program to provide compensatory mitigation for activities authorized by DA permits. This initial evaluation letter must be provided to the sponsor within 30 days of the end of the public notice comment period. (ii) If the district engineer determines that the proposed mitigation bank or in-lieu fee program has potential for providing appropriate compensatory mitigation for activities authorized by DA permits, the initial evaluation letter will inform the sponsor that he/she may proceed with preparation of the draft instrument (see paragraph (d)(6) of this section). (iii) If the district engineer determines that the proposed mitigation bank or in-lieu fee program does not have potential for providing appropriate compensatory mitigation for DA permits, the initial evaluation letter must discuss the reasons for that determination. The sponsor may revise the prospectus to address the district engineer's concerns, and submit the revised prospectus to the district engineer. If the sponsor submits a revised prospectus, a revised public notice will be issued in accordance with paragraph (d)(4) of this section. (iv) This initial evaluation procedure does not apply to proposed modifications of approved instruments. (6) *Draft instrument.* (i) After considering comments from the district engineer, the IRT, and the public, if the sponsor chooses to proceed with establishment of the mitigation bank or in-lieu fee program, he must prepare a draft instrument and submit it to the district engineer. In the case of an instrument modification, the sponsor must prepare a				

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		draft amendment (e.g., a specific instrument provision, a new or modified mitigation plan), and submit it to the district engineer. The district engineer must notify the sponsor within 30 days of receipt, whether the draft instrument or amendment is complete. If the draft instrument or amendment is incomplete, the district engineer will request from the sponsor the information necessary to make the draft instrument or amendment complete. Once any additional information is submitted, the district engineer must notify the sponsor as soon as he determines that the draft instrument or amendment is complete. The draft instrument must be based on the prospectus and must describe in detail the physical and legal characteristics of the mitigation bank or in-lieu fee program and how it will be established and operated. (ii) For mitigation banks and in-lieu fee programs, the draft instrument must include the following information: (A) A description of the proposed geographic service area of the mitigation bank or in-lieu fee program. The service area is the watershed, ecoregion, physiographic province, and/or other geographic area within which the mitigation bank or in-lieu fee program is authorized to provide compensatory mitigation required by DA permits. The service area must be appropriately sized to ensure that the aquatic resources provided will effectively compensate for adverse environmental impacts across the entire service area. For example, in urban areas, a U.S. Geological Survey 8-digit hydrologic unit code (HUC) watershed or a smaller watershed may be an appropriate service area. In rural areas, several contiguous 8-digit HUCs or a 6-digit HUC watershed may be an appropriate service area. Delineation of the service area must also consider any locally-developed standards and criteria that may be applicable. The economic viability of the mitigation bank				

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		or in-lieu fee program may also be considered in determining the size of the service area. The basis for the proposed service area must be documented in the instrument. An in-lieu fee program or umbrella mitigation banking instrument may have multiple service areas governed by its instrument (e.g., each watershed within a State or Corps district may be a separate service area under the instrument); however, all impacts and compensatory mitigation must be accounted for by service area; (B) Accounting procedures; (C) A provision stating that legal responsibility for providing the compensatory mitigation lies with the sponsor once a permittee secures credits from the sponsor; (D) Default and closure provisions; (E) Reporting protocols; and (F) Any other information deemed necessary by the district engineer. (iii) For a mitigation bank, a complete draft instrument must include the following additional information: (A) Mitigation plans that include all applicable items listed in §230.94(c)(2) through (14); and (B) A credit release schedule, which is tied to achievement of specific milestones. All credit releases must be approved by the district engineer, in consultation with the IRT, based on a determination that required milestones have been achieved. The district engineer, in consultation with the IRT, may modify the credit release schedule, including reducing the number of available credits or suspending credit sales or transfers altogether, where necessary to ensure that all credits sales or transfers remain tied to compensatory mitigation projects with a high likelihood of meeting performance standards; (iv) For an in-lieu fee program, a complete draft instrument must include the following additional information: (A) The compensation planning framework (see paragraph (c) of this section);				

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		(B) Specification of the initial allocation of advance credits (see paragraph (n) of this section) and a draft fee schedule for these credits, by service area, including an explanation of the basis for the allocation and draft fee schedule; (C) A methodology for determining future project-specific credits and fees; and (D) A description of the in-lieu fee program account required by paragraph (i) of this section. (7) *IRT review.* Upon receipt of notification by the district engineer that the draft instrument or amendment is complete, the sponsor must provide the district engineer with a sufficient number of copies of the draft instrument or amendment to distribute to the IRT members. The district engineer will promptly distribute copies of the draft instrument or amendment to the IRT members for a 30 day comment period. The 30-day comment period begins 5 days after the district engineer distributes the copies of the draft instrument or amendment to the IRT. Following the comment period, the district engineer will discuss any comments with the appropriate agencies and with the sponsor. The district engineer will seek to resolve issues using a consensus based approach, to the extent practicable, while still meeting the decision-making time frames specified in this section. Within 90 days of receipt of the complete draft instrument or amendment by the IRT members, the district engineer must notify the sponsor of the status of the IRT review. Specifically, the district engineer must indicate to the sponsor if the draft instrument or amendment is generally acceptable and what changes, if any, are needed. If there are significant unresolved concerns that may lead to a formal objection from one or more IRT members to the final instrument or amendment, the district engineer will indicate the nature of those concerns.				

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		(8) *Final instrument.* The sponsor must submit a final instrument to the district engineer for approval, with supporting documentation that explains how the final instrument addresses the comments provided by the IRT. For modifications of approved instruments, the sponsor must submit a final amendment to the district engineer for approval, with supporting documentation that explains how the final amendment addresses the comments provided by the IRT. The final instrument or amendment must be provided directly by the sponsor to all members of the IRT. Within 30 days of receipt of the final instrument or amendment, the district engineer will notify the IRT members whether or not he intends to approve the instrument or amendment. If no IRT member objects, by initiating the dispute resolution process in paragraph (e) of this section within 45 days of receipt of the final instrument or amendment, the district engineer will notify the sponsor of his final decision and, if the instrument or amendment is approved, arrange for it to be signed by the appropriate parties. If any IRT member initiates the dispute resolution process, the district engineer will notify the sponsor. Following conclusion of the dispute resolution process, the district engineer will notify the sponsor of his final decision, and if the instrument or amendment is approved, arrange for it to be signed by the appropriate parties. For mitigation banks, the final instrument must contain the information items listed in paragraphs (d)(6)(ii), and (iii) of this section. For in-lieu fee programs, the final instrument must contain the information items listed in paragraphs (d)(6)(ii) and (iv) of this section. For the modification of an approved instrument, the amendment must contain appropriate information, as determined by the district engineer. The final instrument or amendment must be made available to the public upon request.				

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	230.98(e)	(e) *Dispute resolution process.* (1) Within 15 days of receipt of the district engineer's notification of intent to approve an instrument or amendment, the Regional Administrator of the U.S. EPA, the Regional Director of the U.S. Fish and Wildlife Service, the Regional Director of the National Marine Fisheries Service, and/or other senior officials of agencies represented on the IRT may notify the district engineer and other IRT members by letter if they object to the approval of the proposed final instrument or amendment. This letter must include an explanation of the basis for the objection and, where feasible, offer recommendations for resolving the objections. If the district engineer does not receive any objections within this time period, he may proceed to final action on the instrument or amendment. (2) The district engineer must respond to the objection within 30 days of receipt of the letter. The district engineer's response may indicate an intent to disapprove the instrument or amendment as a result of the objection, an intent to approve the instrument or amendment despite the objection, or may provide a modified instrument or amendment that attempts to address the objection. The district engineer's response must be provided to all IRT members. (3) Within 15 days of receipt of the district engineer's response, if the Regional Administrator or Regional Director is not satisfied with the response he may forward the issue to the Assistant Administrator for Water of the U.S. EPA, the Assistant Secretary for Fish and Wildlife and Parks of the U.S. FWS, or the Undersecretary for Oceans and Atmosphere of NOAA, as appropriate, for review and must notify the district engineer		WCA: MN Rules 8420.0905 MN Statutes 103G.2242	WCA: Like all WCA decisions, wetland bank approvals can be appealed by the applicant or member of the TEP. Appeals are decided upon by BWSR. If a local appeals process is in place, then appeals are first decided upon there and then can be appealed to BWSR.	WCA: Equally stringent. WCA has an appeal process that functions similar to the federal dispute resolution process but is available to more than just IRT members and can ultimately be taken to the state Court of Appeals if the other administrative potions in the rule are exhausted. Any party who is required to receive notice of the final decision may appeal. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		by letter via electronic mail or facsimile machine (with copies to all IRT members) that the issue has been forwarded for Headquarters review. This step is available only to the IRT members representing these three federal agencies, however, other IRT members who do not agree with the district engineer's final decision do not have to sign the instrument or amendment or recognize the mitigation bank or in-lieu fee program for purposes of their own programs and authorities. If an IRT member other than the one filing the original objection has a new objection based on the district engineer's response, he may use the first step in this procedure (paragraph (e)(1) of this section) to provide that objection to the district engineer. (4) If the issue has not been forwarded to the objecting agency's Headquarters, then the district engineer may proceed with final action on the instrument or amendment. If the issue has been forwarded to the objecting agency's Headquarters, the district engineer must hold in abeyance the final action on the instrument or amendment, pending Headquarters level review described below. (5) Within 20 days from the date of the letter requesting Headquarters level review, the Assistant Administrator for Water, the Assistant Secretary for Fish and Wildlife and Parks, or the Undersecretary for Oceans and Atmosphere must either notify the Assistant Secretary of the Army (Civil Works) (ASA(CW)) that further review will not be requested, or request that the ASA(CW) review the final instrument or amendment. (6) Within 30 days of receipt of the letter from the objecting agency's Headquarters request for ASA(CW)'s review of the final instrument, the ASA(CW), through the Director of Civil Works, must review the draft instrument or amendment and advise the district engineer				

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		on how to proceed with final action on that instrument or amendment. The ASA(CW) must immediately notify the Assistant Administrator for Water, the Assistant Secretary for Fish and Wildlife and Parks, and/or the Undersecretary for Oceans and Atmosphere of the final decision. (7) In cases where the dispute resolution procedure is used, the district engineer must notify the sponsor of his final decision within 150 days of receipt of the final instrument or amendment.				
	230.98(f)	(f) *Extension of deadlines.* (1) The deadlines in paragraphs (d) and (e) of this section may be extended by the district engineer at his sole discretion in cases where: (i) Compliance with other applicable laws, such as consultation under section 7 of the Endangered Species Act or section 106 of the National Historic Preservation Act, is required; (ii) It is necessary to conduct government-to-government consultation with Indian tribes; (iii) Timely submittal of information necessary for the review of the proposed mitigation bank or in-lieu fee program or the proposed modification of an approved instrument is not accomplished by the sponsor; or (iv) Information that is essential to the district engineer's decision cannot be reasonably obtained within the specified time frame. (2) In such cases, the district engineer must promptly notify the sponsor in writing of the extension and the reason for it. Such extensions shall be for the minimum time		WCA: MN Statute 15.99	WCA: All decisions on replacement plans are subject to state time limits as defined in MN Statutes 15.99. The time limit in is extended if a state statute, federal law, or court order requires a process to occur before the agency acts on the request, and the time periods prescribed in the state statute, federal law, or court order make it impossible to act on the request within 60 days. The deadline is extended to 60 days after completion of the last process required in the applicable statute, law, or order. The time limit is extended if: (1) a request submitted to a state agency requires prior approval of a federal agency; or (2) an application submitted to a city, county, town, school district, metropolitan or regional entity, or other political subdivision requires prior approval of a state or federal agency. In these cases, the deadline for agency action is extended to 60 days after the required prior approval is granted. An agency may extend the time limit in subdivision 2 before the end of the initial 60-day period by providing written notice of the extension to the applicant. The notification must state the reasons for the extension and its anticipated length, which may not exceed 60 days unless approved by the applicant. An applicant may by written notice to the agency	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		necessary to resolve the issue necessitating the extension.			request an extension of the time limit under this section.	
	230.98(g) *Modification of instruments.*	(g) *Modification of instruments.* (1) *Approval of an amendment to an approved instrument.* Modification of an approved instrument, including the addition and approval of umbrella mitigation bank sites or in-lieu fee project sites or expansions of previously approved mitigation bank or in-lieu fee project sites, must follow the appropriate procedures in paragraph (d) of this section, unless the district engineer determines that the streamlined review process described in paragraph (g)(2) of this section is warranted. (2) *Streamlined review process.* The streamlined modification review process may be used for the following modifications of instruments: changes reflecting adaptive management of the mitigation bank or in-lieu fee program, credit releases, changes in credit releases and credit release schedules, and changes that the district engineer determines are not significant. If the district engineer determines that the streamlined review process is warranted, he must notify the IRT members and the sponsor of this determination and provide them with copies of the proposed modification. IRT members and the sponsor have 30 days to notify the district engineer if they have concerns with the proposed modification. If IRT members or the sponsor notify the district engineer of such concerns, the district engineer shall attempt to resolve those concerns. Within 60 days of providing the proposed modification to the IRT, the district engineer must notify the IRT members of his intent to approve or disapprove the proposed modification. If no IRT member objects, by initiating the dispute resolution process in paragraph (e) of this section, within 15 days of receipt of this	Modification of instruments must follow (d), above, with the streamlined process being appropriate for: - Changes reflecting adaptive management of the bank or ILF; - Credit releases; - Changes in credit release and credit release schedules; - Changes that the DE (PA?) determines are not significant.	WCA: MN Rules 8420.0255 MN Statute 103G.2242	WCA rules establish minimum standards for requiring a new decision on a replacement plan.	WCA: Less stringent. There is ambiguity in WCA rule regarding the need for, and process to, modify an approved wetland bank application. A clear and defined process does not currently exist. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		notification, the district engineer will notify the sponsor of his final decision and, if the modification is approved, arrange for it to be signed by the appropriate parties. If any IRT member initiates the dispute resolution process, the district engineer will so notify the sponsor. Following conclusion of the dispute resolution process, the district engineer will notify the sponsor of his final decision, and if the modification is approved, arrange for it to be signed by the appropriate parties.				
	230.98(h) *Umbrella mitigation banking instruments*	**(**h) *Umbrella mitigation banking instruments.* A single mitigation banking instrument may provide for future authorization of additional mitigation bank sites. As additional sites are selected, they must be included in the mitigation banking instrument as modifications, using the procedures in paragraph (g)(1) of this section. Credit withdrawal from the additional bank sites shall be consistent with paragraph (m) of this section.	Single instrument may provide for future authorization of additional bank sites.	WCA: No provision exists.		WCA: More stringent. Since WCA does not contain a requirement for a bank instrument there is nothing equivalent to an umbrella instrument for banks. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.98(i)	(i) *In-lieu fee program account.* (1) The in-lieu fee program sponsor must establish a program account after the instrument is approved by the district engineer, prior to accepting any fees from permittees. If the sponsor accepts funds from entities other than permittees, those funds must be kept in separate accounts. The program account must be established at a financial institution that is a member of the Federal Deposit Insurance Corporation. All interests and earnings accruing to the program account must remain in that account for use by the in-lieu fee	ILF program sponsor must establish program account after DE (PA?) approval but before accepting fees from permittees. Specific requirements are described in (1). And (2). Sponsor must provide annual reports to DE and IRT with information in (3)(i-v).	WCA: MN Statutes 103G.2242, Subd. 1	WCA: Statute directs BWSR to adopt rules governing the approval of wetland value replacement plans under this section and public waters work permits affecting public waters wetlands under section 103G.245. Any in-lieu fee program established by the board must conform with Code of Federal Regulations, title 33, section 332.8, as amended.	WCA: Equally stringent. MN Statute requires that any ILF program established by BWSR must conform to 33 CFR 332.8 (identical to this section of the 404(b)(1) Guidelines). PWWPP: Less stringent. The PWWPP has no standards or programmatic

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		program for the purposes of providing compensatory mitigation for DA permits. The program account may only be used for the selection, design, acquisition, implementation, and management of in-lieu fee compensatory mitigation projects, except for a small percentage (as determined by the district engineer in consultation with the IRT and specified in the instrument) that can be used for administrative costs. (2) The sponsor must submit proposed in-lieu fee projects to the district engineer for funding approval. Disbursements from the program account may only be made upon receipt of written authorization from the district engineer, after the district engineer has consulted with the IRT. The terms of the program account must specify that the district engineer has the authority to direct those funds to alternative compensatory mitigation projects in cases where the sponsor does not provide compensatory mitigation in accordance with the time frame specified in paragraph (n)(4) of this section. (3) The sponsor must provide annual reports to the district engineer and the IRT. The annual reports must include the following information: (i) All income received, disbursements, and interest earned by the program account; (ii) A list of all permits for which in-lieu fee program funds were accepted. This list shall include: the Corps permit number (or the state permit number if there is no corresponding Corps permit number, in cases of state programmatic general permits or other regional general permits), the service area in which the authorized impacts are located, the amount of authorized impacts, the amount of required compensatory mitigation, the amount paid to the in-lieu fee			framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		program, and the date the funds were received from the permittee; (iii) A description of in-lieu fee program expenditures from the account, such as the costs of land acquisition, planning, construction, monitoring, maintenance, contingencies, adaptive management, and administration; (iv) The balance of advance credits and released credits at the end of the report period for each service area; and (v) Any other information required by the district engineer. (4) The district engineer may audit the records pertaining to the program account. All books, accounts, reports, files, and other records relating to the in-lieu fee program account shall be available at reasonable times for inspection and audit by the district engineer.				
	230.98(j) *In-lieu fee project approval*	(j) *In-lieu fee project approval.* (1) As in-lieu fee project sites are identified and secured, the sponsor must submit mitigation plans to the district engineer that include all applicable items listed in §230.94(c)(2) through (14). The mitigation plan must also include a credit release schedule consistent with paragraph (o)(8) of this section that is tied to achievement of specific performance standards. The review and approval of in-lieu fee projects will be conducted in accordance with the procedures in paragraph (g)(1) of this section, as modifications of the in-lieu fee program instrument. This includes compensatory mitigation projects conducted by another party on behalf of the sponsor through requests for proposals and awarding of contracts.	No summary.	WCA: MN Statutes 103G.2242, Subd. 1	WCA: Statute directs BWSR to adopt rules governing the approval of wetland value replacement plans under this section and public waters work permits affecting public waters wetlands under section 103G.245. Any in-lieu fee program established by the board must conform with Code of Federal Regulations, title 33, section 332.8, as amended.	WCA: Equally stringent. MN Statute requires that any ILF program established by BWSR must conform to 33 CFR 332.8 (identical to this section of the 404(b)(1) Guidelines). PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		(2) If a DA permit is required for an in-lieu fee project, the permit should not be issued until all relevant provisions of the mitigation plan have been substantively determined, to ensure that the DA permit accurately reflects all relevant provisions of the approved mitigation plan, such as performance standards.				
	230.98(k) *Coordination of mitigation banking instruments and DA permit issuance*	(k) *Coordination of mitigation banking instruments and DA permit issuance.* In cases where initial establishment of the mitigation bank, or the development of a new project site under an umbrella banking instrument, involves activities requiring DA authorization, the permit should not be issued until all relevant provisions of the mitigation plan have been substantively determined. This is to ensure that the DA permit accurately reflects all relevant provisions of the final instrument, such as performance standards.	No summary.	MN Rules 8420.0705 Subpart 1. MN Statutes 103G.2242		WCA: Equally stringent. Replacement actions completed without prior LGU approval are not eligible for deposit into the wetland bank. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.98(l) *Project implementation*	(l) *Project implementation.* (1) The sponsor must have an approved instrument prior to collecting funds from permittees to satisfy compensatory mitigation requirements for DA permits. (2) Authorization to sell credits to satisfy compensatory mitigation requirements in DA permits is contingent on compliance with all of the terms of the instrument. This includes constructing a mitigation bank or in-lieu fee project in accordance with the mitigation plan approved by the district engineer and incorporated by reference in the instrument. If the aquatic resource restoration, establishment, enhancement, and/or preservation activities cannot be implemented in accordance with the approved mitigation plan, the district	- Approved instrument prior to collecting funds. - Authorization to sell credits contingent upon compliance with all terms of instrument.	WCA: MN Rule 8420.00705, 8420.0725, 8420.0745 MN Statute 103G.2242	WCA: WCA rules only allow credit withdrawals when LGU authorizes a deposit of credits and the withdrawal of credits. Credits can only be deposited if wetland bank plans have been implemented and construction certification is obtained.	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		engineer must consult with the sponsor and the IRT to consider modifications to the instrument, including adaptive management, revisions to the credit release schedule, and alternatives for providing compensatory mitigation to satisfy any credits that have already been sold. (3) An in-lieu fee program sponsor is responsible for the implementation, long-term management, and any required remediation of the restoration, establishment, enhancement, and/or preservation activities, even though those activities may be conducted by other parties through requests for proposals or other contracting mechanisms.				
	230.98(m)	(m) *Credit withdrawal from mitigation banks.* The mitigation banking instrument may allow for an initial debiting of a percentage of the total credits projected at mitigation bank maturity, provided the following conditions are satisfied: the mitigation banking instrument and mitigation plan have been approved, the mitigation bank site has been secured, appropriate financial assurances have been established, and any other requirements determined to be necessary by the district engineer have been fulfilled. The mitigation banking instrument must provide a schedule for additional credit releases as appropriate milestones are achieved (see paragraph (o)(8) of this section). Implementation of the approved mitigation plan shall be initiated no later than the first full growing season after the date of the first credit transaction.	No summary.	WCA: MN Rules 8420.0725 MN Statute 103G.2242	WCA: WCA rules does not allow debiting based on projected bank conditions. Credit deposits and subsequent withdrawals of credits for replacement only occur after the bank has been constructed and certain performance standards established in the approved plan have been met in accordance with an approved credit release schedule.	WCA: More stringent. No credits can be deposited and sold to offset authorized impacts until the bank has been constructed and certain performance standards established in the approved plan have been met. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.98(n)	(n) *Advance credits for in-lieu fee programs.* (1) The in-lieu fee program instrument may make a limited number of advance credits	Authorizes advanced availability of ILF credits. As credits are released, they must be used to first fulfill advanced credits. Read section for additional requirements.	WCA: MN Statutes 103G.2242, Subd. 1	WCA: Statute directs BWSR to adopt rules governing the approval of wetland value replacement plans under this section and public waters work permits affecting public	WCA: Equally stringent. MN Statute requires that any IFL program established by BWSR

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		available to permittees when the instrument is approved. The number of advance credits will be determined by the district engineer, in consultation with the IRT, and will be specified for each service area in the instrument. The number of advance credits will be based on the following considerations: (i) The compensation planning framework; (ii) The sponsor's past performance for implementing aquatic resource restoration, establishment, enhancement, and/or preservation activities in the proposed service area or other areas; and (iii) The projected financing necessary to begin planning and implementation of in-lieu fee projects. (2) To determine the appropriate number of advance credits for a particular service area, the district engineer may require the sponsor to provide confidential supporting information that will not be made available to the general public. Examples of confidential supporting information may include prospective in-lieu fee project sites. (3) As released credits are produced by in-lieu fee projects, they must be used to fulfill any advance credits that have already been provided within the project service area before any remaining released credits can be sold or transferred to permittees. Once previously provided advance credits have been fulfilled, an equal number of advance credits is re-allocated to the sponsor for sale or transfer to fulfill new mitigation requirements, consistent with the terms of the instrument. The number of advance credits available to the sponsor at any given time to sell or transfer to permittees in a given service area is equal to the number of advance credits specified in the instrument,			waters wetlands under section 103G.245. Any in-lieu fee program established by the board must conform with Code of Federal Regulations, title 33, section 332.8, as amended.	must conform to 33 CFR 332.8 (identical to this section of the 404(b)(1) Guidelines). PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		minus any that have already been provided but not yet fulfilled. (4) Land acquisition and initial physical and biological improvements must be completed by the third full growing season after the first advance credit in that service area is secured by a permittee, unless the district engineer determines that more or less time is needed to plan and implement an in-lieu fee project. If the district engineer determines that there is a compensatory mitigation deficit in a specific service area by the third growing season after the first advance credit in that service area is sold, and determines that it would not be in the public interest to allow the sponsor additional time to plan and implement an in-lieu fee project, the district engineer must direct the sponsor to disburse funds from the in-lieu fee program account to provide alternative compensatory mitigation to fulfill those compensation obligations. (5) The sponsor is responsible for complying with the terms of the in-lieu fee program instrument. If the district engineer determines, as a result of review of annual reports on the operation of the in-lieu fee program (see paragraphs (p)(2) and (q)(1) of this section), that it is not performing in compliance with its instrument, the district engineer will take appropriate action, which may include suspension of credit sales, to ensure compliance with the in-lieu fee program instrument (see paragraph (o)(10) of this section). Permittees that secured credits from the in-lieu fee program are not responsible for in-lieu fee program compliance.				
	230.98(o) *Determining credits*	(o) *Determining credits.* (1) *Units of measure.* The principal units for credits and debits are acres, linear feet, functional assessment units, or other suitable metrics of particular	No summary	WCA: MN Rules 8420.0526, 8420.0700, 8420.0705,	WCA: WCA rules use an acre-based credit to represent changes in functional lift. Specific actions generate credit, and credit amount is based on presumed functional lift associated	WCA: Equally stringent. For the ILF parts of this section, MN Statute

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		resource types. Functional assessment units or other suitable metrics may be linked to acres or linear feet. (2) *Assessment.* Where practicable, an appropriate assessment method (e.g., hydrogeomorphic approach to wetlands functional assessment, index of biological integrity) or other suitable metric must be used to assess and describe the aquatic resource types that will be restored, established, enhanced and/or preserved by the mitigation bank or in-lieu fee project. (3) *Credit production.* The number of credits must reflect the difference between pre- and post-compensatory mitigation project site conditions, as determined by a functional or condition assessment or other suitable metric. (4) *Credit value.* Once a credit is debited (sold or transferred to a permittee), its value cannot change. (5) *Credit costs.* (i) The cost of compensatory mitigation credits provided by a mitigation bank or in-lieu fee program is determined by the sponsor. (ii) For in-lieu fee programs, the cost per unit of credit must include the expected costs associated with the restoration, establishment, enhancement, and/or preservation of aquatic resources in that service area. These costs must be based on full cost accounting, and include, as appropriate, expenses such as land acquisition, project planning and design, construction, plant materials, labor, legal fees, monitoring, and remediation or adaptive management activities, as well as administration of the in-lieu fee program. The cost per unit credit must also take into account contingency costs appropriate to the stage of project planning, including		8420.0725, 8420.0735, 8420.0745, 8420.0755 MN Statutes 103G.2242	with each action. Preservation credits generate the lowest amount of credit, thereby effectively raising the replacement ratio when used. Credits cannot be reused and are debited and tracked by BWSR as the bank administrator. Credit costs are determined by the bank sponsor. Credit release schedules tied to performance standards and credit releases are required by rule. Credits generated from uplands (i.e. buffers) are assigned a lower credit amount than credits generated from wetlands, thereby effectively increasing the replacement ratio when such credits are used.	requires that any IFL program established by BWSR must conform to 33 CFR 332.8 (identical to this section of the 404(b)(1) Guidelines). PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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		uncertainties in construction and real estate expenses. The cost per unit of credit must also take into account the resources necessary for the long-term management and protection of the in-lieu fee project. In addition, the cost per unit credit must include financial assurances that are necessary to ensure successful completion of in-lieu fee projects. (6) *Credits provided by preservation.* These credits should be specified as acres, linear feet, or other suitable metrics of preservation of a particular resource type. In determining the compensatory mitigation requirements for DA permits using mitigation banks or in-lieu fee programs, the district engineer should apply a higher mitigation ratio if the requirements are to be met through the use of preservation credits. In determining this higher ratio, the district engineer must consider the relative importance of both the impacted and the preserved aquatic resources in sustaining watershed functions. (7) *Credits provided by riparian areas, buffers, and uplands.* These credits should be specified as acres, linear feet, or other suitable metrics of riparian area, buffer, and uplands respectively. Non-aquatic resources can only be used as compensatory mitigation for impacts to aquatic resources authorized by DA permits when those resources are essential to maintaining the ecological viability of adjoining aquatic resources. In determining the compensatory mitigation requirements for DA permits using mitigation banks and in-lieu fee programs, the district engineer may authorize the use of riparian area, buffer, and/or upland credits if he determines that these areas are essential to sustaining aquatic resource functions in the watershed and are the most appropriate compensation for the authorized impacts.				

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		(8) *Credit release schedule.* (i) *General considerations.* Release of credits must be tied to performance based milestones (e.g., construction, planting, establishment of specified plant and animal communities). The credit release schedule should reserve a significant share of the total credits for release only after full achievement of ecological performance standards. When determining the credit release schedule, factors to be considered may include, but are not limited to: The method of providing compensatory mitigation credits (e.g., restoration), the likelihood of success, the nature and amount of work needed to generate the credits, and the aquatic resource type(s) and function(s) to be provided by the mitigation bank or in-lieu fee project. The district engineer will determine the credit release schedule, including the share to be released only after full achievement of performance standards, after consulting with the IRT. Once released, credits may only be used to satisfy compensatory mitigation requirements of a DA permit if the use of credits for a specific permit has been approved by the district engineer. (ii) For single-site mitigation banks, the terms of the credit release schedule must be specified in the mitigation banking instrument. The credit release schedule may provide for an initial debiting of a limited number of credits once the instrument is approved and other appropriate milestones are achieved (see paragraph (m) of this section). (iii) For in-lieu fee projects and umbrella mitigation bank sites, the terms of the credit release schedule must be specified in the approved mitigation plan. When an in-lieu fee project or umbrella mitigation bank site is implemented and is achieving the performance-based milestones specified in				

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		the credit release schedule, credits are generated in accordance with the credit release schedule for the approved mitigation plan. If the in-lieu fee project or umbrella mitigation bank site does not achieve those performance-based milestones, the district engineer may modify the credit release schedule, including reducing the number of credits. (9) *Credit release approval.* Credit releases for mitigation banks and in-lieu fee projects must be approved by the district engineer. In order for credits to be released, the sponsor must submit documentation to the district engineer demonstrating that the appropriate milestones for credit release have been achieved and requesting the release. The district engineer will provide copies of this documentation to the IRT members for review. IRT members must provide any comments to the district engineer within 15 days of receiving this documentation. However, if the district engineer determines that a site visit is necessary, IRT members must provide any comments to the district engineer within 15 days of the site visit. The district engineer must schedule the site visit so that it occurs as soon as it is practicable, but the site visit may be delayed by seasonal considerations that affect the ability of the district engineer and the IRT to assess whether the applicable credit release milestones have been achieved. After full consideration of any comments received, the district engineer will determine whether the milestones have been achieved and the credits can be released. The district engineer shall make a decision within 30 days of the end of that comment period, and notify the sponsor and the IRT. (10) *Suspension and termination.* If the district engineer determines that the mitigation bank or in-lieu fee program is not meeting				

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		performance standards or complying with the terms of the instrument, appropriate action will be taken. Such actions may include, but are not limited to, suspending credit sales, adaptive management, decreasing available credits, utilizing financial assurances, and terminating the instrument.				
	230.98(p) *Accounting procedures.*	(p) *Accounting procedures.* (1) For mitigation banks, the instrument must contain a provision requiring the sponsor to establish and maintain a ledger to account for all credit transactions. Each time an approved credit transaction occurs, the sponsor must notify the district engineer. (2) For in-lieu fee programs, the instrument must contain a provision requiring the sponsor to establish and maintain an annual report ledger in accordance with paragraph (i)(3) of this section, as well as individual ledgers that track the production of released credits for each in-lieu fee project.	Bank and ILF instruments must require sponsor to establish and maintain ledger to account for all transactions.	WCA: MN Rules 8420.0705, MN Statute 103G.2242	WCA: WCA rules establish BWSR as the administrator of the wetland banking system. All ledgers and transactions are administered by BWSR, no accounting is done by bank sponsors.	WCA: Equally stringent. Under WCA the State maintains a database that tracks all credit transactions and account balances. Credit transactions are must be verified by BWSR writing to be officially recognized. For the ILF portion of this section addressing wetlands, MN Statute requires that any ILF program established by BWSR must conform to 33 CFR 332.8 (identical to this section of the 404(b)(1) Guidelines). PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.98(q) *Reporting*	(q) *Reporting.* (1) *Ledger account.* The sponsor must compile an annual ledger report showing the beginning and ending balance of available	Annually, sponsor must submit or may be required to submit: - Ledger report - Monitoring report	WCA: MN Rules 8420.0705, 8420.0735, 8420.0810, 8420.0820	WCA: WCA rules establish BWSR as the administrator of the wetland banking system. All ledgers and transactions are administered by BWSR, no accounting is done by bank sponsors.	WCA: Less stringent. Wetland bank sponsors are not required to provide an annual ledger report since the

Responsible Agency	Provision Citation (40 CFR §…)	Provision Text	Summary of Provision	Related State Law Citation	Summary\Explanation of Applicable State Law Text	Assessment of Equivalency/Stringency (Less, Equally, or More Stringent)
		credits and permitted impacts for each resource type, all additions and subtractions of credits, and any other changes in credit availability (e.g., additional credits released, credit sales suspended). The ledger report must be submitted to the district engineer, who will distribute copies to the IRT members. The ledger report is part of the administrative record for the mitigation bank or in-lieu fee program. The district engineer will make the ledger report available to the public upon request. (2) *Monitoring reports.* The sponsor is responsible for monitoring the mitigation bank site or the in-lieu fee project site in accordance with the approved monitoring requirements to determine the level of success and identify problems requiring remedial action or adaptive management measures. Monitoring must be conducted in accordance with the requirements in §230.96, and at time intervals appropriate for the particular project type and until such time that the district engineer, in consultation with the IRT, has determined that the performance standards have been attained. The instrument must include requirements for periodic monitoring reports to be submitted to the district engineer, who will provide copies to other IRT members. (3) *Financial assurance and long-term management funding report.* The district engineer may require the sponsor to provide an annual report showing beginning and ending balances, including deposits into and any withdrawals from, the accounts providing funds for financial assurances and long-term management activities. The report should also include information on the amount of required financial assurances and the status of those assurances, including their potential expiration.	- Financial assurance and long-term management funding report	MN Statute 103G.2242	Monitoring reports for the bank are required and per the approved bank plan.	State is responsible for processing and recording all credit transactions. WCA is equivalent with the monitoring requirement in this section. WCA does not require financial assurances for most replacement sites, including wetland banks, so WCA is less restrictive for the reporting requirement for financial assurances and long-term management funding reporting. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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	230.98(r) *Use of credits*	(r) *Use of credits.* Except as provided below, all activities authorized by DA permits are eligible, at the discretion of the district engineer, to use mitigation banks or in-lieu fee programs to fulfill compensatory mitigation requirements for DA permits. The district engineer will determine the number and type(s) of credits required to compensate for the authorized impacts. Permit applicants may propose to use a particular mitigation bank or in-lieu fee program to provide the required compensatory mitigation. In such cases, the sponsor must provide the permit applicant with a statement of credit availability. The district engineer must review the permit applicant's compensatory mitigation proposal, and notify the applicant of his determination regarding the acceptability of using that mitigation bank or in-lieu fee program.	All activities authorized by permits are eligible to use credits. Applicants may propose particular bank or ILF, and must provide availability statement if doing so.	WCA: MN Rules 8420.0330 MN Statute 103G.2242	WCA: WCA rules require identification of credits to be used in the replacement plan application. BWSR as administrator of the wetland banking system must confirm the availability of credits and complete the withdrawal as a condition of an approved replacement plan using bank credits.	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.98(s) *IRT concerns with use of credits*	(s) *IRT concerns with use of credits.* If, in the view of a member of the IRT, an issued permit or series of issued permits raises concerns about how credits from a particular mitigation bank or in-lieu fee program are being used to satisfy compensatory mitigation requirements (including concerns about whether credit use is consistent with the terms of the instrument), the IRT member may notify the district engineer in writing of the concern. The district engineer shall promptly consult with the IRT to address the concern. Resolution of the concern is at the discretion of the district engineer, consistent with applicable statutes, regulations, and policies regarding compensatory mitigation requirements for DA permits. Nothing in this section limits the authorities designated to IRT agencies under existing statutes or regulations.	No summary	WCA: MN Rules 8420.0905 MN Statutes 103G.2242	WCA: Like all WCA decisions, replacement plan approvals involving the use of wetland bank credits can be appealed by the applicant or member of the TEP. Appeals are decided upon by BWSR. If a local appeals process is in place, then appeals are first decided upon there and then can be appealed to BWSR.	WCA: Equally stringent. MN Statute requires that any ILF program established by BWSR must conform to 33 CFR 332.8 (identical to this section of the 404(b)(1) Guidelines). PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.98(t) *Site Protection*	(t) *Site protection.* (1) For mitigation bank sites, real estate instruments, management plans, or other long-term mechanisms used	No summary. Repeat of requirement in earlier section.	WCA: MN Rules 8420.0705 Subp. 5	WCA: WCA rules require BWSR to hold a conservation easement for all banks as a site protection mechanism except for those on state land. No credits can be deposited in the state wetland bank until a perpetual conservation	WCA: Equally stringent. PWWPP: Less stringent. The PWWPP has no

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		for site protection must be finalized before any credits can be released. (2) For in-lieu fee project sites, real estate instruments, management plans, or other long-term protection mechanisms used for site protection must be finalized before advance credits can become released credits.		MN Statutes 103G.2242 Subd. 3(b)	easement, in a format prescribed by the board, is granted to and accepted by the state.	standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).
	230.98(u) *Long term management*	(u) *Long-term management.* (1) The legal mechanisms and the party responsible for the long-term management and the protection of the mitigation bank site must be documented in the instrument or, in the case of umbrella mitigation banking instruments and in-lieu fee programs, the approved mitigation plans. The responsible party should make adequate provisions for the operation, maintenance, and long-term management of the compensatory mitigation project site. The long-term management plan should include a description of long-term management needs and identify the funding mechanism that will be used to meet those needs. (2) The instrument may contain provisions for the sponsor to transfer long-term management responsibilities to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager. (3) The instrument or approved mitigation plan must address the financial arrangements and timing of any necessary transfer of long-term management funds to the steward. (4) Where needed, the acquisition and protection of water rights should be secured and documented in the instrument or, in the case of umbrella mitigation banking instruments and in-lieu fee programs, the approved mitigation site plan.	No summary.	N/A WCA does not use instruments		WCA: Less stringent. There is not a requirement for long-term management and long-term management funding in WCA outside of the easement stewardship fees charged by BWSR and the easement compliance inspection program. PWWPP: Less stringent. The PWWPP has no standards or programmatic framework in statute or rule regarding compensatory mitigation. Also see the response for 230.91(a-b).

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	230.98(v) *Grandfathering of existing instruments.*	(v) *Grandfathering of existing instruments.* (1) *Mitigation banking instruments.* All mitigation banking instruments approved on or after July 9, 2008 must meet the requirements of this part. Mitigation banks approved prior to July 9, 2008 may continue to operate under the terms of their existing instruments. However, any modification to such a mitigation banking instrument on or after July 9, 2008, including authorization of additional sites under an umbrella mitigation banking instrument, expansion of an existing site, or addition of a different type of resource credits (e.g., stream credits to a wetland bank) must be consistent with the terms of this part. (2) *In-lieu fee program instruments.* All in-lieu fee program instruments approved on or after July 9, 2008 must meet the requirements of this part. In-lieu fee programs operating under instruments approved prior to July 9, 2008 may continue to operate under those instruments for two years after the effective date of this rule, after which time they must meet the requirements of this part, unless the district engineer determines that circumstances warrant an extension of up to three additional years. The district engineer must consult with the IRT before approving such extensions. Any revisions made to the in-lieu-fee program instrument on or after July 9, 2008 must be consistent with the terms of this part. Any approved project for which construction was completed under the terms of a previously approved instrument may continue to operate indefinitely under those terms if the district engineer determines that the project is providing appropriate mitigation substantially consistent with the terms of this part.	N/A	N/A		N/A

Appendix H – Proposed State Program Revisions

Consisting of:

Legislative, Regulatory, and Program Development Needs to Satisfy the Requirements of 40 CFR Part 233, "404 State Program Regulations"

-and-

Legislative, Regulatory, and Program Development Needs to Satisfy the Requirements of 40 CFR Part 230, the "Guidelines For Specification Of Disposal Sites For Dredged Or Fill Material"

Legislative, Regulatory, and Program Development Needs to Satisfy Equivalency Requirements for 40 CFR Part 230, the "GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL":

General Revisions

1. 230.90 Subpart J Compensatory mitigation for losses of aquatic resources.
    a. This section, referred to as the Federal Mitigation Rule, contains extensive information and requirements for compensatory mitigation under the 404 program. For the most part, the provisions in WCA have resulted in a comparable program with respect to effect but there are many subtle differences that raise questions of equivalency that are difficult to assess because this section is not focused on the protection of existing resources but on the replacement of lost functions and services.
    b. The PWWPP lacks any meaningful framework in statute or rule for mitigation so there is a clear need for a non-wetland mitigation program to be developed in Minnesota under an assumed program.

Federal Rule-based Revisions

1. 230.7 – General Permits
    a. Provides conditions and requirements for issuance of GPs
    b. **BWSR:** Amend state regulation to authorize the issuance of GPs. The requirement to meet the conditions of § 230.7 should be included in the authorizing text through incorporation by reference.
    c. **DNR:** DNR is authorized in state rule to issue general permits (MR § 6115.0250 Subp. 4). Provision must be included to state that, when GPs are issued, they will meet the conditions and requirements of § 230.
    d. *General Permits are also addressed under § 233.32(x) in the list of program description requirements.*

2. 230.10(a) Restrictions on Discharge
    a. No discharge shall be approved where a practicable alternative with less adverse impact and no other significant adverse impact exists. Defines the scope of practicable.
    b. **DNR:** Permit cannot be issued if there exists a "feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare." However, neither "feasible and prudent" nor "reasonable requirements" are defined.

3. 230.10(a)(1)(i) and (ii) - Restrictions on Discharge

a. Description of what constitutes a practicable alternative under the Guidelines. Defines the scope of what could be considered practicable.
b. **DNR:** The PWWPP does not have a requirement for consideration of alternatives as specific as that found in § 230.10(a)(1)(i) and (ii).

4. 230.10(a)(2) – Restrictions on Discharge
    a. Definition of practicability under the Guidelines.
    b. **DNR:** PWWPP uses the term "feasible and prudent", but this is not defined.

5. 230.10(a)(3) – Restrictions on Discharge
    a. If an activity with a discharge proposed for a special aquatic site does not require access or proximity to or siting within a special aquatic site to fulfill its basic project purpose, practicable alternatives that do not involve special aquatic sites are presumed to be available unless demonstrated otherwise. Also, when a discharge is proposed for a special aquatic site all practicable alternatives that do not involve a discharge into a special aquatic site are presumed to have less adverse on the aquatic ecosystem.
    b. **BWSR:** Allows flexibility in the order and application of the alternatives analysis (sequencing standards) when the replacement would result in a certain gain in function and public value over the existing condition of the wetland that would be impacted (MR § 8420.0520 Subp. 7a(A)(1) and (2). This section of Rule would need to be revised to prohibit mitigation from being considered when making a compliance determination with this section of the Guidelines.
    c. **DNR**: No provision exists which recognizes special aquatic sites that may be impacted through an activity nor is water dependency a component of the PWWPP evaluation process. These concepts will need to be incorporated into the PWWPP decision making process.

6. 230.10(a)(5) - Restrictions on Discharge
    a. Practicable alternatives that have been identified under a CZM program or plan, Section 208, or other planning processes, they must be considered during the alternatives analysis. If the evaluation of the alternative in other plans is less rigorous relative to the requirements in the Guidelines, it must be supplemented as needed.
    b. **DNR:** The PWWPP does not require or acknowledge consideration of other plans and a provision to allow alternatives to be evaluated will need to be added.

7. 230.10(b)(1) – Prohibition against discharges that violate state water quality standards
    a. No discharge will be permitted if it causes or contributes to a violation of State water quality standards.
    b. **BWSR and DNR:** Regulatory revision required to prohibit permit issuance when the activity would violate a State water quality standard, and to establish a process for MPCA WQS certification of state permits.

8. 230.10(b)(2) – Prohibition against discharges that violate a toxic effluent standard.
    a. No discharge will be permitted if it violates a toxic effluent standard.
    b. **BWSR and DNR:** Regulatory revision required to prohibit permit issuance when the activity would violate a toxic effluent standard.

9. 230.10(b)(3) - Prohibition against discharges that jeopardize the continued existence of a federally listed species or the destruction of critical habitat.
    a. Prohibition against discharges that jeopardize the continued existence of a species listed as threatened or endangered under the Endangered Species Act of 1973 or results in the likelihood of destruction or adverse modification of critical habitat.
    b. **BWSR and DNR:** Regulatory revision required to prohibit permit issuance when the activity would jeopardize the continued existence of a federally listed species or the destroy critical habitat.

10. 230.10(c) and items (1) through (4) – Prohibitions against discharges resulting in significant degradation of a WOTUS and elements that must be considered when making factual determinations.
    a. No discharge permitted which results in significant degradation (SD) of WOTUS. SD based on factual determinations (FDs), evaluations and tests in Subpart B and G, w\consideration of C through F, with emphasis on persistence.
    b. **BWSR and DNR:** Amend MR § 8420.0500, subpart 2 and MR § 6115.0250 to state that no discharge of dredged or fill material will be permitted which will cause or contribute to significant degradation of assumed waters and to require that findings be based on factual determinations, tests and evaluations no less stringent than those in Subparts B and G..

11. 230.10(d) – Practicable steps to minimize adverse effects must be taken.
    a. Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted unless appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem. Subpart H identifies such possible steps.
    b. **BWSR:** Although equivalent in its basic requirement, the WCA rule is less stringent in that it provides an exception to sequencing for wetlands in cultivated fields when they are replaced via restoration. This exclusion must be eliminated to ensure an equivalent level of protection.
    c. **DNR:** PWWPP rule provides an equivalent basic requirement for minimization of impacts. However, it is very general, broad, and is included under "Information Required" of an applicant.

12. 230.11 through 230.11(h) – Factual Determinations
    a. The permitting authority shall determine in writing the potential short term or long-term effects of a proposed discharge on the physical, chemical, and

biological components of the aquatic environment. These factual determinations shall be used in in making findings of compliance or noncompliance with the restrictions on discharge.

b. **BWSR and DNR**: Revise rule to require factual determinations that incorporate the elements prescribed in 230.11. Although both WCA and the PWWPP require a finding of fact as a basis for a permit decision they do not require the same type of information required under 230.11. Specifically, the permitting authority must **A)** determine in writing, the **B)** potential short or long term effects on the **C)** physical chemical and biological components of the aquatic environment, **D)** on the basis of potential impacts described in subparts C through F, **E)** and ensure that the written determination specifically includes those items in paragraphs a-h.

13. 230.12 Findings on Compliance
    a. Findings on compliance must be made in writing by the permitting authority for each proposed discharge and made available to the permit applicant. These findings shall include the factual determinations required by §230.11, and a brief explanation of any adaptation of these Guidelines to the activity under consideration.
    b. **BWSR and DNR:** Amend rule to specify that findings of compliance must be made in writing and must include factual determinations equivalent to those required by §230.11.

14. 230.20 (Subpart C) through 230.54 (Subpart F)
    a. The information in Subparts C through F must be considered when making factual determinations. Each first subparagraph (a) identifies and defines the use\value, with the second (b) describing the potential loss of characteristics and values that must be considered. Use/values broadly categorized under Subparts C through F include potential impacts on physical and chemical characteristics of the aquatic ecosystem, potential impacts on biological characteristics of the aquatic ecosystem, potential impacts in special aquatic sites, and potential effects on human use characteristics.
    b. **BWSR and DNR:** Amend state regulations to establish consideration of "potential impacts" equivalent to those described in subparts C through F. Though there may be substantial overlap between the potential impacts that must be considered under the existing state regulatory programs and those potential impacts that must be considered under Subparts C through F, state regulations will be amended to address remaining gaps. Also, while state WQS and anti-degradation standards incorporate consideration of some of the potential impacts in Subparts C through F, federal provisions require that consideration of these potential impacts be made in writing on a project-specific, case by case basis.

15. 230.60-230.61 – Subpart G – Evaluation and Testing

a. General evaluation procedures to determine if discharge is carrier of a contaminant and prescribes testing procedures to be used if it is. 230.11 states that these procedures "shall be used as necessary to make and shall be described in…" making factual determinations. This section speaks very generally, providing guidance in determining which test and\or evaluation procedures to apply if results of evaluation (§ 230.60) require testing. Requires that permitting authority provide guidance to applicants concerning applicability of various methods. Requires consideration of:
    i. Potential contaminant routes identified through remote resources.
    ii. Results of previous test.
    iii. Potential for pesticide introduction via runoff or percolation.
    iv. Spill\disposal records
    v. Government records indicating significant pollutant production
    vi. Potential for release from substantial natural mineral deposits.
b. Testing (under § 230.61) not required if:
    i. This evaluation indicates discharge not a carrier of contaminants.
    ii. If extraction and discharge sites are adjacent and substantially similar, and transfer from extraction site into less polluted area is contained.
c. Decision not to test must be explained.
d. **BWSR and DNR:** Amend state regulation to include blanket requirement that fill must be clean, on-site fill, or that it be clean fill from a commercial source. This would circumvent the need\requirement for testing and would, in fact, pose a stricter requirement than Part 230.

16. 230.70 – Subpart H – Actions to Minimize Adverse Effects
    a. This Subpart provides specific guidance on actions that may be undertaken in response to the requirement in 230.10(d) to minimize the adverse effects of discharges of dredged or fill material, and that are prescribed for consideration in the determination of potential impacts under Subparts C through F.
    b. **DNR:** Broad requirement for minimization exists in the PWWPP, but no specific actions are recommended or prescribed. While implementation of the specific measures for minimization in the federal provisions are not mandated (IE – alternative effective measures not described in this part could be implemented), their consideration is. Revise PWWPP rules to include consideration of equivalent considerations.

Mitigation

17. 230.91(a-b) - Subpart J Compensatory mitigation for losses of aquatic resources
    a. provides general overarching information concerning mitigation and reiterates that mitigation may be required to ensure that a permit complies with the Guidelines. Requires consideration of regional variations in wetland conditions,

functions, and values. Requires the application of equivalent standards and criteria to all types of compensatory mitigation (project-specific, banking, ILF).

b. **DNR:** The PWWPP rules for impacts to lakes, rivers, and streams are limited with respect to mitigation. If the commissioner determines that a major change in public waters is justified and can be authorized the permit must include provisions to compensate for the detrimental aspects of the change. There are no standards, processes, or requirements for mitigation established for the program.

18. 230.91(c)(2) - Subpart J Compensatory mitigation for losses of aquatic resources
    a. the district engineer will issue an individual section 404 permit only upon a determination that the proposed discharge complies with applicable provisions of 40 CFR part 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States. Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines.
    b. **DNR:** This equivalency was addressed in § 230.10(a) with the following response in this document. *Permit cannot be issued if there exists a "feasible and prudent alternative consistent with the reasonable requirements of the public health, safety and welfare." However, neither "feasible and prudent" nor "reasonable requirements" are defined.*
19. 230.91(d) – Accounting for regional variations
    a. Where appropriate, district engineers shall account for regional characteristics of aquatic resource types, functions and services when determining performance standards and monitoring requirements for compensatory mitigation projects.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
20. 230.93(a)(1) - General compensatory mitigation requirements, General considerations
    a. Mitigation requirements will be based on what is practicable and capable of compensation, while being environmentally preferable. Requirements must be commensurate with amount and type of impact. Acceptable methods are restoration, enhancement and establishment, with preservation being acceptable only in limited circumstances.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document. There is a brief description of methods to provide mitigation in statute (restoring degraded waters, creating or restoring additional areas, and any other measures approved by the Commissioner but it is not equivalent to the general requirements contained in § 230.93.
21. 230.93(b) - Type and location of compensatory mitigation
    a. DE shall consider mitigation type and location options in the following order (see text for additional requirements\restrictions for each) based on a watershed approach:
        i. Mitigation Bank Credits for impacts w\in service area
        ii. In-Lieu Fee for impacts w\in service area

iii. Permittee-Responsible under watershed approach
iv. Permittee-responsible mitigation through on-site and in-kind mitigation
v. Permittee-responsible mitigation through off-site and/or out-of-kind mitigation

b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

22. 230.93(c)(1) – (4) - Watershed approach to compensatory mitigation
    a. DE must implement watershed approach in establishing mitigation requirements for permits "to the extent appropriate and practicable". The section continues by providing a number of considerations and informational needs.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
23. 230.93(d)(1) – (3) – Site selection
    a. Mitigation must occur on ecologically suitable site. Suitability must be determined through practicable consideration of items i-vi. DE may require on-site, off-site, or combination of both.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
24. 230.93(e) – Mitigation Type
    a. In-kind mitigation is preferred unless DE determines out-of-kind will better serve needs of watershed. Basis must be documented. In-kind restoration or preservation should be used for difficult-to-replace wetland types.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
25. 230.93(f) – Amount of Compensatory Mitigation
    a. Determination of amount of mitigation should use functional assessment. If an assessment is not used, minimum compensation will be 1:1 for acreage and\or linear foot.
    b. Greater than 1:1 will be required when appropriate to account for other a number of factors (method, temporal loss, etc., etc.) that would otherwise result in 1:1 providing for inadequate replacement of function.
    c. If ILF is used and credits are not available, additional compensation must be provided to account for uncertainty.
    d. Authorizes use of banks and ILF subject to order of (b) of this section.
    e. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
26. 230.93(g) - Use of mitigation banks and in lieu fee programs.
    a. Mitigation banks and in-lieu fee programs may be used to compensate for impacts to aquatic resources authorized by general permits and individual permits, including after-the-fact permits, in accordance with the preference hierarchy.
    b. **BWSR**: ILF program is not required. If established, clearly the state's ILF provisions must comport with the requirements of Part 230. The statutory

authority for in lieu fee programs currently exists but rules have not been promulgated to allow for ILF program establishment.

c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

27. 230.93(h) – Preservation
    a. Authorizes preservation to satisfy mitigation requirements, subject to five criteria.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
28. 230.93(i) – Buffers
    a. Authorizes DE requirement of buffers and requires that credit be provided for their use.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
29. 230.93(j) - Relationship to other federal, tribal, state, and local programs
    a. Compensatory mitigation projects for DA permits may also be used to satisfy the environmental requirements of other programs with certain restrictions. Federally funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation cannot be used for the purpose of generating compensatory mitigation credits. Compensatory mitigation projects may also be used to provide compensatory mitigation under the Endangered Species Act or for Habitat Conservation Plans, as long as they comply with the requirements of paragraph (j)(1) of this section.
    b. **BWSR:** WCA rule allows for credits to be used for other regulatory programs, but the approach is focused on wetland impacts. This would limit opportunities for conservation banking currently allowed under § 230.93(j). Otherwise WCA is consistent with this provision.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
30. 230.93(k)(1)-(3) – Permit Conditions
    a. Mitigation requirements must be stated in permit "Special Conditions" or verification letter. Must state number and type of credits. Further:
        i. IP: Must identify responsible party, reference mitigation plan, state objectives\standards\monitoring requirements, describe financial assurances (unless in final mitigation plan).
        ii. GP: special conditions must describe proposal and restrict commencement of work until final plan approval. Should also address the items listed under IP, above.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
31. 230.93(k)(4) – Conditioning permits using banks or in-lieu fee programs
    a. If a mitigation bank or in-lieu fee program is used to provide the required compensatory mitigation, the special conditions must indicate whether a

mitigation bank or in-lieu fee program will be used, and specify the number and resource type of credits the permittee is required to secure.

b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

32. 230.93(l)(1)- (3) - Party responsible for compensatory mitigation
    a. Specifies party responsible for providing and maintaining mitigation sites under permittee-responsible, mitigation banks, and in-lieu programs.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
33. 230.93(m) – Timing
    a. Mitigation to occur in advance or concurrent with impact.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
34. 230.93(n)(1) – Financial Assurances
    a. Financial assurances required and will be determined by DE(PA) in consultation with project sponsor, and will be based on factors provided in (n)(2).
        i. Must be included as special condition
        ii. Shall be phased out once project is determined to be successful.
        iii. Must be in form that ensures 120 days notice is received by DE prior to termination\revocation.
        iv. Shall be payable at direction of DE.
    b. **BWSR:** A financial assurance can only be required when the replacement is in advance and the authority to require a financial assurance is with the LGU and not the state. This authority must be given to BWSR and the scope for when a financial assurance can be required must be expanded to include all scenarios.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
35. 230.93(n)(2) – Amount of the financial assurance
    a. must be determined by the district engineer, in consultation with the project sponsor, and must be based on the size and complexity of the compensatory mitigation project, the degree of completion of the project at the time of project approval, the likelihood of success, the past performance of the project sponsor, and any other appropriate factors. Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments.
    b. **BWSR:** WCA rule specifically states that the financial assurance may be used to cover the costs of bringing the replacement project into compliance and is not to serve as an in-lieu fee payment. Additional authority must be given to BWSR to require financial assurances consistent with the federal requirements.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
36. 230.93(n)(3) – Timing of financial assurances

a. If financial assurances are required, the permit must include a special condition requiring the financial assurances to be in place prior to commencing the permitted activity.-
b. **BWSR:** WCA rule is not specific as to how the requirement for a financial assurance is established and enforced. The timing for establishing the financial assurance also is not specifically established in rule.
c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

37. 230.93(n)(4) - Phasing out of financial assurances
    a. Financial assurances shall be phased out once the compensatory mitigation project has been determined by the district engineer to be successful in accordance with its performance standards.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
38. 230.93(n)(5) – Advance notification of termination or revocation
    a. The DE will receive notification at least 120 days in advance of any termination or revocation.
    b. **BWSR and DNR:** An equivalent notification requirement must be added to the WCA and PWWPP mitigation programs.
39. 230.93(n)(6) - Financial assurances payments
    a. Financial assurances shall be payable at the direction of the DE to his designee or to a standby trust agreement.
    b. **BWSR and DNR:** Authority for BWSR and DNR to direct payments of financial assurances must be established.
40. 230.93(o) – Compliance with all applicable federal, state, and local laws.
    a. Mitigation project must comply with all applicable laws.
    b. **BWSR and DNR:** An equivalent requirement must be added to the WCA and PWWPP mitigation programs.
41. 230.94(b)(1) – Public review and comment
    a. Public notices shall contain a statement explaining avoidance, minimization and compensation (mitigation) associated with permit. Must include sufficient detail for public to meaningfully comment on proposed mitigation.
    b. **BWSR and DNR:** Public noticing requirements are likely addressed in the crosswalk that specifically addresses notices for permits. The response here should be identical to that requirement since the federal noticing requirements are the same in the mitigation rule and the permitting section.
42. 230.94(c)(1)(i), (ii), and (iii) – Mitigation plan preparation and approval
    a. Mitigation plans for IPs, GPs, banks and ILF must all include descriptions of:
        i. Objectives
        ii. Site Selection
        iii. Site protection instrument
        iv. Baseline information
        v. Determination of credits

vi. Mitigation work plan
vii. Maintenance plan
viii. Performance standards
ix. Monitoring requirements
x. Long-term management plan
xi. Adaptive management plan
xii. Financial assurances
xiii. Other information (determined by DE(PA?)

b. Plans must be approved prior to permit issuance.
c. **BWSR:** The required elements for a replacement plan under WCA are similar but do not include the following: maintenance plan, performance standards, long-term management plan, adaptive management plan, and financial assurance. These items must be added to the list of required elements under WCA. Deficiencies associated with other elements of a mitigation plan are addressed individually in § 230.94(c)(2) through § 230.94(c)(14)
d. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

43. 230.94(c)(2) – Mitigation plan objectives
    a. A description of the resource type(s) and amount(s) that will be provided, the method of compensation (i.e., restoration, establishment, enhancement, and/or preservation), and the manner in which the resource functions of the compensatory mitigation project will address the needs of the watershed, ecoregion, physiographic province, or other geographic area of interest.
    b. **BWSR:** While some of the required information would be provided in parts of a replacement plan there is not a clear and concise requirement in rule for providing objectives.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
44. 230.94(c)(3) – Mitigation plan site selection
    a. A description of the factors considered during the site selection process. This should include consideration of watershed needs, onsite alternatives where applicable, and the practicability of accomplishing ecologically self-sustaining aquatic resource restoration, establishment, enhancement, and/or preservation at the compensatory mitigation project site.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
45. 230.94(c)(4) – Mitigation plan site protection instrument
    a. A description of the legal arrangements and instrument, including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site.
    b. **BWSR:** The protection instrument for wetland banks is equivalent. The protection for permittee-responsible mitigation is not equivalent and must be

improved. A logical solution is to have the same requirement for banks and permittee responsible mitigation.

c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

46. 230.94(c)(5) – Mitigation plan baseline information
    a. A description of the ecological characteristics of the proposed compensatory mitigation project site.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
47. 230.94(c)(6)(i) and (ii) – Mitigation plan determination of credits
    a. A description of the number of credits to be provided, including a brief explanation of the rationale for this determination.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
48. 230.94(c)(7) – Mitigation plan work plan
    a. Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and erosion control measures.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
49. 230.94(c)(8) – Mitigation plan maintenance plan
    a. A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed.
    b. **BWSR:** Although a vegetation establishment and management plan is required under WCA this is only a part of what is required in the maintenance plan for a compensation site. Additional requirements must be added to have an equivalent requirement for the maintenance plan under WCA.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
50. 230.94(c)(9) – Mitigation plan performance standards
    a. Ecologically based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
51. 230.94(c)(10) – Mitigation plan monitoring requirements
    a. A description of parameters to be monitored in order to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed.

b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

52. 230.94(c)(11) – Mitigation plan long-term management
    a. A description of how the compensatory mitigation project will be managed after performance standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for long-term management.
    b. **BWSR:** A long-term management plan is currently not required under WCA. An equivalent requirement must be added to WCA.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
53. 230.94(c)(12) – Mitigation plan adaptive management plan
    a. A management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures.
    b. **BWSR:** An adaptive management plan is currently not required under WCA. An equivalent requirement must be added to WCA.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
54. 230.94(c)(13) – Mitigation Plan financial assurance
    a. A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards.
    b. **BWSR:** The LGU may require a financial assurance for project-specific replacement that is not done in advance. Financial assurances are not required for other types of replacement, including wetland banks. BWSR must have the authority to require financial assurances for all types of mitigation.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
55. 230.94(c)(14) – Mitigation plan other information
    a. The DE may require additional information as necessary to determine the appropriateness, feasibility, and practicability of the compensatory mitigation project.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
56. 230.95(a-b) – Ecological performance standards
    a. An approved mitigation plan must contain performance standards. Standards must be based on attributes that are objective and verifiable.
    b. **BWSR:** Performance standards are required as part of the bank plan under WCA. However, the rule does not contain specific requirements that the standards be ecologically oriented and based on best available science that can be measured in a practicable manner.

c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

57. 230.96(a) and (b) – Monitoring
    a. Monitoring for a period of not less than 5 years, with submittal of monitoring reports, is required.
        i. Level of detail commensurate with scale and scope of project.
        ii. Monitoring requirements must be addressed in mitigation plan.
        iii. Monitoring requirements may be waived when DE (PA?) determines project has achieved performance standards.
        iv. Monitoring report requirements should be described in special conditions.
        v. Reports are to be made available to interested parties upon request.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
58. 230.96(c) – Monitoring Reports
    a. DE determines the information that must be included. The permittee or sponsor is responsible for submitting monitoring reports. Monitoring reports must be provided to interested federal, state, and local resource agencies, and the public, upon request.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
59. 230.97(a)(1) to (5)– Site protection
    a. Site protection through real estate instruments is required for mitigation project areas.
    b. **BWSR:** The protection instrument for wetland banks is equivalent except for the requirement 60-day advance notification before any action is taken to void or modify the protective instrument. The protection for permittee-responsible mitigation is not equivalent and must be improved. A logical solution is to have the same requirement for banks and permittee responsible mitigation.
    c. DNR: The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
60. 230.97(b) – Sustainability
    a. Mitigation projects shall be sustainable. Management is the responsibility of responsible party. Responsible party will notify DE if:
        i. Project cannot be constructed in accordance with plan.
        ii. Monitoring suggests performance standards will not be met.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
61. 230.97(c)(1) to (4) – Adaptive management
    a. If the compensatory mitigation project cannot be constructed in accordance with the approved plan, the permittee or sponsor must notify the DE. A significant modification of the compensatory mitigation project requires approval from the district engineer.

b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

62. 230.97(d)(1) to (4) – Long-term management
    a. The permit conditions or instrument must identify the party responsible for ownership and all long-term management of the compensatory mitigation project.
    b. **BWSR:** Long-term management funding is currently not required under WCA. Authority to collect and utilize funds for this purpose or an alternative mechanism that is equivalent to the federal requirement must be established.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
63. 230.98 - Mitigation banks and in-lieu fee programs general considerations
    a. Banks and ILF must have an approved instrument signed by DE and sponsor prior to use, must be designed to be self-sustaining, and must comply with standards of this part irrespective of siting or sponsorship.
    b. **BWSR:** A signed instrument is not required for mitigation banks. ILF programs must satisfy the requirements in the Federal Mitigation Rule, including having a signed instrument. Therefore, a requirement for banks to have a signed instrument between BWSR and the sponsor must be established.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
64. 230.98 – Interagency review team
    a. IRT will be established to review documentation for establishment and management of banks and ILF. Provides requirements for inclusion of other parties in IRT and described responsibilities of IRT. Requires DE to give timely consideration to comments\advice of IRT.
    b. **BWSR:** The TEP functions much like the IRT but WCA rule establishes the members of the TEP and does not allow for representation from federal agencies, tribes, or other agency staff on a case-by-case basis. BWSR must be the decision maker on bank and ILF applications and the TEP composition and procedures must be modified to allow for greater flexibility with membership on a project-by-project basis.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
65. 230.98(c) – Compensation planning framework for in-lieu fee programs
    a. ILF instruments must include a watershed-based compensation planning framework to select, secure and implement required activities, and must include the elements in i-xi.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
66. 230.98(d) – Review process
    a. provides the requirements for content and process for review of mitigation bank and ILF prospectus, and draft and final instruments.

b. **BWSR:** The only step required by statute and rule for wetland bank establishment in Minnesota is the banking plan application (MN Rules 8420.0705 subp. 3). The bank plan under WCA is roughly equivalent to the mitigation plan described at 230.94(c). There are no required steps similar to the prospectus phase of the federal review process. Further, since a banking instrument is also not required, there are no steps associated with the submittal and review of this document. Also, the federal review process contains several review periods and timeframes for agency responses. The only timeframe in the WCA review process is the section 15.99 MN requirement that requires a written response within 60 days of receipt. The public has an opportunity to comment on the proposed bank vis the noticing requirement in WCA. The most straightforward way to achieve equivalency is for the state to adopt the framework of the federal review process.
c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

67. 230.98(e) – Dispute resolution process
    a. Members of the Interagency Review Team that object to approval of the final instrument may notify the DE by letter and initiate a dispute resolution process. The process has a series of steps with timeframes for the DE to hear the objection, conduct additional coordination, and make a final decision on the instrument or amendment.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
68. 230.98(f) – Extension of deadlines
    a. The DE can extend deadlines in paragraphs (d) and (e) of this section if certain criteria are met.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
69. 230.98(g) – Modification of instruments
    a. There are two modification procedures for amendments of approved instruments: standard and streamlined. This paragraph outlines the appropriate use of each procedure and the timelines and information requirements for the review process.
    b. **BWSR:** Procedures for amendments to approved wetland bank plans must be established under WCA.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
70. 230.98(h) - Umbrella mitigation banking instruments
    a. Single instrument may provide for future authorization of additional bank sites.
    b. **BWSR:** This is not a required element of a state program but is a potential time saving potion for agency staff and bank sponsors. The concept of an umbrella instrument would need to be established in WCA as it does not exist under the current bank review framework.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

71. 230.98(i) - In-lieu fee program account
    a. ILF program sponsor must establish program account after DE approval but before accepting fees from permittees. Specific requirements are described in (1) and (2). Sponsor must provide annual reports to DE and IRT with information in (3)(i-v).
    b. **DNR:** Although not a required element of a state program, since BWSR is planning to establish and ILF program it is logical to expect that the DNR will also have the authority to approve one and recognize it as a source of mitigation for authorized impacts. The PWWPP currently has no standards in statute or rule regarding mitigation projects, including ILF programs. See General Revision 1 of this document.
72. 230.98(j) - In-lieu fee project approval
    a. This paragraph outlines the process for approving mitigation sites for ILF programs as a modification of the program instrument.
    b. **DNR:** The PWWPP currently has no standards in statute or rule regarding mitigation projects, including ILF programs. See General Revision 1 of this document.
73. 230.98(k) - Coordination of mitigation banking instruments and DA permit issuance
    a. In cases where initial establishment of the mitigation bank, or the development of a new project site under an umbrella banking instrument, involves activities requiring DA authorization, the permit should not be issued until all relevant provisions of the mitigation plan have been substantively determined.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
74. 230.98(l) - Project implementation
    a. Sponsor must have an approved instrument prior to collecting funds and authorization to sell credits is contingent upon compliance with all terms of instrument.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
75. 230.98(m) – Credit withdrawal from mitigation banks
    a. The mitigation banking instrument may allow for an initial debiting of a percentage of the total credits projected at mitigation bank maturity, provided certain conditions are satisfied.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
76. 230.98(n) - Advance credits for in-lieu fee programs
    a. Authorizes advanced availability of ILF credits. As credits are released, they must be used to first fulfill advanced credits. Read section for additional requirements.
    b. **DNR:** The PWWPP currently has no standards in statute or rule regarding mitigation projects, including ILF programs. See General Revision 1 of this document.
77. 230.98(o) - Determining credits

a. Provides information and direction on mitigation credits from banks and ILF sites including assessment, credit production, credit value, credit costs, credits from preservation, credits from riparian areas and uplands, credit release schedules, credit releases, and suspension and termination.
b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

78. 230.98(p) - Accounting procedures
    a. Bank and ILF instruments must require sponsor to establish and maintain ledger to account for all transactions.
    b. **BWSR:** Official ledgers are maintained by BWSR and not the bank sponsor. This is a more reliable and accurate system that what is required under the federal regulation and is considered to be equivalent for purposes of the State program description.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
79. 230.98(q) – Reporting
    a. Annually, sponsor must submit or may be required to submit: ledger report, monitoring report, financial assurance and long-term management funding report.
    b. BWSR: The required reporting requirements must be established in WCA.
    c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
80. 230.98(r) - Use of credits
    a. All activities authorized by permits are eligible to use credits. Applicants may propose particular bank or ILF, and must provide availability statement if doing so.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
81. 230.98(s) - IRT concerns with use of credits
    a. Allows for IRT members to raise concerns about how credits from a particular mitigation bank or in-lieu fee program are being used to satisfy compensatory mitigation requirements by notifying the DE in writing.
    b. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.
82. 230.98(t) - Site Protection
    a. Covered in other sections addressing site protection requirements.
83. 230.98(u) - Long term management
    a. The legal mechanisms and the party responsible for the long-term management and the protection of the mitigation bank site must be documented in the instrument or approved mitigation plans. The responsible party should make adequate provisions for the operation, maintenance, and long-term management of the compensatory mitigation project site. The long-term management plan should include a description of long-term management needs and identify the funding mechanism that will be used to meet those needs.

b. **BWSR:** Authority to require long-term management funds must be established and the state should decide whether they want to collect and manage the funds themselves or rely on third party mechanisms.
c. **DNR:** The PWWPP has no standards in statute or rule regarding mitigation projects. See General Revision 1 of this document.

Legislative, Regulatory, and Program Development Needs to Satisfy Equivalency Requirements for 40 CFR Part 233, "404 State Program Regulations"

NOTE: While a line by line evaluation was completed for Part 233 to determine whether equivalent provisions exist in state statute/regulation, the provisions of Part 233 apply to any state that has received approval to implement a state 404 program. As such, it is the state agencies' understanding that it is not necessary for the state to provide equivalent provisions for much of the text of Part 233. For instance, the prohibitions on permit issuance in Part 233.20 apply to the state under an approved program regardless of whether state statute/regulation also contains such provisions.

General Revisions

1. Although not a "revision", to avoid unnecessary notification and coordination to/with federal agencies, the state agencies must differentiate between waters and activities subject to the requirements of Section 404 of the CWA under the State 404 Program, and those specific to the state that are not regulated under Section 404. For instance, failure to differentiate between those permits that involve fill and those that do not will result in EPA receiving public notice, coordination occurring with SHPO, and other similar measures, for activities that are not regulated on waters that are not regulated under Section 404.

Federal Rule-based Revisions

1. 233.20(x) – Prohibitions on permit issuance
    a. This section contains a series of prohibitions on permit issuance under the assumed program.
    b. **BWSR and DNR**: 404-assumption specific prohibitions imposed directly on state which has received EPA approval to implement a State 404 Program. Consult with EPA to determine whether it necessary, then for the state to explicitly impose the prohibitions of 230.20 upon itself. If it is necessary to incorporate equivalent text into state provisions, simply amend state statute or regulation to provide that "No permit will be issued under the State Program that does not comply with the prohibitions of 40 CFR § 233.20".

2. 233.21(x) – General Permits
    a. Authorizes the issuance of general permits and established certain requirements and conditions that must be included in any general permit under the State Program.
    b. State rule or statute must be revised as follows:
        i. **BWSR**: Authorize general permit issuance under WCA. Not federal requirement, but necessary for the state to authorize itself to issue.

1. Authority already exists under PWWPP rule.

ii. **BWSR and DNR**: The stipulations in § 233.21(a-b, d, e) must be included, and the GP content prescribed in § 233.21(c) must be included, incorporated by reference, or included in an SOP.

3. 233.22 – Emergency Permits
    a. Prescribes requirements/limitations in the issuance of Emergency Permits.
    b. **BWSR** - Emergency permit issuance is discretionary, not compelled, under State Program. If the state does wish to issue such permits, state rule must include provisions ensuring consistency with this section of federal text.
    c. **DNR** – Currently possesses the authority to issue Emergency Permits for dam, reservoir, control structure, or waterway obstruction alteration, repair, or removal; however, state provisions are not equivalent to or consistent with federal provision. For these specific activities, must revise MN Statute 103G.245 Subd. 11 and/or MR § 6115.0350 to include requirements in § 233.22(b-f) or incorporate by reference.

4. 233.23(a) – Permit Conditions
    a. Establishes that state permits must meet all requirements of 404(b)(1) Guidelines and Sections 303 and 307 of the CWA.
    b. **BWSR** - No provision exists which establishes permit conditions requiring compliance with the Guidelines, or Sections 303 and 307. Recommend incorporation by reference.
    c. **DNR** - While MN rule 6115 does authorize the issuance of GPs, no provision exists which establishes permit conditions requiring compliance with the Guidelines, 303, or 307. Amend MR § 6115 to apply requirements in § 233.23.

5. 233.23(c)(1) through (c)(9) – Permit Conditions
    a. Prescribes specific conditions for inclusion in all permits.
    b. **BWSR and DNR**: Revise relevant rule or develop permit templates to include the conditions prescribed in (c)(1) through (c)(9).
    c. **BWSR and DNR**: Develop or revise permit templates to include all conditions in (c)(1) through (c)(9).

6. 233.30(b) – Application Content
    a. **BWSR** – Revise application form to include the required information. Applicants are not required to provide the address of adjacent property owners, specific information about the material that would be discharged, and a description of all of the activities to be undertaken that are reasonably related to the proposed discharge.
    b. **DNR** – Revise MPARS application form to include the required information. At present DNR possesses the authority to require all relevant information but does not require it.

7. 233.31 – Coordination Requirements
    a. Coordination will occur for interstate impacts and Federal-State planning and review processes.
    b. **BWSR and DNR**: Statute or rule must be revised to explicitly require or incorporate by reference the requirement for the State to provide an opportunity for comment to other state's whose waters may be affected by a proposed discharge, and to adhere to the additional coordination requirements of this paragraph. *Verify with EPA; may be inherently satisfied through the public notice and comment process, if/when brought into alignment with federal requirements.*
    c. **BWSR and DNR**: Statute/rule must be revised to require that permits be coordinated with Federal and Federal-State water related planning and review processes. *Verify with EPA; may be inherently satisfied through the public notice and comment process, if/when brought into alignment with federal requirements.*

8. 233.32 – Public Notice
    a. Prescribes public notice applicability, timing (including response/comment period), methods and content.
    b. **BWSR**: Substantial revisions to state public notice requirements must occur. Minor revisions are likely insufficient as multiple fundamental inequivalences exist. The federal requirements should be spelled out in state regulation or incorporated entirely by reference and then edited for state-specific considerations.
    c. **DNR**: A public notice process conforming to this paragraph must be established in statute/rule. Currently, the PWWPP does not have a notice process that is even basically equivalent to federal requirements.

9. 233.33 – Public Hearing
    a. Public hearings must be held at request of a person or when Director determines there is a significant degree of public interest. Establishes person's rights and agencies' requirements for public hearings.
    b. **BWSR and DNR**: Agency requirement to hold public hearings in accordance with this paragraph must be established in statute/rule. WCA affords no such process, and PWWPP provides only post-decision "contested case" hearings.

10. 233.34 – Decisions on Permit Applications
    a. Review requirements for applications and comments, and requirements for issuing written decisions.
    b. **BWSR and DNR**: Revise statute/rule to require that applications be reviewed for compliance with 404(b)(1) guidelines and applicable state law, that all comments in response to public notice and public hearings be considered, that written decisions meet the requirements of this part, that the record be open to the public, and that permits not be issued under certain circumstances.

11. 233.35 – Issuance and effective date of permit
    a. Permit not effective until signed by Director AND applicant.
    b. **BWSR and DNR**: Revise state statute/rule to make permits effective upon being signed by Director AND applicant.

12. 233.36 – Modification, suspension, or revocation of permits
    a. Director must develop procedures for modification, suspension, or revocation of permits where he determines sufficient cause exists, with cause being determined by specific, listed factors.
    b. **BWSR and DNR** Amend state regulations to establish a procedure for modification, suspension or revocation of permits consistent with § 233.36.

13. 233.39 – Electronic Reporting
    a. If receiving electronic documents, must satisfy requirements of 40 CFR Part 3.
    b. **BWSR and DNR**: Incorporate by reference the requirements of 40 CFR Part 3 and consult with MNIT to ensure necessary IT infrastructure and software is in place.

14. 233.40 – Requirements for compliance and evaluation programs.
    a. Program required to **identify** persons who failed to obtain or comply with a permit; must ensure right of entry. Program also required for receiving and considering information submitted by the public.
    b. **BWSR and DNR**: Include in state regulation a "program" to systematically identify persons (not simply a mechanism to address compliance once coincidentally identified) who failed to obtain a permit or violated an existing permit. For instance, for violation of existing authorizations, random spot checks of a predetermined percentage of authorized activities from prior years.
    c. **BWSR**: Establish in state regulation a program for receiving and ensuring proper consideration of whistleblower complaints submitted by the public.

15. 233.41 - Requirements for enforcement authority – This needs more discussion. For instance, state AGENCY (BWSR) does not have authority to "immediately restrain", but DNR does, on BWSRs behalf.
    a. State agency must have authority to restrain, sue to enjoin, and assess or sue to recover civil penalties and seek criminal remedies, including fines. EPA may approve a state program where there is a lack of authority to impose such penalties provided the enforcement program is demonstrably effective.
    b. Most gaps outlined below could be collectively addressed by the following revisions to 103G.141, notwithstanding corresponding removals in other sections of statute/rule.
        i. **103G.142 Subd. 2: These are compiled from the specific gaps addressed below.**

1. Revise to include violations where no permit was previously issued. Current text applies this section only to "…violation of a condition or limitation set forth in a permit **issued**…" Federal text clearly states application to "…without a required permit…"
2. Then, revise to apply also to "…rules adopted by the Director."
3. Revise penalty amount to be applied per violation per day and establish minimum of $5,000.
4. Establish criminal fines under this section for willful or criminally negligent discharges. If prefer to address under other sections, need to also establish authority for BWSR, and to expand authority (for appropriate $ amount) for DNR.
5. Revise to seek criminal fines for criminal mischief described in § 233.41(a)(3)(iiii).

c. **BWSR**: BWSR technically does not possess enforcement authority. While BWSR would still not technically possess enforcement authority, it may be sufficient to revise MS § 103.141, which is specific to a state-assumed program but limited to permits issued under "rules adopted by" the commissioner, to also include permits issued under rules adopted by the Director.
d. **BWSR**: Revise MS § 103B.101 Subd. 12 to authorize civil penalties of at least $5,000 per DAY. Currently, the penalty is $10,000 per *violation*, not per violation per day. Alternatively, revision in "b", above, would authorize fines of up to $25,000 per violation per day, though additional revision would be required to establish a minimum of $5,000 per violation per day.
e. **BWSR and DNR**: Establish statutory authority to seek **criminal** fines (BWSR), and to seek them in the required amounts (DNR).
f. **BWSR and DNR**: Revise relevant statute/rule to provide for public participation in the state enforcement process by allowing intervention of right in any civil or administrative action by any citizen having an interest, or by assuring written responses to ALL citizen complaints, not opposing lawful intervention by citizens, and by publishing notice and allowing comments on proposed settlements.

Appendix I

MINNESOTA

Minnesota Federal Clean Water Act Section 404 Assumption

Report on Funding Estimates

January 27, 2022



Minnesota Federal Clean Water Act Section 404 Assumption - Report on Funding Estimates

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This report was prepared to comply with Laws of Minnesota 2021, 1st Special Session, Chapter 6, Article 2, Section 108, Subd. 9(a). The estimated cost of preparing this report (as required by Minn. Stat. § 3.197), including program development work that contributed to its' cost estimates, was approximately $175,000.

The Environmental Quality Board (EQB) and the Board of Water and Soil Resources (BWSR) are reducing printing and mailing costs by using the Internet to distribute reports and information to wider audiences. This report is available at the following website locations:

- The BWSR 404 Assumption page: https://bwsr.state.mn.us/404-assumption
- The EQB website at: https://www.eqb.state.mn.us/content/all-publications

Upon request, this material will be made available in an alternative format such as large print, Braille, or audio recording. Printed on recycled paper.

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Minnesota Federal Clean Water Act Section 404 Assumption - Report on Funding Estimates

Executive Summary

This report fulfills the requirement of Laws of Minnesota 2021, 1st Special Session, Chapter 6, Article 2, Section 108, Subd. 9 requiring the Minnesota Environmental Quality Board (EQB) to submit a report on the additional funding required to secure 404 assumption and to fully implement the state-assumed program.

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). It is administered by the U.S. Army Corps of Engineers (USACE) with oversight by the U.S. Environmental Protection Agency (EPA). Section 404(g) of the CWA allows states or tribes to apply to the EPA to administer their own state/tribal regulatory program(s) to meet Section 404 requirements ("404 Program assumption"), thereby eliminating the need for separate, federally issued permits for projects affecting those waters over which the state assumes authority.

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

- Jurisdiction
- Legal Authority
- Staffing Capacity
- Regulations
- Enforcement Authority
- Compliance with certain standards and procedural requirements

There are three primary state surface water regulatory laws in Minnesota: The Wetland Conservation Act (WCA) administered by the Minnesota Board of Water and Soil Resources (BWSR) and implemented by local governments and, for activities associated with a permit to mine, the Department of Natural Resources (DNR); the Public Waters Work Permit Program (PWWPP) administered by the DNR; and state water quality standards administered by the Minnesota Pollution Control Agency (MPCA). Each of these regulatory authorities would have a role in implementing 404 assumption in Minnesota.

Recent efforts to explore 404 assumption in Minnesota include completion of the Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study (2017) and the Analysis of Retained and Assumable Waters in Minnesota (2018). In addition, the 2017 federal Assumable Waters Subcommittee report and subsequent memo from the Department of the Army regarding the identification of USACE-retained and state-assumable waters are relevant to potential 404 assumption in Minnesota. These reports and other related information are available on the BWSR website at: https://bwsr.state.mn.us/404-assumption.

More recently, the state has made substantial progress in determining what changes to state regulatory programs would be necessary to secure 404 assumption and how those changes affect estimates for additional funding. Such changes include, but are not limited to: establishment of a WCA permitting program that complies with federal 404 assumption requirements, whereby BWSR acts as the "permitting authority" while maintaining the important implementation role of local governments; establishment of procedures to ensure that state water quality standards are met; improvements to

ensure adequate jurisdiction, mitigation options, and program implementation on federal lands; compliance with federal procedural requirements; and improvements to the state's permitting and data infrastructure. Broadly, additional funding would be required for development and submittal of the application, implementation of the program once approved, and to cover certain one-time costs that would occur at program start-up. Specifically, the funds required to 1) implement 404 assumption and to 2) complete assembly of the application materials are shown in the following two tables:

Additional annual funding ($mil) required for 404 assumption implementation.

Agency	2022 Additional Funding Estimates[1]
BWSR	$2.1[2]
DNR	$2.7
MPCA	$0.0
Total State Agency	$4.8

1. In 2022 dollars.

2. The funding estimate for BWSR includes additional costs of implementation for WCA local government units, implementing expanded state jurisdiction, and ongoing maintenance costs for the online WCA permitting system.

Total additional funding required to implement the assumed 404 program is currently estimated at $4.8 million. However, it is expected that these funding estimates would be refined further if additional progress is made in developing the specific implementation structure and procedures for the state programs as would be necessary for 404 assumption.

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

Agency	Funding Required[1]
BWSR	$580[2]
DNR	$100
MPCA	$60
Total State Agency	$740

1. Required funding calculated using an average cost of $150,000 per FTE based on total agency staffing costs (including salary, benefits, and overhead) in 2022.

2. BWSR funding includes costs for contractual work and certain tasks for all three agencies.

In addition to the funding in the above table, one-time costs that would be incurred at the time of program start-up include:

- $1.5 million for development of a WCA online permitting system.
- $800,000 to update DNR's existing MPARS permitting system.
- A to-be-determined amount to execute programmatic changes and finalize the 404 assumption application, such as amending state statutes and rules, finalizing agreements with federal agencies, workload associated with the formal application process, and conducting training and outreach.

A legislative appropriation of $740,000 would allow for continued analysis, program development work, and assembly of draft 404 assumption application materials. This work would result in a report to the Legislature that summarizes the necessary programmatic changes, required statute changes, and final cost estimates necessary to make an informed decision on whether to apply for 404 Assumption (such approval would consist of approval from the Governor and concurrence by the Legislature).

Chapter 1. Introduction

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

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

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

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

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

Chapter 2. Background

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

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

the purpose of avoiding adverse impacts to those waters and waters downstream. In Minnesota and other states that have not assumed the program, the Section 404 Program is administered by the U.S. Army Corps of Engineers (USACE) with oversight by the U.S. Environmental Protection Agency (EPA).

Section 404(g) of the CWA allows states or tribes to apply to the EPA to administer their own state/tribal regulatory program to meet Section 404 requirements, thereby eliminating the need for separate, federally issued permits. This process is known as Section 404 Program assumption. To clarify, when a state assumes the federal Section 404 Program, the state does not administer Section 404 and does not issue Section 404 permits. Rather, the state issues permits under the state's own regulatory program, which has been approved by EPA to meet Section 404 requirements.

2.2. Current state surface water regulatory authorities in Minnesota

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

2.2.1. State Wetland Conservation Act (WCA)

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

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

Enforcement: DNR enforcement officers and other licensed peace officers.

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

2.2.2. DNR Permit to Mine

Overview: Wetland impacts associated with metallic mineral mining are regulated under "permits to mine" issued by the DNR. In regulating such impacts, the DNR is required to apply WCA standards for wetland impacts, but the permitting process follows the permit to mine rules (e.g. MN Rules Chapters 6130 and 6132). Currently, peat mining operations that exceed 40 acres under MN Rules Chapter 6131 are not subject to WCA (in most cases) because reclamation requires wetland areas to be returned to

wetland areas. The typical 404 permit issued by the St. Paul District of the USACE can require mitigation for temporal loss of the wetlands. Under assumption, this aspect would also be added to the DNR's authority.

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

Enforcement: DNR

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

2.2.3. State Public Waters Work Permit Program (PWWPP)

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

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

Enforcement: DNR

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

2.2.4. State Water Quality Standards (WQS)

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

Jurisdiction and Regulated Activities: WQS identify the designated beneficial uses for each water body and describe the criteria to protect each beneficial use. These standards can be applied through

permitting programs to ensure protection of waters. The 401 Certification Program regulates water quality impacts from federally permitted/licensed projects discharging pollutants into waters of the United States.

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

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

2.3. Basic requirements for Section 404 assumption

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

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

A state's application for 404 Assumption must include:

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

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

2.4. History of 404 Assumption in Minnesota

Recent efforts to explore 404 assumption in Minnesota include completion of the Minnesota Federal Clean Water Act Section 404 Permit Program Feasibility Study (2017) and the Analysis of Retained and Assumable Waters in Minnesota (2018). In addition, the 2017 federal Assumable Waters subcommittee

report and subsequent memo from the Department of the Army regarding the identification of USACE-retained and state-assumable waters is relevant to potential 404 assumption in Minnesota.

2.4.1. 2017 Feasibility Study

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

- the federal requirements for state assumption of the (Section) 404 program;
- the potential extent of assumption, including those waters that would remain under the jurisdiction of the United States Army Corps of Engineers due to the prohibition of 404 assumption in certain waters as defined in section 404(g)(1) of the federal Clean Water Act;
- differences in waters regulated under Minnesota laws compared to waters of the United States, including complications and potential solutions to address the current uncertainties relating to determining waters of the United States;
- measures to ensure the protection of aquatic resources consistent with the Clean Water Act, Wetland Conservation Act, and the public waters program administered by the Department of Natural Resources;
- changes to existing state law, including changes to current implementation structure and processes, that would need to occur to allow for state assumption of the 404 program;
- new agency responsibilities for implementing federal requirements and procedures that would become the obligation of the state under assumption, including the staff and resources needed for implementation;
- the estimated costs and savings that would accrue to affected units of government;
- the effect on application review and approval processes and time frames; and
- options for financing any additional costs of implementation.

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

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

2.4.2. Assumable Waters

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

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

In June of 2015, the EPA established the Assumable Waters Subcommittee of the National Advisory Council for Environmental Policy and Technology (NACEPT) to "provide advice and develop recommendations on how the [EPA] can best clarify for which waters the state/tribe has CWA section 404 permit responsibilities, and for which waters the USACE retains CWA section 404 permit responsibility, under an approved state/tribal program."

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

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

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

Chapter 3. Program Development Progress.

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

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

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

3.1. Equivalent Jurisdiction

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

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

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

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

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

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

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

3.2. Permitting Authority and Implementation Structure

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

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

3.2.1. Board of Water and Soil Resources

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

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

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

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

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

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

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

3.2.2. Department of Natural Resources

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

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

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

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

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

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

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

3.2.3. Pollution Control Agency

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

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

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

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

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

3.3. Development and Modification of Online Permitting Systems

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

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

During completion of the 2017 Feasibility Study, the cost for development of the online WCA permitting system was estimated to be approximately $3.4 million[1], with approximately $225 thousand[2] required annually to support the new system. These estimates were based primarily on the cost of developing the Minnesota DNR Permitting and Reporting System (MPARS). However, technology has improved since that time, staff have further investigated other similar systems, and a new wetland banking database has been developed (which would become a component of the larger permitting system). These factors allow for a substantial downward revision to the estimates included in the 2017 Feasibility Study. In consultation with MNIT staff, we currently estimate a one-time development cost of approximately $1.5 million, with ongoing annual maintenance costs of approximately $90 thousand.

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

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

3.4. Mitigation

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

3.4.1. Public Waters Work Permit Program

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

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

[1] The 2017 estimate was adjusted for inflation using Consumer Price Index data from 2017 through 2021.
[2] The 2017 estimate was adjusted to account for 2022 staffing costs.

3.4.2. Wetland Conservation Act

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

3.4.3. Minnesota Stream Quantification Tool and Debit Calculator

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

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

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

3.4.4. The State Wetland Bank

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

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

3.5. External Coordination

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

3.5.1. Threatened and Endangered Species

Section 404 permit applications are currently reviewed for potential impacts on federally listed threatened and endangered (T&E) species under Section 7 of the Endangered Species Act (ESA). Under an Assumed 404 program, EPA cannot waive their review of state permits that may affect federally listed threatened or endangered species and their designated critical habitat. Further, under the program, EPA is responsible for coordinating with the federal agencies when potential impacts to threatened or endangered species may occur. However, existing state permitting programs do not explicitly require determination of whether such species are present or consideration of impacts to these species, although some federally listed species are also listed under the Minnesota Endangered Species Act and are considered under state permitting programs.

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

3.5.2. Historic Places

Similar to the Endangered Species Act requirements, the EPA cannot waive their review of state permit applications involving activities within sites identified or proposed under the National Historic Preservation Act. If Minnesota assumed the Section 404 program, the state permit programs (WCA and the PWPP) must ensure that adequate screening for potential impacts on historic/cultural sites occurs, in coordination with the State Historic Preservation Office. Specifically, during permit development, the state would review projects for potential impacts to sites listed or eligible for listing on the National Register of Historic places and notify and coordinate with EPA if impacts to those sites may occur.

3.5.3. Federal Lands

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

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

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

3.5.4. State Program Administration

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

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

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

Chapter 4. Funding Estimates

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

4.1. Methods

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

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

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

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

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

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

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

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

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

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

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

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

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

Table 2. Additional annual funding ($mil) required for 404 assumption implementation.

Agency	2022 Additional Funding Estimates[1]
BWSR	$2.1[2]
DNR	$2.7
MPCA	$0.0
Total State Agency	$4.8

1. In 2022 dollars.
2. The funding estimate for BWSR includes additional costs of implementation for WCA local government units, implementing expanded state jurisdiction, and ongoing maintenance costs for the online WCA permitting system.

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

In summary, total additional funding required to implement the assumed 404 program is currently estimated at $4.8 million. However, it is expected that these funding estimates would be refined further if additional progress is made in developing the specific implementation structure and procedures for the state programs as would be necessary for 404 assumption.

4.3. Additional funding necessary to secure section 404 assumption

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

4.3.1. Assembly of the 404 assumption application materials

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

A. Continued development of the program structure, including tasks such as further refinement of WCA draft general permits, drafting of general permits for PWWPP, refinement of mitigation requirements for WCA and PWWPP, refinement of enforcement procedures, and so on.

B. Finalization of ongoing research of, and draft changes to, applicable state statutes and rules necessary to receive authorization for 404 assumption. If this requires changes to reclamation rules (Chapters 6130, 6131 or 6132), the effort could be a substantial workload, particularly for the metallic mining rules which have not been revised since promulgation and tend to garner public interest.

C. Continue to develop and complete all materials to satisfy the administrative requirements for 404 assumption. Examples include draft agreements with the USACE and the EPA, a detailed state-federal regulatory comparison, and development of application forms and procedures to be used in the administration of the program.

D. Continuation of ongoing coordination with the EPA and other federal agencies for all aspects of program development and prospective application.

E. Coordination and consultation with Tribes, affected state agencies, local governments, and interested stakeholders on multiple aspects of program development.

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

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

Agency	Funding Required[1]
BWSR	$580
DNR	$100
MPCA	$60
Total State Agency	$740

1. Required funding calculated using an average cost of $150,000 per FTE based on total agency staffing costs (including salary, benefits, and overhead) in 2022.
2. BWSR funding includes costs for contractual work and certain tasks for all three agencies.

4.3.2 Additional one-time costs

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

1) Development of an online WCA permitting system as described in Section 3.3. One-time funding in the amount of approximately $1.5 million would be required to develop and execute the online system. The annual cost of maintaining and administering the permitting system, once established, is included in Section 4.3.

2) Updates to the DNR's existing MPARS online application system will be required to account for changes to existing permit requirements and processes. One-time funding in the amount of approximately $800,000 would be required to develop the necessary changes. Ongoing costs of system maintenance and administration are not expected to change.

3) Execution of programmatic changes and the 404 assumption application, including:
   - adoption of amendments to state statutes,

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

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

Chapter 5. Next Steps

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

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